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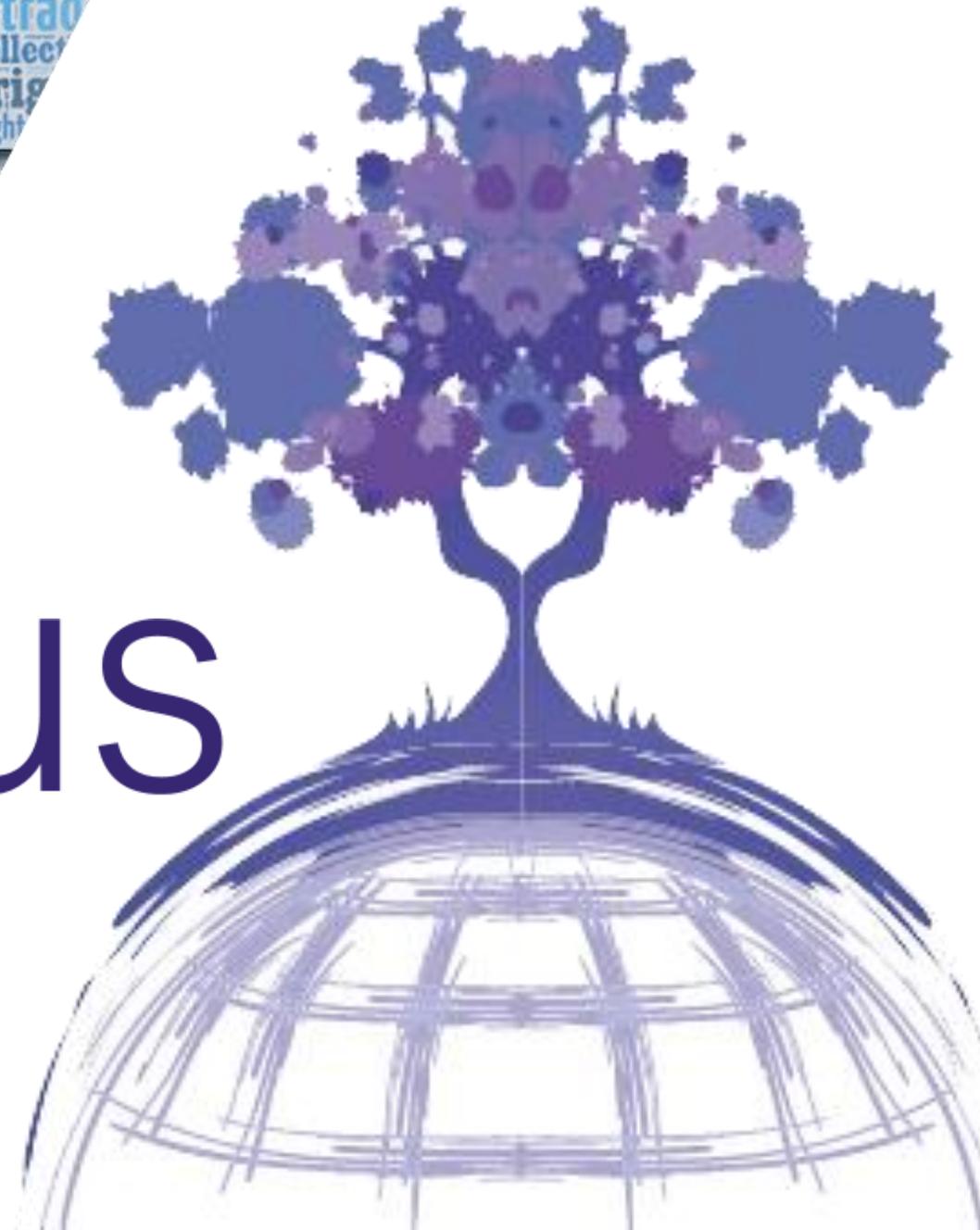


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# Table of Contents

<b>Article .....</b>	<b>3</b>
A ray of hope: Delhi High Court allows amending method claims to product claims.....	4
<b>Ratio Decidendi .....</b>	<b>8</b>
<b>News Nuggets.....</b>	<b>12</b>





