

(2012) 07 MAD CK 0012

In the Madras High Court

Case No : O.A. No's. 264 and 265 of 2011 in C.S. No. 190 of 2011

Sun Pharmaceutical Industries Limited

APPELLANT

Vs

Salud Care (I) Pvt. Ltd., 172-B, Manicktala Main Road,
Kolkatta-700054

RESPONDENT

Date of Decision : 17-07-2012

Acts Referred:

Trade Marks Act, 1999 — Section 17, 17(2), 21, 29

Citation : (2012) 07 MAD CK 0012

Hon'ble Judges : V. Periya Karuppiah, J

Bench : Single Bench

Advocate : K. Murugesan, for the Appellant;

Final Decision : Allowed

Judgement

V. Periya Karuppiah

A.No. 264 of 2011:

1. This application has been filed to grant a temporary, interim, ad-interim injunction restraining the respondent, its distributors, stockists, servants, agents, retailers, legal representatives or any other person claiming under it from in any manner manufacturing, selling, offering for sale, stocking, advertising directly or indirectly dealing in medicinal and pharmaceutical preparations under the trade mark GOLIN or any other trade mark that is identical and/or deceptively similar as that of the applicant's registered trade mark CABGOLIN and/or use similar packaging as that of the applicant's products under the mark CABGOLIN so as to pass off the respondent's medicinal preparations as and for the medicinal preparations of the applicant and/or in any other manner whatsoever connected with the applicant, pending disposal of the suit.

A.No. 265 of 2011:

This application has been filed to grant a temporary, interim, ad-interim injunction restraining the respondent, its distributors, stockists, servants,

agents, retailers, legal representatives or any other person claiming under it from in any manner manufacturing, selling, offering for sale, stocking,

advertising directly or indirectly dealing in medicinal and pharmaceutical preparations infringing applicant's registered trade mark "CABGOLIN"

by use of deceptively similar trade mark GOLIN or any mark deceptively similar to applicant's registered trade mark CABGOLIN or in any other

manner whatsoever, pending disposal of the suit.

Heard, Mr. A.A. Mohan, learned counsel for the applicant/plaintiff and Mr. Ashok Kumar J. Daga, learned counsel for the respondent/defendant.

2. Learned counsel for the applicant would submit in his arguments that the plaintiff is carrying on business as manufacturer of medicinal preparation

for human consumption and in the course of its involvement in making active pharmaceutical ingredients and in branded markets, many of the

plaintiff's products are prescribed for various treatments and it is a well reputed company for its medicinal preparation due to its excellent quality

and efficacy. He would further submit that the plaintiff had thus, manufactured "cabergoline" tablets from May 2003 onwards adopting the trade

mark "CABGOLIN" which would be a medicine for treatment of complex gynecological problems such as infertility, menstrual disturbances,

galactorrhea associated with hyperprolactinemia etc. He would further submit that the medicine prepared in the name of "CABGOLIN" was also

registered with the Registrar of Trade Marks in respect of medicinal and pharmaceutical preparation and substances included in class 5 and the

registered number is 1219940 dated 04.08.2003. He would also submit that the application submitted by the plaintiff on 01.05.2003 was granted

on 04.08.2003 and the proprietary right over the said mark "CABGOLIN" for the plaintiff would commence from the date of application. He

would also submit that the marketing of the said medicinal preparation under the trade mark "CABGOLIN" has steadily increased from its

launching in the year 2003 and it had acquired high reputation and good will.

3. Learned counsel for the applicant would also submit that the turn overs 5 year prior to the suit would go to show that the plaintiff has spent huge

amount for popularising its preparation under the trade mark "CABGOLIN" through advertisements also. He would also submit that during

December 2010, the plaintiff came across the defendant's preparation appearing the mark "GOBIN" and found that the defendant adopted a

deceptively similar mark "GOLIN" which forms predominant part of applicant's registered trade mark "CABGOLIN". He would further submit

that the word "GOLIN" is phonetically, structurally and ocularly almost identical and deceptively similar to the applicants registered trade mark

"CABGOLIN". He would also submit, that the plaintiff had immediately issued a legal notice on 30.12.2010 asking the defendant to cease and

desist from manufacturing and marketing the medical preparation bearing the deceptively similar mark "GOLIN" and to furnish the written

undertaking to that effect and the defendant had replied belatedly with bald denials, that too, after a reminder issued by the plaintiff. He would

further submit that the defendant has no right to use the similar trade mark "GOLIN" which would amount to infringement of plaintiff's registered

trade mark "CABGOLIN", to which, the defendant is a later entrant for using the similar trade mark "GOLIN".

