

National Phase application No. 5272/DELNP/2008. The Respondents shall proceed further with the application in accordance with law. There shall be no orders as to costs.

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2017 (70) PTC 249[Mad]

HIGH COURT OF MADRAS

Original Application Nos. 472 and 473 of 2013

[Applications filed under Order XIV Rule 8 of O.S. Rules read with Under Order 39 Rule 1 & 2 of C.P.C.]

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Micro Labs Ltd.....Plaintiff

Versus

Eris Life Science Pvt. Ltd.....Respondent

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N. Sathish Kumar, J.

Decided on 11.01.2017

Civil Procedure Code, 1908

Order 14 Rule 8 R/w Order 39 Rule 1, 2 — Infringement — Passing off — Injunction, denied — Mark is registered as "OLAMIN" — Products are medicinal and pharmaceutical purpose — Original defendant copied and adopted the infringing mark "OLMIN" — Both the products are based on the different chemical compositions — Original plaintiff's drugs are meant for external use while the original defendant's products are for internal use as well as the difference in the packing style — There may not be any confusion for deception — Both the products are also sold only under the prescription of medical Practitioner — Original plaintiff is also aware of the alleged infringement in the month of May 2011 itself — Suit was filed in the year 2013 — Delay in approaching the Court — Laches visible on the part of the original plaintiff — Interim injunction denied — Applications are dismissed.

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[Paras 29, 30]

Cases Referred :

- Alkem Laboratories Ltd. v. Microlabs Ltd. 2005 (SCC) Onine (Kar) 528
- Anjendra Kumar Agarwal v. Kruzer Herbals 1996 PTC (16) Delhi
- Astrazeneca UK Ltd., v. Orchid Chemicals & Pharmaceuticals Ltd. ILR (2007) 1 Delhi 874 : 2007 (34) PTC 469 (Del)
- Cadila Laboratories Ltd. v. Dabour India Ltd CDJ 1997 DHC 412 : 1997 (17) PTC 417 (Del)
- Kalindi Medicure Pvt. Ltd. v. Intas Pharmaceuticals Ltd. 2007 (34) PTC 18 (Del)
- Kivi Labs Limited v. Sun Pharmaceutical Pvt. Ltd. 2013 (53) PTC 43 (Mad)

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Midas Hygiene Industries (P) Ltd. v. Sudhir Bhatia and Others

2004 (3) SCC 90 : 2004 (28) PTC 121 (SC)

Orchid Chemicals & Pharmaceuticals v. Wockhardt Ltd. 2013 (56) PTC 558 (MAD) (DB)

a Ranbaxy Laboratories Ltd. v. Intas Pharmaceuticals Ltd. 2011 (47) PTC 433 (Del.)

Sami Khatib v. Seagull Labs (I) Pvt. Ltd. 2002 (24) PTC 165 (Del)

Sun Pharma Laboratories Ltd., v. Psycoremedies Ltd.

CDJ 2015 MHC 3970 : 2015 (63) PTC 493 (Mad)

Sun Pharmaceutical Industries Limited v. Anglo French Drugs and

b Industries Limited and another 2013 SCC Online Del. 4866 : 2014 (57) PTC 168 (DEL)

Sun pharmaceutical Industries Ltd. v. West Coast Pharmaceuticals Works

Ltd. AIR 2012 Gujarat 142 : 2012 (52) PTC 362 (Guj)

Trinethra Super Retail Pvt. Ltd., v. Mee Trinetra Trading Pvt. Ltd. 2011 (4) ALT 692 (DB)

Unimed Technologies Ltd., v. M/s. Eyecare Kilitch Limited

2013 SCC Onine Mad 591 : 2013 (54) PTC 394 (MAD)

c Walter bushness pvt. Ltd. And others v. Miracle Life Sciences and another

2014 SCC Online Delhi 3243 : 2014 (59) PTC 339 (DEL)

PRESENT : Mr. D. Bharatha Chakravarthy for applicant in both OA.

