

IN THE HIGH COURT OF DELHI AT NEW DELHI

CS (OS) No. 1287 of 2013

Reserved on: November 20, 2013

Decision on: December 16, 2013

BOEHRINGER INGELHEIM PHARMA Plaintiff
GMBH & CO KG Through: Mr. Pravin Anand with
Ms. Vaishali Mittal, Advocates.

versus

PREMCHAND GODHA & ANR. Defendants
Through: Mr. Shailen Bhatia with
Mr. Nipun Khandelwal, Advocates.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT
16.12.2013

**IA Nos.13529 of 2013(by Defendants under Order XXXIX Rule 4
CPC) & 10330 of 2013 (by Plaintiff u/o XXXIX Rules 1 and 2 CPC)**

1. Is the trademark 'MUCOSOLVIN', used by the Defendants to describe their cough syrup, deceptively and confusingly similar to the Plaintiff's trademark 'MUCOSOLVAN', also used for cough syrup? That is the short question that arises in these applications under Order XXXIX Rules 1 and 2 CPC by the Plaintiff and Order XXXIX Rule 4 by the Defendant.

The case of the Plaintiff

2. The Plaintiff, Boehringer Ingelheim Pharma Gmbh & Co. KG, is a German company, having its principal place of business at Ingelheim am Rhein, Germany. It is a pharmaceutical company having more than 145 affiliated companies. It is stated that beginning in the year 1885, the

Plaintiff has become a global enterprise and is considered to be one of the leading pharmaceutical companies. In India, the Plaintiff conducts its business through its subsidiary Boehringer Ingelheim India Pvt. Ltd.

3. The Plaintiff's trademark 'MUCOSOLVAN' is stated to be used in pharmaceutical preparations for treatment of productive cough. The Plaintiff states that it adopted the trademark 'MUCOSOLVAN' in 1975 and has been using it continuously since 1979. It is stated that 'MUCOSOLVAN' is a coined word and inherently distinctive and, therefore, entitled to maximum protection. It is stated that the active pharmaceutical ingredient ('API') in 'MUCOSOLVAN' is Ambroxol. It is submitted that 'MUCOSOLVAN' is not a trademark derived from the API. The Plaintiff markets a wide range of products under the 'MUCOSOLVAN' trademark which are available in 56 countries and enjoy an immense reputation. The worldwide sales figure for 'MUCOSOLVAN' products for 2007-2011 is stated to be 6,839 million Euros. The worldwide promotional expenditure for 'MUCOSOLVAN' is stated to be 1,888 million Euros.

4. The Plaintiff states that the trademark 'MUCOSOLVAN' is registered in its favour or in the favour of its affiliate companies in 93 countries. It has applied for registration of the trademark 'MUCOSOLVAN' in India under application No. 2224023 in Class 5 and it is pending. The Plaintiff also states that it operates a website www.mucosolvan.com where users can obtain information for the Plaintiff's product. The domain name was created on 1st February 2000. It is stated that out of 1,54,000 visits to the said website till February 2012, over 2,400 visits have been from India.

This, according to the Plaintiff, shows the popularity of 'MUCOSOLVAN' products in India. It is stated by the Plaintiff that the trademark 'MUCOSOLVAN' enjoys a 'stellar reputation and enormous goodwill' around the world, including India, and especially preparations for the treatment of cough. It is stated that the launch of the cough product in India is imminent and the Plaintiff has made significant preparations for the introduction of the product in India. It is stated that the Plaintiff was the first to adopt and the first to use the trademark 'MUCOSOLVAN' anywhere in the world, and with the pending application in India, has the exclusive right to use the trademark in India. The Plaintiff states that it has significant common law rights in the trademark 'MUCOSOLVAN' in India.

