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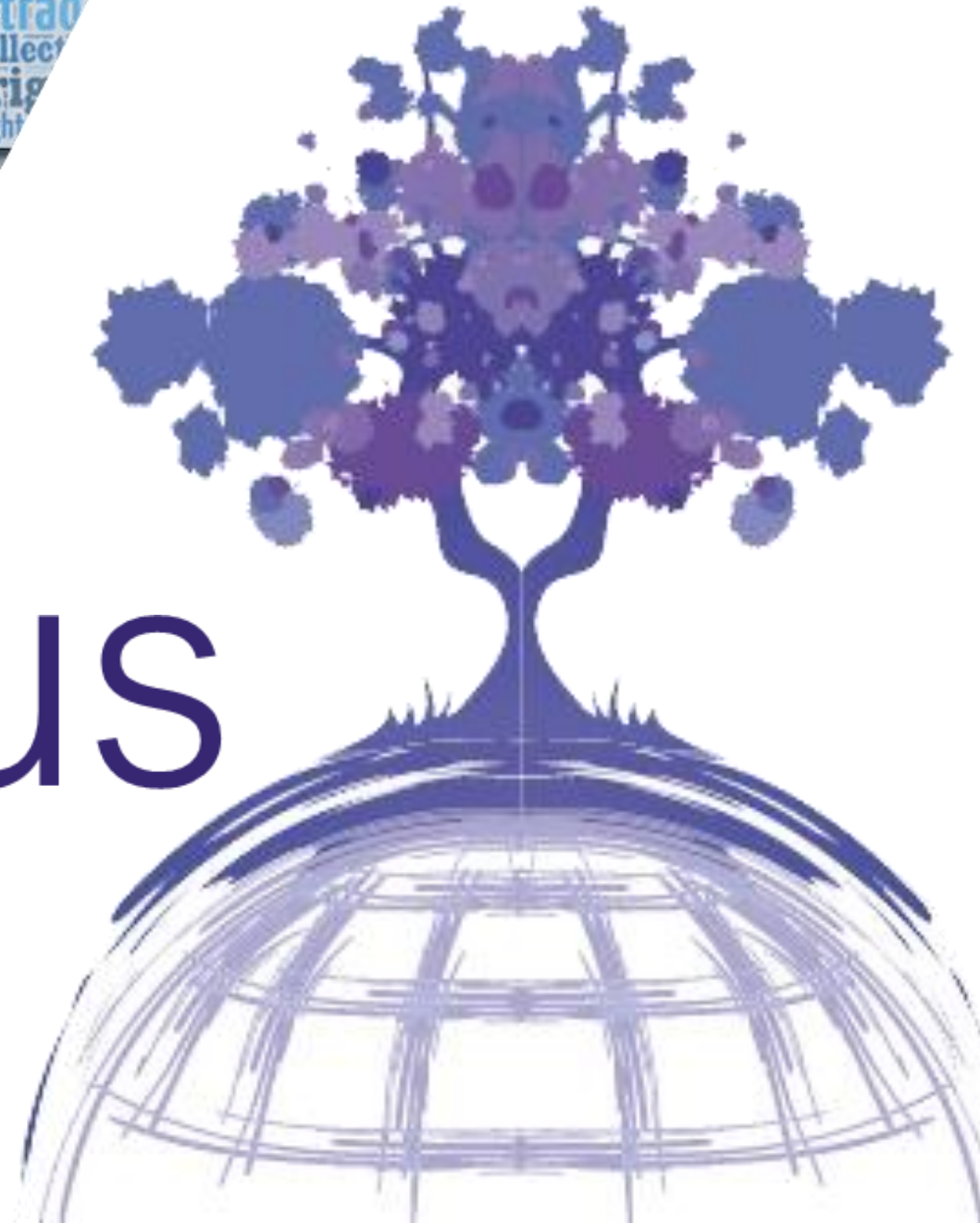


