



Kavita S.J.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

INTERIM APPLICATION (L) NO. 27529 OF 2024

IN

COMMERCIAL IPR SUIT (L) NO. 27527 OF 2024

Hindustan Unilever Limited ... Applicant / Orig. Plaintiff

In the matter between:

Hindustan Unilever Limited ... Plaintiff

Versus

Abbott Laboratories & Ors. ... Defendants

Mr. Hiren Kamod, Advocate a/w Mr. Nidhish Mehrotra, Mr. Rahul Dhote, Mr. Gautam Panchal, Mr. Shwetank Tripathi, Mr. Vidit Desai, Ms. Dishita Shah, Ms. Radhika Mehta, and Mr. Prem Khullar, Advocates i/b ANM Global for the Plaintiff.

CORAM : R.I. CHAGLA, J.

DATED : 5th SEPTEMBER, 2024.

ORDER :

1. The Plaintiff seeks to move without notice for the reasons set out in paragraph 58 of the Plaint. I find that there are sufficient averments and disclosures made in the Plaint to sustain the *ex-parte* application for ad-interim reliefs.

KAVITA
SUSHIL
JADHAV

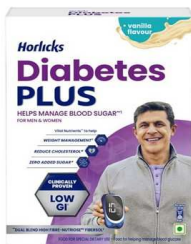
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SUSHIL JADHAV
Date: 2024.09.05
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2. This is an action for injunction against the acts of disparagement, denigration and slander of the Plaintiff's nutritional beverage Horlicks Diabetes Plus, infringement of trade mark and infringement of copyright. It is alleged that the Defendant Nos. 1 and 2 are circulating an audio-visual clip / commercial / advertisement in Malayalam language in relation to the Defendant No.1 and 2's product viz. 'ENSURE DIABETES CARE which disparages, denigrates and belittles Plaintiff's said Product as also infringes its registered trade marks and copyright.
3. It is stated that the Plaintiff is a part of the reputed "Unilever Group" and is subsidiary of Unilever, Plc., an Anglo-Dutch multinational consumer goods company having its registered office in London, United Kingdom, being one of the oldest and a leading multinational company, known for its wide range of consumer products, including personal care, oral care, frozen foods, other food items, sold under several well-known and unique trade marks.
4. It is stated that the Plaintiff is India's largest fast moving consumer goods (FMCG) company, with leadership in Home & Personal Care Products and Foods & Beverages. It is stated that the Plaintiff's 35 brands, spreading across 20 distinct consumer categories, touch the lives of two out of three Indians. Nine out of ten households in India use the Plaintiff's products. It is stated that the Plaintiff's annual turnover for the year 2023-24 was approx. Rs.58154 crores. It is stated that Plaintiff has entered

virtually in every arena in the FMCG market through organic growth, diversification, mergers and acquisitions. It is stated that the products of the Plaintiff are sold in over three million outlets.

5. It is stated that the mark 'HORLICKS' dates back to the year 1872 and has been a popular brand in Indian market since 1930s. It is stated that the first registration of the mark 'HORLICKS' in India dates back to 17th March, 1943 under number 13528 in class 29 and the same continues to be valid and subsisting till date.
6. It is stated that vide order dated 26th February 2020, the National Company Law Tribunal, Chandigarh Branch approved a Scheme of Amalgamation and Arrangement between Glaxo SmithKline Consumer Health Limited ("GSK") and the Plaintiff whereby GSK amalgamated with the Plaintiff. Copy of the NCLT order is at Exhibit A to the Plaint. It is stated that the Plaintiff acquired the intellectual property rights in the brand 'HORLICKS' for India in April 2020. It is stated that vide an assignment deed dated 1st April 2020 all rights, interests and title in and to the trade mark 'HORLICKS', design and domain rights and unregistered rights including patent filed together with goodwill of the business associated with the brand 'HORLICKS' in India were assigned to the Plaintiff. Copy of the Assignment Agreement (with commercials redacted) is at Exhibit B to the Plaint.

