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Glenmark Pharmaceuticals Limited vs. Curetech Skincare And Another 2018, Case analysis and Case Comment.

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ABSTRACT :

Intellectual property rights give their owners exclusive ownership rights as well as the ability to sue for any misuse of the business or service by a third party. It is very common to levy charges and damages, ranging from minimal to exceptional, in instances of trademark infringement. A registered trademark is contested when someone who isn't the rightful owner or someone who is using it under license uses it in the course of business in relation to goods or services for which it is registered, especially in a way that makes it likely that the user will be recognized as a trade mark.

This research conducted totally revolves around the case of Glenmark Pharmaceuticals Limited vs. Curetech Skincare and Another and the issues raised by the plaintiff in it. It consists of a brief introduction to the factual background of the case and the principles on which the case is based and critical analysis and comment on the judgment pronounced by the Bombay High Court. It also consists of certain case laws to have a better understanding of the stand of the courts in the matters related to the trademark issues and what kind of damages can the party claim.

INTRODUCTION:

“The law of Torts in India never possessed great importance until the advent of British rule as it was the British who administered the concept of compensation for a person victimized by a wrong of another”¹. The concepts of justice, fairness, and good faith can now be guaranteed in India, and Indian courts are cautiously examining if English law can be enforced in Indian society and circumstances.

Intellectual property rights give their owners exclusive ownership rights as well as the ability to sue for any misuse of the business or service by a third party. It is very common to levy charges and damages, ranging from minimal to exceptional, in instances of trademark infringement.

¹ Prerna Deep, Evolution of Law of Torts in India, 2018

Defining the term trademark, “Section 2(m) only says that it includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging, or combination of colors, or any combination of such expressions”². A trademark, in general, refers to a mark that can be graphically depicted. It should be able to differentiate between one person's items & services and that of many others. It may include the form of the products, their packaging, and colour combinations.

A registered trademark impinges when an individual who isn't really a legal owner or a person used via way of licensed usage uses in the conduct of trade a mark that is deceptively identical to the trademark in reference to products or services for which the trademark is registered, like in such a way that the use of the mark is likely to be picked up as a trade mark. To compensate the loss of the legal owner of the mark damages are awarded, they could range from nominal to exemplary damages.³

In the case *Microsoft v Yogesh Popat* (2005)⁴, the court found trademark and copyright violations and, after assessing the plaintiff's real loss of business, granted consolidated damages of \$1.97 million (i.e. 19,70,000).

In *Time Incorporated v Lokesh Srivastava*⁵ it was witnessed that the court has given its views on how the punitive damages should be awarded and how they should cover the overall loss of the plaintiff. This case led to a significant rise in the number of damages awarded. The honorable court said that- “punitive damage should really be punitive and not merely a “**flea bite**””.

Nominal damages are paid to a plaintiff in a case where the person has sustained no significant injury or loss for which compensation is required⁶. This type of award represents a legal acknowledgment that a defendant's breach of duty or wrongful conduct has resulted in a violation of a plaintiff's rights.

Exemplary damages may be paid in a tort case if the defendant has not only performed a wrongful act but has acted in an unreasonable and degrading manner⁷. These damages are only granted under exceptional circumstances.

² Trade Mark Act,1999 Section 2(1)(m).

³ Trade Mark Act,1999 Section (WHO, TRIPS)

⁴ Microsoft vs. Yogesh Popat, 2005

⁵ *Time Incorporated v Lokesh Srivastava*, January, 2005.

⁶ Law of Torts B.M Gandhi (9th Edition) Eastern Book Company.

⁷ Pankaj Agarwal & Kunal Sharma, India: Exemplary/ Punitive Damages, Feb,2020.

In most cases of trademark infringement where the type of damages awarded is exemplary, the limits do not exceed Rs.1,00,00,000. But in **Glenmark Pharmaceuticals vs. Curetech Skincare and Ors.**⁸, it was held by the Bombay high court that the defendant company is a habitual offender and has imposed exemplary damages amounting to Rs.1,50,00,000. The particular habitual offender has been described as a person who has no regard and respect for the law and keeps on breaking it again and again.

In the proceeding of the case, the cause of negligence was also added by the court. It was mentioned that the defendant company copies the mark of the companies with a good market image such as Glenmark, Cipla Ltd, SmithKline Beecham PLC, etc, and provides products that do not match the standards and were negligent in providing the standard quality medicines to the public.

This research conducted totally revolves around the case and the issues raised by the plaintiff in it. It consists of a brief introduction of the principles on which the case is based and critical analysis and comment on the judgment pronounced by the Bombay High Court.