Mr. Dr. Venkat Reddy Donthi for Respondent in both OA.

d **N. Sathish Kumar, J.**

ORDER

1. The captioned applications have been filed by the original plaintiff seeking for injunction restraining the original defendant from infringing and passing off.

e 2. It is the case of the applicant /original plaintiff their mark is registered as "OLAMIN". They are manufacturing medicinal and pharmaceutical products and got a steadily growing business with a sales turnover of around Rs. 1350 crores for the financial year 2012-2013 and around Rs. 60 crores being spent for the promotional activity every year. The respondent / original defendant copied and adopted the infringing mark "OLMIN" that is similar to the applicant/original plaintiff's mark "OLAMIN". Since no further similar product was available in the market, the applicant/original plaintiff decided to adopt the mark "OLAMIN". The f applicant/original plaintiff's product became well known trade mark and they are maintaining high standards of their products, marketing and packing. By virtue of the same, the distinctive and unique product of the applicant/original plaintiff had gained extensive reputation throughout the country.

g 3. It is the further case of the applicant/original plaintiff that the respondent/original defendant, dishonestly adopted the identical mark "OLMIN" with respect to their goods and services with a dishonest motive. Therefore, the applicant/original plaintiff issued a legal notice dated 02.05.2011 to M/s. Eris Therapeutics Private Limited, a division of Eris Life Sciences Private Limited. The respondent sent a reply stating that there is no such division of the respondent/

original defendant. Believing it to be a true statement, the applicant/original plaintiff put the matter in abeyance and not pursued for any suit. Only later, the applicant/original plaintiff came to know that the statement made by the respondent/original defendant is false and eye wash and was made with an intention to deceive the applicant/original plaintiff and on the other hand, the respondent/original defendant is continuing its activity of infringement and passing off.

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4. It is also the case of the applicant/original plaintiff that they are the prior user of the alleged mark and only for the purposes of escaping infringement action the respondent /original defendant is making a false averment as if it is a prior user, which is factually incorrect. The applicant/original plaintiff's product is prescribed by the physicians taking into account of its chemical composition and the respondent/ original defendant's product is of a different chemical composition and the presence of the respondent/original defendant's goods throughout the market under the same trade mark cause serious prejudice and hardship to the consuming public and it will create grave confusion in the minds of the consuming public. Hence, the above applications.

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5. It is the case of the respondent/ original defendant that the suit itself is not maintainable in law or on facts. The respondent/ original defendant's product OLMIN is phonetically, structurally and visually different from the applicant/plaintiff's product OLAMIN. Originally, the applicant/plaintiff applied trademark for its product OLAMINE and subsequently, they sought for the amendment of trademark as OLAMINE. It is sated that the trademark OLMIN was originally conceived, adopted and used as trademark by M/s. Eris Therapeutics Pvt. Ltd, which is not impleaded as a party herein.

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6. It is also the case of the respondent/original defendant that the applicant/original plaintiff's product is claimed to be used as a scalp lotion whereas the respondent / original defendant's product is used as a drug against hyper tension and it is in the form of tablets. Further the applicant/original plaintiff's drug is used for topical dermatological treatment of superficial mycoses and it is synthetic antifungal agent applied over the body whereas the respondent/ original defendant's drug is super specialty product for the treatment of hypertension. In view of the different call of purchasers as well as the different variants, the question of confusion and passing of does not arise. Further, the application for registration of Trademark OLMIN was filed on 18.12.2009 which is much prior to the notice given by the applicant/original plaintiff. Since both the products are having the different compositions, different appearance and applicability, the question of infringement does not arise. Hence, respondent/original defendant prayed for dismissal of the applications.

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7. The learned counsel for the applicant/original plaintiff has contended that admittedly, the applicant/original plaintiff is a registered owner of the trade mark

"OLAMIN" and during the pharmaceutical business, the respondent/original defendant copied the mark of the plaintiff and the same will lead confusion among the consumer and the good will and reputation earned by the applicant/original plaintiff would be spoiled, if the spurious products of the respondent/defendant is allowed to continue to be marketed. As the applicant/original plaintiff is a registered trade mark, mere delay in bringing the application is not sufficient to defeat the grant of injunction. The respondent/original defendant in all these days filed an application to reject the plaint and failed. Now, he has filed an application for Rectification before the IPAB only to protract the proceedings.

8. It is the contention of the learned counsel for the applicant/original plaintiff that even if the suit is stayed in view of the Rectification Application, the Court can still grant interim injunction against the respondent/ original defendant as the applicant/original plaintiff is the original trademark owner and the documents filed by him clearly show that he is doing the above business from 1987. Further, legal notice issued by the applicant/original plaintiff clearly prove the infringement. In fact, in the reply notice dated 26.02.2013, the respondent/ original defendant wanted to sort out the issues, however, they did not come forward any settlement. Therefore, the applicant/ original plaintiff has no other option but to file a suit in the year 2013. Hence, it is submitted that mere delay in coming to the Court is not a ground to reject the application for grant of injunction.

