

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION**

COMMERCIAL IP SUIT NO.15 OF 2005

Aglowmed Limited)
a Company registered under the Companies)
Act, 1956, having interalia, its place of)
business at 702-A, Poonam Chambers, Dr. A.B.)
Road, Worli, Mumbai - 400 018.)Plaintiff

Vs.

Aglow Pharmaceuticals Private Limited)
a Company incorporated under the Companies)
Act, 1956, having its place of business at)
19/12, (Back Side) Opp. Gurudwara, S.S.S.)
Nagar, G.T.B. Nagar, Mumbai - 400 037)Defendant

Mr. Mahesh A. Mahadgut a/w. Ms. Poonam Teddu i/b. Mr. Mahesh A. Mahadgut for plaintiff.
Mr. A. W. Ansari for defendant

**CORAM : K.R.SHRIRAM, J.
RESERVED ON : 19th JULY 2019
PRONOUNCE ON : 30th JULY 2019**

JUDGMENT :

1 Plaintiff has approached this Court seeking (a) permanent injunction against defendant from using in relation to its business of manufacturing, marketing, selling, trading, exporting medicinal and pharmaceutical preparations and substances using the trading name 'AGLOW' or any other trading name or mark as part of its trading style or corporate name that is identical and/or deceptively similar to plaintiff's trading name/mark/trading style/corporate name 'AGLOWMED' and/or

using the word 'AGLOW' or and other word/name/mark identical and/or deceptively similar to plaintiff's mark 'AGLOWMED' and prevent defendant from infringing the registered trade mark of plaintiff 'AGLOWMED' bearing no.415401 dated 02.01.1984 and (b) to restrain defendant from using the trading name 'AGLOW' or and other word/name/mark identical and/or deceptively similar to plaintiff's mark 'AGLOWMED' in relation to defendant's medicinal and/or pharmaceutical preparations so as to pass off defendant's business or goods as plaintiff's goods. Plaintiff is also claiming damages in the sum of Rs.5,00,000/-.

2 Plaintiff is a company that was incorporated on 07.11.1983 with the trading name/trading style 'AGLOWMED' as its dominant and memorable feature. Since then plaintiff has been carrying on business of manufacturing and selling of pharmaceutical preparations. Plaintiff has been making and selling various pharmaceutical products like aglozyme syrup, aglozyme capsules, pancef injections and aglonim and various other products.

3 According to plaintiff, and it is not contradicted by defendant, that the word 'AGLOWMED' is a meaningless word. The word 'AGLOWMED' is a part of plaintiff's trading name, trading style which prominently appears on all its products including its business literatures, advertisements, visual aids, etc. The annual turn over of plaintiff for the year 2003-2004 was

Rs.7246.42 lakhs. Plaintiff has a wide network of distribution of its products in India and abroad with depots in several locations and employs around 800 people. It is also stated in the plaint that plaintiff has been exporting its goods to several countries like Russia, Europe, London, Ukraine, Angola, Ghana, Nigeria, Liberia, Sierra Leone etc. Plaintiff is also recognised as an export house. Plaintiff's range includes products in various segments like Vitamins, Antibiotics, Anti-bacterial, Anti-diabetic, Analgesic, Haematinic, Digestive Enzymes, Anti-amoebic, Anti-diarrhoeal, Anti-oxidant, Anti-depressant, Anti-ulcer, Anti-histamine, etc. Plaintiff has three manufacturing facilities at three different locations, viz., Roorkee, Daman and Ankleshwar. Plaintiff is a registered proprietor of 'AGLOWMED' in several classes under the provisions of The Trade Marks Act, 1999, list of which can be found in paragraph 5 of the plaint. Plaintiff's turn over from 1990-1991 upto 2003-2004 were as under :

<i>Year</i>	<i>Turnover (in Lacs)</i>
<i>1990-1991</i>	<i>Rs.730.96</i>
<i>1991-1992</i>	<i>Rs.889.64</i>
<i>1992-1993</i>	<i>Rs.1,127.48</i>
<i>1993-1994</i>	<i>Rs.1,267.33</i>
<i>1994-1995</i>	<i>Rs.1,695.84</i>
<i>1995-1996</i>	<i>Rs.1,596.31</i>
<i>1996-1997</i>	<i>Rs.1,958.39</i>
<i>1997-1998</i>	<i>Rs.2,480.24</i>
<i>1998-1999</i>	<i>Rs.3,509.64</i>
<i>1999-2000</i>	<i>Rs.3,850.85</i>

<i>2000-2001</i>	<i>Rs.4,769.92</i>
<i>2001-2002</i>	<i>Rs.6,061.34</i>
<i>2002-2003</i>	<i>Rs.5,925.50</i>
<i>2003-2004</i>	<i>Rs.7,246.42</i>

4 Plaintiff claims to have spent large sums of money towards sales and promotional expenses as stated in paragraph 7 of the plaint and it reads as under :

<i>Year</i>	<i>Turnover (in Lacs)</i>
<i>1990-1991</i>	<i>Rs.234.34</i>
<i>1991-1992</i>	<i>Rs.301.92</i>
<i>1992-1993</i>	<i>Rs.365.36</i>
<i>1993-1994</i>	<i>Rs.420.44</i>
<i>1994-1995</i>	<i>Rs.539.59</i>
<i>1995-1996</i>	<i>Rs.543.45</i>
<i>1996-1997</i>	<i>Rs.629.19</i>
<i>1997-1998</i>	<i>Rs.773.66</i>
<i>1998-1999</i>	<i>Rs.1,081.40</i>
<i>1999-2000</i>	<i>Rs.1,308.06</i>
<i>2000-2001</i>	<i>Rs.1,629.05</i>
<i>2001-2002</i>	<i>Rs.1,962.41</i>
<i>2002-2003</i>	<i>Rs.2,196.65</i>
<i>2003-2004</i>	<i>Rs.2,259.91</i>

5 Plaintiff has also, in order to establish a connection in the course of trade between its goods and activities, adopted several trade marks with the prefix 'AGLO/AGLOW' and has also acquired registration of such marks, some of whom have been listed in paragraph 8 of the plaint. It

is plaintiff's case that anyone who does business in the pharmaceutical industry under the name 'AGLOWMED' or any other name similar to or identical to or by addition or deletion of certain letters to the mark 'AGLOWMED' is likely to be taken as originating from plaintiff or having some affiliation and/or association with plaintiff. Plaintiff claims to be the exclusive owner of the name 'AGLOWMED'.

6 According to plaintiff, in or about August 1996, plaintiff came across defendant company doing business under the name and style of AGLOW Pharma Private Limited. As the name 'AGLOW' adopted by defendant was identical with and/or deceptively similar to plaintiff's name 'AGLOWMED', plaintiff felt that the use of the name 'AGLOW' by defendant constitutes infringement of plaintiff's mark 'AGLOWMED' and as the two names are being used in respect of same/similar goods and business, plaintiff caused a cease and desist notice issued to defendant by its advocates' letter dated 29.08.1996 (Exhibit P-3). This was replied to by defendant vide its advocates' letter dated 24.09.1996 (Exhibit P-4) denying plaintiffs' allegations.

7 Thereafter, plaintiff approached the Regional Director under Section 22 of the Companies Act, 1956 seeking direction for change of defendant company's name, which came to be rejected on the ground of limitation. Impugning this order plaintiff filed a writ petition before the

High Court of Judicature at Patna. By its order dated 16.09.2004, the Patna High Court dismissed the said petition on the ground that as Section 22 stood at the material time the period within which the application could be made was one year and as petitioner did not make such application seeking change in the name of defendant within the period prescribed by Section 22 of the Companies Act, the application was not maintainable. Therefore, plaintiff's grievance before the Regional Director or the Writ Court that defendant's name resembles closely to plaintiff's name and as both the companies operate in the same field, close resemblance of the registered name of defendant with plaintiff's name adversely affected the interest of plaintiff's company was not gone into at all. The order of the Patna High Court has been relied upon by both plaintiff and defendant but has been produced on record by defendant but not marked as an exhibit. The same for convenience is marked Exhibit D-1.

