



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

% *Judgment reserved on: 31st May, 2023.*
Judgment delivered on: 12th July, 2023.

+ CS(COMM) 118/2023 & I.A. 4329/2023 (O-XXVI R-4, 9 & 10 of CPC), I.A. 4330/2023 (O-XI R-1(6) of CC Act)

HIMALAYA WELLNESS COMPANY & ORS. Plaintiffs

Through: Mr. Pravin Anand, Ms. Prachi Agarwal, Ms. Mishthi Dubey and Ms. Aditi Srivastava, Advocates.

versus

WIPRO ENTERPRISES PRIVATE LIMITED Defendant

Through: Mr. Akhil Sibal, Senior Advocate, Mr. Ankur Sangal, Mr. Ankit Arvind, Ms. Asavari Jain, Mr. Kiratraj Sadana, Ms. Bahuli Sharma, Advocates.

CORAM:
HON'BLE MR. JUSTICE AMIT BANSAL

JUDGMENT

AMIT BANSAL, J.

I.A. 4328/2023 (O-XXXIX R-1 & 2 of the CPC)

1. By way of the present judgment, I shall decide the captioned application filed on behalf of the plaintiffs under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908 (CPC).
2. The present suit has been filed seeking relief of permanent injunction restraining the defendant from infringing the registered marks of the

Signature Not Verified
Digitally Signed By: AMIT
BANSAL
Signing Date: 12.07.2023
15:22:17



plaintiffs as well as passing off their goods as those of the plaintiffs along with other ancillary reliefs.

3. Summons in the suit and the notice in the interim application were issued on 3rd March, 2023. Parties were also referred for mediation to the Delhi High Court Mediation and Conciliation Centre, however, the mediation proceedings were not successful.

4. Reply to the interim application was filed on behalf of the defendant on 5th April, 2023 and the rejoinder thereto has also been filed by the plaintiffs.

5. Subsequently, the plaintiffs have also filed an application under Section 124 of the Trademarks Act, 1999 for framing an issue regarding the invalidity of the registration granted in favour of the defendant for the mark 'EVECARE' and seeking permission to file a rectification petition for removal of the registration of the said mark from the Trade Marks Register.

CASE SET UP BY THE PLAINTIFFS

6. The case set up by the plaintiffs in the plaint is as follows:

6.1. The plaintiffs have been involved in the manufacture and distribution of ayurvedic medicaments and preparations since 1930. Over the years, the plaintiffs have developed several pharmaceutical grade herbal healthcare products.

6.2. The products offered by the plaintiffs are under various categories such as personal care, pharmaceuticals, nutrition, wellness, animal health and baby care. All the products of the plaintiffs sell under the single umbrella brand, Himalaya, which is the house mark of the plaintiffs.

6.3. Under the house mark, Himalaya, the plaintiffs manufacture and sell an ayurvedic proprietary medicine used as a uterine tonic for women under

Signature Not Verified
Digitally Signed By: AMIT
BANSAL
Signing Date: 12.07.2023
15:22:17



the marks 'EVECARE' and 'EVECARE FORTE'. This product is meant for relieving symptoms of dysfunctional uterine bleeding (irregular menstrual cycle, dysmenorrhea) and to provide uterine health with long term safety.

6.4. The mark 'EVECARE' was adopted by the plaintiffs in the year 1997 and has been in continuous and extensive use by the plaintiffs since 1998. The registration of the mark 'EVECARE' was obtained by the plaintiffs on 2nd December, 1997 on a 'proposed to be used' basis in respect of medical and pharmaceutical preparations in class 5. The plaintiffs are also the registered proprietors of several other 'EVECARE' marks, details of which are given in paragraph 26 of the plaint.

6.5. By virtue of long, continuous and extensive use, the plaintiffs have garnered immense goodwill and reputation in respect of their 'EVECARE' marks.

6.6. The plaintiffs have provided their sales turnover from the year 2012–2013 to 2022–2023 in respect of the products being sold under the 'EVECARE' marks/logos in the paragraph 20 of the plaint.

6.7. The plaintiffs have also provided their advertisement and promotional expenses in respect of the products under the 'EVECARE' marks/logos in paragraph 21 of the plaint.

6.8. The aforesaid products of the plaintiffs are available as over-the-counter products at various neighborhood drug stores/chemists, general stores, as well as the exclusive retail stores of the plaintiffs. The said products of the plaintiffs are also listed on various online platforms like Amazon, Netmeds and the like.

6.9. In November, 2022, the plaintiffs became aware that the defendant has obtained registration of the mark 'EVECARE' in class 3 on 22nd

Signature Not Verified
Digitally Signed By: AMIT
BANSAL
Signing Date: 12.07.2023
15:22:17



November, 2020 on a 'proposed to be used' basis in respect of cosmetic products.

6.10. The plaintiffs issued a cease-and-desist notice dated 23rd November, 2022 to the defendant calling upon the defendant to desist from using the mark 'EVECARE'. The defendant *vide* response dated 6th December, 2022 refused to comply with the demands of the plaintiffs.

6.11. The defendant is using the identical mark 'EVECARE' as the plaintiffs in relation to the products meant to promote female menstrual health, thereby causing confusion in the trade and the public.

Accordingly, the present suit has been filed along with the present application seeking interim injunction.

CASE SET UP BY THE DEFENDANT

7. In the reply filed on behalf of the defendant to the interim application filed by the plaintiffs for grant of interim injunction, it has been pleaded that:

7.1. The defendant company is a part of the Wipro conglomerate that was founded in the year 1945. The defendant company was incorporated as a part of the expansion of the business of Wipro into the market of consumers products.

7.2. The defendant is engaged in the manufacture and sale of various consumer goods such as personal wash products, skin care products toiletries, wellness products. The defendant has provided details of their revenues from the last ten years in paragraph 7 of the plaint.

7.3. In November, 2020, the defendant, towards expansion of its range of hygiene products, ventured into the female hygiene segment and conceived the idea of launching an intimate hygiene wash for women. Since the

Signature Not Verified
Digitally Signed By: AMIT
BANSAL
Signing Date: 12.07.2023
15:22:17



product of the defendant pertains to ‘feminine hygiene’, the defendant adopted the mark ‘EVECARE’, which is a combination of two words, ‘EVE’, representing that it is a female-centric brand and ‘CARE’, to give a protective and caring tone to the brand. Hence, the adoption of the mark ‘EVECARE’ by the defendant was completely *bona fide*.

7.4. The defendant applied for registration of the mark ‘EVECARE’ in class 3 after undertaking a trademark search, which indicated that there was no registration or pending trademark application for the said mark in class 3. Neither did the Trade Marks Registry raise any objection, nor was any opposition filed by any third-party against registration of the said mark by the defendant and hence, the mark of the defendant was registered on 20th May, 2021.

7.5. After securing trademark registration, the defendant obtained registration under the Drugs and Cosmetics Act, 1940 on 8th August, 2021 and thereupon, the defendant started manufacturing and selling products under the mark ‘EVECARE’.

