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* **IN THE HIGH COURT OF DELHI AT NEW DELHI***Date of decision: 14th November, 2022*+ **CS(COMM) 223/2021****B C HASARAM AND SONS AYURVEDIC
PHARMACY & ANR.**

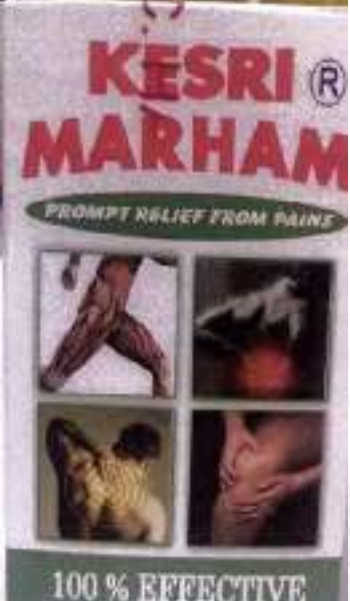
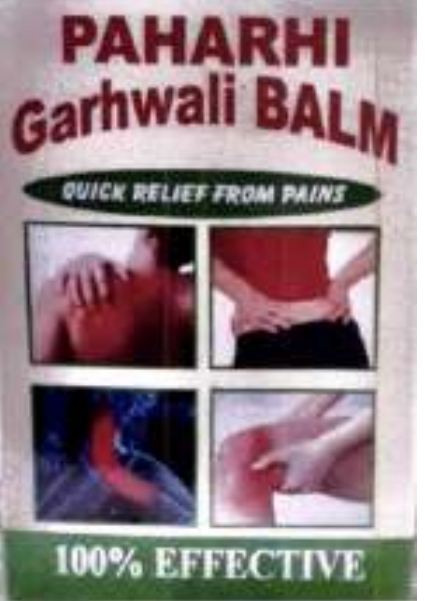
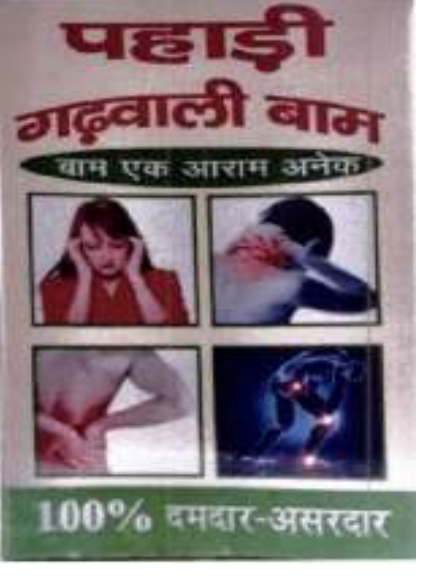
..... Plaintiffs

Through: Ms. Tusha Malhotra and Ms. Yamini
Jaswal, Advocates. (M:9878096700).

versus

PAHARI GARHWALI AYURVEDIC PHARMACY DefendantThrough: Mr. Yashraj Samant and Mr. Shrirang
Verma, Advocates. (M:9829412764)
along with Mr. Vishnu Rathaur (Sole
Proprietor).**CORAM:****JUSTICE PRATHIBA M. SINGH****Prathiba M. Singh, J.(Oral)**

1. This hearing has been done through hybrid mode.
2. The present suit has been filed by the Plaintiffs seeking permanent injunction restraining the infringement of copyright, passing off, unfair competition, delivery up, rendition of accounts, damages, and other reliefs. The dispute in the present suit relates to the mark 'KESRI MARHAM' used by the Plaintiffs in respect of their flagship product which is an ointment for the treatment of body aches. The case of the Plaintiffs was that the Defendant is the manufacturer and marketer of 'PAHARI GARHWALI BALM' which is also a pain relief balm and is being packaged and sold in a nearly identical trade dress as that used by the Plaintiffs for its 'KESRI MARHAM' product.
3. The competing product labels of the Plaintiffs and the Defendant, as impugned in the present suit, are set out hereinbelow:

Plaintiffs' product	Defendant's product
 KESRI[®] MARHAM PROMPT RELIEF FROM PAINS 100 % EFFECTIVE	 PAHARHI Garhwali BALM QUICK RELIEF FROM PAINS 100% EFFECTIVE
 केसरी[®] मरहम दवा एक आराम अनेक 100% दमदार-असरदार	 पहाड़ी गढ़वाली बाम बाम एक आराम अनेक 100% दमदार-असरदार

INDIA'S LARGEST SELLING (MARHAM) OINTMENT
भारत की सर्वाधिक बिकने वाली मरहम

Magnificent Ointment For Headache, Body Pain, Nerves, Neck & Shoulder Pain, Gout, Sciatica, Synovitis, Arthritis, Pain Of Muscles, Joints, Backache, Inflammation, Strains & Sprains, Fibrositis, Dislocation, Slip Disc, Cervical Spondylosis, Cold, Stuffy Nose, Sinus, Stomach Pain Etc.

