

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
NOTICE OF MOTION (L) NO. 1989 OF 2018
IN
COMIP (L) NO. 1143 OF 2018

Shalina Laboratories Pvt. Ltd. and Anr. ...Plaintiff

Versus

1. Twin Impex

2. National Laboratories ...Defendants

Mr. Hiren Kamod, Advocate alongwith Mr. Mahesh Mahadagut and Ms. Poonam Teddu, Advocates instructed by Mr. Mahesh Mahadgut, Advocate for the Plaintiff.

Mr. Rohan Cama, Advocate alongwith Ms. Kainaz Irani, Advocate instructed by Mr. Vivek Sharma, Advocate for Defendant No. 1

Mr. Vikrant Zunjarrao, Advocate instructed by Zunjarrao & Co., Advocates for Defendant No. 2.

Mr. Nishad Gharat, Manager-Legal of the Plaintiff.

Mr. Vijay Devnani, proprietor of Defendant No.1.

Mrs. Pooja Vijay Devnani, proprietor of Garuda Exports.

Mr. Rajesh Tiwari and Mrs. Nutan Tiwari, partners of Defendant No.2.

CORAM: S.J. KATHAWALLA, J.

DATE: 10th SEPTEMBER 2018

P.C. :

1. Several agencies of the Government, including the Courts, are the vanguards of public interest and probity, endeavouring to ensure the safety and security of the public at large. Therefore, any issue pertaining

to public health is of paramount importance. When it comes to the field of medicine, the public invests great faith and hope in the efficacy and genuineness of drugs and medicines, confident that they will cure and/or alleviate their malady, pain and discomfort, thereby restoring their good health at the earliest. It is in good faith that consumers purchase medicines from reputed pharmaceutical companies, which have rightly earned their name and fame through their high quality drugs over the years. However, when the Court is confronted with infringers and fraudsters such as the present Defendants, who callously disregard the faith placed in them with the intent to hoodwink innocent consumers and fill their coffers at the cost of the health and safety of these trusting consumers, then the Court has no option but to come down heavily and unsparingly on such errant parties. The infamous fraternity of fraudsters and counterfeit drug manufacturers must get the message loud and clear that the Courts will deal with them sternly and uphold the rights of hapless consumers who are made victims of the nefarious activities of such unethical drug manufacturers.

2. This is yet another glaring instance where pharmaceutical companies such as the Defendants, by their blatant and malafide actions,

have shown that they neither have any fear nor any regard for the rule of law or even the Courts. However, justice will be done to innocent consumers who have been defrauded by the Defendants with ruthless apathy.

3. The Plaintiffs approached this Court complaining the acts of infringement of copyright and passing off in respect of their pharmaceutical product viz. “TANZOL” at the hands of the Defendants who have been manufacturing and selling impugned pharmaceutical products under an almost identical trade mark / label “INASOL”. The photographs of the Plaintiffs’ product TANZOL and Defendants’ impugned product “INASOL” are reproduced hereinbelow:



4. Pursuant to the ex-parte order dated 29th August 2018 passed by me, the Court Receiver of this Court visited the premises of the

Defendants and seized the pharmaceutical products of the Defendants bearing the impugned artwork / trade mark / label “INASOL”. While the Court Receiver was executing the said order, the Court Receiver, in addition to the impugned products bearing the mark “INASOL”, also found pharmaceutical products bearing the mark “TANZOL” i.e. the very same mark / label / artistic work as that of the Plaintiff. The photographs of the Plaintiffs’ product “TANZOL” and Defendants’ impugned product “TANZOL” are reproduced hereinbelow:



The Court Receiver has also found Reports of Analysis for the products “TANZOL” and “INASOL” dating from 2008 to 2017, evincing manufacture of over 20 Lakh tablets by Defendant No. 2 for

manufacturers, including Defendant No. 1. The similarity between the rival products is striking. I cannot distinguish one from the other.

