



2023:DHC:7668



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

+ CS(COMM) 476/2021, I.A. 12699/2021 & I.A. 2201/2023

HIMALAYA WELLNESS COMPANY & ORS. Plaintiffs
Through: Ms. Prachi Agarwal and Ms.
Kanupriya Chawla, Advs.

versus

ABONY HEALTHCARE LIMITED THROUGH ITS
DIRECTORS & ANR. Defendants
Through: Mr. Gagnish Bhatia, Defendant
1 in Person

CORAM:
HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT (O R A L)**17.10.2023**

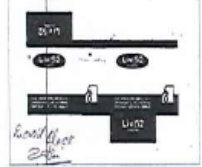

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I.A. 2201/2023 [under Order XXXIX Rule 2A of the CPC]

1. The present suit has been instituted by the plaintiffs, alleging infringement, by the defendants, of the mark LIV.52, which stands registered in favour of Plaintiff 2 *vide* registration number 180564 with effect from 10 July 1957. The following marks of the plaintiff, containing "LIV.52" as a part thereof, stand registered:

S. No.	Trademark	Registration Number	Date of Application	User Date	Class
1.	LIV.52	180564	10.07.1957	Proposed to be used	5
2.	LIV-52 HD (Device)	290061	10.08.1973	Proposed to be used	5



					
3.	LIV.52 (Device)	401959	25.02.1983	Proposed to be used	5
4.	LIV.52 PROTEC	839263	01.02.1999	Proposed to be used	5
5.	LIV-52, Animal feed supplement, (Device of animals) 	1115539	01.07.2002	01.02.2002	5
6.	LIV.52HB	1813135	30.04.2009	Proposed to be used	5

2. The plaint also asserts that the plaintiff has amassed goodwill and reputation over a period of time, in the LIV.52 marks. The sales turnover of products bearing the LIV.52 marks, from 2010-2011 to 2021-22, has been provided. In the year 2021-22 alone, the sales of products bearing the LIV.52 marks of the plaintiff resulted in earnings to the tune of ₹ 209.02 crores. The plaintiff has also incurred huge amounts towards advertisement and promotion of its trademarks, which have also been set out in a tabulated fashion in para 26 of the plaint.

3. It is asserted, in the plaint, that by dint of continuous usage, the LIV.52 marks have become indelibly associated with the plaintiff and have become source identifiers.



4. The plaintiff is aggrieved by the use, by the defendant, of the mark “LIV.55 DS”, for a similar liver tonic, marketed using a trade dress which is deceptively similar to that of the plaintiff. The similarity between the trade dresses of the plaintiffs and defendants’ product becomes apparent from the following photographs:

Plaintiff’s Product	Defendants’ Product
 <p data-bbox="443 1182 635 1205">Liv.52 Vet liquid 110 ml</p> 	 <p data-bbox="954 1473 1114 1496">Liv.55 DS Syrup (225 ml)</p>

5. A bare glance at the trade dress of the plaintiffs and the defendants makes it *ex facie* apparent that the defendant has consciously copied the trade dress of the plaintiff, including the thin



orange border at the top, the central white strip and the green lower half of the bottle/package. The lettering is also similar, in white with similar fonts. Even seen as word marks *per se*, “LIV 52” and “LIV 55” are clearly deceptively similar. To the eyes of a consumer of average intelligence and imperfect recollection, there is every chance of confusion between the marks LIV.55 and LIV.52 especially when both marks are used for liver tonic on bottles and packs which are identical in appearance. The mere fact that the face of the defendants’ product reflects the name of the company Abolab Herbals cannot mitigate, to any substantial degree, the confusion created by the stark similarity between the trade dresses of the defendant and the plaintiff.

6. Lindley, LJ, observed, in *Slazenger & Sons v. Feltham & Co.*¹, thus:

"One must exercise one's common sense, and, if you are driven to the conclusion that what is intended to be done is to deceive if possible, I do not think it is stretching the imagination very much to credit the man with occasional success or possible success. Why should we be astute to say that he cannot succeed in doing that which he is straining every nerve to do?"

7. Kekewich, J. spoke thus, in *Munday v. Carey*²:

"Where you see dishonesty, then even though the similarity were less than it is here, you ought, I think, to pay great attention to the items of similarity, and less to the items of dissimilarity."