सिर दर्द, कनक दर्द, घुटनों का दर्द, रीढ़ का दर्द, कंधों का दर्द, परासी का दर्द, शरीर के सभी अंगों का दर्द, विस्त्रागुनिया का दर्द, गुमघोट, मोच, सूजन, सदी जुकाम, गठिया, रक्त कर्लन वात, दांत दर्द, घेठ दर्द, सर्वाधिकतर एपिडुरलिसि रोग समस्त प्रकार के वात रोगों की लागवडका औषधि।

देसी डेसी एकत्री डेकत्री
मरहम मरहम मरहम मरहम

रोग भगाये - दर्द मिटाये
आराम दिलाये - पल भर में

Very Useful and Largest Selling (Balm) Ointment
आरामा उपयोगी एवं सर्वाधिक बिकने वाली मरम

Powerful Ointment for Headache, Backache, Knee Pain, Shoulder Pain, Neck Pain, Body Pain, Pain of Muscles and Joints, Dislocation, Slip Disc, Fibrositis, Strains, Swelling, Spondylitis, Synovitis, Gout, Arthritis, Sciatica, Toothache, Stomach Pain, Cold, Cough, Stuffy Nose, Sinus etc.

सिर दर्द, घेठ दर्द, घुटनों का दर्द, कंधर का दर्द, कंधों का दर्द, परासी का दर्द, परासी का दर्द, शरीर के सभी अंगों का दर्द, विस्त्रागुनिया के वात का दर्द, रीढ़ों का दर्द, गुमघोट, मोच, सूजन, कुलत वात, गठिया, दांत, विस्त्रागु, दांत दर्द, घेठ दर्द, सदी जुकाम, रक्त वात, शरीर के समस्त प्रकार के रोगों के लिए उपयोगी व असामान्य औषधि।

दर्द मिटाये - रोग भगाये
आराम दिलाये - पल भर में

हरिद्वार का प्रसिद्ध आयुर्वेद की मूलभूत पद्धति से निर्मित
Composition : Each 100 grams contains

Mentha Piperita	1.00 gm.
Carum Copticum	1.00 gm.
Cinnamomum Camphora	1.00 gm.
Gaultheria Fragrantissima	1.00 ml.
Trachyspermum Ammi	0.50 ml.
Cinnamomum Zeylanicum	0.50 ml.
Eucalyptus Globulus	1.00 ml.
Citrus Sinensis	0.10 ml.
Eucalyptus Globulus	1.00 ml.
Gall	0.50 gm.
Approved Colour I.P.	0.50 gm.

89080101843012

FOR EXTERNAL USE ONLY
KEEP IT IN A COOL & DRY PLACE
Customer Helpline Number : 01334-227660

AYURVEDIC PROPRIETARY MEDICINE

हरिद्वार के प्रसिद्ध आयुर्वेद की दुर्लभ जड़ीबूटियों द्वारा निर्मित
Composition :

Each 100 gm. Contains	
Trachyspermum ammi	05 gm.
Syzygium aromaticum	02 ml.
Cinnamomum zeylanicum	01 ml.
Eucalyptus globulus	10 ml.
Gaultheria fragrantissima	20 ml.
Cinnamomum camphora	05 gm.
Mentha piperita	05 gm.
Citrus sinensis	02 ml.
Honey wax	20 gm.
Vaseline	30 gm.

FOR EXTERNAL USE ONLY
KEEP IT IN COOL PLACE
Customer Care Helpline
+91 9044703957

Ayurvedic Proprietary Medicine
समस्त दर्दों में आपका हथकंडा



4. Upon a consideration of the above competing labels, this Court had granted an *ex parte* ad-interim injunction, vide order dated 17th May, 2021, in the following terms:

“14. *Prima facie*, a bare glance of the label of the defendant, vis-a-vis that of the plaintiffs, indicates that there has been a conscious effort to copy the plaintiffs' labels, to the extent that the colours used by the defendant, the placing of various features on the label and the photographs representing the ailments which the balm is expected to alleviate, are also identically placed. There is, therefore, *prima facie* every possibility of an unwary purchaser or customer mistaking the product of the defendant as coming from the stable of the plaintiffs.

15. *Prima facie*, therefore, it appears that the defendant is passing off its products as those of the plaintiffs.

16. In view thereof, I am of the opinion that the plaintiffs have made out a good *prima facie* case for grant of *ex-parte* ad interim relief. In case such relief is not granted and the market is permitted to be flooded with the defendant's product, prejudice to the plaintiffs would be irreparable. The balance of convenience would also, therefore, justify grant of ad interim *ex-parte* relief as prayed.

17. In view therefore, till the next date of hearing, there shall be an ex-parte ad interim order in terms of prayers (a) to (c) of IA 6311/2021.”

5. Post the above injunction order dated 17th May, 2021, the Defendant has entered appearance. However, the Defendant has failed to file the written statement. Accordingly, vide order dated 13th July, 2022 passed by the Id. Joint Registrar, the Defendant's right to file the written statement has been closed.

