IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on : 04.10.2018 & 01.08.2019
Date of decision : 09.01.2020

FAO 447/2018

SUN PHARMA LABORATORIES LTD ..... Appellant

Through Mr. Sachin Gupta, Ms. Jasleen Kaur, Ms. Jyoti Mehra, Advs.

versus

INTAS PHARMACEUTICALS LTD ..... Respondent

Through Mr. Anil Sapra, Sr. Adv. with Ms. Bitika Sharma, Mr. Kapil Midha, Mr. Lakshay Kaushik, Mr. Sarthak Katyal, Ms. Akanksha Choudhary, Advs.

CORAM:
HON'BLE MS. JUSTICE ANU MALHOTRA

JUDGMENT

ANU MALHOTRA, J.

1. Vide the present appeal FAO 447/2018 under order XLIII Rule 1(r) read with Sections 104 and 151 of the Code of Civil Procedure, 1908, the appellant assails the impugned order dated 17.09.2018 of the learned ADJ-05 (SE), Saket Court, New Delhi in TM No. 146/2017 vide which the application under Order 39 Rule 1 & 2 of the Code of Civil Procedure, 1908 filed the appellant i.e. the plaintiff of the said suit seeking interdiction against the defendant of the suit i.e. the respondent herein qua use of trademark **'BEVATAS'** on the ground of similarity / deceptive similarity with its trademark **'BEVETEX'** was

dismissed.

2. The suit filed by the appellant herein as the plaintiff of the TM No. 146/2017 before the learned Trial Court is one for permanent injunction, restraining infringement of trade mark, passing off, unfair competition, rendition of accounts of profits/ damages, delivery up, etc., which suit is in relation to the same trademark of the appellant herein bearing registration no. 410744 dated 16.09.1983 being allegedly infringed by the user of the impugned trademark **'BEVATAS'** by the respondent herein.

3. The appellant herein states that it is a well known medicinal pharmaceutical company in India and is now ranked as the no.1 pharma company in India in a total of 11 specialties and is the world's 4th largest generic pharmaceutical company and provides the best of class products across 150 countries worldwide and its manufacturing operations are focussed on producing generics, branded generics, specially, over-the-counter (OTC) products anti-retrovirals (ARVs), Active Pharmaceutical Ingredients (APIs) and intermediates in the full range of dosage forms, including tablets, capsules, injectables, ointments, creams and liquids etc.

4. The appellant herein states that it is the proprietor and owner of the intellectual proprietary rights of the Sun Pharmaceutical Industries Limited for the domestic formulation undertaking activities under the Scheme of Arrangement between Sun Pharmaceutical Industries Limited and itself, which was approved and sanctioned by the Hon'ble High Court of Gujarat and Hon'ble High Court of Judicature at Bombay both vide order dated 03.05.2013 in Company Petition No.

31 of 2013 and Company Scheme Petition No. 283 of 2013.

5. The appellant submits that its predecessor Sun Pharmaceutical Industries Limited in the year 1983 invented a trademark **'BEVETEX'** and the same is registered vide registration no. 410744 dated 16.09.1983, which trademark is registered for goods for Medicinal and Pharmaceutical preparations for human use and has been renewed, is valid and subsisting and has been entered in the Trade Mark Register.

6. The appellant submits that this medicine of the appellant under the name of **'BEVETEX'** contains Molecule/Salt PACLITAXEL and is a scheduled drug used for treatment of Breast Cancer, Non-Small Cell Lung cancer and Pancreatic cancer. The appellant submits that on account of its registration qua the registered trademark **'BEVETEX',** the appellant herein has a statutory right to the exclusive use of its registered trademark and the use of the same or a deceptive similar trade mark by an unauthorized person or trader in relation to the similar kind of goods will constitute infringement of the appellant's right of the exclusive use of the registered trade mark and also to the provisions of The Trade Marks Act, 1999. The appellant submits that it has been selling its medicine under its trade mark **'BEVETEX'** since the year 2015 and that it has taken efforts to popularize the same and has expended substantial sums of money on sales promotion and publicity on the said goods bearing the said trademark and due to superior quality and high efficacy of its goods, it has acquired immense reputation and goodwill and that the members of the trade, public as also the doctors and chemists exclusively associate the said

trademark with the plaintiff i.e. the appellant herein and its goods and with none else. The appellant through its plaint had submitted that the statement of sales and promotional expenses qua **'BEVETEX'** is as under : -

STATEMENT OF SALES AND PROMOTIONAL EXPENSES

Year	**Expenses Rs. in Lac (Approx)**	**Sales Rs. in Lac (Approx)**
2015-16	18.99	379.97
2016-17	34.80	696.09
Total	53.79	1076.06

7. The appellant herein submits that it being the proprietor of the trade mark **'BEVETEX'** which has acquired formidable goodwill, reputation and distinctiveness vis-a-vis such goods and that the appellant herein has the exclusive right to use the said trademark and ought to be protected by this Court against imitation, confusion, deception, dilution and unfair competition by competitors in trade.

8. It has been submitted through the plaint that the defendant i.e. the respondent to the present appeal i.e. Intas Pharmaceuticals Limited is a company under the Companies Act, 2013 having its registered office at Corporate House, Near Sola Bridge, S. G. Highway, Thaltej Ahmedabad- 380 054 Gujarat with its manufacturing plant at Plot No. 423/P/A Sarkhej-Bavla Highway, Village Moraiya, Taluka-Sanand, Ahmedabad -382 213 is engaged in the business of manufacturing and marketing pharmaceutical preparations and that sometime in the third week of December 2017, the appellant herein came across the medicine of the defendant i.e. the respondent herein being sold at

Delhi under the impugned mark **'BEVATAS',** which on upon enquiry was learnt to have been launched in October 2017 and the application of the defendant i.e. the respondent herein to the present appeal was found by the appellant herein having been published for registration of the impugned trademark **'BEVATAS'** under registration no. 3254683 dated 09.05.2016 in the trade mark journal under no. 1768 dated 24.10.2016 and that the defendant i.e. the respondent herein had filed the said application on "proposed to be used" basis and that the appellant thus filed its notice of opposition before the trade mark registry on 27.12.2016 and expected that the defendant i.e. the respondent herein would not pursue its trade mark application but it continued to do so and the defendant i.e. the respondent herein filed its counter-statement on 28.03.2017, which was served by the Trade Mark Registry on the Plaintiff i.e. the appellant herein on 12.09.2017 and the appellant herein filed its evidence in support of opposition on 08.11.2017, which opposition proceedings are currently pending.

9. The appellant further submits that the respondent's medicine under the impugned mark although a cancer drug contains a different salt namely BEVACIZUMAB and is used for the treatment of Colorectal cancer, Ovarian cancer, Cervical cancer, Lung cancer and recurrent gliolastoma (a type of brain tumor). Nevertheless, the appellant submits that the wrong administration of the drug can prove fatal. The appellant contends that the respondent's impugned mark **'BEVATAS'** is structurally, visually and phonetically similar to the appellant's trade mark **'BEVETEX'** and competing medicines are

sold in the same dosage form i.e. injections and are sold at similar prices and that such adoption also amounts to unfair trade practice, unfair competition and dilution and such act also amounts to misrepresentation and misappropriation of appellant's goodwill-in the trade mark **'BEVETEX'**.

10. The appellant contends that the defendant i.e. the respondent's trade mark **'BEVATAS'** is visually, structurally and as well as phonetically similar to the appellant's registered trade mark **'BEVETEX'.** The appellant contends that the defendant i.e. the respondent's mark is liable to be injuncted urgently so as to protect the public interest at large and that the consumers ought to be protected against confusion and deception.

11. *Inter alia* through the plaint it has been contended by the plaintiff i.e. the appellant herein that the profits earned by the defendant by misappropriating intellectual property rights belonging to the plaintiff i.e. the appellant herein including the goodwill and reputation that vest in the trademark **BEVETEX** is liable to be reimbursed to the plaintiff by directing the defendant to render truthful accounts of profits. *Inter alia* the plaintiff i.e. the appellant herein had submitted through the plaint that the injury to the goodwill and reputation of the plaintiff i.e. the appellant herein and to the members of the purchasing public can in no way be assessed, quantified or compensated and therefore the illegal trade activities of the defendant i.e. the respondent herein ought to be restrained immediately by an order of injunction.

12. The appellant as plaintiff through his suit had submitted the

comparison between competing drugs **Bevetex** and **Bevatas** as under:

Product features	Bevetex	Bevatas	Remarks
Company	Sun Pharma	Intas	
What is the product	This is Paclitaxel Injection Concentrate for Nanodispersion	Monoclonal antibody, used as anti angiogenic agent to treat various cancer indications	Very different class of drugs with different indications & mode of action ;
Presentation	vials of 100mg & 300mg	Vials 100mg & 400 mg	Almost same
Dosage approved	260 mg/m^2 to 295 mg/m^2 every 21 days.	10 to 15 mg/ mg repeated every 2 or 3 weeks.	
Route of administration	IV Infusion	IV Infusion	Same
Effective dose based on BSA	400 mg	700 to 900 mg (2 vials or more of 400 mg used). 100 mg for titration	400 mg Bevetex & Bevetas can be confused at the pharmacy / para medical level.
Broadly recommended for	Metastatic breast cancer	1. Metastatic colorectal cancer, 2.Unresectable, locally advanced, recurrent or metastatic non-squamous NSCLC 3.Recurrent glioblastoma	Non overlapping indications. Patient may get wrong drug for the given indication. This may cause severe / life threatening complications with no tumour kill effect.

		4)Metastatic renal cell carcinoma. 5)Recurrent or metastatic cervical cancer 6)Recurrent epithelial ovarian, fallopian tube, or primary peritoneal cancer that is: platinum-resistant or platinum-sensitive	
Most common side effect	Pain, peripheral neuropahy, neutropenia, leucopenia, alopecia, mucosal inflammation, asthenia, pyrexia, nausea, vomiting.	Gastrointestinal perforation, surgery & wound healing complications, severe & fatal Hemorrhage.	Very different toxicity profile. Life threatening toxicities observed with Bevacizumab.

and thus reiterated its contention that wrong administration of the drug can prove fatal.

13. The defendant i.e. the respondent to the present appeal through its written statement contended that the alleged cause of action claimed by the plaintiff i.e. the appellant herein that there could be confusion leading to false administration of drug by the sale of the respondent's drug and it was not in public interest,- is completely unreal, far stretched and frivolous and that the respondent's

BEVATAS is not an off-the-shelf drug and that the drugs of the plaintiff i.e. the appellant herein as well as of the defendant i.e. the respondent herein in question are not and cannot be self-administered in as much as they are IV infusion and scheduled drugs and are available only on prescription and to be administered to the patients through highly specialized procedures by trained and skilled personnel within the oncology clinics and centres under the supervision of the Specialists Oncologists during the appropriate stage of the medical procedure.

14. The respondent contends that the plaintiff i.e. the appellant herein has already admitted that **BEVETEX** and **BEVATAS** contain totally different molecule formulations/salts and that **BEVETEX** is a product of the chemical formulation PACLITAXEL, which is a synthetic chemical compound and whereas, **BEVATAS** is a product of a biosimilar BEVACIZUMAB, which is rDNA in nature.

15. The respondent has further contended that the word **BEVETEX** when read, seen and spoken as owned by the plaintiff i.e. the appellant herein bears no similarity in any manner whatsoever with the Defendant's/respondent's mark **BEVATAS** and that the marks are visually, structurally and phonetically different as compared below:

PLAINTIFF'S MARK	**DEFENDANT'S MARK**
BEVETEX	BEVATAS
Phonetics of the mark starts with phonics *BEVE*	Phonetics of the mark starts with phonics *BEVA*
Phonetics of the mark ends	Phonetics of the mark ends

with phonics *TEX*	with phonics *TAS*
No visual similarity **BEVETEX**	No visual similarity **BEVATAS**

BRAND NAME: BEVATAS	**BRAND NAME: BEVETEX**
Defendant's drug	Plaintiff's drug
Molecule: Bevacizumab for injection	**Molecule:** Paclitaxel injection concentration for Nano dispersion.
Type of Drug:- rDNA Drug	**Type of Drug:-** Synthetic Chemical Drug
Dosage form: 100 mg and 400 mg for injection	Dosage form: 100 mg and 300 mg for injection
Route of Administration: Intra venous injection and need to be administered by trained oncology nurses at a multi-speciality hospital under supervision of a medical or surgical oncologist. Unlike other injectable medicines it cannot be	**Route of Administration:** Intra venous injection and need to be administered by trained oncology nurses at a multispeciality hospital under super vision of a medical or surgical oncologist Unlike other injectable medicines it cannot be administered at

administered at any common hospital or clinic Bevatas cannot be sold without prescription of any oncologist.	any common hospital or clinic
Therapy: For the treatment purpose	**Therapay:** For the treatment purpose
IMS category Monoclonal antibody (Anti Vascular endothelial growth factor)	**IMS category** Cytotoxic agent or microtubule Inhibitor
Prescribed by Medical / Surgical and Radiation Oncologist	**Prescribed by** Medical / Surgical and Radiation Oncologist
Product appearance Vial for injection in a single pack	**Product appearance** Vial for injection in a single pack
Indication: First-line treatment of non-squamous NSCLC in combination with platinum-based chemotherapy Metastatic carcinoma of the colon or rectum (mCRC) Advanced and/or metastatic	**Indication:** After failure of combination chemotherapy for Metastatic breast cancer (mBC) or relapse within 6 months of adjuvant chemotherapy

renal cell cancer (mRCC) Epithelial ovarian, fallopian tube and primary peritoneal cancer Cervical Cancer Glioblastoma Metastatic breast cancer (mBC)	
Type of medicine: Hospital based medicine need to supply against prescription of registered medical practitioner or oncologist only. Need to administered as a intra venous injection by trained oncology nurses under the supervision of registered medical practitioner (90 minutes infusion)	**Type of medicine:** Hospital based medicine need to supply against prescription of registered medical practitioner or oncologist only. Need to administered as a intra venous injection by trained oncology nurses under the supervision of registered medical practitioner (30 minutes infusion)
MRP **Bevatas: Rs.39995/- for 400mg and Rs. 25990.00 for 100mg.**	**MRP** **Bevetex: 100 mg: Rs. 12500/- 300 mg- 37000/-**
Dose: The recommended dose of bevacizumab is 7.5 mg/kg or 15 mg/kg of body weight given once every 3 weeks as an IV infusion in Non-small	**Dose:** 260 mg/m2 and Bevetex 295 mg/m^2 every 3 weeks ad IV infusion over 30 minutes.

cell lung cancer Advanced and/or metastatic renal cell cancer (mRCC) : The recommended dose of bevacizumab is 10 mg/kg of body weight given once every 2 weeks as an IV infusion. Epithelial ovarian, fallopian tube and primary peritoneal cancer: The recommended dose of bevacizumab is 15 mg/kg of body weight given once every 3 weeks as an IV infusion.	

16. The respondent further submitted that its mark is only associated with the respondent/defendant by virtue of long, continuous and extensive use and likelihood of confusion is nil as the drugs being sold under the plaintiff's and Defendant's marks are totally different.

