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

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Date of Decision : 10th May, 2023

+ CS(COMM) 701/2022 & I.A. 16553/2022 (u/S 151 CPC seeking recall of infringing products)

GLAXO GROUP LIMITED

..... Plaintiff

Through: Mr. Urfee Roomi, Ms. Janaki Arun,
Mr. Alvin Antony and Mr. Anubhav
Chhabra, Advocates.

versus

BIOGEN SERUMS PRIVATE LIMITED

..... 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 infringing the trademark of the plaintiff, passing off and other ancillary reliefs.

BRIEF FACTS

2. Briefly the case set up by the plaintiff in the plaint is as under:

2.1. The plaintiff company incorporated under the law of England and Wales is a part of the GSK group of companies. The plaintiff is an international science-led global healthcare company that researches and

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develops a broad range of innovative speciality medicines. The plaintiff's pharmaceutical products are sold and marketed around the world, including India.

2.2. The plaintiff first adopted the "BETNESOL" mark in the early 1960s in relation to medicinal and pharmaceutical preparations, including injections, which are used to treat a wide variety of diseases such as allergies, arthritis and inflammatory disorders. The plaintiff conducts business in India through its Indian subsidiary, Glaxo Smith Kline Pharmaceuticals Limited.

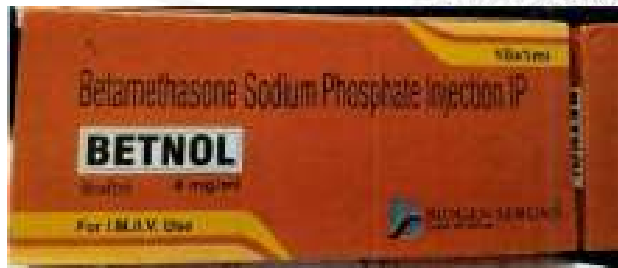
2.3. The plaintiff is the registered proprietor of the mark "BETNESOL" in Class 5 in respect of 'pharmaceutical, veterinary and sanitary substances'. Plaintiff became the subsequent proprietor of the aforesaid trademark owing to an assignment from Glaxo Laboratories Ltd. in 1981. The plaintiff has obtained registrations for the mark "BETNESOL" in India and several other countries.

2.4. The plaintiff has given its annual turnover in respect of sale of medicinal and pharmaceutical preparations, bearing the "BETNESOL" trademark from the years 2011 to 2021. The turnover of the plaintiff in the year 2011 was over Rs.800 crores whereas the turnover in the year 2021 was over Rs.1450 crores. The plaintiff has also provided the marketing expenses incurred by plaintiff in respect of the products bearing the "BETNESOL" trademark.

2.5. A search of the standalone word "BETNESOL" on the Google search engine leads to the plaintiff's products. The plaintiff has successfully

protected its rights in its “BETNESOL” trademark before this Court. Owing to its long and continuous use all over the world the plaintiff has developed a reputation.

2.6. The defendant, Biogen Serums Private Limited is engaged in the manufacturing, marketing and sales of pharmaceutical and medicinal products, bearing the mark “BETNOL” (hereinafter ‘infringing mark’). The active ingredient in the “BETNOL” medicine is Betamethasone Sodium Phosphate. The defendant’s injections are used for the treatment of skin allergies such as itching, swelling, redness etc. The product has been reproduced as under:



2.7. In April, 2022, the plaintiff first learnt of the defendant’s use of the “BETNOL” mark through its products listings on third party websites such as IndiaMart. The plaintiff sent a legal notice dated 28th April, 2022 to the defendant through email, which was replied by the defendant by way of an email dated 9th May, 2022 informing the plaintiff that it has withdrawn the brand “BETNOL” from the market on 1st May, 2022. Since the defendant’s listings on IndiaMart remained active another notice was sent to the defendant on 12th May, 2022, which was replied to on 9th July, 2022.

2.8. In August 2022, it was revealed that the defendant adopted a new packaging for injections bearing the defendant’s “BETNOL” mark in the

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following manner:



2.9. Accordingly, the present suit has been filed.

PROCEEDINGS IN THE SUIT

3. This Court, vide order dated 12th October, 2022 granted an *ex parte* ad interim injunction in favour of the plaintiff under I.A.16550/2022, restraining the defendant from using the trademark “BETNOL”. The relevant portion of the said order is as under:

“27. Having heard learned counsel for the Plaintiff, this Court is of the view that Plaintiff has made out a prima facie case for grant of an ex-parte injunction. Balance of convenience also lies in favour of the Plaintiff and in case an ex-parte injunction is not granted, Plaintiff is likely to suffer irreparable loss.

28. Accordingly, till the next date of hearing, Defendant and all others acting for and on its behalf are restrained from manufacturing, offering for sale, selling, printing, packaging, displaying, advertising, marketing, whether directly or indirectly, injections and other medicinal products, under the Defendant's trademark BETNOL, which is deceptively similar to Plaintiff's trademark BETNESOL.”

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4. The matter was thereafter placed before the Joint Registrar for effecting service and completion of pleadings. As per the office noting the defendant was served through ordinary mode on 26th December, 2022. Even though the defendant was duly served none appeared for the defendant on 19th December, 2022, 8th February, 2023 and 16th March, 2023. Further, no written statement was filed on behalf of the defendant. Consequently, the defendant was proceeded against *ex parte* on 25th April, 2023.

