

\$~

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

*Reserved on: 24<sup>th</sup> July, 2019*  
*Date of decision: 26<sup>th</sup> August, 2019*

+ **CS (COMM) 275/2019**

**EMAMI LIMITED** ..... Plaintiff

Through: Mr. Jayant Mehta, Advocate Mr. Avishkar Singhvi, Ms. Roohina Dua and Mr. Cheitanya Madan, Advocates. (M: 8588939380)

versus

**SHREE BAIDYARAJ AYURVED BHAWAN PRIVATE LIMITED** ..... Defendant

Through: Mr. Pravin Anand, Mr. Manish Biala and Mr. Ashutosh Upadhayay, Advocates. (M: 9810333571)

**CORAM:**  
**JUSTICE PRATHIBA M. SINGH**  
**JUDGMENT**

**Prathiba M. Singh, J.**

**I.As. 7708/2019 (u/O XXXIX Rules 1 & 2 CPC) & 8563/2019 (u/O XXXIX Rules 3A and 4 CPC)**

1. The present order disposes of the applications under Order XXXIX Rules 1 and 2 CPC and Order XXXIX Rules 3A and 4 CPC.

***Brief Facts***

2. The Plaintiff – Emami Ltd. has filed the present suit seeking protection of the mark ‘ZANDU PANCHARISHTA’ and ‘PANCHARISHTA’. The case of the Plaintiff is that the product ‘ZANDU PANCHARISHTA’ was launched in the year 1968 by Zandu Pharmaceutical Works Ltd. This

company was acquired by the Plaintiff – Emami Ltd. sometime in 2008. Thus, in the present suit, reference to the Plaintiff would include its predecessor-in-interest. The term '*PANCHARISHTA*' is stated to have been coined by the Plaintiff and is claimed to be an inherently distinctive trademark. The product sold under the said mark '*PANCHARISHTA*' with the house-mark '*ZANDU*' is an ayurvedic digestive tonic. It treats consumers with ailments including digestive problems, gas, heaviness in the stomach, flatulence, belching, loss of appetite and constipation.

3. The Plaintiff admits that the product is based on the traditional *Asava-Arishtas*, namely, *Drakshasava*, *Kumariasava*, *Lohasava*, *Dashmoolarishta* and *Ashwagandharish*. The Plaintiff further claims that the product has been developed with a unique formulation containing 36 ingredients, including water, using the traditional ayurvedic science of *Asavaarishta*.

4. The '*ZANDU PANCHARISHTA*' label has been registered since 1986, and the word marks '*ZANDU PANCHARISHTA*' and '*ZANDU PANCHARISHTA PLUS*' have been registered since 2010 and 2014, respectively, in Class 5 for ayurvedic, herbal and medicinal preparations and similar goods. The sales of the Plaintiff's products have risen over the years and have been between 70 to 100 crores per year in the last five years. The Plaintiff claims that due to the long and continuous use of over 50 years, the trademark '*PANCHARISHTA*' is exclusively associated with the Plaintiff and it enjoys statutory and common law rights in the same.

5. On 13<sup>th</sup> April, 2019, the Plaintiff came across the Defendant's product under the name '*PANCHARISHTA*' used along with the house-mark '*BAIDYARAJ*'. The Plaintiff immediately filed the present suit, seeking a

permanent injunction restraining infringement of its registered trademark, passing off and other reliefs. This Court, on 27<sup>th</sup> May, 2019, after hearing the ld. counsels for both parties, granted an *ex-parte ad-interim* injunction in the following terms:

*“12. On the basis of the documents filed on record and those that have been handed over today in Court, the Court is satisfied that the Plaintiff has made out a prima face case for grant of an ex-parte injunction. These being medicinal preparations, the consumers who consume the Plaintiffs product Zandu Pancharishta are likely to be confused with the Defendants’ Baidyaraj Pancharishta product which is meant for similar ailments. Accordingly, till the next date, the Defendant is restrained from using, manufacturing or selling any medicinal preparations bearing the mark ‘Pancharishta’.”*

6. The Defendant moved an application under Order XXXIX Rules 3A and 4 CPC and during the course of arguments, the Defendant proposed a new label and name, however, since no amicable resolution could be found, the matter was heard on merits.

