

Burroughs Wellcome (India) Ltd. vs Uni-Sole Pvt. Ltd. And Another on 3 July, 1997

Author: S.H. Kapadia

Bench: S.H. Kapadia

JUDGMENT

S.H. Kapadia, J.

1. The plaintiffs have filed this suit against the defendants seeking permanent injunction restraining the defendants from using in relation to their product (Tablets) the impugned carton, a photograph of which is annexed at Exh. H to the plaint or any other deceptively similar carton. Both the plaintiffs and the defendants manufacture anti-biotics known in the trade as "Septran Tablets" and "Simptran Tablets" respectively. The plaintiffs claim to be the registered Proprietors of the trade mark "Septran" since 1969. They also claim to be the owner of copyrights in various labels and artistic work used by them on their cartons in relation to their product Septran tablets. It is the case of the plaintiffs that since 1993 after discontinuance for about 7 years, the defendants have once again started indulging in colourable imitation in plaintiffs trade mark and artistic labels/cartons and is passing off their product as if associated with the plaintiffs. The plaintiffs have accordingly framed its cause of action in the suit on the footing of the alleged infringement of registered trade marks of which the plaintiffs are the Proprietors, passing off as well alleged infringement of the plaintiffs copyrights in the original artistic work, viz., cartons referred to in the plaint.

2. The plaintiffs are the registered proprietor inter-alia of the following trade marks and artistic works, viz., "Septran", "Septran", "Septrain", "Septran" and "Seprin". The Artistic work on which reliance is placed by the plaintiffs and the subject matter of the copyright is the carton, a photograph of which is annexed as Exh. H to the plaint. The artistic work which was originally registered under Exh. A at page 27 of the plaint refers to the title of the work as "Septran" carton and the copy annexed to the said certificate indicates that the artistic work consists of carton which relates to Septran Tablets and which at the relevant time indicated a compound or component of the Septran Tablets as "Trimethoprim & Sulphamethozazole." At this stage it needs to be clarified that admittedly on account of subsequent technological advancement in medicine the word "Contrimoxazone" has been printed in place of the original words. "Trimethoprim & Sulphamethozazole." which is the brief name given by the British Pharmacopoeia for the compounded preparation of "Trimethoprim and Sulphamethoxazone". Even according to the defendants, who have filed their reply. "Contrimexazone" is the brief name given by the British Pharmacopoeia for the compounded preparation of "Trimethoprim & Sulphamethozazole".

3. In the above matter it is the case of the plaintiffs that since 1974 they have been manufacturing and marketing in India Septran Tablets both in liquid and in tablet form; that they had got prepared the original artistic work from one Ram S. Wahie for valuable consideration for and on behalf of the plaintiffs in respect of the carton having distinct colour scheme, get up and lay out Accordingly they obtained registration and copyrights from the Registrar of Copyrights in respect of the original artistic work, viz., carton vide Registration No. A-39289. The certification dated 29th April, 1983 is annexed as Exh. A to the plaint in respect of the original artistic work in respect of Septran tablets. In other words, the carton is the subject of copy rights. As stated above under the said certificate the component of tablets at that time consisted of a compound of two elements which subsequently has been substituted by one., viz. Contrimoxazone. According to the plaintiffs from 1974 till 1990-91 they used the carton as indicated in the registration certificate. In 1990-91 they started using the carton whose photograph is at Exh. H to the plaint. In September 1986 the plaintiff's attention was drawn to the impugned product Simptran marketed by defendant No. 1 in a carton which was deceptively similar to the plaintiff's carton. By using the impugned carton and the impugned mark, defendant No. 1 allegedly committed acts of infringement of copyrights, trade mark and passing off. Accordingly, the plaintiffs addressed a letter on 13-9-1986 to the Advocate of the 1st defendants. No reply was given. A reminder was addressed to which also no reply was given. In the circumstances, the plaintiffs were entitled to believe that defendant No. 1 has discontinued to use of the impugned carton and the use of the Tablets which was marketed and sold under the trade mark "Septran". In the circumstances, they did not take any legal action till 1993. In September, 1993, the plaintiffs came to know that defendant No. 1 surreptitiously has reintroduced the said product in the market under the mark "Simptran" and they were marketing the said product in an identical carton or a deceptively similar carton and they were marketing the product in Gujarat. In the circumstances, the plaintiffs have filed the above suit.