4. Learned counsel for the applicant would also submit that the sample medicine purchased by the plaintiff produced as M.O. 2 would establish

that the medicine "CABERGOLINE" the same compound in the tablet namely "CABERGOLINE" and the use of the medicine was also similar

and the package is also in an identical carton. He would also submit that since both the medicines are for the same use, the doctors prescribing the

medicine would be confused to prescribe the medicine "GOLIN" instead of "CABGOLIN". He would further submit that the pharmacists in India

would hand over one product for another either on bonafide or unscrupulously for financial gain and this similarity and deceptively identical trade

mark name would certainly lead more confusion to the doctors, pharmacists or consumers to get "GOLIN" instead of "CABGOLIN". He would

also submit that the defendant is thus, passing off his products "GOLIN-0.5" medicine as that of the plaintiff's "CABGOLIN-0.5" using the

deceptively similar trade mark name and thereby, the reputation and the quality of the plaintiff is being stolen. He would also submit that every

package of the tablets sold by the defendant in the trade name "GOLIN-0.5" is nothing but passing off the plaintiff's goods and thereby, the

plaintiff is sustaining damages.

5. He would further submit that the plaintiff being a registered proprietor of the trade mark "CABGOLIN" is entitled to be protected under the

provisions of Section 29 of the Trade Marks Act and the infringement of trade mark name by the defendant and the passing off the products of the

plaintiff have to be necessarily stopped. He would also submit in his arguments that the deceptive similarity and the identical nature of the trade

marks "CABGOLIN" and "GOLIN" would be confused by the chemist as well as the doctor as discussed and laid down in a judgment of the

Honourable Apex court in a case regarding some other medicines as reported in Cadila Health Care Ltd. Vs. Cadila Pharmaceuticals Ltd., . He

would further submit in his arguments that it was stated in the counter affidavit that some other persons are also selling identical products for

treatment of the same disorders by using the trade mark from the generic name "Cabergoline", and therefore, the trademark of the defendant was

derived from the name "Cabergoline" as "GOLIN" and therefore, it could be termed as a generic name and would not be considered as similar

trade name cannot be sustained. He would also submit that those trade marks said to have been Continued as "Cabergoline" was not shown to be

for the same medicine prepared from molecule "CABERGOLINE".

6. Learned counsel for the applicant would cite a judgment of Bombay High Court reported in Glenmark Pharmaceuticals Ltd. Vs. Bal Pharma

Ltd. and Another, to the effect that the use of similar names by others cannot be a defence for the defendant to use a mark deceptively similar to

the plaintiff's registered trade mark. He would also cite a judgment of this Court reported in 1995 PTC 251 (Ciba Geigy Ltd. And Anr. v.

Crossland Research Laboratories) for the purpose of explaining the generic term and the "publici juris" name. Relying upon the said judgment, he

would submit that the word "GOLIN" cannot be considered as a generic name to compare with "GEL", a substance used for preparation of

toothpaste was considered as a generic name in the said judgment. He would further submit that if compared with such substances, it would be

either ""tablet"" or ""tab"" which could be considered as a generic name in this case. He would also submit that the plaintiff did not register the entire

molecules name "Cabergoline" as its registered trade mark. He has invented and

derived the name "CABGOLIN" from generic name

"Cabergoline" in order to denote the doctors and customers regarding the quality and character of the goods. The mere mentioning of

"CABGOLIN" would not lead to name "CABERGOLINE", a basic molecule and therefore, it cannot be said that "GOLIN" is a trade name used

by the defendant, would be considered as a generic name. He would further submit that the drug licence obtained by the defendant in the name of

"GOLIN" would not cure the infringement of trade mark and the remedies provided under the statute of "Trade Marks Act" in any manner. He

would also submit that the use of trade mark "CABGOLIN" was from the year 2003 and the use of the trade mark name "GOLIN" by the

defendant, was only from 2010 which was clearly a subsequent adoption and in the common law also, the defendant is liable to be restrained by an

order of injunction by this Court.

