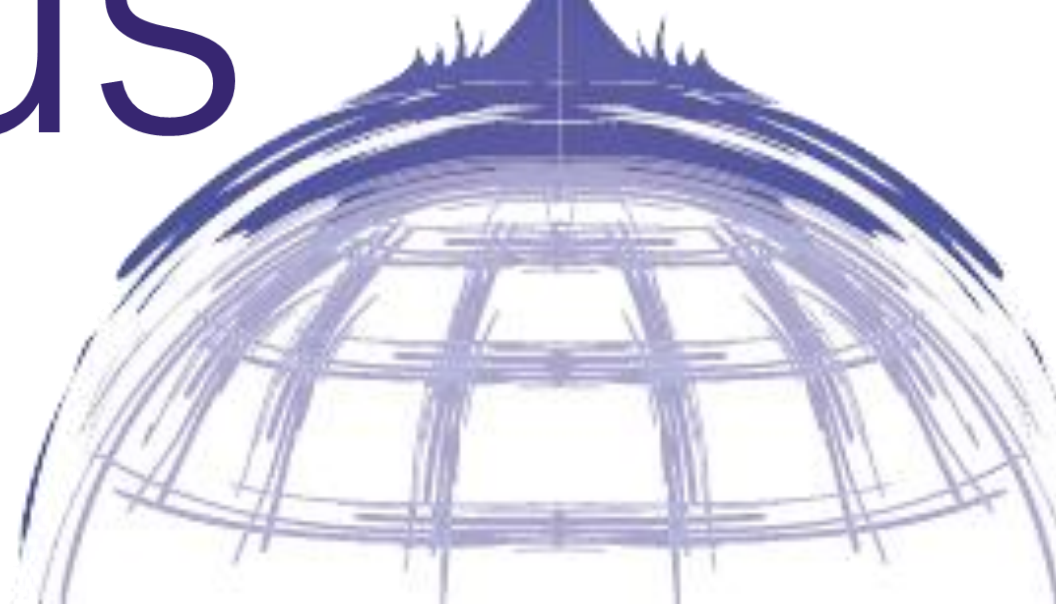


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Article

Registrability of trademarks derived from generic names in Pharma Industry – Madras High Court analyses and propounds test to strike a balance

By Vindhya S Mani, Mohit Kar and Kriti Sood

The article in this issue of IPR Amicus discusses a recent Madras High Court decision against a refusal order for registration of the mark 'Inimox' considering an opposition by the owner of mark 'Imox', both used for pharmaceuticals. The High Court has overturned the Registry's findings in respect of 'likelihood of confusion' and allowed the appeal, directing the mark 'Inimox' to proceed towards registration. Elaborately discussing the rival contentions before the Court and the Court's decision, the authors note that the said decision has provided clarity on the contours of registering API-derivate brand names in the pharmaceutical industry, and the necessary due diligence that needs to be carried out in that regard. They also observe that trademarks that are arbitrary or inventive carry more weight, and that a mark's uniqueness is automatically diminished when it is derived from a generic name, API or disease/condition's name.

Registrability of trademarks derived from generic names in Pharma Industry – Madras High Court analyses and propounds test to strike a balance

By Vindhya S Mani, Mohit Kar and Kriti Sood

Introduction

Naming of drugs and/or other pharmaceutical products from the underlying active pharmaceutical ingredients (APIs) or the diseases or conditions that the drugs treat, has been a long-standing practice in the Pharma industry. Due to the fact that a large number of pharmaceutical brand names are usually derived from a relatively modest number of APIs in existence, there is bound to be similarity between the two rival brand names. However, would that lead to customer confusion, and would you be able to register such a brand name? The Single Judge of the Madras High Court recently conducted an in-depth analysis on this aspect in the case of *Indian Immunologicals Ltd. v. IPCA Laboratories Pvt. Ltd. & Anr.*¹ by its judgment dated 8 December 2023.