7. It is stated that the Plaintiff has obtained several registrations for the marks containing HORLICKS. Copies of status pages / registration certificates / journal copies in respect of the said Trade Mark as downloaded from the online records of the Trade Marks Registry are at Exhibit C to the Plaint. It is stated that the said Trade Mark was recognized as a well-known trade mark by Delhi High Court vide an order dated 1st February 2002 in the matter of *Horlicks Limited and Ors. v. Bimal Khamrai & Anr., 2002 SCC OnLine Del 128*, and consequently, the same has been included in the list of well-known marks published by the Trade Marks Registry. Copies of the Delhi High Court judgment and the list of well-known marks published by the Registrar of Trade Marks are at Exhibit D to the Plaint.
8. It is stated that the product 'Horlicks Diabetes Plus' which is the subject matter of the suit was launched in September 2021 by the Plaintiff under the label / packaging / trade dress viz.



. It is stated that said Product has been designed for blood sugar management and is India's highest fibre nutritional drink and contains high fibre (22% of dual blend fibre). It is stated that it contains unique blend of Fibersol – 2 and Nutriose. Research has shown that a diet rich in fibre helps reduce glucose and lipids in the blood. The said Product is also high in protein and contains 16 vital nutrients. It is stated that said Product is

classified as 'high science' product and *inter alia* sold majorly via recommendations from healthcare professionals including pharmacists, chemists and doctors as part of the expert channel, in addition to traditional sales channels such as dealers, distributors, and retailers. It is stated that the said Product is of superior quality and it has attained huge popularity and demand in the Indian market. The said Product has a market share of 12% and it is ranked 3rd in its category.

9. It is stated that in or about June 2021 the Plaintiff commissioned a third party agency named Bulletproof, Singapore to create, develop and design the said Label / Packaging / Trade Dress / Artwork which underwent minor changes as per marketing requirements over a period of time, however retaining the essence thereof. It is stated that Bulletproof, Singapore, under a contract for service and upon payment of valuable consideration by the Plaintiff, created the said Label / Packaging / Trade Dress / Artwork. It is stated that the Plaintiff is thus the lawful owner and proprietor of the copyright in the original artistic work vesting in the said Label / Packaging / Trade Dress / Artwork. Representation of the said Label / Packaging / Trade Dress / Artwork is at Exhibit E to the Plaintiff. It is stated that since September, 2021, the Plaintiff has been marketing the said Product under the said Label / Packaging / Trade Dress.
10. It is stated that details of the said Product are also available on www.horlicks.in. Screenshots of the website in relation to the

said Product are at Exhibit F to the Plaintiff. Screenshots from the social media and e-commerce platforms evincing sale of the said Product are at Exhibit G to the Plaintiff. Details of awards and recognitions are mentioned at paragraph 24 to the Plaintiff. Details of sales turnover of the said Product is mentioned at paragraph 25 to the Plaintiff.

11. It is stated that pharmacies and doctors are important stakeholders for selling products of this category that are designed for consumer with special dietary needs and therefore, the said Product is mostly sold in pharmacies. Thus, influencing the pharmacy owners is a predominant way to influence sale of such products.
12. It is stated that on 23rd August, 2024, the Plaintiff came across the Impugned Advertisement of total duration of 27 seconds in



relation to Defendant No.1 and 2's product viz. from the WhatsApp status update of a pharmacist on his account on the WhatsApp Platform. It is stated that Plaintiff's representative enquired with the said pharmacist about the source of the Impugned Advertisement, to which, the said pharmacist informed the Plaintiff's representative that the Impugned Advertisement was being widely circulated in various WhatsApp groups across the country comprising of pharmacists, chemists, sales agents, medical representatives, healthcare

professionals, etc. as also in family groups on WhatsApp. It is stated that upon a request made by the Plaintiff's representative, the said pharmacist shared a copy of the Impugned Advertisement which was immediately saved by the Plaintiff's representative. Screenshot of the chat between the Plaintiff's representative and said pharmacist is at Exhibit H to the Plaintiff. It is stated that the said pharmacist later on deleted the video from the chatbox. Copy of the storyboard of the Impugned Advertisement along with the copy of the Impugned Advertisement in a pen drive are at Exhibit I and Exhibit I-1 to the Plaintiff, respectively.

