



2024:DHC:8562



\$~15

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

%

Date of Decision: 28th October, 2024+ **CS(COMM) 345/2023 & I.A. 39197/2024****ALKEM LABORATORIES LTD**

.....Plaintiff

Through: **Mr. Sagar Chandra, Ms. Srijan Uppal,
Ms. Mehek Dua, Ms. K. Natasha and
Ms. Aparna Tripathy, Advocates**

versus

SCOTT EDIL PHARMACIA LTD & ANR.

.....Defendants

Through:

CORAM:**HON'BLE MR. JUSTICE AMIT BANSAL****AMIT BANSAL, J. (ORAL)**

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

PLEADINGS IN THE PLAINT

2. The Plaintiff *i.e.*, 'ALKEM LABORATORIES LTD' is a company incorporated in 1973 under the laws of India. The Plaintiff is ranked among the top ten pharmaceutical companies in India and has a wide-ranging presence across acute and chronic therapeutic segments with substantial market share in gastro-intestinal, antiosteoporosis, nutraceutical and pain management segments and leads the Indian market in the anti-infective segments.



2024:DHC:8562



3. The Plaintiff adopted the mark 'SUMO' and applied for the registration for the mark 'SUMO' in Class 5 bearing no.816751 for goods being 'pharmaceutical, medicinal preparations and substances'.
4. The Plaintiff has been continuously and uninterruptedly using the said mark since 1999 for the said goods. The Plaintiff is also the registered proprietor of various Marks including but not limited to SUMO, SUMOFLAM, SUMOCOLD, SUMO GEL, SUMO SPRAY, SUMO COLD PCF, ULTRASUMO, SUMO NEW, NEW SUMOCOLD, SUMOGESIC, SUMO MF, SUMO-G, SUMO-D, SUMO BALM, SUMO-L RR, SUMO-L IR 650, SUMO PAIN OIL, SUMO-L IV, SUMO-WIN, SUMO JOY, SUMO-L 120 SUSPENSION, SUMO-L 240 SUSPENSION, SUMO HOT GEL, SUMO+ SPRAY, SUMO+ GEL forming a part of 'SUMO Family of marks'. (hereinafter referred to as 'SUMO Formative Marks') The Plaintiff also adopted a unique and a highly distinctive Trade Dress for its product 'SUMO *Nimesulide and Paracetamol*' Tablets and has been extensively using the same till date.
5. The Plaintiff's Mark 'SUMO' was entered into the Trade Marks Register on 27.11.2014 with effect from 27.08.1998. The said mark is valid and subsisting.
6. The Plaintiff has filed invoices from the year 1999-2023 for the products under its mark 'SUMO'. The Plaintiff has given its sales figures in respect of the products being sold under the mark 'SUMO' and SUMO formative marks in the plaint wherein it is stated that in the financial year 2022-2023, the sales *vis-à-vis* SUMO mark is in the range of Rs. 8583 lacs and SUMO formative marks is in the range of Rs.22641 lacs respectively.
7. In and around July, 2021, it came to the knowledge of the Plaintiff



2024:DHC:8562



that a nearly identical product of the Defendants bearing the mark 'ZUMO' being used for the product '*ZUMO Nimesulide and Paracetamol*' tablets. The Defendants have employed a nearly identical trade dress and have substantially reproduced the Plaintiff's artistic work in the Blister Strip of the Impugned Product '*ZUMO Nimesulide and Paracetamol*' tablets'

8. The Plaintiff sent a Legal Notice dated 22.07.2021 for infringement and passing off of the Plaintiff's Products/Marks and the same was delivered. As there was no response to the said legal notice, the Plaintiff issued a reminder notice dated 20th August, 2021 to the Defendants and the same was also delivered.

9. To the utter shock of the Plaintiff, the representatives of the Plaintiff found the Infringing Products of the Defendants '*ZUMO Nimesulide and Paracetamol*' tablets and procured the same within the territorial jurisdiction of this Court, *vide* invoice dated 14.03.2023.

10. The Plaintiff filed the present suit seeking permanent injunction restraining infringement of Trademark, Copyright, Passing Off of Trade Mark/Trade Dress, Dilution, Unfair Competition, Delivery Up, Rendition of Accounts, Damages, etc. in relation to their Trade Mark/Trade Dress/layout of its product under the mark 'SUMO'/ SUMO formative marks.

