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C.M.A. No.2466 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.09.2024

CORAM

THE HONOURABLE MR.JUSTICE **M.SUNDAR**
and
THE HONOURABLE MR.JUSTICE **R.SAKTHIVEL**

C.M.A. No.2466 of 2024
and
C.M.P. No.19576 of 2024 in C.M.A. No.2466 of 2024

Linus Laboratories Pvt. Ltd.,
A Company incorporated under the
Companies Act and having their
registered office at
No.31, Viduthalai Nagar, S.Kolathur,
Kovilambakkam Road, Chennai – 17 and is
rep. By its Authorised Signatory and
Manager – Medico Marketing
Ramya Balakrishnan

.. Appellant

Vs

1.Univentis Medicare Ltd.,
a Company incorporated under the Companies Act
having its Office at
No.606, Ratan Galaxy, J.N. Road,
Mulund (W), Mumbai – 400 080.

2.Innova Captabs,
81-B, EPIP, Phase 1, Jharmajri,
Baddi (H.P.) - 173 205.

.. Respondent

Civil Miscellaneous Appeal filed under Section 13 (1) of The
Commercial Courts Act, 2015 r/w Section 96 of the Civil Procedure



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Code against the common order of learned Principal District Judge,
Chengalpattu in I.A.No.3 of 2021 in Commercial O.S. No.468 of
2021 dated 29.09.2023.

For Appellant : Ms.Meha Varshni M.R.
Along with Mr.G.Ramji

JUDGMENT

(Judgment of the Court was delivered by **M.Sundar, J.**)

Captioned 'Civil Miscellaneous Appeal' (hereinafter 'CMA' for the sake of brevity) has been filed in this 'Commercial Appellate Division' (hereinafter 'CAD' for the sake of brevity) on 12.04.2024 assailing an order dated 29.09.2023 made in I.A. No.3 of 2021 in C.O.S. No.468 of 2021 on the file of Principal District Judge, Chengalpattu. This '29.09.2023 order' shall be referred to as 'impugned order' and the 'Principal District Judge, Chengalpattu' shall be referred to as 'said PDJ Court' both for the sake of convenience and clarity.

2. Short facts are that one 'Linus Laboratories Pvt. Ltd.,' (hereinafter 'Linus' for the sake of convenience) presented in the Court of said PDJ a plaint drafted in October of 2021 (date of plaint, as placed before us is blank); this plaint was taken on file as C.O.S.



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No.468 of 2021; that the said 'C.O.S. No.468 of 2021' (hereinafter 'said suit' for the sake of brevity) was filed with prayers for permanent injunction qua alleged infringement of trade mark, alleged passing off, for surrender of alleged offending material, accounts of profit, costs and the usual residuary limb of further or other reliefs at the discretion of Court; that there are two defendants in the suit; that it is the case of the plaintiff that it has adopted several trade marks and applied the same to various pharmaceutical products manufactured by them; that one such trade mark adopted by the plaintiff is 'EPITRAZ' (from 2014); that this trade mark has been registered vide Registration No.2810474 in Class 5; that the said registration is subsisting; that the plaintiff has also applied for registration of another trade mark 'EPITRA' vide Application No.4467177 also in class 5 for pharmaceutical products, the same has been opposed and it was pending as on the date of plaint (present status is not before us); that plaintiff's claim is that it is doing extensive business under the trade mark EPITRA ; that some time in March 2021, plaintiff became aware that D1 is marketing products manufactured by D2 bearing trade mark EPITIRA; that it is the case of the plaintiff that both the products are pharmaceutical products used as anti-epileptic medicines inter-alia for treating seizures; that the trade marks are deceptively similar



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resulting in infringement and passing off, is the case of plaintiff; that suit summons was served on the defendants; that we are informed that separate written statements have been filed by D1 and D2 and pleadings are complete; that we are informed that said C.O.S. No.468 of 2021 i.e., said suit is next scheduled to be listed on 16.10.2024 for framing issues; that pending suit, plaintiff moved I.A.No.3 of 2021 under Order XXXIX Rules 1 and 2 of 'The Code of Civil Procedure, 1908 (5 of 1908)' [hereinafter 'CPC' for the sake of convenience and clarity] seeking interim temporary injunction restraining the defendants from passing off; that after full contest, interlocutory application was dismissed vide the impugned order; that plaintiff is before this CAD by way of captioned appeal saying that the plaintiff is aggrieved by dismissal of the injunction application vide the impugned order.

3. Captioned CMA along with a 'Civil Miscellaneous Petition' (hereinafter 'CMP' for the sake of brevity) thereat is in the Admission Board today and Ms.Meha Varshini M.R., learned counsel on record for appellant along with Mr.G.Ramji, learned counsel is before us.

4. Learned counsel, adverting to the impugned order submitted that the marks are identical, deceptive and that they are



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not pharmaceutical products which are typically sold only on registered medical practitioners' prescription.

5. Be that as it may, on a careful perusal of the impugned order, we find that the said learned PDJ did not have an opportunity to compare the plaintiff's mark and the alleged offending mark. This aspect and the reason for said learned PDJ not being able to compare the same is captured in paragraph 8 of the impugned order which reads as follows:

'8. It is true that name resembles similar but the plaintiff was asked to produce the cover of the tablet EPITIRA and EPITRAZ to visualize the deceptive trade mark. The petitioner failed to produce the outer cover of tablets containing EPITRAZ. Therefore the court unable to compare whether both have similar in their appearance and deceptive.'