#### ***Submissions of Parties***

7. It is the submission of the ld. counsel for the Defendant, Mr. Pravin Anand, arguing the application under Order 39 Rule 4 CPC, that the word ‘*PANCHARISHTA*’ is based on traditional ayurvedic texts. He relies on an extract from *Sarngadhara-Samhita*, published from Varanasi, wherein ‘*Arishta*’ has been described as a drug which is prepared using water and boiling the same. He submits that since the word ‘*Arishta*’ is an ayurvedic preparation, no monopoly can be claimed or granted in respect of the same.

8. He further submits that during the course of registration of the

'ZANDU PANCHARISHTA' label mark, the trademark agent appearing for the Plaintiff had conceded that the word 'Pancharishta' is descriptive. Extracts from the notings of the Id. Registrar's file are relied upon. Mr. Anand, Id. counsel, relies on the following judgments:

- a) *Marico Ltd. v. Agro Tech Foods Limited*, [FAO (OS) No. 352/2010, decided on 1<sup>st</sup> November, 2010]
- b) *Schering Corporation & Anr. v. United Biotech (P) Ltd. & Anr.*, MANU/MH/1240/2010
- c) *Online India Capital Co. Pvt. Ltd. v. Dimensions Corporate*, 2000 102 CompCas 352 Delhi
- d) *Satyam Infoway ltd. v. Signet Solutions P. Ltd.*, (2004) 6 SCC 145
- e) *SK Sachdeva & Anr. v. Shri Educate Ltd. & Anr.*, [FAO(OS) 531/2014, decided on 25<sup>th</sup> January, 2016]

9. It is further urged that there are third parties which use the mark 'PANCHARISHTA', such as Planet's Pancharishta and Gwapha Pancharishta, and in view of the same, no monopoly can be granted over the mark. Additionally, it is submitted that the claim of user of the Plaintiff is also not tenable as in paragraph 16 of the plaint, user is claimed for over 50 years, whereas in paragraph 10, the claim of user is since 2005/2006. It is further submitted that the Plaintiff admits that 'PANCHARISHTA' has been used with the word 'ZANDU', which is a prominent part of the trademark. In fact, 'ZANDU' is the distinctive part and 'PANCHARISHTA' is the descriptive part of the mark.

10. On the other hand, Mr. Jayant K. Mehta, Id. counsel appearing for the Plaintiff, submits that no written statement has been filed by the Defendant,

hence there is no denial as the Defendant has only preferred an application under Order XXXIX, Rules 3A and 4 CPC. The Defendant does not deny that the Plaintiff's product has been in existence since 1968 and in any event, the label itself is registered in 1986 which proves that the mark is more than 30 years old. The admitted launch by the Defendant is in 2019.

11. It is submitted that the word '*PANCHARISHTA*', though it may be derived from the word *Arishta*, has acquired a secondary meaning due to long usage and the same is not a common word. When a Google search is conducted on the word '*PANCHARISHTA*' almost all the search results relate to the Plaintiff's product and this is evidence of the fact that there is no other generic meaning for '*PANCHARISHTA*'.

12. The mark '*PANCHARISHTA*' is a unique combination of the number '5' in *Devanagari*/Hindi language, combined with the word *Arishta*. This combination did not exist prior to the Plaintiff's usage. The fact that the Plaintiff's product is an over the counter drug which requires DCGI approval shows that consumers can easily purchase the Defendant's products as that of the Plaintiff's due to the use of the word '*PANCHARISHTA*'. The Plaintiff relies on the following judgments:

- a) *Sun Pharma Laboratories Ltd. v. Ajanta Pharma Ltd.*, [CS (COMM) 622/2018, decided on 10<sup>th</sup> May, 2019]
- b) *Amritdhara Pharmacy v. Satya Deo Gupta*, AIR 1963 SC 449
- c) *Heinz Italia & Anr. v. Dabur India Ltd.*, (2007) 6 SCC 1
- d) *Pidilite Industries Limited v. Jubilant Agri & Consumer Products Limited*, (2014) 2 AIR Bom R 142