Brief facts

The Appellant - Indian Immunologicals Ltd. applied for the registration of the word mark 'INIMOX' on February 2, 1999, on a

'proposed to be used' basis for medicinal and pharmaceutical preparations for veterinary use. After the said application was published in the Trade Marks Journal, the first respondent - IPCA Laboratories Pvt. Ltd. filed a Notice of Opposition on 25 February 2004, against the application for registration of the mark 'INIMOX', based on their rights in the prior registered mark 'IMOX' in Class 5 for medical and pharmaceutical preparations, with a use claim of 6 October 1986. Indian Immunologicals contested the opposition proceedings and after hearing both the parties, the Registrar of the Trade Marks Registry refused registration of the mark 'INIMOX'.

Why was the 'INIMOX' Mark refused by the Registry?

The Trade Marks Registry refused the mark on the basis that the goods under the rival marks are used for the same purposes and the Opponent is the prior user of the mark. The Registry was of the view that the rival marks are a combination of *Amoxycillin* + *Cloxacillin*. The Registry noted that IPCA adduced sufficient evidence to corroborate its contentions, and no such evidence had been filed by Indian Immunologicals. Lastly, the Registry concluded

¹ (T) CMA (TM) No.72 of 2023

that Indian Immunologicals being the subsequent user of the 'INIMOX' mark which is formed after a mere addition of the letters 'IN' to the word 'IMOX', had adopted the mark in bad faith and wanted to ride upon the reputation earned by IPCA in respect of the 'IMOX' mark. The Registry held that the use of 'INIMOX' in the market would lead to a likelihood of confusion amongst the relevant class of consumers and accordingly refused the registration of the 'INIMOX' mark.

Rival contentions

Arguments put forward by the Indian Immunologicals:

- They asserted that they started using the 'INIMOX' mark shortly after the trademark application was filed on February 2, 1999, and produced evidence in support of use of the mark in the veterinary industry;
- Given that the rival marks are derived from the common API i.e, Amoxicillin and Cloxacillin, the protection given to such mark is weak, and the differentiator will enable 'INIMOX' to be registered;
- As the products sold under the 'INIMOX' mark is in the form of a syringe meant for use in animals, and the product under the mark 'IMOX' is a capsule meant for humans, therefore, there is no overlapping of trade channels, and consumers, thus no likelihood of confusion;
- That the word 'MOX' is *publici juris* or common to the trade;

- In support of their contentions, the Appellant relied on various case law such as: (i) *Syngenta Limited v. Hyderabad Chemical Supplies Limited & Deputy Registrar of Trade Marks* (Icon vs. Imicon: no relief was granted); (ii) *Corona Remedies Private Limited v. Franco-Indian Pharmaceuticals Private Limited* (Stimuliv v. Stimu-let: no relief was granted); (iii) *Orchid Chemicals & Pharmaceuticals Ltd. v. Wockhardt Limited* (Meto vs. Metox: no relief was granted); *Apex Laboratories Ltd. v. Zuventus Health Care Ltd.* (Zincovit vs. Zinconia: no relief was granted at the interim stage); *Astrazeneca UK Ltd & Anr v. Orchid Chemicals & Pharmaceuticals Ltd* (Meronev v. Meromer: no relief was granted); *Macleods Pharmaceuticals Ltd v. Swisskem Healthcare and another* (Panderm v. Polyderm: no relief was granted); *Schering Corporation & Anr v. United Biotech (P) Ltd* (Netromycin v. Netmicin: no relief was granted.)

