

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

INTERIM APPLICATION NO. 3624 OF 2022

IN

COMMERCIAL IP SUIT NO. 370 OF 2022

Glenmark Pharmaceuticals Ltd.

...Applicant/Plaintiff

Versus

Eden Health Care Pvt. Ltd.

...Defendant

- Mr. Hiren Kamod, Mr. Mahesh A. Mahadgut, Ms. Poonam Teddu, Mr. Anees Patel, Mr. Kaivalya Shetye and Mr. Tanveer Malnas i/by Mahesh A. Mahadgut for Plaintiff.
- Mr. Hiren U. Trivedi, Ms. Mayuri M. i/by Kalpana R. Trivedi, for Defendant.

CORAM : MANISH PITALE, J

RESERVED ON : 22nd DECEMBER, 2022

PRONOUNCED ON : 09th MARCH, 2023

P. C. :

1. Heard, learned Counsel for the parties.
2. By the present application, the Applicant is seeking interim reliefs pertaining to the cause of action of infringement, as also passing off, in the context of its registered trademark "ALEX". The Applicant/Plaintiff has filed the Suit and the present Application for interim reliefs, by relying upon registration of its trademark "ALEX" and various formative marks containing the word "ALEX" as its leading, essential and prominent feature.
3. The Plaintiff is a company engaged in the business of

manufacture, sale and export of wide range of pharmaceutical products for treatment of various ailments. It is in the said business since the year 1977 and it is also listed on the stock exchange of India. The Plaintiff claims to be doing business in over 91 countries.

4. The Plaintiff and its predecessors-in-title claim to have been using the word mark "ALEX" since the year 1990, for various medicinal and pharmaceutical products. It is the case of the Plaintiff that in the year 1988, registration for the arbitrary word "ALEX" was granted in relation to pharmaceutical, medicinal and veterinary preparations in class-5. An assignment deed dated 22nd June, 2000, was executed in favour of the Plaintiff by the entity holding such registration, thereby assigning the registered word mark "ALEX" in its favour. Subsequent to acquisition of the word mark "ALEX", the Plaintiff applied for registration of various "ALEX" formative trademarks, which contained "ALEX" as its leading, essential and prominent features. In paragraph no. 4 (ii) of the plaint, the Plaintiff has given details of such registrations, starting from registration for trademark "ALEX P" (label mark) dated 09th September, 2001 onwards, till registration of trademark "ALEXFLU" dated 08th July, 2021. The Plaintiff has also applied for registration of trademark "ALEX HERBAL" in Class-5.

5. The Plaintiff claims that it has been openly and

extensively using the said trademark with “ALEX”, as its most fundamental and essential feature, for the past many years and the products are sold in the form of syrups, capsules and lozenges, meant for treatment of cough, cold, throat irritation, congestion and stuffiness. The variants of “ALEX” are specifically stated in paragraph no. 5 of the plaint. On this basis, the Plaintiff claims proprietary rights in the said trademark. Documents in support of registrations obtained by the Plaintiff are placed on record with the plaint. In order to demonstrate the goodwill created in favour of the Plaintiff in respect of the said “ALEX” formative trademarks, the Plaintiff has placed on record statements pertaining to its sales turnover, showing that for the year 2021-2022, the sales turnover was to the tune of about Rs. 137 Crores. The Plaintiff has also placed on record copies of various journals and promotional material to indicate that the said formative trademark “ALEX” has been in the public domain for a considerable period of time. The Plaintiff has also referred to number of legal proceedings initiated in order to zealously protect its proprietary rights in the said trademarks.

6. The Plaintiff has stated that in or about January, 2021, it addressed a cease and desist notice to one Harrisun Life Care located at Mumbai for misuse of one of its products. The said entity agreed to discontinue the offending product and furnished to the Plaintiff a

copy of the manufacturing license for the offending product. It is from the said license that the Plaintiff learnt that one Gayatri Pharma Chem located in Gandhinagar, Gujarat, was engaged in manufacturing pharmaceutical products under trademark “AFEX” sold as “AFEX-LS”. When the Plaintiff confronted the said Gayatri Pharma Chem by issuing cease and desist notice dated 08th April, 2021, that by its response dated 19th April, 2021, Gayatri Pharma Chem informed the Plaintiff that it had stopped manufacturing the products under the trademark “AFEX” or “AFEX-LS”. In this letter Gayatri Pharma Chem further informed the Plaintiff that it used to manufacture the said products, bearing the impugned trademarks “AFEX” and “AFEX -LS”, for the Defendant.