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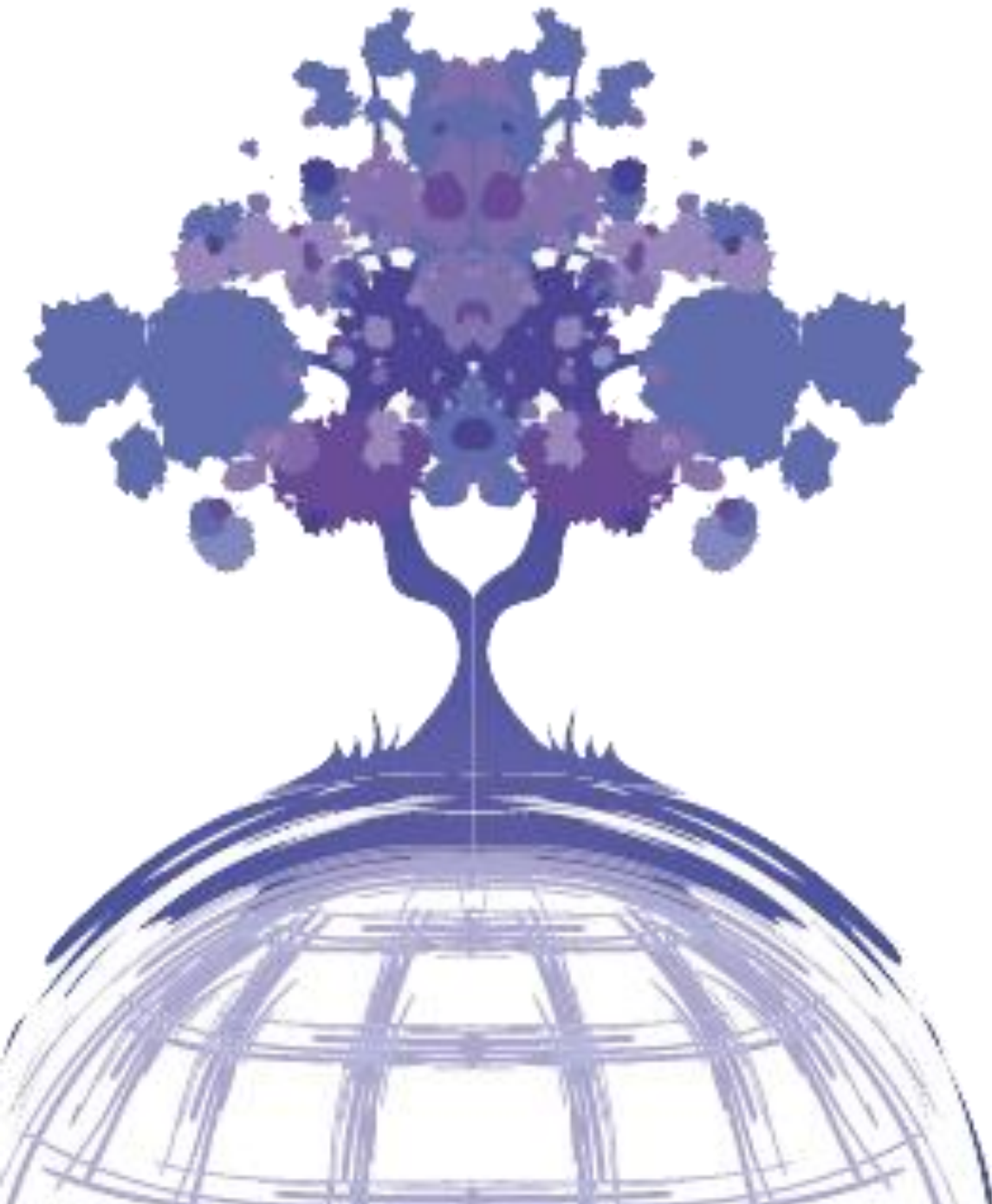


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Article

Divisional Applications in India: Part II

By **Shashank Kinra and Dr. Gaurav Gupta**

In continuation of the article published last month in IPR Amicus, the article in this issue of newsletter further discusses the evolving law around Divisional Applications in India. Analysing two decisions of the IPAB and one of the Delhi High Court, the article notes that a divisional application can be filed when the claims of the parent application include a plurality of inventions however, the requirement that the claims of a divisional application have to be based on, more particularly, to have their route, or to be gleaned from, or clearly exist in, the claims of the parent application, appears to be a unique one and such a requirement is not seen in other major jurisdictions, such as Europe or the USA. According to the authors, while this requirement appears to somewhat narrow the scope of assessment of divisional claims, issues such as whether claims of a divisional application ought to be verbatim supported, or directly supported, or broadly supported, in the claims of the parent application, are open for discussion and adjudication

Divisional Applications in India: Part II

By Shashank Kinra and Dr. Gaurav Gupta

The previous article published in our firm's IPR Amicus, Issue No. 135 (December 2022)¹ highlighted evolving jurisprudence and the principles for filing divisional applications in India as laid out by the erstwhile Intellectual Property Appellate Board ('**IPAB**') and the Delhi High Court.