7.6. The defendant has provided its sales turnover of the years 2021–2022 and 2022–2023 as well as promotional expenses in respect of its products under the mark ‘EVECARE’ in paragraphs 15 and 16 respectively.

7.7. On a visual comparison of the two products, the goods of the defendant are completely different in their nature and scope and hence, there is no possibility of confusion. Furthermore, the packaging of the products of the plaintiffs always displays the plaintiffs’ house brand, ‘Himalaya’ in a prominent manner. Therefore, there is no possibility of confusion.

7.8. The plaintiffs’ and the defendant’s trademarks are also registered under different classes under the Nice Classification for completely different

Signature Not Verified
Digitally Signed By: AMIT
BANSAL
Signing Date: 12.07.2023
15:22:17



goods. The plaintiffs' product falls under class 5, which deals with medicinal and pharmaceutical preparations, whereas the defendant's product falls in class 3, which deals with cosmetic products. On various online portals, the products of the plaintiffs and the defendant are available under different categories.

7.9. The present suit is barred by delay and acquiescence.

7.10. In view of the fact that the defendant is a registered proprietor of the impugned mark under class 3 and that the goods of the plaintiffs and the defendant are not similar, no case of infringement is made out against the defendant.

7.11. The plaintiffs have failed to establish any goodwill or reputation in respect of the mark 'EVECARE' and hence, no case of passing off is also made out.

SUBMISSIONS OF THE PLAINTIFFS

8. On behalf of the plaintiffs, the following submissions have been made:

8.1. The plaintiffs are the prior adopters of the mark 'EVECARE' since 1997. The marks 'EVECARE' and 'EVECARE FORTE' were registered for medicinal/pharmaceutical products in class 5 as far back as on 2nd December, 1997. The plaintiffs have been using the said marks since 1998 and have filed invoices to show its user since 1998.

8.2. The defendant filed a trademark application only on 21st November, 2020 for the mark 'EVECARE' on a 'proposed to be used' basis in class 3. Further, the defendant launched its products under the mark 'EVECARE' after obtaining a license on 8th August, 2021.

Signature Not Verified
Digitally Signed By: AMIT
BANSAL
Signing Date: 12.07.2023
15:22:17



8.3. The mark 'EVECARE' is not a dictionary word. Thus, 'EVECARE' is a coined mark of the plaintiffs and is highly distinctive. At best, the mark 'EVECARE' can be considered to be suggestive, but it is not descriptive.

8.4. Even otherwise, due to continuous user of 24 years, the plaintiffs have acquired immense goodwill in respect of its mark 'EVECARE', which is evident from the extensive sales of its product and promotional expenses undertaken by the plaintiffs. Thus, the said mark has become a source identifier of the plaintiffs.

8.5. The adoption of the identical mark by the defendant is dishonest and *mala fide*. The defendant has not even pleaded that they were unaware of the plaintiffs' trademark or that they took a legal opinion before adopting the said mark. The defendant, which is an established FMCG company with abundant resources, ought to have known about the plaintiffs' mark. If only the defendant had conducted a simple web search, the product of the plaintiffs would have come to their knowledge.

8.6. There is a likelihood of confusion between the goods of the plaintiffs and the defendant as the two marks i.e., 'EVECARE' are identical. A lower degree of similarity regarding goods and services is offset by a higher degree of similarity between the two marks.

8.7. The goods of the plaintiffs and defendant are allied and cognate. Even if the goods are in different classes, they may be considered similar. For determining the similarity of the products, the nature and the purpose of the goods has to be considered. In the present case, the products in question of the plaintiffs and defendant pertain to reproductive health and hygiene of women and therefore, there is a likelihood of confusion. Reliance in this regard is placed on the judgments of this Court in *Mayo Foundation for*

Signature Not Verified
Digitally Signed By: AMIT
BANSAL
Signing Date: 12.07.2023
15:22:17



Medical Education and Research v. Bodhisatva Charitable Trust and Others, 2023 SCC Online Del 3241 and *FDC Limited v. Docsuggest Healthcare Services Pvt. Ltd.*, 2017 SCC Online Del 6381.

8.8. The products of the plaintiffs and the defendant are also available for sale on common trade channels, such as chemist shops, online platforms like Amazon and online pharmacies.

8.9. Both the products are ‘hush products’ pertaining to menstrual and reproductive health of women. Therefore, the buyer may exercise less than normal inquisitiveness. Reliance in this regard is placed on the judgment in *Kotabs v. Kotex Co.*, 50 F, 2d 810 (3d Cir.1931).

8.10. In view of the dishonest adoption, the defendant shall not be entitled to the benefit of prior user even in respect of different goods. There is no suppression in the plaint with regard to the date when the plaintiffs came to know about the product of the defendant bearing the identical trademark. There is nothing unusual about the plaintiffs getting to know about the launch of the defendant’s product in November, 2022, which was only about one year after the launch. On the contrary, the defendant ought to have known about the product of the plaintiffs which has been in the market since 1998.

8.11. There is no suppression regarding the plaintiffs selling their intimate wash under the mark ‘HIMALAYA FOR MOMS’. The said intimate wash under the mark Himalaya was launched by the plaintiffs in 2017 and discontinued in October, 2021.

8.12. The AYUSH license for the plaintiffs’ other product ‘All Day Fresh Intimate Wash’ was obtained on 15th June, 2020 and the mark ‘EVECARE’ was adopted in respect of the said intimate wash in August, 2022.

Signature Not Verified
Digitally Signed By: AMIT
BANSAL
Signing Date: 12.07.2023
15:22:17



SUBMISSIONS OF THE DEFENDANT

9. On behalf of the defendant, the following submissions have been made:

9.1. The plaintiffs have suppressed the fact that they were selling an intimate wash under the mark 'HIMALAYA FOR MOMS' since 2017 that was directed at pregnant women. It is only in August, 2022 that the plaintiffs decided to use 'EVECARE' for its intimate wash. This was after the defendant had registered the said mark and started using it in respect of its intimate washes.

9.2. The plaintiffs have wrongly stated that they became aware only in November, 2022 of the defendant selling its intimate wash under the mark 'EVECARE'. The plaintiffs were well aware of the defendant using the mark 'EVECARE' in respect of its intimate wash since 2021. It is hard to believe that the plaintiffs would not be aware of the product of the defendant since it is the case of the plaintiffs that the products of the plaintiffs and the defendant are sold through common trade channels.

9.3. The exclusive rights of the plaintiffs in respect of the mark 'EVECARE' are only in respect of products falling under class 5 and not beyond that. Even the common law rights of the plaintiffs in respect of the mark 'EVECARE' would not extend beyond the Ayurvedic products of the plaintiffs.

9.4. The conduct of the defendant is *bona fide* as the defendant launched its products only after the registration of its mark 'EVECARE' and after obtaining a manufacturing license in respect of the same.

