



C.S.(Comm Div) No.75 of 2022 &
A.Nos.1851 to 1855, 2275, 2276 & 2299 of 2022 &
O.A.Nos.210 to 214 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Order reserved on	04.07.2022
Order pronounced on	28.07.2022

CORAM

The Hon'ble Mr. Justice **SENTHILKUMAR RAMAMOORTHY**

Application Nos.1851,1852, 1853 1854, 1855, 2275, 2276
2299 of 2022

and

O.A.Nos.210, 211, 212, 213 and 214 of 2022

in

Civil Suit(Comm.Div) No.75 of 2022

1.M/s.Neuberg Hitech Laboratories Pvt. Ltd.

Rep. by its Director

Unit 35, Old No.16, Masilamani Road,

Balaji Nagar, Royapettah,

Chennai – 600 014.

2.Hitech Advanced Labs

86, 1st Floor, SRP Koil Street,

South Agaram, Peravallur,

Chennai – 600 082.

... Applicants/Respondents/Defendants

vs.

Dr.Ganesan's Hitech Diagnostic Centre Pvt. Ltd.

Rep. by Authorised representative

No.1, Millers Road, Kilpauk,

Chennai – 600 010.

... Respondent/Applicant/Plaintiff



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PRAYER IN A.No.1851 of 2022: This Application is filed under Order XIV Rule 8 of O.S. Rules of the Madras High Court, Original side, 1956 r/w r/w Order XXXIX Rule 4 of CPC,1906 to forthwith vacate the ex-parte ad interim injunction passed by this Court vide Order dated 13.04.2022 in O.A.No.210 to 214 of 2022 in C.S.(Comm.Div)No.75 of 2022 with exemplary costs.

For Applicant : Mr.Satish Parasaran, Sr. Advocate
for Ms.Gayatri Roy
Assisted by
Mr.Vadivelu Deenadayalan
Ms.Kavitha Deenadayalan
(Applicant in A.Nos. 2275,
2276 & 2299 of 2022 and
O.A.Nos.210 to 214 of 2022)

For Respondents : Mr.P.S.Raman
Senior Advocate
for Ms.Perna Khatri
M/s.A.K.Mylsamy & Associates
(Applicant in A.Nos.1851 to
1855 of 2022 and 1st Respondent
in A.Nos.2275, 2276 &
2299 of 2022 and O.A.Nos.210
to 214 of 2022)
Mr.P.R.Raman, Sr. Advocate
for Ms.Perna Khatri
M/s.A.K.Mylsamy & Associates
(Applicant in A.Nos.1851 to
1855 of 2022 and
2nd Respondent



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in A.Nos.1699, 2275, 2276 &
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COMMON ORDER

Two established players in the medical diagnostics space are the driving forces in this suit for relief in respect of alleged trademark infringement and passing off. The plaintiff presented O.A.Nos.210 to 214 of 2022 and Application No. 1699 of 2022 along with the plaint. On 13.04.2022, ad interim orders, as prayed for in the original applications, were granted *ex parte* except with regard to the use of the corporate name Neuberg Hitech Laboratories Pvt. Ltd. Upon receipt of notice, the defendants filed Application Nos.1851 to 1855 of 2022 to vacate the ad interim order. The grounds urged in support of the applications to vacate the ad interim orders *inter alia* included the institution of the suit without disclosing that the plaintiff was in voluntary liquidation and the presentation of the suit by an authorised representative instead of the Liquidator. By order dated 28.04.2022, the ad interim order was modified, albeit as an interim arrangement pending adjudication of the interlocutory applications. As regards the mark "Hitech", the order of interim injunction was extended



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subject to the carve out for the corporate name, Neuberg Hitech Laboratories Pvt. Ltd., on condition that changes are made to the colour and font size of name boards. As regards the device marks containing the word "Nalam", the protection was limited to marks which are identical to or deceptively similar to the registered device marks of the plaintiff. As a condition for such extension, the plaintiff was directed to procure and provide a guarantee-cum-indemnity deed executed by Metropolis Healthcare Limited. A Guarantee-cum-Indemnity Deed dated 07.06.2022 was provided in compliance with the said condition.

2. In the above circumstances, the plaintiff filed an additional application to take on record additional documents; and the plaintiff and Metropolis Healthcare Limited filed applications to implead Metropolis Healthcare Limited as the second plaintiff in the suit and amend the plaint. Counters were filed in all these applications by the respondents/defendants. For the sake of clarity, in this order, the expressions plaintiff and first or second defendants are used to describe the parties.



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3. Oral arguments on behalf of the plaintiff were addressed by Mr.Satish Parasaran, learned senior counsel. In support of the application to implead Metropolis Healthcare Limited, it was submitted that the Liquidator of the plaintiff distributed the plaintiff's business on a going concern basis to Metropolis Healthcare Limited with effect from 04.06.2022. The distribution of assets encompassed the intellectual property rights of the plaintiff. As a result, it was contended that it has become necessary to join Metropolis Healthcare Limited as the second plaintiff in the suit. By drawing reference to paragraphs 12 and 15 of the counter affidavit in Application No.2299 of 2022, it was contended that the defendants admitted that the proposed plaintiff has a significant interest in the subject matter of the suit. Therefore, it was contended that the defendants cannot oppose the impleading application. As regards the application for amendment, learned senior counsel submitted that the defendants raised objections to an authorized representative instituting the suit instead of the Liquidator. Since the suit was instituted with the consent of the Liquidator, the plaintiff decided to request for permission to amend the cause title and relevant paragraphs of the plaint so as to substitute the authorized signatory with the



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Liquidator. In addition, the plaintiff discovered the use by the first defendant of the website, <http://www.neuberghitech.com/>. In order to avoid multiplicity of proceedings, the plaintiff decided to request permission for amendment of the plaint so as to also claim relief in respect of the impugned website. Apart from the above, the plaintiff wanted to bring on record additional documents evidencing the plaintiff's sales, promotional activities and the use of the mark "Hitech" by the defendants.