5. Defendant No.2, IPCA Laboratories Ltd., having its registered office in Mumbai, engages in the manufacture and sale of pharmaceutical products. Defendant No.1 is the Managing Director of Defendant No.2. The Plaintiff states that, in or about September 2011, it learnt about the Defendants' use of the mark 'MUCOSOLVIN' for its pharmaceutical preparations for treatment of cough. The Plaintiff alleges that the adoption of the mark 'MUCOSOLVIN' by the Defendants is dishonest and subsequent to the Plaintiff's adoption and use of the trademark 'MUCOSOLVAN'. It is stated that the Defendants, being in the same area, were aware of the goodwill and reputation of Plaintiff's trademark 'MUCOSOLVAN' and its use of the said mark since 1979. It is stated that the Defendants have adopted the mark, which is nearly identical to the distinctive, arbitrary and coined mark of the Plaintiff. It is alleged that the impugned mark has been adopted with the specific intent of

misleading the public into believing that a connection exists between the Plaintiff and the Defendant.

6. The Plaintiff states that the Defendants' impugned mark 'MUCOSOLVIN' is virtually identical and deceptively similar to the Plaintiff's well-known trademark 'MUCOSOLVAN'. The Plaintiff contends that the use by the Defendants of the impugned mark is bound to cause confusion on several grounds. It is stated that the impugned mark is visually, phonetically and structurally indistinguishable from the Plaintiff's mark, except for the letter 'A' in 'MUCOSOLVAN' being substituted by the letter 'I'. It is stated that the confusion due to mispronunciation or misspelling is very high. Secondly, it is stated that API is the same, i.e., Ambroxol. Both the products are meant to treat cough. Thirdly, both the products can be sold over the counter, even though the Defendants' product is a Schedule H drug. The Plaintiff's mark can easily be mistyped or written in a doctor's prescription in a manner that is illegible. Therefore, a person of average intelligence and imperfect recollection is bound to be misled into believing that the Defendants' product originates from the Plaintiff or that the Defendants are associated with the Plaintiff having been licensed by the Plaintiff to use the impugned mark. It is, therefore, submitted that the Defendants' adoption of 'MUCOSOLVIN' is a clear attempt by the Defendants to pass off their goods as originating from the Plaintiff.

7. The Plaintiff further pleads that the use by the Defendants of the impugned mark holds out a misrepresentation of the high quality which the Plaintiff's product adhere to. Thus, it is submitted that this tarnishes

the Plaintiff's goodwill and reputation. It is alleged that this will also cause weakening and eventual erosion of the strength of the Plaintiff's mark, which, at present, is an indicator of a singular source of origin of high quality pharmaceutical preparations.

8. While directing summons to be issued in the suit and notice on IA No. 10330 of 2013, the Court, by an order dated 5th July 2013, restrained the Defendants from using the mark, name, domain name 'MUCOSOLVIN' and/or any other mark/name, including a label or device, which is identical or deceptively or confusingly similar to the Plaintiff's mark 'MUCOSOLVAN'. An appeal, FAO (OS) No. 369 of 2013 filed by the Defendants against the order dated 5th July 2013, was dismissed as withdrawn on 14th August 2013 with liberty to the Defendants to file an application for seeking vacation of the stay. Thereafter, the Defendants have filed IA No. 13529 of 2013 under Order XXXIX Rule 4 CPC for vacation of the interim order.

The case of the Defendant

9. The Defendants filed their written statement on 24th August 2013 in which it was stated that IPCA is a fully integrated Indian pharmaceutical company manufacturing over 350 formulations and 80 APIs. IPCA is stated to be producing quality and efficacious medicines and marketing them not only in India but in 110 countries worldwide. It claims to have a market share of 34%. It is stated that in January 1980, one Mexin Medicaments Private Limited ('MMPL'), Mumbai commenced use of the mark SOLVIN and Solvin label in respect of medicinal preparations and substances. The products were manufactured by MMPL and were

marketed by IPCA. MMPL changed its name to Mexin Medicaments Ltd. ('MML') on 8th May 1991. On 30th October 1998, MML assigned the mark 'SOVLIN' labels, including pending trademark applications and copyrights in labels in favour of Harleystreet Pharmaceuticals Ltd. ('HPL') along with the goodwill under a deed of assignment ('DoA'). The products, however, continued to be marketed by IPCA. On 17th August 2000, HPL assigned the mark 'SOLVIN' and Solvin labels along with the goodwill in favour of IPCA under the DoA. Thus, IPCA became the owner of the mark SOLVIN and the labels thereof.