4. It is the case of the plaintiffs that they are the owners of the copy rights in the original artistic work, namely the carton a specimen of which is annexed at Exh. B to the plaint and the photograph of which is also at Exh. H. According to the plaintiffs, the registration of the said copy right is valid and subsisting till today. According to the plaintiffs, the defendants have copied the original artistic work. The scheme, lay out and get up is copied by defendant No. 1 only with slight alterations, namely with logo appearing on the main panel of the two companies which differ. Otherwise the first defendant's carton is substantial reproduce and/or colourable imitation of the plaintiff's original artistic work. They have also adopted, according to the plaintiffs, the marks "Simptran" which is deceptively similar to the plaintiffs registered trade mark "Septran" and also deceptively similar to the associated trade marks referred to above. According to the plaintiffs, defendant No. 1 has wrongfully and with malicious, and fraudulent intent adopted the mark "Simptran" which is deceptively similar to the plaintiff's trade mark Septran and by using the impugned mark, defendant No. 1 has passed off and/or enabled others to pass off their goods as and for the goods of the plaintiffs. According to the plaintiffs adoption of the carton and the mark by defendant No. 1 is allegedly distinct and fraudulent and the intention of the defendant No. 1 was and is to trade upon the reputation acquired by the plaintiffs and to pass off their goods as and for the goods of the plaintiffs. In the circumstances, as stated hereinabove, the plaintiffs have sought reliefs by way of infringement of trade mark and passing off being closely connected with the reliefs on the basis of copy rights see para 18 of the plaint. The plaintiffs also obtained leave under Clause 14 of the Letters

Patent to permit them to combine the cause of action of infringement of trade mark and passing off with the cause of action for infringement of copyrights.

5. By way of defence to the Notice of Motion, a reply has been filed by defendant No. 1. It is the case of defendant No. 1 that since 1990-91 the plaintiffs have changed and altered the registered carton and therefore, they cannot claim to have any subsisting rights in the artistic work of the carton. It is the case of the defendant No. 1 that when after 1990-91 the plaintiffs replaced the name "cotrimoxazole" in place of the compound "Trimethoprim & Sulphamethozazole", it amounted to a complete change in the artistic work in the carton and since the alternations was not registered the plaintiffs cannot claim any subsisting right on the footing of the registration of the original artistic work on the carton which consisted of the name "Septran" carton preceded by the name of the compounds "Trimethoprim & Sulphamethozazole". It is next contended in the affidavit that the plaintiffs admittedly have registered associated marks with the prefix "Sep" and therefore they do not have any distinctive right in the suffix "tran" and if the plaintiffs are not using the said marks with suffix "Tran" then the plaintiffs cannot claim any proprietary interest in the suffix "tran" and they cannot claim any right in the said suffix. They have further contended by the said affidavit in reply that "Simpran" tablets are sold in strips packing/blister packing which are packed and sold in the carton of specimen of which annexed as Exh. B to the affidavit in reply and in the above circumstances, there is no question of deceptive similarity between the two products. Because, according to the defendant No. 1, the entire edifice of the plaintiffs cause of action is based on the infringement of the copy rights and subject matter of which is the carton or the artistic work on the carton whereas they have been selling the product "Simpran" in tablets strips and not in carton, and therefore, there is no question of infringement of copy rights.

