



2025:DHC:3718



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

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Reserved on: April 21, 2025

Pronounced on: May 14, 2025

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CS(COMM) 912/2024, I.A. 42669/2024-Stay

TORRENT PHARMACEUTICALS LTD**Plaintiff**

Through: Mr. Sachin Gupta, Mr. Tanmay Sharma, Mr. Rohit Pradhan, Ms. Prashansa Singh, Mr. Adarsh Agarwal, Mr. Ajay Kumar and Mr. Sachin Kumar, Advocates.

Versus

**INDORBIT PHARMACEUTICALS P. LTD.
& ANR.**

....**Defendants**

Through: None.

CORAM:

HON'BLE MR. JUSTICE SAURABH BANERJEE

ORDER

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14.05.2025

1. By virtue of the present suit, the plaintiff seeks passing of a decree of permanent injunction against the defendants with respect to the impugned ORBITCAL-500 label/ artistic work as may be deceptively similar to the plaintiff's SHELCAL-500 label/ carton and strip packaging/ artistic work amounting to infringement of copyright of the plaintiff along with other ancillary relief(s).

2. It is the case of the plaintiff that it has acquired several trademarks, including the mark **SHELCAL** and its variants for Calcium and Vitamin-D3 supplements, pursuant to an Assignment Deed dated 27.06.2014 with Elder Pharmaceuticals Ltd., the plaintiff's predecessor-in-interest, which



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had been using the same since the year 1996.

3. In the month of September, 2022, the plaintiff adopted a new trade dress for its preparation **SHELCAL500**, the rights whereof were transferred to the plaintiff *vide* an Assignment Deed dated 07.03.2024 executed between the plaintiff and the designer of the said trade dress, with the designing agency as the Confirming Party. The plaintiff also applied for search and issue of certificate under Rule 22(1) of the Trade Mark Rules, 2017 for the said trade dress on 04.04.2024.

4. The defendant no.1 is also a pharmaceutical company, and is engaged in the marketing of Calcium and Vitamin D3 supplements under the trademark **ORBITCAL-500**, bearing registration no.6000626. The defendant no.2 is the manufacturer of the preparations sold under the said trademark. It is the packaging/ trade dress/ label/ carton/ strip thereof¹ that is under challenge by the plaintiff, and the sole objection is *qua* the said impugned trade dress, and not the trademark/ the pharmaceutical preparation sold under the trademark **ORBITCAL-500** itself.

5. The plaintiff came across the defendants' preparation with the impugned trade dress being sold in the markets of Delhi in the last week of September, 2024, whereafter the present suit was instituted.

6. The adoption of the impugned trade dress by the defendants is an act of passing off to take advantage of the goodwill and reputation of the plaintiff and is detrimental to its distinctiveness, with a likelihood of confusion in the minds of the general public, as well as infringement of copyright under *Section 51* of the Copyright Act, 1957². Further, since the

¹ Hereinafter 'impugned trade dress'

² Hereinafter 'CR Act'



preparations involved are of a pharmaceutical nature, any confusion between the marks is against the public interest.

7. When the present proceedings were listed on 21.10.2024, this Court granted an *ex parte ad interim* injunction in favour of the plaintiff and also appointed a Local Commissioner for visiting the premises of defendant no.2. The said Local Commissioner seized certain documents from the premises of the defendant no.2 at the time of executing the commission on 26.10.2024. Thereafter, despite being served on 12.11.2024 and 13.11.2024 respectively, neither of the defendants entered appearance nor filed their respective written statement(s). As such, their respective rights to file written statement(s) automatically stood closed, after the expiration of the statutory period and they were also proceeded *ex parte vide* order dated 04.03.2025.

8. In the wake of the aforesaid, when the present proceedings were listed before this Court on 21.04.2025, Mr. Sachin Gupta, learned counsel for the plaintiff, based on the uncontroverted pleadings on record made an oral request for passing a decree under *Order VIII rule 10³* of the Code of Civil Procedure, 1908⁴.