5. Further, apart from the impugned products “INASOL” and “TANZOL”, the Court Receiver also found other pharmaceutical products bearing the trade mark / label “SUPER PEPTI”, “BON APETIT”, and “BIG APETITE” in the premises of the Defendant No.1; and pharmaceutical products bearing the trade mark / label “IBUCAB”, and “IBUSAP” in the premises of the Defendant No.2. Samples / Photographs of some of these products have been taken by the Court Receiver. These products were being manufactured and sold / exported by these Defendants. Several invoices, analysis reports and other documents of similar nature evincing manufacture, sale, distribution and export of the impugned products on an industrial scale by the Defendants are annexed to the Report filed by the Court Receiver.

6. Mr. Kamod, Ld. Advocate appearing for the Plaintiffs submitted that Defendants’ impugned pharmaceutical products bearing the marks “SUPER PEPTI”, “BON APETIT”, “BIG APETITE”, “IBUCAB” and “IBUSAP” found in the Defendants’ premises are nothing but a complete copy / reproduction of Plaintiffs’ other registered / well-known

trade marks / labels “SUPER APETI” and “IBUCAP”. He tendered the original products of the Plaintiffs bearing the said marks “SUPER APETI” and “IBUCAP”. The photographs of the Plaintiffs’ products “SUPER APETI” and “IBUCAP” and Defendants’ impugned pharmaceutical products bearing the marks “SUPER PEPTI”, “BON APETIT”, “BIG APETITE”, “IBUCAB” and “IBUSAP” as found in the Defendants’ premises are reproduced hereinbelow:

PLAINTIFFS’ PRODUCTS	DEFENDANTS’ IMPUGNED PRODUCTS
SUPER APETI 	BON APETIT 
SUPER APETI 	BIG APETITE 

PLAINTIFFS' PRODUCTS

SUPER APETI



DEFENDANTS' IMPUGNED PRODUCTS

SUPER PEPTI



IBUCAP



IBUSAP



Plaintiffs' Products IBUCAP	Defendants' impugned products IBUCAB
	

7. Mr. Kamod is correct when he submits that the Defendants have copied all the features of the Plaintiffs' trade marks / labels to the last millimeter and that it is not possible to distinguish one from the other. There is no iota of doubt in my mind that the adoption of word mark, art work, colour scheme, font style, manner of writing, and trade dress of the Defendants' impugned products is fraudulent. The blatant copying / reproduction of the Plaintiffs' trade mark/label by the Defendants speaks volumes of their dishonesty. It is evident that the only intention of the Defendants is to come as close as possible to the Plaintiffs' products in order to make illicit gains.

8. What is shocking to note is that this is not the first time that the Defendants have copied / pirated the Plaintiffs' trade marks / labels and

for the reasons stated hereinafter, I have no hesitation in holding that these Defendants are habitual offenders.