17. The respondent has further submitted that there is no case of passing off and unfair competition made out and that the mark of the plaintiff i.e. the appellant herein came to use in the year 2015 only despite the registration having been applied for in the year 1983 and having been so granted in 1990 and that the defendant's i.e. the respondent's mark was coined and adopted in the year 2016 and that the defendant's/respondent's brand has acquired a huge reputation and goodwill in a short span of time because of the excellent quality of the

respondent's drug and its demand. The respondent has further submitted that the plaintiff i.e. the appellant herein is selling the drug **BEVETEX** with active formulation called Paclitaxel which is a chemotherapy drug used primarily for indication of early breast cancer and that the respondent has also been selling the said active formulation of Paclitaxel but under the brand name Cytax and that the respondent is also marketing nanosornal Paclitaxel Lipid Suspension under the brand name Pacliaqualip and that the standard dose of Paclitaxel which is recommended is often 175 mg per/m^2.

18. The respondent has further submitted that its drug **BEVATAS** is a monoclonal antibody which is a biologic drug derived from mammalian clone cells and are biologic drugs and precisely not the chemical drugs and that **BEVATAS** which is a monoclonal antibodies are derived from mammalian clone (Human Umbilical Vascular Endothelial Cells C - HUVEC Cells) which through various biological processes disintegrates and forms proteins as opposed to traditional cytotoxic which are formulated by combining two or more chemical entities and that **BEVATAS** is a monoclonal antibody, an anti-Vascular Endothelial Growth Factor targets the Vascular Endothelial Growth Receptor and inhibits and reduces the proliferation (multiplication / growth) of tumour cells in various indications like:

a. Metastatic Carcinoma of the Colon or Rectum, say a disorder associated with digestive system;

b. Advanced Epithelial Ovarian, Fallopian Tube and Primary Peritoneal cancer, say a disorder associated with reproductive system in female population;
c. Persistent, recurrent or metastatic carcinoma of the Cervix, say a disorder associated with reproductive system in female population;
d. Unresectable advanced, metastatic or recurrent Non-small Cell Lung cancer, say a disorder associated with lungs;
e. Advanced and. / or metastatic Renal Cell cancer, say a disorder associated with kidneys;
f. Recurrent Glioblastoma with progressive disease, say a disorder associated with brain; and
g. Metastatic breast cancer, say a disorder associated with breast.

19. *Inter alia* the respondent has submitted that permission for marketing and manufacturing the said rDNA drug i.e. BEVATAS was granted by the Drug Controller General of India (DCGI), Directorate General of Health Services on 23.06.2016 and 27.06.2016 and by the Deputy Commissioner, Food & Drugs Control Administration, Gujarat State, Gandhinagar on 30.07.2016. *Inter alia* the respondent has submitted that its product had been immensely used and prescribed by the medical practitioners since its launch and that the plaintiff always knew that the respondent's product was in the market and, therefore, the present suit suffers from delay, latches and acquiescence.

20. *Inter alia* the respondent has submitted that **BEVATAS** can only be supplied against the demand from the cancer hospitals/institutions and that too against the prescription of a cancer specialist and cannot be purchased. *Inter alia* the respondent has submitted that administration of both the products is by or under the close supervision of super speciality medical professionals like medical and surgical oncologists. *Inter alia* the respondent has contended that administration of both the products is through IV infusion in oncology centre / clinic having lengthy and specialized procedures which involve:

a. pre-screening of patients and assessment of vital parameters like blood count;
b. pre-medication for prevention of nausea and vomiting;
c. preparation of the recommended dosage and infusion within specialized earmarked wards;
d. actual process of infusion takes around 90 minutes for **BEVATAS** which under the constant monitoring of highly trained and skilled medical professionals;
e. because of peculiar nature and usage of Onco range of products, these are completely hospital based and are supplied against the prescription of medical oncologist which is being administered within the Onco clinic or centre.

21. The respondent has submitted that the whole process of infusion is a half or full day programme for the patient depending upon its medical condition before and after infusion. The respondent has further submitted that it is not possible that a specialist doctor gets

confused by the two different drugs with different trade marks as the super-specialists have complete information/knowledge and are aware of the differences. The respondent has put forth the comparison and the different in administration of the two products as under:

PARTICULARS	**BEVACIZUMAB (BEVATAS)**	**PACLITAXEL (BEVETEX)**
Reconstitution	It should be diluted with **0.9% sodium chloride** solution for injection. The concentration of the final Bevacizumab solution should be kept within the range of **1.4 to 16.5 mg/ml.**	It should be diluted with **5% w/v dextrose** injection in 1:20 ratio. Each ml of reconstituted Nanodispersion contains 5 mg paclitaxel (Drug concentration will be **5 mg/ml.)**
Administration	The initial dose should be delivered over **90 minutes** as an IV infusion. If the first infusion is well tolerated, the second infusion may be administered over 60 minutes. If the 60-minute infusion is well tolerated, all subsequent infusions may be administered over 30 minutes. Bevacizumab	It has to be administered as intravenous infusion over **30 minutes every 3 weeks.**

	infusion frequency varies from **2** **weekly to 3 weekly** depending on the indication.	

22. The respondent reiterates that as the medicines cannot be sold by any medical practitioner, there is no scope for confusion of any kind. The respondent has further submitted that its trade mark Bevatas is totally different from the plaintiff's trademark Bevetex and the respondent's mark is coined mark which has been coined by amalgamating the words BEVA derived from or referable to the active ingredient BEVACIZUMAB and TAS from Defendant's Corporate name INTAS, a company of a repute and standing since the last several decades. The respondent has further submitted that within the product range BEVACIZUMAB, a number of companies are using prefix 'BEVA' in the trademark for their respective products such as BEVATAS (of the Defendant/respondent), BEVACIREL (Reliance), BEVAZZA (Lupin) and BEVAREST (Emcure). The respondent has put forth an illustrative chart to show the respective users of product range of BEVACIZUMAB which is as follows:

PRE- PLAINTIFF		
S.NO.	APPLICATION PARTCULARS	MARK
01.	No.- 340724 Application Date- 12.09.1978 Registration Date - 07.07.1980	BEVARATE

02.	No.- 373052 Application Date- 05.03.1981 Registration Date - 23.04.1966	BEVISAR

POST- PLAINTIFF		
S.NO.	APPLICATION PARTCULARS	MARK
01.	Application No.- 827384 Application Date- 13.11.l998 Registration Date - 09.06.2017	BEVAC
02.	Application No.- 451957 Application Date- 02.04.1986 Registration Date - 14.08.1991	BEVIN
03.	Application No.-713912 Application Date- 13.08.1996 Registration Date - 01.12.2003	BEVENT
04.	Application No.- 792186 Application Date- 20.02.1998 Registration Date - 31.03.2005	BEVIZ
05.	Application No.- 890171 Application Date- 07.12.1999 Registration Date - 28.02.2005	BEVAC- A
06.	Application No.- 902979 Application Date- 11.02.2000	BEVITAL

	Registration Date - 22.04.2005	
07.	Application No.- 927555 Application Date- 26.05.2000 Registration Date - 01.08.2006	BEVAXIM
08.	Application No.- 1169016 Application Date- 24.01.2003 Registration Date - 23.03.2006	BEVAL
09.	Application No.- 1195752 Application Date- 01.05.2003 Registration Date - 29.10.2005	BEVON
10.	Application No.- 1450700 Application Date- 05.05.2006 Registration Date - 11.03.2010	BEVATRON
11.	Application No.- 1695478 Application Date- 05.06.2008 Registration Date - 04.11.2009	BEVAMAB
12.	Application No. - 1912248 Application Date- 22.01.2010 Registration Date - 28.03.2011	BEVACEPT
13.	Application No.- 2453934 Application Date- 03.01.2013 Registration Date - 07.04.2017	BEVACIREL
14.	Application No.- 3190977	BEVAZZA

	Application Date- 22.02.2016 Registration Date - 23.02.2017	
15.	Application No.- 1329340 Application Date- 31.12.2004 Registration Date - 04.06.2007	BEVEL
16.	Application No.- 2811849 Application Date- 18.09.2014 Registration Date - 25.11.2016	BEVESPI

23. The respondent has further submitted that its product has the suffix ‘TAS’ which is referable and derived from the respondent’s corporate name and house mark "INTAS', so as to indicate that the product is emanating or otherwise belonging to the respondent, a globally reputed pharmaceutical company and that it is a very common practice, especially in the pharmaceutical industry to adopt / conceive trademark by amalgamating the name of the molecule / salt with the name of the manufacturing / marketing company and that there are a large number of products in its basket which have the trademarks with the suffix 'TAS' by amalgamating with the name of the molecule / active ingredient or salt which are already registered in the name of the respondent in Class 5 as the respondent always has an inclination to coin a Trademark by adopting TAS as a suffix so as to indicate association of the product to its Corporate name. The respondent has put up an illustrative list of such registered trademarks as detailed as under:

S.No.	APPLICATION NO.	MARK
01.	629454	LOMITAS
02.	727061	SPARTAS
03.	748044	CLARITAS
04.	750610	RUMENTAS
05.	761079	LOSARTAS
06.	761125	CEFITAS
07.	802659	AMTAS
08.	809669	SERTAS
09.	851467	ALBUTAS
10.	859149	OFOTAS
11.	859152	OFLOTAS
12.	877077	SPRINTAS
13.	935241	FENTAS
14.	983667	TINITAS
15.	989312	FLUTAS
16.	1076825	FERITAS
17.	1172229	MINOTAS
18.	1191911	SOLVITAS
19.	1191914	NORTAS
20.	1261518	SALBITAS
21.	1285442	DORTAS
22.	1292795	LIPYTAS

23.	1293256	GFLOTAS
24.	1334640	CARVEDTIAS
25.	1334641	LISINOTAS
26.	1368921	ECOTAS
27.	1399376	LEVOTAS
28.	1399381	ERYTAS
29.	1421630	LOPATAS
30.	1601636	DOXYTAS
31.	1621395	SOFTAS
32.	1662898	NIFTAS
33.	1773262	DERITAS
34.	1777086	ZOLITAS
35.	1891289	CLINTAS
36.	1898125	OVUTAS
37.	1898127	LUPROTAS
38.	1902866	ENZYTAS
39.	1988968	LIQUITAS
40	2014042	ARGITAS

24. The respondent has further submitted that the Trademark Examiner whilst examining the trademark application of the defendant i.e. the respondent herein, did not cite the mark of the plaintiff i.e. the appellant herein as a conflicting mark which shows beyond doubt that there is no similarity in any manner whatsoever between the

respondent's and the appellant's marks as alleged. The respondent thus contends that all parameters like nature of the product, its characteristics, indications for which they are used, unique logo of depicting Bevatas is in two different colours for differentiating BEVA and TAS with the product pack containing lettering style prominently displayed with its Intas logo in an artistic presentation.

25. The respondent further submits that its mark is a coined mark coined by the combination of prefix 'BEVA' from the active ingredient of the drug i,e. BEVCIZUMAB and 'TAS' is from the suffix from the name of the defendant/respondent i.e. INTAS, in accordance with common prevalent practice in the pharmaceutical industry and that the mark of the respondent has nothing to do with the trademark of the appellant and there is no similarity or resemblance with it neither structural nor phonetic and no case of infringement is made out and that the defendant/respondent's mark is its own independent intellectual property capable of distinguishing the product of the respondent from the world at large including those of the appellant.

26. The respondent has further submitted that it is a well settled principle of law that no one can claim a monopoly in respect of a particular International Non-Proprietary Name (INN name) of the drug and that Bevacizumab is the INN name of the drug being sold by the Defendant under the mark Bevatas.

27. The plaintiff i.e. the appellant herein has stated that the suit has been filed purely in public interest and that the plaintiff i.e. the appellant herein has no commercial interest but submits that if a wrong drug is administered, the same may cause Gastro Intestine

Perforation i.e. creating holes in the stomach which would eventually prove fatal.

28. The learned trial Court vide its impugned order observed to the effect that:

"Findings:-

"I have heard the rival submissions made by the Ld. Counsel for parties and also carefully gone through the written submission and supporting case laws placed on record by both the parties. In my considered opinion the application filed by the plaintiff u/O 39 R 1 and 2 CPC needs to be dismissed for the reasons stated here under:-

6.1 Worth to mention at the outset that both the sides have cited plethora of case law in support of their submissions, it is stated that there is no dispute to the proposition of law enunciated therein, the determining principles remains the same, the outcome depends upon the particular facts and circumstances of each case.

6.2. The entire controversy herein is centered around whether the defendant's trademark 'BEVATAS' is deceptively similar to that of the plaintiff's trademark 'BEVETEX'. Plaintiff's mark is registered whereas defendant's mark is under objection before the registrar Trademark. There is no doubt that registration of trademark gives the registered proprietor thereof exclusive right to use of the trademark in relation to the goods or services in respect of infringement of the trademark as stipulated in Sec-28(1) Trademark Act.

6.3 Section 28(1) of the Act confers upon the registered proprietor of a trademark, the exclusive right, upon a valid registration, to the use of the trademark in relation to goods or services in respect of which the trademark is registered. Section 29(1) provides that a registered trade mark is infringed by a person who, not being a registered proprietor or a person using

by way of permitted use, uses in the course of trade, a mark which is identical with, or deceptively similar to the trade mark in relation to goods or services in respect of which the trade mark is registered and in such manner as to render the use of the mark likely to be taken as being used as a trade mark.

6.4 The expression "deceptively similar" is defined in Section 2(l)(h)- "A mark shall be deemed to be deceptively similar to another mark if it so nearly resembles that other mark as to be likely to deceive or cause confusion."

*6.5. In factual matrix of the case, it is apparent that the trade mark used by the defendant "**BEVETAS**" is not a registered trademark. It is also apparent that the defendant's mark "**BEVETAS**" is not per se identical with the plaintiffs registered mark "**BEVETEX**". Noticeably the defendants and plaintiff trademark are not in relation to the same molecule/product/salt. Therefore, the only question that has to be examined whether the defendant's mark is deceptively similar/ confusingly similar to the plaintiffs registered trademarks thereby entitling to the interdiction against the defendant to its use.*

6.6. It is not uncommon, rather, I would say in pharmaceutical trade it is a normal practice to have prefixes or suffixes linked to chemical salt or compound across various similar products manufactured by different companies. It is also common to have the abbreviated name of the company in conjunction with such prefix or suffix of the salt to indicate the source of the product.

6.7 In view of the pharmaceutical trade, one finds name of various drugs almost similar to each other, having common prefixes of suffixes, for the reason that the name of the drug conveys as to which salt/ compound it is a derivative of drug. Acronyms and short forms are commonly used as a trademark.

6.8 Meaning thereby, having prefix or suffix conjunctively with company name is the normal practice in pharmaceutical business. And trite to say that to judge the similarity the two

marks are to be compared as a whole, it is not legally permissible to dissect it to minutely compare the marks with microscopic eye. What it means in the context of the present case is that in the pharmaceutical trade it would not be unusual to find drugs including the term 'BEVE' as a prefix in plaintiffs mark and 'BEVA' in defendant's mark. And significantly, the chemical compound 'Bevacizumab' in the defendant's drug is totally different from the compound/salt of plaintiff drug, i.e. 'Paclitaxel'.

