



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

% *Date of decision: 30th May, 2023*

+ **CS(COMM) 59/2016 & I.A. 11370/2022 (for exemption)**

GILEAD SCIENCES IRELAND UC Plaintiff
Through: Ms.Vaishali Mittal and Mr.Siddhant Chamola, Advocates.

versus

GOPAL AGRAWAL & ORS Defendants
Through: None.

CORAM:

HON'BLE MR. JUSTICE AMIT BANSAL

AMIT BANSAL, J. (Oral)

CS(COMM) 59/2016 & I.A. 11369/2022 (CH-15A R-1 of the CPC)

1. The present suit has been filed seeking relief of permanent injunction restraining the defendants from infringing the trademark of the plaintiff, passing off their goods as that of the plaintiff and other ancillary reliefs.

PLEADINGS IN THE PLAINT

2. The case set up by the plaintiff in the plaint is as follows:
- 2.1 The plaintiff, Gilead Sciences Ireland Uc, is a part of the Gilead group of companies. The plaintiff carries on business in India through its subsidiary, GSI Pharma Private Limited.
- 2.2 Gilead is one of the world's leading research-based bio-pharmaceutical companies and is engaged in developing and commercialising therapeutics

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for treatment of life threatening diseases such as HIV, Hepatitis B and Hepatitis C among others. The plaintiff is the market leader for providing therapeutics for the treatment of HIV/AIDS, liver diseases, cardiovascular diseases, respiratory diseases, cancer and inflammation.

- 2.3 Over the years, the plaintiff has expanded its operations to various countries including United States of America, United Kingdom, Canada, Brazil among others. Approximately 8 million HIV+ patients in various countries including India now receive a treatment regimen containing the plaintiff's therapies for HIV/AIDS.
- 2.4 The plaintiff adopted the mark 'HARVONI' in the year 2013 in respect of its pharmaceutical preparation for the treatment of Hepatitis C. The word 'HARVONI' is an invented term. It neither has a dictionary meaning, nor is it derived from the International Non-proprietary Name of any pharmaceutical product assigned by World Health Organization (WHO). The active ingredients used in the drug bearing the mark 'HARVONI' are sofosbuvir and ledipasvir, which too have no similarity with the mark 'HARVONI'. The plaintiff also obtained registration of the said mark on 24th October, 2014 in India under number 2617327 in class 5.
- 2.5 The plaintiff has entered into licensing agreements with 11 generic drug manufacturers in India to manufacture Hepatitis C drug bearing the mark 'HARVONI', for supply to 101 countries including India. The global sales figures of the plaintiff in respect of its drug bearing the mark 'HARVONI' crossed US\$ 12 billion since its launch in 2014.
- 2.6 The defendant no.2 is engaged in the business of manufacturing

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pharmaceutical products including APIs and other intermediaries. The defendant no.3 is the sister concern of the defendant no.2. The defendant no.1 is the director of the defendant no.2 and is managing the affairs of the defendant no.3 as well. The defendant no.2 is manufacturing pharmaceutical products, which are then marketed by the defendant no.3.

- 2.7 In October, 2016, the plaintiff discovered the website of the defendant no.3, www.bombaypharmaceuticals.com advertising pharmaceutical products bearing the mark 'HARVOBAY' (hereinafter 'impugned product'), which is deceptively similar to plaintiff's registered mark 'HARVONI'. The impugned product is the formulation of a combination of sofosbuvir and ledipasvir, which is identical to the product being sold by the plaintiff under the mark 'HARVONI'. The said website also quotes prices and invites buyers to place orders for the same.
- 2.8 The defendant no.3 is selling the impugned product without obtaining the necessary approvals/licenses/permissions from the Drug Controller General of India (DCGI). The product 'HARVOBAY' also appears to have been listed on online trade portals such as Alibaba and Indiamart. Even though, it has been stated on behalf of the defendants that the impugned product is only being exported outside India, the plaintiff apprehends that the said product will become available in the Indian markets as well.
- 2.9 The prefix 'HARVO' is identical in the marks of the plaintiff and the defendants and the defendants have merely added a suffix 'BAY' to the mark 'HARVONI' of the plaintiff. Impugned products being sold under a similar mark by the defendants may lead to confusion in the market.
- 2.10 The investigation conducted by the plaintiff revealed that (i) common phone numbers are mentioned on the websites of the defendants no.2 and 3; (ii) The facebook page of the defendant no.3 shows the address of the

