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

% ***Date of decision: 06th December, 2024***

+ **CS(COMM) 544/2024, I.A. 32338/2024 & I.A. 47372 /2024**

ABBOTT PRODUCTS OPERATIONS AG & ANR.Plaintiffs

Through: Ms. Apurva Bhutani, Mr. Naqeeb Nawab, Mr. Ashutosh Ranga and Ms. Sejal Tayal, Advocates
Mob: 9999175083

versus

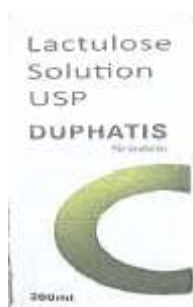
**ATLANTIS FORMULATIONS PRIVATE LIMITED &
ORS.Defendants**

Through: Mr. Yash Prakash, Mr. Ishan Jain and Mr. Yogi Pahal, Advocates for D-1 and D-2.

**CORAM:
HON'BLE MS. JUSTICE MINI PUSHKARNA
MINI PUSHKARNA, J (ORAL)**

I.A. 47372 /2024

1. The present application has been filed jointly on behalf of the plaintiffs and defendant nos. 1 and 2 under Order XXIII Rule 3, read with Section 151 of the Code of Civil Procedure, 1908 ("CPC").
2. The present suit has been filed by the plaintiffs for declaration, permanent injunction restraining infringement of trademarks and passing off, dilution, tarnishment, unfair competition, delivery up, damages and rendition of accounts against the defendants' adoption and use of the mark



DUPHATIS, and DUPHATIC, which are identical, nearly identical, deceptively, confusingly, visually and phonetically similar to the plaintiffs' earlier, registered trademarks-DUPHALAC, DUPHASTON, DPHABEARS,

Duphalac BEARS, **Duphalac CHEWS**

DUPHALAC FIBER, DPHACHEWS,

DUPHAR and DUPHAPRO.

3. Vide order dated 5th July, 2024, an *ex parte ad interim injunction* was granted in favour of the plaintiff and against the defendants, thereby, restraining the defendants from using the impugned marks DUPHATIS and DUPHATIC and/or any other mark, device, logo, domain name or trade name in respect of any goods/ services whatsoever, *inter alia*, pharmaceutical products which are deceptively or confusingly similar to the plaintiffs' earlier and registered DUPHA marks, including, but not limited to DUPHALAC, DUPHASTON, DPHABEARS,

Duphalac BEARS, **Duphalac CHEWS**

DUPHALAC FIBER, DPHACHEWS,

DUPHAR and DUPHAPRO.

4. Consequently, the parties arrived at an out-of-court settlement. The terms of the settlement are contained in Para 3 of the present application.



5. In terms of the settlement, the defendant no. 1 undertakes to withdraw or cancel the impugned trademark application under application number 6545288 in Class 5 for the mark, “DUPHATIS” filed by the defendant no. 1 and undertakes to take appropriate steps in this regard.
6. Similarly, defendant no. 2 has undertaken to withdraw or cancel the impugned trademark application under application no. 6541513 in Class 5 for the mark, “DUPHATIC” filed by the defendant no. 2 and undertakes to take appropriate steps in that regard thereto.
7. Learned counsel appearing for the plaintiff confirms the receipt of ₹ 1,50,000/- (Rupees One Lakh Fifty Thousand) from defendant nos. 1 and 2 in terms of the settlement.
8. Learned counsel appearing for the parties confirm the terms of the settlement and submit that the suit be decreed in terms of the settlement *qua* defendant nos. 1 and 2.
9. This Court has perused the terms of the settlement and finds the same to be lawful.
10. Both the parties are held bound by the terms of the settlement.
11. Accordingly, the suit is decreed in favour of the plaintiffs and against defendant nos. 1 and 2 in terms of the settlement between the parties as contained in Para 3 of the present application, which shall form part of the decree.
12. It is one of the terms of the settlement that the infringing products that were confiscated at the time of execution of the local commission and returned to defendant nos. 1 and 2 on *superdari*, be destroyed.
13. Accordingly, it is directed that the said infringing products shall be destroyed by defendant nos. 1 and 2, in accordance with law and in presence



of a representative of the plaintiff.

14. Considering the fact that the plaintiff has already entered into a settlement with defendant nos. 1 and 2 and that the suit is decreed *qua* defendant no. 3, in view of the fact that defendant no. 3 has neither put appearance before this Court nor filed any written statement despite service, the plaintiff is entitled to refund of the Full Court Fees.

15. At this stage, learned counsel appearing for the plaintiffs submits that the refund of court fees be done to the plaintiffs through the plaintiffs' counsel.

16. The Registry of this Court is directed to issue a certificate of refund of Full Court Fees to the plaintiff, through the plaintiffs' counsel *ZEUS IP Advocate LLP, B-1, Sector – 21, Noida, UP-201301*.