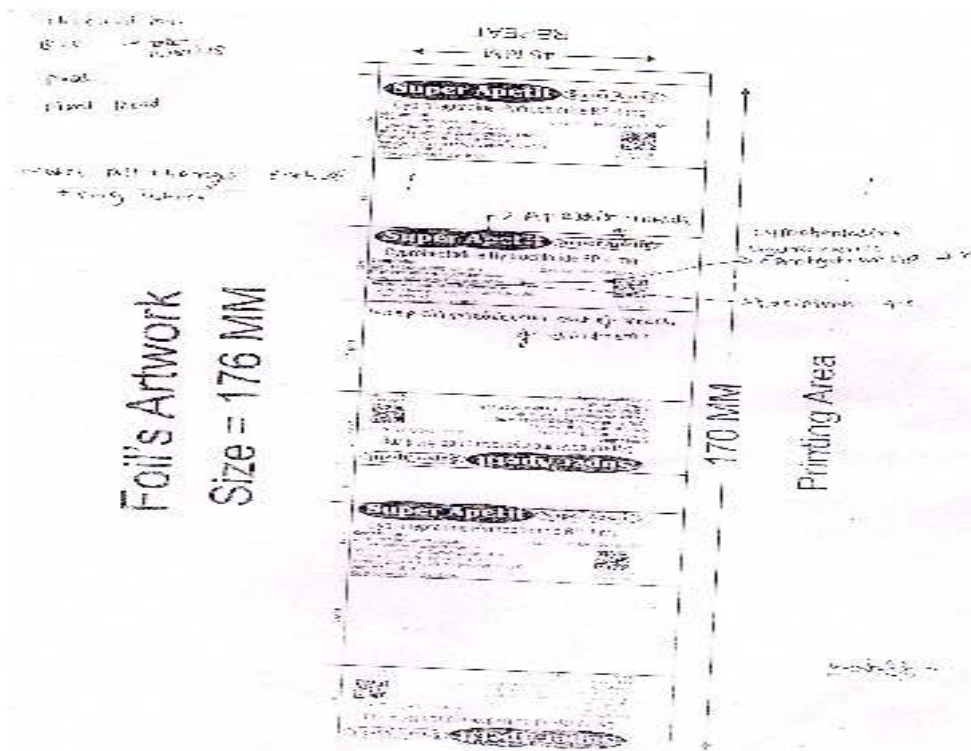
9. In the year 2003, the Plaintiffs came across spurious pharmaceutical products bearing the mark / label “SUPER PEPTI” which was identical with / deceptively similar to the Plaintiffs’ well-known pharmaceutical products “SUPER APETI”. The Plaintiffs, therefore, filed a Criminal Complaint No. 53 of 2003 (later registered as 372/PW/2006) with Addl. Chief Metropolitan Magistrate’s (ACMM) Court No.37 at Esplanade, Mumbai. The investigation in the said complaint discovered that one **Twin Exports** and **Encore Industries** were manufacturing and exporting / selling the spurious pharmaceutical products under the impugned trade mark label “SUPER PEPTI”. It is pertinent to note that the said Twin Exports and Encore Industries are now known as “**Twin Impex**” and “**National Pharamaceuticals**” respectively – the present Defendants. Mr. Kamod submitted that in 2009, Mr. Rajesh Tiwari partner of Defendant No.2 (previously known as ‘Encore Industries’) and Mrs. Chandra Chandumal Devnani, Mrs. Laxmi Khanchand Devnani and Mr. Chandumal Dayaldas Devnani (the then partners of Defendant No.1 which was previously known as “Twin

Exports”) had given personal undertakings and affidavits in February / March 2009 to the Plaintiffs wherein they had *inter alia* acknowledged that they were manufacturing / exporting / infringing / duplicating products under trade marks “SUPER PEPTI” and had undertaken not to adopt or use any mark / label similar to the Plaintiffs’ trade mark / label “SUPER APETI” or other products of the Plaintiffs in future. The Defendant No.2 had also undertaken to cancel / revoke its Manufacturing License No.MH/DRUGS/KD-398 dated 10th January 2000 within a period of two weeks. The Defendant No.1 had undertaken to ensure that the Manufacturing License No.MH/DRUGS/KD-398 dated 10th January 2000 would be cancelled / revoked. Various other undertakings were given by the Defendants. Copies of the Defendant No.2’s undertakings and affidavit are annexed to the Plaint at Exhibit L and M. Copy of the Defendant No.1’s undertaking is annexed to the compilation of documents tendered on behalf of the Plaintiff. In consideration of these undertakings and assurances given by the Defendants, the Plaintiffs agreed to not pursue their criminal complaint filed with ACMM. It was only on the basis of the compromise entered between the Plaintiffs and the Defendants, Mr. Rajesh Tiwari of the

Defendant No.2 and Mr. Vijay Chandumal Levnani of Defendant No.1, who are both present before me today, were acquitted by the ACMM. The order dated 8th September 2009 passed by ACMM forms a part of the compilation of documents filed on behalf of the Plaintiff. The impugned pharmaceutical products bearing the impugned trade mark / label “SUPER PEPTI”, “BON APETIT” and “BIG APETITE” found in the Defendant No.1’s premises are absolutely similar to the products “SUPER PEPTI” and “SUPER APETI” which were the subject matter of the criminal complaint filed before ACMM.