¹ (1889) 6 RPC 531

² (1905) RPC 273



8. The principle that applies, where the Court is *prima facie* convinced that the defendant has consciously copied or imitated the plaintiff is, therefore, that the Court is to presume that the plaintiff has succeeded in his attempt at confusing consumers. Additionally, in such cases, the Court is required to concentrate on similarities rather than dissimilarities.

9. The rival packs in the present case speak for themselves. The defendants have clearly adopted a trade dress which is identical to that of the plaintiffs for its LIV.52 product, which include LIV.55 and LIV.55 DS.

10. Even in respect of the product LIV.999 of the defendants, there is no justification for the defendants using the combination of “LIV” with a number thereafter, in the manner in which the plaintiffs have used it, for liver tonics. A consumer of average intelligence and imperfect recollection has every chance of coming to the conclusion that “LIV.999” has, at the very least, an association with “LIV.52”. At first glance, for an untutored consumer, the suggestion that conveys itself is that they are products of one manufacturer, in different strengths, as it is common, in the pharma industry, to suffix the name with different strengths, such as “Azithral 250” and “Azithral 500” or “Crocic 500” and “Crocic 650”. The appearances of the packs are, in such cases, deliberately made dissimilar, so as to avoid any confusion between products of different strengths, and obviate the possibility of a preparation of greater strength taken instead of one of lesser strength, or *vice versa*.



11. Ms. Agarwal has drawn my attention, in this context, to the judgment of a Division Bench in *Himalaya Drug Company v. M/s S.B.L. Ltd.*³, paras 97 and 98 of which read thus:

“97. Once we arrive at the finding that the Liv.52 mark is conclusive in registration without any challenge as per section 32, then the conclusion would be that the use of the expression LIV in isolation is an infringement of the prominent feature of the plaintiff’s registered trade mark. As the defendant is using the mark LIV in isolation, therefore, the defendant is not entitled to use the same. However, we permit the defendant, if so advised, that the defendant may use the mark containing the expression LIV not written in isolation and is accompanied by suffixes, examples of which are given in the written statement i.e. LIVOGEN, Livpar, Livosin, LIVAPLEX, LIVOFIT, LIVA, LIVOL, LIVDRO, LIVAZOL, LIVERITE, LIVERJET, LIVERNUT, LIVERPOL, LIVUP. At this stage, we wish to recall the submission of the Mr. Hemant Singh, learned counsel that the plaintiff that the plaintiff has no objection if the defendant may use the word LIV along with suffixes which may not be visually, phonetically or structurally similar to the trade of the plaintiff.

98. For the aforesaid reasons, we allow the appeal. The judgment and decree dated 3rd June, 2010 is set aside. Suit of the plaintiff with regard to infringement of trade mark is decreed. The defendant is restrained from using the mark LIV as part of its trade mark LIV-T while dealing with the medicinal preparations. Decree be drawn accordingly. Since the present litigation is pending for the last more than 15 years and as of today the infringing mark is being used by the defendant for the last 20 years, the defendant is granted six months time to liquidate its pending stock.”

12. As such, the plaintiffs are entitled to a decree of permanent injunction as sought in the suit for the marks LIV.55 and LIV.999, both in respect of the marks themselves as well as in respect of the trade dress which was being used by Defendant 1 in respect of the said

³ (2013) 53 PTC 1 (DB)



products.

13. Mr. Gagnish Bhatia, who appears for Defendant 1 in person, pleads that the adoption of the trade dress, by him, for the product LIV.55, similar to the trade dress of the plaintiff's LIV.52, was unconscious and not deliberate. He also submits that these products had been designed and developed during the COVID-19 pandemic to cater to various ailments which were befalling persons at that time. He also submits that there has been no sale of these products which were merely put up for sale on various e-commerce websites.

14. Ms. Agarwal, learned Counsel for the plaintiffs disputes this contention and submits that the infringing products were even purchased by the investigators who were engaged by the plaintiff.

