

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****APPEAL FROM ORDER NO. 167 of 2013****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE S.G.SHAH**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
  - 2 To be referred to the Reporter or not ?
  - 3 Whether their Lordships wish to see the fair copy of the judgment ?
  - 4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?
  - 5 Whether it is to be circulated to the civil judge ?
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G.M.BELL HEALTH CARE PVT.LTD.....Appellant(s)

Versus

UNIVERSAL SKIN IMPEX PVT. LTD.....Respondent(s)

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Appearance:

MR FB BRAHMBHATT, ADVOCATE for the Appellant(s) No. 1

MR ARPIT A KAPADIA, ADVOCATE for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE S.G.SHAH**

**Date : 30/11/2013****CAV JUDGMENT**

The appellant is original plaintiff whose application for interim relief in suit for infringement of copyright and passing off has been dismissed by the trial Court vide impugned judgment and order dated

16.3.2013 in R.C.S No.2 of 2012. Such impugned judgment and order is by Principal District Judge of Ahmedabad (Rural). The sum and substance of appellant's case is to the effect that he owns the copyright of product in question, namely, COLBET GM, Fungdid B, Fungdid, Qualidrim, Micozole – F, Enac Excel Gel, Enac Gel. It is the case of the appellant that in view of assignment deed by original user since long, namely, M/s.Universal Impex Ltd., they acquired the ownership of such trademark and, therefore, nobody can be allowed to use such trademark and product name for same product with similar and deceptive nature and style of writing and packing.

2. Whereas, it is the case of the defendant that the name of the product is generic drug and pursuant to order dated 6.7.2007 in notice of motion No.1817 of 2007 in Suit No.1342 of 2007, the plaintiff is not entitled to use the trademark in question since assignment deed executed by one of the partner is under challenge before the Bombay High Court. It cannot be ignored that there is multiplicity of proceedings in different names for the same product and, therefore, atleast one another appeal from order No.348 of 2010 was also heard and decided by this Court today itself. It cannot be ignored that both these matters were kept together since one of the litigant is common and product under dispute is also common in both the appeals, though original defendant in both the appeals are different. It is also not disputed that initially the trademark in question was owned by Universal Impex, which had assigned it against consideration of the present appellant – plaintiff in the year 2005. It is also not disputed that present defendant has came in existence after the year 2007 and, therefore, in any manner it cannot be said that they were using such trade name in similar or deceptive manner well before it is used by the appellant – plaintiff. Therefore, the only issue remains is regarding nature of the trademark. The learned trial Judge has though referred the previous litigation, it has failed to appreciate that when in

previous litigation, interim relief was granted in favour of the present plaintiff, though it was stated in Appeal from Order No.348 of 2010, it was mainly on the ground of right of the party and not on the ground of nature of the trademark. Therefore, basically, it is crystal clear that though the appellant – plaintiff has purchased the trademark against consideration by assignment deed in the year 2005, someone or several persons are trying to take disadvantage of the judicial process and litigation pending between some parties and thereby different firms like Universal Pharma and present defendant like Universal Skin Impex Pvt.Ltd. are created after the year 2007 have started to infringe the copyright which was otherwise assigned to the appellant – plaintiff and being used by appellant – plaintiff atleast since the year 2005.

3. For better clarity of the dispute, observation and conclusion in A.O. No.348 of 2013 in favour of present appellant are relevant. Hence, it is reproduced hereunder, which categorically confirms the rights of appellant over the trademarks under reference.

“3. Though the trial Court has granted an injunction in favour of the plaintiff after hearing both the parties, by an order dated 26.11.2010 such order of injunction has been stayed by this Court and such stay is in force till date. Thereby, plaintiff is not in a position to restrain the defendant from continuing the infringement of copyright of the product name, which is otherwise in its favour.

4. Coming to the factual details and dispute between the parties, after argument of both the sides and on perusal of record, it becomes clear that the dispute rests in very narrow compass and, therefore, minor facts and details are not relevant at this stage of deciding appeal against the interim order of injunction, when main suit is yet to be decided, wherein both the parties would have ample and sufficient opportunity to adduce proper evidence to prove their case for final determination of the dispute amongst them.