7. This led to the Plaintiff making inquiries about the Defendant and then it was realized that the Defendant was selling many products online, bearing the impugned trademark “AFEX” and associated marks. It was found that the Defendant was marketing and selling a range of cough medicines under impugned trademarks “AFEX” “AFEX-P”, “AFEX-LS” and “AFEX Junior”. These products were found on the website of the Defendant.

8. The Defendant had earlier applied for registration of the impugned trademark “AFEX” on 09th November, 2000, in Class-5, when the Plaintiff had opposed registration thereof. By order dated

20th March, 2019, the Registrar of Trade Marks took into consideration the opposition proceedings initiated by the Plaintiff and refused the application of the Defendant for registration of the impugned trademark “AFEX”.

9. In this backdrop, on 11th December, 2021, the Plaintiff issued cease and desist notice to the Defendant, in respect of the impugned trademark “AFEX”. Despite service of the said cease and desist notice, the Defendant did not stop using the impugned trademark “AFEX”, which led to filing of the present suit and the application for interim reliefs.

10. Mr. Kamod, learned Counsel appearing for the Applicant/Plaintiff submitted that the Defendant was illegally using the impugned trademark “AFEX”, which is phonetically and structurally deceptively similar to the registered trademark “ALEX” of the Plaintiff. It was submitted that the Plaintiff was always vigilant in protecting its proprietary rights in the registered trademark “ALEX” and even against the Defendant, the Plaintiff had initiated the aforesaid opposition proceedings, as a consequence of which, the Registrar of Trade Marks had rejected the application for registration filed by the Defendant for the impugned trademark “AFEX”. It was submitted that the said order was never challenged by the Defendant and in that light, the Defendant had no right to use the said impugned

trademark “AFEX”. It was submitted that since the present case is concerned with proprietary rights of the Plaintiff pertaining to medicinal and pharmaceutical preparations, it is all the more necessary for the Court to adopt a strict approach, so as to prevent the Defendant from continuing the use of the impugned trademark. For this proposition, the learned Counsel relied upon judgment of the Supreme Court in the case of *Cadila Health Care Ltd. Vs. Cadila Pharmaceutical Ltd.*¹

11. The learned Counsel for the Plaintiff referred to the stand taken on behalf of the Defendant in the present application and in the written statement. It was submitted that the Defendant was not justified in claiming that the mark “ALEX” was “common to trade”. It was submitted that the registered trademark “ALEX” of the Plaintiff was an arbitrary word, for which the Plaintiff holds registration and the contention pertaining to “common to trade” cannot be casually accepted because extensive user must be shown for such a stand to be accepted. It was submitted that in the present case, the Defendant had miserably failed to show, even at the interlocutory stage, material to indicate extensive user of the mark in question for it to qualify as “common to trade”. For this proposition, learned Counsel for the Plaintiff relied upon judgment of the Supreme Court in the case of

1 2001 SCC OnLine SC 578

*Corn Products Refining Co. Vs. Shangrila Food Products Ltd.*² and judgment of this Court in the case of *Jagdish Gopal Kamath and Ors. Vs. Lime & Chilli Hospitality Services*.³

12. The learned Counsel for the Plaintiff further submitted that the Defendant was not justified in contending that interim reliefs ought not to be granted, for the reason that the Plaintiff was aware about the existence of the impugned mark and/or that the Defendant had been using the same for a long period of time. It was submitted that when the Defendant was aware about the registered trademark of the Plaintiff “ALEX” and the opposition proceedings had been initiated on its behalf immediately upon the Defendant seeking registration of the impugned trademark “AFEX”, continued use of the impugned trademark on the part of the Defendant was at its own peril and it could certainly not accrue to the benefit of the Defendant. The learned Counsel for the Plaintiff relied upon judgment in the case of *Schering Corporation & Ors. Vs. Kilitch Co. (Pharma) Pvt. Ltd.*⁴