9. Mr. Sachin Gupta submitted that the impugned trade dress of the defendants is similar to the trade dress of the plaintiff. So much so, the essential features therein are also identically similar to that of the plaintiff.

³ **10. Procedure when party fails to present written statement called for by Court.**-Where any party from whom a written statement is required under rule 1 or rule 9 fails to present the same within the time permitted or fixed by the Court, as the case may be, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment a decree shall be drawn up:

Provided further that no Court shall make an order to extend the time provided under Rule 1 of this Order for filing of the written statement.

⁴ Hereinafter referred to as the “CPC”



The present is a case of passing off as the defendants have adopted a trade dress that is confusingly similar, if not identical, to that of the plaintiff, with the intention of riding upon the goodwill and market reputation of the plaintiff.

10. Relying upon *Colgate Palmolive v. Anchor Health*⁵, *Vicco Laboratories v. Hindustan Rimmer*⁶, *Anglo-Dutch Colour v. India Trading House*⁷ and *Dabur India Limited v. Shree Baidyanath Ayurved Bhawan Pvt. Ltd.*⁸ Mr. Sachin Gupta submitted that the defendants are guilty of passing off. As also, relying on *Midas Hygiene Industries P. Ltd. & Anr. v. Sudhir Bhatia & Ors.*⁹, Mr. Sachin Gupta contended that if the adoption of a mark itself appears to be dishonest, an injunction must follow, and also relying upon *Cadila Healthcare Ltd. v. Cadila Pharmaceuticals*¹⁰ submitted that the Court must be extra cautious while dealing with medicinal products, since any likelihood of confusion must be avoided in order to prevent disastrous consequences on public health and safety. Lastly, relying upon *Time Incorporated vs. Lokesh Srivastava & Anr.*¹¹, Mr. Sachin Gupta asked for awarding punitive damages in favour of the plaintiff.

11. As already entailed hereinabove, the right of the defendants to file their respective written statement(s) has already been closed and they have been proceeded *ex parte vide* order dated 04.03.2025 as well. Since neither of the defendants has denied the pleadings made/ case set out by

⁵ 2003 SCC OnLine Del 1005 (SJ)

⁶ 1979 SCC OnLine Del 18 (SJ)

⁷ 1976 SCC OnLine Del 55 (SJ)

⁸ 2012 SCC OnLine Del 3332

⁹ (2004) 3 SCC 90

¹⁰ 2001 SCC OnLine SC 578 : (SC)

¹¹ 2005 SCC OnLine Del 1 (SJ)



the plaintiff herein or the documents filed therewith, the said pleadings and documents are, for all intents and purposes, deemed to be admitted.

12. This Court has heard the submissions advanced by Mr. Sachin Gupta learned counsel for the plaintiff and gone through the pleadings and the documents on record along with the relevant judgments.

13. For adjudicating what Mr. Sachin Gupta has urged as also perusing the pleadings along with the accompanying documents, this Court has to examine the scope, extent and procedure as envisaged under *Order VIII rule 10* of the CPC.

14. No doubt, this Court has the power to decree the present suit under *Order VIII rule 10* of the CPC since neither of the defendants has filed written statement, however, the same is only if the plaintiff has been able to make out a case thereunder and not as a matter of right.

15. Recently, the Hon'ble Supreme Court while dealing with the provisions of *Order VIII rule 10* of the CPC in *Asma Lateef & Anr. v. Shabbir Ahmad & Ors.*¹², held that there must not be any mechanical application of *Order VIII rule 10* of the CPC to pass a decree in favour of the plaintiff on the basis of the plaint, merely because the defendant has not filed the written statement. Referring to *Balraj Taneja v. Sunil Madan*¹³, it was also held that it is only when the Court is fully satisfied that there is no fact which needs to be proved on account of deemed admission that a judgement against a defendant, who has not filed a written statement, ought to be passed, and if there is any contradiction or factual dispute which arises from the plaint itself, it would be unsafe to

¹² (2024) 4 SCC 696

¹³ (1999) 8 SCC 396



still proceed with decreeing the suit in favour of the plaintiff and would in fact tantamount to the plaintiff being altogether relieved of its obligation to prove its case to the satisfaction of the Court. It was further held that the provisions of *Order VIII rule 10* of the CPC have to be read in conjunction with *Order VIII rule 5¹⁴* of the CPC whereunder the Court may require, at its discretion, any fact treated as admitted, to be proved otherwise than by way of such admission.