Contentions put forward by IPCA:

- IPCA is the prior user of the 'IMOX' mark, and that Indian Immunologicals manufactures vaccines and medicines for human use;
- That the mark 'INIMOX' just has two additional letters i.e., 'IN' in comparison to IPCA's 'IMOX' mark, therefore the mark is deceptively similar to IPCA's mark even if the common generic source argument is taken into account;
- IPCA further submitted that Indian Immunologicals failed to prove the 'MOX' word is *publici juris*, and submitted that the registration of the 'INIMOX' would lead to deception and confusion amongst the public;

- In support of their contentions, IPCA relied on various case law such as: *Associate Builders v. Delhi Development Authority* (regarding perversity); *Macleods Pharmaceuticals Ltd v. Union of India and Others* (confusion in pharmaceutical products); *E. Griffiths Hughes v. Vick Chemical Co.* (determination of rights of parties on date of application filing); *Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd* (greater need of protection in the pharmaceutical sector)

Decision and analysis

The Court initially analyzed the factual inconsistencies in the refusal order passed by the Trade Marks Registry. As per the Court, some of the findings in the order such as the finding that both the rival products contain 'amoxicillin' and 'cloxacillin' was held to be inaccurate given Indian Immunologicals' product contained both the APIs and IPCA's product contained only 'amoxicillin'. Similarly, the finding by the Registry that both the rival products are used for human consumption was erroneous in the light of the fact that Indian Immunologicals' syringes are meant only for veterinary use while IPCA's capsules are meant for human consumption.

Nevertheless, given that the primary aspect of the Registry's impugned order dealt with 'likelihood of confusion', the Court comprehensively explored this aspect. The Court, while referring to Section 11(1) of the Trade Marks Act, 1999 (Act), firstly, discussed as to who was the prior user. Once it was ascertained that IPCA was the prior user given its use since 1982 (use of IPCA through exports was held as valid use in the light of the Bombay High Court

judgment in *Cadila Pharmaceuticals Ltd v. Sami Khatib*²); the Court looked at the similarity between the rival goods. The Court concluded that the goods sold under the rival marks are similar given that they are both pharmaceutical products and are therefore similar in nature and origin.

The Court thereafter examined whether the refusal of the 'INIMOX' mark by the Registry was warranted. To undertake this analysis, the Court evaluated the comprehensive list of precedents relied upon by the parties on the aspect of the strength of a trademark derived from a generic name or API. While putting a caveat that most of the orders relied upon were passed in respect of interim injunction applications, the Court concluded that marks that are derived from API or generic names are weaker in comparison to arbitrary or coined marks. The Court held that the larger the portion of the API or disease name that a mark uses, the weaker is its protection. Similarly, if a mark contains additional terms and unique elements apart from what it has borrowed from an API or disease name, then its protection would be stronger. This apart, the Court maintained that the analysis of '*visual, phonetic and structural*' similarity will play an important role in deciding the outcome of infringement, passing off, or proceedings involving strength of marks under Section 11(1) of the Act.

By taking the above discussion into consideration, the Court decided as follows:

- i. Given the admission of IPCA that they appropriated the word 'MOX' from 'Amoxicillin', IPCA's argument of lack of proof for 'MOX' being *publici juris* was inconsequential.

² 2011 SCC Online Bom 484

- ii. IPCA thus appropriated 3 letters from the generic name i.e., 'Amoxicillin' and added one letter i.e., 'I'. On the other hand, Indian Immunologicals appropriated three 3 letters and added the letters 'INI'. Given the appropriation by IPCA from a generic name and a slight addition, the Court held that their mark 'IMOX' as a mark is weak and consequently the said mark cannot prevent the registration of 'INIMOX'.
- iii. The Court considered that Indian Immunologicals' product under the 'INIMOX' mark is an injection meant for veterinary use while IPCA's product under the 'IMOX' mark is a capsule for humans. In this respect, the Court also highlighted Indian Immunologicals' reliance on Section 97(3) of the Drugs and Cosmetics Rules, 1945 which states that containers for medicines made for animal use must display the slogan '*Not for human use; for animal treatment only*' and will have to display a symbol depicting the head of a domestic animal. The Court noted that there was no material or basis provided by IPCA that the mark 'INIMOX' was used by Indian Immunologicals for production of human vaccines. In any case, Indian Immunologicals consented to restricting the use of 'IMINOX' mark only to veterinary use.
- iv. In addition to this, the Court noted that IPCA had not initiated any infringement or passing off action against Indian Immunologicals for the use of their 'INIMOX' mark which would be indicative of '*prima facie of the absence of actual deception or confusion.*' As per the Court the 'absence of actual confusion', would be relevant in such a

matter. The Court also considered that the search report from the Trade Marks Registry showed several marks had been registered containing the term 'MOX' such as 'MOX', 'UMOX', and 'IDIMOX'.