6.9 With above noted factors in mind I proceed to examine whether the two marks in question are deceptively/confusingly similar or not.

*To the said word 'BEVE', plaintiff has added suffix 'TEX' to arrive at the trademark '**BEVETEX**'. On the other hand, the defendant has added the suffix "TAS", which is part of its company name (INTAS), to arrive at the trademark '**BEVATAS**'. The trademarks in this case, be it the plaintiffs' registered trademark or the defendant's trademark are what is described as hybrid or blended words.*

*6.10. In the facts of the case, it would be fruitful to refer to the decision of the Ho'ble High Court of Delhi reported as **Astrazeneca UK Ltd. V. Orchid Chemicals and Pharmaceuticals Ltd. : 2007(34) PTC 469 (Del)** wherein similar words in competing marks being public jurisdiction was considered and it was held as under:*

> *"21. In our considered opinion the facts of the said case are almost similar and squarely applicable to the facts of the present case. 'Meropenem' I the moleculte which is used for treatment of bacterial infections. In that view of the matter, the abbreviation 'Mero' became a generic term, is publici jurisdiction and it is distinctive in nature. Consequently, the appellants/plaintiffs cannot claim exclusive right to the use of 'Mero' as constituent*

of any trademark. The possibility of deception or confusion is also reduced practically to nil in view of the fact that the medicine is sold only on prescription by dealers. The common feature in both the competing marks i.e. 'Mero' is only descriptive and publici jurisdiction and, therefore, the customers would tend to ignore the common feature and would pay more attention to the uncommon feature. Even if they are expressed as a whole, the two did not have any phonetic similarity to make it objectionable. There are at least four other registered users of the prefix 'Mero' in India whereas the names of 35 companies using 'Mero' trademarks, which have been registered or applied for registration, have been furnished in the pleadings. The respondent/defendant advertised its trademark 'Meromer' after submitting its applicant for registration and at that stage, there was no opposition even from the appellants/plaintiffs. The trademark of the respondent/defendant was registered there being no opposition from any quarter, including the appellants/plaintiffs"

6.11 For the plaintiff to succeed, it must also be established that the defendant has no right to use the genuine name/abbreviations of the compound 'Bevacizumab' in their drugs, and that the plaintiff has exclusive right to use the same and which the plaintiff has failed to show.

6.12. Thus, it is clear that parts of words can be combed to pack the meanings of both the words in the new word so formed. And the defendant has been able to show the derivation of the trademark 'BEVATAS'. 'BEVA' from 'Bevacizumab' and 'TAS' from its name/trade name 'INTAS' which apparently is also reflected from other prominent brands of the defendant being

continuously used since long. Necessary documents to support the said view have been placed on record by the defendant.

6.13. Further, in my view the defendant's trademark has been derived by combining the publici- juris, the abbreviation of the salt 'Bevacizumab' with suffix TAS, the abbreviated form of its trade/company name.

6.14. Defendant has also placed on record a list of third party use of Similar trademark with abbreviated prefix 'BEVA' to their merchandise/drugs as detailed in paras 18 and 30 of the WS. To name a few BEVATAS (of the defendant), BEVACIREL (Reliance), BEVAZZA (Lupin), Bevarest (Emcure), AVASTIN (Roche) and ZYBEV (Zydex U.S.) And relevant to note the list includes prominent names in pharmaceutical industry.

6.15. Defendant has also placed on record large number of products which have the trademarks with the suffix 'TAS' by amalgamating with the name of molecule/active ingredient or salt which are already registered in the name of the defendant in class 5. And apparently substantive use by the defendant of the mark for its products is also demonstrated by placing on record invoices/bills etc.

6.16. We must not lose sight of the fact that herein we are at preliminary stage therefore the validity, relevancy and weightage of the documents placed on record can be tested during course of trial, at this stage, prima-facie opinion in favour of defendant is supported by these documents. And thereafter in my view, plaintiff can not have any monopoly over the use of the word 'BEVA'. The Prefix 'BEVA' is derived from 'Bevacizumab' which conveys as to which salt it is derivative of.

7. Now coming to factual aspect of similarity or deceptive similarity -

*7.1. Ocular/ Visual similarity:-it is important to note that there is markedly difference between the two trademarks in dispute here. Plaintiffs mark comprised of '**BEVETEX**' whereas the mark of*

*the defendant '**BEVATAS**' is depicted along with the name of the salt in small font underneath. Both the trademarks are prominently qualified by the name of the compound which ex-facie is completely different, i.e. Paclitaxel and Bevacizumab. And important to note that the name of the salts are predominantly reflected overshadowing the trademarks on the packaging. The get-up, the trade-dress of the two products is different making it highly unlikely of any confusion amongst its consumers. And taking note of above discussion and the font thereof I can thoughtfully say that there is no structural similarity also.*

7.2. Phonetically also, I find apparently there is no similarity in the two words. The word 'Bevetex" बेवे & टेकस and 'Bevetas बेवा & तास (Hindi varaamala uchcharan) and pronounced as a whole they do not rhyme with each other.

8. Thus, it cannot lead to the conclusion that any slight semblance of phonetic similarity between two marks would automatically satisfy the test of confusion to a man as a whole. In entirety of the facts, looking at the two marks as a whole, I do not see any likely hood of confusion or deception and/or similarity between the two marks amongst the customers/consumers. The two marks are entirely different and distinct. There is no phonetically or visual similarity between the two mark taken as a whole.

9. Further both the drugs are schedule H, IV Injunction Drugs and cannot be self administered. Nor it can be said that they are 'Over The Counter' drugs or for that matter easily/readily available on self medication, a general tendency within our society.

10. Drugs are available only on prescriptions and can be administered to the patients by highly specialized -super specialist oncologists and under their supervision though specialized producers by trained & Skilled personnel within

oncology centers. Both the drugs are sold under different contents/weight and the price , i.e.

(i) BEVATAS- 400 mg cost: Rs. 39,995/- 100 mg cost: Rs. 25,990/-

(ii) BEVETEX- 300 mg cost: Rs. 37,000/- -100 mg cost: Rs. 32,500/-.

11. Herein another import factor that needs to be considered and in my view very relevant to the facts of the case is who are the customers /targeted users, the persons who are likely to purchase the drugs in question here. And I must state that it is not the general public or unwary customer in the bracket of targeted customers/ consumers. The customer of the two products are not illiterate persons or a common man. But highly specialized doctors and equally talented and specialized medical staff where the chance of confusion are practically negligible.

12. At this juncture a useful reference may be made to the para 42 of the ***Cadila Healthcare v. Cadila Pharmaceuticals AIR 2001 SC 1952*** *read as under:-*

> *"42. Broadly stated in an action for passing off on the basis of unregistered trade mark generally for deciding the question of deceptive similarity the following factors to be considered:*
>
> *a) The nature of the marks i.e. whether the marks are word marks or label marks or composite marks, i.e. both words and label works.*
>
> *b) The degree of resembleness between the marks, phonetically similar and hence similar in idea.*
>
> *c) The nature of the goods in respect of which they are used as trade marks.*
>
> *d) The similarity in the nature, character and performance of the goods of the rival traders.*

e) The class of purchasers who are likely to buy the goods bearing the marks they require, on their education and intelligence and a degree of care they are likely to exercise in purchasing and/or usin2 the goods.

f) The mode of purchasing the goods or placing orders for the goods and g) Any other surrounding circumstances which may be relevant in the extent of dissimilarity between the competing marks.

(emphasis supplied).”

13. All the circumstances such as nature of products, their indications, being intravenous products self-administration is not possible and the entire process is done under the constant monitoring, guidance and supervision of super specialists, one product being mistaken for other or is replaced by the other is completely ruled out. It is impossible that a super specialist doctor gets confused in as much as both the trademarks are completely different and are being used for completely different drugs and indications of which super specialist doctors have complete information, knowledge and are aware of.

14. Analyzing the facts in backdrop of above discussion it becomes highly unlikely that there can be any deception or confusion or chance of wrong administrations of the drugs. Aberrations are always there. That too cannot apparently be due to confusion/deception qua the drugs but attributable so to gross-negligence or carelessness of the person.

15. Significant to note that plaintiff had applied for registrations of the mark BEVETEX in the year 1983 which was granted in 1990. Merely because plaintiff got its mark registered in 1990 vide its application filed in year 1983 would not by itself give any right in the said trademark when admittedly it was not

commercially used for newly 2 decades. 'Hoading' and 'Parking' of trademark cannot permitted and encouraged.

16. Besides that as discussed above in the preceding paras that

(a) noticeably there is no deception or confusion of the two trademarks in question,

(b) 'beve' is not abbreviated form of the salt Paclitaxel and plaintiff cannot have monopoly over in light of established trade practice,

(c) there is no similarity between the marks; The two marks are distinct and dissimilar; visually / phonetically.

(d) No misrepresentation or mala fides can be attributed to the defendants, 'TAS' is part of its products, commonly used

(e) Both the products were launched seemingly within a span of one year and it cannot be a matter of touch and go to claim prior user. To claim reputation and goodwill qua the trademark BEVETEX in a short span of time would require evidence which can only be adjudicated during course of the trial. Apparently as of now no clear cut case of goodwill and reputation is made out qua the said trademark.

17. The turnover of defendant's product BEVATAS till date is said to be the tune of Rs. 3.5 crore/month, sales figure of Rs. 21 crores from September 2016 till November 2017 are alleged to be much more than that of the plaintiff. It cannot thereby be said that defendant is trying to encash upon the reputation and good will of the plaintiffs trademark.

18. Essential ingredients of the passing off not made out in favour of the plaintiff. Therefore, at this stage, it cannot be said that the plaintiff has made out a prima facie case for grant of interim protection under the doctrine of passing off.

19. With respect to the authorities relied upon by the plaintiff suffice to state that none of the authority in there was dealing with the scheduled H drug life saving drugs, administered through a complex and detailed procedure and that too by highly

specialized persons by highly specialized procedure within the oncology clinic and centres. In so far reliance on Cadila (supra) is concerned, the same is misplaced. Needless to say the judgment is to be read in entirety and not to cull out a passage therefrom, in abstract, devoid of its substance and flavor.

20. In view of my above discussion, I am of the view plaintiff has failed to established a prima facie case in its favour.

21. As discussed above, both the products were launched seemingly within a span of one year and there is nothing on the record to indicate that the plaintiffs trademark has attained the reputation and goodwill so as to fall in the category of well known trademark. Moreover, the drugs in question herein are life saving drug essential for treatment of cancer. Thereby in totality of the facts it also can not be the case of balance of convenience in favour of the plaintiff. No irreparable injury is likely to be caused to the plaintiff by the use of the impugned mark by the defendant.

22. Accordingly, Application u/0 39 R 1 & 2 is dismissed. Nothing stated herein shall tantamount to expression on the merits of the case."

29. The appellant through the present appeal submits that the observations of the learned trial Court whereby it is speculated that there shall be no confusion between the competing drugs, is based on a wrong premise, that the customer of the two medicinal products are not illiterate persons or common men but specialized doctors and their staff and that the learned trial Court wrongly decided the matter as if the competing drugs were Schedule "L" drug, which are only dispensed to hospitals whereas the competing drugs in question are Schedule "H" drugs, which are dispensed against prescription. As regards this submission of the appellant, it

is essential to observe as already adverted to hereinabove that the impugned order, findings of which have been reproduced in para - 9, depicts that the drugs are schedule H, IV Injunction Drugs and can not be self administered and they are not 'Over the counter' drugs and thus are not easily, readily available for self medication.

30. *Inter alia* the appellant contends that the impugned order is against the law laid down by the Hon'ble Supreme Court in ***Cadila Healthcare vs. Cadila Pharmaceuticals; AIR 2001 SC 1952*** which lays down to the effect that:

> *"(1) the courts may not speculate as to whether there is a probability of confusion*
> *between similar names;*
> *(2) Public interest would support lesser degree of proof showing confusing similarity in the case of trade mark in respect of medicinal product as against other nonmedicinal products. Drugs are poisons, not sweets. Confusion between medicinal products may, therefore, be life threatening, not merely inconvenient;*
> *(3) drugs sold under prescription but this fact alone is not sufficient to prevent confusion which is otherwise likely to occur; and*
> *(4) confusion is not uncommon among doctors and paramedical staff apart from the pharmacists and their staff dispending the medicine."*

and reliance was placed specifically on behalf of the appellant on observations in para-34, 35 & 39 of the said verdict to the effect that:

> *"34. As far as present case is concerned, although both the drugs are sold under prescription but this fact alone is not sufficient to prevent confusion which is otherwise likely to*

occur. In view of the varying infrastructure for supervision of physicians and pharmacists of medical profession in our country due to linguistic, urban, semi-urban and rural divide across the country and with high degree of possibility of even accidental negligence, strict measures to prevent any confusion arising from similarity of marks among medicines are required to be taken.

35. ...In the field of medicinal remedies, the ***courts may not speculate as to whether there is a probability of confusion between similar names****. If there is any possibility of such confusion in the case of medicines public policy requires that the use of the confusingly similar name be enjoined.*

39. Public interest would support lesser degree of proof showing confusing similarity in the case of trade mark in respect of medicinal product as against other non-medicinal products. Drugs are poisons, not sweets. Confusion between medicinal products may, therefore, be life threatening, not merely inconvenient Noting the frailty of human nature and the pressures placed by society on doctors, there should be as many clear indicators as possible to distinguish two medicinal products from each other. It is not uncommon that in hospitals, drugs can be requested verbally and/or under critical/pressure situations. Many patients may be elderly, infirm or illiterate. They may not be in a position to differentiate between the medicine prescribed and bought which is ultimately handed over to them.. "

31. The appellant also placed reliance on the verdict in ***Midas Hygiene Industries P. Ltd. and Ors. Vs. Sudhir Bhatia and Ors. 2004 (28) PTC 121 (SC)*** with specific reference to para-5 thereof which reads to the effect that:

> *"5. The law on the subject is well settled. In cases of infringement either of Trade Mark or of Copyright normally an injunction must follow. Mere delay in bringing action is not sufficient to defeat grant of injunction in such cases. The grant of injunction also becomes necessary if it prima facie appears that the adoption of the Mark was itself dishonest."*

to contend that the appellant is a registered proprietor of **BEVETEX** since the year 1983 and the application for registration of **BEVETAS** was filed in the year 2016 on proposed to be used basis, which stands opposed by the plaintiff i.e. the appellant herein before the Trade Mark Office. The appellant also contends that reliance placed by the learned trial Court on the judgment in ***Astrazeneca UK Ltd. vs. Orchid Chemicals; (2007) ILR 1 Delhi 874 (DB)*** was misplaced submitting to the effect that in the said case, the High Court was dealing with drugs MEROMER and MERONEM both of which were for the same ailment and containing the same salt Meropenem and the Prefix "MERO" was taken from the salt which was proved to have become common to trade. *Inter alia* the appellant has submitted that the High Court in that case did not consider the aspect of disastrous consequences considering competing drugs were for same ailments. The appellant further contended that the competing drugs are for different ailments/different cancers and administration of one for another can lead to disastrous consequences and that the learned trial Court erroneously considered that the competing drugs are for same ailment. It was submitted on behalf of the appellant that the learned trial Court did not consider the judgment ***Novartis AG vs. Crest***

Pharma Pvt. Ltd. and Ors. 2009 (41) PTC 57 (Del) (SJ) and Charak Pharma. Vs. Glenmark Pharmaceuticals; 2014 (57) PTC 538 (Bom) to contend that it is more dangerous if a similar trade mark is used for drugs used to cure different ailments.