7. Learned counsel for the applicant would cite a judgment of Delhi High Court reported in Pfizer Products Inc. and Another Vs. B.P. Singh Tyagi

and Another, in support of his argument. He would further submit in his argument that the trade mark "CABGOLIN" and "GOLIN" are

deceptively similar and identical, both visually and phonetically similar and when the Trade Mark "GOLIN" is deceptively similar, it is not

necessary to claim protection under the provisions of Trade Marks Act. He would also submit that it is not necessary to register the trade mark

name "GOLIN" by the plaintiff for claiming the relief against the defendant. He would also rely upon the judgment of the Honourable Apex Court

reported in Ramdev Food Products Pvt. Ltd. Vs. Arvindbhai Rambhai Patel and Others, for the principle that the resemblance of trade mark

would be sufficient for causing infringement of trade mark, when especially, the products are similar. He would therefore submit that the defendant

has to be restrained by an order of interim injunction pending suit, otherwise, the plaintiff would be put to irreparable loss. He would also submit

that the respondent would not be prejudiced by the grant of an order of injunction since he is a faultier under the Trade Marks Act and the plaintiff

is entitled for temporary injunction against the misuser. Therefore, he would submit that the balance of convenience is also lying in favour of the

plaintiff and for the grant of interim injunction. He would further submit that the

defendant has also to be enjoined from passing off the products in the name of "GOLIN" and therefore, ad-interim injunction already granted may be made absolute. He would therefore request the Court to order both the applications, accordingly.

8. Learned counsel for the respondent/defendant would submit in his argument that the trade mark name "GOLIN" was adopted by the defendant for the medicine prepared from cabergoline molecule and the defendant is producing in a package which is different from that of the plaintiff. He would also submit in his argument that after the intervention of the said medicine by an Italian scientist and when the period of patent was over in the year 2005, the said compound was adopted in India. He would also submit the term ""GOLIN"" is taken directly from its molecular composition "CABERGOLINE" and it would be easy for a doctor to remember the brand "GOLIN" for the product "CABERGOLINE". He would also submit that the registered trade mark of the plaintiff is "CABGOLIN" and it was not "GOLIN" so as to seek protection under the provisions of Trade Marks Act.

9. Learned counsel for the respondent would also submit that the word "GOLIN" is a matter common to trade and it cannot be distinguished separately and therefore, such the components of the drug adopted by the defendant cannot be considered as a registered trade make of the plaintiff. He would also draw the attention of the Court to the provisions of Section 17 of the Trade Marks Act. He would further submit that the product "GOLIN" is a schedule-H Drug which has to be sold by the chemist as prescribed by the doctor to any individual and the doctors being highly educated, could easily differentiate between "CABGOLIN" and "GOLIN" and there would not be any confusion for the doctors to prescribe the medicine distinctively. He would also rely upon a judgment of the Division Bench reported in S.B.L. Ltd. Vs. Himalaya Drug Co., in support of his argument. He would further submit that the search report of the defendant would disclose that the trade mark of molecule cabergoline is used and adopted by many pharmaceutical companies which would go to show that "CABGOLIN" and "GOLIN" are publici juris, common to the trade and they have lost their distinctiveness. He would also submit that one Cabro-kaolin registered in favour of Alembic Chemical

Works Company Limited claimed its use since from 1943 and the registration of the plaintiff, even after the said registration, could not oppose the trade mark of the defendant "GOLIN". He would also submit that when other persons have used similar marks, the registered trade mark of the plaintiff "CABGOLIN" derived from cabergoline would become a generic term and publici juris and it cannot be monopolised.