13. The learned Counsel for the Plaintiff further submitted that the defense of acquiescence could not be raised by the Defendant in the present case, for the reason that such a defense was not raised in the pleadings at all. In the absence of pleadings in that regard, the

² AIR 1960 SC 142

³ (2015) 62 PTC 23

⁴ 1990 SCC OnLine Bom 425

Defendant could certainly not claim that there was acquiescence on the part of the Plaintiff. In any case, the Plaintiff, having initiated opposition proceedings against the impugned trademark “AFEX”, leading to rejection of the application for registration filed by the Defendant, clearly demonstrated that the defense of acquiescence is not available to the Defendant. The learned Counsel for the Plaintiff relied upon the order of this Court in the case of *Pidilite Industries Ltd. Vs. Riya Chemy* (order dated 11th November, 2022, in Interim Application (L) No. 15502 of 2021 in Commercial IP Suit No. 147 of 2022).

14. As regards, alleged delay in initiating proceedings on the part of the Plaintiff, it was submitted that mere delay could not be a ground for refusing interim reliefs to the Plaintiff, particularly when it admittedly has registrations for its “ALEX” formative marks and it has demonstrated a strong *prima facie* case regarding deceptive similarity between the rival marks. In this regard, learned Counsel for the Plaintiff relied upon judgment of the Supreme Court in the case of *Midas Hygiene Industries P. Ltd. & Ors. Vs. Sudhir Bhatia & Ors.*⁵ and judgment of this Court in the case of *Cadila Pharmaceutical Limited Vs. Sami Khatib.*⁶

15. The learned Counsel for the Plaintiff emphasized that a

⁵ (2004) 3 SCC 90

⁶ (2011) 47 PTC 69

bare comparison of the two marks i.e. the registered trademark of the Plaintiff “ALEX” and the impugned trademark of the Defendant “AFEX” would show that, the Defendant had merely replaced the alphabet “L” with alphabet “F” and that phonetically as well as structurally the impugned trademark of the Defendant was deceptively similar to the registered trademark of the Plaintiff. It was submitted that the central, essential and fundamental features of the registered trademark of the Plaintiff were slavishly copied by the Defendant, thereby demonstrating that a strong case was made out for grant of interim reliefs. In this regard, the learned Counsel for the Plaintiff relied upon judgments of this Court in the case of *Medley Laboratories (P) Ltd. & Ors. Vs. Alkem Laboratories Ltd.*⁷ and *Glenmark Pharmaceutical Ltd. Vs. Signova Pharma (P) Ltd. & Anr.* (order dated 07th March, 2016, passed in Notice of Motion (L) No. 70 of 2016 in Suit No. 189 of 2016).

16. It was further submitted by the learned Counsel for the Plaintiff that the Defendant has given certain reasons for adoption of the impugned mark, which are nothing but an afterthought and that the attempt to claim honest and concurrent use could not be a defense in an infringement action. The learned Counsel for the Plaintiff submitted that if the Defendant is not restrained immediately, the Plaintiff would suffer grave and irreparable loss, thereby indicating

⁷ 2002 (3) MhLJ 546

that the balance of convenience is in favour of the Plaintiff. It was submitted that this Court ought to allow the Leave Petition for granting reliefs in respect of cause of action of passing off also.

17. On the other hand, Mr. Hiren Trivedi, learned Counsel appearing for the Defendant submitted that in the facts of the present case, the Defendant had failed to make out a case for grant of interim reliefs. It was submitted that deceptive similarity between the two marks claimed on behalf of the Plaintiff was not borne out by the material on record. It was submitted that the Defendant and its predecessor had shown sufficient material to indicate the origin of the word “AFEX” used as a trademark. The case regarding phonetic and structural similarity was denied on behalf of the Defendant. The learned Counsel for the Defendant placed reliance on the judgment of the Gujarat High Court in the case of *Torrent Laboratories Ltd. Vs. Ciba Geigy Limited* (judgment and order dated 08th December, 1998, passed in Original Jurisdiction Case No. 11 of 1993).