11. The Defendant No.1 herein had also applied for the Registration of the Mark 'ZUMO' under Class 5 bearing No.1806183 and 1897340 on 14.04.2009 and 17.12.2009 respectively, claiming alleged use since 27.08.2008 before the Trade Marks Registry and the Plaintiff has duly filed Notice of Oppositions bearing No. 845694 and 831854 against the said marks on 18.02.2016 and 27.04.2015 respectively. It is submitted that the said Marks stand *abandoned* as on date, due to non-prosecution.



2024:DHC:8562



PROCEEDINGS IN THE SUIT

12. On 25th May 2023, this Court granted an *ex-parte ad-interim* injunction against the defendants restraining the defendants from using the mark “ZUMO” or any other identical/ deceptively similar mark and the afore-noted impugned packaging/ trade dress or other mark/ trade dress, which is deceptively or confusingly similar to Plaintiff’s ‘SUMO’ trademark and packaging/ trade dress of their product.

13. Summons in the present suit were issued on 30th June, 2023. Plaintiff served the complete copy of the paperbook of the plaint, the copy of the Order dated 25th May, 2023 and the copy of the summons upon the Defendant No. 1 & 2 *via* Email, WhatsApp, Courier and Registered A.D. It was first delivered to the Defendants *via* Registered A.D. on 15th July, 2023. Court Summons, have also been successfully delivered to at least one of the addresses of both the Defendants on 5th August, 2023.

14. The Plaintiff filed its affidavit of service dated 25th August, 2023.

15. The Learned Joint Registrar has recorded in the Order dated 29.08.2023 that both the Defendants have been served successfully by Courier and Registered A.D.

16. The condonable period of 90 days to file the Written Statement, considering the date of service as 15th July, 2023, expired on 16th November, 2023.

17. The Plaintiff now seeks a decree in terms of Order VIII Rule 10 of the Code of Civil Procedure, 1908 (CPC).

ANALYSIS AND FINDINGS

18. I have heard the counsel for the Plaintiff and perused the material on record.



2024:DHC:8562



19. In *Satya Infrastructure Ltd. & Ors. v. Satya Infra & Estates Pvt. Ltd.*, 2013 (54) PTC 419 (Del) [CS(OS) 1213/2011, decided on 07.02.2013], a Co-ordinate Bench of this Court held as follows:

“4. The next question which arises is whether this Court should consider the application for interim relief and direct the plaintiffs to lead ex parte evidence. The counsel for the plaintiffs states that the plaintiffs are willing to give up the reliefs of delivery, of rendition of accounts and of recovery of damages, if the suit for the relief of injunction alone were to be heard today.

5. I am of the opinion that no purpose will be served in such cases by directing the plaintiffs to lead ex parte evidence in the form of affidavit by way of examination-in chief and which invariably is a repetition of the contents of the plaint. The plaint otherwise, as per the amended CPC, besides being verified, is also supported by affidavits of the plaintiffs. I fail to fathom any reason for according any additional sanctity to the affidavit by way of examination-in-chief than to the affidavit in support of the plaint or to any exhibit marks being put on the documents which have been filed by the plaintiffs and are already on record. I have therefore heard the counsel for the plaintiffs on merits qua the relief of injunction.”

20. The plaint has been duly verified and is also supported by the affidavit of the plaintiff. In view of the fact that no written statement has been filed on behalf of the defendant, all the averments made in the plaint have to be taken to be admitted. Further, since no affidavit of admission/denial has been filed on behalf of the defendant in respect of the documents filed with the plaint, in terms of Rule 3 of the Delhi High Court (Original Side) Rules 2018, the same are deemed to have been admitted. Therefore, in my opinion this suit does not merit trial and the suit is capable of being decreed in terms of Order VIII Rule 10 of CPC.

21. From the averments made in the plaint and the evidence on record, the plaintiffs have been able to prove that they are the registered proprietors of



2024:DHC:8562



the trademarks “SUMO”.

