$~33

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

\+ CS(COMM) 1184/2024 with I.A. 49524/2024, I.A. 49525/2024, I.A. 49526/2024, I.A. 49527/2024, I.A. 49528/2024 and I.A. 49529/2024

EXPHAR S.A. & ANR. .....Plaintiffs

Through: Mr. Pravind Anand and Ms. Lakshmidevi Somanath, Advocates

versus

EXPHA LIMITED & ORS. .....Defendants

Through:

CORAM:
HON'BLE MR. JUSTICE AMIT BANSAL

<u>O R D E R</u>

% 23.12.2024

<u>I.A. 49527/2024 *(exemption)*</u>

1. Allowed, subject to plaintiffs filing original/clear/certified/translated copies of documents within four weeks.

2. The application stands disposed of.

<u>I.A. 49529/2024 (*seeking exemption from advance service to defendant No.5*)</u>

3. The plaintiff submits that the present suit is being filed seeking urgent relief and the contact details of the defendant no. 5, which is a foreign entity, is not available on the internet.

4. In view of the fact, the plaintiff is exempted from serving an advance copy of the present suit on defendant no. 5 at this stage.

5. The plaintiff shall serve the complete paper book of the present suit

on defendant no.5 as and when the contact information of the said defendant no. 5 is made available during the proceedings.

6. The application is disposed of.

I.A. 49526/2024 _(O-XI R-1(4) of the Commercial Courts Act)_

7. The present application has been filed on behalf of the plaintiffs seeking leave to file additional documents under the Commercial Courts Act, 2015.

8. The plaintiffs are permitted to file additional documents in accordance with the provisions of the Commercial Courts Act, 2015 and the Delhi High Court (Original Side) Rules, 2018.

9. Accordingly, the application is disposed of.

I.A. 49525/2024 _(u/s 12A of Commercial Courts Act, 2015)_

10. As the present suit contemplates urgent interim relief, in light of the judgment of the Supreme Court in ***Yamini Manohar v. T.K.D. Krithi,*** 2023 SCC Online SC 1382, exemption from the requirement of pre-institution mediation is granted.

11. The application stands disposed of.

I.A. 49528/2024 _(seeking time for filing certificate u/S 63(4)(c) of BSA)_

12. This application has been filed on behalf of the plaintiff seeking time for filing the certificate under Section 63 (4) (c) of the Bhartiya Sakshya Adhiniyam, 2023.

13. For the reasons stated in the application, the same is allowed. The plaintiff shall file the requisite certificate under Section 63(4)(c) of the Bhartiya Sakshya Adhiniyam, 2023 within four (4) weeks.

14. The application stands disposed of.

CS(COMM) 1184/2024

15. Let the plaint be registered as a suit.

16. Despite advance service, none has appeared on behalf of defendants no.1 to 4.

17. Issue summons.

18. Summons be issued to the defendants through all modes. The summons shall state that the written statement(s) shall be filed by the defendants within thirty days from the date of the receipt of summons. Along with the written statement(s), the defendants shall also file an affidavit of admission/denial of the documents of the plaintiffs, without which the written statement(s) shall not be taken on record.

19. Liberty is given to the plaintiffs to file replications, if any, within thirty days from the receipt of the written statement(s). Along with the replications filed by the plaintiffs, an affidavit of admission/denial of the documents of the defendants be filed by the plaintiffs.

20. The parties shall file all original documents in support of their respective claims along with their respective pleadings. In case parties are placing reliance on a document, which is not in their power and possession, its detail and source shall be mentioned in the list of reliance, which shall also be filed with the pleadings.

21. If any of the parties wish to seek inspection of any documents, the same shall be sought and given within the timelines.

22. List before the Joint Registrar on 24th February, 2025 for completion of service and pleadings.

23. List before the Court on 4th April, 2025.

I.A. 49524/2024 *(u/O-XXXIX Rule 1 & 2 of Code of Civil Procedure, 1908)*

24. The present suit has been filed seeking relief of permanent injunction restraining the defendants from infringing the trademark and copyright of the plaintiffs, passing off along with other ancillary reliefs.

CASE SET UP IN THE PLAINT

25. The plaintiff no.1, Exphar S.A., is a company incorporated in Belgium in 1981, which is engaged in the business of manufacturing and exporting pharmaceutical products.

26. The plaintiff no.2, Gracure Pharmaceutical Ltd., is a Delhi-based public limited pharmaceutical company established in 1989 with the vision of providing world-class affordable medicines.