10. In support of his arguments, he would cite a judgment of various High Courts and Supreme Court which are as follows:

1. 2001 PTC 601 (Del.) (Lipicard case)
2. AIR 1998 Mad. 341 (Dropovit case)
3. Ranbaxy Laboratories Ltd. Vs. Indohemie Health Specialities Pvt. Ltd.,
4. F. Hoffmann-la Roche and Co. Ltd. Vs. Geoffrey Manner and Co. Pvt. Ltd.,

11. He would also submit that there would be no confusion muchless actual confusion in the usage of the word "Golin" by the defendant because it

has to be dealt with by the doctors and chemists. He would also submit that the package colour scheme of the defendant is different from that of

the plaintiff and M.Os. 1 and 2 would prove the same. He would also submit that the defendant had applied for the drug licence in the name of

"golin" and it was granted by the Drug Licensing and Controlling Authority, Uttarakand, and as per the license granted, the defendant is using the

word "Golin" for the manufacturing of the drug. He would further submit that the word "CABGOLIN" cannot be similar to "GOLIN" because it

was decided by various High Court that the name "Sohna" is not similar or identical to "Sona Spices". The name "Raja" is not similar or identical

to "Maharaja". "Ayur" is not similar or identical to "Ayush", "Zanocin" is not similar to "Foxalin" and "Provit" is not similar to "Dropovit" Apart

from the citations, cited already, he had also cited 1987 PTC 294 S.M. Chopra and Sons Vs. Rajendra Prosad Srivastava, Three-N-Products

Pvt. Ltd. Vs. Amrutha Trading Corporation and Others, in support of his arguments. He would further submit that the name adopted by the

defendant "GOBIN" is not similar to "CABGOLIN", the registered trade mark of the plaintiff and even after It is found to be so, the word

"GOBIN", cannot be distinguished from the word cabergoline molecule and therefore, the provisions of section 17(2) would apply and therefore,

the registered proprietorship of the plaintiff regarding the name "CABGOLIN" will

not in any way affect the right of the defendant to have the name as "GOLIN" to continue the manufacture and selling of the medicines. He would also submit that the interim injunction already granted by this court was very much prejudicial to the defendants and therefore, the ad-interim injunction granted in favour of the plaintiff may be vacated and the application for passing interim injunction in both the application, may be dismissed.

12. I have given anxious thoughts to the arguments advanced on either side.

13. The plaintiff has filed the suit against the defendant for the following reliefs.

(a) A permanent injunction restraining the defendant, its distributors, stockists, servants, agents, retailers, legal, representatives or any other person

claiming under it from in any manner manufacturing, selling offering for sale, stocking, advertising directly or indirectly dealing in medicinal and

pharmaceutical preparations infringing plaintiff's registered trade mark CABGOLIN by use of deceptively similar trade mark GOLIN or any mark

deceptively similar to plaintiff's registered trade mark CABGOLIN or in any other manner whatsoever

(b) A permanent injunction restraining the defendant, its distributors, stockists, servants, agents, retailers, legal representatives or any other person

claiming under it from in any manner manufacturing, selling offering for sale, stocking, advertising directly or indirectly dealing in medicinal and

pharmaceutical preparations under the trade mark GOLIN or any other trade mark that is identical and/or deceptively similar as that of the

plaintiff's registered trade mark CABGOLIN and/or use similar packaging as that of the plaintiff's products under the mark CABGOLIN so as to

pass off the defendant's medicinal preparations as and for the medicinal preparations of the applicant and/or in any other manner whatsoever

connected with the plaintiff.

(c) The defendant be ordered to pay to the plaintiff a sum of Rs. 1,00,000/- as liquidated, damages for committing acts of infringement against

Plaintiff's registered trademark so as to pass off its products as and for the plaintiff's products.