# Article

## **A ray of hope: Delhi High Court allows amending method claims to product claims**

*By Swati Upadhyay and Dr. Prosenjit Chattopadhyay*

The article in this issue of IPR Amicus discusses a recent landmark Judgement passed by the Delhi High Court in the matter of *Allergan Inc v. The Controller of Patents*. With this judgement, the Court has allowed the amendments made by the Appellant for converting the method of treatment claims to product claims. Capturing the facts of the case, the appeal proceedings, and the decision including the essence of the order, the authors conclude that the present order will serve to be a significant milestone in the history of patent prosecution in India. They observe that the present decision and the one earlier decided in 2022 have relied on the Ayyangar Committee report and stated that the intention of the report was to allow wider permissibility in claim amendments before the grant. According to the authors, the decision will open gates for several aspiring applicants who wish to obtain a patent in India for their exceptional and important inventions but are barred by the fences of Section 59 of the Patents Act, 1970. They also state that it is important that the scope of the amendments is comprehended within the subject matter as disclosed in the as-filed specification.

# A ray of hope: Delhi High Court allows amending method claims to product claims

By Swati Upadhyay and Dr. Prosenjit Chattopadhyay

Sections 57 and 59 of the Patents Act 1970 (**'Act'**) which govern the amendments in the specification and claims of a patent Application, have always garnered attention. There have been multiple decisions of the erstwhile Intellectual Property Appellate Board (**'IPAB'**) and the High Courts of India, with respect to these provisions. However, there had remained a need for further clarification.

Earlier, the Delhi High Court had passed an important judgement in the matter of *Nippon A and L Inc. v. The Controller of Patents*<sup>1</sup>, whereby the Court allowed the conversion of product-by-process claims to process claims without attracting Section 59 of the Act. Now, the landmark Judgement passed by the Delhi High Court in the matter of *Allergan Inc v. The Controller of Patents*<sup>2</sup> (Order dated 20 January 2023) provides the additional much-needed clarity in these provisions. With this judgement, the Court has allowed the amendments made by Allergan Inc., for converting the method of treatment claims to product claims. The prosecution of the case as well as the essence of the order have been captured in the paragraphs that follow.

## Facts of the case:

Allergan Inc. (**'Appellant'**) filed the national phase Application 7039/DELNP/2012 titled 'INTRACAMERAL SUSTAINED RELEASE

THERAPEUTIC AGENT IMPLANTS' at the IPO. The original claims 1-20 of the Application recited a method for treating an ocular condition which, among other steps, comprises a step of implanting biodegradable sustained release implants to the eye. In the First Examination Report (**'FER'**), the Controller of the Patent Office (**'Controller'**), among other objections, objected to the claims under the provisions of Section 3(i) of the Act stating that the subject matter of the claims relates to the method of treatment of human beings/animals. In response to this objection, the Appellant amended the original method claims to product claims, reciting 'an intracameral implant'. The response to the FER was submitted along with the reduced amended set of claims 1-5. After reviewing the amendments and arguments made by the Appellant, the Hearing Notice was issued, wherein among other objections, the Controller objected to the amended claims under Section 59 of the Act. Essentially, the Controller asserted that the amended claims reciting 'an intracameral implant' were lacking support from the originally filed claims (i.e., as filed claims in PCT Application) and further, were not claimed in the corresponding PCT Application or while entering the national phase, and therefore, such claims cannot be allowed. Subsequent to the hearing and submissions, the Application was refused by the Controller on the premise that the amended claims as submitted by the Appellant are not allowable under Section 59 of the Act. It is also pertinent to note that the

<sup>1</sup> *Nippon A And L Inc. v. The Controller of Patents*, 2022 SCC OnLine Del 1909

<sup>2</sup> *Allergan Inc v. The Controller of Patents*, 2023 SCC OnLine Del 295

impugned order explicitly stated that due to the objection maintained under Section 59 of the Act, *'there is no need to discuss the rest of the objections/sections with respect to the hearing notice for the present invention'*.

## The appeal proceeding:

Being aggrieved by the refusal order of the Controller, the Appellant filed an appeal before the Delhi High Court. The following paragraphs capture the catena of arguments and case law furthered by the learned counsels on behalf of the Appellant and the Respondent.