17. Decree sheet be drawn up.

18. With the aforesaid directions, the present application is disposed of.

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19. The suit already stands settled with defendant nos. 1 and 2.

20. There is no appearance on behalf of defendant no. 3, despite service.

21. The statutory period of filing written statement by defendant no. 3 has already expired.

22. Considering the fact that no written statement has been filed by defendant no. 3 and no appearance has been put in by defendant no. 3, there would be no purpose in proceeding with the matter any further and putting the parties to trial.

23. No plausible defence has been raised on behalf of defendant no. 3. Thus, there is no reasonable chance of defendant no. 3 succeeding in the present case. Moreover, on account of the non-contest on part of defendant



no. 3, the submissions as put forth by the plaintiffs, would stand admitted and un-rebutted.

24. Accordingly, this Court exercises its authority under Order VIII Rule 10 CPC. Thus, this Court in the case of *Nirog Pharma Pvt. Ltd. v. Umesh Gupta & Anr.*, 2016 SCC OnLine Del 5961 has held as follows:

“xxx xxx xxx

11. Order VIII Rule 10 has been inserted by the legislature to expedite the process of justice. The courts can invoke its provisions to curb dilatory tactic, often resorted to by defendants, by not filing the written statement by pronouncing judgment against it. At the same time, the courts must be cautious and judge the contents of the plaint and documents on record as being of an unimpeachable character, not requiring any evidence to be led to prove its contents. The Supreme Court in *C.N Ramappa Gowda v. C.C. Chandregowda*, (2012) 5 SCC 265 had held as under:

“25. We find sufficient assistance from the apt observations of this Court extracted hereinabove which has held that the effect [Ed. : It would seem that it is the purpose of the procedure contemplated under Order 8 Rule 10 CPC upon non-filing of the written statement to expedite the trial and not penalise the defendant.] of non-filing of the written statement and proceeding to try the suit is clearly to expedite the disposal of the suit and is not penal in nature wherein the defendant has to be penalised for non-filing of the written statement by trying the suit in a mechanical manner by passing a decree. We wish to reiterate that in a case where written statement has not been filed, the court should be a little more cautious in proceeding under Order 8 Rule 10 CPC and before passing a judgment, it must ensure that even if the facts set out in the plaint are treated to have been admitted, a judgment and decree could not possibly be passed without requiring him to prove the facts pleaded in the plaint.

26. It is only when the court for recorded reasons is fully satisfied that there is no fact which needs to be proved at the instance of the plaintiff in view of the deemed admission by the defendant, the court can conveniently pass a judgment and decree against the defendant who has not filed the written statement. But, if the plaint itself indicates that there are disputed questions of fact involved in the case arising from the plaint itself giving rise to two versions, it would not be safe for the court to record an ex parte judgment without directing the plaintiff to prove the facts so as to



settle the factual controversy. In that event, the ex parte judgment although may appear to have decided the suit expeditiously, it ultimately gives rise to several layers of appeal after appeal which ultimately compounds the delay in finally disposing of the suit giving rise to multiplicity of proceedings which hardly promotes the cause of speedy trial.

27. However, if the court is clearly of the view that the plaintiff's case even without any evidence is prima facie unimpeachable and the defendant's approach is clearly a dilatory tactic to delay the passing of a decree, it would be justified in appropriate cases to pass even an uncontested decree. What would be the nature of such a case ultimately will have to be left to the wisdom and just exercise of discretion by the trial court who is seized of the trial of the suit."

xxx xxx xxx"

(Emphasis Supplied)

25. The impugned marks DUPHATIS and DUPHATIC are similar/deceptively similar to the marks of the plaintiff, i.e., DUPHALAC, DUPHASTON, DUPHABEARS.

26. Vide order dated 5th July, 2024, this Court has already given its *prima facie* view that the marks being used by the defendants are deceptively similar with that of the plaintiffs.

27. It is to be noted that the product in question are pharmaceutical products, wherein, the level of the test is with respect to the similarity of the products, and the degree of protection and scrutiny prescribed is very high and stringent. Thus, the Division Bench of this Court in the case of ***Glenmark Pharmaceuticals Ltd. Versus Sun Pharma Laboratories Ltd., 2024 SCC OnLine Del 2707***, has held as follows:

"xxx xxx xxx

56. The aforesaid principles as propounded clearly point towards a more exacting and stringent test being adopted when an action of infringement or passing-off comes to be laid in respect of drugs. As was pertinently observed by the Supreme Court in Cadila



