

H.P.SANDESH	<u>25/09/2021</u>
<p>ORDER ON I.A.NO.1/2020 IN O.S.NO.4/2021 BETWEEN: 1. M/S. YASHRAM LIFESTYLE BRANDS PVT. LTD., A COMPANY DULY INCORPORATED UNDER THE PROVISIONS OF THE INDIAN COMPANIES ACT 1956, HAVING REGISTERED OFFICE AT: 139/2, HOSUR ROAD, KORAMANGALA, BENGALURU-560095. KARNATAKA - INDIA, REPRESENTED BY ITS AUTHORIZED SIGNATORY MS.DEEPA A.KUMAR, MAJOR. 2. MS.DEEPA A. KUMAR, W/O MR. ANIL KUMAR, MAJOR IN AGE, HAVING OFFICE AT 139/2, HOSUR ROAD, KORAMANGALA, BENGALURU-560095, KARNATAKA - INDIA. ... PLAINTIFFS (BY SRI DYAN CHINNAPPA, SR. COUNSEL FOR SRI PRANAV KUMAR, ADVOCATE) AND: M/S. ADITYA BIRLA FASHION AND RETAIL LIMITED (MADURA F AND L DIVISION), A COMPANY REGISTERED UNDER THE PROVISIONS OF THE INDIAN COMPANIES ACT 1956, HAVING REGISTERED OFFICE AT: PIRAMAL AGASTYA CORPORATE PARK, BUILDING A, 4TH AND 5TH FLOOR, UNIT NO.401, 403, 501, 502, LBS ROAD, KURLA MUMBAI, MUMBAI CITY MH- 400070 IN REPRESENTED BY ITS DIRECTOR. ALSO AT: REGENT GATEWAY PLOT NO.5B, DODDANEKUNDI VILLAGE, KIADB INDUSTRIAL AREA, ITPL ROAD, BENGALURU-560048. ALSO AT: KHATA NO.118/110/01, BUILDING 2 DIVYASHREE TECHNOPOLIS, OFF HAL AIRPORT ROAD, YEMALUR POST, BENGALURU-560037 ... DEFENDANT (BY SRI GEORGE JOSEPH, MS.NIDHI PATIL AND MS.MARCHA GOVEAS,</p>	

ADVOCATS) THIS I.A.NO.1/2020 IS FILED UNDER ORDER XXXIX RULES 1 AND 2 OF CPC PRAYING THIS COURT TO GRANT AN AD-INTERIM EX-PARTE TEMPORARY INJUNCTION RESTRAINING THE DEFENDANT, ITS EMPLOYEES, SERVANTS, ASSOCIATES, AGENTS OR ANY PERSON CLAIMING THROUGH THE DEFENDANT FROM USING, MANUFACTURING, MARKETING, OFFERING FOR SALE, SELLING, ADVERTISING ANY PRODUCT, WHICH IS EMBODIED IN PLAINTIFFS' GRANTED PATENT BEARING NO.IN 306901, OR IN ANY MANNER INFRINGING THE PLAINTIFFS' EXCLUSIVE AND STATUTORY RIGHTS CONFERRED IN THE PATENT.

I.A.NO.1/2020 HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 18.08.2021, THIS DAY, THE COURT PRONOUNCED THE FOLLOWING: Order on I.A.No.1/2020 filed under Order XXXIX Rules 1 and 2 of CPC The plaintiffs have filed this application praying this Court to grant an ad-interim ex-parte temporary injunction restraining the defendant, its employees, servants, associates, agents or any person claiming through the defendant from using, manufacturing, marketing, offering for sale, selling, advertising any product, which is embodied in plaintiffs' granted patent bearing No.IN 306901, or in any manner infringing the plaintiffs' exclusive and statutory rights conferred in the patent under the name and style of "Cotton Sensation Stay Dry Period Panty", "Period Panty" and/or under any other name, till the disposal of the suit. 2. In support of the application, an affidavit is sworn to by plaintiff No.2 that she is an authorized signatory of plaintiff No.1. It is further

sworn to that the plaintiffs are seeking for a decree of permanent injunction restraining the defendant from infringing the plaintiffs' Indian granted Patent No.306901 and for other allied reliefs. It is the claim of the plaintiffs that the plaintiffs are being given the exclusive proprietary rights in respect of the said patent, the unauthorized use by the defendant of manufacturing, using, offering for sale, selling the very same product in respect of which plaintiff No.2 was granted a patent, constitutes infringement of plaintiff's proprietary and statutory rights conferred under the Patents Act, 1970 and as a result of the act of infringement, the plaintiffs are suffering irreparable loss and injury. 3. The plaintiffs by innovative product a "Sanitary Undergarment" claimed and granted the patent. The patent application was initially filed in her name and after grant of the patent, the same has been assigned, with retrospective effect, in favour of plaintiff No.1 and hence she is an inventor and grantee of the patent, which is now assigned in favour of plaintiff No.1. The patent is granted for a period of 20 years from 2009 and hence it is in force till 2029. It is also claimed that the patent granted in IN 306901 has 26 granted claims and specifically mentioned in paragraph No.8.1A that a sanitary undergarment having a unique configuration of a fabric body which is depicted in picture 200, which is of one or more layers configured in the crotch region (103). The said fabric body extends from the front portion (101) of the pelvic region to the rear portion (102) of the pelvic region thereby forming an elongated patch covering the crotch region (103). In one of the embodiment granted in IN 306901, at the mid-section of the crotch region (103), an additional layer