4. As regards the applications relating to the relief of interim injunction, learned senior counsel submitted that the mark "Hitech" was adopted in the year 1989. The said mark was first registered several years later in the year 2018. Therefore, the plaintiff has used the mark for about 33 years. In September and October 2021, two employees of the plaintiff, namely, S.Senthilnathan and B.Varunadevan left the employment of the plaintiff by citing age and family situation, respectively. Learned senior counsel pointed out that the reasons specified by the said employees were false and that they proceeded to establish Hitech Advanced Labs. Hitech Advanced Labs was acquired by the first defendant, which is a company



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incorporated on 10.03.2022. By drawing reference to the counter of the defendants, learned senior counsel pointed out that the defendants admitted therein that they adopt the names of companies acquired by them and that this practice was continued as regards Hitech Advanced Labs. With regard to the adoption of the mark Hitech, learned senior counsel submitted that such adoption is dishonest because the two exiting employees unjustly and unlawfully misappropriated the said mark and, in turn, the first defendant also dishonestly adopted such mark upon acquiring the second defendant. With regard to the strength of the mark "Hitech", it was submitted that the said mark may not be inherently distinctive but acquired distinctiveness through use for more than 30 years. As regards the marks "Nalam Cancer Screen", "Nalam Diacheck 1.0", "Nalam Diacheck 2.0" and "Nalam MHC", it was submitted that the first defendant wilfully and dishonestly adopted the same for a testing package called Ungal Nalam. Since the adoption of the corporate name is not only likely to deceive but intended to deceive, learned senior counsel concluded his submissions by stating that the first defendant should be restrained from using the impugned corporate name.



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5. Mr.P.S.Raman, learned senior counsel, made submissions on behalf of the first defendant. At the outset, he contended that the alleged dishonest intention of the exiting employees cannot be determined at the pre-trial stage. The next submission was that the plaintiff suppressed material facts relating to the voluntary liquidation. Therefore, the plaintiff is not entitled to equitable relief. Learned senior counsel referred extensively to the prosecution history of the plaintiff by pointing out that objections were raised by the Trade Marks Registry under Section 9(1)(b) and Section 11 of the Trade Marks Act 1999 when the plaintiff applied for registration in 2018. The objection under Section 11 was raised on the ground of the prior registration of the identical mark "Hitech Diagnostic Centre" in the same class by one Valsamma Varghese. By drawing reference to a subsequent application by the plaintiff in 2019 and the reply dated 22.08.2019 to the examination report, learned senior counsel pointed out that the plaintiff contended that the mark "Hitech Diagnostic Centre" is a composite mark and not a word mark. He also pointed out that the plaintiff distinguished its mark from the label mark "Hitech" registered in the name of Dr. Sandeep Jain on the ground that the plaintiff's mark was used with the



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tag line "The Extra Care Lab" and that, therefore, the two marks are distinguishable. Learned senior counsel also referred to a list of trademark registrations and pending trade mark applications for word and device marks containing the word "Hitech". In addition, learned senior counsel drew the attention of the Court to a list of entities using the word "Hitech" as part of their corporate name, including a list of entities in the medical field.

6. Learned senior counsel further contended that the mark "Hitech" is descriptive of diagnostic services that deploy high technology. He further submitted that the first defendant does not use the word "Hitech" on standalone basis, and that the said word is always used along with the word "Neuberg". Since the word "Neuberg" is prominent and well known in diagnostic services, it was submitted that there is no likelihood of deception. Learned senior counsel further pointed out that the first defendant had changed the colour and modified the font size so as to enable potential customers to easily differentiate between the services of the plaintiff and that of the first defendant. He concluded his submissions on the mark



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“Hitech” by also referring to the prosecution history of Metropolis Healthcare Limited in relation to the mark “Hitech Metropolis”, the objections raised by the Trade Marks Registry in relation thereto and the replies of Metropolis Healthcare Limited. He pointed out that both the plaintiff and the proposed second plaintiff provided disclaimers with regard to the nature of the mark "Hitech". Therefore, an estoppel operates against them and they cannot be heard to contend to the contrary before this Court.

7. With regard to the device marks "Nalam Cancer Screen", "Nalam Diacheck 1.0", "Nalam Diacheck 2.0" and "Nalam MHC", learned senior counsel pointed out that the Trade Marks Registry raised objections under Section 11 of the Trade Marks Act, 1999 (the Trade Marks Act. With specific reference to the device mark "Nalam Diacheck 1.0", learned senior counsel referred to the reply dated 13.06.2019 to the examination report, wherein the plaintiff submitted that the said mark is a composite mark. He also pointed out that the plaintiff conceded that the word "Nalam" refers to good health in Tamil and that it is generic, non-distinctive and not entitled to special protection under trademark law.