32. The appellant has further submitted that the learned trial Court had disregarded the order dated 08.05.2018 of this Court in suit titled as ***Sun Pharma Laboratories vs. (1) MSN Laboratories and (2) Intas Pharmaceuticals*** in CS (COMM) No.637/2018 which had injuncted this very defendant/respondent from dealing in medicinal preparations under the mark MIRATAS (for treatment of overactive bladder), which was found to be deceptively similar to MIRTAZ i.e. for treatment of depression and in that case, this Court injuncted the defendant/respondent after observing that the two trademarks are more or less identical but being used for treatment of separate diseases and which would gravely endanger the health of the public. The appellant also contended that the verdicts in ***Schering Corporation and Ors. vs. Alkem Laboratories Ltd.; 2010 (42) PTC 772 (Del) (DB) and Astrazeneca UK Ltd. and Anr. Vs. Orchid Chemicals and Pharmaceuticals Ltd.; (2007) ILR 1 Delhi 874 (DB)*** were not on facts *pari materia* to the instant case, as in that case the disastrous consequences of two drugs being in relation to the same treatment and of the disastrous consequence of the competing drugs had not been considered.

33. The appellant further submitted that in the field of medicinal remedies, the Courts should not speculate as to whether there is a probability of confusion between similar names and that the

learned trial Court had failed to consider that people had died on account of wrongs drugs having been dispensed against written prescriptions. *Inter alia* the appellant submitted that the confusion can occur at any level and it can occur at the time of dispensation of the medicine by the pharmacist, at the para medical level and that the competing medicines are administered by oncologists and their para medical staff and that confusion can occur considering both are cancer drugs though for different cancers.

34. *Inter alia* the appellant submitted that vide the impugned order the learned trial Court erroneously made a side by side comparison of the competing packagings to test visual similarity and it is submitted on behalf of the appellant that the same is against the test of infringement and that the learned trial Court failed to consider that the customer buying the product neither has the benefit of side by side comparison nor does he know the molecules/salt or the difference between the competing salts and that the Doctor's prescription does not carry the image/ trade dress/ packaging of the drug prescribed nor does it suggest the name of the salt that the requisite drug would contain. The appellant reiterated that the competing marks **BEVETEX** and Bevatas are too close on account of both prefix and suffix of the competing marks being similar and it was reiterated on behalf of the appellant that the impugned mark is likely to cause confusion leading to disastrous consequences. Reliance was placed on behalf of the appellant on the verdict of this Court in ***Automatic Electric Limited vs. R. K. Dhawan and Ors., 77 (1999) DLT 292*** (SJ) with specific reference to para-19 thereof which reads to the effect that:

"19. It is undoubtedly true that the first syllable of a work mark is generally the most important and thus, when the defendants are using a similar prefix with that of the plaintiff with a little variation in the suffix part of it, in my considered opinion, the trademarks are deceptively similar and cause of action for prima facie infringement is complete...."

35. On behalf of the appellant, reliance was placed on the verdict of ***Charak Pharma Pvt. Ltd. Vs. Glenmark Pharmaceuticals Ltd., 2014 (57) PTC 538 (Bom),*** to contend that the public interest would support lesser degree of proof showing confusing similarity in the case of trade mark in respect of medicinal products as against other non-medicinal products and in as much as drugs are poisons, not sweets and confusion between medicinal products may be life threatening, not merely inconvenient with specific reliance placed on para 22.1 of the said verdict, which reads to the effect : -

"9.7 Without prejudice to the aforestated contentions, even if this Court holds that the marks are similar, there is no likelihood of any confusion/deception between the two marks in question, since there is a widespread use of the prefix/suffix "NOVA" by several traders in the pharmaceutical trade and the purchasing members will tend to ignore and/or gloss over and/or give less importance to the common features and will always pay more regard to the uncommon part. The Defendant has set out the differences in the salient features between the two products qua its use, packaging, display on cartons, catch cover on blister pack and price and has submitted that this added material is sufficient to distinguish the two products and rules out the question of passing off. In

support, the Defendant has relied on the decision of the Hon'ble Supreme Court in the case of Kaviraj Pandit Durga Dutt Sharma vs. Navaratna Pharmaceutical AIR 1965 SC 980. The Defendant has also submitted that though the Defendant has been selling its products since May, 2006, however, till date the Defendant has not received any complaint of confusion or deception between its products and that of the Plaintiff.

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22.1 Applying the aforesaid tests and considering the Plaintiff's and Defendant's mark as a whole, and for the reasons set out hereinabove, I am prima facie satisfied that the Defendant's mark "ECONOVA" is deceptively similar to the Plaintiff's mark "EVANOVA". In fact, the Plaintiff's product is an ayurvedic preparation in the form of capsules for treatment of menopause. On the other hand, the Defendant's product is entirely different and is a medicine for treatment of bacterial vaginosis. If, as a result of the confusion, the wrong drug is administered, it would lead to disastrous consequences. The Hon'ble Supreme Court while noting this aspect has clearly held that when the drugs have marked differences in their compositions with completely different side effects, the test should be applied strictly as the possibility of harm resulting from any kind of confusion by the consumer can have unpleasant if not disastrous results. In the words of the Hon'ble Supreme Court, "Public interest would support lesser degree of proof showing confusing similarity in the case of trade marks in respect of medicinal products as against other non-medicinal products. Drugs are poisons, not sweets. Confusion between medicinal products may, therefore, be life threatening, not merely inconvenient". ”

36. Reliance was also placed on behalf of the appellant on the verdict of this Court in ***Novartis AG vs. Crest Pharma Pvt. Ltd. and Anr. MIPR 2010 (1) 44*** to contend that that the drugs in question being marketed by the appellant and the respondent within the domain of Schedule 'H' are to be purchased by the customers only on the prescription of a medical practitioner, the same does not suffice to detract from the merits of the contentions of the appellant that there can be misguidance which arises in view of the descriptively similar trade marks and that such an urgency warrants the ground of the prayer made by the petitioner. Reliance was placed on behalf of the appellant to specific observations in para 25 of this verdict which reads to the effect :-

> ***"25. The third contention of the learned counsel for the defendant is that the product of the parties in question is Schedule "H" drug and the same has to be purchased by the customers only on the prescription of medical practitioner. The argument of the defence of Schedule "H" drug has already been dealt with in various cases decided by the High Courts as well as the Apex court wherein the court has rejected the said submission many times. In the case of Cadila Pharmaceuticals (supra) in para 22 and 28 it was held as under :***
>
> ***"22. It may here be noticed that Schedule "H" drugs are those which can be sold by the chemist only on the prescription of the Doctor but Schedule "L" drugs are not sold across the counter but are sold only to the hospitals and clinics. Nevertheless, it is not un-common that because of lack of competence or otherwise, mistakes can arise specially where the trade marks are deceptively similar. In Blansett Pharmaceuticals Co. Vs. Carmick***

Laboratories Inc. 25 USPQ 2nd, 1473 (TTAB 1993), it was held as under:

"Confusion and mistake is likely, even for prescription drugs prescribed by doctors and dispensed by pharmacists, where these similar goods are marketed under marks which look alike and sound alike".”

37. Reliance was placed on behalf of the appellant on the verdict of the Hon’ble Supreme Court in ***Cadila Health Care Ltd. Vs. Cadila Pharmaceuticals Ltd. AIR 2001 SC 1952*** to contend that exacting judicial scrutiny is required if there is a possibility of confusion over marks on medicinal products because the potential harm may be far more dire than that in confusion over ordinary consumer products and reliance was placed on the observations in the said verdict in para 39, which reads to the effect : -

“39. Public interest would support lesser degree of proof showing confusing similarity in the case of trade mark in respect of medicinal product as against other non-medicinal products. Drugs are poisons, not sweets. Confusion between medicinal products may, therefore, be life threatening, not merely inconvenient. Noting the frailty of human nature and the pressures placed by society on doctors, there should be as many clear indicators as possible to distinguish two medicinal products from each other. It is not uncommon that in hospitals, drugs can be requested verbally and/or under critical/pressure situations. Many patients may be elderly, infirm or illiterate. They may not be in a position to differentiate between the medicine prescribed and bought which is ultimately handed over to them. This view finds support from McCarthy on Trade Marks, 3rd Edition, para 23.12 of which reads as under:

The tests of confusing similarity are modified when the goods involved are medicinal products. Confusion of source or product between medicinal products may produce physically harmful results to purchasers and greater protection is required than in the ordinary case. If the goods involved are medicinal products each with different effects and designed for even subtly different uses, confusion among the products caused by similar marks could have disastrous effects. For these reasons, it is proper to require a lesser quantum of proof of confusing similarity for drugs and medicinal preparations. The same standard has been applied to medical products such as surgical sutures and clavicle splints."

38. Reliance was also placed on behalf of the appellant on the factors spelt out in the said verdict essentially to be taken into account deciding a similar question which is so observed in paras 42 to 44 of the said verdict, which reads to the effect : -

"42. Broadly stated in an action for passing off on the basis of unregistered trade mark generally for deciding the question of deceptive similarity the following factors to be considered:

a) The nature of the marks i.e. whether the marks are word marks or label marks or composite marks, i.e. both words and label works.

b) The degree of resembleness between the marks, phonetically similar and hence similar in idea.

c) The nature of the goods in respect of which they are used as trade marks.

d) The similarity in the nature, character and performance of the goods of the rival traders.

e) The class of purchasers who are likely to buy the goods bearing the marks they require, on their education and intelligence and a degree of care they are likely to exercise in purchasing and/or using the goods.

f) The mode of purchasing the goods or placing orders for the goods and

g) Any other surrounding circumstances which may be relevant in the extent of dissimilarity between the competing marks.

43. Weightage to be given to each of the aforesaid factors depends upon facts of each case and the same weightage cannot be given to each factor in every case.

44. The trial court will now decide the suit keeping in view the observations made in this judgment. No order as to costs."

39. Reliance was also placed on behalf of the appellant on the verdict of Hon'ble Supreme Court in ***Wockhardt Limited Vs. Torrent Pharmaceuticals Ltd. and Anr. in Civil Appeal No. 9844 of 2018*** to contend that the defendant's state of mind is wholly irrelevant to the existence of the cause of action in passing off and in an action based on deceit, fraud is not a necessary element of a right of action.

40. On behalf of the respondent, reliance was placed on the verdict of Division Bench of this Court in ***Gufic Ltd. and Anr. Vs. Clinique Laboratories, LLC and Anr. MIPR 2010 (2) 411*** to contend that in case of an infringement, principles have been culled out, which are to the effect : -

"22. The following principles can be culled out from the aforesaid decisions:-

1. The test of deceptive similarity in the case of infringement is the same as in a passing off action, where the marks are not identical;

2. The question has to be approached from the point of view of a man with average intelligence and imperfect recollection;

3. In comparing the marks, it is the overall structural and phonetic similarity of the two marks that is to be seen and not by splitting them into their component parts and to consider the etymological meaning thereof;

4. The trademark is the whole thing - the whole word has to be considered; and

5. In comparing the two marks, it is also to be seen whether they both convey the same idea - (test of commonness of the idea between the two marks).”

and that the overall structure and phonetic similarity of two marks have essentially to be compared and the marks cannot be separated and the mark of each i.e. the appellant and the respondent herein are to be taken up together whilst making a comparison and if there cannot be splitting up of the mark even if there is no phonetic structure or phonetic similarity visually in the two marks. Vide the said verdict another important circumstance taken into account is the price differential between two products with observation to the effect that price differential is so vast that no consumer of products of either the appellant or the respondent would confuse one for the other and, prima facie, a case of infringement cannot be held to be have been made out.

41. Reliance was also placed on behalf of the respondent on the verdict of Division Bench of this Court in ***Schering Corporation and Ors. Vs. Almen Laboratories Ltd. 2010 42 PTC 772 (Del)*** with

specific reliance on observations in paras 2, 3, 6, 100 and 103 of this said verdict to the effect : -

> ***"2. These interim applications had been filed to seek grant of an interim injunction to restrain the Respondent Alkem Laboratories Ltd. (Defendant in CS(OS) NO. 730/2007) (hereinafter referred to as ALKEM) and Getwell Sciences India Pvt. Ltd (Defendant in Suit No. 361/2007) (hereinafter referred to as GETWELL) from using the marks TEMOKEM and TEMOGET respectively in relation to their pharmaceutical products - the active ingredient whereof is TEMOZOLOMIDE, a drug administered for the treatment of brain cancer.***
>
> ***3. The appellants filed the aforesaid two suits to, inter alia, seek permanent injunction to restrain infringement of registered trademarks, copyright, passing off, dilution, unfair competition, rendition of accounts of profits, deliver-up etc. against the aforesaid respondents ALKEM & GETWELL respectively.***
>
> **..**
>
> **..**
>
> ***6. The appellants claim to have came to know that the respondent ALKEM was marketing and selling an almost identically positioned drug (for treatment of brain cancer or glioblastoma multiforme) under the mark TEMOKEM which, according to the appellants, was phonetically, linguistically, textually, visibly, manifestly, confusingly and deceptively similar to their marks TEMODAL/TEMODAR. They also came to know that the respondent ALKEM had submitted a "Proposed to be used" application bearing number 1348168 in class 5 for registration of the mark TEMOKEM and the same was advertised in Trademark Journal no. 1335-0 dated***

01.11.2006 made available to the public on 03.03.2007. In answer to this, the appellants have filed a notice of opposition dated 23.03.2007 to the above application and the same is still pending.

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100. In Cadila Health Care Ltd. V. Cadila Pharmaceuticals Ltd. (supra) the two competing trademarks were 'FALCIGO' of the plaintiff and 'FALCITAB' of the defendant. Both the drugs were meant to cure cerebral malaria commonly known as falcipharum. The drugs were schedule –'L' drugs which means, that the drugs were not at all available for sale in retail and could be supplied only to hospitals and clinics. Consequently, there was even stricter regime for the sale of such drugs when compared to Schedule –'H' drugs. There was also substantial price difference in the two drugs. The Trial Court as well as the High Court (in First Appeal) found that the packaging and getup of the two products was not deceptively similar or confusing. The extra Assistant Judge, Vadodra declined the interim injunction sought by the plaintiff. This order was upheld in First Appeal. The Supreme Court also declined to interfere with the order. The reasons given by the Supreme Court for its decision, and the principles to be kept in mind while dealing with an action for infringement or passing off, specifically in the cases relating to medical products, were subsequently set out by the Supreme Court in the aforesaid judgment. The Court did not grant the interim injunction for the reason that it felt that there was possibility of evidence being required on merits of the case. The Court felt that expression of opinion on merits of the case by the

Supreme Court at the interlocutory stage would not be advisable.