is provided and configured in such a manner that it forms a flap to accommodate the sides of an absorbent pad. The said flap forms the first layer (701) over the fabric body (200), which is the second layer (702). Thus, the said fabric body blocks the flow of the body fluid of the wearer outside the said sanitary undergarment and thereby prevents staining of the outer garment on the front and rear part of pelvic region, crotch region and inner thigh regions of the wearer and thereby ensures comfort to the wearer by allowing air permeability. It is contended that upon perusal of the invention granted under the patent, it can be inferred that the sanitary undergarment invented therein is a sanitary undergarment configured in a manner wherein a fabric body is provided on the crotch region of the sanitary undergarment. 4. The plaintiffs have also given the details of the invention patent in pictures both in the plaint and also in the affidavit and details of numbers are also referred in figures how the product has been designed. It is also sworn to that in the month of May 2019, it came to the notice of the plaintiffs that a Company by name M/s. Shappon Haute Private Limited was infringing the plaintiff's patent and the plaintiffs instituted action for such an infringement by filing a suit for patent infringement before this Court and the same is numbered as O.S.No.4347/2019. It is contended that after the institution of the said suit, the plaintiffs learnt about several other manufactures infringing the plaintiffs patent number, but not limited to the defendant herein. The plaintiffs upon learning about the infringing activities of the defendant, conducted market search and was shocked to learn the extent of infringement of the patent. These products

are nothing but a slavish knock off of the plaintiffs' patented product. It is learnt in the month of September 2020 that the defendant is manufacturing, marketing and selling the infringing products. On examination of the products and the patent, described the figures of the product for which patent is granted or present in the products of the defendant mentioning in pictorial description particularly in 100, 101, 101a to 101d, 102, 102a to d, 103, 103a to 103c, 104, 105, 701, 702 and 703. Hence, it is clear that the defendant's products are clearly nothing but the very same invented product for which the plaintiffs have been granted the patent. 5. The plaintiffs were shocked to learn that the defendant was selling certain products by using a similar, same and/or identical mark namely "Cotton Sensation Stay Dry Period Panty". When the plaintiffs looked into the website of the defendant, the plaintiffs were further shocked to see that the defendant was selling certain products claiming to be "Made of cotton and stretch blend, this everyday panty has innovative, leakproof technology at the crotch for those unpredictable spills during the day or night." It is learnt that the defendant is manufacturing and selling a sanitary undergarment as "Cotton Sensation Stay Dry Period Panty" and further claims them to be made of cotton and stretch blend, this everyday panty has innovative, leak proof technology at the crotch for those unpredictable spills during the day or night. 6. It is also contended that upon perusing the defendant's products and description given by the defendant, it is clearly evident that the defendant is unauthorisedly, blatantly and slavishly using and copying the invention claimed and granted in favour of the plaintiffs with

an intent to deceive the public at large. It is contended that upon learning the uniqueness of the product invented by the plaintiffs over which an Indian patent bearing number IN 306901 and US patent have been granted, the defendant with ulterior motive of usurping the hard work of the plaintiffs, has blatantly, fraudulently and with dishonesty has infringed the statutory rights of the plaintiffs granted under the provisions of the Indian Patents Act, 1970. Hence, it is appropriate to restrain the defendant from selling the product in the market. 7. The learned counsel for the plaintiffs in his arguments in support of his contentions raised in the plaint and also in the affidavit mainly contends that the invention over which the said patent was granted relates to a sanitary undergarment, which is used by women during the menstrual cycle. The learned counsel would contend that the undergarment has various designs and fittings, namely, boxer, brief, hipster, bikini and so on. The plaintiff No.2 in her invention has invented a unique undergarment, which provides a comfortable fit to the wearer during the menstrual cycle and further achieves the characteristics like preventing leakage of body fluid through any portion of the sanitary undergarment, preventing staining of an outer garment, being washable and reusable and the defendant has unauthorisedly used the patent of the plaintiffs in its product. 8. The claim of the defendant is that the same is not infringing the plaintiffs' invention since the defendant is not using flaps in the product. It is contended by the defendant that the essence of the invention is not a leak proof product but in creation of flaps for holding the wings of a sanitary pad and there is no novelty in the invention as the same

existed before. The defendant has also sought for revocation of the plaintiffs' patent and hence the plaintiffs are not entitled for temporary injunction. The defendant also contended that the plaintiffs have not commercially exploited the patent. 9. The learned counsel for the plaintiffs in his arguments would vehemently contend that the plaintiffs have made out a prima case, balance of convenience and the plaintiffs are suffering irreparable loss and injury. It is contended that a sanitary undergarment has various designs in terms of fittings. Some of the important designs are a boxer fitting, hipster fitting and brief fitting. The invention claimed in the patent relates to a sanitary undergarment and in spite of the plaintiffs are having the patent, the very conduct of the defendant is causing infringement of the patent right of the plaintiffs. The learned counsel would contend that claim No.1 of the patent relates to a design having certain essential features. When claim No.5 is read along with claim No.1, it can be inferred that the sanitary undergarment claimed under claim 1 is that of a boxer fitting and the pictures, which have been mentioned in the plaint as well as in the affidavit, particularly 101, 102 and 103 i.e., front portion, rear portion and crotch region is multi-layered, which is depicted in picture 701 and 702 and the same is to prevent leakages of menstrual fluid out of the undergarment and staining the outer garment. When claim No.1 is read along with claim Nos.10, 11 and 13, it can be inferred that undergarment claimed therein is that of a design which is not a boxer fit, which is nothing but a hipster or a brief fit. The essential ingredients for hipster fit is also mentioned in the pictures 101, 102 and 103 is multilayer to prevent leakage of