18. The learned Counsel for the Defendant submitted that in the present case, delay on the part of the Plaintiff in initiating proceedings was palpable and therefore, the prayer for interim reliefs ought not to be entertained. It was submitted that even as per the Plaintiff, opposition proceedings in respect of the registration of the trademark “AFEX” were initiated years ago on the part of the

Plaintiff, thereby showing that it had knowledge about the open use of the trademark “AFEX” by the Defendant. Despite having knowledge about the use of the trademark “AFEX” for such a long period of time, the Plaintiff chose to file the present suit and the application for interim reliefs after long delay, thereby indicating that the Plaintiff had given up its right to claim interim reliefs. Reliance was placed on the judgment of the Supreme Court in the case of *Khoday India Ltd. Vs. Scotch Whisky Association & Ors.*⁸ in support of the said proposition.

19. The learned Counsel for the Defendant then relied upon judgment of the Supreme Court in the case of *M/s Power Control Appliances & Ors. Vs. M/s Sumeet Machines Pvt. Ltd.* (judgment and order dated 08th February, 1994, passed in Civil Appeal Nos. 2551 & 2552 of 1993), to claim that the Plaintiff had acquiesced to the use of the trademark “AFEX” by the Defendant, as the Plaintiff failed to raise any objection regarding the same. The principle of acquiescence could certainly be raised by the Defendant against the Plaintiff, in the facts and circumstances of the present case, while opposing interim reliefs.

20. The learned Counsel for the Defendant also relied upon judgment of this Court in the case of *Charak Pharmaceutical (India)*

⁸ AIR 2008 SC 2737

*Limited & Anr. Vs. Glenmark Pharmaceutical Limited*⁹, to contend that delay in initiating proceedings completely took away the force of the submissions made on behalf of the Plaintiff for grant of interim reliefs. Apart from this, the learned Counsel for the Defendant relied upon contents of the written statement and documents filed therewith to show that the trademark “AFEX” was in use for a long period of time and that it was openly used by the Defendant, due to which considerable goodwill was earned in favour of the Defendant. It was submitted that sales figures pertaining to the product bearing trademark “AFEX” demonstrated its growth over the years and therefore, the Plaintiff ought not to be granted interim reliefs in such a belated action initiated on its part. On this basis it was submitted that the present application deserved to be dismissed.

21. Having heard the learned Counsel for the rival parties, in the backdrop of the material placed on record, this Court is of the opinion that the principal objections to grant of interim reliefs raised on behalf of the Defendant pertains to delay on the part of the Plaintiff in approaching this Court in the present proceedings, alleged acquiescence on the part of the Plaintiff and the registered trademark “ALEX” being “common to trade”. The Defendant also claims that there is no phonetic or structural similarity between the rival marks.

⁹ 2007 (35) PTC 708 (Bom.)

22. This Court has perused the judgments upon which the learned Counsel for the rival parties have placed reliance. There is no serious dispute about the proposition that when the Court is considering such contentions in the context of medicinal and pharmaceutical products, a stricter approach is warranted, as an element of public interest is involved. This is because consumers/patients may be exposed to products deficient in quality or spurious products if they get confused between the rival marks. Therefore, it would be necessary to consider rival submissions in the backdrop of such an approach, commended in the context of medicinal and pharmaceutical products, particularly when the products of the rival parties do pertain to medicines and pharmaceutical products.