During the appeal proceeding, the Respondent submitted that the refusal of the Controller was strictly based on the statutes of the Act. Referring to Section 59 of the Act, the Respondent highlighted that the provision only provides for amendment of claims if the scope of the amended claim falls within the scope of the pre-amended claims of a patent application. Further, the Respondent clarified that any amendment made in the claims, must be explicitly supported by the pre-amended claims (in the present case, the as-filed claims submitted with the PCT Application). The Respondents further submitted that since the claims reciting 'Implants' as products were not a part of the as-filed claims, amending the original method claims to recite 'Implants' is in contravention of Section 59 of the Act. The Respondent interpreted Section 59 of the Act to envisage two different types of amendments, viz., amendment in the specification and amendment in the claims. The Respondent contended that while evaluating the amendments in the claims, the consideration of the specification is immaterial and only the originally filed claims should be considered. Further, the Respondent, while relying on Section 10(4) of the Act, argued that Section 10(4)(c) of the Act envisages that the ending of the complete specification with the actual

claim or claims define the scope of the invention, thus, concluding that claims are only a part of the complete specification and cannot be equated with the complete specification. The order issued in the case of *Nippon A and L Inc. v. Controller of Patents* (paragraph 40) was also discussed by the Respondent to strengthen the abovementioned legal position.

The Appellant, in view of the impugned order, submitted that the Controller was incorrect in holding the Appellant at fault for (1) including the 'Implant' claims in the originally filed claims, which were lacking support and (2) not including 'Implant' claims while entering the national phase in India. For the former part of the alleged rejection, it was explained that the reason that the Appellant has sought protection for the method of treatment in the originally filed claims was because such claims are allowed by the United States Patent and Trademark Office (hereinafter 'USPTO'). For the latter part of the alleged rejection, reference was made to Section 138(4) of the Act, which mandates that an application in India shall be filed with title, description, claim, abstract and drawings *as-filed in the international Application*. What the Appellant pointed out in this line of argument was that, since a PCT Application is always filed in multiple jurisdictions, it is impractical, rather impossible, to expect that the original claims will comply with the patentability requirement of all jurisdictions worldwide.

With regards to complying with the requirements of Section 59 of the Act, the Appellant provided that the aspect of the 'Implant' is well noted in the original as-filed claims, which essentially claims for the method of treating ocular deficiencies using such implants. The aspect of the 'Implants', their constitution and composition have been well explained in the as-filed specification across 60 paragraphs out of a total of 97 paragraphs. The claims reciting 'Implants' are well supported by the as-filed specification, and the scope of the claims is not broadened or

expanded by said amendments. The Appellant concluded their arguments by stating that since the amendments in the claims do not go beyond the disclosure of the as-filed specification and are well supported by the specification, the same should be allowed under Section 59 of the Act.

## The decision:

After hearing both parties exhaustively, the Court concluded that the amendments made by the Applicant in the original claims, i.e., amendment of the method of treatment claims to product (Implant) claims should be allowed under the Act. The important observations of the Court in the judgement are listed below:

1. The main question of law before the Court was to adjudicate upon the interpretation and boundaries of Section 59 of the Act. For the interpretation of the said Section, the Court referred to the decisions made in *Shailesh Dhairyawan v. Mohan Balkrishna Lulla*<sup>3</sup>, *Richa Mishra v. State of Chhatisgarh*<sup>4</sup> and, most recently, *X v. Principal Secretary, Health & Family Welfare Department, GNCTD*<sup>5</sup>. These decisions clarified that literal construction with faithful adherence to the plain words of the statute is no longer the golden rule of interpretation, and this gives way to the principle of purposive interpretation. Referring further to *Bishwanath Prasad Radhey Shyam v. Hindustan Metal Industries*<sup>6</sup>, the Court reaffirmed that '*the object of patent law is to encourage scientific research, new technology and industrial progress*'. The Court expressly noted

that interpreting the sections of the Act in a way that it renders a *possibly inventive invention as non-patentable* will be against the very purpose of the Act.