menstrual fluid and staining of outer garment. 10. The learned counsel also brought to the notice of this Court relevant figures of boxer fit and hipster fit and mainly contend that the defendant's product is that of a hipster fit. Upon perusing the defendant's product with that of the granted claims, claim Nos.1, 10, 11 and 13, it can be inferred that all the essential ingredients present in the said claims are present in the defendant's product, thereby infringing the granted patent. The learned counsel also brought to the notice of this Court that similarity is found in the plaintiffs' product and the defendant's product in the crotch region i.e., with multi layer, flaps absent and fabric body consists of three or more layers and particularly in defendant's product four layers. Hence, it is clear that the defendant has infringed the patent of the plaintiffs. 11. The defendant in the written statement at page No.5, paragraph No.10 has admitted that the crotch region of the infringing product is made of four layers, which is nothing but the invention granted in claim No.1, 10, 11 and 13 of the patent. It is contended that while comparing the products, the defendant mischievously, compared the plaintiffs' boxer fit sanitary undergarment with the infringing product, which is a hipster fit and hence the defendant is infringing the suit patent in spite of the plaintiffs have an exclusive statutory right under Section 48 of the Patents Act to prevent third parties from the act of making, using, offering for sale, selling or importing for those purposes that product in India. Hence, it is clear that the statutory right conferred upon the plaintiffs has been violated by the defendant and the same has to be prevented from carrying the acts of the defendant making, using, offering for sale,

selling or importing, in a common market. The plaintiffs have never consented for such use by the defendant. The defendant has not made any investments whatsoever, whether monetary or intellectually, towards research and development of the product over which the invention is granted in favour of the plaintiffs. 12. The learned counsel would vehemently contend that on account of the act of the defendant, the plaintiffs have suffered irreparable loss, harm and injury as a result of infringement by the defendant. The learned counsel would contend that in the written statement specific defence was taken by the defendant for revocation of the patent contending that claim Nos.1 to 26 are not an invention and anticipation through prior publications and hence not patentable by giving 5 US patent numbers. It is also contended that the suit patent lacks inventive steps and the claim specification does not sufficiently and fairly describe the invention and does not clearly define the claims. It is also contended that the patent was obtained on false representations. The plaintiffs have failed to disclose to the Controller the information required under Section 8 of the Patents Act. The patent has not been commercially exploited and these grounds clearly reflects that the plaintiffs have made out a *prima facie* case of infringement and that the defendant has merely stated that the patent is not valid without any substantive evidence and/or a report by a technical expert. 13. The learned counsel would contend that while granting temporary injunction, the Court has to take note of the infringement of the patent i.e., an invention cannot be a mere arrangement or re-arrangement of previously known integers all functioning independently in a known way. These

integers, though all themselves previously known, may be combined in a previously unknown way, acting independently, each of them essential, to produce a new and improved result. Each of the integers must be essential. If anyone can be taken out without affecting the final result, it is not essential. The patent must be read in a purposive manner to determine what constitutes its 'pith and marrow.' While considering the relief of temporary injunction at an interim stage, a Court is not required to examine the validity of a patent so much as its vulnerability and the same has to be tested not on a mere say-so, but with the aid of cogent and persuasive technical and scientific material, including reliable expert opinions and other data. The fact that a patent has been granted is not wholly immaterial at an interim stage. The Court has to look into whether the plaintiffs have made out a *prima facie* case and if any balance of convenience in favour of the plaintiffs and whether the act of the defendant causes infringement of the patent right of the plaintiffs. 14. The learned counsel for the plaintiffs in support of his arguments has relied upon the judgment of High Court of Madras in the case of BAJAJ AUTO LTD. AND OTHERS v. TVS MOTOR COMPANY LTD. reported in MANU/TN/0174/2008 and brought to the notice of this Court paragraph Nos.18, 32, 48 to 51, 54, 55, 61 and 63. In paragraph No.18 it is discussed with regard to while considering the cases of interlocutory injunction, including any patent action, the principle is the same i.e., the plaintiff must prove/show *prima facie* case, balance of convenience and irreparable loss. In paragraph No.32 taken note of that even after the grant of patent under Section 43 of the Patents Act, 1970, which is given effect from the date of filing

of application for the patent under Section 53(1)(i), it is open to a party, who is opposing the patent to prove that there are no inventive step in the invention of a patentee and therefore, the patent granted need not be taken into consideration atleast at the stage of granting an order of interim injunction. 15. In paragraph No.48 discussed in detail with regard to it is the duty of the plaintiff to prove the *prima facie* case, balance of convenience and irreparable injury in the event of not granting interlocutory injunction. It is also discussed with regard to revocation of patent under Section 64 of the Patents Act and mere filing of such an application, presumption should be drawn against the validity of patent. The fact that the patent creates a statutory monopoly, of course, protects the patentee against any unlicensed user of the patented devise enabling the patentee to get an order of injunction, and considering that a patent has been in existence for more than 5 years, the patentee must be treated as actual user and there is a presumption of its validity. The Court also discussed with regard to the question of infringement in paragraph No.51 and held that it is not in much dispute that except the use of three valves, the product which is attempted to be marketed by the respondent is *prima facie* similar to the applicant's patented product. It is also observed that for the purpose of deciding the novel features to constitute "pith and marrow" a purposive construction has to be given in order to make it essential requirement of the invention that any variant would follow outside the monopoly. In paragraph No.61 discussed with regard to test of balance of convenience that the plaintiffs' infringement has to be protected by their patents against completion by the