13. It is stated that the said Product although partially blurred is clearly visible and identifiable as the Plaintiff's said Product. It is stated that said Product is kept on the left and the protagonist places the Defendants' Product on the right, the protagonist then pushes away / shrugs off the said Product and places the Defendants' Product taking the said Product out of the frame which puts the said Product in a negative light and gives a negative connotation that the said Product is an inferior/useless product which is replaced by Defendants' Product.
14. It is stated that as soon as the Plaintiff got to know about the Impugned Advertisement, its legal representative contacted the legal head of the Defendant Nos. 1 and 2 on 23rd August 2024 on WhatsApp and apprised the concerns pertaining to the Impugned Advertisement. The Defendant Nos. 1 and 2's

representative assured on the same day that she will look into the issue and revert. It is stated that upon not receiving any response, the Plaintiff's representative sent an email dated 26th August 2024 to the Defendant Nos. 1 and 2 *inter alia* stating that *"We understand that the said advertisement is being used in your medicine /expert/chemist channel ('recipients') and has been widely shared within the said channel on WhatsApp. We would like to bring to your notice that such an act is illegal and unfitting of an organization like Abbott."* The Plaintiff, through the said email also called upon the Defendant Nos. 1 and 2 to (i) disclose the extent of circulation of the Impugned Advertisement; (ii) inform the Plaintiff of the actions taken by the Defendants to restrain further dissemination of the Impugned Advertisement; (iii) issue a communication to the recipients of the Impugned Advertisement that the same was issued in error; and (iv) issue instructions to the recipients to delete the Impugned Advertisement from their respective devices and cease and desist from further circulating the Impugned Advertisement. Thereafter, the Plaintiff's representative once again called the Defendant Nos. 1 and 2's representative and also sent a WhatsApp message calling upon them to take immediate action in relation to the Impugned Advertisement. In response thereto, the Defendant Nos. 1 and 2's representative merely once again shared her email id on 27th August 2024. Thus, the Defendant Nos. 1 and 2 failed to address the requisitions of the Plaintiff despite having ample time and opportunity to do so. It is stated that the above clearly shows the

mala fide intent of the Defendant Nos. 1 and 2 who are continuing to use the Impugned Advertisement despite being put to notice. Copies of the email dated 26th August 2024 and screenshots of the said WhatsApp communications are at Exhibit J to the Plaint.

15. It is stated that various chemists and people from the industry, especially from Mumbai have told the Plaintiff that the Impugned Advertisement is being widely circulated on WhatsApp, but the Plaintiff has no direct access yet to the groups / chats on the said Platform where the Impugned Advertisement is being circulated and thus the Plaintiff is not in a position to ascertain the names of the parties who are engaged in the activity of circulating, sharing the Impugned Advertisement. It is stated that thus, at this stage the Plaintiff does not know the constitution of such Defendants and they have been collectively named as 'Ashok Kumar' (Defendant No. 4).

16. Mr. Kamod submits that the Impugned Advertisement, in a very surreptitious manner unauthorizedly shows and/or uses said Product bearing the said Label / Packaging / Trade Dress / Artwork; blurs the same; and then shows an expert choosing Defendants' Product over said Product by pushing the said Product away; thus, creating a negative impression amongst the members of trade, industry and public that the said Product is ineffective and/or useless and / or of inferior quality. He submits that despite the blurring, the members of the relevant trade

channel can easily identify the said Product of the Plaintiff. He submits that the gesture of the protagonist pushing away the said Product coupled with the words that follow gives a clear message that the said Product is inferior and is being rejected. It makes a clear suggestion that the Plaintiff's product is not being 'recommended' since it is inferior or it does not have fiber, protein or nutrients or that it does not effectively help in managing blood sugar, which is patently false as said Product does contain fiber, protein and nutrients and its entirely useful to managing blood sugar.

17. Mr. Kamod submits that the depiction of the said Product bearing the said Trade Mark and the said Label / Packaging / Trade Dress / Artwork in the Impugned Advertisement is deliberate and not a mere coincidence as the Defendant Nos. 1 and 2 could have very well used an unbranded product with a plain packaging and/or an unrelated packaging. However, the Defendant Nos. 1 and 2 have deliberately chosen to show the Plaintiff's said Product in a negative light in the Impugned Advertisement to influence the Plaintiff's customer base / promoters. He submits that Impugned Advertisement specifically targets and blatantly disparages and denigrates the said Product by insinuating the said Product is of inferior quality and further, such depiction of the said Product has caused deception amongst the pharmacy owners and trading channels which tends to influence doctors and further likely to affect behavior of the consumers who will be misled to believe that the said

Product is inferior to Defendants' Product. Mr. Kamod has put reliance on *Gujarat Coop. Milk Marketing Federation Ltd. v. Hindustan Unilever Ltd., 2018 SCC OnLine Bom 7265* and *USV (P) Ltd. vs. Hindustan Unilever Ltd. reported in 2022 SCC OnLine Bom 1471*.