6. Adverting to the above, learned counsel for appellant/plaintiff submitted that outer cover of the tablets containing EPITRAZ have been filed with the plaint and it was made available, in other words, learned counsel is contradicting what transpired in the Court and is contesting the same. We carefully perused the list of plaint documents at the tail end of the plaint. We find plaintiff's carton is there as plaint Document Nos. 7 to 15 but as



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regards defendants' product Sl. No.17 only says defendants' EPITIRA 500 Tablets, in other words, we do not find any plaint document which says defendants' carton. Today also, learned counsel for appellant very fairly submitted that she only has defendants' blister pack and the carton is not available, however, learned counsel contests what transpired in the Court as captured in paragraph 8 of the impugned order.

7. In the aforesaid backdrop, we are of the considered view that the captioned appeal can be disposed of on a short point. The reason is, comparison of the competing marks or in other words, comparison of the plaintiff's mark with the alleged offending mark of the defendant/s is imperative for any Court to return a verdict in a interlocutory application for injunction qua passing off or main decree qua injunction for infringement and/or passing off. Methodology to be adopted for comparing two marks for this exercise or in other words, for this legal drill, has also been well settled and laid down with clarity in a long line of authorities rendered by Hon'ble Supreme Court over a period of time.

8. As regards the disputation/contestation qua paragraph 8 of the impugned order, we express no opinion on the argument that the carton described as outer cover by said learned PDJ in the



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impugned order in paragraph 8 has been filed as a plaint document as such a description does not figure in the list of documents (20 documents) at the tail end of the plaint placed before us but the question is whether it was produced when the learned Court called upon the plaintiff to do so. If there is any dispute in this regard, it can only be by way of review or in other words, it can only be a ground for review and it cannot be a ground for appeal. This position is well settled vide *Nayak's* case being ***State Of Maharashtra vs Ramdas Shrinivas Nayak & Anr*** reported in ***(1982) 2 SCC 463***. In *Nayak's* case rendered by Hon'ble Supreme Court, the facts are that Thiru.A.R.Antulay was Chief Minister of the State of Maharashtra till 1982, while he was holding office as Hon'ble Chief Minister, one Thiru.Nayak an erstwhile member of Maharashtra Legislative Assembly professing a keen interest in clean administration filed a complaint against Thiru.A.R.Antulay in the jurisdictional Metropolitan Magistrate Court alleging commission of offence punishable under Sections 161 and 185 of The Indian Penal Code (45 of 1860)' [hereinafter 'IPC' for the sake of convenience and clarity] and Section 5 of 'The Prevention of Corruption Act, 1988' (hereinafter 'PC Act' for the sake of convenience and clarity). The sum and substance of allegation was that Thiru.A.R.Antulay founded and controlled number of Trusts



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which went by various names but making it appear the same to be those in which the State is interested and benefits of the Trust was misused qua position is the further allegation. Learned jurisdictional Metropolitan Magistrate refused to entertain the complaint holding that it was not maintainable without requisite sanction of Government under Section 6 of PC Act. Against this order, a criminal revision was filed in the Bombay High Court under Sections 407 and 482 of 408 of 'The Code of Criminal Procedure, 1973 (2 of 1974)' [hereinafter 'Cr.P.C.' for the sake of convenience and clarity], State of Maharashtra and Thiru.A.R.Antulay were impleaded and during the course of the pendency of the criminal revision, Thiru.A.R.Antulay resigned and the Bombay High Court upheld the view that sanction was necessary and dismissed the revision but while dismissing the revision, Hon'ble Bombay High Court held that an application is to be made to His Excellency the Governor of Maharashtra for grant of requisite sanction and observed that the application should not be decided by the Law Minister or any other Minister. However, Hon'ble Supreme Court declined to grant leave by noticing that there was express concession made in the High Court but this concession was disputed. As the question as to whether concessions were actually made before the High Court were put in issue, it was held that Hon'ble Judges' record will be



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conclusive and neither the lawyer nor the litigant can claim to contradict it except before the Hon'ble Judge himself/herself and nowhere else. In this regard, paragraph 8 of the Nayak's case is of immense importance and the same reads as follows:

'8. So the judges' record is conclusive. Neither lawyer nor litigant may claim to contradict it, except before the judge himself, but nowhere else.'

9. In the case on hand, as there is disputation regarding producing the outer cover of EPITRAZ, on the teeth of paragraph 8 of impugned order, it can at best qualify only as a ground for review before same Court i.e., said PDJ Court and it cannot be a ground for appeal.

10. In the light of the narrative thus far, respectfully following *Nayak's* principle, we are not entertaining the appeal but we make it clear that it is open to the appellant to file a review in said PDJ Court, if so desired and/or if so advised. For this purpose, all rights and contentions of appellant (including contentions in captioned OSA in this CAD) are preserved and all questions are left open.

11. We also deem it appropriate to make a further observation that the appellant/plaintiff will do well to request for



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expediting the case if 'The Commercial Courts Act, 2015 (4 of 2016)' [hereinafter 'CCA' for the sake of brevity] is applicable and if the case is being heard by learned said PDJ Court as a designated Commercial Court by resorting to the time lines under CCA. We are making this further observation as the plaint itself was drawn in October of 2021, the impugned order was made on 29.09.2023 and we are now in September of 2024 with pleadings having been completed in the main case and the main case itself being scheduled to be listed on 16.10.2024 for framing issues.

12. In the light of the narrative thus far, captioned CMA fails to pass muster in the Admission Board and the same is dismissed albeit with the observations and preservation of rights as set out supra. Consequently, captioned CMP thereat also perishes with the CMA but the same is disposed of as closed. There shall be no order as to costs.

(M.S.J.) (R.S.V.J.)
06.09.2024

Index:Yes/No
Neutral Citation: Yes/No
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To
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- 1.The Principal District Judge,
Chengalpattu.
- 2.The Sub Assistant Registrar,
Original Side, High Court,
Madras.



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**M.SUNDAR, J.,
and
R.SAKTHIVEL, J.,**

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