5. The record shows that initially there was one partnership firm, namely, Universal Impex which was manufacturing certain medicines including medicines which are in dispute in present litigation since 1998. It is not disputed that such Universal Impex was having registration in its favour for several medicines so far as brand name, trade name, product name etc. are concerned. It is also not disputed that the product in reference and question in the present litigation was being manufactured by such Universal Impex for couple of decades. However, some of such product was registered with the competent authority whereas some of them were not registered at relevant time. It is also not disputed that initially partners of such partnership firm were family members, amongst them at present we are concerned with name of two partners, who are real brothers, namely, Satish Kantilal Mehta and Jayesh Kantilal Mehta. It is also not disputed that the plaintiff company was established by several persons including Jayesh Kantilal Mehta. It is also not disputed that in turn Jayesh Kantilal Mehta has entered into an agreement of assignment of certain product in favour of present plaintiff company. Such deed of assignment was signed and executed on 4.10.2005 wherein it is categorically stated on behalf of M/s.Universal Impex as assignor in favour of present plaintiff company that in consideration of a sum of Rs.5 Lacs paid by the assignee i.e. present plaintiff to the assignor i.e. Universal Impex, the assignor assigns, transfer, grant, convey and assure absolute right, title and interest forever in all and each of the trademark including common law rights together with the goodwill and benefits attached to the business related to the trademark under reference for the exclusive benefit of the assignee. The assignor has further undertaken to do, execute and perform all further and other acts, deeds, matters and things and documents or writing as may be reasonable and necessary, appropriate or desirable for absolutely vesting of full right, title, benefit and interest on property in and each of the trademark in favour of the assignee. It is submitted that Mr.Jayesh Kantilal Mehta has signed such a deed for and on behalf of M/s.Universal Impex in presence of two witnesses in favour of the plaintiff. It is the case of the plaintiff that since then i.e. since 2005, plaintiff is enjoying such trademark for their product. However, Satish Kantilal Mehta has filed one suit being Suit No.1342 of 2007 before the Original Civil Jurisdiction of the High Court of Judicature at Bombay for declaration that the assignment deed

dated 4.10.2005 is void, illegal, non-est and of no consequence and not binding upon him. In the same suit, said Satish Kantilal Mehta in his personal capacity has also prayed to restrain his brother Jayesh Kantilal Mehta as well as present plaintiff and its Directors by perpetuate order of injunction from using in any manner the trademarks reference with other ancillary reliefs with reference to trademarks under reference as well as deed of assignment dated 4.10.2005. In such civil suit, the High Court of Bombay has, in its Original Civil Jurisdiction, while deciding the application for injunction on July 6, 2007 granted ad-interim relief in relation to the “registered trademark only”. Thereby, though ad-interim relief in terms of prayer clause B(i) and B(iv) was granted, it was granted for limited product i.e. only for registered trademarks and not for all the products which are referred or listed either in the pleading or in the prayer clause of such suit before the Bombay High Court. It seems that therefore plaintiff and Jayesh Kantilal Mehta, the assignor in assignment deed dated 4.10.2005, had utilised the trade name and in the same manner for their product considering tis assignment in their favour, mainly because of the fact that those trade names were not registered in the name of Universal Impex and thereby according to them it was not covered under the injunction issued by the Bombay High Court in above referred proceedings. In turn, Satish Kantilal Mehta has preferred an application for disobedience of Court’s order i.e. contempt of Court before the Bombay High Court. However, while passing the order below such an application for contempt/disobedience of the Court’s order on 14.8.2008, Bombay High Court has categorically reconfirmed that its initial order granting injunction was limited for the “registered trade mark only” and not for all the products which were referred in the complaint before it. While dismissing such notice of motion No.974 of 2008 in Suit No.1342 of 2007, the Bombay High Court has on its Original Civil Jurisdiction, in paragraph 12, categorically stated that the plaintiff (plaintiff of Suit before the High Court), namely, Jayesh Kantilal Mehta got a limited relief in respect of only registered trademark as a relief prayed for by him were not pressed by him for unregistered trademark and/or trade name, hence, the same was not granted. So far as breach of injunction order by present plaintiff being defendant no.3 before the Bombay High Court is concerned, it is specifically stated in paragraph 11 that though the notice of motion is pressed against defendant no.3 also, it is seen that apart from the aforesaid