defendant until those patents expire. 16. The learned counsel also relied upon the judgment of the Apex Court in the case of BISHWANATH PRASAD RADHEY SHYAM v. HINDUSTAN METAL INDUSTRIES reported in MANU/SC/0255/1978 with regard to the intellectual property rights, specification of patent and objectively of tests suggested by authorities, lacked novelty and invention patent. 17. The learned counsel also relied upon the judgment of the Bombay High Court in the case of CTR MANUFACTURING INDUSTRIES LIMITED v. SERGI TRANSFORMER EXPLOSION PREVENTION TECHNOLOGIES PVT. LTD. AND OTHERS reported in MANU/MH/2895/2015 and brought to the notice of this Court paragraph Nos.73, 74 and 81, wherein 'pith and marrow' rule of construction has been discussed. It is held that the Court should look to the 'pith and marrow' of the invention to see whether a patent infringement had occurred. In paragraph No.74 discussed with regard to as casting a duty on the Court to ascertain just what it is over which the patentee claims monopoly i.e., to determining what is essential to the patent, its 'pith and marrow'; and second, to deciding whether the removal of the so-called essential would defeat an infringement claim even if it made no difference to the final result. The general principles are also discussed with regard to the principles one may legitimately draw in a combination patent infringement case listing out the same in 81.1 to 81.9 and observed that at an interim stage, a Court is not required to examine the validity of a patent so much as it is vulnerability; and this is to be tested not on a mere say-so, but with the aid of cogent and persuasive technical and

specific material, including reliable expert opinions and other data. 18. The learned counsel also relied upon the judgment of the Gujarat High Court at Ahmedabad in the case of GALATEA LTD. v. DIYORA AND BHANDERI CORPORATION reported in MANU/GJ/0977/2018, wherein it is discussed with regard to intellectual property rights and infringement when the plaintiff filed an application for grant of temporary injunction on account of infringement suit patent. The Court has to see whether the plaintiff has made out a *prima facie* case for grant of temporary injunction. 19. The learned counsel also brought to the notice of this Court the judgment of the Delhi High Court in the case of STRIX LIMITED v. MAHARAJA APPLIANCES LIMITED reported in MANU/DE/2174/2009 and brought to the notice of this Court paragraph No.10 and 22 wherein it is observed that in order to raise a credible challenge to the validity of a patent, even at an interlocutory stage, the defendant will have to place on record some acceptable scientific material, supported or explained by the evidence of an expert, that the plaintiff's patent is *prima facie* vulnerable to revocation. 20. Per contra, the learned counsel for the defendant would vehemently contend that the case of the plaintiffs is that the patent has 26 granted claims in terms of document No.7 of the plaint. The patent is given for a sanitary undergarment for blocking flow of body fluids outside the sanitary undergarment. Though the patent was applied on 26.05.2009, the same was granted on 06.02.2019. The plaintiff No.2 is an inventor and patent was given for 20 years and plaintiff No.1 is the assignee of the patent. The plaintiffs have continuously used the mark "Period Panty" and the defendant is manufacturing and selling a

sanitary undergarment as "Cotton Sensation Stay Dry Period Panty" and the defendant is selling the very same product in respect of which the patent has been granted in favour of the plaintiffs and as a result, the act of the defendant constitutes the infringement of the plaintiffs' rights under the Patents Act, 1970. 21. The learned counsel for the defendant would contend that the product sold by the defendant is a distinct and different product from the plaintiffs' patent and hence there cannot be any infringement. The essence of the plaintiffs' invention as highlighted by the plaintiffs is not in the creation of a leakproof product, but in the creation of flaps which allows the wings of a sanitary pad to be folded inwardly thereby preventing chafing and staining. The defendant's product does not have any flaps. There is absolutely no novelty or invention in the plaintiffs' patent. Similar products have been patented/manufactured/sold for many decades. Similar products are also being manufactured/sold by various companies across the world including India. The learned counsel would contend that the defendant has sought for revocation of the plaintiffs' patent by filing a counter-claim under the proviso to Section 104 read with Section 64 of the Act. The plaintiffs' patent is liable to be revoked under Section 64 of the Act on various grounds. Hence, the plaintiffs are not entitled to an order of temporary injunction as the validity of the patent is seriously disputed. 22. The learned counsel would contend that the defendant has been selling the product since 2018. The patent was granted on 06.02.2019. The patent is relatively new and unestablished. The learned counsel would contend that while granting the temporary injunction, the plaintiffs have to

establish prima facie case and balance of convenience but balance of convenience lies in favour of the defendant because if the defendant is prevented from selling the product, it would lose out on its market share and the sales momentum it could achieve in the interregnum. This loss cannot be accounted for or calculated. Irreparable hardship will be caused to the defendant if the interim order continues to operate as the defendant has spent time, effort and money in marketing its product and establishing the same in the market. If injunction is not granted, no hardship will be caused to the plaintiffs. 23. The learned counsel would contend that no prima facie case is made out by the plaintiffs. The impugned patent and defendant's product are distinct. The plaintiffs' patent essential integers is the fabric body (200) of the patent consists of three layers; absorbent layer, laminate layer and fabric layer. But in the case of defendant's it is different from plaintiffs' patent. The basic fabric body of the product consists of only one layer. It is only in the crotch portion that there are four layers i.e., wicking layer using MW Tech cotton; absorbent layer which uses the moisture absorbent cotton; leakproof layer and body fabric. In the case of plaintiffs' patent, crotch portion of the patent consists of two additional layers to create flaps to hold the absorbent pad in position which allows the wings of the absorbent pad to be folded inwardly thereby preventing chafing. No such flaps are provided in the product of the defendant. In the plaintiffs' product, the description of the fabric or material used is vague and does not specify the exact material used. But in the case of defendant's product, the body fabric is made of a cotton stretch blend using 96% cotton and 4% spandex. The crotch