8 Plaintiff instead of taking that order of Patna High Court further in appeal, filed the present suit on or about 11.07.2005. Defendant filed written statement contending :

(a) plaintiff and defendant have their registered office in Patna and therefore, this Court has no jurisdiction;

(b) plaintiff came to know about defendant's existence in 1996 and filed the suit only in 2005 and therefore, the claim is barred by

limitation. Defendant also denied that plaintiff came to know only in 1996 because according to defendant, as stated in the written statement, the Managing Director of plaintiff attended the inaugural ceremony of defendant company and therefore, had knowledge about registration of defendant from 24.03.1992 when defendant was registered and not from 29.08.1996 and the Managing Director of plaintiff and Managing Director of defendant knew each other from childhood as they were from the same village. I have to add here that defendant has not pleaded anywhere acquiescence or delay;

(c) names of plaintiff's products and names of defendant's products are totally different and thus there is no similarity in trade products;

(d) plaintiff has placed reliance on the Trade Marks Act, 1999 but since the 1999 Act came into effect on 19.09.2003 and it has been held that the law has only prospective effect and not retrospective effect there can be no breach;

(e) plaintiff did not challenge the order of the Patna High Court and as such, the suit is not maintainable and principle of *res judicata* will apply. No submissions were made during the hearing on this. So I won't be dealing with it;

(f) plaintiff's turn over and defendant's turn over for 1992-1993 to 2003-2004 was as per the chart below :

Sr. No.	Period	Turnover in Lacs (Rs.)		Percentage of Turnover of Aglow Pharma as compared to Turnover of Aglowmed %
	1992-93	Aglow Pharma	Aglowmed	
1	1992-1993	1.83	1127.48	0.1623
2	1993-1994	3.78	1267.33	0.2982
3	1994-1995	4.07	1695.84	0.2399
4	1995-1996	3.95	1596.31	0.2474
5	1996-1997	5.50	1958.39	0.2808
6	1997-1998	5.89	2480.24	0.2374
7	1998-1999	6.88	3509.64	0.1960
8	1999-2000	8.40	3850.85	0.2181
9	2000-2001	11.86	4769.92	0.2486
10	2001-2002	13.27	6061.34	0.2189
11	2002-2003	14.98	5925.50	0.2522
12	2003-2004	15.23	7246.42	0.2101

Therefore, both are uncomparable and question of defendant eating into plaintiff's business also does not arise. Mr. Ansari repeatedly informed the Court that even today the turn over of defendant is only around Rs.15 lakhs to Rs.16 lakhs p.a.;

(g) there are many other companies which have similar names (unconnected to the names of plaintiff and defendant) like Tatanagar Fertilizers Limited, Tatanagar Bricks Pvt. Ltd., Tatanagar Cements Pvt. Ltd., Alkem Laboratories, Alkem Pharmaceuticals Limited and therefore, just

because there are similarity in the names does not mean the relief as prayed for by plaintiff should be granted;

(h) there are 18 other companies as listed below using the name 'AGLOW' and therefore, there is nothing wrong in defendant using the name Aglow Pharmaceuticals Private Limited :

Sr. No.	Name of the Company	Year of Registration
1	AGLOW MED LTD.	1983
2	AGLOW PHARMACEUTICALS LTD.	1992
3	AGLOW CONSUMER NETWORK PVT. LTD.	2001
4	AGLOW ZOUT PVT. LTD.	1986
5	AGLOW IMPEX PVT. LTD.	1995
6	AGLOW LEASING & HOUSING (INDIA) LTD.	1991
7	AGLOW GREEN LANDS LTD.	1994
8	AGLOW FARMING PROJECTS LTD.	1997
9	AGLOW QUALITY CONTROL LABORATORIES PVT. LTD.	2004
10	AGLOW METALS PVT. LTD.	1992
11	AGLOW FINANCE LTD.	1994
12	AGLOW COMMODITY EXPORTS COMPANY	1991
13	AGLOW FINTRADE PVT. LTD.	1994
14	AGLOW FINANCIAL SERVICES PVT. LTD.	1996
15	AGLOW MARKETING PVT. LTD.	2002
16	AGLOW ENGINEERS PVT. LTD.	2002
17	AGLOW AGROTECH & RESORTS INDIA LTD.	1997
18	AGLOW NETWORK SALES TN PVT. LTD.	2005

9 Issues were framed on 20.08.2011. While hearing the matter, both the counsel agreed that the case of plaintiff is defendant should not use

the name 'AGLOW' in its corporate name and therefore, by consent, issue no.4 was amended. The final issues, therefore, read as under :

1) Whether plaintiff is the registered proprietor of Trade Mark AGLOWMED in Class 5 under Registration No.415101 dated 02.01.1984?

2) Whether by use of the mark 'AGLOW' defendants have infringed plaintiff's trade mark AGLOWMED?

3) Whether plaintiffs have acquired goodwill and reputation in the trade mark AGLOWMED?

4) Whether by use of word AGLOW in the corporate name of defendant, defendants are passing off their goods and/or services as and for plaintiff's goods and/or services¹?

5) Whether plaintiffs is entitled to the relief of permanent injunction as prayed for?

6) Whether plaintiffs are entitled for damages or alternately accounts of profits as prayed for?

7) What relief and what order?

10 Plaintiff led evidence of three witnesses and defendant led evidence of one witness. As regards issue no.1, Mr. Ansari in fairness stated that actually it is not an issue in the suit. Mr. Ansari agreed that plaintiff is a registered proprietor of trade mark 'AGLOWMED'. The facts are such that all the issues will have to be taken up together and answered.

11 Admittedly plaintiff is the registered proprietor of trade mark 'AGLOWMED'. Admittedly plaintiff was incorporated as 'AGLOWMED' on 07.11.1983, while defendant was incorporated on 24.03.1992. The registered office of both plaintiff and defendant is in Patna. Both are in the

1. Issue no.4 as originally framed : Whether by use of the defendant trade mark AGLOW, the defendants are passing off their goods and/or services as and for the plaintiff's goods and/or services?

pharmaceutical business. Defendant, in its evidence, has stated that it does not manufacture anymore any pharmaceutical products but only markets pharmaceutical goods in its name manufactured by others. The points which we need to consider therefore, are (a) whether this Court has jurisdiction, (b) whether the claim is time barred, (c) whether the suit is maintainable in view of plaintiff having lodged a complaint under Section 22 of the Companies Act, 1956, (d) whether plaintiff has acquired goodwill and reputation in the trade mark 'AGLOWMED', (e) whether the use of the word 'AGLOW' by defendant in its corporate name amounts to passing off defendant's goods and/or services as that of plaintiff's goods and/or services and (f) whether plaintiff is entitled to permanent injunction as prayed for and damages/accounts of profits.

Jurisdiction :

12 Paragraph 23 of the plaint reads as under :

23. The defendant carries on business within the jurisdiction of this Hon'ble Court. Plaintiff carries on its business within the jurisdiction of this Court. The entire cause of action has arisen within the jurisdiction of this Hon'ble Court. This Hon'ble Court, therefore, has jurisdiction under Section 134 of the Trade Marks Act, 1999 to entertain, try and dispose off this suit.