10. Mr. Kamod drew my attention to one shocking document that was found in the premises of the Defendant No.2 and forms a part of the Court Receiver’s Report. The said document contains a photograph of pharmaceutical product bearing the trade mark / artwork “SUPER APETIT” which is almost identical with the Plaintiffs’ well-known product “SUPER APETI”. Upon this document, there are written instructions / markings suggesting minor changes to the trade mark / artwork of “SUPER APETIT” in order to make it different than “SUPER APETIT” but close enough to the Plaintiffs’ well-known product “SUPER APETI”. Further, the said document bears a signature

dated 16th July 2018 of the Defendant No. 2's employee approving the changes. Photographs of Defendant No.2's documents are reproduced hereinbelow:



I believe Mr. Kamod is correct when he says that the Defendant No. 2 has been caught red-handed. It is evident from the above photographs that the Defendant No.2 was in the process of systematically preparing a fraudulent label / artwork which was completely based on and almost a reproduction of the Plaintiffs' well-known product "SUPER APETI".

11. A bare perusal of the criminal complaint filed by the Plaintiffs in 2003, undertakings of the Defendants, order passed by ACMM and the impugned products / documents now found by the Court Receiver in the premises of the Defendants, would reveal that the Defendants have clearly breached the undertakings given by them to the Plaintiffs on the basis of which the criminal complaint filed by the Plaintiffs came to be settled. What is further shocking to note is that though the Defendants had given an undertaking to withdraw the Manufacturing License No.MH/DRUGS/KD-398 dated 10th January 2000 within two weeks of the undertakings given by them in March 2009, the impugned pharmaceutical products found by the Court Receiver in the Defendant No.2's premises continue to bear the manufacturing License No.MH/DRUGS/KD-398. Hence, it appears that even as on date, the

Defendant No.2 continues to use its Manufacturing License No. MH/DRUGS/KD-398.

12. There is one more fact that shows the dishonesty of the Defendants. On perusing the Defendant No.2's invoices annexed to the Court Receiver's Report it is apparent that Defendant No.2 manufactured the impugned medicinal products and supplied to various parties including the Defendant No.1. Some of the invoices of the Defendant No.2 were raised in the name of one entity viz. ELH Amadou Alkairou (ELH). Mr. Kamod submitted that this entity is fictitious and the same is evident from the address of ELH which is mentioned on the invoices. A perusal of the Defendant No.2's invoices raised in the name of ELH shows the following address:

ELH AMADOU ALKAIROU,
Big Marker, Shop No.0811,
Socogem, Cotonou, Niger,
Worli, Mumbai 400030

There is absolutely no doubt that the above entity and the address mentioned therein is bogus and fictitious. There are other invoices which are in the name of one Garuda Exports. Mr. Cama, Ld. Advocate

appearing on behalf of the Defendant No.1 submitted that Garuda Exports is a proprietary concern of Mrs. Pooja Devnani who is the wife of Mr. Vijay Devnani, the proprietor of the Defendant No.1. It is therefore evident that the Defendants are committing the infringing activities not only in their name but also in the name of their related entities or fictitious entities.

13. Mr. Kamod has relied upon an article published in Mid-Day Newspaper on 17th November 2003 titled “FDA seizes illegal drugs worth 50 lakh”. It was reported in the said article that a raid was conducted by FDA, Thane upon *inter alia* both the Defendants’ premises. The article reports that drugs (which were not in compliance with FDA regulations) worth a whopping Rs. 35 Lakhs were found in Defendant No. 2’s premises which were to be sold to Defendant No.1 who in turn would export them to Africa. The article further reports that the manufacturing license of the Defendant No.2 and trading license of the Defendant No.1 was revoked.