22. The plaintiffs have placed on record the products of the defendants to show that the defendants are indulging in infringement and passing off the plaintiffs’ registered mark, ‘SUMO. The comparison of the products/marks used by the plaintiff and the defendants is illustrated below:

PLAINTIFF’S ‘SUMO BLISTER STRIP’	DEFENDANTS’ ‘ZUMO BLISTER STRIP’
	
	

23. On a perusal of the product of the Defendant, it is evident that the mark was nearly identical and hence, deceptively similar to ‘SUMO’ and SUMO formative marks and that the Defendants had employed a nearly identical trade dress and have substantially reproduced the Plaintiff’s artistic work in the Blister Strip of the Impugned Product ‘ZUMO *Nimesulide and Paracetamol*’ tablets. Moreover, the shape and colour of the tablets of the Plaintiff’s product ‘SUMO’ and Defendants’ product ‘ZUMO’ are also nearly identical.

24. The Defendants herein have merely replaced ‘S’ with ‘Z’ while wholly copying the entire mark of the Plaintiff ‘SUMO’ thereby making the marks structurally, visually and phonetically similar and therefore nearly



2024:DHC:8562



identical.

25. The Defendants are using a deceptively similar trade mark 'ZUMO' for a medicine used for identical purposes and the same constitutes infringement of the Plaintiff's registered trade mark 'SUMO'.

26. It is pertinent to mention that both the Trade Mark Applications for the Impugned Mark 'ZUMO' as filed by the Defendant No.1 bearing Application Nos. 1806183 and 1897340 stand 'abandoned' due to non-prosecution.

27. The Plaintiff has also filed several documents in support of its contentions including but not limited to sales invoices in support of prior user claim, CA Certificates establishing goodwill and reputation as well as several trade mark registrations for the Plaintiff's 'SUMO and SUMO formative marks', in support of prior registrations of the Plaintiff.

28. The Plaintiff is irrefutably the prior user and prior registrant of the mark 'SUMO' as the same has been in use since 1999; *whereas* the Defendant No.1 has allegedly claimed use of the impugned Mark 'ZUMO' only since 27.08.2008. Thus, the Plaintiff has made out a clear case of infringement of trade mark/ trade dress as well as Passing off.

29. Based on the discussion above, a clear case of infringement of trademark and copyright is made out. The defendants have taken unfair advantage of the reputation and goodwill of the Plaintiffs' trademark/artistic work and has also deceived the unwary consumers of their association with the plaintiffs by dishonestly adopting the Plaintiffs' registered marks without any plausible explanation. Therefore, the Plaintiffs have established a case of passing off as well.

30. At this stage, it may be relevant to note that the Defendants did not



2024:DHC:8562



appear before the Court, despite service of summons on 5th August, 2023. Further, no communication on behalf of the Defendants have been placed on record in respect of the allegations of the Plaintiffs in this suit.

31. Since the Defendants have failed to take any requisite steps to contest the present suit, despite having suffered an *ad interim* injunction order, it is evident that they have no defence to put forth on merits.

RELIEF

32. A decree of permanent injunction is passed in favour of the Plaintiff and against the Defendants in terms of prayer clauses 53(i) to (v) of the plaint. The said clauses read as follows:

- i. *A Decree for permanent injunction restraining the Defendants, its directors, executives, partners or proprietors, subsidiaries, sister concerns as the case may be, their officers, servants and agents or any other persons acting for and on their behalf from manufacturing, selling, offering for sale, exporting, advertising, marketing, and/or in any manner using, directly or indirectly, in relation to any pharmaceutical and/or medicinal preparation and/or such allied and cognate goods, under the Impugned Mark 'ZUMO' or any other identical and/or deceptively similar mark to the Plaintiffs mark 'SUMO' and 'SUMO Family of Marks' amounting to infringement of the Plaintiffs registered marks in Class 5;*
- ii. *A Decree for permanent injunction restraining the Defendants, its directors, executives, partners or proprietors, subsidiaries, sister concerns as the case may be, their officers, servants and agents or any other persons acting for and on their behalf from manufacturing, selling, offering for sale, exporting, advertising, marketing, and/or in any manner using, directly or indirectly, in relation to any pharmaceutical and/or medicinal preparation and/or such allied and cognate goods, under the Impugned 'ZUMO' Blister Strip or any other deceptively similar Carton/logo/Blister Strip, which is reproduction and/or substantial reproduction of so as to infringe the Plaintiffs Copyright in the original artistic works of the products under the 'SUMO' and 'SUMO Family of Marks' by reproducing the same in any material form or using the same or any colourable imitation thereof or otherwise howsoever.*