portion consists of three additional layers apart from the body fabric. 24. The learned counsel would contend that an important aspect is that the patent is for a boxer brief design in terms of document No.7 of the plaint. While the plaintiffs' patented product and the defendant's product are both hipster designs. The defendant's product and the photos capturing the same are produced as document No.D24 and D25. A comparison chart has been provided by the defendant as document No.11. Hence, it makes it abundantly clear that the products are distinct and there is no infringement. The learned counsel would contend that the plaintiffs' patent claims as against others it can be seen that they point out the differences between their claims and differentiate between three and four layers, so as to demonstrate that their claims are different from existing patented products. The plaintiffs amend their claims to highlight the subtle differences such as – layers, material used, manner of stitching and unless the defendant's product is a replica of the plaintiffs' product, there cannot be any infringement. The learned counsel would contend that no valid assignment created in favour of plaintiff No.1 and no locus standi to file the suit. The learned counsel would contend that grant of patent is not a guarantee of its validity. 25. The learned counsel in support of his contentions relied upon the judgment of the Apex Court in the case of M/S. BISHWANATH PRASAD RADHEY SHYAM v. HINDUSTAN METAL INDUSTRIES reported in (1979) 2 SCC 511 and brought to the notice of this Court paragraph No.32, wherein the Apex Court held that grant and selling of the patent, or the decision rendered by the Controller in the case of opposition, does not guarantee

the validity of the patent, which can be challenged before the High Court on various grounds in revocation or infringement proceedings. The learned counsel would submit that in the case on hand also the defendant has raised the counter-claim for revocation of the patent. 26. The learned counsel also relied upon the Delhi High Court judgment in the case of F. HOFFMANN – LA ROCHE LTD. AND ANOTHER v. CIPLA LIMITED reported in 2008 SCC Online Delhi 382 and brought to the notice of this Court paragraph No.67 wherein it is held that in several judgments in India, including judgments of this Court, it has been consistently held that where the patent is of recent origin and its validity has not been tested, the Courts should not grant injunctions where infringement is alleged; it has also been held that if the defendant alleges that the patent cannot be sustained, the injunction should be refused. 27. The learned counsel also relied upon the judgment in the case of 3M INNOVATIVE PROPERTIES COMPANY AND ANOTHER v. M/S. VENUS SAFETY AND HEALTH PVT. LTD. AND ANOTHER reported in 2014 SCC Online Delhi 3362 and brought to the notice of this Court paragraph No.32 wherein it is held that from the reading of the judgments of Bishwanath Prasad (supra) passed by the Supreme Court and Hoffman (supra) of this Court, it is clear that there is no presumption of the validity attached to the patent. The scheme of the Act clearly permits to raise the challenge to the patent by the defendant in an infringement proceedings filed by the plaintiff before the Court. 28. The learned counsel would contend that burden to prove infringement is on the plaintiffs and they have to discharge the same under Section 104-A(1) of the Act which prescribes that the

burden of proof in cases of suits concerning infringement is primarily on the patentee deriving title or interest in the patent to prove that the infringing product is identical to the patent. The plaintiffs have failed to *prima facie* prove that the defendant is using the same product that is patented. The learned counsel contends that the defendant has made counter claim that impugned patent is liable to be revoked since the subject of claims 1 to 26 is not an invention within the meaning of the Act. 29. The learned counsel would also contend that claim Nos.1 to 26 does not involve any inventive step and also claim specification does not contain sufficient details to enable a person to work the invention as required under Section 64(1)(h) of the Act. The learned counsel would contend that patent was obtained on false representations by misleading the Controller and the plaintiffs have failed to abide by the mandatory disclosures under Section 8(1)(a) of the Act. The learned counsel would contend that the matter involves serious questions to be tried and cannot be decided at an interlocutory stage and there is no balance of convenience in favour of the plaintiffs and if injunction is continued, defendant will suffer loss and the same cannot be compensated in any terms but the plaintiffs are claiming monopoly over 'Period Panties' which is a generic term used to describe a range of underwear and pending revocation proceedings, there cannot be any interim order in favour of the plaintiffs. 30. The learned counsel also relied upon the judgment of the Madras High Court in the case of TVS MOTOR COMPANY LIMITED v. BAJAJ AUTO LIMITED reported in 2009 (3) CTC 178 and brought to the notice of this Court paragraph Nos.59, 60, 61, 82, 84, 85 and