Healthcare, in the case of drugs, the tests to be adopted is that of “exacting judicial scrutiny”. It was further held that the mere fact that the drug was being sold on the basis of a prescription or dispensed by pharmacists would also not constitute a reliable determinant which would dilute the strict view test as articulated by it while attempting to answer the question of possibility of confusion. This the Supreme Court so held bearing in mind the injurious or detrimental possibilities attendant to an inadvertent purchase, sale and consequential consumption of a drug. It also took into consideration the harmful effect that a usage of a drug may have even though the competing products may be meant for curing an identical ailment. Not stopping at this, the Court also found that notwithstanding the pharmaceutical market being regulated by prescriptions and the dispensation of products being overseen and supervised by trained physicians, those factors would not allay the fears and apprehensions attendant to an incorrect or inappropriate drug being accidentally dispensed. This is evident from the following observations appearing in Paras 27 and 28 of the report:

“27. As far as the present case is concerned, although both the drugs are sold under prescription but this fact alone is not sufficient to prevent confusion which is otherwise likely to occur. In view of the varying infrastructure for supervision of physicians and pharmacists of medical profession in our country due to linguistic, urban, semi-urban and rural divide across the country and with high degree of possibility of even accidental negligence, strict measures to prevent any confusion arising from similarity of marks among medicines are required to be taken.

28. Here it will be useful to refer to the decision of Morgenstern Chemical Co. case where it has been held as under:

“(5) In the field of medical products, it is particularly important that great care be taken to prevent any possibility of confusion in the use of trade marks. The test as to whether or not there is confusing similarity in these products even if prescribed and dispensed only by professionally trained individuals does not hinge on whether or not the medicines are designed for similar ailments. The rule enunciated by Judge Helen in Cole Chemical Co. v. Cole Laboratories [DC Mo 1954, 118 F Supp 612, 616, 617, 101, USPQ 44, 47, 48] is applicable here:

‘The plaintiff and the defendant are engaged in the sale of medical preparations. They are for ultimate human consumption or use. ... They are particularly all for ailments of the human body.



Confusion in such products can have serious consequences for the patient. Confusion in medicines must be avoided.

Prevention of confusion and mistakes in medicines is too vital to be trifled with.'

The observations made by Assistant Commissioner Leeds of the Patent Office in R.J. Strassenburgh Co. v. Kenwood Laboratories, Inc. [106 USPQ 379 (1955)] USPQ 380 are particularly apt, that: 'Physicians are not immune from confusion or mistake. Furthermore it is common knowledge that many prescriptions are telephoned to the pharmacists and others are handwritten, and frequently handwriting is not unmistakably legible. These facts enhance the chances of confusion or mistake by the pharmacists in filling the prescription if the marks appear too much alike when handwritten or sound too much alike when pronounced.'

The defendant concedes that physicians and pharmacists are not infallible but urges that the members of these professions are carefully trained to detect difference in the characteristics of pharmaceutical products. While this is doubtless true to dos (sic) not open the door to the adoption by manufacturers of medicines of trade marks or names which would be confusingly similar to anyone not exercising such great care. For physicians and pharmacists are human and in common with the rest of mankind are subject to human frailties. In the field of medicinal remedies the courts may not speculate as to whether there is a probability of confusion between similar names. If there is any possibility of such confusion in the case of medicines public policy requires that the use of the confusingly similar name be enjoined (see Lambert Pharmacol Ltd. v. Bolton Chemical Corpn. [DCNY 1915, 219 F 325, 326]).

57. More significantly, the Supreme Court proceeded to hold and spoke of a lesser degree of proof being applicable in the case of medicinal products while answering the question of confusing similarity and the same being warranted in order to subserve large public interest. These observations are found in para 32 of the report, which is extracted hereinbelow:

"32. Public interest would support lesser degree of proof showing confusing similarity in the case of trade mark in respect of medicinal products as against other non-medicinal products. Drugs are poisons, not sweets. Confusion between medicinal products may, therefore, be life threatening, not merely



inconvenient. Noting the frailty of human nature and the pressures placed by society on doctors, there should be as many clear indicators as possible to distinguish two medicinal products from each other. It is not uncommon that in hospitals, drugs can be requested verbally and/or under critical/pressure situations. Many patients may be elderly, infirm or illiterate. They may not be in a position to differentiate between the medicine prescribed and bought which is ultimately handed over to them. This view finds support from McCarthy on Trade Marks, 3rd Edn., para 23.12 of which reads as under:

“The tests of confusing similarity are modified when the goods involved are medicinal products. Confusion of source or product between medicinal products may produce physically harmful results to purchasers and greater protection is required than in the ordinary case. If the goods involved are medicinal products each with different effects and designed for even subtly different uses, confusion among the products caused by similar marks could have disastrous effects. For these reasons, it is proper to require a lesser quantum of proof of confusing similarity for drugs and medicinal preparations. The same standard has been applied to medical products such as surgical sutures and clavicle splints.”

xxx xxx xxx”

(Emphasis Supplied)

28. Accordingly, in exercise of the authority under Order VIII Rule 10, the suit is decreed in favour of the plaintiff and against the defendant no. 3 in terms of Para 104 (a) and (b).
29. The present suit, along with the pending applications, accordingly stands disposed of.

MINI PUSHKARNA, J

DECEMBER 6, 2024

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