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8. Mr.P.R.Raman, learned senior counsel, addressed oral arguments on behalf of the second defendant. He submitted that the amendments requested for by the plaintiff should not be permitted because these amendments are designed to defeat the defences raised by the defendants. In particular, he submitted that the defendants had contended that the suit is not maintainable since it was instituted by an unauthorized person on behalf of a company in voluntary liquidation. By the proposed amendment, the plaintiff seeks to substitute the Liquidator for the authorized representative and delete and replace paragraphs of the plaint, which deal with the institution of the suit. According to learned senior counsel, material facts were suppressed while instituting the suit and the plaintiff should not be permitted to overcome such fundamental defects by seeking amendments. In support of the contention that such amendments should not be permitted, learned senior counsel referred to and relied upon the judgment of the Hon'ble Supreme Court in *Revajeetu Builders and Developers v. Narayanaswamy and sons and others (Revajeetu)*, 2009 (10) SCC 84, particularly paragraphs 21,26,27,30 and 50 thereof. With reference



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thereto, he also submitted that an amendment which changes the cause of action should not be allowed. By referring to the judgment of the Division Bench of this Court in *Patanjali Ayurved Limited and others v. Arudra Engineers Private Limited (Patanjali)* 2021 (85) PTC 523 (Mad), he contended that no action for infringement is maintainable under Section 17 of the Trade Marks Act, 1999 (the Trade Marks Act) in respect of one element of a composite mark. Since "Hitech" constitutes one element in the composite mark "Hitech Diagnostic Centre", it was contended that the element "Hitech" is not entitled to any protection. In conclusion, learned senior counsel submitted that the threshold for establishing secondary meaning is very high and that the plaintiff has not satisfied the requirements for acquiring distinctiveness on account of secondary meaning.

9. By way of rejoinder, Mr.Satish Parasaran submitted that the record reflects that the plaintiff is the first adopter of the mark "Hitech". By drawing reference to the objections of the registry in view of the registration of the mark by Valsamma Varghese, he pointed out that the plaintiff responded to the objection on the ground that its use of the mark predates



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the use by Valsamma Varghese by at least 14 years. He also pointed out that the second defendant is admittedly a firm constituted by two ex-employees of the plaintiff and that it was also admitted that the corporate name of the first defendant is derived from the second defendant. Therefore, he reiterated that the adoption is dishonest. On balance of convenience, he pointed out that all the labs of the first defendant were admittedly opened after the interim order. By referring to paragraph 50 of the counter to the applications for interim injunction, he pointed out that the defendants admitted that "Hitech" is not specifically identifiable with the diagnostic industry. On such basis, he submitted that the mark cannot be considered as generic. In response to the contention that neither the first nor second plaintiff can maintain the suit, he submitted that such contention is self-evidently untenable. With regard to suppression, he relied on the judgment of the Hon'ble Supreme Court in *Arunima Baruah v. Union of India and others* (2007) 6 SCC 120, particularly paragraph 12 thereof, to contend that unless suppression has a direct impact on the reliefs prayed for, a party does not become disentitled to relief on the ground of suppression. By relying on the judgment of the Division Bench of the Calcutta High Court in *Sailendra*



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Nath Sinha and another v. The State and another 1954 SCC Online Cal

194, he submitted that a liquidator has the right to delegate.

10. With regard to the amendments prayed for, he submitted that except for the amendment in relation to the website, the other amendments do not impact the cause of action. By referring to the judgment in *The Commissioners of Inland Revenue v. Muller & Co.'s Margarine Limited H.L.(E) 1901 Appeal cases 217*, he pointed out that goodwill does not have an independent existence and always attaches to the business. He further submitted that in the hierarchy of trademarks, "Hitech" is at worst descriptive and at best suggestive. In either case, both by virtue of pre-registration and post-registration use, the mark has attained distinctiveness. In order to substantiate the claim for an injunction against the use of the corporate name, he relied upon the judgment of the Hon'ble Supreme Court in *Mahendra & Mahendra Paper Mills Ltd v. Mahindra & Mahindra Ltd (2002) 2 SCC 147* and, in particular, paragraphs 7, 8, 16 and 23 thereof. In support of the contention that goodwill remains with a firm under voluntary liquidation, he relied on a judgment of the Hon'ble Bombay High Court in



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Court Receiver, High Court, Bombay v. R.R.Ommerbhoy Pvt. Ltd and others 2003 SCC Online Bom 430. Learned senior counsel also referred to the judgment of the United States Court of Appeals in *Zatarains, Inc. v. Oak Grove Smokehouse, Inc., 698 F. 2d 786* to contend that the plaintiff has established distinctiveness through use and that the mark "Hitech" has acquired secondary meaning. Learned senior counsel concluded his submissions by relying upon the judgment of the Delhi High Court in *Ishi Khosla v. Anil Aggarwal and others 2007(34) PTC 370(Del).*

11. Before dealing with the applications for interim injunction and the applications to vacate the orders of ad interim injunction, I propose to deal with the applications to implead Metropolis Healthcare Limited as the second plaintiff and amend the plaint. In support of the application for impleading Metropolis Healthcare Limited, it was stated that the plaintiff was placed in voluntary liquidation pursuant to the special resolution passed on 01.04.2022. As part of the voluntary liquidation process, the plaintiff stated that the business undertaking was distributed to Metropolis Healthcare Limited with effect from 04.06.2022. In terms thereof, it is stated



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that the intellectual property rights of the plaintiff were transferred to Metropolis Healthcare Limited.