6. In reply it is next contended that the mark "Septran" is not associated by the traders and members of the public exclusively with the plaintiffs. It is further contended that the defendants product is sold in strips and it has no connection with the outer carton. It is further contended by defendant No. 1 that the clear making on the carton of defendant No. 1 wherein its name, logo and product is clearly displayed which shows that there, is no likelihood of deception in the product and that the products "Simpran" and "Septran" are totally distinct and separate. It is further mentioned in the affidavit-in-reply that under the above circumstances, since the defendants have been selling Simpran tables since 1986 there is no question of deception, fraud or likelihood of such deception or fraud being pointed out and that they have, large turn over of Rs. 2 crores and that they have been openly selling the said product in the market, it is further contended that in order to renew the cause of action a false allegation has been made by the plaintiff that the product is being sold since 1993 in Ahmedabad. According to the defendants, the plaintiffs have discontinued using the said carton in which they have copyright, namely Exh. A, since 1990-91 and that the plaintiffs have no copyright in the carton at Exh. B to the plaint. It is further contended that the entire product is such that it is not sold in carton but it is sold as per the strips and there is no co-relation to the carton.

7. On the above cause of action, various submissions have been made by the learned Advocates appearing for the plaintiffs and the defendants. Before coming to the rival contentions, the following concepts are required to be clarified.

8. Copyright it is a form of intellectual property. With advancement in technology it is very easy to copy. The basic test in actions based on the infringement of the copyright is that if a thing fetches a price, it can always be copied and therefore, it needs adequate protection. It is well settled that although under the Copyright Act 1957, there is a provision of registration, under Section 44 of the Act. It is not in doubt that the said procedure is an enabling provision and registration is not compulsory for the purpose of enforcing copyright. Section 44 of the Act provides for registration of work in which copyright exists but in order to claim copyright registration is not necessary. This is because registration is only to raise a presumption that the person shown in the certificate of registration is the author. This presumption is not conclusive, but no further proof is necessary unless there is a proof rebutting the contents of the said certificate. Under Section 48 of the Registration Act therefore, the act of registration is ex-facie prima facie evidence of the particulars incorporated in the certificate. There is no provision under the Act which deprives the author of his rights on account of non-registration of the copyright. There is nothing in the Act to suggest that the registration is condition precedent to the subsistence of the copyright or acquisition of copyrights or ownership thereof or for reliefs of infringement of copyrights. The sine-qua-non of existence of a copyright is expenditure of skill, labour and capital on any work expended by a person/author and unless the original work is produced in Court to prima facie show that the work has originated from author, no relief can be granted. In other words, copyright exists even without it being registered for the purposes of its enforcement. The nature of copyright is also meant to be borne in mind. It subsists in any material form in which ideas are translated. Copyright is an incorporeal right. It does not lie in any idea, but it lies in the expression in which the idea is expressed. The work of an author therefore becomes the subject matter of the copyright. In essence the copyright is a negative right of preventing copying of physical material in the field of art, literature etc. Once an idea is written down, the writing becomes the subject matter of copy right. With globalisation and advancement of technology, even computer programmes come within the copyright. Any work conveying a particular information comes within the subject matter of a copyright and it needs protection. Even a catalogue of items manufactured by a manufacturer can come within the subject matter of copyright. Even a decoration or an artistic work on a carton or a container of goods can become the subject matter of copyright. This discussion is made because of two points which have been vehemently urged by the learned counsel for the defendants, namely that in the present case there is no artistic work involved which would attract the provisions of the Copyright Act and secondly, it has been argued on behalf of defendant No. 1 vehemently that since 1990-91, the label on carton has undergone substantial change in artistic work on the original registered copyright and therefore there was no subsisting right in the artistic work of the carton which is shown by way of photograph at Exh. H. With the above introductory remarks, the contentions of the parties are required to be seen.

