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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **FAO (COMM) 25/2024 CAV 57/2024 CM APPL. 7168/2024 CM**
APPL. 7169/2024 CM APPL. 7170/2024 CM APPL. 7171/2024
ALKEM LABORATORIES LTD

..... Appellant

Through: Mr. Sandeep Sethi, Sr Advocate with
Mr. Sagar Chandra, Ms. Ishani
Chandra, Mr. Mikhil Sonkee, Ms.
Riya Kumar and Mr. Om Ram,
Advocates.

versus

WINGS PHARMACEUTICALS PVT LTD & ANR.

..... Respondent

Through: Mr. Chander M Lall, Sr Advocate
with Mr. Siddharth Bambha, Mr. Luv
Virmani, Ms. Atreyi Chatterjee, Ms.
Sucharu Garg, Ms. Yashi Aggarwal,
and Mr. Abhinav Bhalla, Advocates

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MS. JUSTICE TARA VITASTA GANJU

ORDER

06.02.2024

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1. The appellant has filed the present appeal impugning an ad-interim order dated 16.01.2024 (hereafter '**the impugned order**') passed by the learned Commercial Court in CS (COMM) No.55/2024 captioned *Wings Pharmaceuticals Pvt Ltd v. Celebrity Biopharma Limited & Anr.*

2. By the impugned order, the learned Commercial Court had appointed a Local Commissioner to seize and take custody of all allegedly infringing goods bearing blue and white carton packaging/trade dress or any other packaging, which is identical or deceptively similar to respondent no.1's



‘ORASORE’ products including ORASORE tablets, dispenser pack and blister pack.

3. Respondent no.1 had filed the aforesaid suit, *inter alia*, praying for a decree of permanent injunction restraining the appellant and respondent no.2 (arrayed as defendants in the suit) for violation of its rights in the trade dress of its product sold under the trademark ‘ORASORE’, copyright infringement, and passing off.

4. The learned Commercial Court had, *prima facie*, found that the trade dress of the appellant’s product sold under the trademark ‘OROGARD’ was visually and structurally similar to the trade dress of respondent no.1’s product sold under the trademark ORASORE. The learned Commercial Court was of the view that the packaging of the OROGARD product may cause confusion and deceive an unwary customer. The learned Commercial Court also observed that the overall colour combination, lay out, placement and arrangement of features and devices in packaging/ trade dress of the appellant’s product is a colourable imitation of the trade dress of the respondent no.1’s product

5. The learned Commercial Court had, accordingly, restrained the appellant from using the infringing trade dress or any other trade mark which is deceptively similar to respondent nos.1 trademark.

6. It is the appellant’s case the impugned order was obtained by misrepresentation. It is alleged that respondent no.1 had produced the packaging, which was discontinued by the appellant in January, 2022. The appellant alleges that respondent no.1 had in fact furnished an expired



product in a packaging that was discontinued to persuade the learned Commercial Court to pass an ad interim injunction. It is contended on behalf of the appellant that the same amounts to a clear misrepresentation and therefore, disentitles respondent no.1 from obtaining any interim order.

7. Mr. Sethi, learned senior counsel appearing for the appellant handed over the current packaging used by the appellant for its product OROGARD as well as packaging used by respondent no.1. *Prima facie*, the trade dress of two products does not seem similar. Apart from the photograph of a mouth showing ulcers, the other features of the trade dress of the competing products, as handed over, have little in common. Mr. Sethi, submitted that the pictorial depiction of a mouth on the cartons, is common to all similar products used for treating mouth ulcers, and therefore, the said pictorial depiction cannot lead to a *prima facie* conclusion of passing off.

8. He submits that there is a blanket injunction granted by the learned Commercial Court, which interdicts the appellant from using the trade dress currently used by the appellant for its products.

9. Mr. Lall, learned senior counsel who appears on Caveat, submits that new packaging used by the appellant also infringes respondent no.1's trade dress. He further submits that although a Local Commissioner was appointed for seizing the infringing goods, the Local Commissioner did not find any goods at the premises of the appellant. Thus, he had merely signed the stock statements and did not seize any product, documents, or material.

10. One of the grievances articulated by Mr. Sethi is regarding a publication allegedly circulated by respondent no.1 representing that the



learned Commercial Court had banned the appellant's product. The copy of said publication as reflected in the present appeal is set out below: -



Important Announcement
27.01.2024 | Delhi, India

Wings Pharma Announces Ban on Orogard Mouth Ulcer Tablet (by Alkem)

The Honorable Patiala House Court, Delhi, has issued an injunction **banning the sale of Orogard Tablet with immediate effect.**

ओरोगार्ड माउथ अल्सर टैबलेट (एल्केम) पर प्रतिबंध लगा।
माननीय पटियाला हाउस कोर्ट, दिल्ली ने एक निषेधाज्ञा जारी कर
के तत्काल प्रभाव से ओरोगार्ड टैबलेट की बिक्री पर प्रतिबंध
लगा दिया है।

The copycat/ripoff product, Orogard Mouth Ulcer Tablet by Alkem, was found to be infringing on Orasore's intellectual property rights, including its packaging, colors, trademark & style.

The court order prevents the manufacturer of Orogard Tablet from making, selling, or distributing the product in India.

Cheers to **ORASORE!!!**- the One & Original #1 Mouth Ulcer Tablet in India 🙌⚡

1:25 PM

11. Mr. Lall, readily submits that such an advisory was not required to be circulated. He stated the said publication was prepared by respondent no.1 but was not circulated to any external party.



12. It is apparent from the above, the circulation of the aforesaid advisory is *ex facie* mischievous and is an abuse of process of the Court. The advisory does not correctly reflect the order passed by the learned Commercial Court. More importantly, the impugned order is an *ad interim* order and was passed without hearing the appellant. The order was not required to be circulated. If the said advisory has been circulated, the only inference that can be drawn is that respondent no.1 has misused the order to tarnish and damage the reputation of the appellant.

13. *Prima facie*, we are of the view that if such a publication has been circulated by respondent no.1, the same ought not to be countenanced and would dis-entitle it to any *ad interim* relief. We are refraining ourselves from making any further observation in this regard as we are of the view that the learned Commercial Court ought to consider whether the Advisory was circulated by respondent no.1 and the consequences of circulating such advisory, in the first instance.

14. We are of the view that no orders are required to be passed at this stage considering the order passed by the learned Commercial Court is an *ex parte* *ad interim* order, and the Local Commissioner has not seized any goods.

15. We, accordingly, dispose of the present appeal by permitting the appellant to move an appropriate application before the learned Commercial Court setting out the grievances as articulated in the present appeal.

16. The learned senior counsel for the appellant submits there is a stock of manufactured products, which the appellant has been holding since the date



of the order and the appellant ought not to be interdicted from selling the same. It would be open for the appellant to approach the learned Commercial Court for apposite order in this regard as well.

17. In case any application is moved by the appellant, we expect the learned Commercial Court shall consider the same and take an appropriate view as early as possible and, preferably, within a period of two weeks from said date.

18. The appeal stands disposed of with the aforesaid observation. All pending applications also stands disposed of.

VIBHU BAKHRU, J

TARA VITASTA GANJU, J

FEBRUARY 06, 2024

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Click here to check corrigendum, if any