27. It is stated that the plaintiff no.1 is an innovative pharmaceutical company which manufactures and promotes high-quality pharmaceutical products at affordable prices in developing countries. In 1986, the plaintiff no.1 established its Pharma Development Division. It is further stated that the philosophy of conciliating the notion of profit with the social dimension has been at the root of the plaintiff no. 1's business. Accordingly, in 1989, the plaintiff no. 1 developed the concept of "Socialities", a term used to refer to pharmaceutical specialities offered at a social cost, making them accessible to a large number of people. Designed specifically for the private sector, the range of "Socialities" complements and supports the traditional distribution systems in ensuring the accessibility of essential medicines in developing and underdeveloped countries.

28. It is averred that plaintiff no. 1 has been involved in large-scale export of pharmaceutical products since 1983 in countries like Africa, Asia and

Central America, and plaintiff no.1 is claimed to be a leading player in the health sector in sub-Saharan Africa. The plaintiff no.1 is largely involved in the sale and distribution of medicinal preparations in the category of anti-parasite, cardiology, anti-malarials, eye drops, pain management, antifungals, antibiotics, anti-flu, gastroenterology, metabolism and urogenital system. Extracts from the websites and social media webpages of the plaintiff no. 1 are annexed to the list of documents filed along with the plaint.

29. The plaintiff no. 1's 'EXPHAR' brand is its flagship brand which has various sub brands under the same, including but not limited to Flucazol, Cardlurine, Cardiovalam, Gerdicid, Diarzil, Gastricid, Clomilen, Fercefol, Carbosol, Cromsol, Difenasol, Floxsol, Antalgex, Pregabaneurine, Difains, Exxib, Prostalen, Fluoxine, Micozal, Tinazol and Vozole. It is further submitted that the plaintiff no. 1's products under the said sub-brands are always sold and advertised under plaintiff no. 1's flagship brand 'EXPHAR'.

30. The plaintiff no. 1 partners with various entities for the production, promotion and distribution of its pharmaceutical products in regions such as sub-Saharan Africa, Burundi, Rwanda, Uganda, etc. The plaintiff no. 1 has manufacturing arrangements with Gracure Pharmaceuticals, an Indian Entity, whereby Gracure Pharmaceuticals is authorized to manufacture pharmaceutical preparations under the trademarks of plaintiff no. 1 for the purpose of export.

31. It is stated that the mark 'EXPHAR' is a coined and invented word which has no meaning in the English dictionary or any Medical dictionary and does not bear any direct reference to the character, quality and intended

purpose of the goods (i.e. pharmaceutical preparations) for which it has been used. Therefore, the 'EXPHAR' trademarks are inherently distinctive and further, due to the long, widespread and extensive use, are exclusively associated with the plaintiff no. 1's products.

32. The plaintiff no.1 has obtained registration for the trademark "EXPHAR" and its formative marks in India. Details of the registration obtained by the plaintiff in respect of its mark 'EXPHAR' and its formative marks are given in paragraph 10 of the plaint.

33. The plaintiff no. 1 has also obtained registrations for its 'Exphar' trademarks across international jurisdictions around the world. Details of WIPO International Trademark Registrations obtained by the plaintiff for its 'EXPHAR' marks are detailed in paragraph 12 of the plaint.

34. It is further contended that the Exphar trademarks of the plaintiff no. 1 enjoy an immense reputation crossing industrial and territorial boundaries. Owing to strict quality control, accessibility and affordability of the plaintiff no. 1's pharmaceutical products, the Exphar trademarks have become well renowned internationally as well as in India. It is stated that plaintiff no. 1 has received numerous approvals and recognitions over the years, details of which are given in paragraph 14 of the plaint.

35. The plaintiff no. 1 has been using the mark "EXPHAR" since the 1980's worldwide and at least since 1991 in India, and on account of such long, extensive, uninterrupted, and continuous use for the past two decades, the impeccable quality of the "EXPHAR" products and the accompanying reputation, the plaintiff no. 1's "EXPHAR" trademark is instantly identifiable and recognizable by both the members of trade and the consuming public as being exclusively associated with the goods and

business of plaintiff no.1. The plaintiff no. 1 has also invested huge sums of money and efforts in relation to promotional activities and publicity concerning their pharmaceutical drugs under the Exphar trademarks, which is evident from the widespread advertisement and promotional activities contributing to the exponential growth and reputation of the Exphar trademarks.

36. It is stated that the plaintiff no.1 has been diligently protecting its rights in its trademarks and has successfully pursued to prevent any misuse and infringement by third parties. The plaintiff no.1 has also filed several lawsuits in pursuit of protecting its valuable intellectual property rights.