2. For the boundary and scope of Section 59 of the Act, the Court placed reliance on the order issued for *Nippon A and L Inc. v. Controller of Patents*, which further cites the erstwhile IPAB's order in the matter of *Tony Mon George v. The Controller General of Patents, Designs & Trademarks*<sup>7</sup>, which noted that if the claims, post amendment, define the features of the invention for clarification or disclaim the earlier claimed features, then the same can be allowed. Reliance was also placed on the Ayyangar Committee Report<sup>8</sup> stating that the report particularly notes that the invention before and after amendment need not be identical '*so long as the invention is comprehended with the matter disclosed*'. The Court further applied the standard of the report to the present provision of Section 59 of the Act and clarified that *amendments to a patent specification or claims prior to grant ought to be construed more liberally rather than narrowly*. The Court also compared the Article 123 of the European Patent Convention which echoes the position of Section 59 of the Act in mandating that nothing new should be permitted to be inserted in the specification or claims. However, amendments in claims which are supported by the as-filed specification, and restricted to the disclosures already made in the specification, should not be rejected.

<sup>3</sup> *Shailesh Dhairyawan v. Mohan Balkrishna Lulla*, (2016) 3 SCC 619

<sup>4</sup> *Richa Mishra v. State of Chhatisgarh & Ors.*, (2016) 4 SCC 179

<sup>5</sup> *X v. Principal Secretary, Health & Family Welfare Department, GNCTD*, 2022 SCC OnLine SC 1321

<sup>6</sup> *Bishwanath Prasad Radhey Shyam v. Hindustan Metal Industries*, AIR 1982 SC 1444

<sup>7</sup> *Tony Mon George v. Controller General of Patents, Designs & Trademarks*, 2020 SCC OnLine IPAB 988

<sup>8</sup> *Report on the Revision of the Patents Law*, Rajagopal Ayyangar Committee, September 1959

3. Keeping the aforesaid points in mind, the Court clarified that discriminating between the claims and the as-filed specification by considering the two as separate '*would militate against the very ethos and philosophy of the Patents Act*'. Re-quoting *Bishwanath Prasad Radhey Shyam*, the Court held that the correct way to read the patent Application is to first read the specification *in order that the mind may be prepared for what it is, that the invention is to be claimed* (paragraph 43). Further, while citing *Parkinson v. Simon*<sup>9</sup> in this judgement on paragraph 43, the Court emphasized that *the specification and the claims must be looked at and construed together*. The case of *Merck Sharp & Dohme Corporation v. Glenmark Pharmaceuticals*<sup>10</sup> was referred to by the Court for explaining that 'the construction of claims is not something that can be considered in isolation from the rest of the specification' (paragraph 48). Similarly, the Court observed that '*the claim by itself, and de hors the complete specifications which accompany it, cannot convey, to the Court, the exact scope of the claim*'. After referring to the submissions made by the Appellant, the Court noted that the support for the Implant is found throughout the as-filed specification which provides the *peculiarities and characteristics* of the implant in detail. Thus, the Implants of the amended claims *do* form a part of the original as-filed claims and specification.

## Conclusion:

The Delhi High Court hence quashed the Controller's refusal order and considered the amendments in the claims as allowable. The Court further

clarified that the present decision is exclusively for the permittance of amending the claims from process to product; and that the Controller shall freshly examine the claims for patentability on merits.

The present order will definitely serve to be a significant milestone in the history of patent prosecution in India. It is expected that the decision will open gates for several aspiring Applicants who wish to obtain a patent in India for their exceptional and important inventions but are barred by the fences of Section 59 of the Act. What is also highlighted by the Court in this order is the fact that the ultimate goal of enshrining the IPR, and thus the Patents Act, is to encourage inventors and promote their invention. It is also interesting to note that the Order has emphasized that the provisions of the Act should be interpreted with certain perceptiveness considering the principle of natural justice. The provisions recited in the sections serve as a guideline for the Controllers as well as the Inventors. However, if the provisions debar the inventors from patenting their rightful invention, then the same would be against the very principle of the Act.