14. Further, from the compilation of documents tendered on behalf of the Plaintiff, it appears that in 2009 a suit was filed by Mr. K. T. More, Drug Inspector before the Civil Court Junior Division, Palghar against

Mr. Rajesh Tiwari of Defendant No. 2 under Section 18(a) of the Drugs and Cosmetics Act, 1940. Further, in 2011, an action for infringement of trade mark, in respect of pharmaceutical products, was brought against Defendant No. 2, in a suit filed by one Mr. Upendra Deshpande before this Court in Suit No. S/1255/2011. The suit was settled by filing Consent Terms. Once again, in 2016, action for infringement of trade mark, in respect of pharmaceutical products, was brought against Defendant No. 2, in a suit filed by Socomed Pharmaceuticals Pvt. Ltd. before this Court being Suit No. S/135/2011. The Defendant No.2 submitted to a decree in the said suit. All these documents clearly show that these Defendants are habitual offenders.

15. Mr. Cama Ld. Advocate appearing on behalf of the Defendant No.1 and Mr. Vikrant Zunjarrao, Ld. Advocate appearing on behalf of the Defendant No.2 upon instructions of their respective clients who are present before me today submitted that they are ready to submit to a decree and put an end to the suit. They further submitted that they are ready to give an undertaking even in respect of the trade mark / labels “SUPER PEPTI”, “BON APETIT”, “BIG APETITE”, “IBUCAB” and “IBUSAP” which are presently not annexed to the Suit. Mr. Cama

fairly submitted that there cannot be any plausible explanation for the conduct of the Defendants. He submitted that the Defendant No.1 would not henceforth indulge in these kinds of infringing activities and would henceforth ensure that the marks adopted and used by them do not violate the rights of other legitimate proprietors. Mr. Zunjarrao submitted on the same lines on behalf of the Defendant No.2. Mr. Kamod submitted that looking at the dishonest and fraudulent conduct of the Defendants and considering the aspect of public safety, this is a fit case where this Court should issue directions to various enforcement agencies for looking into the affairs of the Defendants. Mr. Cama and Mr. Zunjarrao submitted that one last opportunity be given to the Defendants. They further submitted that the Defendants are even ready to pay heavy costs. The parties submitted that the quantum of cost, if any, should be decided by the Court.

16. This Court cannot feign ignorance of the consequences of the Defendants' infringing activities upon the members of the public that consume their product. Recently, I was faced with a similar situation in the case of *Glenmark Pharmaceuticals Ltd. v. Galpha Laboratories Ltd.*¹

¹ Glenmark Pharmaceuticals Ltd. v. Galpha Laboratories Ltd. in COMIP (L) No. 1063 of 2018, Order & Judgment dated 28th August 2018

wherein the Defendant was a habitual infringer just as in this case. I had observed the following in Glenmark (*supra*):

“8. Drugs are not sweets. Pharmaceutical companies which provide medicines for health of the consumers have a special duty of care towards them. These companies, in fact, have a greater responsibility towards the general public. However, nowadays, the corporate and financial goals of such companies cloud the decision of its executives whose decisions are incentivized by profits, more often than not, at the cost of public health. This case is a perfect example of just that.

10. Generally, in these kinds of cases of infringement of trade mark, copyright and passing off, if the Defendants appear and show willingness to submit to a decree, the Courts are generally lenient and allow the parties to settle the matter with no or nominal costs. However, this is not one of those cases. This is a case where the conduct of the Defendant No.2 is not only dishonest but also audacious and such which displays no regards to the authority/rule of law.

11. ... After tendering a written apology and undertaking, one is expected to be careful and cautious while conducting

its business, but the actions of the Defendant No.2 are far from being careful or cautious and to say, at the least, are shocking and appalling.