16. For ease of reference, the relevant extracts from *Asma Lateef (supra)* are as under:-

“26. We have no hesitation to hold that Rule 10 is permissive in nature, enabling the trial court to exercise, in a given case, either of the two alternatives open to it. Notwithstanding the alternative of proceeding to pronounce a judgment, the court still has an option not to pronounce judgment and to make such order in relation to the suit it considers fit. The verb 'shall' in Rule 10 [although substituted for the verb 'may' by the Amendment Act of 1976] does not elevate the first alternative to the status of a mandatory provision, so much so that in every case where a party from whom a written statement is invited fails to file it, the court must pronounce the judgment against him. If that were the purport, the second alternative to which 'shall' equally applies would be rendered otiose.

27. At this stage, we consider it apposite to take a quick look at *Balraj Taneja (supra)* to examine the scope of Rule 10 of Order VIII. Therein, this Court ruled that a court is not supposed to pass a mechanical judgment invoking Rule 10 of Order VIII, Code of Civil Procedure merely on the basis of the plaint, upon the failure of a Defendant to file a written statement... ..

28. What emerges from a reading of *Balraj Taneja (supra)*, with which we wholeheartedly concur, is that only on being satisfied that there is no fact which need to be proved on account of deemed admission, could the court pass a judgment against the Defendant who has not filed the written statement; but if the plaint itself

¹⁴ 5. *Specific denial.*—(1) Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability: Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission: (... ..)



suggests involvement of disputed questions of fact, it would not be safe for the court to pass a judgment without requiring the Plaintiff to prove the facts. Balraj Taneja (supra) also lays down the law that provision of Rule 10 of Order VIII, Code of Civil Procedure is by no means mandatory in the sense that a court has no alternative but to pass a judgment in favour of the Plaintiff, if the Defendant fails or neglects to file his written statement.

29. If indeed, in a given case, the Defendant defaults in filing written statement and the first alternative were the only course to be adopted, it would tantamount to a Plaintiff being altogether relieved of its obligation to prove his case to the satisfaction of the court. Generally, in order to be entitled to a judgment in his favour, what is required of a Plaintiff is to prove his pleaded case by adducing evidence. Rule 10, in fact, has to be read together with Rule 5 of Order VIII and the position seems to be clear that a trial court, at its discretion, may require any fact, treated as admitted, to be so proved otherwise than by such admission. Similar is the position with Section 58 of the Indian Evidence Act, 1872. It must be remembered that a plaint in a suit is not akin to a writ petition where not only the facts are to be pleaded but also the evidence in support of the pleaded facts is to be annexed, whereafter, upon exchange of affidavits, such petition can be decided on affidavit evidence. Since facts are required to be pleaded in a plaint and not the evidence, which can be adduced in course of examination of witnesses, mere failure or neglect of a Defendant to file a written statement controverting the pleaded facts in the plaint, in all cases, may not entitle him to a judgment in his favour unless by adducing evidence he proves his case/claim.”

[Emphasis supplied]

17. Therefore, the touchstone for this Court to pass a decree under *Order VIII rule 10* of the CPC in the present proceedings is not *simpliciter*, the averments made in the plaint by the plaintiff or the non-appearance by the defendants or the non-filing of the written statement(s) by them, but is heavily dependent upon the plaintiff being able to show/ prove/ establish such averments made in the plaint as also the supporting documents filed along with it.

18. Furthermore, since the present is a *commercial suit* to be tried by a



Commercial Court under the Commercial Courts Act, 2015, it is incumbent for the plaintiff to not only bring on record, but also establish and prove its case after bringing sufficient materials/ document(s), in support of its pleadings to satisfy the conscience of this Court, which can be done only after due evidence has been led and the trial therefor has been conducted, unless the plaintiff is able to make out a case under *Order VIII rule 10* of the CPC for seeking a decree at this stage without proceeding for trial.