10. The Defendants state that the medicinal preparations bearing the mark SOLVIN have been available for over 30 years in the Indian market. The SOLVIN family of products is stated to comprise of cold range and cough range and 15 such products. The SOLVIN cold range of products includes Solvin, SolvinCold, SolvinCold DS, SolvinCold AF, Solvin Nasal Spray, and Solvin Vapocaps for inhalation. Solvin cough range of products includes SolvinCough, BronchoSolvin (later, one of the ingredients Bromhexine was replaced with Ambroxol for mucoactive action). It is stated that another formulation named as SedoSolvin was also changed by dropping Bromhexine chemical entity therefrom and renamed it as Solvin Cough. The new product developed by the Defendants was MucoSolvin. Post the grant of *ex parte* injunction by this Court on 5th July 2013, the Defendants have stopped producing MucoSolvin.

11. IPCA is stated to be the proprietor of a series of marks containing the word 'Solvin', which was known to the Plaintiff. It is, therefore,

contended that the Plaintiff has suppressed material facts. It is stated that either the Plaintiff has been negligent in not conducting a search in the Trade Marks Registry records or concealed the results of such search. It is stated that IPCA and its predecessors had filed various applications for registration of their products for a series of 'SOLVIN' marks. The details of the grant of registration for the SOLVIN label mark and a whole range of products with the suffix 'SOLVIN', which have been granted, have been set out in para D (a) to (g) of the written statement. The pending applications for registration of the trademark SOLVIN Cold, SOLVIN cough syrup and Solvin in Class-V have been set out in para D (h) to (j) of the written statement. It is stated that SOLVIN EXPECTORANT (word mark) was registered on 29th May 1997, but was removed by the Registrar of Trade Marks on the ground of lack of payment of renewal fee.

12. The Defendants state that the adoption of the mark 'MucoSolvin' is honest and genuine and for bonafide reasons. Since the Defendants' products with the mark 'SOLVIN' and a new product with Ambroxol was launched, the appropriate choice of name was MucoSolvin as the same was indicative of the product being meant for action on mucous/mucus. The addition of the prefix 'Muco' to the mark 'SOLVIN' was to convey to the medical profession, public and consumers that it was used for loosening and diluting the mucus in the respiratory tract. The word 'Muco' has been defined to mean and represent 'mucus' or 'mucous'. The API Ambroxol is known for its mucoaction and, therefore, it is called a mucoactive drug. Since 'SOLVIN' was already being used and had acquired enormous reputation and goodwill over a period of

time, IPCA decided to expand the range of its 'Solvin' family of products by offering a formulation which was highly mucoactive and efficacious in cases of productive and wet coughs. Therefore, the name was changed by replacing Bromhexine with Ambroxol. In the case of SedoSolvin, the formulation was changed by dropping Bromhexine from the formulation and the name was changed to Solvin Cough. It is stated that the Defendants cannot be stopped from using the prefix or expression MUCO, which under the Random House Dictionary is defined as "a combining form representing mucus or mucous in compound words."

13. In para G of the written statement, the annual sales turnover of the Defendants' products under the trademark SOLVIN, SOLVIN COUGH and SOLVIN COLD from the year 1982-83 till June 2013 has been set out. The annual sales turnover of the product bearing the mark 'SedoSolvin' from 2002-2003 till 2010-2011 and MucoSolvin for the year 2011-June 2013 have been set out. The annual sales turnover of the product bearing the mark 'BRONCHOSOLVIN' for the years 2002-2003 till 2011-2012 have also been set out.