15. *It is clear that the Defendant No.2 is not only indulging in infringing activities by repeatedly copying brands of other companies but also appears to be in complete violation of the FDA regulations. The conduct of the Defendant No.2 shows that this Defendant has no regard or respect to the rule of law. The consumers and general public are being repeatedly cheated by the Defendant No.2. I am of the opinion that had this Defendant been imposed with exemplary costs at the very beginning of their infringing activities, this Defendant would not have been audacious in repeating its infringing activities. I also feel that this is a fit case where directions should be issued to various enforcement agencies to look into the affairs of the Defendant No.2. No party, and particularly a party like this Defendant, should ever be under an impression that they can get away every time from the clutches of law despite being involved in these kinds of activities.*

16. *When I expressed my above opinion in court, Mr. Jyoti Prakash Narayan Singh, Managing Director of the Defendant No.2 submitted that they are ready to pay*

heavy costs to the Plaintiff in order to bring an end to the present suit. He submitted that the Defendant No.2 would not henceforth indulge in these kinds of infringing activities. He submitted that Defendant No.2 would henceforth ensure that the marks adopted and used by them do not violate the rights of other legitimate proprietors. He submitted that the Defendant No.2 would be more vigilant and would ensure that their products do not violate any of the FDA regulations. He requested that a last chance may be given to the Defendant No.2. Mr. Kamod and Mr. C.M. Lokesh, upon instructions, submitted that the quantum of cost, if any, should be decided by the Court.

17. *Considering the facts of the present case and the conduct of the Defendant No.2, I was initially not in favour of showing any leniency to the Defendant No.2. However, considering the assurances given by Mr. Jyoti Prakash Narayan Singh, Managing Director of the Defendant No.2 and their willingness to pay heavy costs, I am of the opinion that one last chance can be given to the Defendant No.2 to henceforth conduct its business honestly without violating legitimate rights of other parties and strictly abiding by the FDA rules and regulations. Though the wrong done by the activities of the Defendant No.2 cannot*

be quantified in terms of money, I feel that in the facts and circumstances of the present case, an amount of Rs.1,50,00,000/- (Rupees One Crore Fifty Lakhs Only) is an appropriate amount of costs which should be paid by the Defendant No.2. Alongwith the cost, all the Directors of the Defendant No.2 must also give personal undertakings to this Court to the effect that the Defendant No.2 - would immediately withdraw all products bearing the impugned mark CLODID and its variants from the market and destroy the same; forthwith apply for cancellation of manufacturing permission granted under the impugned trade mark CLODID and its variants; shall conduct their business by strictly abiding to the rules and regulations of the FDA and that they would not, in future, indulge in these kinds of infringing activities qua products of not only the Plaintiff but other pharmaceutical companies also.”

17. The above observations made by this Court in the case of Glenmark (Supra) squarely apply to the facts of the present case. Considering the dishonest conduct of the Defendants and considering the fact that the parties have left it to this Court to decide the amount of costs, even in the present case, I direct that an amount of **Rs.1,50,00,000/- (Rupees One Crore Fifty Lakhs Only)** shall be

jointly and/or severally paid towards costs. Alongwith the costs, Mr. Vijay Devnani, sole proprietor of the Defendant No.1; Mrs. Pooja Devnani, sole proprietor of Garuda Exports; Mr. Rajesh Tiwari and Mrs. Nutan Tiwari, partners of the Defendant No.2 shall also give personal undertakings to this Court to the effect that the Defendants would immediately withdraw all products bearing the impugned marks “INASOL”, “TANZOL”, “SUPER PEPTI”, “BON APETIT”, “BIG APETITE”, “IBUCAB” and “IBUSAP” and their variants from the market and destroy the same; forthwith apply for cancellation of manufacturing / trading licenses granted under the impugned trade marks “INASOL”, “TANZOL”, “SUPER PEPTI”, “BON APETIT”, “BIG APETITE”, “IBUCAB” and “IBUSAP” and its variants; shall conduct their business by strictly abiding to the rules and regulations of the FDA and that they would not, in future, indulge in these kinds of infringing activities qua products of not only the Plaintiffs but other pharmaceutical companies also.