13 In the written statement, in paragraph 5, defendant has not denied that defendant is carrying on business within the jurisdiction of this Court. Paragraph 5 of the written statement reads as under :

5. With reference to paras 2, 3 and 23 of the plaint, the defendant states that the defendant company was registered on 24.03.1992, with the main objects

to manufacture, buy, sell, export, import, store, produce, process, convert, formulate, use and deal in all types of pharmaceuticals etc. including all kinds of Homeopath, Ayurved medicines and any other allied and bye-products. The registered office of this company is also situated in the State of Bihar at Patna. Thus, the plaintiff and defendant both companies are within the jurisdiction of Registrar of Companies, Bihar. Thus, for all practical purposes the jurisdiction of High Court of Judicature at Patna will have jurisdiction in relation and the place at which the registered office of the company concerned is situated. But for the reasons best known the plaintiff company have failed to specify in the plaint, where its registered office is situated. The plaint is also silent as to how this Hon'ble Court is having jurisdiction to try the present suit without indicating that the registered office of the plaintiff company is situated at Exhibition Road, Patna, Bihar 800 001.

14 Section 134 of the Trade Marks Act, 1999 reads as under :

134. Suit for infringement, etc., to be instituted before District Court.—

(1) No suit—

(a) for the infringement of a registered trade mark; or

(b) relating to any right in a registered trade mark; or

(c) for passing off arising out of the use by the defendant of any trade mark which is identical with or deceptively similar to the plaintiff's trade mark, whether registered or unregistered, shall be instituted in any court inferior to a District Court having jurisdiction to try the suit.

(2) For the purpose of clauses (a) and (b) of sub-section (1), a "District Court having jurisdiction" shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or any other law for the time being in force, include a District Court within the local limits of whose jurisdiction, at the time of the institution of the suit or other proceeding, the person instituting the suit or proceeding, or, where there are more than one such persons any of them, actually and voluntarily resides or carries on business or personally works for gain.

Explanation.—For the purposes of sub-section (2), "person" includes the registered proprietor and the registered user.

(emphasis supplied)

Therefore, for a Court to have jurisdiction in a suit for infringement of a registered trade mark or relating to any right in a registered trade mark plaintiff should be actually and voluntarily residing or carrying on business

within the jurisdiction of the Court. This suit is for infringement of trade mark and plaintiff is carrying on business within the jurisdiction of this Court. Moreover, defendant has not denied plaintiff's allegation that defendant also carries on business within the jurisdiction of this Court. Therefore, this Court will have jurisdiction for a passing of action as well.

Therefore, this Court has jurisdiction.

Limitation :

15 According to plaintiff, it came to know about the infringement only in 1996, whereas it is defendant's case that plaintiff came to know about the corporate name of defendant as Aglow Pharmaceuticals Private Limited on 23.03.1992 when Managing Director of plaintiff attended the inaugural function of defendant. Defendant in its evidence has not been able to prove that the Managing Director of plaintiff attended the inaugural function. In the evidence in chief of defendant's only witness, Managing Director of defendant (DW-1), it is stated that the Managing Director of plaintiff company attended the inaugural ceremony of defendant company and as such, the knowledge about the registration of defendant as Aglow Pharmaceuticals Private Limited was known to plaintiff from 24.03.1992, the date of incorporation of defendant and not from 29.08.1996. The wordings in the evidence affidavit are identical to what is stated in the written statement. In the further examination in chief of DW-1, in answer to

question no.5, the tune changed a bit. DW-1, who is the Managing Director of defendant, states that in 1992 when the defendant company was inaugurated after incorporation the family members of the Managing Director of the plaintiff company had remained present. Question nos.5 and 6 with their answers in examination in chief read as under :

Q.5 : Can you tell us something with regard to the present suit that has been filed against the defendant company?

Ans. : Yes. Both the companies belong to the same native place. In 1992 when the defendant company was inaugurated after incorporation the family members of the Managing Director of the plaintiff company had remained present.

Q.6 : What is your relationship with the management of the plaintiff company?

Ans. : We belong to the same caste and gotra and are neighbours. Our houses are adjoining each other in our village.

(emphasis supplied)

16 In the cross examination, however, in answer to question no.10 read with question nos.11 and 12, DW-1 states that one Mr. Surendra Sharma, cousin of the Managing Director of plaintiff had attended the inauguration. Question nos.10, 11 and 12 with answers thereto read as under :

Q.10 : Can you tell us the names of the family members of the Managing Director of the plaintiff company that had attended the inauguration of the defendant company?

Ans. : Mr. Surendra Sharma, cousin of the M.D. of plaintiff company.

Q.11 : In view of your answer to Q.10, will it be correct to say that only one person i.e. Mr. Surendra Sharma had attended the inauguration of the defendant company?

Ans. : Mr. Surendra Sharma is employed with the plaintiff company and that is why he had attended the inauguration of the defendant company as a representative of the plaintiff company.

Q.12 : You have stated that family members of the M.D. of the plaintiff company had attended the inauguration of the defendant company. On the other hand you have stated in answer to Q.11 that employee of plaintiff company Mr. Surendra Sharma had attended the inauguration on behalf of the plaintiff company. Which of these two statements is correct?

Ans. : Mr. Surendra Sharma is a family member of the M.D. of the plaintiff company as also a employee of the plaintiff company. Therefore, both the statement are correct.

Therefore, DW-1 has been changing his stand thrice and all inconsistent with the other.

17 In answer to question no.13, DW-1 admits that what he has stated in examination in chief (family members of plaintiff's Managing Director attended) and what he has stated in answer to cross examination (Surendra Sharma an employee of plaintiff attended) has not been stated in the written statement. There was a further attempt to improvise. In answer to question no.18 in cross examination DW-1 states that the Managing Director of plaintiff had attended the inauguration for a couple of minutes but had met with eldest brother of DW-1 and not DW-1. DW-1 again admits that none of that has been stated in the written statement. This shows the contradictory and dishonest stand of defendant. I use the expression "dishonest" because in answer to question no.22, he states that he was not aware of the existence and business of plaintiff though he has been stating that plaintiff's Managing Director and he belong to the same village, same

caste, gotra and were neighbours. But in answer to question no.16, he states that he was aware of the existence of plaintiff company on the date of formation and incorporation of defendant. These contradictions expose DW-1, the Managing Director of defendant and its only witness as unreliable and also shows he was being economical with truth. Question nos.15, 16, 18, 19, 20 and 22 read as under :

Q.15 : Will it be correct to state that the defendant company has been incorporated subsequent to the incorporation of the plaintiff company?

Ans. : Yes. It would be correct. Their company was incorporated in 1983. Our company was incorporated in 1992.

Q.16 : Will it be correct to state that you were aware of the existence of plaintiff company on the date of formation and incorporation of the defendant company?

Ans. : Yes. I was aware of this. (Witness volunteers : We applied to the Company Registrar for incorporation of our company under the name of Aglow Pharmaceuticals Pvt. Ltd. No objection was raised by the Company Registrar to the formation and incorporation of our Company by this name and our company was registered under that name).

Q.18 : In view of your answer to Q.11, I put it to you that you have made a false statement in para 6 of your affidavit to the extent that the Managing Director of the plaintiff company also attended the inaugural ceremony of the defendant company?

Ans. : No. (Witness volunteers : The M.D. of the plaintiff company had attended the inauguration for a couple of minutes, but had met with my eldest brother and not me and therefore I did not mentioned his name in answer to the above question).

Q.19 : Can you show us from your written statement as to where you have mentioned about the meeting of M.D. of plaintiff company and your eldest brother on the day of inauguration of defendant company?

Ans.: In the written statement it is only stated that the M.D. of the plaintiff company had attended the inauguration. It is not mentioned that he met with my eldest brother.

Q.20 : I put it to you that you have repeatedly made contradictory and false statements in your written statement and affidavit in examination in chief

and that no one from the plaintiff company had visited the inauguration of the defendant company?