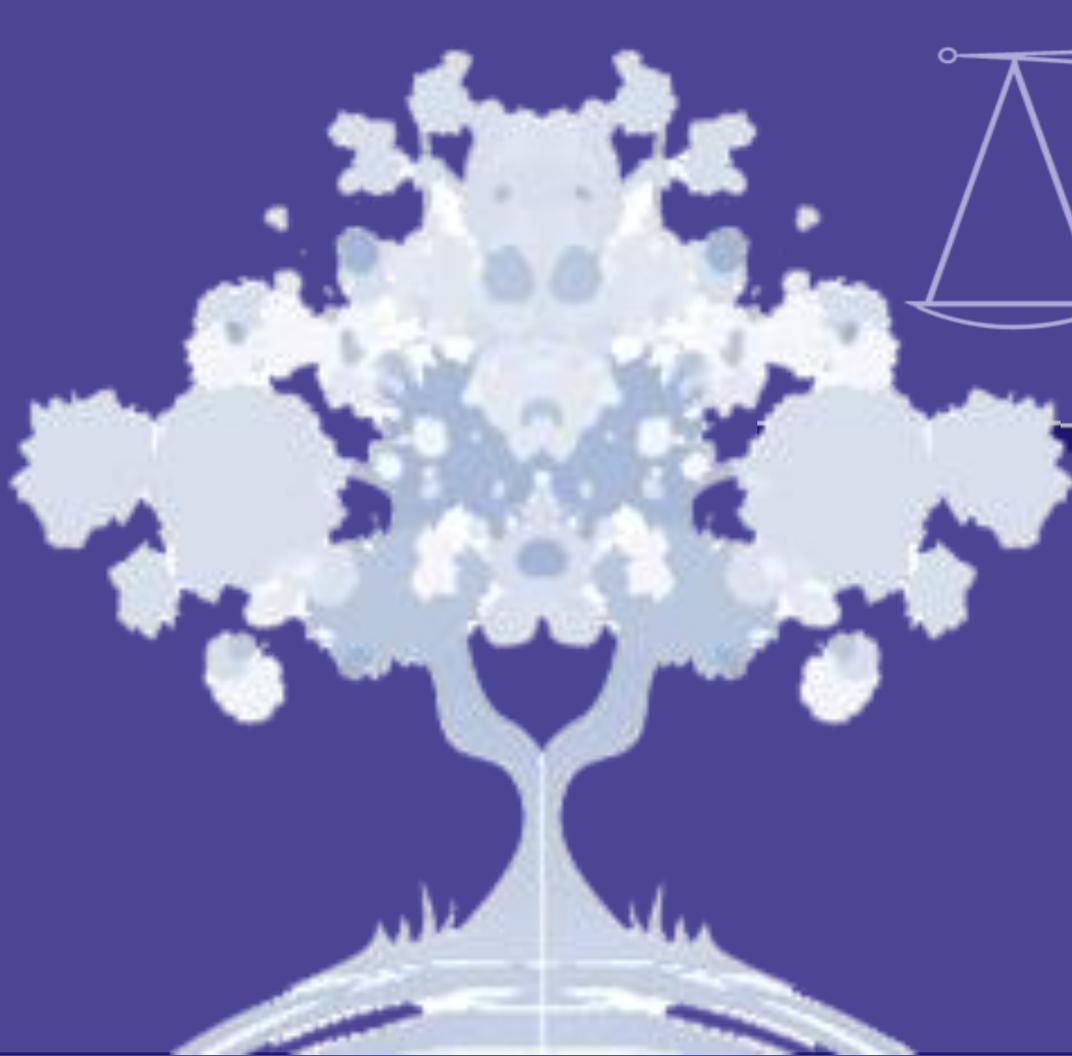
The year 2022 and the beginning of 2023 has witnessed noteworthy decisions in lieu of claim amendments. What is worth noting is that both the decisions, the orders have placed special reliance on the Ayyangar Committee report, stating that the intention of the report was to allow *wider* permissibility in claim amendments before the grant, and it is not needed for the invention to be identical before and after the amendment. Hence, it is important that the scope of the amendments is comprehended within the subject matter as disclosed in the as-filed specification.