- iii. *A Decree for permanent injunction restraining the Defendants, its directors, executives, partners or proprietors, subsidiaries, sister concerns as the case may be, their officers, servants and agents or any other persons acting for and on their behalf from manufacturing, selling, offering for sale, exporting, advertising, marketing, and/or in any manner using, directly or indirectly, in relation to any pharmaceutical and/or medicinal preparation and/or such allied and cognate goods, under the Impugned Mark 'ZUMO' or any other mark identical/deceptively similar to the mark/s of the Plaintiff being 'SUMO' and 'SUMO Family of Marks', the Impugned trade dress of 'ZUMO Blister Strip' and/or any other trade dress identical or deceptively similar to trade dress of Plaintiff's Sumo Carton and Blister Strip or doing any other thing which will lead to Passing off of the goods of the Defendants as those of the Plaintiff;*
- iv. *A Decree for permanent injunction restraining the Defendants, its directors, executives, partners or proprietors, subsidiaries, sister concerns as the case may be, their officers, servants and agents or any other persons acting for and on their behalf from manufacturing, selling, offering for sale, exporting, advertising, marketing, and/or in any manner using directly or indirectly in relation to any pharmaceutical and/or medicinal preparation and/or such allied and cognate goods under the Impugned Mark 'ZUMO' or any other mark identical/deceptively similar to the mark/s of the Plaintiff being 'SUMO' and 'SUMO Family of Marks', the Impugned trade dress of 'ZUMO' Blister Strip and/or any other trade dress identical or deceptively similar to trade dress of Plaintiffs SUMO Carton and Blister Strip or doing any other thing which will lead to dilution of the Plaintiffs Trademarks, Logo and Trade Dress mentioned in the Plaint;*
- v. *A Decree for permanent injunction restraining the Defendants, its directors, executives, partners or proprietors, subsidiaries, sister concerns as the case may be, their officers, servants and agents or any other persons acting for and on their behalf from manufacturing, selling, offering for sale, exporting, advertising, marketing, and/or in any manner using directly or indirectly in relation to any pharmaceutical and/or medicinal preparation and/or such allied and cognate goods, under the Impugned Mark Impugned Mark 'ZUMO' or any other mark identical/deceptively similar to the mark/s of the Plaintiff being 'SUMO' and 'SUMO Family of Marks', the Impugned trade dress of 'ZUMO' Blister Strip and/or any other trade dress identical or deceptively similar to trade dress of Plaintiffs 'SUMO Carton and Blister Strip' or doing any other thing which will amount to unfair competition;*



2024:DHC:8562



33. Insofar as the reliefs of damages sought in prayer clause 53(viii) is concerned, reference may be made to the judgment in ***Hindustan Lever Ltd. v. Satish Kumar***, 2012 SCC OnLine Del 1378. The relevant observations are set out below:

“23. One of the reasons for granting relief of punitive damages is that despite of service of summons/notice, the defendant had chosen not to appear before the court. It shows that the defendant is aware of the illegal activities otherwise, he ought to have attended the proceedings and give justification for the said illegal acts. Since, the defendant has maintained silence, therefore, the guilt of the defendant speaks for itself and the court, under these circumstances, feels that in order to avoid future infringement, relief of punitive damages is to be granted in favour of the plaintiff.”

34. In light of the foregoing analysis, the Court concludes that the Defendant’s conduct not only warrants but also necessitates the imposition of both costs and aggravated damages. Thus, in addition to the decree passed in the terms already mentioned above, taking into account the entire facts and circumstances presented in this case, the Court also awards damages and costs amounting to INR 5,00,000/- in favour of the Plaintiff and against the Defendants.

35. Let the decree sheet be drawn up.

36. All pending applications stand disposed of.

AMIT BANSAL, J.

OCTOBER 28, 2024