9. In support of his arguments, the Learned counsel for the applicant/original plaintiff has relied upon the judgment of the High Court of judicature at Delhi reported in **2014 SCC Online Delhi 3243 : 2014 (59) PTC 339 (DEL)(Walter bushness pvt. Ltd. And others v. Miracle Life Sciences and another)** as well as the judgment of the Hon'ble Apex Court reported in **2004 (3) SCC 90 : 2004 (28) PTC 121 (SC) (Midas Hygiene Industries (P) Ltd. v. Sudhir Bhatia and Others)**.

10. Per contra, it is the contention of the learned counsel for the respondent/original defendant that even though the mark is registered in the name of the Micro Labs (p) Ltd., the present suit has been filed by the Micro Labs Limited and the reason for the same has not been explained by the applicant/original plaintiff. Further, it is the contention of the learned counsel for the respondent/ original defendant that though the mark is registered in the name of the Micro Labs (p) ltd., the same is not put in use. Further, the applicant/original plaintiff's mark is "OLAMIN" whereas the respondent/ original defendant mark is "OLMIN". Since the applicant/original plaintiff has picked the mark from the ingredients of the pharmaceutical products, which is prescribed under Section 13 of the Trade mark Act, the respondent/original defendant has rightly filed an application for Rectification.

11. It is the further contention of the learned counsel for the respondent/original defendant that the applicant/ original plaintiff's products are used for

dermatological applications whereas, the respondent/original defendant's products are used for Anti Hyper tension and internal application. The applicant/original plaintiff's products are used for skin diseases and the respondent's/original defendant's products are used for chronic disorder. The applicant/original plaintiff's products is only a shampoo and lotion whereas the respondent/original defendant's are tablet. Overall market size of the product of the applicant/original plaintiff is Rs. 6.6. crores whereas the respondent/original defendant market size is Rs. 413.9 crores. The respondent/ original defendant is the prior user whereas the applicant/ plaintiff trade mark was not put in use.

12. It is submitted by the learned counsel for the respondent/original defendant that originally the applicant/plaintiff filed an application for registration of trade mark "OLAMINE". Only single invoices filed by the plaintiff to show that their product is sold widely. It is the submission of the learned counsel for the respondent/original defendant that the applicant/original plaintiff is aware of the fact that in the year 2011 itself, the respondent/original defendant are selling their products under the trade mark "OLMIN" and in spite of the same, the applicant/plaintiff has sent a legal notice and the same has been suitably replied. Thereafter, the applicant/original plaintiff suddenly filed a suit in the year 2013.

13. The conduct of the applicant/original plaintiff would clearly show that they are issuing groundless threat. Further, no documents whatsoever, filed to show that there is a confusion or deception due to user of trade mark "OLMIN" by the respondent/original defendant. Similarly, no documents have been filed to prove the reputation of the applicant/original plaintiff's trade mark. The respondent/original defendant has also filed for registration of several trademark. There is no resemblance between the two trade marks. No similarity with regard to the pronouncement and appearance and application. The mode of purchase is also different. Hence the learned counsel for the respondent/original defendant prayed for dismissal of the applications.

14. In support of his contention, the learned counsel for the respondent/original defendant has relied upon the judgments reported in **2013 SCC Online Del. 4866 : 2014 (57) PTC 168 (DEL) (Sun Pharmaceutical Industries Limited v. Anglo French Drugs and Industries Limited and another); 2013 (56) PTC 558 (MAD) (DB) (Orchid Chemicals & Pharmaceuticals Ltd., v. Wockhardt Ltd.); 2013 SCC Onine Mad 591 : 2013 (54) PTC 394 (MAD) (Unimed Technologies Ltd., v. M/s. Eyecare Kilitch Limited) 2013 (53) PTC 43 (Mad) (Kivi Labs Limited v. Sun Pharmaceutical Pvt. Ltd.); 2011 (4) ALT 692 (DB) (Trinethra Super Retail Pvt. Ltd., v. Mee Trinetra Trading Pvt. Ltd.); ILR (2007) 1 Delhi 874 : 2007 (34) PTC 469 (Del) (Astrazeneca UK Ltd., v. Orchid Chemicals & Pharmaceuticals Ltd.); 2005 (SCC) Onine (Kar) 528 (Alkem Laboratories Ltd. v. Microlabs Ltd); 2002 (24) PTC 165 (Del) (Sami Khatib**

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v. Seagull Labs (I) Pvt. Ltd.);CDJ 1997 DHC 412 : 1997 (17) PTC 417 (Del) (Cadila Laboratories Ltd. v. Dabour India Ltd.) ; 1996 PTC (16) Delhi (Anjendra Kumar Agarwal v. Kruzer Herbals) and CDJ 2015 MHC 3970 : 2015 (63) PTC 493 (Mad) (Sun Pharma Laboratories Ltd., v. Psycoremedies Ltd.)