9.5. In view of the fact that the defendant is the registered proprietor of the mark 'EVECARE' in class 3 for its intimate wash, in terms of Section 28(3)

Signature Not Verified
Digitally Signed By: AMIT
BANSAL
Signing Date: 12.07.2023
15:22:17



of the Trade Marks Act, 1999, no infringement action would lie against the defendant. The plaintiffs have failed to make out a case of invalidity of the registration granted in favour of the defendant.

9.6. The test of 'similarity of goods' has to be exercised with caution and circumspection and in a narrow manner so that no monopoly is created in favour of a registered proprietor in respect of a wide category of goods. Reliance in this regard is placed on the judgments in (i) **British Sugar PLC v. James Robertson & Sons Ltd.**, (1996) RPC 281; (ii) **Nandhini Deluxe v. Karnataka Coop. Milk Producers Federation Ltd.**, (2018) 9 SCC 183; (iii) **Vishnudas Trading v. Vazir Sultan Tobacco Co. Ltd.**, (1997) 4 SCC 201; and, (iv) **V Guard Industries v. Crompton Greaves Consumer Electricals**, 2022 SCCOnline Del 1593.

9.7. The nature of the products of the plaintiffs and defendant are different. The product of the plaintiffs is in the nature of Ayurvedic medicine in class 5, whereas the product of the defendant is a cosmetic intimate wash falling under class 3. The differences between the two products are highlighted below:

- (i) The ingredients of both the products are different.
- (ii) The method of use of both the products is different as the product of the plaintiffs is in the form of a tablet/syrup, whereas the product of the defendant is for external use.
- (iii) The product of the defendant is meant to maintain external hygiene, whereas the plaintiffs' medicine is intended to address internal uterine and menstrual health.
- (iv) The product of the defendant purports to externally cleanse without disturbing the natural pH of the body, whereas the plaintiffs' medicine

Signature Not Verified
Digitally Signed By: AMIT
BANSAL
Signing Date: 12.07.2023
15:22:17



is intended to address mensural disorder and promote uterine health.

9.8. In view of the differences discussed above, there is no cause or connection between the two products and there is no likelihood of confusion among the probable consumers. Only the fact that both the products are sold on common e-commerce websites is not sufficient to establish similarity of products as e-commerce platforms carry many dissimilar products. The goods are neither competing, nor complementary and do not have any trade connection with each other.

9.9. The plaintiffs have failed to establish any *prima facie* case of goodwill and reputation for use of the mark 'EVECARE' on a standalone basis. The plaintiffs use the mark 'EVECARE' in conjunction with the use of its house brand 'Himalaya' which is displayed prominently on the products. Further, the products of the defendant are sold in an absolutely different trade dress and the manner of writing 'EVECARE' is totally dissimilar. Therefore, there is no likelihood of confusion and hence, no case of passing off is made out.

10. I have heard the rival contentions as well as perused the material on record.

ANALYSIS AND FINDINGS

11. It is the submission of the defendant that since the defendant is the registered proprietor of 'EVECARE' in class 3, in view of Section 28(3) of the Trade Marks Act, 1999, no infringement action can lie against the defendant unless its registration is declared to be invalid. For ease of reference, Section 28(3) is extracted below:

“28. Rights conferred by registration.—

...

Signature Not Verified
Digitally Signed By: AMIT
BANSAL
Signing Date: 12.07.2023
15:22:17



(3) Where two or more persons are registered proprietors of trade marks, which are identical with or nearly resemble each other, the exclusive right to the use of any of those trade marks shall not (except so far as their respective rights are subject to any conditions or limitations entered on the register) be deemed to have been acquired by any one of those persons as against any other of those persons merely by registration of the trade marks but each of those persons has otherwise the same rights as against other persons (not being registered users using by way of permitted use) as he would have if he were the sole registered proprietor.”

12. It was further submitted on behalf of the defendant that the plaintiffs have not made out any grounds either under Section 9 or Section 11 of the Trade Marks Act, 1999 for the Court to come to any conclusion with regard to *prima facie* invalidity of the registration of the defendant. I find merit in the aforesaid submission of the defendant. The plaintiffs have not made any submissions with regard to invalidity and therefore, at this stage, the Court cannot go into the validity of the registration of the mark in favour of the defendant and a presumption has to be drawn in favour of the registration as per Section 31 of the Trade Marks Act, 1999. Therefore, in my *prima facie* view, a case for infringement cannot be made out at this stage in light of Section 28(3) of the Trade Marks Act.

13. The present suit has been filed by the plaintiffs for infringement as well as for passing off. Section 27(2) of the Trade Marks Act provides that *de hors* the provisions of the Act, an action of passing off would be maintainable. A reference in this regard may be made to the judgment of *S. Syed Mohideen v. P. Sulochana Bai*, 2016 (2) SCC 683, wherein the Supreme Court held that an action for passing off shall remain unaffected by any registration provided under the Trade Marks Act. Therefore, even if the

Signature Not Verified
Digitally Signed By: AMIT
BANSAL
Signing Date: 12.07.2023
15:22:17



marks of the plaintiffs and the defendant are both registered, an action for passing off would still be maintainable.

14. Passing off is an action founded in common law, which is based on the principle that no-one has the right to represent their goods or services as those of someone else. In *Cadila Health Care Ltd v. Cadila Pharmaceuticals Ltd.*, 2001 (5) SCC 73, the essential elements for constituting passing off have been elucidated by the Supreme Court in the following terms:

“10. Under Section 28 of the Trade and Merchandise Marks Act on the registration of a trade mark in Part A or B of the register, a registered proprietor gets an exclusive right to use the trade mark in relation to the goods in respect of which the trade mark is registered and to obtain relief in respect of infringement of the trade mark in the manner provided by the Act. In the case of an unregistered trade mark, Section 27(1) provides that no person shall be entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered trade mark. Sub-section (2) of Section 27 provides that the Act shall not be deemed to affect rights of action against any person for passing off goods as the goods of another person or the remedies in respect thereof. In other words in the case of unregistered trade marks, a passing-off action is maintainable. The passing-off action depends upon the principle that nobody has a right to represent his goods as the goods of somebody. In other words a man is not to sell his goods or services under the pretence that they are those of another person. As per Lord Diplock in Erven Warnink BV v. J. Townend & Sons [(1979) 2 All ER 927] the modern tort of passing off has five elements i.e. (1) a misrepresentation, (2) made by a trader in the course of trade, (3) to prospective customers of his or ultimate consumers of goods or services supplied by him, (4) which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence), and (5) which causes actual damage to a business or goodwill of the trader by

Signature Not Verified
Digitally Signed By: AMIT
BANSAL
Signing Date: 12.07.2023
15:22:17



whom the action is brought or (in a quia timet action) will probably do so.”

(Emphasis Supplied)

15. In *Cadila* (supra), the Supreme Court laid down the following test for determining deceptive similarity:

“35. Broadly stated, in an action for passing-off on the basis of unregistered trade mark generally for deciding the question of deceptive similarity the following factors are to be considered:

(a) The nature of the marks i.e. whether the marks are word marks or label marks or composite marks i.e. both words and label works.