RESEARCH OBJECTIVES :

The objectives to be fulfilled while conducting the research are as follows:

1. To study the facts related to the case.
2. To study the arguments and the plaintiff's contentions.
3. Analysis of the judgment that is pronounced by the court.
4. To learn about the position of courts in the case of pharmaceutical trademarks.
5. To study related cases and draw references from them.

FACTUAL BACKGROUND :

The following are the circumstances of the case:

Glenmark, a generics producer based in Mumbai, is involved in the dispute, and its product Candid – B. (an anti-fungal cream). Galpha Laboratories, the main defendant, is the manufacturer of a similar medicine sold under the brand name Clodid – B.

Glenmark Pharmaceuticals Ltd. filed a lawsuit against Curetech Skincare for selling products

⁸ Glenmark Pharmaceuticals Limited vs. Curetech Skincare and Another 2018 (76) PTC 114 (Bom): Case analysis and Case Comment

with the trademark 'CLODID-B,'⁹ which was confusingly similar to the plaintiff's 'CANDID-B.'

Plaintiff claimed that Galpha Laboratories' CLODID-B mark infringed on his trademark CANDID-B. Galpha Laboratories was also accused of plagiarising Plaintiff's trademark, artwork, colour scheme, and trade dress.

No. 1 Defendant Curetech Skincare is a contracting firm that made products for Galpha Laboratories. As a result of the Contract Manufacturing Agreement, Defendant No. 2 submitted the artwork, labels, and mark to Defendant No. 1.

Interestingly, in this case, the Defendants accepted the Plaintiff's charges and gladly agreed to the decision by not opposing the matter. It was also claimed that they did not infringe on the trademark on purpose, but rather by "mistake." Defendant No. 2's lawyer, on the other hand, admitted that they "ought to have acted diligently before adopting and utilizing the trademark."¹⁰

ISSUES:

The case is upon:

- Whether the defendant is a "habitual offender" or "habitual infringer."
- Is it appropriate to impose exemplary damages on the defendant in order to deter them in the future?¹¹

ARGUMENTS & PLAINTIFF'S CONTENTIONS :

When the Defendants were accused of trademark infringement, they agreed to the imposition of a costs order, claiming that the trademark infringement was a "mistake" and not deliberate. They also did not raise any objections to the case.

Plaintiff refused Defendant No. 2's arguments about their claim of infringement by "mistake." Defendant No.2 is also described as a "habitual infringer," according to them.

Plaintiff claimed that they had previously given Galpha Laboratories a cease and desist notice for utilizing the term ASCODIL and infringing on their registered trademark ASCORIL. In this case, Defendant No.2 had issued a written unconditional apology and promised not to infringe on Plaintiff's trademark in the future.

⁹ <https://www.ourlegalworld.com/glenmark-pharmaceuticals-ltd-v-curetech-skincare-and-galpha-laboratories-ltd/>

¹⁰ See *supra* note 9

¹¹ See *supra* note 9

Plaintiff also claimed that the Central Drugs Standard Control Organization determined Defendant No.2's medical equipment or products to be "Not of Standard Quality/Spurious." Plaintiff provided a number of public-domain papers and papers to show that Defendant No.2 had broken several FDA restrictions.

Plaintiff requested that exemplary damages be imposed on the principal defendant since past efforts by the court to stop the principal defendant from infringing on trademarks had failed and that exemplary damages would serve as a deterrent to the principal defendant's behavior. Plaintiff referenced the case of Win-Medicare Pvt. Ltd. v Galpha Laboratories Pvt. Ltd. & Ors.¹²², in which the Delhi High Court declared Galpha Laboratories a "habitual infringer" in January 2016.

CASE JUDGMENT AND ANALYSIS :

JUDGMENT

Because the lawsuit was not contested, the defendants agreed to pay the plaintiff's costs and pray the plaintiff's prayers. It's crucial to look at how and why charges are imposed in the first place.

The defendant's history of trademark infringement was investigated by the Court. It cited the Delhi High Court's negative findings against the defendant in Win-Medicare Pvt. Ltd. Vs. Galpha Laboratories Ltd. & Ors., in which the court stated that Galpha was a "habitual offender." The Court also looked at the defendant's history of producing substandard pharmaceuticals, which was brought up by both the Central Drugs Standard Control Organization and the Maharashtra Office of the Drug Control Administration.