Ans. : I do not agree.

Q.22 : In view of your answer to Q.21 and Q.16, I put it to you that you have incorporated your company being fully aware of the existence and business of the plaintiff company?

Ans. No. I was not aware of the same.

18 Therefore, I will have to conclude that defendant has not been able to prove that plaintiff was aware of defendant's existence in 1992. I shall also not hold plaintiff guilty of delay. As soon as plaintiff came to know of defendant in 1996, plaintiff immediately sent a cease and desist notice (Exhibit P-3). Defendant replied on 24.09.1996 (Exhibit P-4). Therefore, defendant was aware that plaintiff was unhappy with defendant having incorporated a company in the name Aglow Pharmaceuticals Private Limited. Plaintiff also took up the matter on 20.08.2001 with the Regional Director, Ministry of Company Affairs, Kolkata, who vide its letter dated 05.10.2001 rejected the request of plaintiff on the ground being time barred as provided under Section 22 of the Companies Act, 1956. Plaintiff thereafter filed a writ petition in 2002 which was dismissed on the ground that plaintiff's complaint was time barred. The writ petition was rejected on 16.09.2004 and the present suit has been filed on 11.07.2005.

Defendant has not pleaded acquiescence. Defendant also has not led evidence on acquiescence or has made out any case to the effect that plaintiff has stood by for a substantial period and thus encouraged

defendant to expend money in building up a business associated with its corporate name. It is not defendant's case either in the written statement that plaintiff stood by and allowed defendant to carry on business in the manner complained of to acquire a reputation and to expend money and therefore, plaintiff cannot after a long lapse of time, turn round and say that the corporate name of defendant ought to be changed. To succeed on acquiescence there has to be a plea and there is no such plea in the written statement. Moreover, it is defendant's own case that its turn over in 1993-1994 was Rs.1.83 lakhs which gradually has grown up and in 2003-2004 was Rs.15.23 lakhs as compared to plaintiff's turn over of Rs.7246.42 lakhs. Mr. Ansari, to the query posed by this Court, repeatedly stated that even today defendant's turn over is in the region of Rs.15 lakhs to Rs.16 lakhs. In view of this small turn over, the Court also asked Mr. Ansari whether defendant would be inclined to sell its business to plaintiff, which Mr. Mahadgut stated plaintiff will be inclined to buy, subject to due diligence, Mr. Ansari stated that defendant is not inclined to settle.

19 Moreover, the Apex Court in *Bengal Waterproof Limited V/s. Bombay Waterproof Manufacturing Company*², has held that infringement of a registered trade mark carried on from time to time would give a recurring cause of action to the holder of the trade mark to make a grievance about the same and similarly such impugned passing off actions

2. 1997 PTC (17)

also would give a recurring cause of action to plaintiff to make a grievance about the same and to seek appropriate relief from the Court. The Court has also held that whenever and wherever a person commits breach of a registered trade mark of another he commits a recurring act of breach of infringement of such trade mark giving a recurring and fresh cause of action at each time of such infringement to the party aggrieved. Section 22 of the Limitation Act, 1963 lays down, in the case of continuing breach of contract or in the case of a continuing tort, a fresh period of limitation begins to run at every moment of the time during which the breach or the tort, as the case may be, continues. Therefore, as act of passing off is an act of deceit and tort every time when such tortious act or deceit is committed by defendant, plaintiff gets a fresh cause of action. Similarly infringement of a registered trade mark would also be a continuing wrong so long as infringement continues. Therefore, whether the earlier infringement has continued or a new infringement has taken place, cause of action for filing a fresh suit would obviously arise in favour of plaintiff who is aggrieved by such fresh infringements of trade mark or fresh passing off actions alleged against defendant.

Maintainability/Goodwill and reputation of plaintiff/use of the word AGLOW by defendant in its corporate name amounts to passing off defendant's goods/services as that of plaintiff :

20 On the defence raised that plaintiff having lodged a complaint under Section 22 of the Companies Act, 1956, this suit is not maintainable, in my view, the claim of plaintiff is maintainable. Plaintiff has not filed any suit anywhere admittedly against defendant. Plaintiff's filing an objection under Section 20 and 22 of the Companies Act, 1956 is not a suit for injunction. Plaintiff will have two independent rights of action against defendant who may be using the corporate name of a previously incorporated company, one under Section 22 of the Companies Act, 1956 and the other for injunction restraining defendant from using the corporate name of plaintiff or from using a name bearing close resemblance which may cause or which is likely to cause confusion in the minds of the customers or general public in view of the similarity of names. Both the remedies, one under Section 22 and the other under the common law operate in different fields. Under Section 22 of the companies Act, the Central Government has no jurisdiction to grant any injunction against the use of an undesirable name by a company whereas in a suit for permanent injunction the Court can pass an order injuncting defendant from using the name which is being passed off by defendant as that of plaintiff. As Section 20 of the Companies Act, 1956 treats a name of the company to be undesirable if it is identical with or too nearly resembles the name by which a company in existence has been previously registered, the legislative intent must be given effect to by giving injunctive relief to a plaintiff against a

defendant who has copied the corporate name of plaintiff (***Montari Overseas Limited V/s. Montari Industries Limited***³).

21 On the goodwill and reputation of the trade name 'AGLOWMED' of plaintiff, defendant in its written statement has also admitted that plaintiff's turn over in 2003-2004 itself was about Rs.72 Crores. Plaintiff has led evidence to show that plaintiff's products regularly features in various trade journals and a collection of some of them are at Exhibit P-7. Plaintiff has also produced copies of invoices at Exhibit P-9. Plaintiff has led evidence of a Chartered Accountant (PW-3) one Ishaq Lakkadghat, who has issued a certificate of turn over, sales and promotional expenses since plaintiff's incorporation (Exhibit P-10) and the same reads as under :

Company's Turnover, Sales and Promotional Expenses since its incorporation

YEAR	(Rs. In Lacs)	(Rs. In Lacs)
	TURNOVER	SALES & PROMOTIONAL EXPENSES
1983-84	2.21	1.93
1984-85	47.24	20.50
1985-86	82.08	32.82
1986-87	180.19	59.89
1987-88	283.61	88.88
1988-89	265.75	91.17
1989-90	529.09	179.24
1990-91	730.96	234.34
1991-92	889.64	301.92

3. 1996 PTC (16)

1992-93	1,127.48	365.36
1993-94	1,267.33	420.44
1994-95	1,695.84	539.59

22 In cross examination of PW-3, PW-3 has stated that the turn over figures shown are as per the audited profit and loss account of the company for many years and they have relied upon the sales bills plus the audited accounts of the company for arriving at the figures mentioned therein. He has also clarified that the turn over figures contains only the sales figures and denied the suggestion put that the certificate issued was blindly issued without deeply examining the actual state of affairs of plaintiff company. The witness has not been contradicted or confronted with any other figure or document. Therefore, I will have to accept the figures, as stated in Exhibit P-10, as correct. PW-2 has produced invoices and the invoices are at Exhibit P-9 and in the cross examination, he has explained how he is identifying every document, how the records are maintained and how he is able to identify each person who has signed the invoice. The evidence of PW-2 has not been controverted. Therefore, I will accept the figures as mentioned in the evidence of PW-2 and the invoices. Coming to PW-1, again defendant has not been able to make any dent. In his cross examination, PW-1, in answer to question no.42, has stated that Aglow is a word which plaintiff has formed and does not have any meaning. In answer to question no.44, PW-1 has stated the abbreviation of the word

'AGLOWMED' into 'AGLOW' by defendant is deceptive. He has also confirmed the figures of turn over mentioned in the plaint.