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defendant no.2 as its place of business and the phone number and the email id listed there also belonged to the defendant no.2 and; (iii) The WHOIS details of the domain name of the defendant no.3 revealed that the website of the defendants no.2 and 3 were developed by the same entity. Reference is made to the affidavit of the investigator filed at page no.60 of the documents filed along with the plaint.

- 2.11 The mark 'HARVONI' was coined by the plaintiff and use of the registered mark of the plaintiff by the defendants in respect of their goods in identical classes amounts to infringement of the plaintiff's mark 'HARVONI' and passing off the goods of the defendants as that of the plaintiff.

PROCEEDINGS IN THE SUIT

3. The summons in the suit and notice in the interim application were issued on 28th January, 2016. On 5th February, 2016, the defendants no.1 and 2 gave an undertaking that the mark 'HARVOBAY' had never been used by them and the defendant no.3 was directed to maintain status quo with respect to the marketing of the drugs in question under the mark 'HARVOBAY'. The written statement was filed on behalf of the defendants no.1 and 2 on 16th September, 2016.

4. Interim order was made absolute qua defendant no.3 on 1st December, 2016 and the suit was decreed against the defendants no.1 and 2 on the said date. However, the suit was directed to continue against the said defendants qua reliefs of damages and other reliefs sought in the suit. Issues in the suit were framed on 25th May, 2017. The plaintiff's evidence concluded on 28th February, 2019. The cross-examination of the defendant no. 2 commenced on 19th February, 2020, but has not proceeded thereafter. On 3rd February, 2022, the defendant no. 3 was proceeded against *ex parte* as he has failed to

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enter appearance in the present matter, despite due service.

5. Subsequently, the present application was filed on behalf of the plaintiff seeking pronouncement of judgment and decreeing the suit in favour of the plaintiff and against the defendant no.3 and costs and damages against all the defendants. Notice in the present application was issued on 22nd July, 2022.

6. On 10th March, 2023, the counsel appearing on behalf of the defendants no.1 and 2 had submitted that he would be filing an application for discharge as he has not been receiving instructions from the said defendants. Once again on 11th April, 2023, counsel appeared on behalf of the defendants no.1 and 2 and sought time to file discharge application. However, on the next date of hearing, i.e., 9th May, 2023, none appeared for the defendants no.1 and 2. Today also, none appears for the defendants no.1 and 2, neither any discharge application has been filed. Notice could not be served on the defendants no.1 and 2 as they were not available at the address given in the memo of parties.

ANALYSIS AND FINDINGS

7. I have heard the counsel for the plaintiff and perused the record of the case.

8. In the present case, the defendant no.3 has failed to appear before this Court despite service. Since the defendant no.3 has failed to enter appearance or even take any requisite steps to contest the present suit, despite having suffered an ad interim injunction order, it is evident that the defendant no.3 has no defence to put forth on merits.

9. From the documents placed on record, the plaintiff has been able to

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prove that they are the registered proprietors of the mark 'HARVONI' and the plaintiff has also been able to show their goodwill and reputation in respect of the mark 'HARVONI'.

10. A perusal of the material placed on record makes it abundantly clear that the defendant no.3 is selling pharmaceutical products bearing the mark 'HARVOBAY' and advertising the same through their own website. The website of the defendant no.3 also quotes prices of its products and invites orders for the same from interested persons, thereby ensuring their widespread commercial presence. Further, Section 29(6) of the Act clarifies that 'use' is not restricted to manufacture of goods, but also includes use of such mark in advertisements. Therefore, such acts of the defendant no.3 amount to infringement of the mark 'HARVONI' of the plaintiff and passing off the goods of the defendant no.3 as that of the plaintiff.