(b) The degree of resemblance between the marks, phonetically similar and hence similar in idea.

(c) The nature of the goods in respect of which they are used as trade marks.

(d) The similarity in the nature, character and performance of the goods of the rival traders.

(e) The class of purchasers who are likely to buy the goods bearing the marks they require, on their education and intelligence and a degree of care they are likely to exercise in purchasing and/or using the goods.

(f) The mode of purchasing the goods or placing orders for the goods.

(g) Any other surrounding circumstances which may be relevant in the extent of dissimilarity between the competing marks.”

16. The principles relating to passing off have also been crystallised by the Supreme Court in *Satyam Infoway v. Siffynet Solution Pvt. Ltd.*, (2004) 6 SCC 145 in the following manner:

“13. The next question is, would the principles of trade mark law and in particular those relating to passing off apply? An action for passing off, as the phrase “passing off” itself suggests, is to restrain the defendant from passing off its goods or services to the public as that of the plaintiff’s. It is an action not only to preserve

Signature Not Verified
Digitally Signed By: AMIT
BANSAL
Signing Date: 12.07.2023
15:22:17



the reputation of the plaintiff but also to safeguard the public. The defendant must have sold its goods or offered its services in a manner which has deceived or would be likely to deceive the public into thinking that the defendant's goods or services are the plaintiff's. The action is normally available to the owner of a distinctive trade mark and the person who, if the word or name is an invented one, invents and uses it. If two trade rivals claim to have individually invented the same mark, then the trader who is able to establish prior user will succeed. The question is, as has been aptly put, who gets these first? It is not essential for the plaintiff to prove long user to establish reputation in a passing-off action. It would depend upon the volume of sales and extent of advertisement.

14. *The second element that must be established by a plaintiff in a passing-off action is misrepresentation by the defendant to the public. The word misrepresentation does not mean that the plaintiff has to prove any mala fide intention on the part of the defendant. Of course, if the misrepresentation is intentional, it might lead to an inference that the reputation of the plaintiff is such that it is worth the defendant's while to cash in on it. An innocent misrepresentation would be relevant only on the question of the ultimate relief which would be granted to the plaintiff [Cadbury Schweppes v. Pub Squash, 1981 RPC 429 : (1981) 1 All ER 213 : (1981) 1 WLR 193 (PC); Erven Warnink v. Townend, 1980 RPC 31 : (1979) 2 All ER 927 : 1979 AC 731 (HL)] . What has to be established is the likelihood of confusion in the minds of the public (the word “public” being understood to mean actual or potential customers or users) that the goods or services offered by the defendant are the goods or the services of the plaintiff. In assessing the likelihood of such confusion the courts must allow for the “imperfect recollection of a person of ordinary memory” [Aristoc v. Rysta, 1945 AC 68 : (1945) 1 All ER 34 (HL)] .*

15. *The third element of a passing-off action is loss or the likelihood of it.”*

(Emphasis Supplied)

Signature Not Verified
Digitally Signed By: AMIT
BANSAL
Signing Date: 12.07.2023
15:22:17



17. In *V-Guard* (supra), relied upon by the defendant, while holding that infringement under Section 29(2) is not made out as the competing goods are not similar, the Court, nevertheless, held that the defendants therein were passing off their goods as those of the plaintiff. The relevant extracts from the judgment are set out below:

“ 56. In the context of passing off, once again a crucial question arises as to why and with what intent the Defendant adopted the word PEBBLE as a part of its mark and the answer in my prima facie view could only be to confuse an unwary purchaser and create an impression that the purchaser is buying the goods of the Plaintiff. Learned counsel for the Plaintiff rightly contended that in the absence of any plausible reason for the Defendant to adopt the word PEBBLE, the only inference that can be drawn is that the intent was to pass off its goods as those of the Plaintiff. Defendant, as claimed in the reply, has an enviable and formidable reputation and does not need to ride over the goodwill of the Plaintiff. If that be so, it intrigues the Court as to why the Defendant adopted the word PEBBLE in addition to its house mark CROMPTON. In this context, I may refer to a few lines from the passage in the case of Thomas Bear and Sons (India) Ltd. v. Prayag Narain, (1941) 58 RPC 25, wherein Lord Langdale observed:

“A man is not to sell his own goods under the pretence that they are the goods of another man; he cannot be permitted to practise such a deception nor to use the means which contribute to that end. He cannot, therefore, be allowed to use names, marks, letters or other indicia, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person.””

18. A reference in this regard may also be made to the judgment of the Gujarat High Court in *Good Life Industries v. J R J Foods Pvt Ltd.*, MANU/GJ/3045/2022. The facts of the aforementioned case are quite

Signature Not Verified
Digitally Signed By: AMIT
BANSAL
Signing Date: 12.07.2023
15:22:17



similar to the facts of the present case. In the aforesaid case, an injunction was denied on the basis that the defendant was the registered proprietor of the mark. However, injunction was granted on the basis of passing off. The relevant extracts with regard to the passing off in *Good Life Industries* (supra) are set out below:

“17. The plaintiff has filed Suit for infringement as well as for passing off action. Even if the defence of the defendant that it being registered owner of the disputed trademark, and therefore, no infringement action would lie against it, is accepted, for the sake of argument, then in that case also, the similarity between the two marks, which is likely to cause confusion in the public at large, can be considered for protecting the right of the plaintiff, under the head of passing off action. Passing of action has its origin, as an action in tort to restrain the wrongful conduct of the defendant in passing off his goods as the goods of the plaintiff. This might be done by using the trade name, trademark or other get-up of the plaintiff so as to induce any potential purchaser the belief that his goods or business were those of the plaintiff's. The tort list in the misrepresentation by the defendant. Mis-representation is aimed at the potential buyers of the goods or the services, who are invited to buy goods believing that the goods are of the plaintiff. This might be done through confusion or deceitful use of the trade name or mark with or other indication used by the plaintiff in respect of such goods or service. The passing off action is to create an actionable wrong based on the border principles of law that nobody has any right to represent his goods or business as the goods or business of somebody else. The principle is that "trading must not only be honest but must not even unintentionally be dis-honest". The purpose of passing off action is to protect commercial goodwill and to ensure that the purchaser are not exploited and dis-honest trading is prevented. For that, the plaintiff must establish that his business or goods have acquired the reputation. Whether the defendants goods are marked with the trademark of the plaintiff or made-up or described as calculated to mislead the ordinary purchaser, it is

Signature Not Verified
Digitally Signed By: AMIT
BANSAL
Signing Date: 12.07.2023
15:22:17



thus tendency to mislead or confuse which forms the gist of passing off action. There is no need to establish fraud or actual deception or actual damages in such cases. In passing off action it is necessary to prove that an ordinary person is likely to buy goods in a belief that the goods are that of plaintiff, though it is not necessary to show that actual sale took place.