12. This application was resisted by the defendants on the ground that Metropolis Healthcare Limited should institute a separate suit after the trademarks are registered in its favour upon transmission. It was also submitted that the cause of action of Metropolis Healthcare Limited is separate and cannot be clubbed with that of the plaintiff. The second contention was that the plaintiff did not have the right to continue to prosecute the suit after distribution of its business undertaking to Metropolis Healthcare Limited, and that this defect cannot be remedied by impleading Metropolis Healthcare Limited as the second plaintiff. These rival contentions are addressed next.

13. The suit was presented on 12.04.2022 and this is subsequent to the special resolution of 01.04.2022 by which it was decided to place the plaintiff in voluntary liquidation. It was concluded in the order dated 28.04.2022 of this Court that the commencement of voluntary liquidation



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should have been disclosed as a material fact, but that such non-disclosure did not preclude consideration of the applications for interim relief. The implications of this development were also disclosed, including by imposing the condition that Metropolis Healthcare Limited should provide a guarantee-cum-indemnity in relation to obligations arising in this suit. On this aspect, the said order may be read as part and parcel of this order. The special resolution indicates that the business undertaking of the plaintiff would be distributed by the Liquidator to Metropolis Healthcare Limited on a going concern basis. In order to give effect thereto, a letter of distribution dated 04.06.2022 was issued by the Liquidator. This letter of distribution was issued after institution of the suit and discloses that the assets of the plaintiff were distributed with effect from 04.06.2022. As part of such distribution, it also records that the business undertaking is transferred on a going concern basis to Metropolis Healthcare Limited. As a result of the above actions, the intellectual property rights of the plaintiff were transferred to Metropolis Healthcare Limited with effect from 04.06.2022. Pursuant to such transfer, parties are required to make the necessary application before the Trade Marks Registry for registration of



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assignment in favour of Metropolis Healthcare Limited. Until the records of the Trade Marks Registry reflect the name of Metropolis Healthcare Limited as the proprietor of the relevant marks, the plaintiff continues to be the registered proprietor. However, as between the plaintiff and Metropolis Healthcare Limited, there is an equitable transfer which has already taken effect.

14. In the meantime, as per the direction of this Court by order dated 28.04.2022, Metropolis Healthcare Limited has executed a Guarantee cum Indemnity Deed dated 07.06.2022 to fulfil all obligations arising out of this suit. For reasons set out above, Metropolis Healthcare Limited is certainly a proper party to the suit and would become a necessary party once the transmission is registered. The objection of the defendants on the ground that the cause of action changes is untenable because Metropolis Healthcare Limited would become the successor-in-interest of the plaintiff upon registration of the assignment. This process does not alter the cause of action; instead, Metropolis Healthcare Limited would be prosecuting on the same cause of action as its predecessor-in-interest. The contention that the



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impleading application should not be allowed because it defeats the defence that the suit could not have been instituted by the plaintiff is also not valid inasmuch as the plaintiff was the registered proprietor of the relevant marks at the time of institution of the suit and continues to be the registered proprietor as on date. Therefore, A.No.2276 of 2022 (to implead Metropolis Healthcare Limited) is liable to be and is hereby allowed.

15. The application seeking amendment of the plaint is considered next. When the applications for interim injunction were taken up for hearing, one of the objections raised by the defendants was that the plaintiff is a company in voluntary liquidation and that the suit should have been instituted for and on behalf of the company by the Liquidator, whereas it was instituted by an authorised representative. In these circumstances, the plaintiff presented this application seeking to amend the plaint so as to correct the description of the plaintiff both in the cause title and in appropriate paragraphs of the plaint. The defendants opposed this application on the ground that the defences of the defendants would be



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defeated if the amendments are permitted. They further contended that these amendments alter the cause of action.

16. In **Revajeetu Builders**, the Hon'ble Supreme Court formulated criteria on which applications for amendments should be decided. Paragraph 63 of the judgment is as under:

“63. On critically analysing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:

- (1) whether the amendment sought is imperative for proper and effective adjudication of the case;*
- (2) whether the application for amendment is bona fide or mala fide;*
- (3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;*
- (4) refusing amendment would in fact lead to injustice or lead to multiple litigation;*
- (5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and*



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(6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.”

The amendments to the description of the plaintiff in the cause title and in relevant paragraphs of the plaint certainly do not alter the cause of action. Originally, the suit was filed by stating that the plaintiff is represented by an authorised signatory. By this amendment, the plaintiff proposes to change the description and indicate that the Liquidator would represent the plaintiff. In view of the plaintiff being a company in voluntary liquidation, it is appropriate that the plaintiff be represented by the Liquidator and not by an authorized signatory.

17. The plaintiff also seeks an amendment with regard to the website, namely, <http://www.neuberghitech.com/>. In order to justify this amendment, the plaintiff stated that it noticed the impugned website after the suit was filed. While dealing with a request for amendment, it should be borne in mind that a request at the pre-trial stage is granted relatively liberally unless it alters the cause of action or impacts limitation. In the



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context of intellectual property rights, every infringing use creates a fresh cause of action. Therefore, limitation is not a barrier to the institution or prosecution of proceedings provided the infringing use continues. In this case, the defendants do not deny use, but justify use on the ground that the marks are not distinctive and that therefore the use is not infringing. While this amendment is based on substantially the same cause of action, the plaintiff seeks to expand the scope of the suit by also seeking relief in respect of the website or domain name. Therefore, there is limited impact on the cause of action but it certainly does not substantially or fundamentally alter the character of this suit, avoids multiplicity of proceedings and is certainly *bona fide*. Therefore, A.No.2299 of 2022 is liable to be and is hereby allowed. Consequent to both the impleading application and the amendment application being allowed, the plaintiff is permitted to carry out amendments to the plaint on or before 11.08.2022 and serve a copy of the amended plaint on the defendants within a week thereafter.