14. The Defendants contend that the expression 'MUCO' is *publici juris*. There are several manufacturers of medicinal preparations including cough syrups who are using the prefix MUCO as part of their trademark. A list of 67 such products has been set out in para H of the written statement. It is stated that the Defendants' goods under the trademark 'SOLVIN' are available in the market since 1980 and the Defendants have simply added the descriptive word to the already registered and well-known trademark of the Defendants. It is stated that no exclusive

right can be claimed with respect to the prefix mucus/muco/mucous which is generic and descriptive and is being used by several persons in their medicinal preparations for bonafide purposes.

15. The Defendants state that the Plaintiff has not used its trademark 'MUCOSOLVAN' in India till date. In fact, it filed its application for registration of the said mark only on 21st October 2011 on a 'proposed to be used basis' after knowing the existence of the Defendants' product with the said mark. It is submitted by the Defendants that the Plaintiff cannot claim any reputation in the word 'MUCOSOLVAN' in India since it has never used the said mark in India. The principles of transborder reputation would not be applicable in the present case. It is unlikely that an Indian travelling abroad could purchase cough syrup from a duty free shop. On the other hand, Indian customers would be conversant with the Defendants' products bearing the mark 'SOLVIN' and its variants including MucoSolvin.

16. The Defendants point out that the Plaintiff, on its own showing, has stated in para 25 of the plaint that it was aware of the Defendants' goods being available in the market as far back as in September 2011. There is absolutely no explanation why the suit was filed only in July 2013. The suit is barred by delay, acquiescence and laches. It is pointed out that the *vakalatnama* in favour of the Plaintiff's counsel was signed on 24th January 2013, whereas the suit was filed in July 2013. Thus, the Plaintiff has not been diligent in pursuing the suit and seeking an interim relief.

17. Along with the written statement, the Defendants have filed a huge

volume of documents, including the registrations granted in respect of the marks 'SOLVIN' and Solvin label and several marks using the word 'SOLVIN' including 'RINOSOLVIN', BRNCOSOLVIN, SINOSOLVIN, NASOSOLVIN, DRISOLVIN, the invoices of sales of products under the 'SOLVIN' mark, photographs of third party products with the word 'MUCO' and true copy of search results downloaded from the website of the Trademark Registry for the trademark 'MUCO' in Class 5.

18. In the replication, it is stated by the Plaintiff that from the search report from the Trademark Registry, it was seen that the Defendants applied for registration of 'SOLVIN COLD', 'SOLVIN COUGH SYRUP' on 1st April 2011 and 'SOLVIN' on 9th April 2012. All of them were objected to by the Office of the Controller General of Patents, Design and Trademarks. It is asserted that the reputation of the trademark 'MUCOSOLVAN' has spilled over into India and the trademark is well known in India. Both the Plaintiff's and the Defendants' product are Schedule-H drugs and can be sold over the counter and, therefore, a person of average intelligence and imperfect recollection would not be able to distinguish between "MUCOSOLVAN" and 'MUCOSOLVIN', which has the difference of only one letter. According to the Plaintiff, the Defendants admittedly adopted the mark 'MUCOSOLVIN' after the Plaintiff's first use and after the Defendants changed the API in their product to Ambroxol. It is, therefore, stated that the Defendants are seeking to ride upon the goodwill and reputation of the Plaintiff's mark 'MUCOSOLVAN'.