9. It is contended by Shri Tulzapurkar, the learned counsel appearing on behalf of the plaintiffs that in the present matter the artistic work in the carton was duly registered as evidenced by the registration certificate at Exh. A. Mr. Tulzapurkar further contended that the annexure Exh. B to the said certificate clearly indicate that septran tablets has a dual compounds which were subsequently supplemented by a single compound. He has contended that if one compares Exh. B with the photograph of carton which is used after 1990-91 of septran tablets, the same is substantially similar and in the circumstances it is contended on behalf of the plaintiffs that it is not open to the

defendants to contend that after 1990-91 there was no subsisting right in the artistic work in the carton which has been substantially altered with replacement of one compound for the two compounds indicated in the original annexure to the certificate at Exh. A. In the alternative, Mr. Tulzapurkar submitted that in view of the provisions of the Copyright Act, 1947, and particularly Section 44 and Section 48 of the said Act, since registration of artistic work in the carton was not necessary, it cannot be said that the defendants are entitled to infringe that copyrights on the ground that new artistic work has not been registered. Because even an unregistered artistic work in the carton could be enforced as indicated by the above observations made by this court and particularly in view of Sections 44 and 48 of the Act of 1947. Mr. Tulzapurkar contended that in the present matter, the impugned carton of defendant No. 1 is deceptively similar to the plaintiffs carton. He has submitted that the 1st defendant has copied the colour scheme, lay out and get up of the plaintiffs carton. He has further submitted that the 1st defendant adopted the blue background with a red strip and white border on either side of the strip. He has further contended that the cover panels have an identical colour scheme and lay out and the placement of the material is also identical. He has submitted that the overall get up of defendant No. 1's carton is very close to the carton of the plaintiffs and defendant No. 1 has adopted the carton with similar colour scheme, lay out and get up and by using impugned carton defendant No. 1 has passed off his goods as and for the goods of the plaintiffs. He has further contended that defendant No. 1 has copied not only the plaintiff's carton but also the plaintiffs mark. He has contended that the 1st defendant has adopted the mark "Simptran" which is deceptively similar to the plaintiffs registered trade mark "Septran" and also it is deceptively similar to the earlier trade mark "Septran" and "Seprin". Mr. Tulzapurkar further contended that in the present case after 1986, the plaintiffs genuinely believed that the defendants have given up marketing the impugned product under the mark "Simptran" and has also given up selling the product under the impugned carton because no reply was given to the Advocates noticed and it is only in 1993 that for the first time from Bhagwati Stores in Ahmedabad, the plaintiffs came to know that the defendants have once again started infringing the copyright being the artistic work in the carton as also passing off and infringement of the trade mark and in the above circumstances, the suit has been filed in the year 1993. Mr. Tulzapurkar specifically drew my attention to the affidavit-in-reply of the defendants and pointed out that there is no denial and no explanation given and no prima facie evidence produced by the defendants to show that during 1986 and upto 1993 they have been selling the above product under the impugned mark and in the impugned carton. Mr. Tulzapurkar therefore submitted that the suit is filed and Notice of Motion has been taken out well within time. Mr. Tulzapurkar also invited my attention to the sales figures in respect of the plaintiffs "Septran" tablets and he has also indicated the expenses incurred by the plaintiffs to promote the sale of Septran tablets. On the other hand, he has pointed out that the defendants have a turn over of Rs. 2 crores which clearly indicates losses suffered by the plaintiffs. In the above circumstances, Mr. Tulzapurkar submits that the plaintiffs are entitled to seek the reliefs by way of the present Notice of Motion. Mr. Tulzapurkar has also clarified the ambiguity in the pleadings by pointing out that the registration certificate annexed as Exh. A to the plaint is the evidence of artistic work on the Septran carton being registered and the annexure to the said Exhibit "A" indicates that the Septran carton was the artistic work which was registered and prior to 1991 it was prefixed by two compounds, whereas after 1991 it is prefixed by one compound and that also is the adoption based on British pharmacopoeia. Mr. Tulzapurkar has invited my attention to the judgment of this court to show that the registration of the copy right is not compulsory and for

