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

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Date of Decision : 1st May, 2023

+ CS(COMM) 542/2022 & I.A. 12547/2022 (O-XXXIX R-1 & 2 of CPC), I.A. 12548/2022 (O-XXVI R-9 of CPC)

SUN PHARMA LABORATORIES LTD

..... Plaintiff

Through: Mr. Sachin Gupta and Ms. Yashi Agrawal, Advocates.

versus

CIAN HEALTHCARE LTD

..... Defendant

Through: None.

CORAM:

HON'BLE MR. JUSTICE AMIT BANSAL

AMIT BANSAL, J. (Oral)

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

FACTUAL MATRIX

2. The case set up in the plaint is as under:

2.1. The plaintiff company is a wholly owned subsidiary of Sun Pharma Industries Ltd. and is engaged in the business of marketing drugs and pharmaceutical combinations in over 150 countries with 45 manufacturing

sites in various countries.

2.2. The plaintiff is the registered proprietor of the trademark “Maxgalin” bearing No. 1402291 since 29th November, 2005 and various other marks, details of which are provided in paragraph 9 of the plaint.

2.3. The “Maxgalin” mark is used by the plaintiff for its medicine used to relieve neuropathic pain. The said drug is sold in the form of tablets and is a Schedule H drug.

2.4. The trademark “Maxgalin” has also acquired goodwill and reputation due to its extensive and continuous use since 2005 and has therefore attained the status of a well-known trademark within the meaning of Section 2(1)(zg) of the Trade Marks Act, 1999.

2.5. The sales turnover of the plaintiff from the year 2012–2013 to the year 2020–2021, for the pharmaceutical preparation sold under the mark “Maxgalin,” is Rs.383,28,66,000/-. In the year 2020–2021 alone, the sales turnover of the plaintiff in relation to the aforesaid mark was Rs.52,32,23,000/-.

2.6. The defendant is a registered company operating out of Pune and engaged in the business of selling medicines.

2.7. In June, 2022, the plaintiff came across the defendant selling a drug under the impugned mark “MGalin” on various platforms, being “https://www.medplusmart.com/product/mgalin-nt-tab_mgal0001,” “<https://www.1mg.com/drugs/mgalin-750mcg-75mg-capsule-394027>” and “<https://pharmeasy.in/online-medicine-order/mgalin-75mg-cap-6102>”.

2.8. Accordingly, the plaintiff has filed the present suit.

PROCEEDINGS IN THE SUIT

3. Summons in the were issued on 18th August, 2022. Subsequently, affidavit of service dated 2nd September, 2022 was filed on behalf of the plaintiff, wherein it was stated that summons along with the suit papers were dispatched to the defendant through courier. The postal vouchers along with the tracking report have been placed on record. Defendant was additionally served through e-mail dated 31st August, 2022.

4. However, despite service, none appeared on behalf of the defendant on 28th September, 2022. Consequently, the defendant was proceeded against *ex parte* and an interim injunction was passed by the Court, restraining the defendant from, *inter alia*, dealing with pharmaceutical preparations under the impugned mark “McGalin” or any other mark either identical or deceptively similar to the registered trademark of the plaintiff.

5. Written submissions have been filed on behalf of the plaintiff in the suit.

SUBMISSIONS ON BEHALF OF THE PLAINTIFF

6. The following submissions have been made on behalf of the plaintiff:

6.1. The impugned mark “MGalin” is deceptively similar to the mark of the plaintiff, “Maxgalin”.

6.2. In the cancellation petition, being C.O. (COMM. IPD-TM) 723/2022, the plaintiff has made out a case for removal of the registration granted in favour of the defendant for the mark “MGalin” and therefore, a decree of permanent injunction should follow in the present suit.

6.3. The plaintiff is the prior user of the mark “Maxgalin”. The defendant has failed to provide any evidence to support the claim that the defendant has been using the impugned mark “MGalin” bearing Registration No. 3956223 since 2003.