Despite the fact that the dispute was finally solved in terms of the plaintiff's pleas, the Court found it appropriate to impose exemplary costs on the defendant and imposed costs of 1.5 crores. Mr. J. Kathawalla made the following observation:

"Drugs are not sweets. Pharmaceutical companies that provide medicines for the health of consumers have a special duty of care towards them. These companies, in fact, have a greater responsibility toward the general public. However, nowadays, the corporate and financial goals of such companies cloud the decision of their executives whose decisions are incentivized by profits, more often than not, at the cost of public health. This case is a perfect

¹² Win-Medicare Pvt. Ltd. Vs. Galpha Laboratories Ltd. & Ors., 65 PTC, 506 (Del: 2016).

example of just that."¹³

ANALYSIS

In this case, a learned single judge determined that the defendant's disputed product is a "systematic" and "blatant" replica of the plaintiff's product. Everything was a ruse and a copy, from the word mark to the packaging. Despite the fact that the defendants in this instance were willing to submit to the Court's decision and directions, the plaintiff called the Court's attention to the defendant's previous actions. The defendant has repeatedly infringed on the plaintiff's trademarks. The plaintiff issued a cease and desist order to the defendant in 2003 after the latter copied the plaintiff's trademark "ASCODIL." The defendant expressed his regret and offered an unqualified apology. The defendant has copied trademarks of other well-known pharmaceutical businesses, including Cipla Ltd., SmithKline Beecham PLC, Times Drugs and Pharmaceuticals, and many more, in addition to the plaintiffs. In a lawsuit against him, the Delhi High Court labeled the defendant a "habitual infringer." As a result, the defendant is a serial infringer, breaching the law on a regular basis.

In this case, the defendant may have faced only modest expenses, but because the pharmaceutical business was a repeat offender, they were held accountable for substantial damages. The defendants were accused of being of poor quality, spurious, or adulterated, in addition to being habitual infringers. They were the subject of multiple FDA investigations for rule infractions. As a result, the defendant was likewise a habitual lawbreaker. Considering the importance of drugs to human life, the defendant had shown flagrant disregard for the law and ethics. Lawbreakers and repeat infringers will suffer greatly as a result of this lawsuit. People are only trained to fear violating behaviors because of the imposition of high charges.

The Bombay High Court made the correct decision. Despite the fact that the Court did not consider statutory requirements such as the Trade Marks Act of 1999, it relied on basic and broad legal principles to reach its decision.

HABITUAL OFFENDER AS DEFINED BY COURTS :

The following individuals are prone to be labeled as "habitual criminals":

- i. Any person convicted of an offense punishable under Chapters XII, XVII, or XVIII of the Indian Penal Code, whose previous conviction or convictions, when considered in

¹³ See *supra* note 9

light of the facts of the case, show that he is a habitual robber, housebreaker, dacoit, thief, or receiver of stolen property, or that he is a habitual extortionist, cheater, or counterfeiter of a coin, currency notes, or

- ii. Any person convicted of an offense punishable under Chapter XVI of the Indian Penal Code, whose past convictions, considered together with the facts of the case, establish that he regularly commits offenses against the person.
- iii. Any individual detained or sent to prison by Section 123 (read with Section 109 or Section 110) of the Code of Criminal Procedure [new Code Sections 122, 109, 110].
- iv. Any individual is guilty of any of the offenses listed in I above when it emerges from the facts of the case, even if no previous conviction has been established, that he is a member of a gang of dacoits, thieves, or a slave or stolen property dealer by habit.

POSITION OF COURT :

Due to the impact on an individual's health and life, as well as the potentially dangerous effect of confusion or deceit, trademark infringement and passing off are particularly important in the pharmaceutical sector. In a developing country like India, the risk of confusion is high, so a stricter approach and stricter rules are used when comparing pharmaceutical trademarks to other sectors, as compared to other sectors, because any confusion could harm consumers' health. The courts take into account even minor chances of confusion or deception linked with the use of identical or similar marks, relying on the principle of judging similarity from the perspective of a common man with average intelligence and poor memory, who would rather rely on his memory, or what he remembers, than split the names and analyze their individual meaning before purchasing.

The Supreme Court Cadila case is the major authority on determining the likeness or identity of pharmaceutical trademarks, and it has established the view that a lower degree of proof is preferable to prove confusion in the public interest when it comes to medicinal products. The Court stated that confusion between medicinal items can be fatal and that stronger standards in situations concerning pharmaceutical items are necessary.

In one of the cases, the Delhi High Court held that trademark/name disputes in the pharmaceutical industry must be viewed through the prism of public interest, where the correct manufacturer is held responsible in the event of a problem with its pharmaceutical product and no innocent manufacturer is made to suffer an injury. The Court has adopted the

'likelihood of confusion approach in one of the cases, based on the misleading likeness of the 'Bectodine – M' and 'Betadine' trademarks, trade dress, and packaging, as well as the identity of colour theme, get-up, and design.