enforcement of those rights registration is not required. He has heavily relied upon the judgment of Dhanuka, J., in the case of Hindustan Lever Ltd. v. Nirma Pvt. Ltd., to show that even in that matter injunction was sought in respect of Exh. D to the plaint which was an artistic label which was not registered under the copyright, Act, though two other artistic labels appearing in Exh. Y-1 and Exh. Y-2 were registered. Mr. Tulzapurkar contended by placing reliance on the judgment of Hindustan Lever that even if there is a change in the artistic work, namely Exh. D to the plaint (in that suit) which is substantially similar to the registered artistic work relief by way of injunction can always be granted. In that case Dhanuka, J. found that the change in the artistic work which was not registered as substantially similar to the artistic work which was registered as evidenced by Exh. Y-1 and Y-2. Relying on the said judgment therefore, Mr. Tulzapurkar contended that replacement of two compounds with one compound will not alter the enforceability of the rights in respect of the unregistered carton as evidenced by the photograph at Ext. H. Mr. Tulzapurkar has also referred to the above judgment of Dhankar, J., With regard to the infringement of the trade mark and has submitted that in the present matter to constitute infringement of copy right degree of resemblance and substantial resemblance was sufficient and exact resemblance was not necessary. With regard to the infringement of the mark, he has also relied upon the judgment of this court in the case of Astra/IDL Ltd. v. TTK Pharma Ltd. . This judgment is relied upon by Mr. Tulzapurkar learned counsel appearing on behalf of the plaintiffs also to answer the submission raised by the defendants. In that matter it was contended on behalf of the defendants that the word "Beta" is prefixed to every drug which deals with angina or heart disease and merely because defendants have used the mark Betalong it cannot be said to be similar to the plaintiffs mark Belaloc. This argument was rejected by the learned Judge on the basis that in a matter of this type, we have to see whether the mark is deceptively similar to any mark and for that purpose we have to see the totality of the circumstances including the colour get up, phonetic, visual and structure similarity. This judgment of Jhunjunwala, J., in the case of Astra/DL Ltd. (supra) further lays down that there is no merit in the defence of the defendants that the medicinal preparation form part of Schedule H and that they can be sold only against prescription. The court in the matter took judicial notice of the situation prevailing in India and has observed that no weightage can be attached to the sale of pharmaceutical products on prescription, when in fact the products are available in India on many occasions purely on demand and without prescription and in such cases the interest of the public is more important than the rights of the parties.

10. In reply to the arguments advanced by Tulzapurkar, Mr. Anand learned counsel appearing on behalf of the defendants, submitted that in the present case no interim relief ought to be given on account of the delay in adopting the proceedings by the plaintiffs. He contended that in the present matter till 1993 no steps were taken by the plaintiffs to adopt suitable action. It is contended that right from 1986 the defendants have been in business and they have been selling the Simptran tablets and in the above circumstances, they were not entitled to any interim orders. Mr. Anand further submitted that even after filing of the suit, the plaintiffs did not take out Notice of Motion for ad interim relief which clearly indicate that till today no steps have been taken by the plaintiffs and therefore, they were not entitled to interim reliefs. It is further contended by Mr. Anand learned counsel for the defendants that in view of the change in the artistic work on the carton after 1990, there was no subsisting right in the plaintiffs and if they had any right in the plaintiffs and if they had any right in the new artistic work which is unregistered then they ought to have moved the court