A key prerequisite for filing a divisional application, as mentioned in the previous article, is that the presence of plurality of invention has to exist, not just in the specification, but also in the claims of the parent (first mentioned) application.

This prerequisite can be clearly drawn from the following orders:

(1) Order No. OA/66/2020/PT/DEL dated 27 October 2020, of IPAB, *Esco Corporation v. Controller of Patents & Designs*²;

(2) Order No. OA/3/2015/PT/MUM dated 27 October 2020, of IPAB, *UCB Pharma S.A. v. Controller of Patents & Designs*³; and

(3) *Boehringer Ingelheim International GMBH v. The Controller of Patents & Anr.*, dated 12 July 2022, of the Delhi High Court⁴.

¹<https://www.lakshmisri.com/insights/articles/divisional-application-in-india-evolving-jurisprudence/>

² OA/66/2020 PT/DEL dated 27 October 2020, of IPAB, *Esco Corporation v. Controller of Patents & Designs*

Emphasis is drawn on to some excerpts of the above-mentioned orders:

1. *Esco Corporation v. Controller of Patents & Designs*, dated 27 October 2020 (Order No. OA/66/2020/PT/DEL):

"10. Therefore, looking at the provisions of law and the settled practices, we reach the following conclusions that **a patent application can only be divided, if it claims more than 'one invention'**"

"14.2 ***The claims of divisional application shall have their route in the first mentioned (parent) application.***"

2. *UCB Pharma S.A. v. Controller of Patents & Designs*, dated 27 October 2020 (Order No. OA/3/2015/PT/MUM):

"10.10 Further the appellant have submitted through table 2 above that **only claims 1, 5, and 6 of the amended divisional application had their routes in the claims of parent application**; the other claims such as 13-15,16,17,18,21,24 and 26 were newly added in the body of the claim and their basis in the description is shown in the table."

³ OA/3/2015/PT/MUM dated 27 October 2020, of IPAB, *UCB Pharma S.A. v. Controller of Patents & Designs*

⁴ C.A. (COMM.IPD-PAT) 295/2022 & I.As.10369-70/2022 *Boehringer Ingelheim International GMBH v. The Controller of Patents & Anr.*, dated 12 July 2022, of Delhi High Court

“10.14 Therefore, addition of new claims from the description, which were not present in the body of the parent claims, cannot form part the divisional application, as per the teachings of Section 16 of the Patents Act, 1970.”

3. Boehringer Ingelheim International GMBH v. The Controller of Patents & Anr., dated 12 July 2022

This order of Delhi High Court takes into consideration the principle laid down by the erstwhile IPAB in the decision of *Esco Corporation v. Controller of Patents & Designs*, decided on 27 October 2020. Said order of the Delhi High Court recites the following:

*“30. But what is crucial to note, is the fact that **the invention itself is defined in the claims**. While such claims do have to be based on the disclosure in the specification, however even if a person does not read the complete specification and wishes to identify the invention, the place to look for it is in the ‘Claims’. **The Invention thus resides in the Claims. Accordingly, “unity of the invention”/ “plurality of inventions” and whether they form a “single inventive concept” has to be gleaned from a reading of the claims.**”*

*“31., it is clear that under Section 16 of the Act, **the “plurality of inventions” should clearly exist in the claims of the original parent application** and within the scope of the specification of the parent application. Therefore, under Section 16, the question of whether the*

*claims of the complete specification relate to more than invention **i.e., a “plurality of inventions” has to be seen from the claims of the parent application**. Obviously, the claims in turn, have to be based on the disclosure in the specification.”*

From the above-mentioned excerpts, it is abundantly clear that a divisional application can be filed when the claims of the parent application include a plurality of inventions.