*“I, Dr. Neena Sharma, D/o Sh. Dr. Indravadhan Mehta, aged about 57 years, residing at 1/1A Umakant Sen Lane. Kolkata 70030 do hereby solemnly affirm and state as under:*

- 1. I state that I am a qualified doctor having the degree of B.A.M.S, MD (Ayurveda) In Ayurvedic.*
- 2. I state that I am working as Associate Vice President and have an experience of 29 years in the field of Ayurveda & Ayurvedic Pharmaceuticals. I say that I am duly authorized and competent to swear the present Affidavit on behalf of the Plaintiff Company.*
- 3. I state that the word "Pancharishta" is not a generic word but it is a coined word which is made by the Plaintiff Company. In the entire Ayurvedic Pharmacopeia, the word "Pancharishta" is not mentioned unlike 'Chyawanprash' which is a generic medicine whose formulation is prescribed in Ayurvedic text books.*
- 4. I state that "Pancharishta" is a proprietary medicine and its formulation is prepared by Research department of the Plaintiff Company. Ayurvedic text books have no reference of the word "Pancharishta" anywhere.*
- 5. I further state that five different 'Asav' & 'Arista' (1) Angurasava (2) Ashwagandharista (3) Dashamoolarista (4) Kumari asava (5) Lohasava have been combined by Zandu Pharmaceutical Works Limited, the predecessor in interest of the Plaintiff Company to make one medicine named Pancharishta.*
- 6. I state that there is no such formulation existing with any other entity in the Industry and therefore, the word "Pancharishta" is not applicable to any other medicine and it is an unique formulation created by the Plaintiff Company.*
- 7. I state that as per entire content of all Ayurvedic Pharmacopeia under the Drugs and Cosmetics Act, 1940, there is nothing which allows anyone to use the*

*word "Pancharishta" freely other than the registered owner of brand."*

A perusal of this affidavit shows that whereas the word '*Chyawanprash*' is claimed to be found in ayurvedic texts, the word '*PANCHARISHTA*', a combination of *panch* and *arishta*, is not found in any ayurvedic text. The expert has stated that '*PANCHARISHTA*' is a proprietary medicine and the formulation of this medicine has been prepared by the Research and Development wing of the Plaintiff Company. She further states that five different *Arishtas* have been combined to make this formulation.

16. This affidavit was filed prior to the conclusion of arguments in the matter, however, no rebuttal has been filed by the Defendant. Moreover, in the reply to the Order XXXIX Rules 3A and 4 CPC application, the Plaintiff has also relied upon Google search results which show that for the word '*PANCHARISHTA*' almost all the search results are of the Plaintiff's products. There are several advertisements featuring various brand ambassadors including, Mr. Amitabh Bachchan, Mr. M. S. Dhoni and other ayurvedic doctors, which shows that the product of the Plaintiff has been advertised extensively. Further, even before the Registrar of Trademarks, in Application No. 4206808, an Affidavit of Use has been filed by the Plaintiff to show that the mark has been used continuously since 1968. The sales figures of the Plaintiff's product run into crores of rupees which reflects the goodwill of the product. A significant fact to note is that before the Registrar of Trademarks, there is no other application for the word '*PANCHARISHTA*' by any manufacturer or trader. These facts clearly go to show that while *Arishta* is based on an ayurvedic form of medicine, the word '*PANCHARISHTA*' is not existing in Ayurveda and has, in fact, been



coined by the Plaintiff.