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18. By Application No.2275 of 2022, the plaintiff seeks permission to exhibit additional documents. These documents are listed in the schedule to the judge's summons. On perusal, the documents include an excel sheet indicating the number of patients who had availed of the plaintiff's services, chartered accountant's certificates, the plaintiff's invoices, the plaintiff's promotional materials, pictures indicating the defendants' continued use of the mark "Hitech", an extract from the defendants' impugned website and the letter of distribution dated 04.06.2022 of the plaintiff's assets. This application is opposed by the defendants on the ground that except the letter of distribution, all the documents were in existence at the time of filing the suit.

19. On the contrary, the plaintiff asserted that the suit was filed hurriedly to seek urgent interim relief and, therefore, these documents could not be filed with the suit. The documents listed at Serial No.3 and 6 to 8 are subsequent to the filing of the suit and, therefore, could not have been filed along with the suit. The other documents are intended to establish the plaintiff's reputation and goodwill. Considering the preliminary stage of the



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suit, where even pleadings are incomplete, I am of the view that the defendants are not prejudiced and that reasonable cause is established. Therefore, the plaintiff is permitted to exhibit these documents subject to the right of the defendants to file an affidavit of admission/denial in respect thereof and raise objections in the course of trial *inter alia* on the grounds of admissibility, relevance and proof.

20. Turning to the applications for interim injunction, at the outset, it bears repetition that the main contestants are two leading players in the medical diagnostics industry, and the applications are in relation to two sets of marks. The primary focus of the applications is the mark "Hitech Diagnostic Centre" in relation to the impugned mark "Neuberg Hitech" and impugned corporate name "Neuberg Hitech Laboratories Private Limited, and this is dealt with first. This mark has been used by the plaintiff from the year 1989. When the plaintiff applied for registration of the word mark in Class 44 on 31.05.2018, objections were raised by the Trade Marks Registry on 30.08.2018 both under Section 9(1)(b) of the Trade Marks Act and under Section 11(1) thereof. In response thereto, by communication dated



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18.09.2018, the plaintiff stated that it was using the mark openly, honestly and continuously without any hindrance or objection from any quarter since 1989. On such basis, the plaintiff asserted that the mark attained distinctiveness as per the proviso to Section 9(1) of the Trade Marks Act. As regards the objection under Section 11(1), the plaintiff stated that the other registered proprietor, Valsamma Varghese, had used the mark since 2003, whereas the plaintiff had used the mark from 1989. This contention was controverted by the defendants by relying upon the plaintiff's reply to the objections of the Trade Marks Registry on 22.08.2019 to the application dated 30.07.2019 for device mark registration in class 42 and 44. In the examination report dated 22.08.2019, the Trade Marks Registry had cited the registration of the label mark "Hitech" in Class 42 by Dr. Sandeep Jain and the application for registration of the mark "Hitech" by Priti Mittal in Class 44. In response thereto, by reply dated 16.09.2019, the plaintiff had pointed out that its mark is a composite mark with the tag line "The Extra Care Lab" and, therefore, distinguishable from the other registered mark containing the words "Hitech". The defendants contended that the statements made by the plaintiff before the Trade Marks Registry operate as



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an estoppel against the applicant and that the plaintiff cannot contend to the contrary before this Court. The impact of these statements on the present applications is considered next.

21. From the search report dated 30.08.2018 and the response thereto on 18.09.2018, it appears that the principal contention of the plaintiff was that the word mark "Hitech Diagnostic Centre" had acquired distinctiveness through pre-registration use from 1989 as per the proviso to Section 9(1) of the Trade Marks Act. The plaintiff also asserted that its use pre-dated use by the prior registrant by at least 14 years. Upon considering these statements, registration was granted. The position taken by the plaintiff now is in consonance with the representation made to the Trade Marks Registry then. Moving to the search report dated 22.08.2019 with regard to the device mark application dated 30.07.2019 and the response thereto dated 16.09.2019; unlike on the previous occasion, the objections of the Trade Marks Registry were only under Section 11 and not under both Sections 9(1) and 11 of the Trade Marks Act. Such objections were on account of the prior registration of the label mark "Hitech" in the name of



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Dr.Sandeep Jain with effect from 19.11.2008 and the application dated 14.02.2013 to register the mark "Hitech" in Class 44 by Priti Mittal. Without doubt, the plaintiff responded by relying on the composite nature of its mark and represented that the mark was distinguishable for that reason. The plaintiff also asserted that the composite mark had acquired a distinctive character. Thus, the plaintiff asserted and claimed distinctiveness through pre-registration use of the word mark "Hitech Diagnostic Centre" in 2018 and distinctiveness of its composite mark in 2019 by emphasising the distinguishing features. Therefore, both these statements should be considered while assessing whether an estoppel operates. Three aspects should be noticed while making such assessment. First, in the latter case, the objections by the Trade Marks Registry are not on the ground of lack of distinctiveness but only on relative grounds. Secondly, use by the prior registrant in both cases is subsequent to 1989 when the plaintiff commenced usage of the mark "Hitech". Thirdly, the plaintiff is seeking protection against defendants who allegedly appropriated its mark dishonestly. While definitive conclusions cannot be drawn at the interlocutory stage on this



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issue, the above aspects lead to the conclusion that interim relief cannot be refused on the ground of prosecution history estoppel.