19. The Plaintiff is seeking to enforce its right in the mark 'MUCOSOLVAN' read as a whole and not as individual components. With the Defendants themselves using the composite marks, they were stopped from claiming that the Plaintiff's composite mark 'MUCOSOLVAN' was incapable of protection. The protection of composite marks was admitted by the Defendants, who themselves hold registrations for composite marks, such as 'BRONCHOSOLVIN' and 'BRONCOSOLVIN'. It is pointed out that Registration No.599638 in Class 5 is not in respect of the mark 'SOLVIN' but in respect of the mark 'SOLVIN EXPECTORANT (label)'. It is stated that the Defendants were fully aware of the Plaintiff's use of 'MUCOSOLVAN', which was adopted way back in 1975 and has been used since 1979. On the other hand, according to the Plaintiff, the mark 'SOVLIN' is not well known. 'MUCOSOLVIN' was introduced in the Indian market only in 2011. It is stated that the transborder reputation of the mark 'MUCOSOLVAN' is enhanced by virtue of information available on the internet, exchange between the relevant sections of public around the world and during international medical conferences and seminars which are attended by thousands of Indian doctors. It is submitted that Indians travelling abroad would have become aware of the mark 'MUCOSOLVAN' through advertisements and retail displays.

20. As regards the delay in filing the suit, the explanation given in the replication reads as under:

“The Plaintiff was aware of the cause of action in September 2011 but the action was initiated only in July 2013 as the Plaintiff needed time to assess the irreparable injury caused to it by the Defendants' product. Additionally, as the present suit has been

filed by Boehringer Ingelheim GmbH & Co. KG, a company which is incorporated under the laws of Germany and having its principal office in Ingelheim, Germany, a certain amount of time was taken to execute and file the suit. Further, it is submitted that the Defendants have acted fraudulently and with the knowledge that they are violating the Plaintiff's rights. Therefore, in light of the Defendants clearly fraudulent and illegal acts it is submitted that the relief of an injunction ought not to be denied to the Plaintiff on account of a negligible delay."

21. As regards the delay in filing the suit after executing the *vakalatnama* in favour of counsel, again it is stated that it was on account of "assessing the damage being caused to the Plaintiff." It is pointed out that the Power of Attorney in favour of the constituted attorneys of the Plaintiff executed by the Plaintiff is dated 19th September 2012.

22. This Court has heard the submissions of Mr. Pravin Anand, learned counsel for the Plaintiff and of Mr. Shailen Bhatia, learned counsel for the Defendants.

23. Before discussing the submissions of learned counsel, certain features of the present case may be noticed. This is a case of passing off brought by the Plaintiff in respect of medicinal preparations, which is yet to be launched by it in India. The Plaintiff has applied for the registration of its trademark 'MUCOSOLVAN' under the Trade Marks Act, 1999 in Class 5 and the said application is pending. The Plaintiff claims that its worldwide reputation has spilled over to India. It has pleaded transborder reputation for its products. The Plaintiff was aware that Defendant No.2 has been marketing its cough syrup under the trademark 'MUCOSOLVIN' since September 2011. The present suit was filed on

4th July 2013. However, the Plaintiff contends that the delay, if any, in filing the suit will not matter since the adoption of the mark 'MUCOSOLVIN' by the Defendants is dishonest and fraudulent. It is alleged that the Defendants, being in the same trade, were aware of the Plaintiff's product 'MUCOSOLVAN', which contained the same API Ambroxol, which was meant to treat productive cough. The Plaintiff's case is that the impugned mark 'MUCOSOLVIN' is deceptively and confusingly similar to the Plaintiff's mark 'MUCOSOLVAN' and, therefore, the Defendants should be enjoined from using the impugned mark. The Defendants on the other hand state that they are registered proprietors of the 'SOLVIN' family of marks and the mere addition of the prefix 'MUCO' to the mark cannot be said to be a dishonest adoption. The Defendants' case is that the Plaintiff has failed to establish its reputation in India and therefore no case of passing off has been made out.

24. The tests for passing off in a case involving medicinal preparations were spelt out in *Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd.* AIR 2001 SC 1952. In para 35 of the said judgment, it was stated as under:

“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 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 trademarks.
- 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 and
- g) Any other surrounding circumstances which may be relevant in the extent of dissimilarity between the competing marks.