However, the requirement that the claims of a divisional application have to be based on, more particularly, **to have their route, or to be gleaned from, or clearly exist in**, the claims of the parent application, appears to be a unique one and such a requirement is not seen in other major jurisdictions, such as Europe or the USA. While this requirement appears to somewhat narrow the scope of assessment of divisional claims, issues such as whether claims of a divisional application ought to be verbatim supported, or directly supported, or broadly supported, in the claims of the parent application, are open for discussion and adjudication.

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Statute Update

Public Notices

- Patents – Hearing intimation of only 10 days to be given – Adjournments advised to be not for more than 10 days
- Patents – Adjournment of hearings – Reasonable cause to be mandatorily

Patents – Hearing intimation of only 10 days to be given – Adjournments advised to be not for more than 10 days

The Office of Controller General of Patents, Designs and Trademarks, Mumbai has on 26 December 2022 issued a Public Notice to dispense with the practice of giving four weeks' time from the date of hearing intimation/notice. According to the Public Notice, the earlier practice of 10 days' time from the date of hearing intimation/notice, which is also prescribed under Rule 129 of the Patents Rules, 2003, has been restored with immediate effect.

Further, the Notice also advises that each of the two adjournments should not be for more than 10 days. The Notice in this regard though notes that Rule 129A of the Patent Rules prescribes that each adjournment should not be for more than 30 days, it states that instant directions have been issued looking at the exigencies and priorities with respect to time bound disposal of long pending applications/matters.

Patents – Adjournment of hearings – Reasonable cause to be mandatorily specified

Noticing that the adjournment requests were being filed without mentioning the 'reasonable cause', the Office of Controller General of Patents, Designs and Trademarks, Mumbai has on 26 December 2022 issued another Public Notice to request the stakeholders, specifically the Patent Agents, to specify the 'reasonable cause' in the request for adjournment, without fail. According to the Public Notice, requests for adjournment under Rule 129A of the Patents Rules, 2003, whereby the 'reasonable cause' for seeking extension is not mentioned, will not be entertained. The Notice in this regard also states that it is also desirable that 'reasonable cause' is supported by documentary evidence, if any.



Ratio Decidendi

- Use of trademark in form of translation or transliteration amounts to infringement – Delhi High Court
- Trademarks – Rectification petitions by defendant to be clubbed with civil suits – No requirement of staying civil suit – Delhi High Court
- Framing of issues by Court – Court can at subsequent stage also frame issues not pressed earlier – Delhi High Court
- Anti-dissection rule does not disallow significant part of two competing marks to be compared – Court also compares mental impact of competing words in the marks – Delhi High Court
- Trademarks – Indirect use of misleading country of origin/manufacture is 'material respect' in definition of 'false trade description', which is not registrable – Delhi High Court

Use of trademark in form of translation or transliteration amounts to infringement

The Delhi High Court has reiterated that the use of the infringing mark in the form of a translation (same trademark but in a different language) or its transliteration, amounts to infringement. The Court in this regard observed that as per Section 29(9) of the Trade Marks Act, where the distinctive element of a registered trade mark consists of or include words, the trademark may be infringed by the spoken use of those words. In this regard, the submission of the Defendant to the effect that the mark was being used in Arabic language and thus there shall be no infringement, was not accepted by the Court.

Further, the High Court answered in affirmative the question as to whether affixation of the mark for the purposes of export would amount to 'use in the course of trade' under Section 56 of the Trade Marks Act. Madras High Court decision in the case of *Crompton Greaves Limited*, as relied upon by the Defendant, was distinguished on facts while the Court observed that even in that decision, the Court had held that the affixation of a trademark for purpose of export of goods would amount to its user in terms of Section 29(6).

The argument on the basis of Section 29(6) would not apply since Defendant No. 4 (the foreign importer) was neither importing goods into India nor exporting the same from India, was also rejected by the Court and it observed that merely because the Defendant No.4 was the recipient of the said rice, this cannot come to the aid of the Defendant No.1 who was seeking to export rice

with the impugned trademark registered in the name of the plaintiff.

Similarly, the plea of honest concurrent user did not *prima facie* impress the Court and it was observed that while applying for the registration of the mark in Saudi Arabia, the Defendant no.4 was well-aware of the claim of the right in the said trademark by the Plaintiff. The Plaintiff was also held to not have acquiesced its rights in the export of rice with the impugned trademark 'TAJ MAHAL' to the Defendant No.4. In respect of supply of rice by the Plaintiff to the Defendant No. 4 under the impugned mark, the Court was of the view that merely because the packaging of rice was in a manner approved by the Defendant No.4, it does not mean that the plaintiff also accedes to the right of the Defendant No.4 in the mark.