6. As recorded in the previous order dated 30th August, 2022, during the pendency of the present suit, the Defendant made certain minor modifications in the colour scheme and packaging of the impugned product. The said packaging was shown to this Court on the said date. However, the same were not satisfactory, and vide order dated 30th August, 2022, it was directed as under:

“5. During the pendency of the present suit, the Defendant claims to have made some minor modifications in the colour scheme and packaging of the impugned product. The said packaging have been shown to the Court. Having perused the same, the Court is of the opinion that the change effected in the packaging of the Defendant's product is minimal in nature. Thus, the new packaging of the Defendant's product would, prima facie, amount to contempt of the orders passed by the Court in the present suit.

6. Interim order already granted shall stand confirmed during the pendency of the present suit. I.A. 6311/2021 is disposed of.”

7. On the said date, **I.A. 6313/2021** wherein the Plaintiff was seeking disclosure of the accounts and the quantum of sales by the Defendant, was also disposed of, in the following terms:

“7. This is an application filed on behalf of the Plaintiff seeking the disclosure of the accounts and the quantum of sales by the Defendant, since the Defendant has not filed any written statement.

8. Let the Defendant file an affidavit, disclosing the time since when the impugned packaging for ‘PAHARI GARHWALI BALM’ product was adopted by it and also giving the complete quantum and value of sales since adoption, on an annual basis. The said affidavit shall be filed within four weeks.

9. I.A. 6313/2021 is disposed of in the above terms.”

8. During the course of hearing on the last date, i.e., 30th August, 2022, the sole proprietor of the Defendant - Mr. Vishnu Rathaur had joined the proceedings virtually and had also agreed to place new artwork proposed to be adopted by the Defendant before this Court. The Defendant was also directed to ensure that the change which is now brought about in the packaging for its product is substantial and not violative of the injunction order dated 17th May, 2021.

9. Today, Mr. Vishnu Rathaur is present in Court and his statement has been recorded. He has also filed an affidavit dated 8th November, 2022 wherein he has stated that the mediation proceedings between the parties failed only due to the legal costs that were demanded by the Plaintiffs. A perusal of the said affidavit also shows the gross sales of the Plaintiffs, which has been set out below:

- i. Year ending 31st March, 2020 : Rs.70,277/-
- ii. Year ending 31st March, 2021 : Rs.2,25,729/-
- iii. Year ending 31st March, 2022 : Rs.5,97,959/-

10. Vide affidavit dated 8th November, 2022, the Defendant has also stated as under:

“16. The defendant has also as per the order dt. 30.08.2022 prepared a proposed new design which is in no manner similar to the design of the plaintiff's product. The defendant most humbly produces the proposed new design for the perusal and approval of this Hon'ble court.

A copy of the proposed new design prepared by the defendant is annexed herewith and marked as **ANNEXURE A-8**.

17. The defendant states that the defendant is ready and willing to make payment of reasonable amount to the plaintiff which may be directed to be paid by this Hon'ble Court after considering the financial status of the defendant.”

11. Accordingly, a further new label has been proposed to be adopted by the Defendant and the same has been extracted below:



12. The above proposed label is broadly acceptable to the Plaintiffs, except for the green stripe at the bottom of the said label. Accordingly, Mr. Rathore who is present in Court has given instructions to his Id. Counsel that he would replace the green colour of the stripe at the bottom of the label with any other colour which is not similar to green colour. The statement of Mr. Rathour has also been recorded.

13. Considering the nature of the matter and the foregoing facts, the following directions are issued:

- i. The present suit is decreed in terms of the reliefs as sought in paragraph 44(a), (b) and (c) of the Plaint;
- ii. The Defendant undertakes to destroy the products of its manufacture and sale bearing the impugned packaging, labels and patterns, and shall not use the same in future. The said undertaking is accepted;
- iii. Going forward, the Defendant shall adopt the new label, as extracted hereinabove in paragraph 11, with the modification in terms of paragraph 12 to the effect that the green stripe at the bottom of the label shall be replaced with any other colour which is not similar to green colour;
- iv. In addition, the Defendant shall pay a sum of Rs.1 lakh as nominal costs to the Plaintiffs.
- v. If the Defendant is found to be violating any of the undertakings given to this Court or the decree passed hereinabove, the Defendant shall be liable to pay damages to the tune of Rs.25 lakhs, to the Plaintiff without further adjudication. The Plaintiff would also be entitled to enforce and

avail of all its remedies in accordance with law, including the prayer for rendition of accounts and damages, as contained in paragraph 44(e) and (f) in the present suit. Subject to the above, Id. Counsel for the Plaintiff submits that the prayer for rendition of accounts and damages is not pressed at this stage.

14. Since the matter has been amicably resolved, full court fee is refunded to the Plaintiff, through Id. Counsel in terms of the judgment of the Id. Division Bench of this Court in *Nutan Batra v. M/s. Buniyaad Associates*, [2018 (255) DLT 696].

15. The present suit is decreed in the above terms. Decree sheet be drawn accordingly. All pending applications are also disposed of.

PRATHIBA M. SINGH
JUDGE

NOVEMBER 14, 2022
Rahul/AD