15. In the light of the above submissions, now the only point for consideration in these applications is as to whether the applicant/ original plaintiff is entitled for interim injunction for infringement and passing-off as prayed for.

16. From the typed set filed by the applicant/original plaintiff, it is seen that in the year 1987, drug licence was issued to one M/s. Micro Labs (p) ltd., for the product "OLAMIN VAGINAL CREAM". In the legal notice dated 06.02.2013 issued to Eris Therapeutics Pvt. Ltd., and M/s. Eris Lifesciences Pvt. Ltd., it is stated by the applicant/ original plaintiff that recently, they came across that the respondent/defendant adopted the mark, which is similar to the mark of the applicant/original plaintiff. The legal notice issued in the year 2013 shows as if the applicant/original plaintiff is aware of the infringement only in the year 2013. In this regard, it is pertinent to note that the legal notice dated 02.5.2011, which has been filed by the respondent/ original defendant in the typed set of papers, clearly show that the applicant/original plaintiff was aware of the alleged infringement in the year 2011 itself. This notice, which has been sent issued earlier to the Eros Therapeutics P Limited, is not at all mentioned by the applicant/original plaintiff in the subsequent notice issued in the year 2013.

17. Even though the applicant/ original plaintiff's mark "OLAMIN" is a registered mark, the fact remains that the applicant/ original plaintiff's product are only a dermatological product, which is meant for external applications whereas the respondent/ original defendant's products are for internal applications and used for anti hyper tension. The applicant/original plaintiff's drugs are in the form of liquid, lotion and shampoo and the same is packed in bottle whereas the respondent/original defendant's drugs are in the form of Tablet and stripe packed. These facts are also not disputed. The typed set filed by the respondent/ original defendant clearly show that they have also filed application for registration of several trade marks, i.e., OLMIN 10 to 40. The nature of the drugs of the parties clearly show that they are two different products and distinguishing each other and there is no likelihood of confusion arise for the purchasers. These drugs normally sold under the prescription of the medical practitioner. Therefore, there may not be any confusion over the drugs sold.

18. In this regard, it is useful to refer the judgment reported in **2013 SCC On line 4866** cited supra, wherein it is held as follows:

11. Thus, it is aptly laid down that despite the fact that the drugs are sold on the basis of prescription, both the drugs being Schedule H drugs, whether confusion can arise or not has to be tested on the basis of various factors laid

down in Cadila Health Care. In the present case, the two trademarks are OXETOL and EXITOL. Undoubtedly, the word TOL is prefixed by word EXI by the defendants. The active ingredients of the two products are different; as the plaintiff's product has Oxcarbazepine and that of the defendant lactitol. The product of the plaintiff is available in capsule and tablets and that of the defendants is available in syrups or granules. Further, the packaging of both the products shows different word and graphics. The plaintiff's product shows that a man with brain has been created whereas in the case of defendant's product diagram of intestine has been reproduced. Thus, the visual impression of both the products is different. Further, the two drugs are used for totally different purposes; as OXETOL is used as an anti-convulsant for mood stabilizing whereas EXITOL is used as a laxative. The plaintiff had in fact agreed and permitted the defendant to confine the use of trademark EXITOL for the laxatives, however the settlement failed as the plaintiff demanded compensation. This being the position it is thus the admitted case of the plaintiff that it is not deceived/harmed by the trademark EXITOL used by the defendant as a laxative. The adoption of the trademark EXITOL by the defendant cannot be said to be dishonest. It is common knowledge that the medicinal preparations are named after the chemical composition, or the disease they cure, or the organ with which they are related. The strip of tablet of the plaintiff and the sachets/bottle of the defendant show totally different pictures, graphics, etc. Further, the defendant's product EXITOL can be administered only to patients admitted in the hospital and thus it has to be prescribed by trained doctors and administered by trained nurses.