immediately for ad-interim orders. Mr. Anand further contended that there are judgments of this court which clearly indicates that in a matter of this type, which is essentially founded on the infringement of copyrights, delay defeats the equitable right of the plaintiffs to claim reliefs in equity. In the circumstances, no interference is called for particular when the dependents have a turn over of Rs. 2 crores for a period of time. I do not find any merits in the above contention of the learned counsel for the defendants. In the present matter as stated above, in 1986 Advocate's Notice was given to the defendants to cease and desist from infringement of copyright in favour of the plaintiffs. Two notices were given. However, no reply was given by the defendants to the said two notices. Even before this Court, as stated herein above, there is no clear denial that during 1986 and 1993 they have not discontinued the business. No evidence even prima facie has been produced to show that they have been in business of selling Simptran tablets during 1986 and 1993. On the other hand the plaintiffs have made out prima facie a positive case that in 1993 they came to know from Bhagwati Stores in Ahmedabad that the defendant have restarted selling Simptran table under the impugned cartons and accordingly the above suit has been filed. After 1993 till today the question may arise as to whether the plaintiffs are entitled to claim damages ultimately. But in the present case on merits, the plaintiffs have made out a very strong case and therefore, I am not inclined to defeat the plaintiffs case only on the ground of delay.

11. Mr. Anand, learned counsel appearing on behalf of the defendants, next submitted that in the present case, there is no copy right as the work on the carton is not artistic and in the circumstances, such a work on the carton, if it is not artistic, cannot be a subject matter of copy right. Mr. Anand contended that this argument is very relevant in respect of the alleged new artistic work, which is not registered. I do not find any merit in the second contention advanced by Shri Anand. In the first instance, as stated hereinabove, we have to keep in mind that with globalization and with introduction of modern technology, it is very easy to copy the work which has a monetary value. It is in this that the concept of artistic work is required to be read in a probable perspective. Even catalogues maintained by the manufacturers come within the article work as defined under the Act. It is not necessary to go into the various judgments on that aspect of the matter. Today with photocopying machines etc., the work which has a monetary value can easily be copied and certainly such work needs to be protected. In the above circumstances, I do not find any merits in the above second contention of Mr. Anand.

12. Mr. Anand next contended that in the present case, if one goes to para 3 of the plaint, the cause of action spelt out by the plaintiffs is based on infringement of copyright. He submitted that however, the cause of action in para 3 is purely based on Exh. B to the plaint and not on the existing carton which is in use from 1990-91. Mr. Anand submitted that in the present case, the plaintiffs have connected the remaining two cause of actions being based on passing off and infringement of trade mark with the cause of action based on infringement of copyright, because the plaintiffs are aware of the fact that the cause of action on the basis of infringement of trade mark and passing off will not lie within the jurisdiction of this court and it is for that reason that they have connected the two cause of actions with the cause of action of infringement of copyright and if the copyrights action is based only on Exh. B, which is not in existence, then this court has no jurisdiction and the leave granted under Clause 14 of Letters Patent should be revoked. Mr. Anand has very heavily argued the matter. In the present matter of this point, I was prima facie initially impressed.