18. It is well settled that while considering the likelihood of confusion in the mind of a purchaser, the wisdom of an ordinary person is to be taken into consideration. If an ordinary person exercising ordinary caution is likely to be confused or is likely to be deceived into buying the product of the defendant, believing the same to be originating from the plaintiff, the injunction must follow. Intention to pass off is neither necessary nor is required to be shown. There is no necessity to prove actual damage to the plaintiff. Of course, the plaintiff has to establish that he has build-up good reputation and goodwill on the trademark. The plaintiff has also to establish deception similar so as to cause confusion in the minds of consumer and also likely suffering of substantial damages either to his business financially or to the reputation and goodwill of his trademark.”

19. In *Mother Sparsh Baby Care v. Aayush Gupta and Others*, 2022 SCC OnLine Del 1061, relied upon by the plaintiffs, both the plaintiff and the defendant therein were registered proprietors of the mark ‘Plant Powered’, though the plaintiff was the prior adopter and user. While granting an interim injunction in favour of the plaintiff, the Court observed that both the plaintiff and the defendant were selling the same kind of products and since the plaintiff was the prior adopter and user of the said mark, the defendant’s user of the said mark was not *bona fide*.

20. Applying the principles of passing off as set out in the aforesaid precedents to the facts of the present case, in my *prima facie* view, the plaintiffs have established a case of passing off, for the reasons set out

Signature Not Verified
Digitally Signed By: AMIT
BANSAL
Signing Date: 12.07.2023
15:22:17



hereinafter.

21. The undisputed facts in the present case are that both the plaintiffs and the defendant use the identical trademark, 'EVECARE', in respect of their respective goods. The plaintiffs adopted the mark 'EVECARE' in relation to its Ayurvedic medicines in 1997, whereas the defendant adopted the mark 'EVECARE' in November, 2020 in relation to its 'vaginal wash'. The products of the plaintiffs bearing the aforesaid mark have been in the market since 1998, whereas the product of the defendant was launched around August, 2021.

22. It is intriguing for me as to why a reputed company such as the defendant company would launch its product, also pertaining to female reproductive hygiene, almost 22 years later, using the identical trademark as that of the plaintiffs. A simple due diligence exercise conducted on behalf of the defendant would have informed the defendant about the existence of the product of the plaintiffs with an identical trademark. A google search or a Trade Marks Registry search across various classes would have brought to light the registered mark of the plaintiffs.

23. The reply of the defendant only indicates that the defendant conducted a search only in class 3 and found that there was no other registered mark or pending application in respect of the mark 'EVECARE'. It is not the case of the defendant that they conducted a trademark search and came across the registration of the plaintiffs under class 5 and yet decided to adopt the identical trademark in respect of their product, which was under class 3. Nor is it the case that the defendant took a legal opinion before adopting an identical trademark. The defendant company is not a small-time operator. It is a company with ample resources and surely, with access to legal

Signature Not Verified
Digitally Signed By: AMIT
BANSAL
Signing Date: 12.07.2023
15:22:17



resources.

24. The reply of the defendant is conspicuously silent with regard to its knowledge of the products of the plaintiffs selling under the identical mark. It is difficult to fathom that the defendant was not aware of the use of the trademark 'EVECARE' by the plaintiffs when it decided to launch its product under the same trademark in 2020. While countering the contention of the plaintiffs that the plaintiffs became aware of the defendant's 'EVECARE' product in November 2022, the defendant has argued that the plaintiffs ought to have been aware of the defendant's 'EVECARE' product, which has only been launched 1.5 years back. Applying the same argument, the defendant ought to have been aware of the plaintiffs' 'EVECARE' product that has been in the market for a period of 24 years.

25. As noted in the judgments above, misrepresentation can even be made out in the absence of any *mala fide* intention on the part of the defendant. Further, there is no need to establish fraud or actual deception or actual damage to the business or goodwill of the plaintiff, and a mere likelihood is sufficient. In my considered view, the defendant has failed to provide a plausible explanation for adopting the identical trademark. Accordingly, this Court is of the *prima facie* view that the adoption of the registered trademark of the plaintiffs by the defendant was not *bona fide* and amounts to misrepresentation.

26. Next, what has to be considered is whether the goods of the plaintiffs and the defendant are similar or allied/cognate goods.

27. In ***British Sugar*** (supra), a judgment relied upon by the defendant, the Court has laid down the following tests to be considered for determining whether there is similarity between the goods:

Signature Not Verified
Digitally Signed By: AMIT
BANSAL
Signing Date: 12.07.2023
15:22:17



“(a) *The respective uses of the respective goods or services;*
 (b) *The respective users of the respective goods or services;*
 (c) *The physical nature of the goods or acts of service;*
 (d) *The respective trade channels through which the goods or services reach the market;*
 (e) *In the case of self-serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;*
 (f) *The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.”*

28. The aforesaid tests have been repeatedly applied by Indian courts in various judgments including *FDC* (supra); *V-Guard* (supra) and *Balkrishna Hatcheries v. Nandos International Ltd.*, 2007 SCC OnLine Bom 449.

29. In *Pfizer Ltd v. Eurofood Link (U.K.) Ltd.*, 2001 F.S.R. 3, the Chancery Division of the U.K. High Court laid down the following factors for deciding the similarity of goods or services:

“23. *In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant facts relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their end users and their method of use and whether they are in competition which each other or are complementary.”*

30. In *FDC* (supra), the plaintiff therein used the registered mark ‘Zifi’ for goods falling under class 5 pertaining to pharmaceutical preparations, whereas the defendants used the mark ‘Ziffi’ for booking appointments for doctors, diagnostics and the like. Applying the aforesaid tests laid down in

Signature Not Verified
 Digitally Signed By: AMIT
 BANSAL
 Signing Date: 12.07.2023
 15:22:17



British Sugar (supra), the court came to the conclusion that the products/services of the plaintiff and the defendants therein are allied and cognate and hence, granted an interim injunction in favour of the plaintiff. While coming to the aforesaid conclusion, the court held that the classification of goods and services under Section 7 of the Trade Marks Act is not the criteria for deciding the question of similarity in goods/services. The relevant findings of the Court regarding similarity of the goods as contained in paragraphs 60 and 70 of the judgment are set out below:

“60. As discussed above, goods and services in question, prima facie, appear to be overlapping. A purchaser of plaintiff’s product may also end up booking an appointment with a doctor/spa/salon on the defendants’ platform, and may see plaintiff’s promotional material or find plaintiff’s medicinal products at the same, or another doctor’s clinic or dispensary, or get prescribed plaintiff’s product under the trademark ‘ZIFI’ by the same or some other doctor. This is enough to, prima facie, establish that there is an overlap and linkage in goods and services, as well as the customers of the plaintiff’s product and defendants’ services.

xxx

xxx

xxx

70. The plaintiff’s mark ‘ZIFI’ is being used for medicinal and pharmaceutical products, whereas the defendants’ mark ‘ZIFFI’ is being used to offer services for online booking for spas, salons, doctors, diagnostic etc. through a website and mobile application. The goods and services if taken to be dissimilar, can still be said to be related. Related goods as per McCarthy on Trademarks and Unfair Competition Vol. 5, need not be the same, or in competition with each other, but should satisfy the test of likelihood of confusion as to source, affiliation, connection or sponsorship as amongst the prospective purchasers. As stated above, the marks in question are so similar that a consumer with an imperfect memory and recollection is likely to associate and connect the defendants’ mark with that of the plaintiffs, and vice versa.”