18. Mr. Vijay Devnani, sole proprietor of the Defendant No.1 along with Mr. Rajesh Tiwari and Mrs. Nutan Tiwari, partners of the Defendant No.2, undertake to pay the said costs of Rs. 1.50 crore on or

before 24 September, 2018. They have also stated that they have agreed to contribute Rs. 75 lakhs each (i.e. Rs. 75 lakh by Defendant No. 1 and Rs. 75 lakh by the partners of Defendant No. 2) and, they along with Mrs. Pooja Devnani, sole proprietor of Garuda Exports, also undertake to furnish the said undertakings. This Court suggested to Mr. Kamod, Advocate for the Plaintiffs, that just like the case in Glenmark (*supra*), the Plaintiffs herein should donate the entire amount of the costs to a charitable organization. Mr. Kamod on instructions submitted that the Plaintiff has no objection if instead of paying the costs to the Plaintiffs, the Defendants pay the costs directly to a charitable organization. In view thereof, I direct that the Defendants should pay the total costs of Rs.1,50,00,000/- (Rupees One Crore Fifty Lakhs Only) undertaken to be paid by them as a donation to the Tata Memorial Hospital for the treatment of poor patients i.e. towards Patients Welfare Fund.

19. By consent, the following order is passed:

- (i) The above suit is decreed against the Defendants in terms of prayer clauses (a), (b), and (d) to the Plaint.
- (ii) The Defendants undertake to jointly and/or severally pay Rs. Rs.1,50,00,000/- (Rupees One Crore Fifty Lakhs only) towards

costs, by getting a Demand Draft drawn in the name of “Tata Memorial Hospital” payable at Mumbai by Monday, 24th September 2018.

- (iii) The Defendants state that they have agreed to contribute equally towards the Costs i.e. Rs. 75 lakhs by Defendant No. 1 and Rs. 75 lakh by the partners of Defendant No. 2 and shall accordingly submit Demand Drafts in the name of ‘Tata Memorial Hospital’ payable at Mumbai by Monday, 24th September, 2018.
- (iv) The Defendants undertake to furnish personal undertakings of Mr. Vijay Devnani, sole proprietor of the Defendant No.1; Mrs. Pooja Devnani, sole proprietor of Garuda Exports; Mr. Rajesh Tiwari and Mrs. Nutan Tiwari, partners of the Defendant No.2 by the next date i.e. 24th September 2018 to the effect that the Defendants - would immediately withdraw all products bearing the impugned marks “INASOL”, “TANZOL”, “SUPER PEPTI”, “BON APETIT”, “BIG APETITE”, “IBUCAB” and “IBUSAP” and their variants from the market and destroy the same; forthwith apply for cancellation of manufacturing / trading licenses granted under the impugned trade marks “INASOL”, “TANZOL”, “SUPER PEPTI”, “BON APETIT”, “BIG APETITE”, “IBUCAB” and “IBUSAP” and its variants; shall conduct their business by strictly abiding to

the rules and regulations of the FDA and that they would not, in future, indulge in these kinds of infringing activities qua products of not only the Plaintiffs but other pharmaceutical companies also.

- (v) The undertakings/statements are accepted.
- (vi) The goods seized by the Court Receiver, shall be destroyed in the presence of the Plaintiffs' representative within a period of seven days at the cost of the Defendants.
- (vii) The Court Receiver stands discharged without passing accounts but subject to payment of his cost, charges and expenses within a period of one week from today by the Plaintiff.
- (viii) The Suit as well as Notice of Motion are disposed off.
- (ix) Refund of Court fees, if any, as per Rules.
- (x) The proceedings, if any, pending as on date, before any authority against the present Defendants should be decided independently and on their own merits.

20. List the above matter on Monday, 24th September 2018 for compliance.

(S.J. KATHAWALLA, J.)