37. It is stated that the defendant no.1, Expha Limited is believed to be a business concern, with its office at Zeinenweg 4 CH-8405 Winterthur, Switzerland, as per the information available on the website – www.expha.ch. The defendant no. 1 is engaged in the business of marketing and distributing pharmaceuticals mainly in French-speaking regions of Africa. The defendant no. 1 also operates by means of its highly interactive website www.expha.ch. The website has a detailed "CONTACT US" page, along with a drop-box which allows consumers to get in touch with the defendant no. 1 at any point in time.

38. It is stated that the defendant no. 2, Swiss Parenterals, is believed to be a limited company with its office in Gujarat, India. The defendant no.2 is believed to be engaged in the business of developing, manufacturing and exporting pharmaceutical products. The defendant no. 2 also has a highly interactive website being www.swiss.in and the website has a detailed "CONTACT US" page, along with a drop-box which allows consumers to get in touch with the defendant no. 2 at any point of time. The defendant no.

2 is engaged in the business of manufacturing pharmaceutical products under the trademark 'EXPHA' for defendant no. 1 and is exporting the said products from India.

39. It is stated that the defendant no. 3, Eris Lifesciences Limited, is a company incorporated under the Companies Act, 1956, with its address at Gujarat, India. The defendant no. 3 also has a highly interactive website being www.eris.co.in and the website has a detailed "CONTACT US" page, along with a drop-box which allows consumers to get in touch with the defendant no. 3 at any point of time. It is believed that the defendant no. 3 has acquired a majority stake in the defendant no. 2 company as of February 2024.

40. The relationship between defendants no. 2 and 3 has also been actively advertised by the defendants on their Social Media pages.

41. The plaintiff no. 1 verily believes that the defendants no. 2 and 3, in partnership with defendants no. 4 and 5 are manufacturing pharmaceuticals products under an identical trademark, "EXPHA" being surreptitiously exported to African nations of Cameroon, Benin, Senegal, etc.

42. An independent investigation was also conducted on behalf of the plaintiff no. 1 against the defendant no. 2 and the investigator's affidavit is filed with the present suit. The findings of the investigation show that defendant no. 2 is manufacturing and exporting products from India under the name ACURE with the house mark 'EXPHA' for defendant no. 1.

43. A comparison of the plaintiff's trademark with that of the Defendants is reproduced in the table below:

PLAINTIFF’S TRADE MARK	DEFENDANT’S IMPUGNED TRADE MARK
exphar sa SOCIALITES	expha

44. The similarity between the plaintiff’s Trade Mark and the defendants’ Trade Mark is evident from the table above. A bare perusal of the above comparison shows that the only difference in the two marks is the omission of the letter ‘r’ in the defendants’ mark. The aforesaid similarities clearly show the dishonest and *mala fide* intention of the defendants in the adoption/use of the defendants’ Trade Mark ‘EXPHA’.

45. Based on the averments made in the plaint, the plaintiff has established proprietary rights over the mark “EXPHAR” and its formative marks. The mark adopted by the defendants is deceptively similar to that of the plaintiff and in respect of identical goods.

46. Clearly, an attempt has been made by the defendants to create an impression that the products being sold by the defendants are connected to the plaintiff. The mark being used by the defendants, on a *prima facie* view, appears to be deceptively similar to the plaintiff’s marks.

47. Balance of convenience is in favour of the plaintiffs and against the defendants. Irreparable injury would be caused to the plaintiffs if the defendants continue to use the impugned mark. Prejudice would also be caused to the public as the mark of the defendants is deceptively similar to that of the plaintiffs and likely to cause confusion in the market.

48. Despite advance service, none has appeared on behalf of defendants no.1 to 4.

49. Issue Notice.

50. Notice be issued to the defendants *via* all permissible modes, including e-mail.

51. Reply(ies) be filed within four (4) weeks.

52. Rejoinder(s) thereto, if any, be filed within two (2) weeks thereafter.

53. Accordingly till the next date of hearing the defendant no. 2, their successors in rights, title and interest, their affiliates and subsidiaries, their principals, employees, directors, wholesalers, distributors, partners, proprietors, officers, servants, agents, and all others acting under, on their behalf, or through the defendant no. 2, and lawfully claiming under the defendant no. 2, for all times to come are restrained from using, manufacturing, selling, marketing, exporting, importing, offering for sale, distributing, advertising, directly or indirectly dealing in pharmaceutical products, or goods of any description and from using the impugned mark "EXPHA" or any identical / deceptively similar mark to that of the plaintiff no. 1's trademarks "EXPHAR", in any manner whatsoever.

54. Compliance of Order XXXIX Rule 3 of the Code of Civil Procedure, 1908 (CPC) shall be done within three days from today.

55. List before the Joint Registrar on 24th February, 2025 for completion of service and pleadings.

56. List before the Court on 4th April, 2025.

AMIT BANSAL, J

DECEMBER 23, 2024
ds