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103. As we have already noticed, the present is an action for infringement under Section 29 of the Act and not an action for passing off. In any event, on consideration of the various factors set out by the Supreme Court, as aforesaid, to us it is clear that keeping in view the nature of the marks-which are word marks; the lack of resemblance between the marks-phonetic or otherwise; the fact that the word fragment 'TEMO' is publici juris for the generic term TEMOZOLOMIDE, which is the active ingredient in the appellants drugs and the use of 'TEMO' is, therefore, descriptive; the fact that the appellants cannot appropriate to themselves the exclusive use of a generic term which is publici juris and descriptive; the fact that the drugs in question are Schedule-H drugs and that there are vast price differences, we are of the view that the injunction earlier granted in favour of the appellants in the two cases have rightly been vacated by the learned Single Judge."

42. Reliance was also placed on behalf of the respondent on the verdict of the Division Bench of this Court in ***Astrazeneca UK Limited and Ors. Vs. Orchid Chemicals and Pharmaceuticals Ltd. (2007) ILR 1 Delhi 874,*** to contend that trade marks are to be taken as a whole and not to be broken up separately. Reliance was thus placed on behalf of the respondent with specific observations in paras 19, 20, 21, 22, 23 of the said verdict, which reads to the effect : -

"19. Admittedly, 'Mero', which is common to both the competing marks, is taken by both the

appellants/plaintiffs and the respondent/ defendant from the drug 'Meropenem', taking the prefix 'Mero" which is used as a prefix in both the competing marks. Both the appellants/plaintiffs and the respondent/defendant are marketing the same molecule 'Meropenem'. Neither the appellants/plaintiffs nor the respondent/defendant can raise any claim for exclusive user of the aforesaid word 'Meropenem'. Along with the aforesaid generic/common prefix, 'Mero', the appellants/plaintiffs have used the syllables 'nem', whereas, the respondent/defendant has used the syllable 'mer'. It is true that the aforesaid words/trade names cannot be deciphered or considered separately, but must be taken as a whole. But even if they are taken as a whole, the prefix 'Mero' used with suffix in the two competing names, distinguishes and differentiates the two products. When they are taken as a whole, the aforesaid two trade marks cannot be said to be either phonetically or visually or in any manner deceptively similar to each other.

20. We are informed that there are a number of such other similar names with the prefix 'Mero' which are in the market. They were also taken notice of by the learned Single Judge while dealing with the injunction application. In the decisions of the Supreme Court and this Court also, it has been clearly held that nobody can claim exclusive right to use any word, abbreviation, or acronym which has become publici juris. In the trade of drugs, it is common practice to name a drug by the name of the organ or ailment which it treats or the main ingredient of the drug. Such an organ ailment or ingredient being publici Juris or generic cannot be owned by anyone exclusively for use as a trade mark. In the Division Bench decision of this Court in SBL Limited (supra) it was also held that possibility of deception or confusion is reduced practically to nil in view of the fact that the medicine will be sold on medical prescription and by licensed dealers well versed in the field and having knowledge of medicines. It was further

held that the two rival marks, 'Liv.52' and 'LIV-T', contain a common feature, 'Liv' which is not only descriptive, but also publici Jurisdiction and that a customer will tend to ignore the common feature and will pay more attention to uncommon features i.e. '52' and 'T' and that the two do not have such phonetic similarity so as to make it objectionable.

21. In our considered opinion the facts of the said case are almost similar and squarely applicable to the facts of the present case. 'Meropenem' is the molecule which is used for treatment of bacterial infections. In that view of the matter, the abbreviation 'Mero' became a generic term, is publici Juris and it is distinctive in nature. Consequently, the appellants/plaintiffs cannot claim exclusive right to the use of 'Mero' as constituent of any trademark. The possibility of deception or confusion is also reduced practically to nil in view of the fact that the medicine is sold only on prescription by dealers. The common feature in both the competing marks i.e. 'Mero' is only descriptive and publici Juris and, therefore, the customers would tend to ignore the common feature and would pay more attention to the uncommon feature. Even if they are expressed as a whole, the two did not have any phonetic similarity to make it objectionable. There are at least four other registered users of the prefix 'Mero' in India whereas the names of 35 companies using 'Mero' trademarks, which have been registered or applied for registration, have been furnished in the pleadings. The respondent/defendant advertised its trademark 'Meromer' after submitting its application for registration and at that stage, there was no opposition even from the appellants/plaintiffs. The trademark of the respondent/defendant was registered there being no opposition from any quarter, including the appellants/plaintiffs.

22. Consequently, the two names, namely, 'Meromer' and 'Meronem' are found to be prima facie dissimilar to

each other. They are Schedule-H drugs available only on doctor's prescription. The factum that the same are available only on doctor's prescription and not as an over the counter medicine is also relevant and has been rightly taken note of by the learned Single Judge. In our considered opinion, where the marks are distinct and the features are found to be dis-similar, they are not likely to create any confusion. It is also admitted by the parties that there is a difference in the price of the two products. The very fact that the two pharmaceutical products, one of the appellants/plaintiffs and the other of the respondent/ defendant, are being sold at different prices itself ensures that there is no possibility of any deception/confusion, particularly in view of the fact that customer who comes with the intention of purchasing the product of the appellants/plaintiffs would never settle for the product of the respondent/defendant which is priced much lower. It is apparent that the trademarks on the two products, one of the appellants/plaintiffs and the other of the respondent/defendant, are totally dissimilar and different.

23. Consequently, we find no infirmity with the findings arrived at by the learned Single Judge at this stage, which are prima facie in nature. The learned Single Judge was justified in not granting temporary injunction in favor of the appellants/plaintiffs and directing defendant/respondent to maintain accounts of the sale. We, therefore, dismiss this appeal leaving the parties to bear their own costs."

43. Reliance was also placed on behalf of the respondent on the verdict of Division Bench of this Court in ***Sun Pharmaceutical Industries Ltd. Vs. Anglo French Drugs & Industries Ltd. 2014 SCC OnLine Del 4716*** to contend that in terms of the verdict in ***Wander Ltd. and Anr. v. Antox India P. Ltd.: 1990 (Supp) SCC 1 727,*** there

is no ground for variation of the order made by the Trial Court and there is no infirmity in the impugned order taking into account the factum that the active ingredient of the product of the appellant and the respondent are different, the prices of the two products are different, their scheme and trade members are different and the ailment that they treat is different.

44. It was also submitted on behalf of the respondent that the contentions raised on behalf of the appellant that there was a likelihood of confusion cannot be accepted in as much as even qua the contention that has been raised on behalf of the appellant that there has been a confusion at one stage in administration of the drug due to similarity in name of the drug of the appellant and the respondent, no such circumstance has been specified on behalf of the appellant, qua which it was submitted on behalf of the appellant by the learned counsel for the appellant that the same cannot be put forth by the appellant due to professional reasons.

45. Written submissions have also been submitted on behalf of either side. Through the written submissions of the appellant it has been sought to be reiterated that the plaintiff's i.e. the appellant's mark Beve in **BEVETEX** is arbitrary not derived from the salt Paclitaxel and that the competing drugs **BEVETEX** and **BEVATAS** are for different cancers and both are injections and administration of one for another can lead to disastrous consequences i.e. causing of Gastro Intestine Perforation i.e. creating holes in the stomach which would eventually prove fatal. The appellant reiterates that the suit has been filed purely in public interest and that it has no commercial interest

and that it has given up its relief for rendition of accounts before the learned trial Court.

46. *Inter alia* the appellant submits that the defendant's i.e. the respondent's mark has not been claimed to be used, whereas the appellant i.e. the plaintiff is a prior user since 2015 of the registered trade mark, registered in 1983.

47. The appellant submits that though the respondent has contended that there is no possibility of confusion as the drug is administered by a specialized doctor and the staff, confusion can occur at any level and it can occur at the time of dispensation of the medicine by the pharmacist, at the para medical level and that competing medicines are administered by oncologists and their para medical staff and that confusion can occur considering both are cancer drugs though for different cancers. *Inter alia* the appellant submits that such an argument could have been raised that one medicine is administered by a general physician/ gynecologist etc. and the other by oncologists and their staff and that no confusion would take place because the respective doctors may know their medicines but in the instant case there is no such situation.

48. The appellant further submits that there have been reported cases where people had died on account of wrong drugs having been dispensed despite of their being prescription of schedule drugs and that the prescription does not contain the name of the salt or the trade dress/ packaging of the drug and that the competing marks are not to be compared side by side. *Inter alia* the appellant has contended that the test of confusion that is to be seen if an average person with

imperfect recollection would get confused. *Inter alia* the appellant submits that the consumer/patient does not know the difference between the salt and in fact one cannot even pronounce the competing salts/molecules and that to be able to distinguish between the two is not possible.

49. Reliance was placed on behalf of the appellant on the verdict of the Hon'ble Supreme Court in ***Corn Products Refining Co. Vs. Shangrila Food Products Ltd., AIR 1960 SC 142*** with reference to para-20 which reads to the effect that:

> *".....Again, in deciding the question of similarity between the two marks we have to approach it from the point of view of a* ***man of average intelligence and of imperfect recollection****. To such a man the overall structural and phonetic similarity and the similarity of the idea in the two marks is reasonable likely to cause a confusion between them."*

50. The appellant further submits that the para medical staff of a hospital was about to administer the plaintiff's i.e. the appellant's drug in place of the defendant'/respondent's drug on account of confusion and that the plaintiff i.e. the appellant cannot give the name of the hospital in the pleadings as the same would lead to blacklisting of the product of the plaintiff by the said hospital and the other hospitals. The appellant further submits that the Court does not have to see the actual confusion but likelihood of confusion and in the field of medicinal remedies, the Courts may not speculate as to whether there is a probability of confusion between similar names and reliance was thus placed on ***Cadila (Supra)*** wherein injunction was refused by the

District Court and the High Court and the Hon'ble Supreme Court remanded the matter back to the District Court with specific reference to paras-34, 35 & 39 of the said verdict which have already been adverted to elsewhere hereinabove.

51. *Inter alia* the appellant submits that the judgments relied upon on behalf of the respondent are distinguishable inasmuch as in none of these judgments, the Courts considered the aspect of disastrous consequences since competing drugs were not for the same ailment and were not derived from the same salt.

52. *Inter alia* a contention was also raised on behalf of the appellant, that if the same trade mark apparently a reference to a similar trade mark is used for different ailment, the same is more dangerous. Reliance is placed on behalf of the appellant on the verdict of this Court in ***Novartis AG Vs. Crest Pharma Pvt. Ltd. and Ors. 2009 (41) PTC 57 (Del)*** with specific reference to paras-21, 22, 23, 25 of the said verdict which read to the effect that:

> *"21. The second contention of the defendant is that the plaintiff's drug is prescribed for urinary respiratory track infection and acute otitis media whereas the defendant's product being an antibiotic is prescribed mostly for post operative cases and the ingredients of the two products are also different and used for different purposes of disease. The defendant has also contended that the plaintiff's product is used in tablet and oral suspension form whereas the defendant's product is only available in injection form, therefore, there is no confusion and deception between the two products in question.*

22. I do not accept the submission of the learned counsel for the defendant as I feel that it is more dangerous if the pharmaceuticals products bearing the same mark is used for different purposes for the same ailment or even otherwise. I also do not accept the contention of the defendant's counsel that there would be no confusion if the products contain different ingredients/different salt. In my opinion, it is more dangerous and harmful in the trade if the same trade mark is used for different ailments. The Apex court has already dealt with this proposition of law in the case of Cadila Healthcare Ltd. Vs. Cadila Pharmaceuticals, (2001) 5 SCC 73 and held as under :

23. The other argument of the counsel for the defendant that the plaintiff's product is available in tablets and oral suspension form and the defendant's product is available in injection form has also no force as it has been seen from experience of the pharmaceuticals products available in all over the world that most of the companies are making pharmaceuticals products in both the forms i.e. tablets as well as in injection form under the same trade mark. As per well settled law, the actual confusion and deception is not required in order to prove the case of passing off even if the defendant has adopted the mark innocently and the court comes to the conclusion that the two trade marks are deceptively similar, injunction under the said circumstances has to be granted. Actual deception is not required in an action of passing off. Century Traders vs. Roshan Lal Duggar & Co., AIR 1978 (Del) 250. Therefore there is no chance of confusion and deception.

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25. The third contention of the learned counsel for the defendant is that the product of the parties in question is Schedule "H" drug and the same has to be purchased by the customers only on the prescription of medical practitioner. The argument of the defence of Schedule "H" drug has already been dealt with in various cases decided by the

High Courts as well as the Apex court wherein the court has rejected the said submission many times. In the case of Cadila Pharmaceuticals (supra) in para 22 and 28 it was held as under :

> *"22. It may here be noticed that Schedule "H" drugs are those which can be sold by the chemist only on the prescription of the Doctor but Schedule "L" drugs are not sold across the counter but are sold only to the hospitals and clinics. Nevertheless, it is not un-common that because of lack of competence or otherwise, mistakes can arise specially where the trade marks are deceptively similar. In Blansett Pharmaceuticals Co. Vs. Carmick Laboratories Inc. 25 USPQ 2nd, 1473 (TTAB 1993), it was held as under:*
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> > *"Confusion and mistake is likely, even for prescription drugs prescribed by doctors and dispensed by pharmacists, where these similar goods are marketed under marks which look alike and sound alike".*

53. Reliance was also placed on behalf of the appellant on the verdict in ***Charak Pharma Pvt. Ltd. Vs. Glenmark Pharmaceuticals Ltd., 2014 (57) PTC 538 (Bom)*** with specific reference to para-9.7 and 22.1 thereof which have already been adverted to hereinabove.

54. *Inter alia* reliance was placed on behalf of the appellant on the verdict of Hon'ble Supreme Court in ***Neon Laboratories Vs. Medical Technologies Ltd. 2015 (64) PTC 225 (SC)*** with specific reference to para-1, 9 & 10 to contend that as the plaintiff had admittedly entered the market prior to the respondent, the injunction ought to have been granted by the learned trial Court on the "First in the Market" principle. Reliance was further placed on behalf of the appellant on the verdict of the Hon'ble Supreme Court in ***Wockhardt Limited Vs.***

Torrent Pharmaceuticals Ltd. and Anr. in Civil Appeal No. 9844 of 2018 contents of which have already adverted to hereinabove.

55. The appellant further submits that the examination report issued by the trade mark registry is an electronic report obtained by a mechanical process without application of mind and it is a result thrown electronically within the internal data base and if search reports are held to be conclusive, there is no need for the trade mark registrar to invite oppositions and that if that is so, once there are no conflicting marks shown in the examination report, the mark should be automatically registered which is never the case and that the respondent's trade mark has been opposed by the plaintiff i.e. the appellant herein which is still pending disposal.

