



2024:DHC:7199-DB



\$~59

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

%

Date of Decision: 11.09.2024

+

FAO (COMM) 177/2024 & CM APPL. 53062/2024, CM APPL. 53063/2024, CM APPL. 53064/2024, CM APPL. 53065/2024

ANTEX PHRAMA PVT LTD.

.....Appellant

Through: Mr. Sumit Rajput, Mr. Rishabh Vaha and Mr. Priyansh Verma, Advocates.

versus

AADVIK PHARMA & ANR.

.....Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE Mr. JUSTICE SACHIN DATTA

VIBHU BAKHRU, J. (ORAL)

1. The appellant has filed the present appeal impugning an order dated 12.07.2024 passed by the learned Commercial Court (hereafter *the impugned order*) rejecting the appellant's application under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908 (hereinafter *the CPC*) in CS (COMM) 386/2021 titled as *M/s Antex Pharma Pvt. Ltd. v. Aadvik Pharama and Another*.

2. The appellant (hereafter also referred to as *the plaintiff*) had preferred the said suit, *inter alia*, seeking an injunction restraining the respondents (hereafter also referred to as *the defendants*) from



2024:DHC:7199-DB



infringing its copyright in the mark 'LIVON-DS'. Additionally, the appellant also alleged passing off.

3. The respondents/defendants had adopted a similar trademark 'LIVHON-DS' in respect of their product – ayurvedic medicinal preparations – which the plaintiff alleges are identical to its product. It is the plaintiff's case that it has adopted the mark LIVON-DS in the year 2009 and over a period of time, the plaintiff had acquired goodwill in respect of the products sold under the trademark LIVON-DS.

4. The plaintiff claims that LIVON-DS is a coined and invented mark and enjoys a high degree of distinctiveness indicating the plaintiff as a source of the said product.

5. The plaintiff claims that the said ayurvedic drugs are required to be sold under a doctor's prescription for the treatment of liver ailments. The appellant claims that it has a registered copyright in the mark LIVON-DS and therefore, was entitled to an order restraining the respondents from using the impugned mark LIVHON-DS.

6. The plaintiff claims that in September, 2021 he discovered through a medical representative that the respondents had adopted the mark LIVHON-DS and deceptively similar packaging. Thereafter, the plaintiff conducted a market survey and found that the respondents were selling their product, using the mark LIVHON-DS, in the markets of South Delhi.



2024:DHC:7199-DB



7. The plaintiff issued a cease-and-desist notice dated 27.09.2021 calling upon the respondents to refrain themselves from manufacturing and marketing the products under the mark LIVHON-DS.

8. Respondent no.1 responded to the said notice by stating that it was only manufacturing the product for respondent no. 2. In the aforesaid context, the plaintiff filed the above-mentioned suit.

9. The respondents are contesting the suit on several grounds. Insofar as the plaintiff's copyright action is concerned, the respondents claim that the mark LIVON is commonly used in the market and several entities across India are using the same in connection with goods under Class-5 of NICE classification. It is stated that prior to the plaintiff adopting the mark in the year 2009, the same was registered in the name of company Paras Pharmaceuticals Ltd. in Class-5. The respondents also claim that LIVON is used by an entity named M/s. Smith Burn Research Laboratory in respect of Class-5 since the year 1945. The respondents pointed out that similar marks are used by the several entities across India for various products viz. LIVONIL since 1991, LIVONLY Capsul since 2003, LIVONA (Device) since 2002, LIVONOL since 2003, LIVONIT since 2003, LIVONERGY since 2010, LIVONI-DS since 2012, LIVONISE since 2015, LIVONAP since 2015, LIV ON 4G since 2017, LIVONTA since 2018, LIVONIBE since 2018 etc.

10. The aforesaid contentions have not been effectively controverted.



2024:DHC:7199-DB



The learned Commercial Court has also noted the same in the impugned order.

11. In view of the above, it is difficult to accept that the plaintiff has exclusive copyright in the mark LIVON. If it is correct that the said trademark was used by the other entities prior to the appellant adopting the same, the appellant is not entitled to claim any copyright in respect of the said name. In the given facts, *prima facie*, the appellant's contention that it had coined the word is also unpersuasive.

12. Insofar as the appellant's claim for passing off is concerned, the respondents have pointed out that the plaintiff's sales turnover of the product is not significant. It is asserted that in the year 2009-10, the plaintiff's annual turnover was merely ₹25,663/-. Accordingly to the plaintiff, the said turnover increased to ₹62,69,498/- in the year 2019-20 but, thereafter, dipped to ₹17,59,650/- in the year 2020-21. It is the respondents' case that the appellant's product has not acquired any significant goodwill under the mark LIVON.

13. The learned Single Judge also found that there was no material on record to establish that the defendant's products were sold in the markets of South Delhi as was claimed by the plaintiff in the suit. In the aforesaid context, learned Commercial Court did not find any *prima facie* merit in the plaintiff's case of infringement of copyright and passing off and accordingly dismissed the plaintiff's application under Order XXXIX Rules 1 and 2 of the CPC.



2024:DHC:7199-DB



14. The learned counsel appearing for the plaintiff submits that the learned Commercial Court has erred in passing the impugned order on the basis that the plaintiff has been unable to establish that the respondents are selling their goods in the markets of South Delhi. He submits that since the plaintiff had made an averment to the said effect in its plaint, at an interim stage the same was required to be accepted as correct. According to him, the plaintiff's application under Order XXXIX Rules 1 and 2 of the CPC was required to be decided on a demurrer, that is, accepting all averments made in the plaint to be correct.

15. We find no merit in the said contention. The same ill-founded. There is no principle in law, which postulates that a Court while deciding the application under Order XXXIX Rules 1 and 2 of the CPC must necessarily confine itself to the averments made in the plaint and cannot evaluate, on *prima facie* basis, the defence raised by the defendants.

16. In view of the above, we are unable to accept that the learned Commercial Court misdirected itself in law or that the impugned order is capricious or suffers from the vice of arbitrariness. Thus, on the anvil of the tests laid down by the Supreme Court in ***Wander Ltd. and Anr. v Antox India P. Ltd.*** 1990 Supp. SCC 727 no interference with the impugned order is warranted.

17. Having stated the above, we consider it apposite to direct the



2024:DHC:7199-DB



learned Commercial Court to adjudicate the suit as expeditiously as possible, considering that the products involved are medicinal products.

18. The present appeal is disposed of in the above terms.

19. Pending applications also stand disposed of.

VIBHU BAKHRU, J

SACHIN DATTA, J

SEPTEMBER 11, 2024

at