19. In the present proceedings, the entire case of the plaintiff is revolving around its new trade dress adopted in the month of September, 2022 for its preparation **SHELCAL500**, after acquiring the rights thereof *vide* an Assignment Deed dated 07.03.2024 and for which it applied for search and issue of certificate under *Rule 22(1)* of the Trade Mark Rules, 2017 thereafter on 04.04.2024. For this, the burden is on the plaintiff to *at the very least* show that it is the author of the original “*artistic work*” of the impugned trade dress and had actually commenced with the usage of its new trade dress for its preparation **SHELCAL500** since September 2022, i.e. prior to the use of the impugned trade dress by the defendants.

20. As per records, the plaintiff has pleaded of having acquired the rights in the new trade dress for its preparation **SHELCAL500** in September, 2022 on the basis of an Assignment Deed dated 07.03.2024, which is not a registered document and has been executed at a subsequent point of time, around *nineteen months* later, as also does not mention the date of publication/ adoption/ usage thereof. In fact, the Invoices (*Document 7* of the list of documents filed along with the plaint) prior to September, 2022, do not even pertain to the new trade dress since,



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admittedly, the same was not in existence then and the rest of the Invoices post September, 2022 bear no reference/ connection with the new trade dress adopted by the plaintiff. Further, the promotional material (*Document 8* of the list of documents filed along with the plaint) do not mention the time/ date/ period of their usage/ publication. As such, there is nothing before this Court which can form a basis for allowing the oral prayer of Mr. Sachin Gupta, learned counsel for the plaintiff for passing a decree under *Order VIII rule 10* of the CPC.

21. Moreover, the execution of the commission by the Local Commissioner on 26.10.2024 has also led to seizure of certain Invoices from the premises of the defendant no.2 which, as per the Report of the Local Commissioner, are pertaining to the mark **ORBITCAL-500** under the impugned trade dress and the oldest Invoice therein is dating back to 20.06.2023, as is evident from *Annexure-9* of the Report of the Local Commissioner.

22. Under these circumstances, the plaintiff has to show/ prove/ establish that it is the prior adopter and user of the new trade dress for its preparation **SHELCAL500** at least with effect from September, 2022, as per its own claims, which, at this stage, is missing.

23. Although, this Court has passed an *ex parte ad interim* injunction in favour of the plaintiff *vide* order dated 21.10.2024, however, the threshold for considering and passing an order under *Order VIII rule 10* of the CPC is significantly higher, more so, since a judgment and decree would render the final adjudication of the rights and liabilities of the parties, and that too without trial. Keeping all the aforesaid facts and circumstances in mind, and since there is no clarity with respect to the actual date of publication/



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adoption/ usage of the new trade dress by the plaintiff, at this stage, this Court is not satisfied to accede to the oral prayer of Mr. Sachin Gupta for passing a decree under *Order VIII rule 10* of the CPC.

24. In view of the aforesaid, reliance by Mr. Sachin Gupta upon *Colgate (supra)*, *Vicco Laboratories (supra)*, *Anglo-Dutch (supra)* and *Dabur (supra)*, *Midas Hygiene (supra)* and *Cadila Healthcare (supra)* is also misplaced.

25. In light of the aforesaid, there is nothing discernible on record to satisfy the conscience of this Court to accede to the oral prayer of Mr. Sachin Gupta for passing a decree under *Order VIII rule 10* of the CPC, at this stage, and that too without evidence and trial. As such, the oral prayer of Mr. Sachin Gupta for passing a decree under *Order VIII rule 10* of the CPC, at this stage, is rejected.

26. Accordingly, list before the learned Joint Registrar for filing the List of Witnesses of the plaintiff as also respective Affidavit-in-Chief of all its witnesses, on 07.07.2025.

SAURABH BANERJEE, J.

MAY 14, 2025
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