products marketed by defendant no.3, no other act against the defendant no.3 is shown. Therefore, marketing of any product under reference which was also subject matter in such notice of motion was not considered as breach of injunction against use of such trade and product name by the plaintiff, even after filing of a suit by Satish Kantilal Mehta to declare the assignment deed as null and void. Therefore, to that extent, assignment deed for unregistered trademark be said to be null and void unless and until Suit No.1342 of 2007 is finally decided by the Bombay High Court where the main issue is regarding the validity and legality of such assignment deed and it is declared as null and void.

6. In the present case, the present plaintiff is claiming his right to utilise the trade and product name under reference as its trademark, mainly because of such assignment deed and because of their application for registration which is under process. However, surprisingly at present Satish Kantilal Mehta or his company Universal Impex are not in picture, but brother of Satish Kantilal Mehta, namely, Jayesh Kantilal Mehta who was one of the co-defendant with plaintiff in a suit before the Bombay High Court has initiated one another form, namely, Universal Pharma and started to use the same trade name and product name, which was assigned by Universal Impex in favour of present plaintiff i.e GMBELL Healthcare Pvt. Ltd.

7. So to recollect the factual details in mind, it is made clear that the product in question was initially used by Universal Impex, the partnership firm which was assigned to GMBELL Healthcare Pvt.Ltd. by assignment deed in the year 2005 and one of the partner of Universal Impex, namely, Satish Kantilal Mehta has miserably failed to restrain the plaintiff from utilizing such trademark in a suit filed before the Bombay High Court in the year 2007. Thereafter, brother of said Satish Kantilal Mehta, namely, Jayesh Kantilal Mehta has started a partnership firm, namely, Universal Pharma and since he was one of the defendant before the Bombay High Court in a suit of his brother Satish Kantilal Mehta and though he was very much aware about the assignment deed in favour of the present plaintiff, probably to get disadvantage of the observation of the Bombay High Court that injunction granted by Bombay High Court is restricted for registered trademark only. He has tried to get disadvantage of the entire situation and started production

and marketing of same medicine with same trade name and product name with similar artistic logo and seal etc. and thereby tried to infringe the copyright of the product which is in favour of present plaintiff and thereby committed passing off also. It is also evidence from the record that plaintiff has served notice to respondent in the year 2007 with all other concerns to restrain them from continuing infringement of its copyright and to pay compensation for passing off and, therefore, it was certain that defendants were very much aware about the factual details. All amongst the pleadings and other documents, the relevant document is letter dated 28.8.2008 by Mr.Satish Kantilal Mehta as a partner of Universal Impex addressed to the present plaintiff probably before applying for breach of injunction order wherein it is categorically stated that as per the assignment deed between GMBELL Healthcare (I) Pvt.Ltd. and M/s.Universal Impex executed through one of the partner of our firm Mr.Jayesh Kantilal Mehta unilaterally for the product in reference which are approved by the Licensing Authority to manufacture on behalf of Universal Impex only, and that the purpose of such assignment deed is only to manufacture the above mentioned brands and not to sell or market of whatsoever nature. It is further stated that all brands manufactured by plaintiff were to be exclusively marketed by Universal Impex only and nobody else either in personal capacity or in the capacity of company etc. is permitted to market the products. It is also stated that all the products under reference are applied to the Registrar of Trademarks long before by Universal Impex only. Though it is stated in such letter that therefore Universal Impex withdraws the effect of the said deed by assignment. However, in absence of proper legal procedure for withdrawal of such assignment, such withdrawal cannot be considered as legal withdrawal and, therefore, Satish Kantilal Mehta has to file a suit before the Bombay High Court, details of outcome of which is already discussed herein above. However, reference to such letter and its contents makes it clear that there was assignment deed in favour of the present plaintiff. This fact is also admitted by present defendant in affidavit in reply filed before the Bombay High Court and admission of Mr.Jayesh Kantilal Mehta before several other media and members to that effect. From the record, it is also not disputed fact that Universal Pharma came into existence only in July, 2007 i.e. almost two years after the deed of assignment was executed by original owner of the trademark in question, namely, Universal