(d) The defendant be ordered and decreed to deliver up for destruction to the plaintiff all the preparations, dies, blocks, labels, packaging either

filled or empty brochures, leaflets, pamphlets, hand bills, hoardings, wall posters,

calendars, carry bags, stationery items and such other sales

promotional materials bearing and/or containing the impugned trademark GOLIN;

(e) A preliminary decree be passed in favour of the plaintiff directing the defendant to render accounts of profits made by it by use of the trade

marks GOLIN which is identical and/or deceptively similar and a final decree be passed in favour of the plaintiff for the amount of profits found to

have been made by the defendant after the latter has rendered accounts;

(f) for costs of the entire proceedings.

14. The plaintiff is claiming to be the registered proprietor of the trade mark "CABGOLIN". In the registration certificate produced by the plaintiff

in the typed set, registration No. 1229940, was stated and it has been commenced from the year 2003. No doubt, the certificate issued by the

Registering Authority shows that it was applied on 1.5.2003 and was granted in the month of August 2003. Whether the plaintiff is manufacturing

the medicine from that day onwards or not, it is quite clear that the trade name "CABGOLIN" was registered in medicine from that day onwards

or not, it is quite clear that the trade name "CABGOLIN" was registered in Registration No. 1219940 by the competent registering authority on

1.5.2003. Apart from that, the license to manufacture the said medicine from that molecule cabergoline was also promptly obtained and medicines

in the name of "CABGOLIN" have been manufactured by the plaintiff which is the medicine for gynecological problem.

15. The admitted facts from the allegation made in the application, counter affidavit, reply affidavit are that the defendant is also carrying on the

business of manufacturing the same medicine for the disorders of women, in gynaec side and the compound of the drug was made from the

molecules of cabergoline. The defendant is adopting the trade mark name "GOLIN" and he had adopted the said business in the manufacture of

drug from the year 2010. Admittedly, both the products are for the same purpose comprising the same compound. The product of the plaintiff is

produced as M.O. 1 and the defendant's product is produced as M.O. 2. The cartons containing the drugs and the number of tablets are 4 in each

cartons and the composition of contents are also same and they are meant for the disorders of women on gynaec side. According to the defendant,

the word "GOLIN" is derived from the basic molecule cabergoline and it is a

generic term and it has got exemption u/s 17 of the Trade Marks Act even though the plaintiff has got registration of trade mark "CABGOLIN".

16. The judgment of the Delhi High Court reported in S.B.L. Ltd. Vs. Himalaya Drug Co., has dealt with the generic or publici juris work being

used in the trade marks. The relevant passage would be as follows:

19 (1) Firstly, he submitted that "LIV" is an abbreviation of liver. This abbreviation has been used in over 100 registration as a constituent of the

name under which the products relating to treatment associated with liver in the field of medicinal and pharmaceutical preparations-Homeopathic

and Ayurvedic-are being marketed. The word "Liv" is, therefore, generic and common to trade as describing the medicines associated with the

treatment of liver. It has become public juris. In the field of medicines and pharmaceuticals, it is common practice that the drugs are named either

by the name of the organ which it treats or by the principal ingredients or the name of the ailment. This enables a doctor to associate a particular

trade name with the organ, ingredient or ailment, thereby reducing chances of errors. No trader can therefore restrain another trade from using the

description of the organ, ingredients or ailment. The learned Counsel has cited a host of authorities in support of his submission that a word or its

abbreviation having become publici juris ceases to be subject matter of proprietorship, also ceases to be source of deception or confusion, for the

person likely to deal with such goods would ignore the public juris and go distinguishing the products by the prefixes and/or suffixes.

19. 2 Secondly, he submitted that the goods, trade marks whereof are under scrutiny and medicines. They are sold by the licensed chemists and

druggists and that too under prescription by medical practitioners. It is not that any man in the street would just reach the counter in a shop, ask for

the goods by spelling out the trade mark and the salesman would hand over one or the other of the two goods which would be carried away by the

unwary customer unmindful of what he intended to purchase and what he is fact got into his hands. Attention was invited to certain provisions of

the drugs & Cosmetics Rules 1945 framed under the Drugs & Cosmetics Act, 1940. No drug may be sold without a licence. A licence to sell,

stock, exhibit or offer for sale or distribute Homeopathic medicines by retail or by wholesale has to be under a licence under Rule 67C. One of the

conditions of the licence as provided by Clause (2) OF Rule 67G is that the sale of Homeopathic medicine shall be conducted under the

supervision of a person competent to deal with homeopathic medicines. So are the provisions for sale etc, of drugs other than Homeopathic medicines.