23 Plaintiff has a registered trade mark and name 'AGLOWMED'. Defendant has adopted the same name without the word 'MED' and used just 'AGLOW'. In my view, the name of defendant is close to the name under which plaintiff is carrying on its business. An individual has the latitude of trading under his own name because he does not have choice of name which is given to him. However, in the case of a Corporation the position is different. Unlike an individual who has no say in the matter of his name, a company can give itself a name. Normally a company cannot adopt a name which is being used by another previously established company, as such a name would be undesirable in view of the confusion which it may cause or is likely to cause in the minds of the public. Use of name by a company can be prohibited if it has adopted the name or a name which is very closely similar to the name of another company. It is also well settled that no company is entitled to carry on business in a manner so as to generate a belief that it is connected with the business of another company, firm or an individual. As held in *Montari (Supra)*, the same principle of law which applies to an action for passing off of a trade mark will apply more strongly to the passing off of a trade or corporate name of one for the other. Likelihood of deception of an unwary and ordinary person in the street is

the real test and the matter must be considered from the point of view of that person. Copying of a trade name amounts to making a false representation to the public from which they have to be protected. Besides the name of the company acquires reputation and goodwill and the company has a right to protect the same. A competitor, and in this case defendant is in the same pharmaceutical business as plaintiff, cannot usurp the goodwill and reputation of another. One of the pernicious effects of adopting the corporate name of another is that it can injure the reputation and business of that person. In this case, there are striking features which have to be taken note of in arriving at a decision whether defendant in adopting the word 'AGLOW' as a part of its corporate name is likely to deceive or cause confusion in the minds of the public. It is not disputed that defendant was formed almost a decade after plaintiff was formed. Defendant has also not explained as to why it selected the word 'AGLOW'. It is also not the case where defendant had no knowledge of plaintiff's corporate name. Defendant's case has been that defendant's Managing Director and plaintiff's Managing Director were neighbours, of the same gotra and of the same caste (though defendant failed to prove that) and both the names were registered in Patna.

24 In the evidence of DW-1, DW-1 has not explained any reason why they have used the word 'AGLOW' in the corporate name. The onus was

on defendant to prove why and how the word 'AGLOW' was used. If a party, for no apparent or a valid reason, adopts, with or without modifications, a mark belonging to another, whether registered or not, it will be difficult for that party to avoid an order of injunction because the Court may rightly assume that such adoption of the mark by the party was not an honest one. The Court would be justified in concluding that the defendant, in such an action, wanted to cash in on the plaintiff's name and reputation and that was the sole, primary or the real motive of the defendant adopting such a mark as held in *M/s. Hindustan Pencils Pvt. Ltd. V/s. M/s. India Stationery Products Company and Anr.*⁴. Where infringement is deliberate and wilful and defendant acts fraudulently with knowledge that he is violating plaintiff's rights, essential elements of estoppels are lacking and in such a case the protection of plaintiff's rights by injunctive relief is never denied. Defendant has not led evidence as to how he decided to use this word 'AGLOW'. Admittedly, defendant was incorporated, nine years after plaintiff was incorporated. According to defendant, the Managing Director of plaintiff and defendant were neighbours. According to defendant, admittedly, though DW-1 says he was not aware, the turn over of plaintiff in 1990-91 itself was Rs.730.96 lakhs as per the Chartered Accountant certificate (Exhibit P-10), in 1991-92 plaintiff's turn over was Rs.889.64 lakhs and in 1992-93 it was Rs.1127.48 lakhs. According to DW-1 the

4. AIR 1990 Delhi 19

Managing Director of plaintiff and DW-1 were neighbours in the same village. Therefore, I can safely assume that he was aware that plaintiff was doing big business and therefore, defendant decided to cash in on the popularity of plaintiff.

25 In the circumstances, it does appear to this Court that the adoption of the corporate name by defendant with the word 'AGLOW' figuring in it, was not innocent. When a defendant does business under a name which is sufficiently close to the name under which plaintiff is trading and that name has acquired reputation and the public at large is likely to be misled that defendant's business is the business of plaintiff or is a branch or subsidiary or group or department of plaintiff, defendant is liable for an action in passing off. The members of the public, in my view, are likely to mistakenly infer from defendant's use of the name 'AGLOW' which is sufficiently close to plaintiff's name 'AGLOWMED' that the business of defendant company is from the same source or the two companies are connected to each other. The question to consider in a case of similarity in trade names is whether ordinary person or public at large will mistake one company for the other. Paragraphs 9, 13, 14, 15, 16 and 22 of *Montari (Supra)* read as under :

(9) We have considered the submission of learned counsel but we have not been persuaded to accept the same. Section 20 of the Companies Act, 1956 provides that no company will be registered by a name which is similar or identical or too nearly resembles the name by which a company in existence

has been previously registered. In case where a company has been incorporated with a name which is identical or too nearly resembles the name of a company which has been previously incorporated, Section 22 makes a provision for getting the names of the former altered. No doubt, Section 22 makes provision for rectification of the name of a company which has been registered with undesirable name but that does not mean that the common law remedy available to an aggrieved party stands superseded. The plaintiff will have two independent rights of action against the defendant who may be using the corporate name of a previously incorporated company, one under Section 22 of the Companies Act and the other for injunction restraining the defendant from using the corporate name of the plaintiff or from using a name bearing close resemblance which may cause or which is likely to cause confusion in the minds of the customers or general public in view of the similarity of names. Both the remedies, one under Section 22 and the other under the common law operate in different fields. Under Section 22 of the companies Act, the Central Government has no jurisdiction to grant any injunction against the use of an undesirable name by a company whereas in a suit for permanent injunction the court can pass an order injecting the defendant from using the name which is being passed off by the defendant as that of the plaintiff.

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(13) It is well settled that an individual can trade under his own name as he is doing no more than making a truthful statement of the fact which he has a legitimate interest in making. But while adopting his name as the trade name for his business he is required to act honestly and bonafidely and not with a view to cash upon the goodwill & reputation of another. An individual has the latitude of trading under his own name in recognition of the fact that he does not have choice of name which is given to him. However in the case of a Corporation the position is different. Unlike an individual who has no say in the matter of his name, a company can give itself a name. Normally a company can not adopt a name which is being used by another previously established company, as such a name would be undesirable in view of the confusion which it may cause or is likely to cause in the minds of the public. Use of name by a company can be prohibited if it has adopted the name of another company. It is well settled that no company is entitled to carry on business in a manner so as to generate a belief that it is connected with the business of another company, firm or an individual. The same principle of law which applies to an action for passing off of a trade mark will apply more strongly to the passing off of a trade or corporate name of one for the other. Likelihood of deception of an unwary and ordinary person in the street is the real test and the matter must be considered from the point of view of that person. Copying of a trade name amounts to making a false representation to the public from which they have to be protected. Besides the name of the company acquires reputation and goodwill, and the company has a right too to protect the same. A competitor cannot usurp the goodwill and reputation of another. One of the pernicious effects of adopting the corporate name of another is that it can injure the reputation and business of that person.