Impex and, therefore, in any case, the present defendants could not have the ownership or other rights on trademark under reference. When it is so clear that defendants have come into existence in the year 2007 and that one of the partner of the defendant was also partner of the transferring owner, namely, Universal Impex by similar trademark and when he himself has admitted before the judicial authorities that such trademarks were assigned by Universal Impex in favour of the present plaintiff, then, at present, defendants cannot be allowed to plead or argue and if at all they do so, there is no substance in their pleading and submission that assignment deed is without consideration and never executed and, therefore, plaintiff has never acquired any legal right over the trademark under reference.

8. Learned advocate Mr.Kapadia is relying upon the decision of **Acme Pharmaceuticals Vs. Torrent Pharmaceuticals Ltd.** reported in **2010(1) GLR 802** submitting that if any trademark or trade name is found to be derived from pharmaceutical preparation CEFADROXIL designating the kind of goods and was devoid of any distinctive character and parties cannot prevent from using such name as brand name or trade name and thereby order of injunction passed by the trial Court was set-aside. Therefore, Mr.Kapadia has submitted that in the present case also, name of all the products in question are derived from pharmaceutical preparations and, therefore, it can never be treated as a trademark and hence granting of injunction by the trial Court is not proper. However, at present, registration of trademark is under process and such issue can be taken care by the competent authority registering the trademark. Whereas I am of the opinion that irrespective of copyright and trademark, when defendant is one of the party to the deed of assignment and when trying to use same product name with same logo and same style, this act could be treated as a tortuous act also and requires to be stopped from continuous use of such trade name.

9. As against that learned advocate Mr.Brahmbhatt for plaintiff is relying upon the case between **Cadila Health Care Ltd. Vs. Cadila Pharmaceuticals Ltd.** reported in **JT 2001(4) SC 243**, wherein the Apex Court has categorically held that trademark is essentially adopted to advertise one's product and make it known to the purchaser. A stricter approach should be



adopted while applying the test to judge the possibility of confusion of one medicinal product for another by the consumer. While confusion in the case of non-medicinal products may only cause economic loss to the plaintiff, confusion between the two medicinal products may have disastrous effects on health and in some cases life itself. Stringent measures should be adopted specially where medicines are the medicines of last resort as any confusion in such medicines may be fatal or could have disastrous effects.

10. In the case of **Sun Pharmaceuticals Industries Ltd. Vs. Cipla Limited** reported in **2009(39) PTC 347 (Del.)** by Delhi High Court wherein while considering the provision of Section 45 read with Order 39, Rules 1 and 2 of the Civil Procedure Code, 1908; which are also relevant in present case; the Delhi High Court has categorically held that immediately on assignment i.e. by writing, assignee acquires title to the registered trademark. When there is nothing to show that plaintiff is in any way to blame for non-decision by the Registrar on his application, then, practically, title exists in favour of assignee even before registration. Similar situation is before us. Thereby the cited case confirms that registration of trademark in favour of the plaintiff is to be considered from the date of assignment itself i.e. 4.10.2012 and when assignment date is produced on record, it cannot be said that plaintiff has failed to prove the registration of trademark in his favour. The Delhi High Court has further held that infringement of rights in a trademark can never be sufficiently compensated and there is a possibility of great injury being done if the defendant is permitted to continue to use such trademark and, therefore, balance of convenience is always in favour of registered user. Thereby, the defendant has no equity in its favour and thus plaintiff is entitled to interim order. The Delhi High Court has dealt with the subject in depth and confirmed that the plaintiff notwithstanding being not registered on a particular date is entitled to exercise rights as a registered proprietor of the trademark in question. While arriving at such conclusion, Delhi High Court has taken care of several reported cases also.