86. It is held that infringement suit and principles relating to grant of injunction and *prima facie* validity of registered patent, there must be a strong *prima facie* case, balance of convenience and irreparable injury are to be considered in injunction application in intellectual property cases also. The plaintiff must show *prima facie* validity of patent and establish *prima facie* infringement. The Court must consider strength of case of plaintiff and strength of case of defendant and should be slow in granting injunction where revocation application is pending and serious controversy exist regarding invention. No presumption can be drawn as to validity of patent and patent should be construed in such manner that construction which would make patent valid should be preferred. The Court should find out whether infringement has taken substance of invention ignoring omission or addition of certain parts. 31. The learned counsel also relied upon the judgment of the Delhi High Court in the case of SANDEEP JAIDKA v. MUKESH MITTAL AND ANOTHER reported in 2014 SCC Online Delhi 2970 and brought to the notice of this Court paragraph Nos.20, 24 to 32 and 36 to 43 wherein it is held that in a case of injunction with regard to infringement of registered patent, it is the case of the plaintiff that the defendants are wilfully infringing that said patent i.e. by introducing in their 4D theatre a device/system which produces aromatic/heating, cooling and other effects corresponding to the scene appearing in a movie. No *prima facie* case is made out by the plaintiff to grant injunction as prayed for. It is further observed that if an injunction order is passed at this stage, the same would be far greater than the plaintiff whose device/product has not been

commercially used so far. The balance of convenience is in favour of the defendants. 32. The learned counsel referring this judgment would contend that the said judgment is aptly applicable to the case on hand with regard to the principles governing the grant of injunction in cases of infringement of patent. 33. The learned counsel also relied upon the judgment of Delhi High Court in the case of VRINGO INFRASTRUCTURE INC. AND ANOTHER v. INDIAMART INTERMESH LTD. AND OTHERS reported in 2014 SCC Online Del 3970 and brought to the notice of this Court paragraph No.22 wherein it is held that onus is on the plaintiff to show that the infringer is using the same technology that is patented by them. The comparison *prima facie*, at this stage, cannot be done by the Court as it essentially involves scientific evidence which needs great deal of specialized knowledge in telecommunications and experience as to how cell phone technology functions. This can be opined by an expert, who has experience in the field of telecommunication and help the Court in understanding the patent. 34. The learned counsel also relied upon the judgment in the case of M/S. NIKI TASHA INDIA PVT. LTD. v. M/S. FARIDABAD GAS GADGETS PVT.LTD. reported in 1984 SCC Online Delhi 73 and brought to the notice of this Court paragraph Nos.8 to 12 and 25 wherein it is held that an interlocutory injunction will not normally be granted where damages will provide an adequate remedy should the claim succeed and the question is whether the plaintiffs have made out a *prima facie* case for the grant of temporary injunction has to be considered. 35. Having heard the learned counsel for the plaintiffs and the learned counsel for the defendant, the points that

arise for the consideration of this Court are: (i) Whether the plaintiffs have made out a *prima facie* case to grant the temporary injunction against the defendant? (ii) Whether the balance of convenience is in favour of the plaintiffs to grant the interim injunction? (iii) Whether there is any irreparable hardship, if interim order is not granted in favour of the plaintiffs? (iv) What order? Point Nos.(i) to (iii): 36. Having heard the respective counsel appearing for the parties and also the principles laid down in the judgments referred supra, this court has to analyse the material available on record to come to the conclusion that whether it is a fit case to grant an order of temporary injunction in favour of the plaintiffs. On this background, this Court also has to analyse the fact that if the temporary injunction is granted in favour of the plaintiffs, whether it causes inconvenience and hardship to the plaintiffs or the defendant and also whether the plaintiffs have made out a *prima facie* case to grant an order of temporary injunction. 37. It is the case of the second plaintiff that she is the inventor and granted a patent in respect of her invention bearing No.IN306901. In support of the said contention, she has produced the Document No.4. It is also the case of the second plaintiff that she has assigned her rights in favour of the first plaintiff. It is also not in dispute that the second plaintiff applied for the patent in respect of her invention on 26th May 2009 and the same was granted on 6th February 2019. It is also the contention of the plaintiffs that the invention upon which the said patent was granted has 26 claims. The same was granted relates to a sanitary undergarment which is used by the women during the menstrual cycle. It is the claim of the plaintiffs that their invention regarding

sanitary undergarment has various designs and fittings namely, Boxer, Hipster, Brief and Bikini. It is the further claim of the plaintiffs that the second plaintiff's invention is in respect of inventing a unique undergarment which provides a comfortable fit to the wearer during the menstrual cycle and further achieves the characteristics like preventing leakage of body fluid through any portion of the sanitary undergarment, preventing staining of an outer garment, being washable and reusable. It is also the claim of the plaintiffs that the sanitary undergarment which is designed to prevent leakages of menstrual fluid and the specification figures also narrated in the plaint as well as in the affidavit filed in support of the application seeking for the relief of temporary injunction. 38. On the other hand, it is the contention of the defendant that the product of the defendant is not infringing the plaintiffs' invention and in the defendant's product, there is no flaps. It is also the contention of the defendant that the essence of the invention is not in the creation of leak-proof product but in creation of flaps for holding the wings of a sanitary pad. It is also further contention that there is no novelty in the invention as the same is existed before. The defendant contends that it also made the counter claim to revoke the plaintiffs' patent. 39. The main contention of the plaintiffs is that they have made out a *prima facie* case in their favour and also the balance of convenience lies in their favour. To substantiate their contention, they have produced some of the important designs like boxer fitting, hipster fitting and brief fitting. The main invention of the aforesaid designs is with regard to blocking the body fluid outside the sanitary undergarment preventing

staining of the outer garment and preventing chafing at the inner thigh region. The said problems are solved by the plaintiffs by an invention providing a sanitary undergarment having the essential ingredients particularly, in respect of claims No.1, 5, 10, 11 and 13 along with the complete specification and the same has been explained in the different pictures as narrated in the plaint and also in the affidavit. The plaintiffs also explained the same in picture No.101 in respect of a front portion, picture No.102 in respect of a rear portion and picture No.103 with regard to the crotch region.