In a case involving the marks 'PACITANE' and 'PARKITANE'¹⁴ for pharmaceutical preparations for the treatment of Parkinson's disease, the Bombay High Court held that the goods were similar, the customers buying these goods as well as the trade channels are also the same, and that the test is the possibility of confusion rather than the probability of confusion. Furthermore, the Bombay Judicature has been harsh on 'habitual' infringers, imposing exemplary costs of INR 1.5 crores (roughly USD 200,000) on a defendant who was 'habitually' infringing on pharmaceutical trademarks in a recent case.

Because of the potential for injury to human life, Indian courts are taking a more stringent approach to determine the likelihood of confusion in pharmaceutical trademarks.

CASE LAWS :

1. Cadila Healthcare Ltd. Vs. Cadila Pharmaceuticals Ltd.¹⁵

In terms of trademark infringement in medicines, the Supreme Court established many principles. It was decided that in medical instances, strong steps should be made to avoid confusion. If the marks are similar, the public interest supports requiring a lower standard of proof to show infringement in a pharmaceutical case.

2. Shalina Laboratories Pvt. Ltd. Vs . Twin Impex and National Laboratories¹⁶.

The Plaintiffs sued the Defendants for trademark infringement, copyright infringement, and passing off in relation to their pharmaceutical medication "TANZOL," which they were marketing under the almost identical trademark/label "INASOL." The Court Receiver confiscated the pharmaceutical items of the Defendants carrying the impugned artwork/trademark/label "INASOL" and directed the Defendants to pay the amount of Rupees One Crore Fifty Lakhs as exemplary damages after the court issued an ex-parte order on August 29, 2018.

3. Dr. Reddy's Laboratories v. Reddy Pharmaceuticals Ltd¹⁷.

¹⁴ Wyeth Holdings Corp. & Anr. vs. Sun Pharmaceuticals Industries Ltd., 2004 (28) PTC 423 (Bom).

¹⁵ Cadila Health Care Ltd vs. Cadila Pharmaceuticals Ltd., 2001(5) SCC 73.

¹⁶ Shalina Laboratories Pvt. Ltd. Vs . Twin Impex and National Laboratories, Sept. 2018.

¹⁷ Dr. Reddy's Laboratories v. Reddy Pharmaceuticals Ltd, August, 2004.

It was decided that owners of trademarks or copyrights are not required to pursue every infringer and, as a result, spend time in court at the expense of their business. They may overlook and disregard minor infractions until they reach frightening dimensions if the alleged infringement is too minor or insignificant to jeopardize their commercial interests.

CONCLUSION :

The learned single judge stated in the judgment that the defendant "has no concern or respect for the rule of law." Exemplary costs are the only method to deter such lawsuits in the future in such circumstances. Such unethical practices hurt not only rivals and competitors, but also the general public, who rely on pharmaceutical and other companies' treatments, drugs, and other products, which, if not of proper quality, may jeopardize their health, life, and fortune. The court's stance, in this case, combined with a proposal to amend the Drugs & Cosmetic Act to include penalties of 3-5 years in prison for producing "substandard" quality drugs and life in prison in cases where the goods are found to be spurious, could help to improve India's pharmaceutical sector's current state of affairs.

LIST OF CASES

- Cadila Health Care Ltd vs. Cadila Pharmaceuticals Ltd., 2001(5) SCC 73
- Bio-Chem Pharmaceutical vs. Astron Pharmaceuticals, 2003 (26) PTC 200 (Del) para 19
- Win-Medicare Pvt Ltd vs. Galpha Laboratories Limited, 2016 (65) PTC 506 (Del)
- Sun Pharma Laboratories Limited vs. Bdr Pharmaceuticals International Pvt Ltd & Anr., CS(COMM.) 757/2017
- Curewell Drugs & Pharmaceuticals Pvt Ltd vs. Ridley Life Science Private Ltd., CS (COMM) 1071/2018
- Wyeth Holdings Corp. & Anr. vs. Sun Pharmaceuticals Industries Ltd., 2004 (28) PTC 423 (Bom)
- Shalina Laboratories Pvt. Ltd. Vs . Twin Impex and National Laboratories, Sept. 2018.
- Dr. Reddy's Laboratories v. Reddy Pharmaceuticals Ltd, August 2004

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6. Divya Joshi, “ Drugs Are Not Sweets” – Bombay HC Imposes Exemplary Costs for Pharma Trademark Infringement, Sept 2018