However, on deeper consideration of the matter. I find that on the reading of the plaint in its entirety the cause of action is not only base on infringement of copyrights but it has direct nexus to the infringement of trade mark and passing off. Further as rightly clarified by Mr. Tulzapurkar and in view of the judgment of this court in Hindustan Lever's case, it is clear that the photograph at Exh. H refers to the current artistic work which is substantially similar to the registered artistic work as evidenced by Exh. A and Exh. B to the plaint. Even the carton used by defendant No. 1 has the same compound "Contrimoxazone", and as stated above, the new artistic work even though unregistered was enforceable. The prayers in the Notice of Motion further make it very clear that an injunction is sought by the plaintiffs against the defendants preventing the defendants from using the carton whose photograph is produced at Exh. H to the plaint. As stated herein above, in the judgment of Hindustan Lever's case also Exh. D to the plaint was not a registered artistic work and injunction was still granted. In the above circumstances, taking into account the similarity between the two artistic works and the fact that the new artistic work is not remained unregistered and still it was enforceable, clearly shows that there is no merit in the defence put up by Mr. Anand for the defendants. This argument is also connected to the next arguments of Mr. Anand who has contended that in the present matter the cause of action is only on the registered certificate which encloses the original artistic work and since there is no amendment to the plaint there is no cause of action based on the new artistic work which is evidenced by photograph Exh. H. He has further submitted as a limb of the same arguments that since new artistic work is not registered and since it is not similar to the original artistic work, there is not question of there being any subsisting right of the plaintiff in the new artistic work and in the circumstances. they are not entitled to the injunction. I do not find any merit in the said contention also. As stated herein above, there is a substantial similarity between the two artistic works. There is a substantial similarity between the two cartons both in the nature of get up, colour combination and essential similarity is the test and actual reproduction of the two cartons is not the test. This is the basic ratio of the judgment of Court in Hindustan Lever's case. This point is important because it is also argued by Mr. Anand in the present matter that the logo and the name of the company on the impugned carton clearly indicates that there is substantial difference between the impugned carton and the registered carton and in the circumstances of the case, no case is made out by the plaintiffs. As laid down by the various judgments of this Court, we have to see as to whether there is substantial similarity between the impugned carton and the carton of the plaintiff and if that test is satisfied and the minor dissimilarity will not put the plaintiffs out of this court. Mr. Anand further contended that in the present case, no figures of the loss suffered by the plaintiffs have been indicated and therefore, they are not entitled to any interim relief, I do not find any merit in the said contention. The plaintiffs have given their own sales figures. They have also given the amount spent by them and the very fact that the defendants has a turn over of Rs. 2 Crores by exploitation reputation of plaintiffs trade mark and the copyrights itself speaks volume with regard to the losses suffered by the plaintiffs. The plaintiffs have earned their reputation with regard to the product "Septran" tablets and that name has been registered under the Trade Mark Act and in the above circumstances therefore, the infringement of the trade mark is clearly prima facie spelt out by the plaintiffs.

13. Mr. Anand next contended that the plaintiff's trade mark with associated trade mark indicates that the prefix "Sep" is common. He further submits that the word "Trans" is not common registered trade mark or the associate trade mark which are also required to be registered and in the

circumstances the plaintiffs cannot claim any right or interest with regard to the suffix "Trans". He further submitted that the suffix "Trans" means tranquiliser" and if that be the case then the plaintiffs cannot claim any interest in the said suffix. I do not find any merit in said submission. Septran or Simptran are anti-biotic drugs. There is nothing to indicate that the word "Trans" which is suffix means tranquiliser. In any event in view of the judgment of Jhunjunwalla, J., in the case of Astra/IDL Ltd. (supra), it is clear that we have to see the totality of the trade marks, phonetic structural and visual resemblance between the rival marks, nature of the marks, the trade channels, the characteristic of the purchasing public, the mode of selling and surrounding circumstances supported by references to decided cases. In the case of Astra/IDL Ltd. (supra) at least there is prima facie evidence to show that the word "Beta" was the common prefix in drugs which are administered to patients having angina in the present case there is no such evidence before me to show that the suffix "Trans" is a tranquiliser. Whether as an anti-biotic a tranquiliser can be used or not is again a matter of debate, but there is no evidence to show that the word "Tran" is commonly used as suffix in all anti-biotics. In the above circumstances, there is no merit in the contention advanced by Mr. Anand, learned counsel appearing for the defendants, Mr. Anand, next contended that in the present case the defendants have been selling the tablets not in carton but in strips and in the circumstances the question of applying the test of wonderment will not apply, because the defendants have been selling the Simptran tablets in strips and not in carton. I do not find any merit in the said contention. As laid down by the judgment of Jhunjunwalla, J., in the case of Astra/IDL Ltd. (supra) judicial notice of the fact can be taken that in India the tablets are sold without the prescription even when the law mandates that they are to be sold only on prescription of the Doctors. Secondly, I have seen the two strips of Simptran and Septran. Except the colour of the script there is similarity between the two strips which again lead a person of ordinary intelligence to make a mistake when he goes to the Chemist to buy the strip. In the above circumstances, I do not find any merit in the contention advanced by Mr. Anand, Mr. Anand next contended that in the present case the logo and name of the two companies on the carton substantially bring about the difference and in the circumstances there is no question of any infringement. I do not see any merit in the said contention also. Under the Drug Act, the name of the Company is compulsorily to be mentioned, but as stated by Jhunjunwalla, J., in the case of Astra/ IDL Ltd. (supra), we have to see the totality of the marks, phonetic structural and visual resemblance between the rival marks, nature of marks, the trade channels, the characteristic of the purchasing public etc. and in the above circumstances, therefore, minor discretion as indicated by name or logo will not defeat the claim of the plaintiffs for interim relief. Mr. Anand next contended that in the present case the registration of the mark is only upto 1990 as evidenced by Exh. C. I do not find any merit in the said contention. Mr. Tulzapurkar has pointed out to me the renewal of the registration from 1990 onwards. In the above circumstances, there is no merit in last contention advanced by Mr. Anand.