Weightage to be given to each of the aforesaid factors depends upon facts of each case and the same weightage cannot be given to each factor in every case.”

25. Going by the above factors, as far as the present case is concerned, it is clear that the competing marks are composite marks. There is a close degree of resemblance with only one letter being different in each mark. They are phonetically similar and similar in idea. They are used in relation to cough syrups containing the same API, Ambroxol, meant to treat productive coughs. The class of purchasers of both the goods is same and can be expected to have the same degree of education and intelligence. The degree of care they are likely to exercise would not be different. The mode of purchasing the goods or placing the order for the goods would be no different.

26. However, there are further factors which are required to be considered. One is the transborder reputation of the Plaintiff's product in

India. The Plaintiff has placed considerable reliance on the decision in *Milmet Oftho Industries v. Allergan Inc. (2004) 12 SCC 624*. In the said case, the Supreme Court observed that the mere fact that the Plaintiff was not using the mark in India would be irrelevant if they were first in the world market. The Defendants do not dispute that the Plaintiff hold registration for the mark 'MUCOSOLVAN' in as many as 93 countries, and that the Plaintiff's 'MUCOSOLVAN' products are available worldwide. Although the Plaintiff may not have produced invoices of its sales abroad, there are documents placed on record, including the printout of the website drugs.com, which shows that 'MUCOSOLVAN' is available in several countries across the world. It states that either Ambroxol or Ambroxol Hydrochloride (a derivative of Ambroxol) is reported as an ingredient in 'MUCOSOLVAN' in several countries. The Google Analytics web page also gives the indication of international presence of 'MUCOSOLVAN' products. It is very unlikely that the Defendants, being in the same trade, were unaware of the presence of 'MUCOSOLVAN' worldwide when they decided to adopt 'MUCOSOLVIN' as a name for their cough syrup.

27. In *N.R. Dongre v. Whirlpool Corporation (1996) 5 SCC 714*, the Supreme Court pointed out that the advertisement of a trademark, even without the existence of the goods in market, can be considered to be use of the trademark. Importantly, it was pointed out that "In an action for passing off it should not matter whether misrepresentation or deception has proceeded from a registered or an unregistered user of a trade mark. He cannot represent his own goods as the goods of somebody else." The internet is today a major site for advertisement of products which include

medicinal preparations. In *Jolen Inc. v. Doctor and Company (2002) 2 CTMR 6*, the Court noted that “Mere advertisement in other countries is sufficient if the trade mark has established its reputation and goodwill in the country of its origin and countries where it is registered.” While it would be a matter for evidence as to the precise volume of sales of ‘MUCOSOLVAN’ worldwide, the overall turnover figures have been set out by the Plaintiff in the plaint.

28. It was submitted by Mr. Bhatia that the Plaintiff began using ‘MUCOSOLVAN’ internationally in 1979, whereas the ‘Solvin’ products of the Defendants have been available in India since 1980. The comparison here is not between the marks ‘SOLVIN’ and ‘SOLVAN’ but between the marks ‘MUCOSOLVAN’ and ‘MUCOSOLVIN’. The Defendants began using ‘MUCOSOLVIN’ only in September 2011. On the Defendants’ own showing, they changed their earlier formulation of BronchoSolvin for which they hold registration by replacing API Bromhexine with Ambroxol. The precise averments in this regard in the written statement read as under:

“Prior to the launch of said MucoSolvin by Defendant No.2, the medicinal preparations being a formulation of terbutaline, bromhexine and guaiphenesin was being marketed in India under the trade mark BronchoSolvin wherein Terbutaline was acting as a Bronchodilator and therefore the name BronchoSolvin was being used. The Defendant No.2 changed and replaced Bromhexine with Ambroxol in the said formulation in order to make the same more effective and efficacious and to act on mucus being an excessive secretion of mucous membrane in cases of productive and wet cough ,i.e., in conditions which are associated with abnormal and excessive mucus secretions and impaired mucus transport. The prefix muco/muco is indicative, suggestive and descriptive of mucus related actions or something pertaining to mucus.”