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<sup>9</sup> *Parkinson v. Simon*, (1894) 11 RPC 483

<sup>10</sup> *Merck Sharp & Dohme Corporation v. Glenmark Pharmaceuticals*, (2015) 64 PTC 417



# Ratio Decidendi

- Trademarks – ‘NOW’ family of marks – Confusion with use of VNOW for similar services – Delhi High Court
- Trademarks – ‘NOVAEGIS’ is phonetically and visually similar to ‘NOVARTIS’ – Delhi High Court
- Trademarks – Rigours of Section 11(5) applicable even at stage of cancellation of registration – Delhi High Court
- Trademarks – ‘FAB!O’, used for vanilla cream filled chocolate biscuits, has deceptively similar trade dress and is phonetically similar to mark ‘OREO’ – Delhi High Court

## Trademarks – ‘NOW’ family of marks – Confusion with use of VNOW for similar services

The Delhi High Court has held that the usage of ‘NOW’ as the latter part of  the impugned mark renders the mark similar to the ‘NOW’- family of marks registered in favour of the Petitioner, in respect of TIMES NOW, ET NOW, ROMEDY NOW, MIRROR NOW and MOVIES NOW, as ‘NOW’ constitutes the dominant part thereof.

In a case involving rectification of the registration of the mark ‘VNOW’, as was allegedly infringing the family of marks with NOW, the Delhi High Court observed that the viewer who views Petitioner’s channels would identify NOW as the distinctive common feature of all the marks and, therefore, their ‘dominant’ part. It was hence of the view that if such a viewer, endowed with average intelligence and an imperfect recollection, comes across another channel, providing similar services, with a title of which ‘NOW’ is the latter part, there is a likelihood of him considering the new channel as part of the Petitioner’s repertoire, or at least associated with the NOW-family of channels of the Petitioner.

Further, the Court also noted that a person who must pronounce the impugned mark would pronounce it as ‘vee-now’, and hence the NOW part of the impugned mark would be separately and distinctly intoned by the person and would therefore have its own distinct identity even if it is not used as a separate word, as has been used by the Petitioner. It also noted that the usage, by the Respondent, of a different colour for the ‘NOW’ part of the

impugned mark further emphasizes its distinct identity, even as part of the whole mark.

[*Bennet, Coleman and Company Limited v. VNOW Technologies Private Limited* – Judgement dated 14 February 2023 in C.O. (COMM.IPD-TM) 117/2021, Delhi High Court]

## Trademarks – ‘NOVAEGIS’ is phonetically and visually similar to ‘NOVARTIS’

The Delhi High Court has held that ‘NOVAEGIS’ is, phonetically, nearly identical to ‘NOVARTIS’, when tested from the point of view of a customer of average intelligence and imperfect recollection. The Court in this regard observed that the initial ‘Nova’ and the concluding ‘is’ parts of the two words are identical, and the difference is restricted to the central ‘eg’ in one case and ‘rt’ in the other. It found it difficult, at the *prima facie* stage, to believe that the phonetic similarity between the two marks was merely coincidental and that the Defendant was an innocent adopter of the impugned mark NOVAEGIS.

Further, considering the visual similarity between the two marks –  and , the Court noted that both the marks were written in bluish green, with the difference in colour being too minor to pass muster. It noted that both the marks were preceded by a pictorial symbol which, given the size of the marks as would be reflected on the packages on which the marks figure, were also similar. Noting the similarities between the recitals (taglines and catchphrases) on the website of the Defendant with the recitals available on the Plaintiff’s website, the Court held that the

similarities were too stark to be inadvertent or, at least at a *prima facie* stage, innocent.

Also, observing that likelihood of confusion and deception was writ large in the present case, further because the goods for which the rival marks were used were identical goods (pharmaceutical products), the High Court found merit in the contention that the Defendant has consciously sought to piggyback on the goodwill of the Plaintiff. It was held that the case falls squarely within the four corners of Section 29(2)(b) of the Trade Marks Act, and a *prima facie* case of infringement was there. [*Novartis AG v. Novaegis (India) Private Limited* – Order dated 20 February 2023 in CS(COMM) 86/2023, Delhi High Court]

