

SUPREME COURT OF INDIA REITERATES ITS COMMITMENT TO PROTECT WELL- KNOWN FOREIGN BRANDS

In a landmark decision handed down by the Supreme Court of India (*Milmet Oftho Industries & Ors. v Allergan Inc.* - Date of Decision May 7, 2004), the court confirmed an order of injunction restraining an Indian company from using OCUFLOX. The injunction was confirmed despite the fact that the U.S. company had neither any use of the mark OCUFLOX in India, nor was the mark registered in India.

Justice S.N. Variava of the Supreme Court relied upon the previous decisions of the Supreme Court in the famous *Whirlpool* case wherein the Supreme Court had for time recognized the concept of trans-border reputation, as also the more recent *Cadilla Healthcare* decision wherein the court had taken cognizance of the fact that in the field of medicine and healthcare all possibility of confusion must be avoided as public health is in issue. Justice Variava in his decision held :

“Whilst considering the possibility of likelihood of deception or confusion, in present times and particularly in the field of medicines, the courts must also keep in mind the fact that nowadays the field of medicines is of an international character. The court has to keep in mind the possibility that with the passage of time, some conflict may occur between the use of the mark by the applicant in India and the user by the overseas company. The court must ensure that public interest is no way imperiled. Doctors particularly eminent doctors, medical practitioners and person or companies connected with medical field keep abreast of latest developments in medicine and preparations worldwide. Medical literature is freely available in this country. Doctors, medical practitioners and persons connected with the medical field regularly attend medical conferences, symposiums, lectures etc. It must also be remembered that nowadays goods are

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widely advertised in newspapers, periodicals, magazine and other media which is available in the country. Thus, **if a mark in respect of a drug is associated with the respondents worldwide it would lead to an anomalous situation if an identical mark in respect of a similar drug is allowed to be sold in India.** However, one note of caution must be expressed. Multinational corporations, who have no intention of coming to India or introducing their product in India should not be allowed to throttle an Indian company by not permitting it to sell a product in India, if the Indian company has genuinely adopted the mark and developed the product and is first in the market. Thus, the ultimate test should be who is first in the market. In the present case, the marks are the same. They are in respect of pharmaceutical products. **The mere fact that the Respondents have not been using the mark in India would be irrelevant if they were first in the world market.** The Division Bench had relied upon material which prima facie shows that the Respondents product was advertised before the Appellants entered the field. On the basis of that material the Division Bench has concluded that the Respondents were first to adopt the mark. If that be so, then no fault can be found with the conclusion drawn by the Division Bench.

The decision is again reflective of the commitment of Indian courts to protect its citizens, and resultantly well-known foreign brands. Our firm is proud to have represented Allergan Inc. in this case.

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