22. This leads to the question whether, for interlocutory purposes, the element "Hitech" is *prima facie* distinctive. Trademarks have traditionally been classified into four categories, namely, generic, descriptive, suggestive and arbitrary. In the landmark judgment in *Abercrombie & Fitch Company v. Hunting World Incorporated*, 537 F.2d 4 (2d Cir. 1976) (*Abercrombie*), the US Court of Appeals for the Second Circuit held, in relevant part, as under:

“The cases, and in some instances the Lanham Act, identify four different categories of terms with respect to trademark protection. Arrayed in an ascending order which roughly reflects their eligibility to trademark status and the degree of protection accorded, these classes are (1) generic, (2) descriptive, (3) suggestive, (4) arbitrary or fanciful. The lines of demarcation, however, are not always bright...”

In other words, if trademarks are placed in a spectrum, at one end are marks that are ineligible for protection (generic), at the middle are marks that are



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entitled to protection subject to satisfaction of conditions (descriptive) and marks entitled to protection without conditions (suggestive), and at the other end are marks entitled to strong unconditional protection (arbitrary). The placement of a mark on this spectrum is dependent on the product or service to which the mark is applied and, therefore, the exercise cannot be carried out in a vacuum. It is also significant to bear in mind, as held in *Abercrombie*, that “the lines of demarcation...are not always bright.” The definition of a generic term in *Abercrombie* is: “a generic term is one that refers, or has come to be understood as referring, to the genus of which the particular product is a species.”

23. As regards the element "Hitech" in the mark “Hitech Diagnostic Centre”, it is a relatively easy-to-discern fusion of the common words “high technology”. While “high technology” is used in diagnostic services, it certainly cannot be said that high technology is unique to diagnostic services. As pointed out by learned senior counsel for the plaintiff, paragraph 50 of the counter of the defendants also supports this position. Thus, it cannot be said that the word "Hitech" describes the service or even



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the service category. Because the element "Hitech" is not descriptive of the service category or service provided by the applicant, *prima facie* the mark does not appear to be generic. A plea of *publici juris* was also raised by relying on use of the term "Hitech" by others both in health care services and otherwise. In *P.M.Palani Mudaliar & Co v. M/s.Jansons Exports and another*, 2017 SCC Online Mad 1090, a Division Bench of this Court concluded that for a plea of *publici juris* to succeed, the use of the mark by others should be greater than use by the person claiming the right to exclusive use. The Supreme Court instructs that use by others should be substantial to draw a conclusion of *publici juris*. This determination cannot be made at the interlocutory stage although the extent and nature of use by others is a material consideration while deciding whether interim relief should be granted. I now turn to the descriptive or distinctive nature of the element "Hitech".

24. In *Zatarains, Inc. v. Oak Grove Smokehouse* 698 F.2d 786 (*Zatarains*), the US Court of Appeals for the Fifth Circuit formulated four tests to discern if a mark is descriptive: whether the mark has a dictionary



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meaning; whether imagination is required to connect the product or service to the mark and, if so, how much; whether competitors are likely to need the terms used in the mark to describe their product or service; and the extent of use of the term by others to market a similar product or service. If the above tests were to be applied to the element "Hitech" in the plaintiff's mark, when used in relation to diagnostic services, the following tentative conclusions may be drawn. The dictionary meaning of the term "high technology", which is fused in the term "Hitech", is "of/or using high technology". The term thus appears to refer to the deployment of high technology in the provision of services, i.e. the presence of a feature or characteristic that enhances the quality of service. Hence, it does not directly describe the quality of service but refers to a feature that improves the quality of service and this connection may be made without much imagination. While the use of the term as a trademark by other providers of similar services is not necessary, the term may be required to be used at least descriptively by other service providers both in the same field and otherwise. Finally, the *prima facie* evidence on record, in the form of search reports, discloses that a number of other service providers have applied for registration of the mark



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"Hitech" and a list of entities using "Hitech" as part of their corporate name is also on record. When the above aspects are considered cumulatively, it *prima facie* falls within the descriptive and not the suggestive category. As a descriptive mark, it does not have inherent distinctiveness but may acquire distinctiveness through use. Such use may be either at the pre-registration or post registration stage. This leads to the question whether the mark has *prima facie* acquired distinctiveness.

25. In support of the claim of acquired distinctiveness, the plaintiff asserted and adduced evidence of open, honest and continuous use from the year 1989. Section 9(1) of the Trade Marks Act deals with absolute grounds to refuse registration and the proviso thereto, which carves out an exception, is extracted below:

“Provided that a trade mark shall not be refused registration if before the date of application for registration it has acquired a distinctive character as a result of the use made of it or is a well-known trade mark”



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Section 32 deals with distinctiveness acquired post-registration and is as under:

“Protection of registration on ground of distinctiveness in certain cases. -- Where a trade mark is registered in breach of sub-section (1) of section 9, it shall not be declared invalid if, in consequence of the use which has been made of it, it has after registration and before commencement of any legal proceedings challenging the validity of such registration, acquired a distinctive character in relation to the goods and services for which it is registered.”