SUBMISSIONS OF THE PLAINTIFF

5. Counsel for the plaintiff places reliance on the judgment of this Court in *Surya Food & Agro Ltd. v. Om Traders*, 2023 SCC OnLine Del 265, to contend that a Court can on its own decide the disputes by a summary judgment without a formal application being moved by any party.

6. In view of the above, the counsel for the plaintiff prays for a judgment in terms of Order VIII Rule 10 of the Code of Civil Procedure (CPC) granting a decree of permanent injunction and costs in the suit.

ANALYSIS AND FINDINGS

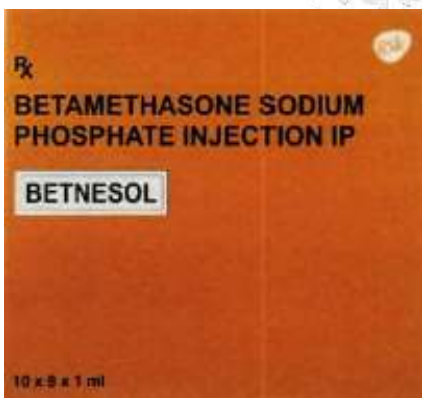
7. I have heard the counsel for the plaintiff and perused the record of the case.

8. At the outset, it may be relevant to note that the defendant has deliberately chosen not to enter appearance. Ample opportunity has been given to the defendant to appear before the Court and defend the case; however, no written statement has been filed by the defendant. The maximum permissible period of 120 days in filing written statement is already over. It is evident that the defendant has no defence 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. From the averments made in the plaint and the documents filed therewith, the plaintiff has been able to prove that it is the registered proprietor of the “BETNESOL” mark in Class 5 and the said registration is valid and subsisting. The plaintiff has also been able to show its goodwill and reputation in respect of the “BETNESOL” mark. Further, the plaintiff has placed on record various orders passed by this Court against the infringers using the mark similar to the plaintiff’s mark. Plaintiff has established statutory as well as common law rights on account of long usage of the “BETNESOL” mark.

11. At this stage, it may be relevant to make a comparison between the mark of the plaintiff and the defendant, which is as under:

Plaintiff’s mark	Defendant’s mark
BETNESOL	BETNOL
	 (Old packaging)



12. From the comparison above, this Court is of the view that the mark of the defendant is deceptively similar to the plaintiff's "BETNESOL" mark. The above comparison shows that both the marks start with the letter combination "BETN" and ends with the letter combination "OL". The defendant has merely removed the letters "E" and "S" in the plaintiff's "BETNESOL" mark in respect of the same products i.e., injections (medicinal and pharmaceutical preparation).

13. Counsel for the plaintiff has placed reliance on *Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd.*, (2001) 5 SCC 73 to contend that a stricter approach should be adopted in judging likelihood of confusion where the goods involved are pharmaceutical and medicinal products because such confusion may have disastrous effects on human health.

14. The defendant has used the infringing mark, which is identical to the plaintiff's mark with intent to springboard its business by drawing association with the plaintiff and its trademark to ride on the goodwill and reputation of the mark of the plaintiff. The aforesaid act of the defendant amounts not only to infringement of the trademark of the plaintiff but also

to passing off the goods of the defendant as that of the plaintiff. Further, the trade channels/target consumers are identical/similar. The defendant has not only taken unfair advantage of the reputation and goodwill of the plaintiff's mark but also deceived unwary consumers of its association with the plaintiff.

15. In view of the observations made above and undisputed factual position, it appears that the defendant does not have any real prospect of successfully defending the claims in the present suit.

16. I am of the opinion that no purpose would be served by directing the plaintiff to lead *ex parte* evidence by filing an affidavit of examination in chief and in terms of Rule 27 of the Delhi High Court Intellectual Property Rights Division Rules, 2022 (in short, 'IPD Rules'), a summary judgment decreeing the suit in favour of the plaintiff deserves to be passed.

RELIEF

17. The various registrations and the long usage of the trademark "BETNESOL" by the plaintiff, as also the goodwill vesting in the "BETNESOL" trademark, entitles the plaintiff for grant of permanent injunction and decree in terms of the plaint.

18. Accordingly, the present suit is decreed in terms of the prayer clauses (a), (b) and (c).

19. Considering the fact that the despite trying to amicably settle the matter, the plaintiff was forced to file the present suit and incur litigation costs including Court fee, costs of Rs.5,00,000/- is imposed on the

defendant. The defendant shall pay the said amount to the plaintiff within eight weeks, failing which the plaintiff is permitted to commence execution proceedings against the defendant.

20. The present case is being decided on an *ex parte* basis and decree is being passed under Order VIII Rule 10 of the CPC upon the failure of the defendant to file written statement. In my view, evidence would have to be led on behalf of the plaintiff to establish its claim of being a ‘well-known trademark in terms of 11(6) of the Trade Marks Act, 1999. Therefore, in the facts and circumstances of the present case, I am not inclined to grant the relief of declaring the trademark of the plaintiff as a “well-known trademark” as sought in prayer clause (f).

21. In view of the above, counsel for the plaintiff does not press for the remaining reliefs sought in the plaint.

22. Let the decree sheet be drawn up.

23. In view of the above, all pending applications stand disposed of.

MAY 10, 2023

at

AMIT BANSAL, J.

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