18. Mr. Kamod submits that the rival products belong to the same category of products viz. nutritional drink in powdered form meant for individual suffering from diabetes or those who are at risk of diabetes. Both the rival products fall under the classification of 'high science' product and are majorly sold via recommendations from healthcare professionals including chemist and pharmacists as part of the expert channel in addition to traditional sales channels. He submits that the Impugned Advertisement, by being circulated on such WhatsApp groups which has large participation of members consisting of / pharmacists / medical shops, pharmacy owners on the said Platform by the Defendant Nos. 1 and 2, has severely disparaged the Plaintiff's said Product and injured the goodwill and reputation of the Plaintiff in the said Product.
19. Mr. Kamod submits that the Defendant Nos. 1 and 2 are circulating the Impugned Advertisement clandestinely in WhatsApp groups and not publicly. The Defendant Nos. 1 and 2 have failed to take any action to withdraw the circulation of the Impugned Advertisement despite being put to notice by the Plaintiff. He submits that the dishonesty and bad faith of the

Defendant Nos. 1 and 2 is writ at large from their conduct. He submits that if the Defendant Nos. 1 and 2 get notice of the Plaintiff's application for ad-interim reliefs, the Defendants are likely to further circulate / broadcast the Impugned Advertisement in bulk to other chemists / pharmacists or groups having these chemists / pharmacists as members. Further, the Defendant Nos. 1 and 2 may circulate the Impugned Advertisement further to the members of the trade and general public with the intention of ensuring that the Impugned Advertisement reaches to as many people as possible before any injunction order is passed by this Court. He submits that such a situation would result in prejudicially affecting the Plaintiff's market reputation and goodwill including the substantial goodwill acquired by the Plaintiff in the said Product, the said Trade Marks and the said Label/ Packaging/ Trade Dress / Artwork. He submits that in these circumstances, it is in the interest of justice that *ad-interim* orders are granted to the Plaintiff without notice to the Defendants.

20. I have considered the submissions advanced on behalf of the Plaintiff and I have perused the record. Before I get into the facts of the case, I find it appropriate to reproduce some well-established principles in a case for disparagement of goods. It is a settled law that a tradesman is entitled to declare his goods to be the best in the world or to say that his product is better than his competitor's, however, while doing so he cannot directly or indirectly say that the goods of his competitors are bad or

inferior and if he does so then he really slanders the goods of his competitors and defames his competitors and their goods which is not permissible. Further, it is equally well settled that to decide the question of disparagement, three factors are crucial viz. (i) Intent of the commercial; (ii) Manner of the commercial; and (iii) storyline of the commercial and the message sought to be conveyed by the commercial. Out of these three factors, the manner of commercial' is very important and if the manner of commercial is ridiculing or condemning the product of the competitor, it amounts to disparagement. The reliance upon the ***Gujarat Co-operative Milk Marketing Federation Ltd. (supra)*** by Mr. Kamod is apposite.

21. Coming to the facts of the case, *prima facie*, the record shows that the Plaintiff is the registered proprietor of the said Trade Marks and the owner of the copyright subsisting in the said Label/ Packaging/ Trade Dress / Artwork as well as that the same have acquired substantial goodwill and reputation. I have seen the actual Impugned Advertisement. The Impugned Advertisement starts with a female protagonist shown as an industry expert and dressed in a white coat (used by doctors or pharmacists indicating person of authority and subject-matter expert) pushing away the Plaintiff's said Product and replacing it with the Defendants' Product. Thereafter, she goes on to describe the benefits of Defendants' Product and why she recommends Defendants' Product, in regional language. Reproduced below is the first frame of the Impugned Advertisement as depicted in the Plaint:

00:01 to 00:05

Voice over (VO) People will ask, "why I am recommending Ensure Diabetes care?"