17. In the said judgment, it has been mentioned that the drug given to liver was described by the letters "LIV" by various traders. However, the

said traders have used the said word "LIV" in homeopathic and Ayurvedic medicines and since both the drugs were meant for liver, the said

adoption of the name "LIV" would be considered as a generic name and it cannot be given as a prerogative mark of any registered holder.

18. According to the learned counsel for the plaintiff, the said judgment is not applicable to the present case since the drugs prepared or

manufactured in the said case were through two different methods of treatments namely Homeopathic and Ayurvedic and the word was referring

to the organ, to which, the drug was meant. But in this case, the name of the molecule cannot be said to be a generic name because it is meant for

only one particular disorder. In the judgment relied upon by the learned counsel for the plaintiff reported in 1955 PTC 251 (Ciba Geigy Ltd. And

another v. Crossland Research Laboratories Ltd.), the Division Bench of this court would lay down as follows:

It is significant to note that in these cases the expression GEL is a separate word, whereas in EMULGEL and EUGEL they are part and parcel of

the product name. The dispute is about the part and parcel of the two rival word marks. In deciding the question of similarity between two rival

marks they have to be considered as a whole. One part of the word cannot be taken out and compared with the part of the other word. There

may be two words which in their component points are widely differed but which when read or spoken together may represent something which is

so similar as to lead inevitably to confusion. The correct method of adopt is not to divide the word and seek to distinguish a portion of it from a

portion of the other word. The true test is whether the totality of the proposed trade mark is such that it is likely to cause mistake or deception or

confusion in the minds of persons accustomed to the existing trade mark. Where both the words are invented and both contained descriptive

element, one cannot disregard such element of the words which are descriptive and compare only with the remaining parts of the words. The

question of likelihood of confusion has to be decided by comparison of the mark as a whole.

19. Relying upon the aforesaid judgment of the Division Bench of this Court, learned counsel for the plaintiff would stress in his argument that the

word "GOLIN" need not be separated and compared with the trade mark "GOLIN" and even if the words "CABGOLIN" and "GOLIN" are

compared, both the words are phonetically and visually similar and the judgment of the Division Bench is squarely applicable to the present case.

20. When we consider the arguments advanced by the learned counsel for the plaintiff and the submission of the defendant in respect of the

judgment of the Division Bench of Delhi in respect of "LIV 52" case, I could see that the liver being an organ in everybody's body is no doubt, a

generic term and the medicines meant for in different concept of treatment and in the said circumstances, the word "LIV" could be considered as

generic term. However the word GOLIN could not be considered as generic term which forms as part and parcel of the molecule cabergoline and

it cannot be separated as "GOLIN" and be called as a generic term or publici juris so as to attract the provisions of Section 17 of the Trade

Marks Act. If really, the entire molecular name cabergoline has been registered as trade mark of the plaintiff, the said molecule is the generic term

and it cannot be claimed as monopoly by the plaintiff, even though, it is a registered one. But it is not so in this case. The plaintiff has coined the

letters "cab" and "golin" and had formed a word to denote the trade mark name. Therefore, the principle laid down in S.B.L. Ltd. Vs. Himalaya

Drug Co.,) in respect of generic terms is not applicable to the present case. The same rule can be applied for the judgment cited by the defendant

reported in 2001 PTC 601 Del. (Aviat chemicals Pvt. Ltd. & another v. Intas Pharmaceuticals Ltd.), a case dealing with lipid lowering drugs.

21. The plaintiff's averments would go to show that he was doing business in manufacturing the drug "CABGOLIN" from 2003 onwards. Even if

it is not proved through the documentary evidence, the registration certificate would go to show that the plaintiff's trade name "CABGOLIN" was

registered in the year 2003. The plaintiff has given particulars of turn over for 5 years immediately prior to the suit and has also given the particulars

of expenditure towards advertisements for the same period. This would not mean that he was doing business only from the year 2005 onwards.