(14) In the present case, there are certain striking features which have to be taken note of in arriving at a decision whether the appellant in adopting the word 'MONTARI' as a part of its corporate name is likely to deceive or cause confusion in the minds of the public. It is not disputed that the appellant was incorporated on April 21, 1993 after about a decade of the incorporation of the respondent. From the record of the trial Court it appears that the respondent and its other group of Montari companies has an established business. On the other hand, the appellant has entered the capital market very recently. It was noticed by the learned single Judge that the factory of the appellant was in the process of completion and its products have not entered market. It was not claimed, either before us or in the memo of appeal, that the products of the appellant are now being marketed. The respondent has explained as to why the word 'MONTARI' was selected by it. It is explained that the word was coined by the respondent by deriving a part of it from the name of the Chairman of the company and part of it from the name of his wife. The appellant has also tried to furnish some explanation by urging that the word 'MONTARI' is also of significance to it and the same was derived from the names of the father of the Managing Director of the company and his father-in-law. It claimed in the written statement that the father of the Managing Director is Mohan Singh while the name of his father-in-law is Avtar Singh. However, during arguments it was not disputed that the name of the father of the Managing Director was Kirpal Singh. This shows that the word 'MONTARI' has nothing to do with the name of the father of the Managing Director. The explanation appears to be not correct. If this is so then, what was the purpose of selecting the word 'MONTARI' by the appellant for use in its corporate name. No satisfactory explanation has been given by the appellant in this regard. It is also not a case where the appellant had no knowledge of the corporate name of respondent. Rather the stand of the appellant is that in the prospectus and press reports of the company, it was pointed out that the appellant had nothing to do with the respondent. In the circumstances it appears to us that the adoption of the corporate name by the appellant with the word "MONTARI" figuring in it, was not innocent. When a defendant does business under a name which is sufficiently close to the name under which the plaintiff is trading and that name has acquired reputation and the public at large is likely to be misled that the defendant's business is the business of the plaintiff, or is a branch or department of the plaintiff the defendant is liable for an action in passing off. Even if the word "MONTARI" as part of the corporate name of the appellant was derived from the names of the father and father-in-law of the M.D. of the appellant company it would still be liable for an action in passing off as the use of the word "MONTARI" in its corporate name is likely to cause confusion and injure the goodwill and reputation of the respondent, in the sense that this is a reasonable and foreseeable consequence of the appellant's action. We find from the record of the trial court, which contains the Memorandum of Association of six Montari group of companies and annual reports of Montari Industries Ltd, that Montari group of industries have large operations and some of them have been in business for a long time. The members of the public are likely to mistakenly infer from the appellant's use of the name which is sufficiently close to the respondent's name that the business of the appellant's company is from the same source, or the two

companies are connected together.

(15) The question to consider in a case of similarity in trade names is whether ordinary person or public at large will mistake one company for the other. Relying on the observation of Sir George Jessel in *Guardian Fire and Life Assurance Co. Vs. Guardian and General Insurance Co. Ltd.* (8) (1880) 50 L.J. Ch. 253 to (3) to Bombay High Court in *National Bank of India Vs. National Bank of Indore* Air 1923 Bombay 119 (4) observed as follows: ".....BUT the question in this class of cases is not whether the intelligent section of the public is likely to be deceived but whether the public at large is likely to be deceived. Further as observed by Sir George Jessele in *Guardian Fire and Life Assurance Co. vs. Gurdian and General Insurance Co. Ltd* (8), "the public are careless, and it is no use supposing that if they paid a very moderate attention to names they would see they were not the same but only similar".

(16) This court in *Kwality Restaurant & Ice Cream (1978) Company, New Delhi Vs. Kwality Confectioners, New Delhi* 1981 Ptc 276 (5) had an occasion to deal with a case where the plaintiff Kwality Restaurant and Ice Cream Company, New Delhi brought a suit for injunction for restraining the defendant Kwality Confectioners, New Delhi from using the word "KWALITY" in latter's trade name. The court while granting injunction against the defendant observed :

"I may say here that the law relating to trade names and trade marks is based partly on the Trade and Mechandise Marks Act and partly on ordinary law. Thus a person who has a goodwill relating to business particularly in respect of trade name has a right to injunct others from using the name which is similar or deceptive. Reference "Kerly's Law of Trade Mark and Trade Name, Tenth Edition at page 408 ;

"IF the name of the defendant company is one which is calculated to lead to the belief that it is an agency, branch or department of the plaintiff company, an injunction will be granted. Where there is probability of confusion in business, an injunction will be granted even though the defendants adopted the name innocently."

.....

(22) In considering the question whether the activities of the appellant are likely to cause confusion or pose a real and tangible risk of injuring the respondents reputation or goodwill, regard must be had to the fact that appellant is using a name similar to that of the respondent and it will amount to making a representation that the appellant is associated with the defendant. The appellant cannot be permitted to appropriate the reputation and goodwill of the respondent to promote its business interests.

(emphasis supplied)

26 Mr. Ansari during the course of his arguments submitted as under :

(a) this Court rejected the interim application by observing that the suit filed is to restrain defendant from using the word 'AGLOW' in its corporate name. Therefore, as the notice of motion was dismissed, nothing survives in the suit.

This submission of Mr. Ansari is not acceptable since first of all any order passed in an interim application is based only on a *prima facie* view. Secondly, the Court rejected the prayer for interim injunction because the Court felt plaintiff did not move the Court immediately upon being aware of the alleged infringement but chose to exercise its remedies under Section 22 of the Companies Act, 1956. Therefore, I cannot accept Mr. Ansari's submission that rejection of the interim application sounded the death knell for the suit itself.

(b) Plaintiff is a big company and defendant is a small company. Mr. Ansari submitted that the turn over of defendant for the year 2016-2017 was Rs.15,60,868/-, for 2017-2018 was Rs.23,43,977/- and for 2018-2019 was Rs.15,42,535/- and therefore, it is a harassment by a big company of a small company.

This submission is also not acceptable since there is no pleading or evidence led to that effect.

(c) Registrar of Companies allowed the application of defendant for the name Aglow Pharmaceuticals Private Limited and therefore, it is binding upon plaintiff.

This submission also is not acceptable because the Companies Act, otherwise, will not have provisions of Section 22 and as held in *Montari (Supra)* plaintiff has an independent separate course of action to restrain defendant from using a name as that of plaintiff or similar to plaintiff's name.

(d) Mr. Ansari thereafter read out paragraphs 8 to 15 of Exhibit P-4. Though he did not elaborate, I would assume that the contents of those paragraphs were Mr. Ansari's submissions. Mr. Ansari submitted that 'AGLOW' is commonly used english word which means glowing, brightness and the word 'AGLOW' when used in combination of other words, can be registered under the Act.

No evidence has been led by defendant on this. I do not even find any averment in the written statement as to how the word 'AGLOW' came to be used by defendant.

(e) the registration of defendant's name in no manner is illegal or invalid and there is no dishonesty or fraud or the name has been chosen with malafide intention. Mr. Ansari also added that the trade name of products of defendant is different from trade name of products of plaintiff

and as such, there is no question of passing off goods manufactured by defendant as that of plaintiff.

(f) plaintiff, because of poor quality of product manufactured by plaintiff and bad behavior, has failed in the market and hence, the attempt is to malign defendant's reputation. Plaintiff's families and defendant's families have developed village rivalry and out of jealousy and personal grudge plaintiff is trying to play foul.

(g) both the names are distinct from each other and cannot create any confusion in the mind of general public.

None of these submissions at paragraph (e), (f) to (g) above that Mr. Ansari made has been proved in evidence. The submissions that there was village rivalry between the families and it was a personal grudge do not even find a mention in the written statement. Nowhere in the written statement defendant has alleged that plaintiff's products are of poor quality.

27. Mr. Ansari thereafter relied upon a judgment of the Division Bench of this Court in the matter of *Voy Cosmetics Pvt. Ltd. & Ors. V/s. Union of India & Ors.*⁵ to submit that merely because the name of a company subsequently registered is identical with or too nearly resembles the name of a company which has already been registered, albeit, through inadvertence or otherwise, it does not follow that an order for rectification is

5. 2013 (4) ALL MR 33

bound to be passed. Mr. Ansari submitted that therefore, Regional Director of Companies having rejected plaintiff's Section 22 application, the question of plaintiff now seeking injunction in the second round does not arise.