26. In a recent judgment, *FreeElective Network Private Limited v. Matrimony.com Limited* [C.S.(Comm. Div.) No. 122 of 2021], I examined the acquisition of secondary meaning, including the threshold in such regard, and concluded as under:

“As is evident from the above extract, the Bombay High Court held that the primary meaning should be lost and the expression should have transcended its original connotation to acquire secondary meaning. If this standard were to be applied and tested against the well-known mark



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'Apple', when used in the context of computers, there is sufficient basis to take judicial notice and conclude that the primary meaning of apple as referring to a type of fruit has not been lost. But when the word 'Apple' is used or the device mark is seen in the context of computers, it brings to mind a popular brand of computer and its maker and not the fruit. While undertaking this exercise, it should be noticed that the mark 'Apple', when used for computers, is far removed from its primary meaning. As a rule, the further the distance between the goods or services to which the mark is applied and the primary meaning thereof, the easier it is to acquire secondary meaning. The converse is equally true. For instance, hypothetically, if 'Apple' were a mark used by a retailer of fruit, the acquisition of secondary meaning would be a herculean task. Instead, if it were used by a retailer of groceries, the difficulty would be moderate. Taking another example from the universe of fruits, when the word 'blackberry' is used in the context of mobile phones, it brings to mind the once immensely popular mobile phone, whereas, when used in the context of fruits, jams and the like, the word connotes the fruit. Indeed, even while



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recognising the secondary meaning in context, one continues to be aware of the primary meaning. Thus, I conclude that it is not necessary for the primary meaning to be lost but it is necessary that the primary meaning should be overshadowed in context by the secondary meaning.”

27. Therefore, the test is whether the primary meaning of "Hitech" (that is, High Technology) is overshadowed in context. To put it differently, whether the use of the element “Hitech”, in relation to diagnostic services, brings to the fore the plaintiff and its services by overpowering and pushing to the recesses of one's mind the primary meaning. In order to substantiate the contention that the mark is not distinctive, the defendants relied upon the plaintiff's responses to the examination reports of the trademark registry. In the reply dated 18.09.2018, the plaintiff responded to the objection under Section 9(1)(b) of the Trade Marks Act on the ground that it had used the mark openly, honestly and continuously without any objection from any quarter since 1989. In fact, the plaintiff expressly contended that the mark attained distinctiveness as per the proviso to Section 9(1) of the Trade Marks Act. Learned senior counsel for the plaintiff relied on this reply and



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contended that the use of the mark pre-dated the registration thereof by a number of years and, therefore, the plaintiff is entitled to the benefit of the proviso to Section 9(1). Even in the post-registration period, it was submitted that the mark has been used for at least four years by investing considerable sums in advertising and that the mark had attained a high reputation. Consequently, it was contended by learned senior counsel that the mark has acquired distinctiveness in terms of Section 32 of the Trade Marks Act also.

28. On the contrary, learned senior counsel for the first and second defendants contended that the element "Hitech" is not inherently distinctive and has not acquired distinctiveness through use. Mr.P.S.Raman, learned senior counsel, pointed out that there are several other users both in the medical/pharmaceutical sector and in other sectors. In such circumstances, it was contended that the mark has not attained distinctiveness or a secondary meaning. Mr.P.R.Raman. learned senior counsel, contended that the plaintiff is not entitled to protect the element "Hitech", which is a part of the composite mark "Hitech Diagnostic Centre". For such purpose, Section 17



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of the Trade Marks Act and the judgment of the Division Bench of this Court in ***Patanjali*** was relied upon. It was also contended that a very high threshold should be satisfied for a claim of secondary meaning to be successful.

29. As discussed above, the plaintiff asserts that the element "Hitech" was adopted and put to use by the plaintiff in the year 1989 and the assertion of use for about 33 years since adoption has not been effectively controverted at this juncture. The invoices on record, including the additional documents, *prima facie* evidence use from about 2004. The defendants have also failed to controvert the plaintiff's contention of prior use in comparison to other users. The plaintiff expressly relied upon the proviso to Section 9(1) in its response to the objections raised by the Trade Marks Registry. The question as to whether the use of the term "Hitech" would immediately bring to mind the plaintiff or its services should be tested from the perspective of a consumer or potential consumer of such services. Subject to the caveat that this is a tentative conclusion, which should be revisited in final disposal, if so tested, in my view, *prima facie*,



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the answer would be in the affirmative, within the market in which the plaintiff operates and in relation to which the first defendant recently applied the impugned mark, because of long use and reputation. Another aspect remains to be addressed: since the mark is “Hitech Diagnostic Centre” and not “Hitech”, can protection be claimed for one element or feature of a composite mark? Yes, it can, provided such element is both essential and distinctive. In this case, there is no doubt that the element “Hitech” in the mark “Hitech Diagnostic Centre” is the essential or prominent feature because the other two words are generic or commonly descriptive. While learned senior counsel for the second defendant relied on *Patanjali*, the said judgment dealt with marks applied in relation to dissimilar goods. The plaintiff therein had placed reliance on Section 29(4) of the Trade Marks Act and paragraphs 79 and 80 of the Manupatra Report indicate that the conclusion turned on the particular criteria applicable for such purpose. Even otherwise, if the whole word mark “Hitech Diagnostic Centre” is compared with the impugned mark and corporate name “Neuberg Hitech” and “Neuberg Hitech Laboratories Private Limited”, a *prima facie* case of deceptive similarity is made out especially because the entities carry



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on identical or near-identical businesses. Although learned senior counsel for the first defendant contended that the use of the word “Neuberg” would avert confusion, I am of the *prima facie* view that consumers are likely to be confused or deceived into believing that there is a common origin or trade connection between the service providers. I now focus on an aspect of considerable significance to the decision on the grant of interim relief.