Signature Not Verified
Digitally Signed By: AMIT
BANSAL
Signing Date: 12.07.2023
15:22:17



31. The aforesaid observations in *FDC* (supra) were recently followed by me in *Mayo* (supra), wherein I concluded that the use of the mark ‘Mayo’ by the defendants in relation to ‘hospitals’ and ‘education services in medicine and healthcare’ would amount to infringement of the plaintiff’s registered mark ‘Mayo’ in class 16 in relation to ‘medical journals and periodicals’ as well as passing off. The relevant observations from *Mayo* (supra) are extracted below:

“14. In the present case also, the plaintiff had registration under Class 16. Applying the ratio of the aforesaid judgments to the facts of the present case, in my view, ‘hospitals’ and ‘education services providing courses of instruction in medicine and health care’ would be allied and cognate to ‘medical journals and periodicals’ as all of them relate to the healthcare and medical education sector. Since, the defendants are using identical marks in respect of services that are similar to the services of the plaintiff, it is likely to cause confusion in the public and is also likely to show an association with the registered trademarks of the plaintiff. Therefore, a prima facie case of infringement in terms of Section 29(2)(a) of Trade Marks Act, 1999 is made out.

xxx

xxx

xxx

37. ...On a prima face view, the plaintiffs trademarks have also acquired sufficient reputation and goodwill in India as is evidenced from 33 crore sessions by Indian users on the plaintiffs website, www.mayoclinic.org and over 10 lakh sessions by Indian users on the plaintiff’s website, www.mayo.edu. Various news and health reports of the plaintiff have been regularly published and cited in Indian newspapers, magazines and online publications. Clearly, the adoption by the defendants of an identical trademark in relation to identical services was an attempt to ride on the goodwill and reputation of the plaintiff. Therefore, a prima face case of passing off has been made out by the plaintiff.”

32. In *Corn Products Refining Co. v. Shangrila Food Products Ltd.*, AIR 1960 SC 142, the Supreme Court held that if a trade connection can be

Signature Not Verified
Digitally Signed By: AMIT
BANSAL
Signing Date: 12.07.2023
15:22:17



established between the two commodities having similar trademarks, there is likelihood of confusion or deception in the market. In the said case, the Supreme Court held that there was a trade connection between glucose manufactured by the appellant and biscuits manufactured by the respondent.

33. Applying the aforesaid principles to the facts of the present case, I am of the considered view that the goods of the defendant are similar and allied/cognate to the goods of the plaintiffs. In arriving at the aforesaid finding, the following factors weigh with this Court:

- (i) Both the goods of the plaintiffs and the defendant are targeted at the same set of consumers, i.e., women.
- (ii) The function of both the products is similar i.e., to maintain a healthy female reproductive system with uterine and vaginal care being the focus. The main purpose of the uterine tonic of the plaintiffs is to increase the level of oestrogen causing growth of commensal bacteria, which in turn results in lowering or maintaining of pH levels between 3.5 to 4.5. This is the optimum pH level required for a healthy vagina. The function of the defendant's vaginal wash is also to maintain balanced pH, besides maintaining sanitation and hygiene. In fact, the defendant's products state on its packaging, "*in order to maintain microflora balance in the feminine area, washing with the product like 'EVECARE' that has pH 3.5 is recommended*".
- (iii) Both the products can be taken at the same time so as to achieve better results and are hence, complimentary to each other.
- (iv) The trade channels of both the products are same - both the products are sold by chemists as well as online pharmacies. The products of the plaintiffs, even though in the nature of a medicine, do not require a

Signature Not Verified
Digitally Signed By: AMIT
BANSAL
Signing Date: 12.07.2023
15:22:17



doctor's prescription and can be freely bought and sold as over-the-counter products.

- (v) The products of both the plaintiffs and defendant are sold by online pharmacies under a common category on their websites i.e., 'Women Care'. Reference in this regard may be made to page numbers 165–169 and 194–203 of the documents filed with the plaint on behalf of the plaintiffs, which are extracts from the website of 'TATA 1mg' where the products of the plaintiffs and the defendant are sold under the common category of 'Women Care'.
- (vi) When a prospective consumer would search for 'EVECARE' on various third-party e-commerce platforms, such as 'Amazon', 'Netmeds' and 'TATA 1mg', both the products of the plaintiffs and the defendant would show up, which is likely to cause confusion. Reference in this regard may be made to page numbers 144–146 of the documents filed with the plaint and page numbers 11–16 of the documents filed with the rejoinder by the plaintiffs, which are extracts from the aforesaid websites.
- (vii) A perusal of the screenshots of third-party websites filed by the plaintiffs clearly shows that the prices at which the two products are sold are similar. Reference in this regard may be made to the extracts from the website 'Netmeds' and 'TATA 1mg' on page numbers 11–16 of the documents filed with the rejoinder by the plaintiffs and the extracts from 'Amazon' on page numbers 144–146 of the documents filed with the plaint.
- (viii) There are common manufacturers for both the products, such as 'Piramal', 'Rapross' and the plaintiffs, who manufacture both, the

Signature Not Verified
Digitally Signed By: AMIT
BANSAL
Signing Date: 12.07.2023
15:22:17



medicine as well as the intimate wash. Reference in this regard may be made to page numbers 90–136 of the documents filed with the rejoinder by the plaintiffs.

34. The defendant has pointed out the following differences between its product and the product of the plaintiffs:

- (i) The product of the plaintiffs is in the nature of a medicine, whereas the product of the defendant is a cosmetic product. Hence, the two fall under different classes.
- (ii) The product of the defendant is for topical application, whereas the product of the plaintiffs is in the nature of a tablet/syrup.
- (iii) The product of the defendant is directed towards maintaining hygiene, whereas the product of the plaintiffs is directed towards treatment of menstrual disorder.
- (iv) The products of the plaintiffs and the defendant are available under different product categories in online pharmacies.

35. In my considered view, the aforesaid differences are not material and are unlikely to weigh in the mind of a customer with average intelligence and imperfect recollection while making the purchase. Since the products bear identical trademarks in relation to similar goods, a consumer who comes across both the product of the plaintiffs and the product of the defendant at the same time is likely to get confused and also associate the product of the defendant with that of the plaintiffs or vice versa. Therefore, in my *prima facie* view, this would cause likelihood of confusion in the minds of prospective consumers of the products.

36. Insofar as the contention of the defendant that the two products fall in different classes i.e., class 3 and class 5, it may be relevant to note that under

Signature Not Verified
Digitally Signed By: AMIT
BANSAL
Signing Date: 12.07.2023
15:22:17



the Nice classification, 'vaginal washes' are specifically included under both class 3 and class 5, even though they are qualified with the words 'for medicinal purpose' in class 5 and the words 'for personal sanitary and deodorant purpose' in class 3.