## Trademarks – Rigours of Section 11(5) applicable even at stage of cancellation of registration

The Delhi High Court has rejected the contention that rigour of Section 11(5) of the Trade Marks Act, 1999 would not dilute the applicability of Section 11(2) or 11(3) at the stage when cancellation of a registered mark is sought. The Court in this regard believed that Section 11(5) does not apply differently at the stage when the application for registration of a mark is under consideration and when an application for rectification of the register and removal of a mark therefrom, under Section 57(2), has been made. Sub-section 11(5) provides that a mark would not be refused registration under sub-sections (2) and (3) unless an objection, on one of the grounds envisaged by sub-section 11(2) or 11(3), is raised in an opposition

proceeding by the proprietor of the earlier trademark (Petitioner here). Observing that no opposition, as predicated on Section 11(2) or 11(3) was raised by the Petitioner at the time when the Defendant's mark was proceeding to registration, the Court held that the Petitioner cannot urge Section 11(2) or 11(3) as a ground to seek its cancellation or variation. [*Bennet, Coleman and Company Limited v. VNOW Technologies Private Limited* – Judgement dated 14 February 2023 in C.O. (COMM.IPD-TM) 117/2021, Delhi High Court]

## Trademarks – 'FAB!O', used for vanilla cream filled chocolate biscuits, has deceptively similar trade dress and is phonetically similar to mark 'OREO'

The Delhi High Court has held that the words 'FAB!O' and 'OREO' are phonetically similar. It, in this regard, noted that the Defendant had in its advertisements declared that its 'FAB!O' mark was required to be pronounced as 'fab-ee-yo', and which amounted to be a candid acknowledgement that 'FAB!O' is required to be pronounced like 'OREO'. It was of the view that since the two concluding syllables, of the three syllables which constituted each of the words 'FAB!O' and 'OREO' were the same, i.e. 'ee-yo', the names undoubtedly rhyme. The Court also noted that it was not the case of the Defendant that a terminal 'eo' sound was common to the biscuit – or any other – trade. It, for this purpose, also noted that '!' in the word 'FAB!O' was in fact letter 'l' in disguise. The Court

also rejected the contention that since the first syllable in the words were dissimilar, the marks cannot be treated phonetically similar.

The Court raised the question as to why while using the laudatory 'FAB!' mark for its other biscuits, the Defendant choose, solely for cream filled chocolate sandwich biscuits, to add an 'O', rendering the name meaningless? Further, observing that the 'FAB!O' mark was used only in respect of cream filled chocolate sandwich biscuits, and the blue package was also used only for vanilla cream filled chocolate sandwich biscuits, the Court was, *prima facie*, of the view that the Defendant consciously sought to approach as close to the Plaintiff's 'OREO' mark as possible by adding a terminal 'O' to its pre-existing 'FAB!' mark.

Further, holding that the trade dress of the Defendant's vanilla cream filled FAB!O chocolate cookie was deceptively similar to the trade dress of the Plaintiff's vanilla cream filled OREO chocolate cookie, the Court also noted that though the logo of the manufacturers of the biscuits, i.e. of Parle in the case of 'FAB!O' and Cadbury in the case of 'OREO', were visible on the packs, a customer of average intelligence need not be a person who is aware of the

identity of the manufacturers of the respective cookies. It may be noted that the Court also held that merely citing trade dress of cookies manufactured by others, which may be similar to the trade dress of the Plaintiff and of the Defendant, cannot suffice to hold that the trade dress of the Plaintiff's cookies is common to the trade.

Agreeing with the Plaintiff on 'initial interest confusion', the Court was of the opinion that *prima facie*, the Defendant was infringing the registered trademarks of the Plaintiff, and has also, by adopting a trade dress which is deceptively similar to that of the Plaintiff's 'OREO' brand of cookies, sought to pass off its FAB!O brand of vanilla cream filled chocolate cookies as bearing an association with the Plaintiff's OREO cookies.