11. In the case of **Midas Hygiene Industries P. Ltd. & Anr. Vs. Sudhir Bhatia & Ors.** reported in **(2004)28 PTC 121(SC)** while dealing with the issue of interim injunction for infringement and passing off action, the Apex Court has held

that when plaintiff is prior and prominent user of trademark under reference, grant of injunction becomes necessary, when *prima facie* it appears that the adoption of the similar mark by defendant, since such adoption itself is to be considered as dishonest. However, the Apex Court has clarified that observations at such stage are *prima facie* and shall not be taken into consideration at the time of trial of the suit.

12. In **Shree Sainath Industries Vs. Sainath Auto Industries** reported in **2004(28) PTC 377(Guj.)**, this High Court has held that ultimately on the objective scrutiny of the records and documents, the Court would have to come to a conclusion, may be based on subjective satisfaction as to whether the respondent is liable for an action of passing-off or as to whether the appellant is entitled to an interim injunction and if an answer to this question is in the affirmative, there is no reason to deny this interim injunction to the appellant. Whereas while confirming the order, the High Court has relied upon the case of Midas Hygiene (*supra*) regarding prior user and confirmed the injunction in favour of the original plaintiff.

13. I have gone through the record and proceeding and averments of both the sides, which makes it clear that defendant has misled the trial Court and trial Court has grossly erred in appreciating the evidence at such stage where mainly *prima facie* evidence is to be looked into i.e. Court is not deciding the suit finally, but deciding the rights of the parties based upon the *prima facie* evidence where interim injunction is sought for.

14. In background of above facts and circumstances, when main suit is yet to be decided on its own merits wherein all the parties would have sufficient and ample opportunity to adduce final evidence to prove their case, scrutinizing and thereby discussion and determination on any evidence on record in any manner would ultimately prejudice the trial. Therefore, it is not advisable to scrutinize, discuss and thereafter determining the outcome of other documentary evidence and submissions of both the sides so as to arrive at any specific conclusion either regarding dispute or issue between the parties or regarding the effect of such evidence at such interim stage.

15. At present, it is sufficient, at the cost of repetition to recollect that the original user of trademarks under reference

was one M/s.Universal Impex. One of the partners of such Universal Impex against whom there is an allegation that he has unilaterally executed an assignment deed, his partner of present defendant Universal Pharma i.e. Jayesh Kantilal Mehta and, therefore, he is very much aware about the fact that original ownership of trademark by Universal Impex was assigned against consideration in favour of present plaintiff and, therefore, he has no reason whatsoever to use same trade name and trademark for same product in any manner whatsoever. Therefore, the trial Court was right in allowing the interim application by the plaintiff restraining the defendant from continuing infringement and passing off so far as other issues are concerned, the trial Court has rightly granted the injunction with an observation that it is subject to a decision by the High Court of Bombay in Civil Suit No.1342 of 2007. Therefore, after decision in such suit, either party is entitled to apply for modification of such impugned order. However, at present, I do not see any illegality or irregularity to interfere in the impugned order. I have perused the record, pleading and impugned order also. The trial Court has taken care in detail of all relevant aspect, argument and submission of both the sides and referred relevant decisions cited by both the sides and passed a reasoned order.”

4. Thereby, the application filed by the appellant – plaintiff before the trial Court for interim injunction at Exh.5 in Civil Suit No.2/2012 stands allowed as prayed for in terms of paragraph 12A and 12B of such application. However, it is clear that parties are at liberty to pray for modification of such order subject to decision of Civil Suit No.1842 of 2007 by the Bombay High Court and at such point of time, the trial Court shall decide such application on its own merits without being influenced by the present order.

**(S.G.SHAH, J.)**

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**Further Order**

Learned advocate Mr.Arpit Kapadia for the appellant is praying to stay operation of the judgment and order for couple of days so as to enable him to challenge the order before the appropriate Court. However, since it is not disputed that respondent – Company is incorporated afterwards and it has never utilised such trademark prior to its use by the appellant, I do not see any reason to stay the operation of the judgment. Hence, such request is rejected.

**(S.G.SHAH, J.)**

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