After considering the above aspects, the Court held that as, (i) the 'INIMOX' product was meant for use only in the injection form (that would be administered by trained doctors or nurses); (ii) the said injection was meant for use in veterinary purposes only; (iii) since most pharmacies do not combine human and animal drugs; (iv) the fact that Section 97(3) of the Drugs and Cosmetics Rules, 1945 laid down specific guidelines for its packaging; and (v) given the presence of multiple 'MOX' formative marks in Register, there would be no *likelihood of confusion* between the rival products on the condition that 'INIMOX' products would not be used for humans. Therefore, the Court overturned the Registry's findings in respect of 'likelihood of confusion' and allowed the appeal, directing the mark 'INIMOX' to proceed towards registration.

The High Court's order in this matter has provided clarity on the contours of registering API-derivate brand names in the pharmaceutical industry, and the necessary due diligence that needs to be carried out in that regard. Trademarks that are arbitrary or inventive carry more weight. That is to say, a mark's uniqueness is automatically diminished when it is derived from a generic name, API or disease/condition's name.

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Ratio Decidendi

- Patents – No deemed abandonment under Section 40 in case of bona fide belief that permission under Section 39 for patent of addition is not required – Absence of prior consent under Section 39 when only a technical breach – Madras High Court
- Patents – Use of laminate in prior art cannot motivate person skilled in such art to consider use of a film on standalone basis – Madras High Court
- Trademarks – Non-use of earlier mark in relation to relevant goods/services by the opponent is a material consideration while deciding opposition – Madras High Court also observes that Use to be established when trademark proprietor sues for infringement
- Certification trademark – Exception under Section 76(3) to infringement, and registration prohibitions under Section 70 – Delhi High Court
- Trademarks – Mere global/cross-border reputation is not sufficient, significant reputation need to be proved in India for protection here – Delhi High Court

Patents – No deemed abandonment under Section 40 in case of bona fide belief that permission under Section 39 for patent of addition is not required – Absence of prior consent under Section 39 when only a technical breach

Observing that there was a *bona fide* belief on the part of the patentee regarding no requirement of permission under Section 39 of the Patents Act, 1970 for foreign filing of patent of addition, when parent invention was first filed in India, the Madras High Court has set aside the order rejecting patent application on the ground that the same was deemed to be abandoned under Section 40.

Section 39 restrains a person resident in India from making an application outside India for grant of patent for an invention without obtaining a written permit from the Controller, while Section 40 deems the application to be abandoned in case there is contravention of Section 39.

Directing for reconsideration of patent application, the High Court considered the statutory provisions (Sections 54 to 56 of the Patents Act, 1970) relating to patent of addition, nature of the parent invention (*method for determining authenticity or tampering of a security label and the method of recording colour profiling in relation thereto*), claimed patent of addition (*method for an automated authentication of the security label*) and the fact that the application for grant of patent for the parent invention was first filed in India. It was of the view that the patent applicant did not

intend to circumvent the requirements of Section 39 and that there was credibility in the assertion of *bona fide* belief that permission under Section 39 was not necessary.