12. Undoubtedly, while deciding the question of infringement this court has to bear in mind that the claim for infringement of the plaintiff is based on its statutory right unlike a case of passing off. While dealing with the trademarks ACICAL and ACUCAL with regard to drugs in **Sun pharmaceutical Industries Ltd. v. West Coast Pharmaceuticals Works Ltd., AIR 2012 Gujarat 142 : 2012 (52) PTC 362 (Guj)** the High Court noted that the user of the two drugs was different, even the relevant material and ingredients were different, the chemical composition was different and so were the mode of taking it, one being a chewable tablet while the other a gulpable tablet. Applying the principal laid down in Cadila Health Care it was held that prima facie there was no such similarity in both the drugs ACUCAL and ACICAL so that the same may cause confusion in the mind of the chemist or the consumer. In **Ranbaxy Laboratories Ltd. v. Intas Pharmaceuticals Ltd. 2011 (47) PTC 433 (Del.)** it was held that if a drug is ordered by hospital, there is no reasonable likelihood that NIFTAS would be passed off as NIFTRAN since the nurses and doctors in the hospital are always in a position to distinguish the drugs not only on account of difference in the name but also on account of packaging, price of the drugs and the form in which they are sold. In **Kalindi Medicure Pvt. Ltd. v. Intas**

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Pharmaceuticals Ltd. 2007 (34) PTC 18 (Del) this Court noted that physicians are also not immune from confusion and mistake, however one product was sold as pill while the other product was sold as intra-muscular injection with huge difference in price. That being the position, the balance of convenience was in favour of the defendant and hence the interim injunction was vacated in case wherein the two drugs were named as LOPRIN and LOPARIN."

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The above judgment is squarely applicable to the facts of the present case as in this case also, both the parties' products are meant for different purposes. The applicant/ original plaintiff's products are only meant for external use and in fact packed in bottle whereas the respondent/original defendant's products are in the form of tablet strip packed. Therefore, there may not be any confusion and deception among general public. It is further to be noted that chemical composition of both the drugs are different and both are sold only on the prescription of the medical practitioner. Therefore, this Court is of the view that there may not be any confusion between two products.

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19. Similarly, in the judgment reported in **2013 (56) PTC 558 (Mad) (DB)**, this Court has held as follows:-

".. ..10. Accordingly, let us apply the facts to the provisions. The records would show that the word METOPROLAL is a chemical component. It is publici juris. There are number of registered Proprietors having the prefix METO. The learned Single Judge has also noted the said fact. Now all of them are identified with the common name, in view of the chemical component. Hence, it is not as if the Respondent has infringed the said word METO. It is already in the public domain, even much prior to the Application of the Appellant. Applying the said facts when we read Section 29 of the Act, we can safely come to the conclusion that the limits on effect of the registered Trade Mark under Section 30 of the Trade Marks Act, 1999, would apply with all force. Therefore, the exclusive right claimed by the Appellant in pursuant to the registration would no longer be available, in view of the fact that the word METO is already publici juris, thereby, giving protection under Section 30 of the Act. When Section 28 of the Act is not applicable, then consequently, Section 29 of the Act also is not applicable. Even otherwise, Section 29 of the Act is subject to Section 30 of the Act. As Section 28 of the Act is also subject to other provisions, it is needless to state that it is also subject to Section 30 of the Act. Therefore, looking from any angle, we have no hesitation in holding that there is no infringement of the Appellant's Trade Mark under Section 29 of the Trade Marks Act, 1999."

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20. In **2013 SCC Online Mad 591**, cited supra this Court has held as follows:-

".. .. 7. In this case, it is to be seen that the word TOBA has been derived from the chemical molecule Tobramycin. Therefore, we can safely conclude that it is generic in nature and publici juris. The appellants have not disputed the

contentions raised by the respondents before the learned single Judge that there are 49 marks found in the Indian trade mark data base, which start that the mark TOBA and 116 marks contained the word TOBA. The learned single Judge took pains to go through the documents filed with reference to the carton and bag of both the products. A factual finding has been given about the dissimilarity in the colour scheme of both carton and the bag. The learned single Judge has also correctly held that there is dissimilarity in the symbols apart from the fact that there is a difference in the price of both the products."