56. *Inter alia* the appellant submits that he is not claiming any right in BEV and that marks are not to be dissected for the purpose of comparison which is against the Anti-Dissection Rule and that marks are required to be compared as a whole with reliance having been placed on the verdict of this Court in ***Stiefel Laboratoties Vs. Ajanta Pharma Ltd. 211 (2014) Dlt 296*** wherein it has been submitted that reference is being made to paragraphs 23 and 23.15 of the verdict of the Division Bench of this Court in ***United Biotech Pvt. Ltd. Vs. Orchid Chemicals and Pharmaceuticals Ltd. and Ors. 2012 (50) PTC 433 (Del) DB*** which read to the effect that:

> *"23. No fault can also be found with the approach of the IPAB in comparing the two competing marks as a whole. That is in fact the rule and the dissection of a mark is an exception which is generally not permitted. The anti-dissection rule is based upon a common sense observation*

of customer behaviour as explained in McCarthy on Trade Marks and Unfair Competition [J Thomas McCarthy, IV Ed., Clark Boardman Callaghan 2007] under the sub-heading "Comparing Marks: Differences and Similarities". The treatise further states:

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23.15 .... The typical shopper does not retain all of the individual details of a composite mark in his or her mind, but retains only an overall, general impression created by the composite as a whole. It is the overall impression created by the mark from the ordinary shopper's cursory observation in the marketplace that will or will not lead to a likelihood of confusion, not the impression created from a meticulous comparison as expressed in carefully weighed analysis in legal briefs."

"In litigation over the alleged similarity of marks, the owner will emphasize the similarities and the alleged infringer will emphasize the differences. The point is that the two marks should not be examined with a microscope to find the differences, for this is not the way the average purchaser views the marks. To the average buyer, the points of similarity are the more important that minor points of difference.

A court should not engage "technical gymnastics" in an attempt to find some minor differences between conflicting marks. However, where there are both similarities and differences in the marks, there must be weighed against one another to see which predominate."

57. *Inter alia* the appellant submits that BEVE in **BEVETEX** is arbitrary; not derived from the salt Paclitaxel and that the defendant/ respondent herein having derived the impugned mark from the salt has

no relevance when the question is of public interest and safety. Reliance was placed on behalf of the appellant on the verdict of this Court in ***Cadila Healthcare Ltd. Vs. Aureate Healthcare Pvt. Ltd. and Ors. 2012 (51) PTC 585 (Del) (SJ)*** with specific refence to observations in paras 41,46,48-50 in which an ex parte injunction was confirmed in relation to the defendant/respondent's unregistered trade mark PANTOBLOC against the plaintiff's registered trade mark of PANTODAC with the details of the case being to the effect:

Particulars	*Plaintiff*	*Defendant*
Trade Mark	*PANTODAC*	*PANTOBLOC*
Registration	*1996*	*2006 (pending)*
Use	*1999*	*2003*
Salt	*Pantoprazole*	*Pantoprazole*

58. *Inter alia* the appellant submitted that secondly BEVACIREL, BEVAREST and BEVAZZA are not deceptively similar to Plaintiff's trade mark **BEVETEX** and thirdly, the various marks containing prefix BEV had been applied for /pending before trade mark registry did not prove that they are in use and that common to register does not prove common to trade. Reliance was also placed on behalf of the appellant on the verdict of this Court in ***Century Traders Vs. Roshan Lai Duggar Co. AIR 1978 Delhi 250*** Division Bench quoted with approval ***The Supreme Court in Corn Products Refining Co. Vs.***

Shangrila Food Products Ltd., AIR 1960 SC 142, which reads to the effect:

> *"(13) The Supreme Court in Corn Products Refining Co. v. Shangrila Food Products Ltd., 1960 J1 SCR 968 laid down the mle vis-a-vis user of a mark as opposed to registration of mark. It observed that the onus of proving user is on the person who claims it. It did not approve of looking into the register of trade marks where a mark may be entered to be any proof of user. To quote from the speech of A.K. Sarkar, J. :* ***"Now, of course, the presence of a mark in the register does not prove its user at all. It is possible that the mark may have been registered but not used. It is not permissible to draw any inference as to their user from the presence of marks in the register.***

59. The appellant further submitted that the plea of common use would fail unless substantial usage by others persons is proven. Reliance in relation thereto is placed on behalf of the appellant on the verdict in ***Pidilite Industries Ltd. vs. S.M. Associates and Ors. 2003 (5) Bom CR 295*** with specific refence to observations in paras 53, 55 & 58, which read to the effect:

> *"53****. It is important to note at the outset that other than annexing cartons bearing the aforesaid marks with the suffix "seal", there is no evidence produced as to its actual use much less the extent of its use.*** *In paragraphs 26, 27 and 28 of the affidavit in rejoinder, the Plaintiff has categorically denied the existence of the said brands "A-Seal" "Inn-Seal" "Jam-Seal" "Max-Seal". The Plaintiff has further stated that the brands are not in use much less in continuous or extensive use. It is further denied that the colour scheme is used by most of the manufacturers."*
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> *55. In National Bell Company Vs. Metal Goods Manufacturing Co. (P) Ltd. &Anr. AIR 1971 SC 898, the Supreme Court held :-*

"The plea of common use must fail, for, to establish it the use by other persons should be substantial. Though evidence was produced by the appellant companies to show that there were other bells in the market with Tiftv or 50 inscribed on them, no evidence was led to show that the use of the word Fifty or the numeral 50 was substantial. In these circumstances, it is impossible to sustain the contention founded on Clause (c) of Section 32"

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*58... **.The judgment in Com Products requires the Defendant to prove that the marks must be not merely in use but in "extensive use". Thus, even in interim proceedings, it is not sufficient merely for the Defendant to show prima-facie that there is some user of the marks. There must be prima facie evidence to show extensive use.** At the final hearing of the suit the level of proof required is higher - the matter requiring to be proved viz. "extensive or substantial use" remaining the same."*

60. *Inter alia* the appellant submitted that the reliance placed on behalf of the respondent on the verdicts relied upon are distinguishable on the facts therein submitted as under:

CASE LAW 1	
Sun Pharmaceutical Industries Limited v. Anglo French Drugs & Industries Ltd & Anr. (2014) 215 DU 493 (DB)	*The competing marks were OXETOL vs. EXITAL. High Court declined injunction to the Plaintiff.* *The impugned judgment has been set aside by the* *Hon'ble Supreme Court in SLP No.*

	33164 /2014 *vide order dated 5.07.2016 @ 580-585 Vol. 3*
Cited with approval in case law 1- *Sun* *Pharmaceutical Industries* *Limited v. West Coast* *Pharma & Anr* *AIR 2012 Gujarart 142*	***Impugned order staved in SLP 22195/2012- SLP admitted*** *C.A. No. 8254 / 2013 Registered on 12-09-* *2013 @586 Vol. 3*
CASE LAW 2.	
Schering Corporation and Ors. v Alkem Laboratories Ltd.; 2010 *(42) PTC 772 (Del) (DB)*	*The court did not find any similarity between the trade mark TEMODAL and TEMODAR of the appellants/Plaintiffs and TEMOKEM and TEMOGET of the Defendants.* ***The court did not consider the aspect of disastrous consequences considering competing drugs were for same ailments, same salt. Para 2 and 6*** *Prefix TEMO was taken from the same salt which loas proved to have become publici juris. Para 54* *In the present case, BEVE in BEVETEX is arbitrary and not derived from the salt Paclitaxel. The competing drugs are for*

	different cancers. and administration of one for another can lead to disastrous consequences.
CASE LAWS 3.	
Astrazeneca UK Ltd. and Anr. v Orchid Chemicals and Pharmaceuticals Ltd.; (2007) ILR 1 Delhi 874 (DB)	*Both parties were registered proprietor* *The court did not find similarity between MEROMER and MERONEM* ***The court did not consider the aspect of disastrous consequences considering competing drugs were for same ailments, same salt**. Prefix **MERO** was taken from the salt which was proved to be common to trade.*

61. Reliance was also placed on behalf of the appellant on a newspaper article to submit that wrong handing out of drugs by chemists has resulted into deaths of patients and it has been submitted on behalf of the appellant that the marks **BEVATAS** of the respondent phonetically was similar to the marks **BEVETEX** of the appellant and as both the marks of the appellant **BEVETEX** and the respondent's **BEVATAS** are used for cure of cancer though it may be for different kinds of cancer, the similarity between two names of the drugs is bound to create confusion both to the chemists, to the consumer and to

those administering the drugs, which can be fatal to the life of a patient.

62. Reliance has also been placed on behalf of the appellant vide CM No.29182/2019 on the verdict of this Court in ***Sun Pharma Laboratories Ltd. Vs. Ajanta Pharma Ltd.*** in CS (COMM) 622/2018, a verdict dated 10.05.2019 and in ***Sun Pharma Laboratories Ltd. Vs. Intas Pharmaceuticals Limited*** in CS (COMM) 1206/2016, a verdict dated 15.05.2019, apart from the appellant also having placed on record a table of deceptively similar pharmaceutical trade marks as held vide the verdict of this Court.

63. The ***Sun Pharma Laboratories Ltd. Vs. Ajanta Pharma Ltd. (supra)*** refers to the question as to whether the test for infringement and passing off for nutraceutical products is the same as the test applicable for pharmaceuticals and related to trade marks 'GLOEYE‟ and 'GLOTAB‟ both of which were ocular medicines containing plant extracts and they are termed as 'nutraceuticals' under Section 22 of the Food Safety and Standards Act, 2006 and are governed by the Food Safety and Standards (Licensing and Registration of Food Businesses) Regulations, 2011and the Food Safety and Standards (Health Supplements, Nutraceuticals, Food for Special Dietary Use, Food for Special Medical Purpose, Functional Food and Novel Food) Regulations, 2016

64. The guidelines laid down in ***Cadila*** were paraphrased in para 11 thereof to the effect:

> *"i) In the case of drugs, a strict test needs to be applied for determining confusion and deception;*

ii) If the products have a difference in composition with completely different side effects, a stricter test should be applied;
iii) Greater vigilance is required where the products are meant to cure the same ailments, but the compositions are different;
iv) Merely because drugs are sold under prescription is not sufficient protection against confusion;
v) The prevalent social conditions and linguistic barriers require stricter measures to be taken, to prevent confusion arising from similarity of marks among medicinal products;
vi) Physicians and pharmacists are not immune to mistakes;
vii) A lesser degree of proof to establish confusing similarity would be required in the case of medicinal products as against non- medicinal products;
viii) The varying profiles of patients, especially the elderly, illiterate persons and children need to be kept in mind;
ix) In view of public health issues involved in the case of medicines, stringent measures ought to be adopted."

65. It was submitted on behalf of the appellant that in this case ***Sun Pharma Laboratories Ltd. Vs. Ajanta Pharma Ltd. (supra)*** relied upon where the two products were used for treating similar medical conditions it was held that it is not possible to accept the explanation of the defendant/respondent therein that it was of a bonafide adopter of the mark. *Inter alia* reliance was placed on behalf of the appellant on the verdict in ***Laxmikant V. Patel vs. Chetanbhat Shah and Ors. (2002) (24) PTC 1 (SC)*** to submit that only the probability of confusion needs to be considered as laid down by the Hon'ble Supreme Court vide para 8 to the effect:

> *"8. It is common in the trade and business for a trader or a businessman to adopt a name and/or mark under which he would carry on his trade or business. According to Kerly (Law of Trade Marks and Trade Names, Twelfth Edition, para 16.49), the name under which a business trades will almost always be a trade mark (or if the business provides services, a service mark, or both). Independently of questions of trade or service mark, however, the name of a business (a trading business or any other) will normally have attached to it a goodwill that the courts will protect. An action for passing-off will then lie wherever the defendant company's name, or its intended name, is calculated to deceive, and so to divert business from the plaintiff, or to occasion a confusion between the two businesses. If this is not made out there is no case. The ground is not to be limited to the date of the proceedings; the court will have regard to the way in which the business may be carried on in the future, and to its not being carried on precisely as carried on at the date of the proceedings. Where there is probability of confusion in business, an injunction will be granted even though the defendants adopted the name innocently."*

66. Reliance was also placed on behalf of the appellant on the observations in the verdict in ***Novartis AG vs. Crest Pharma Pvt. Ltd. and Anr.*** in CS (OS) 851/2008, a verdict dated 24.07.2009 wherein vide para 23, it was observed to the effect:

> *"23. The other argument of the counsel for the defendant that the plaintiff's product is available in tablets and oral suspension form and the defendant's product is available in injection form has also no force as it has been seen from experience of the pharmaceuticals products available in all over the world that most of the companies are making pharmaceuticals products in both the forms i.e. tablets as well as in injection form under the same trade mark. As per well settled law, the actual confusion*

and deception is not required in order to prove the case of passing off even if the defendant has adopted the mark innocently and the court comes to the conclusion that the two trade marks are deceptively similar, injunction under the said circumstances has to be granted. Actual deception is not required in an action of passing off. Century Traders v. Roshan Lal Duggar & Co. AIR 1978 (Del) 250. Therefore there is no chance of confusion and deception."

67. *Inter alia* on behalf of the appellant reliance was placed on the verdict in ***Sun Pharma Laboratories Ltd. Vs. Ajanta Pharma Ltd. (supra)*** wherein it has been categorically laid down therein that in case of products used for the same ailments but with different composition, a more stringent test is required to be set down.

68. As regard the reliance placed on behalf of the appellant on the verdict of this Court in ***Sun Pharma Laboratories Ltd. vs. Intas Pharmaceuticals Ltd.*** in CS (COMM) 1206/2016, a verdict dated 15.05.2019 in which the respondent herein as the defendant of the suit was injuncted from user of the trade mark DECITAS or any other mark i.e. similar to the petitioner's trade mark 'DECITEX', which was found to be structurally or deceptively similar to the petitioner's registered trade mark 'DECITEX', it is essential to observe that the basic facts in the said case relied upon by the plaintiff therein using the trade mark DECITEX for its medicinal preparations used for cancer/chemotherapy since July 2011 with the said trade mark having been registered on 15.07.2011 with the defendant therein having alleged that its drug used for cancer/chemotherapy using the trade mark DECITAS, for which an application for registration was filed on

19.04.2019 and it was stated that the said trade mark was proposed to be used.

69. It was *inter alia* observed vide para 17 of the said verdict to the effect:

> *"17. Hence, the test to see as to whether the trade mark of the defendant is deceptively similar to that of the plaintiff is as to whether the essential features of the trade mark of the plaintiff have been adopted by the defendant. Phonetic similarity would constitute an important index. To see as to whether a mark bears a deceptive or misleading similarity to another, the rival marks have to be compared as a whole. All the surrounding circumstances have to be considered. Further the competing marks have to be compared keeping in mind a unwary purchaser of average intelligence and imperfect recollection. In my opinion, the mark used by the defendant DECITAS when compared as a whole is structurally and phonetically prima facie identical and similar to the trade mark of the plaintiff DECITEX. That apart, likelihood of confusion in this case is much more as the drugs of the respective parties deal with the same medical problem i.e. cancer/chemotherapy. Strong measures are required to prevent confusion arising from similarities of marks in medicines. In my opinion, there is no merit in the plea of the defendant that the mark of the defendant is not deceptively similar to that of the plaintiff."*

It was thus sought to be submitted by the appellant that in the instant case **BEVETEX** being the plaintiff's mark and **BEVATAS** being the respondent's marks, the facts of the instant case are in *pari materia* with the facts of the case in ***Sun Pharma Laboratories Ltd. Vs. Intas Pharmaceuticals Ltd.*** with the mark of the appellant herein being **BEVETEX** and that of the respondent being **BEVATAS**.