17. The Defendant claims that it is using the number '5' to signify that its product combats 5 causes of a poor digestive system. This is completely different from why the Plaintiff uses the word '*PANCHARISHTA*'. The Plaintiff uses '*PANCHARISHTA*' because its formulation has five traditional *Asava Arishtas*. Thus, the use of the number '5' by the two parties is for different reasons. A perusal of the label of the Defendant shows that *Aegle marmelos, clerodendrum phlomidis, oroxylum indicum, gmelina arborea, stereospermum suaveolens, desmodium gangeticum, uraria picta, tribulus terrestris, solanum indicum, solanum surattense, emblica officianalis, terminalia bellirica, terminalia chebula, hemidesmus indicus, messua ferra, terminalia arjuna, withania somnifera, asparagus racemosus, tinospora cordifolia, sida cordifolia, glycyrrhiza glabra, aloe barbadensis, vitis vinifera, zingiber officinale, piper nigrum, cinnamomum tamala, elettaria cardamomum, coriandrum sativum, cuminum cyminum, inula racemosa, trachyspermum ammi, apium graveolens, syzygium aromaticum, cinnamomum zeylinicum, woodfordia fruticosa, jaggery* and *water* are the ingredients used by the Defendant. The Plaintiff's product, on the other hand, as per the label, additionally contains *rubia cordifolia, symplocos racemosa, piper longum, amomum subulatum, curcuma longa, hedychium spicatum, saccharum officinarum*, and does not contain *uraria picta, solanum surattense, hemidesmus indicus, messua ferra, vitis vinifera, elettaria cardamomum, inula racemosa, apium graveolens* and *jaggery*. The ingredients of the two products being different, the effect on the consumer/patients would also be different. The use of '*PANCHARISHTA*' has a scientific basis insofar as the Plaintiff is concerned, however, its use by

the Defendant is in a general manner and there is no reasonable basis for use of the number '5' with *Arishta*.

18. Considering that the products are medicinal preparations, the effect of the Plaintiff's product on a consumer could be considerably different than the effect of the Defendant's product. The consumers may purchase the Defendant's products simply presuming that because of the use of the word '*PANCHARISHTA*' in both products, Plaintiff and the Defendant's products are one and the same or have the same therapeutic effect.

19. It is the settled position in law since the judgment in *Cadila Health Care Ltd. v. Cadila Pharmaceuticals Limited*, (2001) 5 SCC 73, that in medicinal preparations a high standard needs to be imposed for ascertaining the likelihood of deception and confusion. Recently, in *Sun Pharma Laboratories Ltd. v. Ajanta Pharma Ltd.* (*supra*), this Court has held that confusion should be avoided in the case of pharmaceutical products. The observations of this Court are as under:

*"21. Thus, the settled law in passing off is that of probability or likelihood of confusion and not actual confusion. In Cadila, the Supreme court has warned that in case of products used for the same ailments but with different composition, a more stringent test needs to be adopted.*

...

*23. The overwhelming precedents including in several Division Bench judgments of this Court is that in the case of medicinal and pharmaceutical products, confusion and deception ought to be avoided"*

The Supreme Court in *Heinz Italia & Anr. v. Dabur India Ltd.* (*supra*) has even granted protection for the word marks '*GLUCON-D*' and '*GLUCOSE-D*', which were also descriptive marks. In *Godfrey Philips India Ltd. v.*

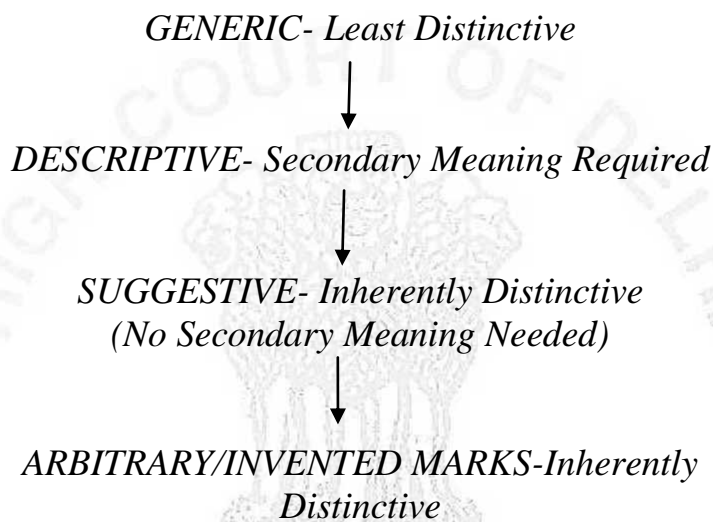
*Girnar Food & Beverages (P) Ltd., (2004) 5 SCC 257*, the Supreme Court has clearly held that if a descriptive mark acquires secondary meaning, the same can be granted protection.