The Court also held that the breach committed by the patentee was a technical breach and would not trigger the deemed abandonment under Section 40. Tracing the history of the amendments in Section 40, the Court in this regard observed that the words 'contravention of Section 39' in Section 40 are intended to apply to situations where there is a clear breach of the requirement of written permit (prior consent from Central Government) in respect of inventions in all fields, including in the specific context of inventions relevant for defence purposes or atomic energy. It was hence of the view that a legal fiction incorporated in Section 40 is intended to serve a particular purpose to prescribe the consequences of a clear breach of Section 39, as opposed to procedural irregularities, and that the scope of Section 40 should not be extended beyond such purpose. [*Selfdot Technologies (OPC) Pvt. Ltd. v. Controller General of Patents, Designs & Trademarks* – Judgement dated 28 November 2023 in (T)CMA(PT)/61/2023, Madras High Court]

Patents – Use of laminate in prior art cannot motivate person skilled in such art to consider use of a film on standalone basis

The Madras High Court has set aside the decision of the Patent Office rejecting the patent application on grounds that the claimed invention was obvious and does not satisfy the requirements of Section 2(1)(ja) of the Patents Act, 1970 relating to 'inventive step'. The Patent Office's contention that the claimed patent (*use of*

polyvinyl alcohol film (PVA film) of particular specifications in plant cultivation) was obvious considering the prior art patent (*water-absorbing laminate and production process thereof*), was thus rejected by the Court.

Extracting the specifications of the two inventions, the High Court held that the invention disclosed in prior art document was intended to resolve a different problem. Also, noting that the said prior art taught the use of a laminate comprising of a PVA film in combination with a non-woven fabric, the Court was of the view that a person skilled in such prior art would not be motivated to consider the use of a PVA film on a standalone basis for resolving the problem that the claimed invention intended to resolve, i.e., the need for improved nutrient permeability and suppression of root penetration in plant cultivation.

It may be noted that the Court also upheld the appellants view that prior art document does not teach, motivate, or suggest the claimed invention and, in fact, teaches away to the extent that it proposes the use of a laminate. [*Kuraray Co. Ltd. v. Assistant Controller of Patents & Designs* – Judgement dated 29 November 2023 in (T) CMA (PT) No.47 of 2023, Madras High Court]

Trademarks – Non-use of earlier mark in relation to relevant goods/services by the opponent is a material consideration while deciding opposition

The Delhi High Court has rejected the contention that non-use of the earlier registered trademark by the opponent of the trademark

in relation to relevant goods/services is irrelevant or immaterial for the purposes of making a determination under Section 11(1) of the Trade Marks Act, 1999 which prescribes for relative grounds for refusal of registration.

Deciding the question of whether use of the relevant mark by the opponent is a material consideration while deciding the opposition, the High Court differed from the Court's earlier decision in the case of *RSPL Health Pvt. Ltd. v. Reckitt and Colman (Overseas) Hygiene Home Ltd.*, which had held that actual use of the relevant mark is not relevant for purposes of adjudicating whether there are relative grounds for refusal under Section 11(1).

According to the Court, if the earlier mark was not being used in relation to similar goods or services, except if the earlier mark is well-known, the likelihood of confusion on the part of the public becomes remote, if not non-existent. The appellant here was using the mark 'Walkman' in relation to portable audio cassette players, while the respondent used the device mark in relation to goods such as boots, shoes, slippers.

Dismissing the appeal filed against the rejection of an opposition application, the Court also rejected the appellant's assertion that non-use is relevant only for the purposes of a rectification petition under Section 47 of the Trade Marks Act. It observed that though a trademark cannot be removed from the Register except in accordance with Sections 47 and 57, the said proposition does not support the inference that non-use of the earlier mark in relation to the relevant goods is irrelevant or immaterial for purposes of deciding relative grounds for refusal under Section 11.

It may be noted that the High Court also observed that a trademark is liable to be removed from the register if there is no *bona fide* intention to use, and that the Registrar and the High Court have the *suo motu* power under Section 57(4) to rectify for any contravention or failure to observe a condition which would extend to non-use after registration.

Use to be established when trademark proprietor sues for infringement

Further, the Court also rejected the contention that exercise of proprietary rights conferred by the registration is not conditional upon use. According to the Court, since registration confers a statutory right to exclusive use, when a registered proprietor sues for infringement, it would be necessary for such proprietor to establish use, if not by the proprietor, at least by a registered or licensed user of such mark.