37. The words 'Eve' and 'Care' by themselves are dictionary words and may be considered to be descriptive. However, the plaintiffs have cited various dictionaries to highlight that 'EVE CARE' is not a dictionary word and hence, cannot be considered to be a descriptive word. At the highest, 'EVE CARE' is a suggestive term and hence, would be entitled to a high level of protection. This view is fortified by the fact that the defendant itself has obtained registration of the mark 'EVE CARE'.

38. Even otherwise, the plaintiffs have been using the said trademark for a period of 24 years and such long usage has, in my *prima facie* view, resulted in the plaintiffs acquiring goodwill and reputation in the mark 'EVE CARE'. The plaintiffs have provided their sales figures as well as the promotional expenses over the past ten years. Between 2012 and 2020, the plaintiffs had sales of around Rs.150 Crores in respect of the products selling under the trademark 'EVE CARE' and incurred promotional expenses of Rs.1.25 Crores in the said period. The popularity of the products of the plaintiffs is evident from a simple Google search for the term 'EVE CARE', which shows only the products of the plaintiffs in the first two pages of the search results.

39. Therefore, in my *prima facie* view, the use by the defendant of the identical mark would not only cause injury to the goodwill and reputation of the plaintiffs but is also likely to cause confusion and deception in the market.

Signature Not Verified
Digitally Signed By: AMIT
BANSAL
Signing Date: 12.07.2023
15:22:17



40. In the present case, an added factor for likelihood of confusion is the inherent nature of the goods. As discussed above, the products of the plaintiffs and the defendant pertain to menstrual and reproductive health of women and would therefore, fall in the category of 'hush products'. A prospective buyer of these kind of products is unlikely to ask too many questions about the product before purchasing the same. The topic of menstrual hygiene/health is, unfortunately, still not a subject matter of open and free discussion. In this regard, the plaintiffs have correctly placed reliance on the judgment of the United States Court of Appeals in *Kotabs* (supra). In the said case, the plaintiff used the registered trademark 'Kotex' in respect of sanitary pads, whereas the defendant used the same trademark subsequently in respect of medicinal tablets used for relieving menstrual pain. The court, while noting that the product of the plaintiff was in the nature of a medical appliance, whereas the product of the defendant was a medicine, observed that both the products of the plaintiff and the defendant are used for the same physical ailments and hence, are related products. The court also noted that the woman in this incident is not a 'casual purchaser' but is an 'exceptional purchaser', who would hesitate to make enquiries about the product and its origin. In view of the above, it was held that this would likely cause confusion in the mind of a purchaser who may think that the defendant's medicine is made by the plaintiff.

41. I do not find merit in the submission of the defendant that because the plaintiffs use their house-mark, 'Himalaya' along with trademark 'EVECARE', it would eliminate confusion. In today's times, when most products are purchased online, the search on e-commerce platforms is usually done through the trademark and therefore, in such cases, the house

Signature Not Verified
Digitally Signed By: AMIT
BANSAL
Signing Date: 12.07.2023
15:22:17



mark would not be of much relevance. In this regard, reference may be made to *Mother Sparsh* (supra), where a Co-ordinate Bench of this Court rejected the submission of the defendant that a house mark can be the distinguishing factor between the two parties by holding that when a search is conducted for a product on any e-commerce platform, it would automatically throw up the results of the products of the plaintiff and the defendant, which was not desirable.

42. Undoubtedly, the plaintiffs sell their various products under their umbrella brand 'Himalaya', however the plaintiffs also use various other marks in respect of their various categories of products along with their house-mark 'Himalaya'. The word 'EVECARE' is a separate registered mark of the plaintiffs and in the products of the plaintiffs, it occurs separately and distinctively from its house mark. In other words, the mark 'Himalaya' and the mark 'EVECARE' are not written together but occur separately on the product. Therefore, I do not find merit in the submission of the defendant that the use of the house-mark 'Himalaya' would distinguish the goods of the plaintiffs.

43. The defendant has also contended that it uses the mark in a different style, get-up, packaging, and the other writing or marks on the goods or on the packets are different or indicate a different trade origin. However, where an identical trademark of the plaintiff has been adopted by the defendant, the aforementioned factors would be immaterial. Reference in this regard may be made to the judgment in *Kaviraj Pandit Durga Dutt Sharma v. Navaratna Pharmaceutical*, AIR 1965 SC 980, which was followed by me in *Mayo* (supra).

Signature Not Verified
Digitally Signed By: AMIT
BANSAL
Signing Date: 12.07.2023
15:22:17



44. Now, I will deal with the judgments cited on behalf of the defendant. The senior counsel for the defendant has placed reliance on the judgment in *Nandhini Deluxe* (supra) and *Vishnu Das Trading* (supra) in support of his contention that registered proprietors of a mark should not be allowed to monopolise the said mark in respect of distinct products which are not related to the products of the registered proprietor.

45. In *Nandhini Deluxe* (supra), the nature of the business of the parties was totally different. The appellant was in the business of running restaurants, whereas the respondent was dealing with milk and milk products. The Court also noted that the mark 'Nandini'/'Nandhini' was a generic term as it represented the name of a goddess and a cow in Hindu mythology and hence, was not an invented or a coined word. Further, though there was a phonetic similarity in the marks, the trademark with the logos adopted by the parties were quite different. Another factor that weighed with the Court was that even though the respondent was a prior user in 1985, the appellant also started using the mark in the year 1989 and had already used the mark for 12/13 years before applying for registration. All the aforesaid factors are enough to distinguish the aforesaid judgment from the facts of the present case.

46. In the case of *Vishnudas* (supra), the respondent was involved in the business of manufacture and sale of cigarettes and in 1955, had got its mark 'Charminar' registered under class 34 i.e., 'Manufactured Tobacco'. The appellant had been manufacturing and selling 'quiwam' and 'zarda' under its trade name 'Charminar' since 1973. The registration of the appellant's mark was objected to by the respondent since both the products fell in the same class 34, 'Manufactured Tobacco'. On appeal, the Supreme Court held that

Signature Not Verified
Digitally Signed By: AMIT
BANSAL
Signing Date: 12.07.2023
15:22:17



though the two products fell in the same class, they are distinct from one another in their use and characteristics. It also held that since the respondent did not intend to sell 'quiwam' and 'zarda', it could not have claimed monopoly over the same. In the present case, the products of the plaintiffs and the defendant have similar use and function. Further, the plaintiffs have also launched an intimate wash under the mark 'EVECARE'. Moreover, the Supreme Court in *Vishnudas* (supra) was only concerned with the propriety and validity of the order of rectification of the registration of trademark and was not dealing with the issue of infringement of trademarks and passing off. Therefore, *Vishnudas* (supra) would not come in aid of the defendant in any manner.