21. In **2012 SCC Online Mad 3763** cited supra , this Court observed as follows:

".. . . . 25. Relying upon the said judgments, learned counsel for the plaintiff submitted that though the defendant had produced a list of products with prefix AMI and suffix XIDE, whether those products are available in the market and if so, whether such of those products are having a reputation or not as that of the plaintiff's product, is a matter of evidence and the same cannot be considered at this stage. Though there is some force in the said submission of the learned counsel for the plaintiff, I find that the products involved in the cases relied upon by the plaintiff are not relating to the drug products. So far as the drug products are concerned, it is a legally acceptable practice to use the letters from the components of the drugs as the name of those products. Hence, the only test that has to be applied is, whether the tradename KIMIXIDE is a patent copy of the trade mark of the plaintiff AMIXIDE or not and whether the usage of trade mark KIMIXIDE would create a confusion in the minds of the consumers. It is an admitted case that the plaintiff company have coined their brand name AMIXIDE from the two chemical components, namely, AMITRIPTYLINE and CHLORDIAZEPOXIDE. The defendant' products also contained the same chemical components but with different quantity. The defendant, by taking letters from their company name KI and by deriving from the letters MI from AMITRIPTYLINE and XIDE from the drug CHLORDIAZEPOXIDE, have coined their brand name KIMIXIDE. It is a common practice to name a pharmaceutical product by taking the letters from the components of the drugs. Therefore, I am of the view that adopting the trade name KIMIXIDE by the defendant would not amount to infringement of the trade mark of the plaintiff. Moreover, the drugs are to be sold only on the prescription of the medical practitioners. Under such circumstances, there is no question of creating confusion in the mind of the public.

The above judgments are applicable to the facts of the present case as in the case on hand also, both the products are sold on the prescription of the medical practitioners. Further, there is dissimilarity in the packing style of both the products, as the applicant/ plaintiff's products are in bottle packed and the respondent/original defendant's products are in strip packed.

22. In **2011 (4) ALT 692 (D.B)**, cited supra, the High Court of Judicature at Andhara Pradesh has held as under:

a 43. The rule of phonetic similarity should not be extended in such a way that words with some consonants of similar dispatch should always be treated as phonetically similar. If such expansion is permitted, it is very difficult. Words change their meanings sometimes by a prefix and sometimes by a suffix. They also change when combined with another word. In determining phonetic similarities, thus the phonetic sequence of the consonants and vowels in a word or
b a compound of words will also be significant, in the context, however, deception of confusion is not over only by eliminating phonetic infringement. In trademark, visual violation is equally important for the obvious reason that all the commodities for sale to all group of people-literate, illiterate. It is visual which causes the real impact.

c 23. In **ILR (2007) 1 Delhi 874** cited supra, the High Court of Judicature at Delhi has held as follows:

d "21. In our considered opinion the facts of the said case are almost similar and squarely applicable to the facts of the present case. 'Meropenem' is the molecule which is used for treatment of bacterial infections. In that view of the matter, the abbreviation 'Mero' became a generic term, is public juris and it is distinctive in nature. Consequently, the appellants / plaintiffs cannot claim exclusive right to the use of 'Mero' as constituent of any trademark. The possibility of deception or confusion is also reduced practically to nil in view of the fact that the medicine is sold only on prescription by dealers. The common feature in both the competing marks i.e. 'Mero' is only descriptive and public juris and, therefore, the
e customers would tend to ignore the common feature and would pay more attention to the uncommon feature. Even if they are expressed as a whole, the two did not have any phonetic similarity to make it objectionable. There are at least four other registered users of the prefix 'Mero' in India whereas the names of 35 companies using 'Mero' trademarks, which have been registered or applied for registration, have been furnished in the pleadings. The respondent/defendant advertised its trademark 'Meromer' after submitting its application for registration and at that stage, there was no opposition even from the appellants/plaintiffs. The trademark of the respondent/defendant was registered there being no opposition from any quarter, including the appellants/plaintiffs.

f 22.... Consequently, the two names, namely 'Meromer' and 'Meronem' are found to be prima facie dissimilar to each other. They are Schedule-H drugs available only on doctor's prescription. The factum that the same are available only on doctor's prescription and not as an over the counter medicine is also relevant and has been rightly taken note of by the learned single Judge. In our considered opinion, where the marks are distinct and the features are found to be dis-similar, they are not likely to create any confusion. It is also admitted by
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the parties that there is a difference in the price of the two products. the very fact that the two pharmaceutical products, one of the appellants/plaintiffs and the other of the respondent/defendant, are being sold at different prices itself ensures that there is no possibility of any deception/confusion, particularly in view of the fact that customer who comes with the intention of purchasing the product of the appellants/plaintiffs would never settle for the product of the respondent/defendant which is priced much lower. It is apparent that the trademarks on the two products, one of the appellants/plaintiffs and the other of the respondent/defendant, are totally dissimilar and different."