Lastly, contention that the mark 'Walkman' of the appellant, used in relation, was well-known mark, was also rejected by the Court. [*Sony Group Corporation v. Walkman Rubber Industries* – Judgement dated 17 November 2023 in (T) CMA (TM) No.25 of 2023, Madras High Court]

Certification trademark – Exception under Section 76(3) to infringement, and registration prohibitions under Section 70

Observing that the words 'is one of' are of stellar significance in the opening words of Section 76(3) of the Trade Marks Act, 1999, the Delhi High Court has held that so long as both the marks are

registered under the Trade Marks Act, and *one of them* is a Certification Trademark ('CTM'), the fact of registration would entitle each of the said marks to be used as a trademark. The Court was hence of the view that no injunction against such use can be granted, irrespective of whether the mark is, or is not, infringing.

Grant of injunction for use of the word mark 'CSM' [acronym of Certified Scrum Master] by the defendant was thus declined to the plaintiff by the Court, though according to the Court the provision appears peculiar. The plaintiff had a registered Certification Trademark 'CSM' while the defendant's mark was registered as an ordinary trademark and not as CTM.

The Court however rejected defendant's contention in respect of non-registrability of the plaintiff's 'Certified Scrummaster/CSM' mark on the basis of Section 70 of the Trade Marks Act, which proscribes registration of a mark as a CTM in the name of a person, carrying on a trade in goods of the kind, certified or a trade of the provision of services of the kind certified. According to the Court, imparting training in 'Agile methodology', which would entitle the trainee to obtain a 'Scrum certification', cannot be regarded as training in the provision of the services rendered using the 'Scrum Agile methodology'. The Court observed that Section 70 would be applicable only if the plaintiff were to itself provide Scrum services for commercial consideration.

Scrum is one form of Agile methodology which provides incremental innovative solutions for project management and development in software engineering, and the plaintiff was a Scrum certification organization. [*Scrum Alliance, Inc. v. Prem Kumar S.* – Judgement dated 21 November 2023 in CS(COMM) 700/2021, Delhi High Court]

Trademarks – Mere global/cross-border reputation is not sufficient, significant reputation need to be proved in India for protection here

The Division Bench of the Delhi High Court has held that a claimant who has no presence or a customer base in India, has not established its presence by way of adequate advertisement or promotional activity or one who fails to establish a global reputation equally well known to the consuming public in India is not entitled to claim protection in India. According to the Court, this would strike the right balance between the brands whose reputation transcends territories and the interest of national enterprise and that of consumers on the other.

Take note of various precedents including the Supreme Court decision in the case of *Toyota Jidosha Kabushiki Kaisha v. Prius Auto Industries Ltd.*, the Court observed that a mere global reputation or asserted goodwill has neither been accorded a judicial imprimatur nor accepted as being sufficient by the Indian courts to answer a claim of transborder reputation.

The High Court hence opined that in order to succeed on this score, it is imperative for the claimant to prove and establish the existence of a significant and substantial reputation and goodwill in the concerned territory. The Court in this regard stated that unless a sizeable imprint of the presence of the mark is established amongst the consuming public, a claimant would not be entitled to protection. [*Bolt Technology OU v. Ujoy Technology Private Limited* – Judgement dated 30 November 2023 in FAO(OS) (COMM) 45/2023, Delhi High Court]



News Nuggets

- Trademarks – Reasons for accepting or directing advertisement of a mark are to be made publicly available
- Trademarks – 'Honest concurrent use' required for claiming benefit of Section 12 but evidence relating to adoption is also relevant
- Patents – Situs of High Court for filing appeal under Section 117A
- 'Apollo' recognised as well-known trademark in healthcare and pharma sector

Trademarks – Reasons for accepting or directing advertisement of a mark are to be made publicly available