The Defendant was hence restrained from using the mark 'FAB!O' or 'FAB!O', and from manufacturing, packing or selling their vanilla cream filled chocolate sandwich biscuits in the impugned pack or using the impugned trade dress. [*Intercontinental Great Brands v. Parle Product Private Limited* – Judgement dated 10 February 2023 in CS(COMM) 64/2021, Delhi High Court]



# News Nuggets

- Designs – Counter claim seeking revocation of suit design can be filed before High Court
- Trademarks – Distinctiveness of the word mark 'Jain Shikanji'
- Trademarks – No interim protection to 'Campus' against use of 'Camps'
- Trademarks – Deemed abandonment of opposition to registration of trademark if evidence not submitted within 3 months of receipt of counter statement
- Designs – Originality of suit design must be examined vis-à-vis date of its registration

## Designs – Counter claim seeking revocation of suit design can be filed before High Court

The Delhi High Court has rejected the contention that the counter claim filed by the Defendant seeking revocation and cancellation of the suit design has specifically to be raised only before the Controller of Designs. Relying upon Supreme Court decision in the case of *S.D. Containers Indore v. Mold-Tek Packaging Ltd.* [(2021) 3 SCC 289], the Court in *Novateur Electrical & Digital Systems Pvt. Ltd. v. V-Guard Industries Ltd.* noted that the ground that a counter claim could not have been filed before the High Court, as it lies only before the Controller under Section 19, was effectively reversed by the Supreme Court.

## Trademarks – Distinctiveness of the word mark 'Jain Shikanji'

The Delhi High Court has held that word mark, 'Jain Shikanji', when seen as a whole, cannot be said to inherently lack distinctiveness. The Court noted that it was not a matter of common usage that a Hindu surname is used as a prefix in a trademark used for a drink which was being made and sold by the proprietor of the trademark. Petitioner's plea predicated on Section 9(1)(a) of the Trade Marks Act was thus held as not sustainable in the case of *Anubhav Jain v. Satish Kumar Jain* [Judgement dated 8 February 2023].

## Trademarks – No interim protection to 'Campus' against use of 'Camps'

The Delhi High Court has declined to grant temporary injunction to the Plaintiff using the mark  'Campus' against the mark  'Camps'. being used by the Defendant. The Court in this regard noted that though there were substantial similarities in the competing marks, there was no material on record for the Court to conclude that Defendants' adoption was dishonest or that Defendants had misrepresented their marks to be that of the Plaintiff's. It observed that on the contrary, adoption of the impugned mark by the Defendant *prima facie* appeared to be in good faith and has been in long and continuous use, without any protest or opposition from the Plaintiff. The Court concluded that the Plaintiff failed to satisfy the classic trinity test of passing off. The High Court in *Campus Activewear Limited v. Rama Shankar Garg* [Judgement dated 7 March 2023] rejected the Plaintiff's contention of prior use, observed that the mark was honestly adopted, and that there was delay and acquiescence on the part of the Plaintiff.

## Trademarks – Deemed abandonment of opposition to registration of trademark if evidence not submitted within 3 months of receipt of counter statement

The Delhi High Court has held that if the opponent opposing the application seeking grant of the trademark fails to file its evidence

in support of the opposition within a maximum of three months (2months plus one month of extension) from the receipt of the counter-statement of the trademark applicant, the opposition would *ipso facto* be deemed to be abandoned. It, in this regard, noted that the dispute in *Mahesh Gupta v. Registrar of Trademarks* [Judgement dated 2 March 2023] pertained to period prior to Trade Marks Rules, 2017, i.e. when the Trade Marks Rules, 2002 were prevalent. Not agreeing with the decision of the Gujarat High Court in the case of *Wyeth Holdings Corpn. v. Controller*, the Court observed that the words 'not exceeding one month' in Rule 50(1) of the Trade Marks Rules, 2002, empowering the Registrar to extend the said period only up to one month, were mandatory in their import. It was thus of the view that grant of any further extension would clearly be in the teeth of Rule 50(1).

## Designs – Originality of suit design must be examined vis-à-vis date of its registration

In a case involving challenge to novelty of the suit design, by the Defendant in its defence, the Delhi High Court has held that the plea of novelty or originality has to be urged and examined *vis-à-vis* the date of registration of the suit design. The Court in the case *Casio Keisanki Kabushiki Kaisha v. Riddhi Siddhi Retail Venture* [Judgement dated 7 February 2023] was hence of the view that the existence, thereafter, of any number of similar designs in the market, or even the publication of any number of similar designs, cannot indicate any want of novelty or originality in the suit design, within the meaning of Section 19(1)(c) or Section 4(a) of the Designs Act, 2000.

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