15. The aspect of whether the defendants' products were, or were not, sold, is not of particular relevance insofar as the infringement is concerned. Actual sale is not a prerequisite for infringement. If the defendant's mark is deceptively similar to that of the plaintiff, and there is likelihood of confusion, infringement within the meaning of Section 29 of the Trade Marks Act *ipso facto* stands committed. Section 29(2)(b)⁴ clearly applies where the competing marks are

⁴ **29. Infringement of registered trade marks. –**

(2) A registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which because of –

(b) its similarity to the registered trade mark and the identity or similarity of the goods or services covered by such registered trade mark; or



similar, used for similar or identical products and where the similarity between the marks and the similarity or identity of the product or services for which the marks are used, is likely to result in confusion or in the public or the public to believe an association between the marks. These criteria are referred to, by certain decisions, as the triple identity test. Where, in other words, there is congruence of similarity or identity of marks, identity of products or services and availability of the products or services through the same outlets, the Courts have repeatedly held that infringement is found to have taken place. One may refer, in this context, to *Sumeet Research and Holdings Pvt. Ltd. v. Sipra Appliances*⁵, *Living Media India Limited v. Vijayan Madhavan Praveen*⁶ and *Ahmed Oomerbhoy v. Gautam Tank*⁷.

16. In the present case, the marks LIV.55 and LIV.999 are deceptively similar to the mark LIV.52. Both the marks are used for liver tonics. The trade dress adopted by the defendant for its LIV.55 product is nearly identical to the trade dress of the plaintiff, with a thin orange border on the top, and interspersed white band and a lower green half of the bottles/package. The manner in which LIV.52 and LIV.55 are written are also deceptively similar to each other.

17. One cannot forget the fact that these are Ayurvedic preparations. They are not, therefore, allopathic medicines or Scheduled drugs which are prescribed by doctors or for which,

is likely to cause confusion on the part of the public, or which is likely to have an association with the registered trade mark.

⁵ (2018) 76 PTC 620

⁶ 2019 SCC OnLine Del 8180

⁷ (2008) 146 DLT 774 : (2008) 36 PTC 193



generally, doctors' prescriptions are required. These are over the counter preparations, which are often brought by patients without prescription. Given the similarity of the defendants and the plaintiffs' product, there is every likelihood of an unwary consumer purchasing the defendants' LIV.55, believing it to be the plaintiffs' LIV.52 or another product of the plaintiffs. This principle would also apply to LIV.999.

18. As such, the plaintiffs are entitled to a decree of permanent injunction, restraining the defendants from using the marks LIV.55 or LIV.999 or using the trade dress which is deceptively similar to that of the plaintiff.

19. Insofar as the mark LIVA 55 is concerned, Ms. Agarwal submits that the same orange, white and green design has been adopted by the plaintiffs for its product.

20. I need not enter into this dispute, however, as Mr. Bhatia who appears in person submits that he would not be using the LIVA 55 mark, either, unless the plaintiffs allows him to do so. A decree of permanent injunction shall also, therefore, extend to the mark LIVA 55.

21. Ms. Agarwal does not press for damages in the present case. However, she submits that, owing to the adoption, by the defendants, of deceptively similar trademarks and a deceptively similar trade dress, the plaintiffs have unnecessarily been dragged into litigation.



She submits that even prior to the institution of the suit, the plaintiffs had issued legal notices to the defendants on 11 December 2019 and 30 September 2020. In the circumstances, she prays for actual costs.

22. In my view, the prayer is justified. Commercial litigation is not cheap. In view of the fact that the defendant consciously adopted a trademark and trade dress which was deceptively similar to that of the plaintiff, the plaintiff cannot be denied actual costs.

23. As such, the suit is decreed in the following terms:

(i) There shall be a decree of permanent injunction restraining the defendants as well as all others acting on their behalf from using the mark “LIV.55”, “LIVA 55” or “LIV.999” or any other mark which is deceptively similar to the registered trade marks of the plaintiff or using the trade dress which is similar to the trade dress of the plaintiff in respect of its LIV.52 product, either for liver tonics or for any other pharmaceutical preparations or allied goods.

(ii) The prayer for damages is not pressed and is, accordingly, declined.

(iii) However, the plaintiff shall be entitled to actual costs. For this purpose, let the matter be placed before the taxation officer of this Court on 9 November 2023 before whom the plaintiff would produce a statement of costs. The taxation



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officer would work out the actual costs incurred by the plaintiff and allow the same accordingly.

24. The suit stands decreed in the aforesaid terms.

C.HARI SHANKAR, J

OCTOBER 17, 2023

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Click here to check corrigendum, if any