Granting ad-interim injunction in favour of the Plaintiff, the Court restrained the Defendant from affixing the mark 'Taj Mahal' for the purposes of selling or marketing rice in India or for exports. [*New Bharat Overseas v. Kian Agro Processing Pvt. Ltd.* – Decision dated 23 December 2022 in CS(COMM) 280/2020, Delhi High Court]

(i) Trademarks – Rectification petitions by defendant to be clubbed with civil suits – No requirement of staying civil suit

(ii) Framing of issues by Court – Court can at subsequent stage also frame issues not pressed earlier

The Delhi High Court has recently opined that rectification petitions filed by the Defendant can be clubbed with the civil suits and that

there is no requirement of staying the civil suit. The Court in this regard observed that now, after passing of the Tribunals Reforms Act, 2021, the suit as well as the rectification applications must be decided by one authority alone, i.e., the High Court and resultantly, there cannot be any possibility of conflicting decisions. The Tribunals Reforms Act, 2021, has abolished IPAB and the jurisdiction to decide rectification petitions now vests with the High Court under Section 21 of the Trade Marks Act, 1999.

The Court further went on to examine whether the defendant had made the necessary averments in the written statement with regard to the invalidity of the plaintiff's trademarks so as to frame an issue in this regard.

It rejected the contention of the Plaintiff that since no issue with regard to the invalidity of the trademarks of the Plaintiff was framed earlier by this Court, it cannot, under the garb of the present application, raise the aforesaid issue again. According to the Court, even if the counsel for the Defendant did not press for framing of the issues sought to be framed now, it would not mean that the Court cannot, at a subsequent stage, frame such issues if they emerge from the pleadings in the suit.

The High Court noted the necessary pleadings with regard to invalidity of the Assignment Deed and the invalidity of the trademark registrations granted in favour of the plaintiff. According to the Court, these were material propositions of fact in terms of Order XIV Rule 1 of the CPC and therefore, an issue needs to be framed with regard to the same. [*Sana Herbals Pvt. Ltd. v. Mohsin Dehlvi* – Judgement dated 20 December 2022 in CS(COMM) 813/2016, Delhi High Court]

Anti-dissection rule does not disallow significant part of two competing marks to be compared – Court also compares mental impact of competing words in the marks

The Division Bench of the Delhi High Court has held that though the anti-dissection rule provides that a composite mark cannot be dissected and the fact that a part of the trademark is similar to part of the competing mark does not necessarily lead to conclusion that the two marks are similar, but, that does not mean similarity between significant part of the two competing marks is required to be disregarded while ascertaining whether the two composite marks are similar.

In a dispute between the marks 'Rooh Afza' and 'Dil Afza', the Court observed that when one examines the question of similarity, the fact that both the composite marks end with 'AFZA' does lend an element of similarity to both the marks. According to the Court, this also acquires a higher significance since 'AFZA' is not a descriptive word of the product (sharbat) in question.

Further, setting aside the Single Judge decision, the Court noted that relevant question to be addressed is whether meaning of the words 'ROOH' and 'DIL', at some level, have a mental impact that would lead a person of imperfect recollection to be confused. The Court in this regard noted that mental impact of certain competing marks may be similar although their meaning may not be identical. Taking note of the meanings – 'Heart' in case of 'Dil' and 'Soul' in case of 'Rooh', the Court noted that the words 'heart' and 'soul' are part of the commonly used phrase of the English language and are used commonly in conjunction.

According to the Court,



“The propensity for confusion on account of a similar meaning must be understood in a wider sense. It is not essential that the competing brands be synonymous. Given that the chords of memory are also connected by association of ideas and subjects; a wider conceptual association between the meaning of the competing brands may be sufficient to add to consumer confusion.”