24. In **2005 SCC Online Kar 528**, cited supra High court of Karnataka at Bangalore, has held as under:

".. . . 28. In the light of the rival contentions and upon consideration of the material on record, the findings of the Trial Court, in my opinion, are arbitrary and capricious:

- (a) The finding of the Trial Court that the trade name AVAS is coined from the generic name Atorvastatin is established by acceptable documentary evidence and that trademark ATVAS is not established by the production of any plausible documentary evidence is clearly a capricious finding;
- (b) The case of the respondent that it had established a long prior user is again accepted by the Trial Court in the face of the admitted fact that it is only after 25-5-2000 that the respondent has chosen to call its product AVAS for upto that date the name was A-VAS. And further the respondent was permitted to manufacture the product under the name AVAS only from 16-6-2000. And the appellant was permitted to manufacture its product ATVAS on 17-8-2000. The dishonest intention to use a name similar to that of the respondent, to encash on its reputation, is not tenable. The Court has adopted an arbitrary stance. The issue can only be determined after a trial;
- (c) The finding of the Court below that the name and mark coined by the appellant is phonetically and visually similar to that of the respondent, is not entirely correct. The similarities and dissimilarities in packaging, colour scheme and other particulars are not apparently similar. The same is a matter for trial;
- (d) The material on record to indicate that the appellant has itself invested substantial sums of money in promotion and sales of its product and has a substantial volume of sales in the product, cannot be readily attributed to any reputation that the respondent may have developed over the relevant period of time.

25. In **1996 PTC (16)** cited supra, the High Court of Judicature at Delhi has held as follows:

... 25. I am of the view that the principle laid down by the Supreme Court in the above case governs the instant case. The appearance of two boxes and the trade marks thereon look entirely different and there is no phonetic similarity between the two trade marks. A close study of the carton would also show that they are distinct and different and there is no scope for any confusion. The plaintiff can rely upon the registration only if there is any phonetic similarity.

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26. In **2002 (24) PTC 165**, cited supra, High Court of judicature at Delhi, has held as follows:

"... 17. Both the products of the plaintiffs as well as of the defendants are concerned with enzymes. Once it is so, if they use the word near to enzymes and both are to be taken as a medicine, the necessary consequence would be that merely if there is a little phonetic similarity concerning with the word enzymes, it is not enough. Normally a person would purchase product XYMEX or XENEX on a prescription and advice of the doctor. They would know what is to be advised and the patient would know what has to be purchased. The necessary corollary, therefore, would be that it can not be taken that an ordinary person is likely to be deceived or taken stray in the first impression. This conclusion is basically further from the fact that one product is in liquid and the other in capsule form.

... .."

27. Similarly, in **CDJ 1997 DHC 412 : 1997 (17) PTC 417 (Del)** (Delhi High Court) cited supra, it has been held as follows:

... Since the two marks are different as the opening syllables of both the rival marks are completely different and distinct and the two drugs are schedule "h" drugs of a specialised nature which could only be purchased on showing a prescription from a cancer specialist the two competing trade marks appear to be prima facie entirely different and dissimilar.

As held in the above judgments, in the case on hand also, there cannot be any confusion in the mind of the public. Both the trademarks are distinct and different and there is no scope for any confusion. Therefore the above judgments are squarely applicable to the facts of the present case.

28. It is also useful to refer the judgment of this Court reported in **CDJ 2015 MHC 3970** cited supra, where in this Court has held as follows:

"17. But, it is the reply of the learned senior counsel appearing for the plaintiff that since the plaintiff did not have any substantial business in the market, until the initiation of the present proceedings, the plaintiff was not aware of the business of the defendant and the trademark SYZOPIN. Therefore, it is the submission of the learned senior counsel appearing for the plaintiff that the ground of delay and acquiescence raised by the learned counsel for the defendant cannot be accepted.