20. The word '*PANCHARISHTA*' is not a generic word. *Arishta* is a method of preparation of drugs in Ayurveda, however, '*PANCHARISHTA*' is a unique formulation of five different ingredients which have been prepared by the Plaintiff. The long and continuous use of the mark since 50 years clearly tilts the balance in favour of the Plaintiff. The case law cited by the Defendant, i.e., *Marico Ltd. v. Agro Tech Foods Limited (supra)* is clearly distinguishable as the mark therein was not used for such a long period. In the said case, by the time the suit was filed, the mark was only in use for six to seven years. Insofar as the alleged admission with the trademark registry is concerned, a perusal of the notes of the Registrar shows that the Registrar raised an objection that '*PANCHARISHTA*' is descriptive and the agent of the Plaintiff sought an adjournment. Thereafter, the mark was amended for a proposed user instead of a registration based on user.

21. Subsequently, however, two other marks of the Plaintiff have been registered, i.e., '*ZANDU PANCHARISHTA*' and '*ZANDU PANCHARISHTA PLUS*'. Both these trademarks have been registered with a user claim of 1968. There is no disclaimer in either of the trademarks which have been registered for the Plaintiff. The word mark '*ZANDU PANCHARISHTA*' having been registered and there being no disclaimer concerning the word '*PANCHARISHTA*', even the Trademark Registrar appears not to consider the word '*PANCHARISHTA*' as being descriptive.

22. In *Bata India Limited v. Chawla Boot House*, [CS (COMM) 110/2019, decided on 16<sup>th</sup> April, 2019] on the question of generic and descriptive marks, it was held as under:

*“27. The spectrum of distinctiveness of marks clearly explains how distinctiveness of marks is to be judged. The spectrum as explained in McCarthy on ‘trade Marks and Unfair Competition’, can be illustratively depicted as below:*



28. As the well-known author Mr. J. Thomas McCarthy, in the treatise on ‘Trademark and Unfair Competition’, opines, the question as to whether the mark is descriptive or suggestive, can be based on the following tests:

- a) Degree of imagination required to connect the mark with the product; and
- b) The Competitor’s need to use the mark.”

23. Applying the test laid down above, the mention of the word ‘PANCHARISHTA’ does not give any direct connection to a medicinal formulation meant for curing digestive ailments. It sounds like a medicine based on traditional ayurvedic knowledge but the exact formulation or

purpose, its nature and effect on ailments etc., is not decipherable. The use by the Plaintiff of the mark 'PANCHARISHTA' is for a different purpose from its use by the Defendant. The two alleged third party users which have been shown are completely unreliable at this stage as there are no details as to who these parties are, i.e., Planet's Pancharishta and Gwapha Pancharishta. The period from when they are selling their products is also not known. There is overwhelming evidence to show that there has been no significant third-party use of the mark 'PANCHARISHTA' and there has not even been a trademark application by any party for the mark 'PANCHARISHTA'.

24. During the course of arguments, the Defendants made a suggestion that it is ready to amend its label in following manner

**5-अरिष्ट**  
 सर्वोत्तम परिणाम के लिए :- रास : फल, दूध, शर्करा एवं वैदिक भोजन ।  
 अल्प : मसालेदार, कैदीप, भारी एवं देर से पचने वाला भोजन ।  
**For best results :-** Advice : Fruits, Milk, Light and Nutritious food.  
**Avoid :** Spicy, oily, Stale and Heavy Food.  
 Note : सात-अरिष्ट से सम्बंधित रास से कुछ मही के अंत केवल की नहीं से फिर मही है, यह केवल फे अरिष्ट द्वारा निर्धारित अरिष्टि या सेवर की, एक मही समय अपना २, सिद्धि की लेते है।  
**Note :** One tablespoon is equal to 15ml.  
 This product is liable to natural sedimentation.  
**SHAKE WELL BEFORE USE.**  
**Fortifies & Re-Energizes Digestive System**  
**Net. Cont. 450 ml**  
**CONTAINS:** Self generated alcohol  
 M.L. No. : L.A.-12/2002  
 B. No. :  
 Mfg. Date :  
 Exp. Date :  
 M.F.P. Rs. :  
 (incl. of all taxes)