14. Before concluding one more aspect needs to be mentioned is that under Section 22 of the Copyright Act, life of a copyright for 60 years. That period is not expired and in the above circumstances, the copyright which is assigned by the author in favour of the plaintiffs still subsists. On the other hand there are cases to indicate that the burden will also lie on the defendants to show as to from what source they have derived the impugned artistic work on the carton. In the present case, there is no such evidence before me to show that as to on what basis the impugned artistic work has been derived on the impugned carton of the defendants. Taking into account the above facts and

circumstances of the case, the following order is passed.

ORDER

15. Pending the hearing and final disposal of the suit, there will be an interim order against the 1st defendant, their servants and agents in terms of prayer Clauses (a), (b) (c) and (d) which are to be following effect :

(a) That pending the hearing and final disposal of this suit the 1st defendants by themselves, their servants and agents be restrained by an order and injunction of this Hon'ble Court from in any manner infringing the plaintiffs copyright in the original artistic work, registered under No. A/39289 by using and or exposing for sale and/or offering for sale without the plaintiff's licence the carton being Exh. H to the plaintiff or any other colourable imitation thereof or a substantial reproduction of the plaintiff's original Artistic work being Exh. B to the plaintiff.

(b) That pending the hearing and final disposal of this suit the 1st defendants by themselves, their servants and agents be restrained by an order and injunction of this Hon'ble Court from in any manner using in relation to any medicinal or pharmaceutical preparations the impugned mark "Simptran" or any other deceptively similar trade mark so as to infringe the plaintiff's registered trade marks "Septran" bearing No. 256883, and/or "Septran" bearing No. 296017 and/or "Septrain" bearing No. 296517 and/or "Septran" bearing No. 296517 and/or "Septrim" bearing No. 297209 :

(c) That pending the hearing and final disposal of this suit the 1st defendants by themselves, their servants and agents be restrained by an order and injunction of this Hon'ble Court from in any manner using in relation to any medicinal or pharmaceutical preparations and in particular in respect of Contrimazazone Medical preparation and in particular in respect of Contrimazazone Medical preparation the impugned mark "Simptran" or any other deceptively similar trade mark so as to pass off or enable others to pass off the 1st defendants goods as and for the goods of the plaintiff;

(d) That pending the hearing and final disposal of the suit, the 1st defendants by themselves their servants and agents be restrained by an order and injunction of this Hon'ble Court from in any manner using in relation to any medicinal or pharmaceutical preparations and in particular in respect of contrimazazole medicinal preparation the impugned carton, which is annexed as Exh. H to the plaintiff or any other deceptively similar carton so as to pass off or enable others to pass off the the 1st defendant's goods as and for the good of the plaintiffs.

16. However, looking to the facts and circumstances of the case, there will be no order as to costs.

17. Mr. Anand, learned counsel for the defendants, applies for stay of the order for a period of 8 weeks. Learned Advocate for the plaintiffs opposes the application. In the above matter, I am inclined to stay the order for six weeks, for the reason that the plaintiffs did not apply for ad-interim orders from 1993 till today.

18. Injunction granted.