The Court also compared the trade dress of the competing products and found similarity. It concluded that it was not difficult to conceive that a person who looks at the label of DIL AFZA may recall the label of ROOH AFZA as the word ‘AFZA’ is common and the meaning of the words ‘ROOH’ and ‘DIL’, when translated in English, are commonly used in conjunction. [*Hamdard National Foundation (India) v. Sadar Laboratories Pvt. Ltd.* – Judgement dated 21 December 2022 in FAO(OS) (COMM) 67/2022, Delhi High Court]

Trademarks – Indirect use of misleading country of origin/manufacture is ‘material respect’ in definition of ‘false trade description’, which is not registrable

While examining as to whether the mark, depicting a white cross on a red background, and the ‘SWISS MILITARY’ word mark, individually or in conjunction with each other, can be registered in India in relation to textiles, footwear, etc., in Class 25, the Delhi High Court has held that false trade descriptions are not registrable. Observing that a trade description which is untrue or misleading in a ‘material respect’ regarding the goods to which it is applied is a ‘false trade description’, the Court held that the country of manufacture of goods is certainly a ‘material respect’, within the meaning of Section 2(1)(i)(I) of the Trade Marks Act, 1999.

According to the Court, if a trademark is untrue or misleading regarding the country of origin of the goods on which it is used, there is no reason to believe that it would not deceive the public or cause confusion, as the intent to deceive or cause confusion can be read into the very use of the mark.

Further, the Court also held the mark  depicting a white cross on a red background, and the ‘SWISS MILITARY’ word mark, individually or in conjunction with  other, as false trade description. It, in this regard, observed that if the trademark even indirectly indicates the country of manufacture of the goods, it is a ‘trade description’ within the meaning of Section 2(1)(za)(iv). According to the Court, if the country of manufacture or production suggested by the use of the mark on the goods is not, in fact, their country of manufacture or production, the mark would be a ‘false trade description’. The Court was of the view that the use of the impugned mark would be an indirect trade description regarding the country where the goods, bearing the mark, are manufactured or produced. The Hon’ble High Court held that if the impugned mark deceives, or confuses, the average consumer into mistaking the goods to be manufactured or produced in Switzerland, i.e., of Swiss origin, it is immediately hit by Section 9(2)(a), as the goods are, admittedly, not of Swiss, but of Chinese origin. Also, the Court held that even if mark is used in a black and white format, it would be ineligible for registration.

It may be noted that Appellant’s contentions regarding Sections 9(1)(b), 11(3)(a) and 144 of the Trade Marks Act, 1999, were however rejected by the Court. [*Armasuisse v. Trade Mark Registry* – Judgement dated 4 January 2023 in C.A.(COMM.IPD-TM) 158 and 159/2022, Delhi High Court]



News Nuggets

- Order containing non-understandable reasons is worse than an unreasoned order
- Not filing pre-grant opposition in proper format is not fatal
- Jurisdiction of Commercial Court clarified
- Facebook postings cannot be determining of person's location at particular time
- Trademarks – No interim protection if mark though registered but not used for long
- Failure of Defendant in filing written statement – Court when can decree the suit without calling for affidavit in evidence
- Generic disparagement – Not every generic comparison refers to market leader

Order containing non-understandable reasons is worse than an unreasoned order

The Delhi High Court has observed that an order which contains reasons that no one can understand is worse than an unreasoned order. Setting aside the order, the Court observed that, the basis for holding that the invention of the petitioner was lacking in an inventive step was impossible to comprehend. The Court also noted that even the Counsel for the respondent has submitted that he was not in a position to explain the reasoning contained in the impugned order. The matter was remanded to the Assistant Controller of Patents for reconsideration after granting an opportunity of hearing. The Court in *Art Screw Co. Ltd. v. Assistant Controller of Patents and Designs* [Judgement dated 14 December 2022] however, in order to obviate the possibility of any apprehension of pre-determination, advised that the matter be placed before an officer other than the officer who passed the impugned order.

Not filing pre-grant opposition in proper format is not fatal

The Delhi High Court has held that the right to oppose an application for grant of a patent, as statutorily conferred by Section 25 of the Patents Act, 1970, is a valuable right, and cannot be permitted to be defeated on technical considerations. The High Court hence set aside the impugned order granting the patent without considering the pre-grant opposition filed by the petitioner. The opposition was not considered by the Patent Office

as the same was not filed in the proper format and following the proper procedure. The Respondent in this case *Sonya Kapur v. Controller General of Patent, Designs and Trademark* [Judgement dated 12 December 2022] also had no objection to the matter being remanded to the Patent Office for re-consideration, after taking into account the pre-grant opposition filed by the petitioner.