47. Similarly, in *Mittal Electronics v. Sujata Home Appliances*, 2020 SCC OnLine Del 2658, the Court noted that the products of the plaintiff (mixers, grinders, blenders) and the products of the defendant (water filters, water purifiers and RO systems) are different goods used for different purposes. Further, the defendant had been using the trademark in question for a long period of time. In the present case, as discussed above, the products of the plaintiffs and the defendant are used for similar purposes. Hence, the aforesaid judgment is of no assistance to the defendant.

48. In *V Guard Industries* (supra), both the plaintiff and the defendant were using an identical mark 'pebble' in respect of their respective goods. While the plaintiff used the said mark for water heaters, the defendant used the same for electric irons. The Court held that the two products are not similar as they are dissimilar in their physical nature, their intended purpose and their method of use. Therefore, the said judgment does not advance the case of the defendant.

Signature Not Verified
Digitally Signed By: AMIT
BANSAL
Signing Date: 12.07.2023
15:22:17



49. In *Kalindi Medicure Pvt. Ltd. v. Intas Pharmaceuticals Ltd. And Ors.*, 2006 SCC OnLine Del 1166, the factors that weighed with the Court in not granting injunction was that one of the drugs, 'Loprin' was an 'anti-platelet drug' that prevented coagulation, to be used for a long period of time, whereas the other drug 'Loparin' was a critical care medicine used as an anti-coagulation in emergency, normally used in the intensive coronary care unit. Further, one of the two drugs was 52 times more costlier than the other. Consequently, the judgment in *Kalindi Medicure* (supra) also does not advance the case of the defendant.

50. The defendant has contended that the plaintiffs were aware of the use of the mark 'EVECARE' by the defendant much before the date given in the plaint, i.e., November, 2022 and have suppressed the said fact. Therefore, the present suit has been filed belatedly.

51. Admittedly, the earliest user of the impugned mark by the defendant was after August, 2021 when they received the regulatory approvals in respect of its product. It is unlikely that the plaintiffs would immediately come to know of the launch of the impugned product by the defendant. The plaintiffs claim knowledge from November, 2022, which is not too far removed from the date of launch of the product of the defendant. Immediately upon coming to know, a cease-and-desist notice was sent by the plaintiffs to the defendant on 23rd November, 2022. Since the defendant failed to comply with the said notice, the present suit was filed in February, 2023. Therefore, in my view, there is no significant delay on the part of the plaintiffs in filing the present suit so as to deny the relief of interim injunction.

Signature Not Verified
Digitally Signed By: AMIT
BANSAL
Signing Date: 12.07.2023
15:22:17



52. It has also been vehemently contended on behalf of the defendant that the plaintiffs have suppressed the fact that they were already selling an intimate wash under the trademark 'Himalaya'. The plaintiffs have explained that though the plaintiffs had launched an intimate wash under the mark 'Himalaya' in July, 2017, the same was discontinued in October, 2021. On 15th June, 2020, the plaintiffs applied for an AYUSH license in respect of an '*All Day Fresh Intimate Wash*' and decided to launch the same in August, 2022, under the mark 'EVECARE'.

53. Plaintiffs have already obtained licenses from the Department of AYUSH on 15th June, 2020 regarding the launch of a vaginal wash. Further, the plaintiffs have applied for approval of additional branding for the intimate wash product on 29th November, 2022, which has already received the approval of the Department of AYUSH.

54. In my considered view, it is not a case of material suppression as sought to be made out by the defendant. It was the legitimate right of the plaintiffs to expand their business and venture into related products using their registered trademark. This aspect has been recognized by a Co-ordinate Bench of this Court in *Somany Ceramics Ltd. v. Shri Ganesh Electric Co.*, 2022 SCC OnLine Del 3270. The relevant paragraphs of the said judgment are set out below:

"61. Pertinent it is to mention, at this stage, that while the Plaintiff started its business in ceramics tiles, it subsequently expanded into sanitaryware and bath fittings and obtained registrations in Class 11 on 05.01.2007. Later, Plaintiff also expanded its business into selling water heaters/geysers and obtained registration on 31.07.2018. This fact is important in the context of the judgment of the Supreme Court in Laxmikant (supra), where it was held that Courts have to be mindful of

Signature Not Verified
Digitally Signed By: AMIT
BANSAL
Signing Date: 12.07.2023
15:22:17



future expansion of the business of a proprietor of a trademark. Plaintiff is right in its contention that merely because a trademark registration is applied for in a particular class, the proprietor is forever bound to sell only those goods. Law recognises the expansion of business into similar or cognate or allied goods and this factor is relevant for determination of a claim for passing off.”

(Emphasis Supplied)

55. The judgment in *Somany Ceramics* (supra) was followed by me in *KRBL Limited v. Vikram Roller Flour Mills Limited*, 2023 SCC OnLine Del 219 as well. Therefore, I do not find any merit in the plea of suppression taken on behalf of the defendant.

CONCLUSION

56. In view of the discussion above, a *prima facie* case of passing off is made out on behalf of the plaintiffs. The balance of convenience is also in favour of plaintiffs and against the defendant inasmuch as the product of the defendant has been launched only about 1.5 years back and has limited sales. On the other hand, the product of the plaintiffs has been in the market for 24 years and has significant sales. Irreparable harm would be caused not only to the plaintiffs but also to the public if an injunction as sought is not granted in favour of the plaintiffs.

57. Accordingly, the defendant, its directors, partners, officers, servants and agents, distributors, wholesalers, dealers, retailers or any other person acting for and on their behalf are restrained from manufacturing, selling, offering for sale, advertising, directly or indirectly dealing in any manner with regard to any products and services, including but not limited to their female hygiene and menstrual health product under the mark ‘EVECARE’

Signature Not Verified
Digitally Signed By: AMIT
BANSAL
Signing Date: 12.07.2023
15:22:17



and/or any other mark which is deceptively similar to the plaintiffs' registered 'EVECARE' mark till the final adjudication of the suit.

58. Needless to state, any observations made herein are only for the purposes of adjudication of the present application and would have no bearing on the final outcome of the suit.

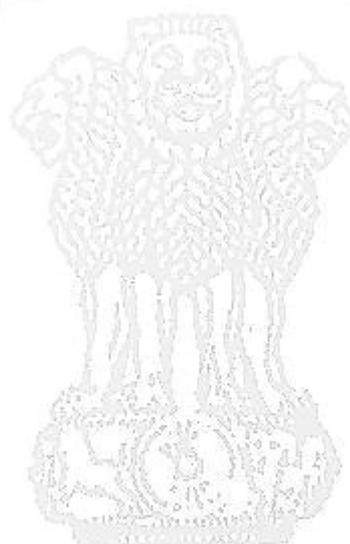
59. The present application stands disposed of in above terms.

JULY 12, 2023

rt

AMIT BANSAL, J.

HIGH COURT OF DELHI



सात्यमेव जयते

Signature Not Verified

Digitally Signed By: AMIT
BANSAL
Signing Date: 12.07.2023
15:22:17