23. There is sufficient material placed on record on behalf of the Plaintiff to show that registrations for the word mark "ALEX" and all formative marks of the Plaintiff containing word "ALEX" as its leading, essential and prominent feature, have existed from the year 2001 onwards. There is sufficient material placed on record to show that the Plaintiff has initiated legal proceedings, including opposition proceedings whenever deceptively similar or identical marks were sought to be registered by various entities. The registration of the trademarks in favour of the Plaintiff certainly grant proprietary

rights in its favour, particularly when there is sufficient material to indicate at this stage that the Plaintiff has been using the said marks for various medicinal and pharmaceutical preparations. The rights available to entities holding registered trademarks, under Section 28 of the Trade Marks Act, 1999, can certainly be asserted on the part of the Plaintiff, in the facts and circumstances of the present case. There is also sufficient material placed on record to show the considerable goodwill generated in favour of the Plaintiff in respect of the said registered trademarks, of which “ALEX” is the most essential, central and fundamental feature. The sales turnover figures and the amount spent towards advertising and promotion, clearly indicate the amount of goodwill existing in favour of the Plaintiff. This Court is convinced that there is enough material to show that the said registered trademarks of the Plaintiff have been in the public domain for a considerable period of time.

24. The Defendant had applied for using the impugned mark “AFEX” on 09th November, 2000, in the very same class i.e. Class-5, for medicinal and pharmaceutical preparations. It is undisputed that the Plaintiff initiated opposition proceedings before the Registrar of Trade Marks. The proceedings before the Registrar of Trade Marks continued for considerable period of time and eventually the application for registration submitted on behalf of the Defendant was

rejected on the basis of opposition proceedings initiated by the Plaintiff. The order was passed on 20th March, 2019, wherein the Registrar of Trade Marks specifically rejected the explanation sought to be given on the part of the Defendant for origin of the impugned mark “AFEX” and the reason why the Defendant had adopted the same. In fact, the Registrar of Trade Marks found that the explanation given on behalf of the Defendant was fanciful and far-fetched. It is an admitted position that the Defendant did not challenge the said order dated 20th March, 2019, passed by the Registrar of Trade Marks.

25. In the plaint, the Plaintiff has stated as to the manner in which it found use of the impugned mark “AFEX” on the part of the Defendant, despite the aforesaid order passed by the Registrar of Trade Marks, refusing registration to the impugned mark “AFEX”. The Plaintiff had caused a cease and desist notice to be issued to the Defendant in that regard, to which the Defendant did not respond. It is in this backdrop that the Plaintiff filed the present Suit and the Application for interim reliefs. The question is, as to whether in the face of such facts, the Defendant can claim that interim reliefs ought not to be granted to the Plaintiff for alleged delay in approaching this Court. The answer has to be in the negative. This is because delay in approaching the Court for grant of reliefs has to be examined and

considered in the facts and circumstances of each individual case. In any case, when the Court is considering the question of grant of interim reliefs for the cause of action of infringement, delay can hardly be a defense. It is laid down by the Supreme Court in the case of *Midas Hygiene Industries P. Ltd. & Ors. Vs. Sudhir Bhatia & Ors.* (supra) that normally injunction must follow if a strong *prima facie* case is made out and adoption of the impugned mark itself appears to be dishonest. Applying the said position of law, this Court is convinced that the prayer for grant of interim reliefs cannot be rejected, merely because the Defendant claims that the Plaintiff delayed in approaching this Court. The judgment of this Court in the case of *Cadila Pharmaceutical Limited Vs. Sami Khatib.* (supra) further supports the case of the plaintiff and this Court is convinced that the prayer for grant of interim reliefs cannot be rejected merely because the Defendant claims that the Plaintiff delayed in approaching this Court. The judgment of this Court in the case of *Charak Pharmaceutical (India) Limited & Anr. Vs. Glenmark Pharmaceutical Limited* (supra), on which the Defendant has placed reliance can be of no assistance, for the reason that in the present case the continued use of the impugned mark “AFEX” on the part of the Defendant, *prima facie*, appears to be dishonest.

26. As regards the aspect of acquiescence, suffice it to say that

there are no pleadings in that regard placed before this Court. The Defendant has not stated in the written statement or the reply affidavit to the application anything regarding acquiescence. Therefore, reliance placed on judgment of the Supreme Court in the case of *M/s Power Control Appliances & Ors. Vs. M/s Sumeet Machines Pvt. Ltd.*(supra) can be of no assistance to the Defendant. There is substance in the contention raised on behalf of the Plaintiff, by placing reliance on order of this Court in the case of *Pidilite Industries Ltd. Vs. Riya Chemy*(supra), that in the absence of pleadings regarding acquiescence, mere oral arguments in that regard cannot suffice.