70. Through the written submissions submitted on behalf of the respondent, the submissions that were made through the written statement of the respondent as defendant in TM No.146/2018 have been reiterated. It was further submitted through the written submissions that there was no similarity in both the marks "**BEVETEX**" and "**BEVATAS**" which are entirely different and there is no likelihood of confusion or deception and/or similarity between the two marks amongst the customers and that the two marks are totally different, dissimilar and distinct and that there cannot be any likelihood of confusion and that the said marks are visually and phonetically dissimilar. The respondent no.2 further submitted that even the drugs which are sold under these marks are administered under supervision of specialists in a different ways and there is no likelihood of confusion at any level and in the instant case, the marks are visually, structurally and phonetically different:

71. The respondent has further submitted that the respondent had also applied for the registration of its trade mark vide application bearing No. 3254683 dated 09.05.2016 and that that the respondent's Trade Mark when examined by the Examiner of Trade marks, he did not cite any conflicting trademark and the application was accepted for advertisement and even the trademarks office did not find any similarity between the trademarks of the appellant's and of the respondent's. The respondent has further submitted that the appellant was manufacturing a medicine containing Molecule/Salt PACLITAXEL under the mark **BEVETEX** as a scheduled drug for treatment of Breast Cancer, Non-small Lung cancer and pancreatic

cancer and that the appellant alleges to have started selling its medicine under the mark **BEVETEX** since the year 2015 though the appellant has claimed to have invented the mark in year 1983 and that the appellant has malafidely hoarded the said mark and that the appellant has no alleged goodwill or recognition with the mark as the same has been very recently adopted.

72. The respondent has further submitted that both the products were launched within a span of one year and the appellant has failed to prove that the appellant's trade mark has attained the reputation and goodwill as to fall in the category of a well-known trade mark and that the turnover of the respondent's product **BEVETAS** is more than that of the appellant and it cannot thereby be said that respondent is trying to encash upon the reputation and goodwill of the appellant's trade mark. The respondent has further submitted that the appellant is a subsidiary of Sun Pharmaceuticals Industries Limited and the mark was initially filed for registration vide application No. 410744 dated 16.09.1983 on "PROPOSED TO BE USED BASIS" under the proprietorship of TAMILNADU DADHA PHARMACEUTICALS LTD. and later allegedly transferred to Sun Pharmaceuticals Industries Limited, who further transferred it in the name of the appellant. The respondent has further submitted that no documents to the effect of transfer have either been placed on record by the appellant nor are they available on the website of the Trade Mark registry.

73. The respondent has further submitted through its written submissions that the process of infusion is a half or full day process, depending upon the medical condition of the patient and that

“Intravenous Product" and cannot be self-administered and the entire process of infusion is done under constant monitoring, guidance and supervision of super specialists and that Medical practitioners prescribing or administering the drug are super specialists like oncologists and radiologists and can be administered under their supervision though specialized producers by trained and skilled personnel within oncology centers. The respondent no.2 has further submitted that the respondent's drug costs three times the drug of the appellant and that the drug of the respondent is a biological/biosimilar drug which involves an extremely expensive clinical trial.

74. *Inter alia* the respondent no.2 has further submitted that there was no prima facie case whatsoever made out for the grant of the interim injunction as prayed by the appellant and thus had rightly not been granted by the learned trial Court and that there was no prima facie evidence to show that appellant’s mark has acquired goodwill and reputation and that rather the respondent's brand has acquired huge reputation and goodwill in the short span of time and the clear motive of the appellant by filing the litigation was to curb healthy competition in the market. The respondent has further submitted that the launch of the respondent's drug was aimed at making BEVACIZUMAB accessible for Indian patients and that before the launch of BEVATAS 400 mg, only approx. 200 patients per month could afford the Bevacizumab therapy, however, now there has been a phenomenal increase and roughly 700 patients get benefited of which BEVETAS is the most preferred product.

75. The respondent has further submitted that the product of the respondent is in the market for such a long period and has created its own goodwill and reputation over all these years and that the product of the respondent is a lifesaving drug, essential for cancer treatment and has proved its success and has a large reach to the number of ailing patients across the length and breadth of the country and with offerings of the respondent such number of patients are on rise. The respondent has further submitted that the respondent's product is highly efficacious and also affordable (approx. 60% less) which is making more and more number of ailing eligible patients to be benefited by the said therapy and that thus, the continuity of BEVETAS therapy is of paramount importance for survival of patients and that if the injunction is granted it shall cause great injury to the cancer patients in India. The respondent has further submitted that the marks **BEVETEX** and BEVATAS are totally different, dissimilar and distinct and that the drug formulations of the marks are completely different along with mode of administration and that there cannot be likelihood of confusion as these drugs are Schedule H drugs and cannot be sold off the shelf and the indications and effect of both the drugs are different and is known to the experts and medical practitioners who prescribe these drugs.

76. The respondent further submitted that the appellant had contended in the plaint that there is likelihood of confusion between the marks, however, in the rejoinder to the application under Order 39 Rule 1 and 2 the appellant suddenly shifted its stand in making a bald misleading averment of actual confusion having taken place and that

the appellant has failed to file any documentary proof establishing an instance of actual confusion. The respondent has further submitted that the appellant has approached this Court with unclean hands and has suppressed the relevant information and that the appellant filed the notice of opposition against the trademark application of the respondent on 27.12.2016 and the respondent filed the detailed response to the same on 28.03.2017. The respondent has further submitted that the respondent had launched its drug in October 2016 and the said launch was extensively covered in media, and, therefore, the appellant has been well aware of the respondent since 2016. The respondent further submitted that the appellant has blatantly lied and has filed the present suit on a frivolous cause of action with an ill motive to deprive the respondent of its lawful right.

77. The respondent further submitted that there is no cause of action for the institution of the present suit and that the appellant has claimed that the cause of action for institution of the present suit arose in the third week of December and more specifically on 20.12.2017, however, the appellant had opposed the respondent's trade mark application in 2016 and further the launch of the respondent's drug was in 2016 and that the appellant has been well aware of the same and had approached the Court with unclean hands. The respondent has further submitted that the appellant has its registered office and principal place of business at Mumbai and the respondent has its registered office and place of business at Ahmedabad, Gujarat and thus, the territorial jurisdiction of this Court has not been made out by the appellant and the appellant is in fact attempting to indulge in

forum shopping and has filed the present suit and application just to harass the respondent.

78. Reliance was placed on behalf of the respondent on the following verdicts:

S.No.	*Case Name*	*Citation*	*Relevant Paragraphs*
1.	*Sun Pharmaceutical Industries Ltd. & Anr. Vs. Anglo French Drugs & Industries Ltd. Anr.*	*(2014) 215 DLT 493 (DB)*	*Para No. 16, 17, 18, 19, 20*
2.	*Schering Corporation & Ors. Vs. Alkem Laboratories Ltd.* *And* *Schering Corporation & Ors. Vs. Getwell Life Sciences India Pvt. Ltd.*	*2010(5) RA.J. 501 (Del); 2009(165) DLT 474; 2010(42) PTC 772*	*Para No. 21, 22, 23, 30, 61, 62, 63,* *100,102*
3.	*Astrazeneca UK Limited & Anr. Vs. Orchid*	*(2007) ILR 1 DeM874; 2007*	*Para No. 19, 20, 21, and 22*

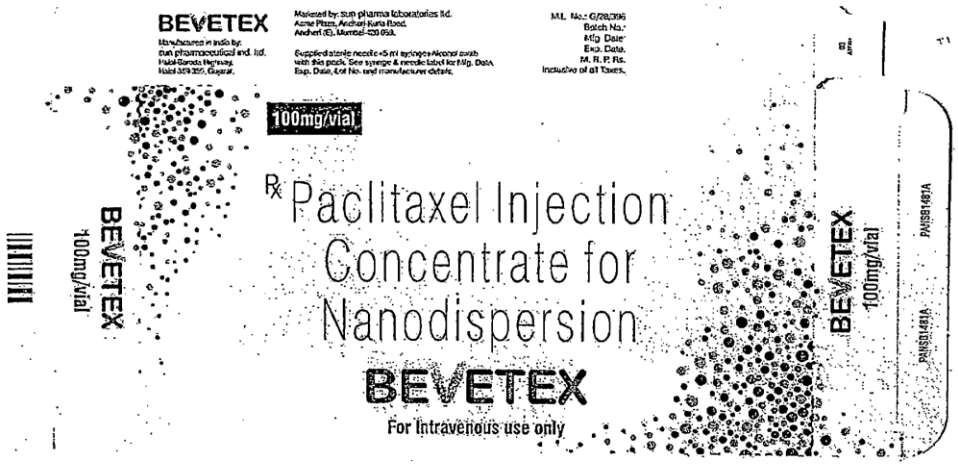
	Chemicals and Pharmaceuticals Ltd.	*(34) PTC 469(del)*	
4.	*Gufic Ltd. and Anr. Vs. Clinique Laboratories, LLC and Anr.*	*2010 (43) PTC 788 (Del)*	*Para No. 22, 23 and 24*

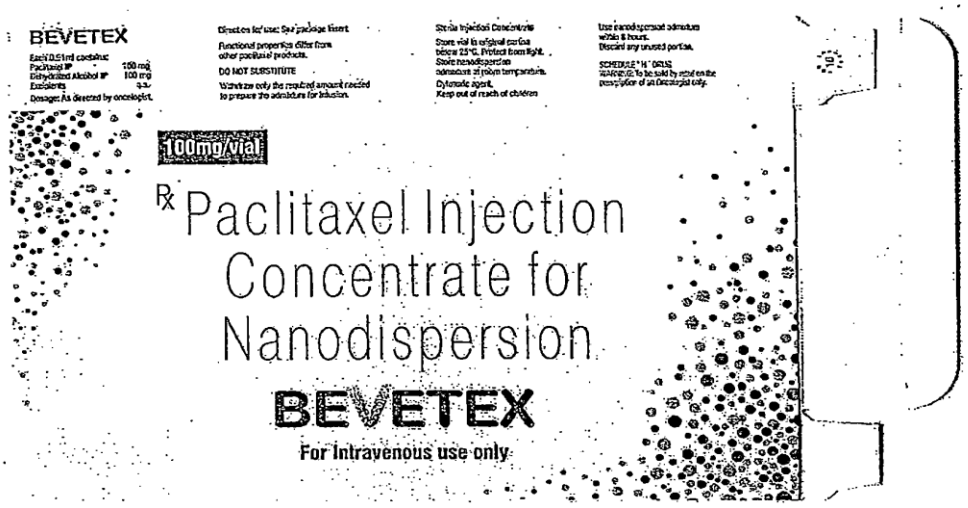
79. It has been submitted on behalf of the respondent that reliance placed on behalf of the appellant on the verdicts of this Court in ***Sun Pharma Laboratories Ltd. Vs. Ajanta Pharma Ltd.*** **(supra)** and ***Sun Pharma Laboratories Ltd. Vs. Intas Pharmaceuticals Limited*** (supra) is misplaced as the facts of those cases are distinguishable and not in *pari materia* to the facts of the instant case.

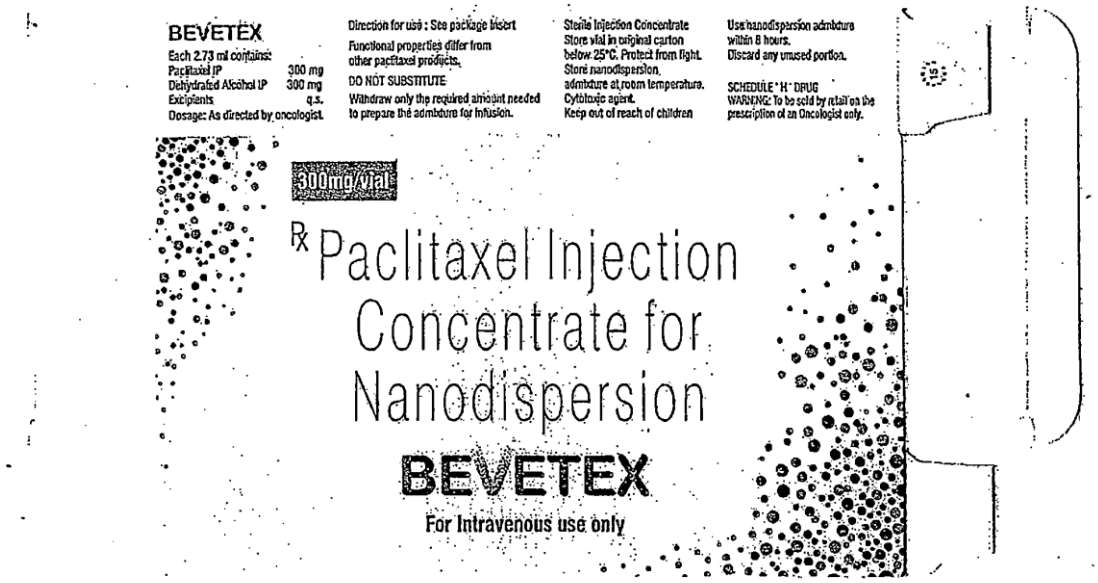
80. On a consideration of the rival submissions that have been made on behalf of either side, it is essential to observe that the suit in which the appellant herein has had filed the application seeking an interim restraint against the respondent is not merely for a restraint against infringement of trade mark but also for a restraint against passing off of the goods of the respondent claimed to be deceptively similar with the plaintiff's/ appellant's trade mark of **BEVETEX**, the respondent's trade mark being BEVATAS. Thus it cannot be contended on behalf of the appellant/ plaintiff that the suit being only one for an action for infringement, the relevant consideration is only the similarity of the essential features of the registered trade mark and the impugned trade mark as opposed to an action for passing of where the defendant can escape the liability by showing dis-similar features nor can it be

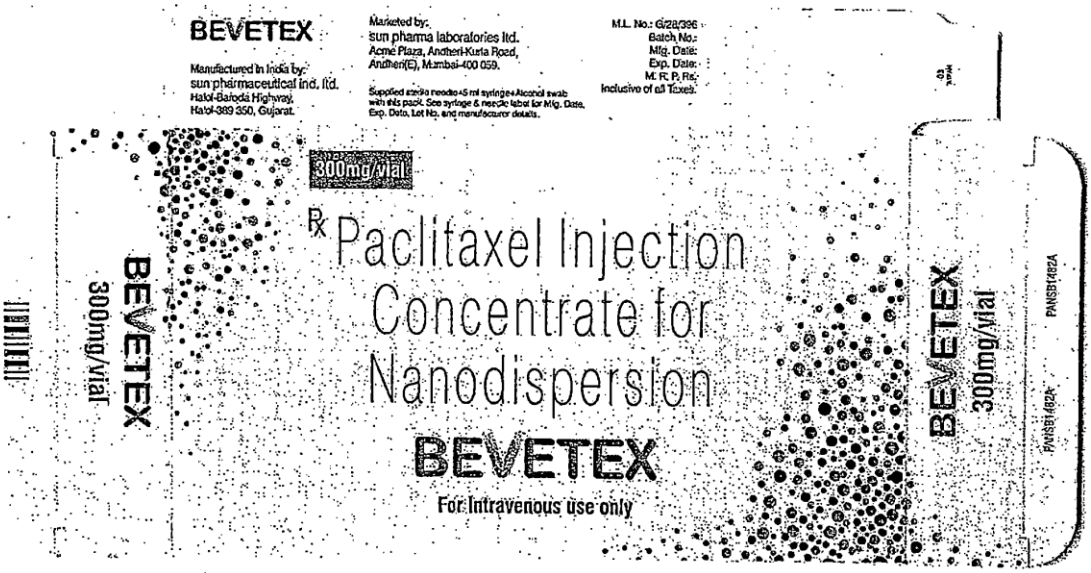
contended that the difference between the appellant's mark and the respondent's mark are irrelevant.