40. The plaintiffs also brought to the notice of this Court in respect of the crotch region which is explained in picture No.103 having multi-layered and the same is to prevent leakages of menstrual fluid out of the undergarment and staining the outer garment. The picture Nos.701 and 702 also show the said aspect. In support of the claims No.1, 10, 11 and 13, it is contended that the undergarment claimed therein is that of a design which is not a boxer fit, which is nothing but a hipster or a brief fit. The same is also explained in the pictures with regard to the hipster fit and also the boxer fit. The contention of the plaintiffs that the defendant's product is that of a hipster fit. Upon perusing the defendant's product with that of the granted claims in claims No.1, 10, 11 and 13, it can be inferred that all the essential ingredients present in the said claims are present in the defendant's product which amounts to infringing the patent granted in favour of the plaintiffs. 41. On the other hand, it is the contention of the defendant that the defendant's product is different from the product of the plaintiffs. The essential ingredients of the plaintiffs' product is of the fabric body consists of

three or more layers and in the case of defendant's product, the basic fabric body of the product consists only one layer and in the crotch region, there are four layers. But no flaps in the product of the defendant and hence, the same is distinct. The body fabric is made of cotton stretch blend using 96% cotton and 4% spandex. The crotch portion consists of three additional layers apart from the body fabric and description of the fabric used in the product by the plaintiffs is vague and does not specify the exact material used. Hence, it does not amounts to any infringement but the product of the plaintiffs and the defendant are hipster in design. When such being the case, the defendant's product makes it clear that the same are distinct and there is no infringement. 42. After considering the contentions of the respective counsel and perusal of the material available on record this Court has comes to the conclusion that both the parties are selling the undergarments. The plaintiffs' patent is with regard to the period panty and the same is invented by the second plaintiff and thereafter the right has been assigned to the first plaintiff. On the other hand, the defendant has marketed the product that is a sanitary undergarment has cotton sensation stay dry period panty. Hence, it is clear that the product of the plaintiffs and also the product of the defendant are in respect of period panty. It is also not in dispute that the plaintiffs' product having the specification of different layers, various designs and fittings like boxer, brief, hipster and bikini. It is the specific claim of the second plaintiff that in her invention, she has invented a unique undergarment which provides a comfortable fit to the wearer during the menstrual cycle and further achieves the characteristics like

preventing leakage of body fluid through any portion of the sanitary undergarment, preventing staining of an outer garment. 43. Now, the question is whether any specific invention and novelty are made out by the plaintiffs. It is the contention of the defendant that there is no invention and novelty and the same was in existence prior to bringing the plaintiffs' product into the market and the defendant is also made the counter claim for revocation of the patent. Whether there is an invention or novelty and also the question of revocation of the patent needs a trial and the same has to be proved scientifically. While considering the case on hand for granting the temporary injunction and the same cannot be adjudicated at this stage. If the defendant is marketed the very same product giving different name, it causes hardship to the plaintiffs and balance of convenience would be the consideration for granting temporary injunction. No doubt, in the defendant's product, there is no flaps as contended by the defendant but the other aspects with regard to the designs and fittings, are similar. But only in the absence of flaps it will not make the same as distinct product. 44. The similarity is found with regard to the claim No.1 of the patent a design having certain essential features and also claim No.5 is read along with claim No.1, it can be inferred that sanitary undergarment is that of a boxer fitting. The other claim is read along with the claim Nos.10, 11 and 13, it cannot be inferred that undergarment claim therein is that of a design which is not a boxer fitting which is nothing but a hipster fitting and except the flaps, the product of the plaintiffs and the defendant are quite similar. It is also noted that the crotch region is multi-layered and the same is made with an

intention to prevent the leakages of body fluid through any portion of the sanitary undergarment and staining of an outer garment. 45. No doubt, the very contention of the defendant is that the product of the defendant is distinct and there is no any infringement and also the said product was existed prior to the plaintiffs' product. The defendant also does not dispute the fact that the plaintiffs' product consists of a fabric body of three layers but it is the contention of the defendant that its product is consists of only one layer. It is only in the crotch portion, there are four layers. But the fact that there are three layers and four layers in the product of the plaintiffs and the defendant is not in dispute. Similarly, the product of the plaintiffs and the defendant is not in dispute except the fact that the flaps are not provided in the product of the defendant. The crotch portion of the product of the plaintiffs consists of two additional layers to create flaps to hold the absorbent pad in position which allows the wings of the absorbent pad to be folded inwardly thereby preventing chafing. But only the contention of the defendant is that body fabric is made of a cotton stretch blend using 96% cotton and 4% spandex makes no difference if fabric is used is different and the same will not makes out any distinct features in the product. 46. Having considered the products of the plaintiffs and the defendant except the flaps, all the specifications and designs are similar and also the said product is manufactured in order to give protection during the menstrual cycle preventing leakage of the fluid but having the similar specifications. When such being the case, if the product of the defendant is marketed, it causes hardship to the plaintiffs and hence, there is a balance of convenience lies in favour