Action: fleeting movement between frames 1-4 pushing the pack of HDP"



The protagonist then explains why she is recommending the Defendants' Product Ensure Diabetes care as follows (translated in English and as mentioned in the Plaintiff) :

"People will ask, why I am recommending Ensure Diabetes Care".

"Diabetes is not just about sugar management. It involves managing symptoms like frequent hunger, body weight and fatigue.

That's why I believe in clinically proven Ensure Diabetes Care. Its triple care system includes high fiber, high quality protein and 36 nutrients.

It helps in managing blood sugar in 4 weeks. World's No. 1 selling Diabetes nutrition drink."

22. Firstly, the Plaintiff's Product 'Horlicks Diabetes Plus' can be easily seen and identified behind the blurring filter in the Impugned Advertisement. There is no doubt in my mind that it is the Plaintiff's product 'Horlicks Diabetes Plus' that is being shown in the first four frames of the Impugned Advertisement. The comparison of the Plaintiff's said Product as shown in the Impugned Advertisement and as it actually appears, is as follows:

Said Product shown in the Impugned Advertisement	Image of the said Product
	

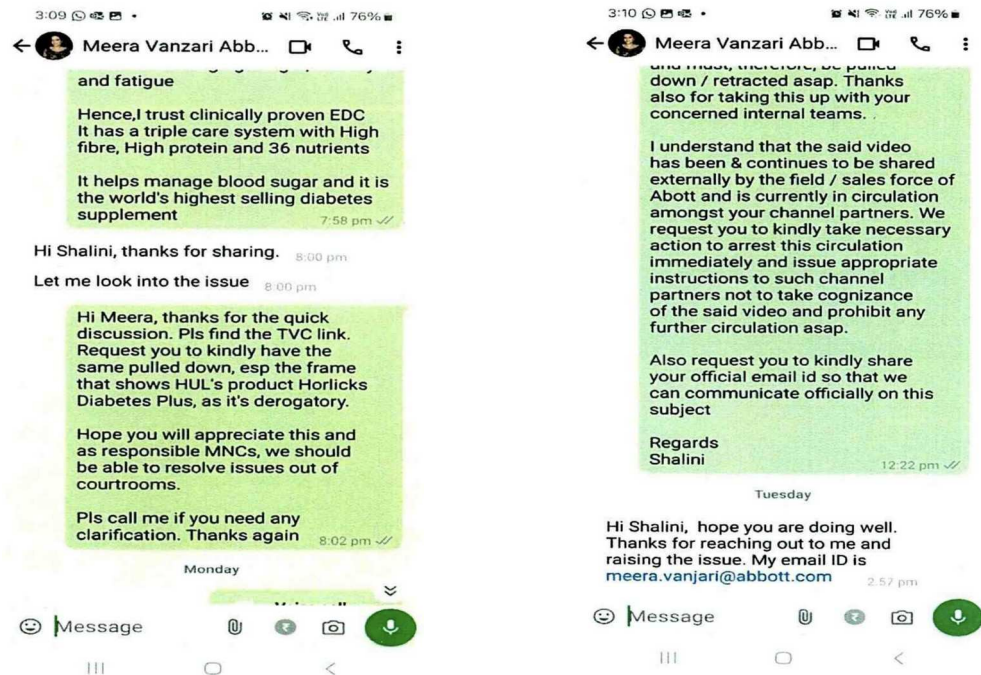
23. Upon seeing the Impugned Advertisement and the story board, *prima facie*, I am of the considered opinion that the basic premise of the Impugned Advertisement is to denigrate and slander the Plaintiff's said Product. The act of pushing away the Plaintiff's product 'Horlicks Diabetes Plus' and substituting it with the Defendant's product 'Ensure Diabetes Care' followed by the explanation given by the protagonist about the Defendant's product gives a clear message that the Plaintiff's said Product is inferior and is therefore not being recommended. The manner in which the protagonist, who is the industry expert, pushes away /

shrugs off the Plaintiff's said Product and substitutes it with the Defendants' Product taking the Plaintiff's said Product out of the frame coupled with the words that follow, certainly puts the Plaintiff's said Product in a negative light and gives a negative connotation that the Plaintiff's said Product is an inferior/useless product which is replaced by Defendants' Product. I fully agree with the submissions of Mr. Kamod that the depiction of the Plaintiff's said Product 'Horlicks Diabetes Plus' in the Impugned Advertisement is deliberate and not a mere coincidence as the Defendant Nos. 1 and 2 could have very well used an unbranded product with a plain packaging and/or an unrelated packaging, however, they chose to deliberately use the Plaintiff's said Product evidently with a view to create a bias in the minds of the viewers.