81. The sample of the original packaging and trade dress in the instant case were submitted before this Court by either side on 04.10.2018. The said sample of the appellant is to the effect:

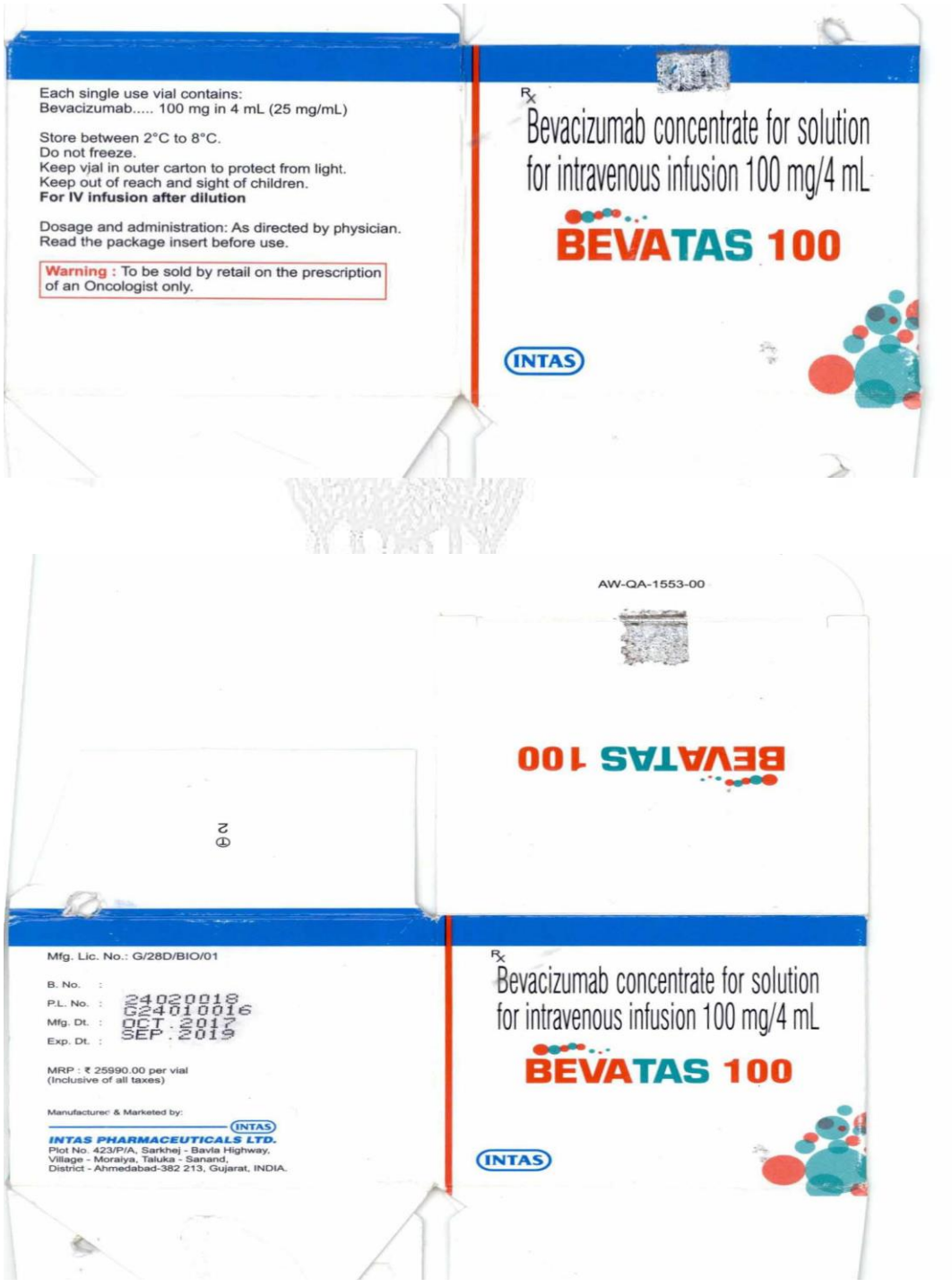





BEVETEX
Each 2.73 ml contains:
Paclitaxel IP 300 mg
Dehydrated Alcohol IP 300 mg
Excipients q.s.
Dosage: As directed by oncologist.
Direction for use : See package insert
Functional properties differ from other paclitaxel products.
DO NOT SUBSTITUTE
Withdraw only the required amount needed to prepare the admixture for infusion.
Sterile Injection Concentrate
Store vial in original carton below 25°C. Protect from light.
Store nanodispersion, admixture at room temperature.
Cytotoxic agent.
Keep out of reach of children
Use nanodispersion admixture within 8 hours.
Discard any unused portion.
SCHEDULE 'H' DRUG
WARNING: To be sold by retail on the prescription of an Oncologist only.
300mg/vial
℞ Paclitaxel Injection Concentrate for Nanodispersion
BEVETEX
For Intravenous use only


BEVETEX
Manufactured in India by:
sun pharmaceutical ind. ltd.
Halol-Baroda Highway,
Halol-389 350, Gujarat.
Marketed by:
sun pharma laboratories ltd.
Acme Plaza, Andheri-Kurla Road,
Andheri(E), Mumbai-400 059.
M.L. No.: G/28/396
Batch No.:
Mfg. Date:
Exp. Date:
M. R. P. Rs.:
Inclusive of all Taxes.
Supplied sterile needle+5 ml syringe+Alcohol swab with this pack. See syringe & needle label for Mfg. Date, Exp. Date, Lot No. and manufacturer details.
300mg/vial
℞ Paclitaxel Injection Concentrate for Nanodispersion
BEVETEX
For Intravenous use only
BEVETEX
300mg/vial
BEVETEX
300mg/vial
PANSB1482A

and the sample of the respondent's product is to the effect:



82. As observed vide the impugned order vide para 7 thereof that there is no ocular/visual similarity whatsoever in the trade mark of the appellant and the respondent prima facie. The said observations of the impugned order have already been adverted to elsewhere hereinabove.

83. The impugned order also appropriately holds that there is no phonetic similarity in the two words **BEVETEX** and **BEVATAS** as pronounced as a whole and do not rhyme with each other. Thus prima facie the product trade dress of both products of the appellant and of the respondent do not appear to be even remotely similar nor confusing to even a layman nor is there phonetic similarity sufficiently enough to be confusing to any consumer of the products.

84. Furthermore, both the drugs **BEVETEX** of the appellant and the drug **BEVATAS** of the respondent are schedule H, IV injection drug and cannot be self-administered and are not over the counter drugs nor easily readily available for self-medication and can be administered to patients only by highly specialized, super specialized oncologists and under their supervision through specialized procedures by trained and skilled personnel within an oncology centre. Furthermore, the two products are also sold under different contents/weight with different prices being to the effect:

(i) BEVATAS – 400 mg cost : Rs.39,995/-
100 mg cost : Rs.25,990/-
(ii) BEVETEX – 300 mg cost : Rs.37,000/-
-100 mg cost :Rs. 32,500/-

85. In as much as the consumers and customers of the products of the appellant and the respondents are not unwary customers and

illiterate persons and not layman and are rather highly specialized oncologists and a specialized medical staff, there appears no likelihood of any confusion. The two drugs are used for different indications of which, the specialist oncologists have complete information, knowledge and are aware of the same as rightly observed vide the impugned order vide para 13 thereof.

86. The drugs can also only be administered through the intravenous mode and self-administration is not possible and can only be administered through constant monitoring, guidance and under supervision of the super specialists and thus there appears no likelihood of any confusion or deception for administration of a wrong drug.

87. It is essential to observe that each case is to be determined on its own facts and circumstances and thus the reliance placed on behalf of the appellant on a catena of verdicts relied upon in the facts and circumstances of the instant case does not aid the appellant in as much as observed by the Hon'ble Division Bench of this Court in ***Sun Pharmaceutical Industries Ltd. & Anr. vs. Anglo Frensh Drgus & Industries Ltd. & Anr. 2014 SCC OnLine Del 4716*** vide para 18 thereof, the verdict of the Hon'ble Supreme Court in ***Cadila (Supra)*** has to be read in its entirety and the contours of the test laid down by the Hon'ble Supreme Court thereby cannot be restricted by an artificial process which focuses attention only upon the factual aspect of both products being pharmaceutical preparations and that the observations in para 42 of the said verdict, which has already been adverted to elsewhere hereinabove, thus as laid down by the Hon'ble

Supreme Court in ***Cadila (Supra)*** that the weightage to be given to each of the factors in relation to the aspect of resembleness between the marks, phonetically similar and hence similar in idea; nature of the goods in respect of which they are used as trade marks, similarity in the nature character and performance of the goods of the rival traders, the class of purchasers who are likely to buy the goods bearing the marks and the education and intelligence and a degree of care they required and likely to exercise in purchasing and/or using the goods and other surrounding circumstances which may be relevant in the extent of dissimilarity between the competing marks have to be considered in each and every case.

88. The other aspect which cannot be overlooked is that the respondent's trade mark has been derived by combining publici-juris i.e. the abbreviation of the salt 'Bevacizumab with the suffix TAS, the abbreviated form of its trade/company name and there is prima facie presently nothing to indicate that the appellant/ plaintiff has any exclusive right to use the abbreviation of BEVE which it has arbitrarily utilized in relation to the compound / salt with Paclitaxel. The appellant/ plaintiff has thus added the suffix BEVE to the word TEX to arrive at its trade mark **BEVETEX** and the respondent / defendant has on the other hand added the suffix TAS which is a part of its company named INTAS to arrive at the trade mark BEVATAS and as observed hereinabove the user of the word BEVA by the respondent being only descriptive and *publici juris*, in as much as the abbreviated prefix BEVA is used for several drugs by several prominent pharmaceutical industrialists other than the respondent i.e.

BEVACIRE of Reliance, BEVAZZA of Lupin, BEVAREST of Emcure and ZYBEV of Zydex US. Furthermore, as put forth on behalf of the respondent that several trademarks have used the prefix of BEV in the pharmaceutical trade which are already registered, as under:-

S.NO.	APPLICATION NO.	MARK
1.	340724	BEVARATE
2.	373052	BEVISAR
3.	451957	BEVIN
4.	713912	BEVENT
5.	792186	BEVIZ
6.	890171	BEVAC- A
7.	902979	BEVITAL
8.	927555	BEVAXIM
9.	1169016	BEVAL
10.	1195752	BEVON

and thus it is submitted on behalf of the respondent that there cannot be a monopoly over a particular word which is a general word and which is used by several companies.

89. Furthermore, the word suffice TAS is associated which a large number of products of the respondent /defendant which has been amalgamated with the name of the molecule / ingredient or salt registered in the name of the respondent / defendant.

90. Furthermore, presently, the appellant though it applied for registration of the mark **BEVETEX** in the year 1993, which was granted to it in the year 1999 and began its utilization only in the year 2015 and despite having learnt of the launch of the defendant's drug in 2016 by having opposed the trade mark application of the defendant / respondent in the year 2016 having chosen to institute the suit by claiming that the cause of the action for the suit arose only on 20th December, 2017, the contention of the respondent that the suit of the plaintiff/ appellant suffered from delay, laches would essentially have to be considered during the trial. Undoubtedly, drugs are not sweets but poison as observed by the Hon'ble Supreme Court in ***Cadila (supra)*** as contended on behalf of the appellant, however as observed elsewhere hereinabove as laid down also in ***Sun Pharmaceutical Industries Ltd. & Anr. vs. Anglo Frensh Drgus & Industries Ltd. & Anr. (supra)*** by the Hon'ble Division Bench of this Court vide para 18 thereof, the verdict of the Hon'ble Supreme Court in ***Cadila (supra)*** has to be read in its entirety and each case is to be determined on its own facts and circumstances.

91. Undoubtedly as laid down in paraphrasing of the tests laid down in ***Cadila (supra)*** in para 11.6 in ***Sun Pharma Laboratories Ltd. Vs. Ajanta Pharma Ltd.*** in CS (COMM) 622/2018 physicians and pharmacists are not immune to mistake, yet it cannot be overlooked that in the instant case, the administration of the drug has to be intravenous by specialized oncologists by a special procedure by trained medical staff and both the products of the appellant and of the

respondent through their trade dress cannot even remotely be prima facie considered to be similar.

92. In the circumstances, as rightly held by the learned trial Court vide the impugned order dated 17.09.2018, there is no prima facie case brought forth in favour of the appellant for the grant of the interim injunction seeking a restraint against the respondent for user of its trade mark **BEVETEX** on the ground of stated similarity or deceptive similarity with the trade mark of the appellant/plaintiff **BEVETEX** which prima facie does not appear to exist. As rightly observed vide the impugned order dated 17.09.2018, there is no balance of convenience in favour of the appellant/ plaintiff also in as much as the appellant has not been able to prima facie establish that its trademark **BEVETEX** has acquired a reputation and goodwill so as to fall in the category of a well known trademark and thus in the circumstances, there is prima facie no irreparable injury likely to be caused to the plaintiff by the user of the impugned mark by the defendant.

93. It is also essential to observe that as laid down by the Hon'ble Supreme Court in ***Wander Ltd. and Ors. Vs. Antox India P. Ltd. 1990(2) ARBLR 399 (SC)***, the Appellate Court is not to re-assess the material and seek to reach to a conclusion different from the one reached by the Court below if one reached by that Court was reasonably possible on the material available and the Appellate Court would not normally be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to contrary conclusion and that if the discretion that has been exercised by the learned trial

Court has been reasonably exercised and in a judicial manner that the Appellate Court may or would have taken a different view, may not justify interference with the trial Court's exercise of discretion. In the instant case, as it is apparent, it cannot be contended on behalf of the appellant that there has been an unreasonable or un-judicious exercise of discretion by the learned trial Court vide the impugned order dated 17.09.2018 in the non-grant of the prayer for the ad interim injunction as prayed by the appellant in TM No.146/2017.

94. In the circumstances, there is no merit in the appeal against the said impugned order, which is thus dismissed.

ANU MALHOTRA, J

JANUARY 9th , 2020/*mk/vm*