29. Likewise, earlier, the Defendants were using the mark 'SedoSolvin', but later, it changed the name to 'Solvin Cough'. The Defendants have, therefore used 'Muco' and 'Cough' as prefix and suffix. Although there may be several 'Muco' products in market, the peculiar feature as far as the present case is concerned is that the two rival composite marks 'MUCOSOLVAN' and 'MUCOSOLVIN' are confusingly and deceptively similar in terms of the tests spelt out in *Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd.* A person of average intelligence and imperfect recollection can easily mistake one for the other. Also, it is not open to the Defendants to say that the word 'Muco' is not distinctive, when the Defendants have themselves applied for registration of 'MucoSolvin'. There is very little to distinguish 'MUCOSOLVAN' from 'MUCOSOLVIN'.

30. Whether a mark is generic or *publici juris* is a question of fact. However, there is a rule against dissection of composite marks. It is not permissible to split the mark MucoSolvin into 'Muco' and 'Solvin' or the mark Mucosolvan into 'Muco' and 'Solvan' and thereafter undertake comparison of the different parts. The marks have to be compared as a whole, and when so compared in the instant case, there is likelihood of deception and confusion. In *Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd.*, the Court in the following passage underscored the importance of avoiding unnecessary confusion when it comes to medicinal products:

“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. The confusion as to the identity of the product itself could have dire effects on the public health.”

31. As regards the prior use, what is to be seen is whether the Plaintiff is prior in use in the world to the Defendants. It was sought to be argued by Mr. Bhatia that internationally, there are some other companies which have made or marketed similar ‘MUCO’ products earlier than the Plaintiff. While that would be a matter of evidence, for the purposes of present case, the Plaintiff was earlier in point of time than the Defendants for its product ‘MUCOSOLVAN’ worldwide. The Defendants introduced ‘Solvin’ products in 1980 and MucoSolvin in 2011. It is not possible to hold at this stage that the Defendants are prior users of Muco Solvin compared to the Plaintiff’s use worldwide of Mucosolvan.

32. The Court is not satisfied that the addition of the prefix ‘Muco’ by the Defendants in 2011 to the word ‘Solvin’ was, in the circumstances, bonafide. Till then, the mark adopted for the product was BronchoSolvin. It is only when the change was introduced in the formulation, which is the same API Ambroxol as in the Plaintiff’s product ‘MUCOSOLVAN’, that the Defendants decided to change the name of their cough syrup to ‘MUCOSOLVIN’. The Court inquired of learned counsel for the Defendants whether they would be willing to change the mark to ‘SolvinMuco’ or ‘Solvin’ with ‘Muco’ written in small above or below

the word 'Solvin'. On instructions, Mr. Bhatia stated that such a change might lead to confusion among the Defendants 'Solvin' products.

33. As regards the delay in filing the suit, it has been explained in *Hindustan Pencils Pvt. Ltd. v. India Stationery Products Co. AIR 1990 Del 19* that if the Defendant was acting with the knowledge that it is violating the Plaintiff's rights, then injunction cannot be refused, even if there is some delay in filing the suit. As already discussed, the Plaintiff has been able to show *prima facie* the Defendants' adoption of 'MUCOSOLVIN' was not honest.

34. In the circumstances, the Court confirms the injunction granted by this Court on 5th July 2013 in favour of the Plaintiff. IA No. 13529 of 2013 filed by the Defendants is dismissed and IA No. 10330 of 2013 filed by Plaintiff is disposed of. However, if the Defendants are prepared to change the mark of their cough syrup in a manner that will obviate confusing or deceptive similarity with the Plaintiff's mark Mucosolvan, they can apply to the Court for variation of this order.

S. MURALIDHAR, J.

DECEMBER 16, 2013

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