27. Even otherwise, this Court has perused the material on record to reach *prima facie* conclusions at the interlocutory stage and it is found that the moment the Plaintiff became aware about the impugned mark, in respect of which the Defendant had applied for registration, the Plaintiff took immediate steps by initiating opposition proceedings and by the aforementioned order, the Registrar of Trade Marks refused registration to the impugned mark of the Defendant. In such a situation, the defense of acquiescence to oppose grant of interim reliefs cannot be taken into consideration.

28. The Defendant has specifically contended that the word “ALEX” is “common to trade” and that therefore, the Plaintiff cannot

claim any interim reliefs. This Court is of the opinion that casually pleading and contending about “common to trade” is not sufficient and that to successfully raise such a defense to thwart interim reliefs, the Defendant has to show the extensive use of such a wordmark to qualify as being “common to trade”. A perusal of the pleadings on record would show that other than merely repeating that the word “ALEX” is common to trade, the Defendant has failed to place on record satisfactory material to accept the said contention. In this regard, the Plaintiff is justified in relying upon judgment of the Supreme Court in the case of *Corn Products Refining Co. Vs. Shangrila Food Products Ltd.* (supra) and judgment of this Court in the case of *Jagdish Gopal Kamath and Ors. Vs. Lime & Chilli Hospitality Services* (supra).

29. As noted hereinabove, this Court finds use of the impugned mark by the Defendant, *prima facie*, to be dishonest, for the reason that the explanation now sought to be given for adopting the said mark appears to be an afterthought. Even otherwise, as noted above, the Registrar of Trade Marks specifically held that the explanation given on behalf of the Defendant was fanciful and far-fetched. The order of the Registrar of Trade Marks was never challenged by the Defendant. Merely by stating that now the Defendant intends to challenge the order or that it intends to file

rectification proceedings against the Plaintiff, cannot take the case of the defendant any further for opposing interim reliefs claimed on behalf of the Plaintiff.

30. According to the Defendant, since there is material to show continuous use of the impugned mark, on this ground alone interim reliefs ought to be rejected. The said contention cannot be accepted, for the reason that the Plaintiff did initiate opposition proceedings against the Defendant. In any case, if the Defendant chose to use the impugned mark despite notice and knowledge of the registered trademarks of the Plaintiff, the Defendant did so at its own peril. In this regard, the Plaintiff is justified in placing reliance on judgment in the case of *Schering Corporation & Ors. Vs. Kilitch Co. (Pharma) Pvt. Ltd.* (supra).

31. In this backdrop, the most crucial aspect of the matter needs to be examined i.e. the allegation of deceptive similarity raised on behalf of the Plaintiff and also the assertion that the Defendant has indulged in the tort of passing off, as the trademark of the Plaintiff has been in use for considerable period of time and it has been slavishly copied by the Defendant. At this stage, it would be relevant to consider the Leave Petition filed on behalf of the Plaintiff under Clause XIV of the Letters Patent, for combining the action of passing off with that of infringement. The Defendant has opposed the Leave

Petition. But, this Court is inclined to grant the same, for the reason that this Court in the case of *Jagdish Gopal Kamath and Ors. Vs. Lime & Chilli Hospitality Services* (supra) has considered objections to the Leave Petition and found that in the interest of justice, such Leave Petitions ought to be allowed, particularly to avoid multiplicity of proceedings. Hence, the Leave Petition is allowed and consequently the interim relief prayed in the context of action of passing off is also taken up for consideration.

32. A comparison of the rival marks would show that the Defendant has simply replaced the alphabet “L” with the alphabet “F”. Otherwise, all the essential, fundamental and central features of the registered trademarks of the Plaintiff have been copied by the Defendant. This Court finds phonetic and structural similarity and therefore, the Plaintiff has been able to make out a strong *prima facie* case to contend that the impugned mark “AFEX” of the Defendant is deceptively similar to the registered trademark “ALEX” of the Plaintiff.