I cannot accept Mr. Ansari's submissions. The Bombay High Court in *Voy Cosmetics (Supra)* has not held that plaintiff can have no other remedy. Moreover, in the present case, Section 22 application was rejected because it was beyond one year period and not on merits. It has to be noted that the Delhi High Court in *Montari (Supra)*, with whom I am in respectful agreement, has held that Section 22 makes provision for rectification of the name of a company which has been registered with undesirable name but that does not mean that the common law remedy available to aggrieved party stands superseded. Plaintiff will have two independent rights of action against defendant who may be using the corporate name of a previously incorporated company, one under Section 22 of the Companies Act and the other for injunction restraining defendant from using the corporate name of plaintiff or from using a name bearing close resemblance which may cause or which is likely to cause confusion in the minds of the customers or general public in view of the similarity of names.

28 Mr. Ansari submitted that in paragraph 23 of the plaint, plaintiff has averred that the entire cause of action arose within the

jurisdiction of this Court but has not explained what were those cause of action and therefore, the Court should dismiss the suit.

I have to dismiss this submission also of Mr. Ansari because in paragraph 23 plaintiff has given three different reasons why this Court has jurisdiction, (i) plaintiff is carrying on business within the jurisdiction of this Court, (ii) defendant is carrying on business within the jurisdiction of this Court and (iii) entire cause of action arose within the jurisdiction of this Court. Section 134 of the Trade Marks Act, 1999 provides that plaintiff can file a suit within the jurisdiction where plaintiff is carrying on business or is gainfully employed or resides. This has not been denied by defendant. Plaintiff has also averred that defendant carries on business in Mumbai, which also has not been denied by defendant in the written statement. Therefore, this submission of Mr. Ansari also requires to be rejected.

29 Mr. Ansari in response to plaintiff's counsel's reliance upon *Hindustan Pencils Pvt. Ltd. (Supra)* submitted that no authority or Court of law has held that defendant using the word 'AGLOW' in its corporate name was fraudulent and therefore, suit has to be dismissed.

I am afraid, I cannot accept this submission also because in this suit I am going to conclude that defendant have no apparent or valid reason for having adopted a mark with modification belonging to plaintiff. The Court would be justified in concluding that defendant, in such an action,

wanted to cash in on plaintiff's name and reputation and that was the sole, primary or the real motive of defendant adopting AGLOW in its corporate name. I am also concluding that defendant's infringement is deliberate and wilful and therefore, defendant's act was fraudulent with knowledge that he is violating plaintiff's right.

30 Mr. Ansari submitted that there were 18 other companies as listed by him in the written statement and evidence affidavit of DW-1 using the name 'AGLOW' which means there are series of marks registered or unregistered having common word 'AGLOW'. The onus was on defendant to prove that there were 18 such companies and they were carrying on business in the same field of pharmaceutical production. Defendant has led no evidence. Infact in its cross examination, DW-1, in answer to question no.24 has admitted that he is not aware which of the companies are in pharmaceutical business. He has also stated that he only knows some of the companies are existing and the company at serial nos.1 and 2 are plaintiff and defendant. He has also answered in his cross examination that he is not aware which of the other company are in pharmaceutical business. Though he has answered that he was aware of the existence of two other companies - Aglow Engineers Pvt. Ltd. and Aglow Agrotech and Resorts India Ltd., he does not know where they were situated and he came to know about their existence because the Chartered Accountant, who audits defendant, is the

same as the Chartered Accountant of those two companies, which is hearsay. Question nos.24 to 29 and the answers thereto read as under :

Q.24 : Can you tell us which of the companies stated in para 14 of your affidavit of examination in chief are in pharmaceutical business?

Ans. : I would not be able to say as I am not aware of which of these companies is in the pharmaceutical business. All the companies bear the prefix 'Aglow', that is all I know.

Q.25 : In view of your answer to Q.24, will it be correct to say that you have no knowledge of existence or non existence of the companies stated in para 14 of your affidavit of evidence in chief?

Ans. : I say that some of these companies are existing.

Q.26 : In view of your answer to Q.25, can you tell us which of the companies stated in para 14 of your affidavit of examination in chief are existing as per your knowledge?

Ans. : The companies listed at Sr. Nos.1 and 2 being the plaintiff and the defendant company are existing to my knowledge. The companies listed at Sr. Nos.16, 17 of the table at para 14 being Aglow Engineers Pvt. Ltd. and Aglow Agrotech and Resorts India Ltd. are also existing to my knowledge.

Q.27 : In view of your answer to Q.26, can you tell us the business activities of companies listed at Sr. Nos.16, 17 of the table at para 14 being Aglow Engineers Pvt. Ltd. and Aglow Agrotech and Resorts India Ltd.?

Ans. : I am not aware of their business activities.

Q.28 : On what basis have you stated in answer to Q.26 that companies listed at Sr. Nos.16, 17 of the table at para 14 being Aglow Engineers Pvt. Ltd. and Aglow Agrotech and Resorts India Ltd. are existing?

Ans. : I know this because the Chartered Accountant who does our audit is the same as the Chartered Accountant who does the audit of these two companies.

Q.29 : In view of your answer to Q.28 can you tell us where are the registered offices of companies listed at Sr. Nos.16, 17 of the table at para 14 being Aglow Engineers Pvt. Ltd. and Aglow Agrotech and Resorts India Ltd. situated?

Ans. : I am not aware.

31 In answer to question no.33, DW-1 has also confessed that the information given in paragraph 10, 13 and 14 of the affidavit in

examination in chief was based on information received by him from his Chartered Accountant, which again is hearsay. The Chartered Accountant has not been examined to corroborate. The Apex Court in ***Corn Products Refining Company V/s. Shangrila Food Products Limited***⁶ has held that a party that seeks to derive assistance for his success from the presence of a number of marks having one or more common features which occur in his mark also has to prove that those marks had acquired a reputation by user in the market. The onus of proving such user is of course on defendant who wants to rely on those marks which are the names given in paragraphs 13 and 14 of the evidence affidavit. As stated earlier, no evidence has been led by defendant as to the user of marks with the common element 'AGLOW'. It is possible that the mark have been registered but not used. In any event, plaintiff's grievance is that defendant also happens to be in the same pharmaceutical business and therefore, 'AGLOW' word in the corporate name is creating confusion.

32 It is plaintiff's case that people buying pharmaceutical products will be confused and will assume that the product being pushed in the market by defendant is actually manufactured by plaintiff. Mr. Mahadgut repeatedly submitted that if for example defendant was a scrap dealer, plaintiff may have no problem or in some other business unconnected to pharmaceutical.

6. AIR 1960 SC 142

Relief for injunction and damages/accounts of profits :

33 The question that arises for determination in this case is whether I can grant the prayer for injunction and other reliefs. This question has been considered by different High Courts and the Apex Court in various cases from time to time. Whether there is a likelihood of deception or confusion arising is a matter for decision by the Court and no witness is entitled to say whether the mark is likely to deceive or to cause confusion (*Mahendra and Mahendra Paper Mills Limited V/s. Mahindra and Mahindra Limited*⁷).

34 It is well established principle of law that if, in fact, the use of the name does lead to the result that a person's goods are being passed off as the goods of another although that may not have been the intention of the person so using that name, and although he may have a perfectly honest reason for using it, yet, if in fact the use of the name which the defendant makes is such that it leads, or must lead, to a misrepresentation that the goods of the defendant are the goods of the plaintiff, then *prima facie* the defendant cannot be held to be entitled to use his name, although it is his own name and although he has not, and may never have had, any fraudulent intention. I find support for this view from *M/s. Sarabhai International Limited and Anr. V/s. M/s. Sara Exports International*⁸. In

7. AIR 2002 SC 117

8. 1985 PTC 105

the present case, the defendant having come on the scene at a quite later stage, use of the name AGLOW cannot be said to be a bonafide one.