This Court need not go into the question of doing business at interlocutory stage, where it has to decide about the infringement of the trade mark

and the likelihood of passing off. This can be considered only in a full fledged trial with the support of oral evidence and documentary evidence

regarding the accounts. Now, it is brought to the notice of the Court that the Honourable Apex Court had also found that the words "protovit" is

different from "dropovit" on the test by look and sound as reported in F. Hoffmann-la Roche and Co. Ltd. Vs. Geoffrey Manner and Co. Pvt.

Ltd., The judgment of other High Courts reported in 1987 PTC 294 (Punjab State Co-operative Supply & Marketing Federation Ltd. vs. Sana

Spices Pvt. Ltd.) to distinguish the word "sohna" and "sona species". A judgment reported in S.M. Chopra and Sons Vs. Rajendra Prosad

Srivastava, to distinguish the word Raja and Maharaja, a comparison of the words "Ayur" with "Ayush" as reported in Three-N-Products Pvt.

Ltd. Vs. Amrutha Trading Corporation and Others, and "Zanocin" with the word "foxacin" as discussed in Ranbaxy Laboratories Ltd. Vs.

Indohemie Health Specialities Pvt. Ltd., are not applicable to the present case because the suffix word of the registered trade mark "GOLIN" is

containing the same alphabets and the pronouncement of the said word will phonetically the same, when both the words "CABGOLIN" and

"GOLIN" are pronounced, both are found, phonetically similar and also ocularly similar. Therefore, those judgments cited by the learned counsel

for the respondent/defendant cannot be applied since they were coined with various other alphabets which is not found in this case. In Ciba

Geigy's case reported in 1995 PTC 251 (M/s. Ciba Geigy Limited and Anr. vs. M/s. Crosslands Research Laboratories Ltd.) by the Division

Bench, of this court has categorically found that the trade mark "Eugel" and "Emugel" are similar, in both phonetic and ocular, likewise, the words

"CABGOLIN" and "GOLIN", are found similar in both, phonetically and ocularly. In Cadila's case reported in Cadila Health Care Ltd. Vs.

Cadila Pharmaceuticals Ltd., also it has been found in paragraph 15 as follows:

... The persons who would be deceived are, of course, the purchasers of the goods and it is the likelihood of their being deceived that is the

subject of consideration. The resemblance may be phonetic, visual or in the basic idea represented by the plaintiff's mark. The purpose of the comparison is for determining whether the essential features of the plaintiff's trade mark are to be found in that used by the defendant. The identification of the essential features of the mark is in essence a question of fact and depends on the judgment of the Court based on the evidence led before it as regards the usage of the trade.

22. It has also been pointed out by the Honourable Apex Court in the above case that the confusion as to the identity of the product itself could have a direct effect on the public health in case of medicinal cases when compared with non-medicinal cases wherein it would only cause economic loss.

23. In yet another judgment of the Honourable Apex Court reported in Kaviraj Pandit Durga Dutt Sharma Vs. Navaratna Pharmaceutical Laboratories, it has been held as follows:

29. When once the use by the defendant of the mark which is claimed to infringe the plaintiff's mark is shown to be "in the course of trade", the question, whether there has been an infringement is to be decided by comparison of the two marks. Where the two marks are identical no further questions arise; for then the infringement is made out. When the two marks are not identical, the plaintiff would have to establish that the mark used by the defendant so nearly resembles the plaintiff's registered trademark as is likely to deceive or cause confusion and in relation to goods in respect of which it is registered (Vide Section 21). A point has sometimes been raised as to whether the words "or cause confusion" introduce any element which is not already covered by the words "likely to deceive" and it has sometimes been answered by saying that it is merely an extension of the earlier test and does not add very materially to the concept indicated by the earlier words "likely to deceive". But this apart, as the question arises in an action or infringement the onus would be on the plaintiff to establish that the trade mark used by the defendant in the course of trade in the goods in respect of which his mark is registered, is deceptively similar. This has necessarily to be ascertained, by a comparison of the two marks--the degree of resemblance which is necessary to exist to cause deception not being capable of definition by laying down objective