Jurisdiction of Commercial Court clarified

The Delhi High Court has rejected the submissions that even if the Suit is not a Commercial Suit but as the order has been passed by a Commercial Court, the provisions of Section 13(1A) of the Commercial Courts Act, 2015 would apply. The Court observed that there was no challenge made by the respondents/applicants to the valuation of the Suit, which was below the limit. It was of the view that merely because the suit was numbered as a Commercial Suit or may have been dealt with by the parties or even by the Court as a Commercial Suit, it would not convert the same to a 'Commercial Suit' of a specified value and/or vests jurisdiction in a Commercial Court. In this regard, the Delhi High Court's earlier decision in the matter of *Delhi Tourism and Transportation Development Corporation*, was distinguished. The Court in the present case *Dhani Aggarwal v. Mahesh Yadav* [Decision dated 15 December 2022] thus dismissed the review petition which had sought to review the earlier decision of the Court on the ground that in terms of Section 13(1A) an appeal arising out of an order passed by a Commercial Court at the level of the District Judge exercising the original Civil Jurisdiction, can be adjudicated only by the Commercial Appellate Division of the High Court, and not by the Single Judge.

Facebook postings cannot be determining of person's location at particular time

The Delhi High Court has held that postings on Facebook cannot be treated as determining of the location of a person at a particular point of time, at least by a Court. It added that even if a Court is to take an adverse view in that regard, the Counsel ought to be given an opportunity to explain the position before such a view is taken. The dispute in *Vinod Kumar v. IPAB* [Judgement dated 12 December 2022] involved rejection of adjournment by the IPAB observing that the Counsel was on a holiday in Chennai while it was falsely represented before the IPAB that the Counsel was in quarantine due to Covid-19.

Trademarks – No interim protection if mark though registered but not used for long

The Delhi High Court has opined that prior registration of the mark without the use of the mark for over twenty-four years would not entitle the appellant to an interim injunction. The Court hence upheld the decision of the Single Judge that the marks in question (SETARET and SITARA-D) could not be appropriated by any party as they were based on their active ingredients which were generic. It noted that there was not much of a time difference in the first usage of the marks between both the parties and that there were no equities in favour of either of the parties. Interestingly, the High Court in *Sun Pharma Laboratories Ltd. v. Intas Pharmaceutical Ltd.* [Judgement dated 12 December 2022] also stated that if the appellant-plaintiff is of the view that the marks in question are causing confusion, it is open to the appellant-plaintiff to change its marks at this *prima facie* stage.

Failure of Defendant in filing written statement – Court when can decree the suit without calling for affidavit in evidence

The Delhi High Court has rejected the contention that by operation of the second proviso to Order VIII Rule 5(1) of the Civil Procedure Code, as introduced by the Commercial Courts Act, 2015, the failure on the part of a defendant to file a written statement by way of response to a plaint would *ipso facto* deem the allegations in the plaint to stand admitted. According to the Court, the said provision caters to a situation, and envisages a consequence, relatable to Order VIII Rule 3A, in which a written statement *has* been filed by the Defendant. Further, relying on various Supreme Court decisions, the Court in *Kleenoil Filtration India Pvt. Ltd. v. Udit Khatri* [Order dated 5 January 2023] observed that failure on the part of the defendant to file a written statement within the time allowed cannot *ipso facto* and by itself justify invocation, by the Court, of Order VIII Rule 10 to decree the suit without further process. According to the Court, it is only where the issue and the controversy in the plaint and the facts set out therein do not disclose any such fact as would require to be proved by the plaintiff on affidavit, that the Court can proceed to decree the suit without calling for an affidavit in evidence.

Generic disparagement – Not every generic comparison refers to market leader

In a case involving alleged generic disparagement by way of an advertisement, the Delhi High Court has held that it cannot be said that every generic comparison would be referencing to the market

leader. According to the Court, otherwise it be curtailing freedom of advertising to a considerable extent. The Court in this regard stated that an advertiser ought to have the freedom to make advertisements with generic comparison highlighting the features of its own product and if the same is done without an allusion to any market leader, objection cannot be raised unless representation being made is absolutely false or misleading. The

High Court in *Zydus Wellness Products Ltd. v. Dabur India Ltd.* [Decision dated 22 December 2022] also noted that according to an earlier decision of the Court in the case of *Dabur India Ltd. v. Colortek*, where there is no overt or covert reference, merely on the basis of market share it cannot be presumed that the advertisement is directed towards the market leader.