24. As laid down by a Division Bench of this Court in ***USV Private Limited (supra)***, an advertiser of a product has full freedom to talk about the good aspect of its product and use exaggerations or simple truth to catch the eyes of the consumer. However, there is also caution which the advertiser needs to adhere to in order to ensure that in the process, it does not ridicule or disrepute the other products in the same category, which in the present case I am of the prima facie view, the Defendant Nos. 1 and 2 have clearly done so.

25. In view of the above, applying the well settled principles of disparagement to the present case and after considering the manner, intent and message conveyed by the Impugned

advertisement, I prima facie find that the Impugned advertisement denigrates and disparages the Plaintiff's said product. Further, it is clear from the WhatsApp communication exchanged between the Plaintiff and Defendant Nos.1 and 2 that the Defendants have chosen not to take any action despite the fact that the Plaintiff reached out to them asking them to immediately withdraw the said advertisement. The relevant screenshot at page 474 of the Plaint is reproduced below:



26. In the aforesaid circumstances, I am satisfied that the Plaintiff has made out a strong *prima facie* case for the grant of *ad-interim* reliefs. The balance of convenience is in favour of the Plaintiff. Unless reliefs as prayed for are granted, the Plaintiff will suffer irreparable harm / injury which cannot be compensated in terms of money. In view of the averments in

paragraph 58 of the Complaint and the foregoing discussion, I am satisfied that giving notice to the Defendants before passing this order would defeat the very purpose of granting *ad-interim* reliefs. In the circumstances, there shall be *ad-interim* relief in terms of prayer clauses (a), (b) and (f) of the Interim Application against the Defendant Nos.1, 2 and 4 except the bracketed portion as reproduced below:

- a. *Pending hearing and final disposal of the present suit, the Defendant Nos. 1, 2 and 4, their management, members, affiliates, directors, servants, officers, employees, representatives, agents and all other persons claiming through or under them or acting in concert with them or on their behalf or acting on their instructions be restrained by a temporary order and injunction of this Hon'ble Court from in any manner circulating / sharing broadcasting or otherwise howsoever communicating to anyone, the public including trade channels or publishing the Impugned Advertisement or any part thereof or any other advertisement of a similar nature in any language or in any manner causing the Impugned Advertisement or any part thereof or any other advertisement of a similar nature to be telecast or broadcast or shared or communicated to anyone or public or published on the said Platform of Defendant No. 3 or any other platform or in any other manner whatsoever;*
- b. *Pending hearing and final disposal of the present suit, the Defendant Nos. 1, 2 and 4, their management, members, affiliates, directors, servants, officers, employees, representatives, agents and all other persons claiming through or under them or acting in concert with them or on their behalf or acting on their instructions be restrained by a temporary order and injunction of this Hon'ble Court from in any manner either directly or indirectly or in any manner*

whatsoever disparaging or denigrating the Plaintiff's said Product;

- f. *Pending hearing and final disposal of the present suit, the Defendant Nos. 1, 2 and 4, their management, members, affiliates, directors, servants, officers, employees, representatives, agents and all other persons claiming through or under them or acting in concert with them or on their behalf or acting on their instructions be directed by a temporary order and injunction to (i) recall / delete / take down the Impugned Advertisement from all platforms where it is circulated; [(ii) issue appropriate communication to the recipients of the Impugned Advertisement that the same was issued in error] and (iii) issue instructions to the recipients to delete the Impugned Advertisement from their respective devices and cease and desist from further circulating the Impugned Advertisement;*

27. The Plaintiff will comply with the provisions of Order 39 Rule 3 within 3 working days of the present order being uploaded.
28. Liberty to the Defendants to apply for a variation, modification or recall of this order after at least 7 clear working days' notice to the Advocates of the Plaintiff.
29. List the above Interim Application on 07/10/2024. The remaining reliefs including the reliefs sought by the Plaintiff against Defendant No.3 will be considered on the next date.
30. This order will continue till 08/10/2024.

[R.I. CHAGLA, J.]