11. From a perusal of the material on record, this Court is of the view that the defendant no.3 has been using mark 'HARVOBAY' with a view to trade upon the established goodwill and reputation of the plaintiff. By its aforesaid conduct, the defendant no.3 is infringing the mark 'HARVONI' of the plaintiff, as also passing off its goods and services as that of the plaintiff.

12. I am of the opinion that no purpose would be served by directing the plaintiff to lead evidence by filing examination-in-chief by way of affidavit. The defendant no.3 has no reasonable prospect of succeeding in the present suit. Therefore, in my opinion, this is a fit case where a Summary Judgment in terms of Order XIII-A of the CPC, as applicable to commercial disputes of a specified value, read with Rule 27 of the IPD Rules, deserves to be passed in favour of the plaintiff and against the defendant no.3.

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13. A decree of permanent injunction has already been passed against the defendants no.1 and 2 in terms of paragraph 42(a) and (b) of the plaint on 1st December, 2016.

14. Based on the averments made in the plaint and the discussion above, this Court is of the view that this is a fit case for granting relief of permanent injunction in favour of the plaintiff and against the defendant no.3.

15. Accordingly, the present application is allowed.

RELIEF

16. In view of the above, a decree of permanent injunction is passed against the defendant no.3 in terms of prayer clause 42 (a) and (b) of the plaint.

17. Insofar as the relief of costs as sought in the prayer clause 42(f) of the plaint is concerned, it is clear that the defendants have blatantly infringed the registered mark of the plaintiff. The defendant no.3 is the seller of the impugned products bearing the mark 'HARVOBAY' and has also advertised and offered impugned products for sale on its website and on various third party websites.

18. The defendant no.2 is the manufacturer of the impugned products bearing the mark 'HARVOBAY'. The defendant no.1 is the director of the defendant no.2 and is managing the affairs of the defendant no.3 as well. The defendants no.1 and 2 had earlier contested the plaintiff's claims for costs and damages in the present suit. However, the said defendants have now stopped appearing before this Court, neither any instructions have been given by the said defendants to the counsel appearing on their behalf in the present suit. The said defendants had cross-examined witness of the plaintiff once

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on 19th February, 2020. Thereafter, the said defendants were also not agreeable to resolve the issue as regards costs and damages in the mediation proceedings in February, 2022. Moreover, the defendants no.1 and 2's stand that they have no association with the defendant no.3 is highly suspicious, as the Facebook page of the defendant no.3 provides defendants no.2's address as the address of the defendant no.3 and also mentions the phone number of the defendant no.2 as the phone number of the defendant no.3. Though the defendants no.1 and 2 claim that the defendant no.3 has misused details of the said defendants, no action has been taken by the defendants no.1 and 2 to report the misuse of the same.

19. Clearly, the customers are being misled by the defendants and the entire effort is deliberate and dishonest. This amounts to dilution of the reputation and goodwill of the plaintiff's mark and causing loss to the plaintiff in business and reputation. The members of the public are bound to confuse products manufactured and sold by the defendants under the mark HARVOBAY as emanating from the plaintiff. The defendants have been making unlawful gains at the expense of the plaintiff. I am convinced that this is not a case of innocent adoption by the defendants. The Court cannot ignore such flagrant misuse of the plaintiff's mark by the defendants. Therefore, the suit is decreed in favour of the plaintiff for Rs.5,00,000/- towards costs to be paid by the defendants jointly and severally. The aforesaid costs be paid within four weeks.

20. Accordingly, the suit is decreed in terms of prayer clause 42 (f) of the plaint.

21. In view of the above, the counsel for the plaintiff does not press for

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the remaining reliefs against the defendants.

22. Decree sheet be drawn up.

23. All pending applications stand disposed of.

AMIT BANSAL, J.

MAY 30, 2023

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