6.4. The defendant has obtained registration of the impugned mark on the basis of a false statement in their trademark application regarding their user of the mark since 7th January, 2003. The said date is the date of incorporation of the defendant and not the date of user of the mark in question.

6.5. By adopting the mark “MGalin,” defendant is taking unfair advantage of the goodwill and reputation of the plaintiff’s trademark, which has attained the status of a well-known trademark within the meaning of Section 2(1)(zg) of the Trade Marks Act, 1999.

ANALYSIS AND FINDINGS

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

8. At the outset, it may be relevant to note that the defendant failed to enter appearance in the suit despite service. Affidavit of service on behalf the plaintiff has been filed in this regard. On 14th September, 2022, the plaintiff was also directed to serve a copy of the order passed by the Court on the defendant. In addition to successfully serving a copy of the order dated 14th September, 2022 on the defendant through e-mail, the plaintiff also dispatched the order through courier and speed post, which were returned with the note “refused”. Further, no steps have been taken by the

defendant to contest the suit, despite having suffered an ad interim injunction order. Therefore, it is clear that the defendant has no case to put forth on merits.

9. In terms of Rule 4 of Chapter VII of the Delhi High Court (Original Side) Rules, 2018, since the defendant has failed to file the affidavit of admission/denial of documents filed by the plaintiff, the documents filed by the plaintiff shall be deemed to be admitted.

10. A comparison of the competing marks would show that mark “MGalin” of the defendant is visually, phonetically and structurally similar to the mark “Maxgalin” of the plaintiff. The defendant has merely deleted the alphabets “AX” from the mark of the plaintiff.

11. The plaintiff has also submitted that even though the composition of the drugs being sold under the competing marks is different, they are used for the treatment of the same type of ailment. In cases of pharmaceutical preparations/products, the threshold for proving confusion in the market is low. Reference in this may be made to paragraph 25 of the judgment in ***Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd.***, 2001 SCC OnLine SC 578, which is set out below:

*“25. 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 plaintiff's 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. ...**”*

12. Even though the defendant claimed user since 2003 in its registration application for the impugned mark, no pleadings or evidence has been put forth on behalf of the defendant to show proof of user since 2003. Further, the registration for the impugned mark was sought only on 26th September 2018. On the other hand, the plaintiff has filed the legal proceedings certificate in respect of the “Maxgalin” mark to show that it is the registered user of the mark in class 5 since 29th November, 2005. Invoices as well as a certificate of the Chartered Accountant of the plaintiff dating back to 2007, showing sale under the “Maxgalin” mark, have also been filed on behalf of the plaintiff.

13. From a perusal of the material on record, it is clear that the defendant has made a dishonest attempt to ride on the goodwill and reputation of the plaintiff. This is further evidenced from the prominent use of the mark “MGalin” on third-party websites “https://www.medplusmart.com/product/mgalin-nt-tab_mgal0001,” “<https://www.1mg.com/drugs/mgalin-750mcg-75mg-capsule-394027>” and “<https://pharmeasy.in/online-medicine-order/mgalin-75mg-cap-6102>” where the defendant is selling the medicine under the impugned mark.

14. Vide a separate judgment passed today, I have allowed the petition, being C.O. (COMM.IPD-TM) 723/2022, filed on behalf of the plaintiff herein and ordered cancellation of the registration of the impugned mark granted in favour of the defendant.

15. By adopting the mark “MGalin,” the defendant is violating the statutory as well as common law rights of the plaintiff. There is a likelihood of confusion in the market on account of deceptive similarity of the

trademark of the defendant with that of the plaintiff.

16. Accordingly, a decree of permanent injunction is passed in favour of the plaintiff and against the defendant in terms of prayer clauses 29(a) and 29(b).

17. At this stage, counsel for the plaintiff does not press for the reliefs contemplated in prayer clause 29(c) and 29(d).

18. The defendant is additionally burdened with costs of Rs.3,00,000/- to be paid to the plaintiff.

19. Decree sheet be drawn up.

20. All pending applications stand disposed of.

MAY 1, 2023

at

AMIT BANSAL, J.