18. But, on perusal of number of documents produced by the plaintiff itself, particularly medical journals (found in page 235 of the typed set of papers produced on the side of the plaintiff), I find that the plaintiff's trademark SIZOPIN as well as the defendant's trademark SYZOPIN are consistently featuring together since 2008. Therefore, prima facie it appears that the plaintiff ought to have had the knowledge about the presence of the defendant's trademark SYZOPIN for several years. It appears that till the defendant has filed the rectification application, the plaintiff has allowed the defendant to use the trademark SYZOPIN. Therefore, as contended by the learned counsel for the defendant, this is not a case of mere delay alone; this is a case of laches and acquiescence also. Though the plaintiff has denied the knowledge about the presence of the defendant's trademark SYZOPIN till 2014, I am of the opinion that since the evidence on record would show the presence of both the marks of the plaintiff and the defendant for quiet a long period, the question as to whether the plaintiff had the knowledge about the defendant's mark or not, has to be considered only after recording the evidence. In the case of this nature, until and unless the plaintiff establishes by evidence that they are not aware of the presence of the defendant's trademark for several years, they are not entitled for interim injunction. But, in the instant case, the defendant has produced documents viz., copy of the invoices for sale of their products under the mark SYZOPIN since 2002. Hence, in my considered opinion, now, all of a sudden, the defendant cannot be restrained by the plaintiff from using the said mark. Though the plaintiff denies their knowledge about the presence of the defendant's mark, this Court is of the opinion that since plaintiff has approached this Court after 12 years, the plaintiff has to establish their case only at the time of trial. I find prima facie that the case of the plaintiff suffers from not only mere delay, but also laches coupled with acquiescence. Since the defendant has been using the mark SYZOPIN for the past 12 years; if the defendant is restrained from using the said mark, definitely it will affect their business; whereas the plaintiff who has allowed the defendant to use the mark SYZOPIN for the past 12 years, would not suffer any loss, even if the defendant is allowed to use the mark, pending the suit. Therefore, I am of the opinion, the balance of convenience is not in favour of the plaintiff. Hence, the plaintiff is not entitled for injunction. Since the defendant has not denied the case of the plaintiff that both the marks of the plaintiff and the defendant viz., SIZOPIN and SYZOPIN are identical, I am of the opinion that it is not necessary to deal with the other submissions made by the learned senior counsel for the plaintiff. Therefore, only on the ground of laches and acquiescence, the plaintiff is not entitled for the continuation of the interim injunction order."

29. Having regard to the above judgments and also having regard to the nature of the products manufactured by the parties, considering the fact that both the

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a products are based on the different chemical compositions and also the fact that the applicant/ original plaintiff's drugs are meant for external use while the respondent/original defendant's products are for internal use as well as the difference in the packing style, there may not be any confusion for deception. Further, both the products are also sold only under the prescription of medical practitioner.

b 30. It is to be noted that the applicant/ original plaintiff is also aware of the alleged infringement in the month of May 2011 itself. But the suit was filed in the year 2013. The delay in approaching the Court also clearly shows laches on the part of the applicant/original plaintiff.

c 31. Insofar as the judgment reported in **2014 SCC Online Delhi 3243** cited supra, which has been relied on by the learned counsel for the applicant/original plaintiff, is concerned, the same is not applicable to the facts of the present case. In the said judgment, both the marks are deceptively similar and used in relation to same goods it would create confusion and deception. Considering the said aspect, the Hon'ble High Court of Delhi granted interim injunction. But in the case on hand, both the products are not similar and both are different medical composition as well as in packing style. Therefore, the said judgment will not help the applicant/original plaintiff in any way.

d 32. Similarly, in the judgment reported in **2004 3 SCC 90** cited supra, which has also been relied on by the learned counsel for the applicant/original plaintiff, both the products' packing and design having similar colour scheme, get up, background and colour combination apart from similar phrase. Therefore, the Hon'ble Supreme Court has upheld the injunction granted by the lower Court. But in the case on hand, the applicant/original plaintiff's product is in the form of liquid, lotion and shampoo and bottle packed and used for external application whereas the respondent / original defendant's product is in the form of tablet and strip packed and used for internal application. Therefore, the said judgment is not applicable to the facts of the present case.

e f 33. Furthermore, the plea of invalidity of the registration in favour of the applicant/ original plaintiff's trade mark is also pending before the Intellectual Property Appellate Board (IPAB). Hence, this Court is of the view that if injunction is allowed in favour of the applicant/original plaintiff, the same would lead to irreparable loss and hardship to the respondent/original defendant. Therefore, the interim injunction cannot be granted at this stage.

g The captioned applications are dismissed accordingly.