30. It should also be noticed that the plaintiff's assertion that two employees of the plaintiff resigned from its employment and established the second defendant under the trade name "Hitech Advanced Labs" is not denied by the defendants. Thus, it appears that two ex-employees of the plaintiff, without permission or authorisation, appropriated the mark of their ex-employer and applied it to the business established by them. Since these facts are not controverted, they qualify as *prima facie* evidence of dishonest adoption by the first defendant. The second defendant was admittedly acquired by the first defendant and, thereafter, a limited company was incorporated under the corporate name "Neuberg Hitech Laboratories Private Limited", which contains the mark "Hitech". The plaintiff is an



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established diagnostic services company especially in Tamil Nadu and the first defendant cannot and does not assert ignorance of the prior use of the mark “Hitech” by the plaintiff. In addition, the advertisement of the first defendant contained in page 10 of the plaintiff's typed set uses the tagline "நம்ப நியூபெர்க் இப்போ உங்க புது உறடெக் லேப்" which *prima facie* is likely to cause confusion among existing and potential consumers. Considering the above and the admitted fact that the first defendant's adoption of the mark owes its origin to the acquisition of the second defendant, the first defendant's adoption is also *prima facie* not honest. Both *Midas Hygiene Industries Pvt. Ltd. v. Sudhir Bhatia and Ors.*, (2004) 3 SCC 90 and *T.V. Venugopal v. Ushodaya Enterprises Limited* (2011) 4 SCC 85 instruct that an injunction should follow if it appears, either *prima facie* or otherwise, that the adoption of the mark was dishonest. Therefore, a *prima facie* case is made out for the grant of interim relief.

31. The plaintiff approached this Court even before the first defendant inaugurated its first laboratory under the corporate name and



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trademark Neuberg Hitech Laboratories Private Limited. Thus, the plaintiff approached the Court at the earliest point of time and the first defendant has not functioned under the above mentioned corporate name for long. While a change in corporate name requires some lead time, it can be achieved with limited disruption to business. Keeping in mind the above aspects, the balance of convenience tilts in favour of the plaintiff. Undoubtedly, if interim relief is not granted, the loss incurred by the plaintiff cannot be adequately remedied.

32. As stated earlier, there is *prima facie* evidence that the mark "Hitech" has acquired distinctiveness through long use. When coupled with the manner in which such mark was adopted first by the second defendant and thereafter by the first defendant, a case is made out to restrain the defendants from using either the corporate name or trademark. As regards the corporate name, a change in corporate name cannot be effected without initiating corporate actions at the board of directors and shareholder levels and also requires the filing of returns with the Registrar of Companies. In order to provide reasonable lead time to the first defendant to complete the



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above actions, the order of interim injunction, as regards the corporate name, will come into operation two months from the date of receipt of a copy of the order. As regards the use of the mark "Hitech" as a trade mark, the order of interim injunction shall continue in operation with immediate effect. Both with regard to the trademark and corporate name, once effective, the order shall operate until disposal of the suit.

33. The application for relief in respect of the device marks "Nalam Cancer Screen", "Nalam Diacheck 1.0", "Nalam Diacheck 2.0" and "Nalam MHC" remains to be considered. These marks were registered on different dates in the year 2019. At the time of registration, the plaintiff stated that the marks were proposed to be used. Hence, in contrast to the mark "Hitech", which was stated to be used from the year 1989, these marks were proposed to be used as of 19.04.2019. Significantly, the word "Nalam" means health or well being in Tamil. When used in relation to diagnostic services, it clearly refers to the intended purpose or objective of the services. Thus, they are descriptive marks. The use of these marks has been for only about three years. Moreover, the defendants have not used marks



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that are identical or deceptively similar to the composite device marks.

Instead, the defendants have used "Ungal Nalam" as the name for a package of tests. In addition, the defendants have used the expression "Ungal Nalam Engal Poruppu", which is an appropriate and common assertion by any provider of healthcare and related services. In these circumstances, the plaintiff is not entitled to prevent the use of the word "Nalam" except to the limited extent that the defendants should not use marks that are identical or deceptively similar to the registered device marks of the plaintiff. The interim order granted earlier provides protection to that limited extent and such order shall continue to operate until disposal of the suit. The applications for injunction and the applications to vacate the same are disposed of in these terms.

28.07.2022

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SENTHILKUMAR RAMAMOORTHY, J.

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Pre-Delivery Common Order in

Application Nos.1851,1852,1853 1854,
1855, 2275, 2276, 2299 of 2022

and

O.A.Nos.210, 211, 212, 213
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in

Civil Suit(Comm.Div) No.75 of 2022



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SENTHILKUMAR RAMAMOORTHY, J

The matter is listed upon being mentioned by learned counsel for the plaintiff.

2. Learned counsel points out that the amendments could not be carried out on or before 11.08.2022, as directed by order dated 28.07.2022, in view of the objections raised by the Registry to the use of the word 'Liquidator' in the amended plaint instead of the words 'Official Liquidator'. Since the plaintiff is under voluntary liquidation, a liquidator and not an Official Liquidator was appointed. Therefore, it is clarified that the plaintiff is permitted to use the word 'Liquidator' instead of Official Liquidator while carrying out the amendments. In view of the above objection, the amendments could not be carried out within the specified time limit. Therefore, the time for carrying out the amendments is extended until 22.08.2022. It is brought to my notice that the certified copy of the order has not been issued. The Registry is directed to ensure that such certified copy of the order is issued on or before 16.08.2022.

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12.08.2022

SENTHILKUMAR RAMAMOORTHY, J.



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