standards. The persons who would be deceived are, of course, the purchasers of the goods and it is the likelihood of their being deceived that is

the subject of consideration. The resemblance may be phonetic, visual or in the basic idea represented by the plaintiff's mark. The purpose of the

comparison is for determining whether the essential features of the plaintiff's trade mark are to be found in that used by the defendant. The

identification of the essential features of the mark is in essence a question of fact and depends on the judgment of the Court based on the evidence

led before it as regards the usage of the trade. It should, however, be borne in mind that the object of the enquiry in ultimate analysis is whether the

mark used by the defendant as a whole is deceptively similar to that of the registered mark of the plaintiff.

24. In the said judgment, the trade names "Navratna Kalpa" was held to be similar with the registered trade mark "Navratna" which, is a

pharmaceutical case relating to Ayurvedic medicines. No doubt, the trade mark namely "CABGOLIN" and "GOLIN" is for the Allopathic

medicine. It is also brought to the notice of the Court that the defendant has adopted search report and thereafter found the name suitable for the

said drug and had adopted it. It was rightly answered by the learned counsel for the plaintiff that the search reports produced would show that they

have been obtained only after filing of the suit and how the search report would help the defendant to choose the name in the year 2010 before

adopting the name "GOLIN". Therefore, I could see that the trade mark registered by the plaintiff in the name "CABGOLIN" when compared

with "GOLIN" is phonetically and ocularly similar. No doubt, the "CABGOLIN" is a registered trade mark which has to be protected under the

provision of Section 17 and 29 of the Trade Marks Act. Admittedly, the product manufactured by the defendant was the same product as licensed

by the licensing authorities. Therefore, there is no question of any bar for producing the said medicine since the defendant had obtained proper

license from the licensing authority but it is not feasible and possible for the defendant to produce the said drug in the name "GOLIN" because it is

infringing the registered trade mark "CABGOLIN" of the plaintiff's registered trade mark in the year 2003.

25. As per the provisions of section 29 of the Trade Mark Act, a registered proprietor shall not be infringed and protection should be granted. The

averments made in the plaint as well as the affidavit would go to show that 5 years turn over is steadily increasing on the side of the plaintiff,

however, it has to be substantiated only at the time of trial, Even otherwise if the defendant is permitted to infringe the trade mark of the plaintiff

who is a registered proprietor of the said trademark, the usage of trade mark adopted by the defendant in the name of "GOLIN", would certainly

violate the provisions of the Trade Mark Act. Further more, the products of the defendant produced as "GOLIN" would be passed off as the

products of the plaintiff since there would be more confusion for the doctors as well as pharmacists and the public in identifying and distinguishing

the words "Golin" from "cabgolin".

26. Therefore, I find a prima facie case in favour of the plaintiff for the grant of temporary injunction. In the event of any injunction is granted, the

plaintiff would be very much affected by the act of passing off done by the defendant and therefore, the plaintiff would be put into irreparable loss.

This Court, on an earlier occasion, had considered the prima facie case in favour of the plaintiff and had granted an order of ad-interim injunction.

The defendant has not come forward with any application to vacate the stay and therefore, there could not be any prejudice for the defendant, if

temporary injunction is granted in favour of the plaintiff. Therefore, I could see that the balance of convenience is also in favour of the plaintiff and it

would lead to the grant of temporary injunction.

27. For the foregoing discussions held above, I am of the considered view that the plaintiff is entitled for the grant of temporary injunction in both

the applications in respect of infringement of trade mark as well as passing off the goods and both the applications are allowed as sought for. The

ad-interim injunction already granted by this court is, accordingly, made absolute. In fine, the application in O.A. Nos. 264 and 265 of 2011 are

ordered and ad-interim injunction passed in favour of the plaintiff is made absolute with costs.