of the plaintiffs since, the plaintiffs in the year 2009 itself sought for a patent with the specification in respect of the period panty. No doubt, the same was given in the year 2019. But the fact is that the defendant also marketed the very same product recently. The contention of the defendant is that there is no invention and novelty in the product of the plaintiffs and also sought for revocation of the patent given in favour of the plaintiffs. The further contention of the defendant that the patent had obtained by misrepresentation and it is not an invention and all these aspects has to be considered only after recording the evidence and it needs a trial. 47. No doubt, the defendant also invoked Sections 104 and 64 of the Patent Act, 1970 for revoking the patent given in favour of the plaintiff. The same cannot be adjudicated at this stage. The Court has to only look into whether the plaintiffs have made out a *prima facie* case and whether there is balance of convenience lies in favour of the plaintiffs. It is the specific case of the plaintiffs that a sanitary undergarment having various designs in terms of fittings and some of the important designs are boxer fitting, hipster fitting and brief fitting which was invented by the second plaintiff having 26 claims in the patent of the plaintiff and similar designs and fittings are made by the defendant which causes infringement to the statutory right given to the plaintiffs. When the defendant's product is also having the similar specification particularly, in respect of the claim Nos.1, 5, 10, 11 and 13, it cannot be contended that the said product is distinct and different from the plaintiffs' product. 48. Having considered the material available on record and also the pictures which have been shown both in boxer fitting and hipster fitting, specifically

in pictures No.10, 102, 103, 701, 702, 703 and also taking note of multi-layered specifications and all the essential ingredients present in the plaintiffs' patent. The claim of the plaintiffs are found similarity in the product of the defendant which amounts to infringing the statutory right granted in favour of the plaintiffs under the patent. Crotch region in the plaintiffs' product also which is mentioned in pictures No.103, 701 and 702 also present in the defendant's product. In the crotch region, except the flaps, the fabric body consists of three of more layers in the plaintiffs' product and four layers in the defendant's product. When such similarities are found in the product of the defendant and the plaintiffs having the patent from the year 2009 and granted in the year 2019, it affects the statutory right of the patent of the plaintiffs. The defendant also did not dispute the fact that the crotch region of the defendant's product is also having the layer which is made of four layers and when such being the case, the very contention of the defendant is that it is not an invention, cannot be accepted at this stage. 49. Comparing the products of the defendant particularly in respect of the plaintiffs' boxer fitting sanitary undergarments which infringes the statutory right of the plaintiffs in respect of the hipster fitting also. When the defendant marketed the similar product, it is evident that it amounts to infringing the right of the plaintiffs. It is the specific contention of the plaintiff that they are having an exclusive statutory right under Section 48 of the Patent Act, 1970 and it is necessary to prevent the third parties from making, using, offering the sale of the similar product without the consent and authorization from the plaintiffs, it amounts to infringing the right

of the plaintiffs. No doubt, the principles laid down in the judgments referred supra, it is clear that the Court should be very slow in granting the temporary injunction but when the material placed before the Court *prima facie* evident that a patent right is infringed by the defendant marketing the similar type of sanitary undergarment giving any different name using different fabric body amounts to an infringement. Under the circumstances, the Court has to see the *prima facie* case and balance of convenience and causing hardship to invoke the discretion. 50. The principles laid down in the judgments referred supra and the submission of both the plaintiffs and the defendant's counsel, it is clear that unless a *prima facie* case is made out infringing the right of the plaintiffs, there cannot be any temporary injunction. But as already discussed above in detail with regard to the product which are marketed by the plaintiffs as well as the defendant and when the second plaintiff has invented the same with an object to prevent the leakage of body fluid during the menstrual cycle and the same is brought in the market, the same product cannot be marketed by the defendant. If the said act of the defendant is accepted, it amounts to infringement as held by the Apex Court as well as the High Courts particularly, Delhi and Madras High Courts. The principles with regard to granting of temporary injunction is one and the same, they have to make out a *prima facie* case, balance of convenience and take note of the hardship. 51. Having considered the case of the plaintiffs, the plaintiffs have made out a *prima facie* case and there is a balance of convenience lies in their favour and if infringement is not prevented, it causes hardship to the plaintiffs since the plaintiffs invented the said product and

brought the same into the market making huge investment and the plaintiffs have not given any authorization to the defendant to similarly place the period panty in the market. 52. The very contention of the defendant that such product was existed prior to the patent of the plaintiff cannot be accepted at this juncture and it requires a trial both in respect of the contention of the invention and also the grounds urged in the written statement with regard to the revocation of the patent of the plaintiffs. Admittedly, there is a patent in favour of the plaintiffs and the same was applied in the year 2009 and granted in the year 2019. Under the circumstances, I do not find any force in the contention of the defendant that its product is distinct and different from the plaintiffs' product exclusively. The product of the defendant is having similar claims and similar specifications comparing to the product of the plaintiffs. Merely because of absence of flaps, it will not make it as distinct and different product. If temporary injunction is granted, it will not cause any hardship to the defendant or otherwise it amounts to causing hardship to the plaintiffs and balance of convenience is in favour of the plaintiffs. Under the circumstances, I am of the opinion that the plaintiffs have made out a case to grant the temporary injunction and ad-interim temporary injunction is already granted and the same is in force, hence, this Court only has to make it as absolute instead of vacating the ad-interim temporary injunction granted in favour of the plaintiffs. Point No.(iv): 53. In view of the discussions made above, I pass the following ORDER The application filed by the plaintiffs under Order XXXIX Rules 1 and 2 of CPC is allowed and the temporary injunction granted earlier is made as absolute.