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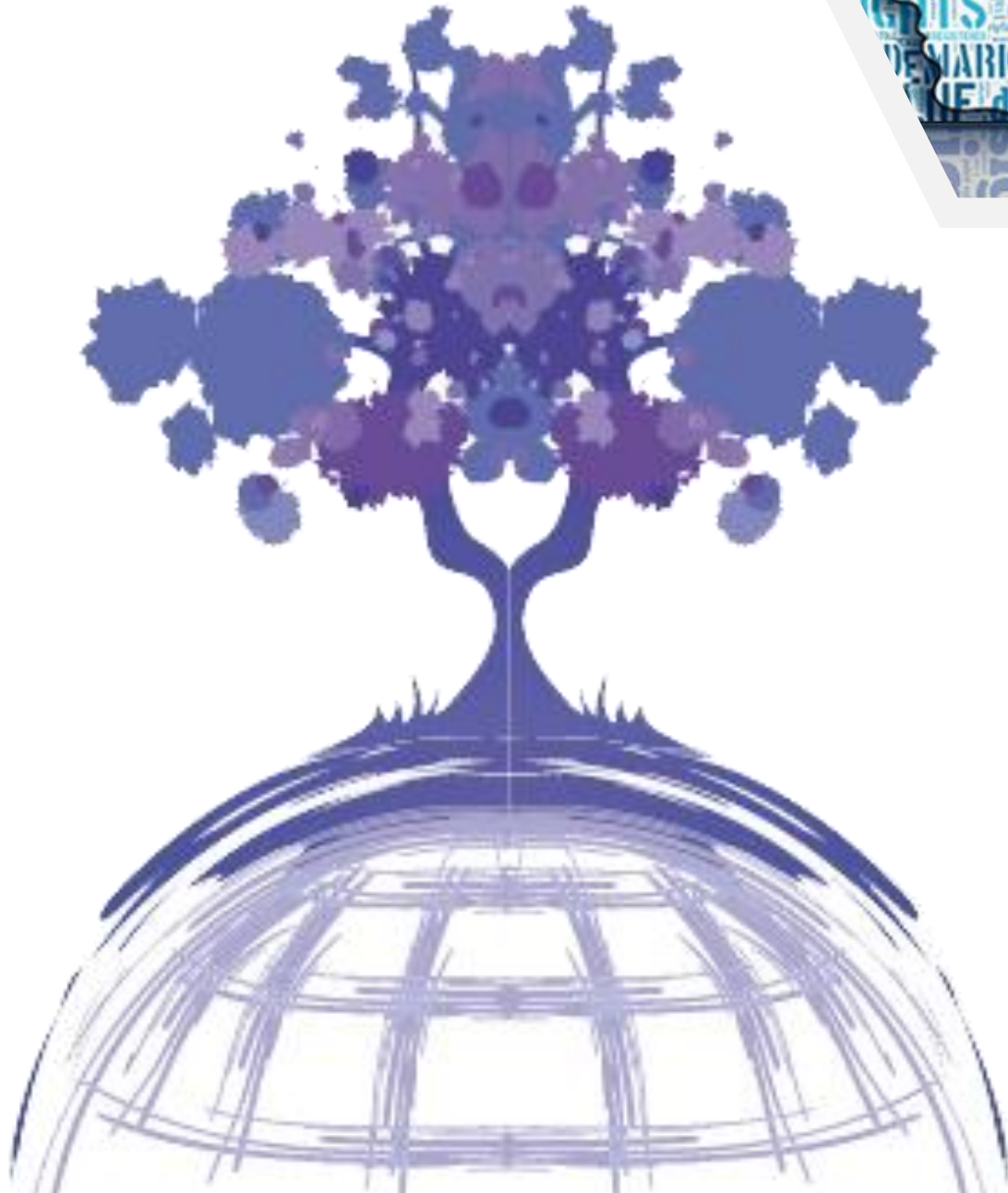
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