35 It is not necessary that the mark adopted by defendant should be exactly identical with that of plaintiff. The mark must be compared as a whole. It is not right to take a portion of the word and say that because that portion of the word differs from the corresponding portion of the word in the other case there is no sufficient similarity to cause confusion. The true test is whether the totality of the proposed trade mark is such that it is likely to cause deception or confusion or mistake in the minds of persons accustomed to the existing trade mark (*Indchemie Health Specialities Pvt. Ltd. V/s. Naxpar Labs Pvt. Ltd. & Anr.*⁹). In *Indchemie (Supra)* the Division Bench has cited with approval the test formulated by Lord Parkar in *Pianotist Co. Ltd.*¹⁰ and the same reads as under :

"You must take the two words. You must judge of them, both by their look and by their sound. You must consider the goods to which they are to be applied. You must consider the nature and kind of customer who would be likely to buy those goods. In fact, you must consider all the surrounding circumstances, and you must further consider what is likely to happen if each of those trade marks is used in a normal way as a trade mark for the goods of the respective owners of the marks. If, considering all those circumstances, you come to the conclusion that there will be a confusion that is to say not necessarily that one man will be injured and the other will gain illicit benefit, but that there will be a confusion in the mind of the public which will lead to confusion in the goods then you may refuse the registration, or rather you must refuse the registration in that case".

9. 2002 (24) PTC 341

10. (1906) 23 RPC 774

36 The test for causing confusion of deception was also considered in *Amritdhara Pharmacy V/s. Satya Deo Gupta*¹¹ where the Court held that the case has to be considered as to whether an unwary purchaser of average intelligence and imperfect recollection was looking at the overall structure and phonetic similarity between the two names "Amritdhara" and "Lakshmandhara" was likely to be deceived or confused. The Court held that if a person is put in a state of wonderment it is sufficient to hold that the mark is likely to deceive or cause confusion.

As held in *Corn Products Refining (Supra)* the question has to be approached from the point of view of a man of average intelligence and imperfect recollection. A critical comparison of the two names 'AGLOWMED' and 'AGLOW' with the word pharmaceuticals may disclose some points of difference but an unwary purchaser of average intelligence and imperfect recollection would be deceived by the overall similarity of the two names having regard to the nature of the company whose medicine he is looking for with a somewhat vague recollection that he had purchased a similar medicine of plaintiff company on a previous occasion. It will be useful to reproduce paragraph 8 of *Indchemie (Supra)* and the same reads as under :

8. In the light of the aforesaid observations of the Supreme Court the question we must ask to ourselves is -: what would be the effect on the mind of the person of average intelligence and imperfect recollection. Applying this test which is established principle quoted above, there can be no manner of doubt that the respondents' mark "Cherish" is deceptively similar to the

11. AIR 1963 449

appellants' mark "Cheri". If we compare the words cheri and cherish they are structurally and visually similar as well as aurally similar and easily give rise to deception and confusion. It would be highly improbable to expect on ordinary person of average intelligence and imperfect recollection to notice the difference in the meaning of two words cheri and cherish. As there is great deal of similarity in the phonetics of these two words. This phonetic similarity taken in conjunction with the fact that there is also a similarity in the products, to our minds, undoubtedly confuse an ordinary purchaser of average intelligence an imperfect recollection and who may even be an illiterate. This is all the more manifest because entire mark of the appellants is incorporated in the mark of the respondents. We have therefore no hesitation in coming to the conclusion that the respondents' mark Cherish is deceptively similar to the appellants' mark "Cheri" and is likely to deceive or cause confusion. Merely because the words are different it makes no difference since possibility of confusion remains.

37 In **Cadila Health Care Limited V/s. Cadila Pharmaceutical Limited**¹² the Supreme Court observed as under :

"The drugs have a marked difference in the compositions with completely different side effects; the test should be applied strictly as the possibility of harm resulting from any kind of confusion by the consumer can have unpleasant if not disastrous results. The courts need to be particularly vigilant where the defendant's drug, of which passing off is alleged, is meant for curing the same ailment as the plaintiffs medicine but the compositions are different. The confusion is more likely in such cases and the incorrect intake of medicine may even result in loss of life or other serious health problems. Public interest would support lesser degree of proof showing confusing similarity in the case of trade mark in respect of medicinal products as against other non medicinal products. Drugs are poisons, not sweets. Confusion between medicinal products may, therefore, be life threatening, not merely inconvenient. Noting the frailty of human nature and the pressures placed by society on doctors, there should be as many clear indicators as possible to distinguish two medicinal products from each other. It is not uncommon that in hospitals, drugs can be requested verbally and/or under critical/pressure situations. Many patients may be elderly, infirm or illiterate. They may not be in a position to differentiate between the medicine prescribed and bought which is ultimately handed over to them...."

38 Therefore, we must remember that both plaintiff and defendant are in pharmaceutical business and any kind of confusion by the customer can have an unpleasant if not disastrous results. The Courts need to be

12. 2001 PTC 300 (SC)

particularly vigilant where defendant's drug are passing off as plaintiff's medicine. The confusion is more likely in such cases to result in loss of life or other serious health problems. As held in *Cadila Health Care (Supra)* public interest would support lesser degree of proof showing confusing similarity in the case of names of companies manufacturing medicinal products as against other non medicinal products. Drugs are poisons, not sweets and confusion between even medicinal products of manufacturers may lead to threat of life. As held in *Indchemie (Supra)* where medicinal products are involved the test to be applied for adjudging the violation of trade marks law for passing off may not be at par with cases involving non medicinal products. A stricter approach should be adopted while applying the test to judge the possibility of confusion of one medicinal product for another by the consumer.

39 Plaintiff and defendant are in the same business and therefore, the activities of defendant are likely to cause confusion or pose a real and tangible risk of injuring plaintiff's reputation or goodwill in view of the fact that defendant is using a name similar to that of plaintiff. Using the word 'AGLOW' in its corporate name does amount to making a representation that defendant is associated with plaintiff, particularly since both are in the same filed and business. Defendant cannot be permitted to appropriate the reputation and goodwill of plaintiff to promote its business interests. We

should keep in mind that the goods sold by defendant are pharmaceutical products and medicinal preparations. Plaintiff is also preparing pharmaceutical products and medicinal preparations. In the pharmaceutical industry, reputation is absolutely paramount and the company with a turn over of just about Rs.15 lakhs p.a. cannot be allowed to interfere with the reputation and goodwill of a company which is almost five hundred times bigger.

Therefore, plaintiff will be entitled to permanent injunction, which is hereby granted, against defendant in using the word 'AGLOW' in its corporate name.

40 As regards the damages suffered, though evidence has been led on the turn over and reputation of plaintiff, no evidence has been led to work out the amount actually suffered as damages.

Since the turn over of defendant itself is only Rs.15 lakhs and that has not been contradicted by plaintiff, the question of directing defendant to disclose its profits also does not arise.

Therefore, I am not inclined to grant the reliefs for damages or disclosure of profits by defendant.

41 Having come to the conclusion that defendant cannot use the word 'AGLOW' in its corporate name, defendant is directed, within four

weeks, to deliver upto plaintiff for destruction without compensation all product, carton, label, goods, articles, dies, papers and all other things bearing and/or containing reference in any manner whatsoever to the impugned name 'AGLOW'.

42 Defendant shall also apply, within two weeks of this judgment being uploaded, to ROC, Patna for change of name and the new name shall not contain the trade name “AGLOW”.

43 All issues accordingly stand answered.

44 Suits stands disposed with costs in the sum of Rs. 2 Lakhs to be paid by defendant to plaintiff within four weeks.

(K.R. SHRIRAM, J.)