33. In this regard, it would be appropriate to refer to the law laid down by the Supreme Court, as to the manner in which the rival marks should be compared. In the case of *F. Hoffmann – La Roche & Co. Ltd. Vs. Geoffrey Manners & Co. Pvt. Ltd.*¹⁰, the Supreme Court

¹⁰ AIR 1970 SC 2062

laid down as follows:

“The mark must be compared as 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 marks is such that it is likely to cause deception or confusion or mistake in the minds of persons accustomed to the existing trade mark.”

34. The Supreme Court cited with approval the test formulated by Lord Parker in the case of *Pianotist Co. Ltd.*¹¹. The test laid down in the said case reads as follows:

“You must take the two words. You must judge of them, both by their look and 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 owner of the marks. By considering all those circumstances, you come to the conclusion that there will be 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

11 (1906) 23 RPC 774

confusion in the mind of the public which will lead to confusion in the goods then you may refuse the registration, or rather you may refuse the registration in that case.”

35. Applying the said test to the facts of the present case, this Court is satisfied that the Plaintiff has indeed made out a strong case for grant of interim reliefs in its favour. Reliance placed on judgment of the Gujarat High Court in the case of *Torrent Laboratories Ltd. Vs. Ciba Geigy Limited* (supra) on the part of the Defendant can be of no assistance, because the said case was obviously decided on its own facts. The rival labels were “ULCIBAN” and “CIBA”. On the facts of the said case, the Gujarat High Court found that even comparing the rival marks and the prominent features thereof, no case was made out by the holder of the proprietary rights in the registered trademark “CIBA”. The facts in the present case are distinguishable, as noted hereinabove.

36. Thus, this Court finds that unless interim reliefs as prayed by the Plaintiff are granted, the Applicant/Plaintiff will continue to suffer grave and irreparable loss, thereby indicating that the balance of convenience is also in favour of the Plaintiff. The proprietary rights available to the Plaintiff under the provisions of the aforesaid Act cannot be allowed to be diluted at the hands of the Defendant, particularly when at this *prima facie* stage, it is found that the

adoption of the impugned mark on the part of the Defendant is dishonest.

37. In view of the above, the application is allowed in terms of prayer clauses (a) and (b), which read as follows:

“(a) That pending the hearing and final disposal of the Suit, the Respondent by itself, its Directors, employees, servants, agents, associates, distributors, franchisees, sister concerns, subsidiaries, representatives, affiliates and/or assigns and all persons acting for and on its behalf be restrained by a temporary order and injunction of this Hon’ble Court from using in relation to any medicinal and pharmaceutical preparations and/or such allied and cogent products, the impugned trade mark “AFEX” and/or any other trade mark containing the word “AFEX” or using in combination with or without any mark/word/device and/or from using any other mark, device, logo, domain name or trade name, word identical with and/or deceptively similar to the Applicant’s trade mark “ALEX” so as to infringe the Applicant’s trademarks “ALEX” and formative trademarks containing the word “ALEX” registered under Nos. 492751, 1050857, 1050858, 1050859, 1050860, 1053869, 1053870, 2587302, 4698417, 4845860, 4961559, 4961560, 4961561 and 5036658 all falling in Class -5 by such use and/or in any other manner howsoever;

(b) That pending the hearing and final disposal of the

Suit, the Respondent by itself, its Directors, employees, servants, agents, associates, distributors, franchisees, sister concerns, subsidiaries, representatives, affiliates and/or assigns and all persons acting for and on its behalf be restrained by a temporary order and injunction of this Hon'ble Court from using in relation to any medicinal and/or pharmaceutical preparations and/or such allied and cogent products, the impugned trade mark "AFEX" and/or any other trade mark containing the word "AFEX" or using in combination with or without any mark/word/device and/or from using any other mark, device, logo, domain name or trade name, word identical with and/or deceptively similar to the Applicant's trade mark "ALEX" so as to pass off its impugned products bearing the trade mark "AFEX" as and for the Applicant's products sold under the trade mark "ALEX" of in any other manner whatsoever;"

(MANISH PITALE, J.)