**AYURVEDIC PROPRIETARY MEDICINE**  
**INGREDIENTS:** Each 5ml. contains:  
 Kwath derived from the following : Bha (Argy marmelos, R.), Agnivesh (Chondrodendron tomentos, R.), Sara patha (Coccinia indicum, R.), Gambhari (Gmelina arborea, R.), Palaia Chhat (Stereospermum suaveolens, R.), Sakasani (Desmodium gangeticum, R.), Prithvipari (Derris pida, R.), Gokhru (Tribulus terrestris, R.), Kateri badi (Solanum indicum, R.), Katerichai (Solanum swartzense, R.), Amli (Gmelina alvinaensis, R.), Bahera sabut (Flemingia strobilifera, R.), Harad Gadi (Terminalia chiodora, R.), Anard mode (Hemidesmus indicus, R.), Nagkesar (Messaspora, Simm.), Ajain chai (Terminalia arjuna, S.) 0.01 mg. each, Ashwagandha (Withania somnifera, R.), Salwani (Asparagus racemosus, R.), Gily (Pterocarya corallifolia, S.), Bala (Sida cordifolia, R.) 0.08 mg. each, Musliha (Cycymha glabra, S.) 0.04 mg., Ghri Kurnari (Viburnum barbatum, L.), Marakesi (Vib. vifera, F.) 0.15 mg. each, Sonth (Zingiber officinale, Ritz.), Kali Marich (Piper nigrum, R.), Peppalnoel (Piper longum, R.), Tej patra (Cinnamomum tamala, L.), Chiroli Ekachi (Elettaria cardamomum, S.), Chhatle (Coriandrum sativum, R.), Jera sadi (Coriandrum oytivatum, F.), Paktar mod (Eula racemosa, R.), Ajwale (Trachyspermum amoi, R.), Afruda (Apura graveolens, F.), Laung (Eryngium aromaticum, F. Bur.) 0.006 mg. each, Dachei (Cinnamomum zeylanicum, S. br.) 0.018 mg., Fer Sandhan Poochi : Thin Poo (Woodfordia frutescens, R.) 0.35 mg., Guda (Jugger) 3mg., Jal (Water) 0.5.

**INDICATION :** Control Gas and Acidity formation, Indigestion, Constipation, Flatulence & Loss of Appetite. Helps to revitalize the digestive system by stimulating various digestive enzymes.  
**DOSE :** 15 - 30 ml. twice a day in the morning & evening after meals or as directed by the physician.

मधुमेह रोगियों के लिए  
 • NO ADDED PRESERVATIVE  
 • NO ADDED CHEMICAL  
 • NO ADDED SUGAR

Mfg. In India by  
**SHREE Baidyarak**  
 Ayurvedic BHAWAN PVT. LTD.  
 At C-19, Site C, Industrial Area Surajpur  
 Gr. No. 23/182 (U.P.) Pl. O. 28, Sakher  
 Nagar, New Delhi - 110065  
 Consumer Care No. : 011-45307777

Purity & Efficacy assured by  
**Shree Baidyanath**  
 RESEARCH INSTITUTE

25. In response to this proposal, the Plaintiff suggested that the Defendant attach this label:



26. Since no amicable resolution took place, the Court would refrain from suggesting or directing any specific manner of use being adopted by the Defendant. Under these circumstances, the Plaintiff is entitled to an injunction restraining the Defendant from using the word 'PANCHARISHTA' as a trademark for medicinal preparations. It is, however, clarified that the Defendant would be at liberty to use the word *Arishta* in a manner so as to not result in violation of the Plaintiff's statutory and common law rights.

27. The I.As are disposed of.

**PRATHIBA M. SINGH, J.  
JUDGE**

**AUGUST 26, 2019/dj**