Relying upon the Delhi High Court's decisions in the cases of *Jai Bhagwan Gupta* (2020: DHC:1532) and *Kaira District Cooperative Milk Producers Union Ltd.* (2023 SCCOnLine Del 1730), the Delhi High Court has observed that a brief order should be passed at the time of acceptance or directing the advertisement of a mark by the Trademark registry. According to the Court, ordinarily, a brief order should be available on the online portal of the Trademark Registry for litigants' reference, and that if the same is not uploaded for all applications, its copy should be made available upon request via email. The Court in *Laxmi Kohlu Ghar v. Controller General of Patents Designs and Trademarks* [Decision dated 22 November 2023] rejected the contention of the Registry that reasons for accepting or directing the advertisement of a mark under Section 20 of the Trade Marks Act, 1999 are recorded in an internal note sheet maintained by the Registry, which may be given upon filing of an RTI application. The Court in this regard doubted whether such an order can be called as an internal note sheet. It also held that the need for a RTI application was unnecessarily onerous.

Trademarks – 'Honest concurrent use' required for claiming benefit of Section 12 but evidence relating to adoption is also relevant

In a trademark dispute where the appellant had contended that the benefit of Section 12 of the Trade Mark Act, 1999 arises only by

honest concurrent use and not by mere adoption, the Madras High Court has held that while a person cannot claim the benefit of Section 12 without establishing honest concurrent use, this does not mean that evidence relating to adoption is irrelevant or immaterial.

Dismissing the appeal filed against the rejection of opposition in respect of the trademark 'Black Gold' used for black henna hair dye when the appellant here was using the mark 'Black N Gold' for cosmetic products, the Court noted that the respondent was granted a licence to manufacture cosmetics bearing the mark 'Black Gold' with effect from 10 August 1992, which predates use by the appellant, and therefore, the adoption was honest. The Court in *Ved Prakash Malhotra v. Abhinav Export Corporation* [Judgement dated 27 November 2023] also noted that first evidence of use by the appellant was barely a month earlier than the use by the respondent and that it was unlikely that the use of the mark by the appellant was well recognised in trade circles when the respondent first used the mark.

Patents – Situs of High Court for filing appeal under Section 117A

In a case where the patent application was initially filed at Mumbai and was allotted to the office of the Assistant Controller of Patents, Delhi for examination and adjudication, and the order rejecting the patent was issued by the Assistant Controller of Patents, Delhi, the Delhi High Court has reiterated that the appeal against such rejection order has to be preferred to the Bombay High Court and not the Delhi High Court.

The High Court in *Filo Edtech Inc. v. Union of India* [Judgement dated 21 November 2023] agreed with the Coordinate Bench decision in the case of *Dr. Reddys Laboratories* [295 (2022) DLT 591] which had held that the geographical location of the High Court which could exercise jurisdiction under Section 117A(2) would have to be determined on the basis of the geographical location of the 'appropriate office' having dominion over the application within the meaning of Rule 4(2) of the Patent Rules.

The Court in this regard also noted that Rule 4(1)(i) specifically states that the appropriate office of the Patent Office shall, 'for all proceedings under the Act', be the Patent Office where the application seeking grant of patent is initially filed. According to the Court, the words 'for all proceedings under the Act' would embrace all proceedings from the stage of filing of the application before

the Patent Office under Section 7 till the filing of the appeal before the High Court under Section 117A.

'Apollo' recognised as well-known trademark in healthcare and pharma sector

The Madras High Court has recognised that 'Apollo' is a well-known trademark insofar as healthcare and pharmaceutical sector is concerned as per the provisions of Section 2(1)(zg) read with Section 11 of the Trade Marks Act, 1999. The High Court in *Apollo Hospitals Enterprises Ltd. v. New Apollo Hospital* [Judgement dated 20 November 2023] observed that the ten-factor test as highlighted in Section 11(6) was satisfied by the plaintiff for recognising their mark as a well-known trademark.

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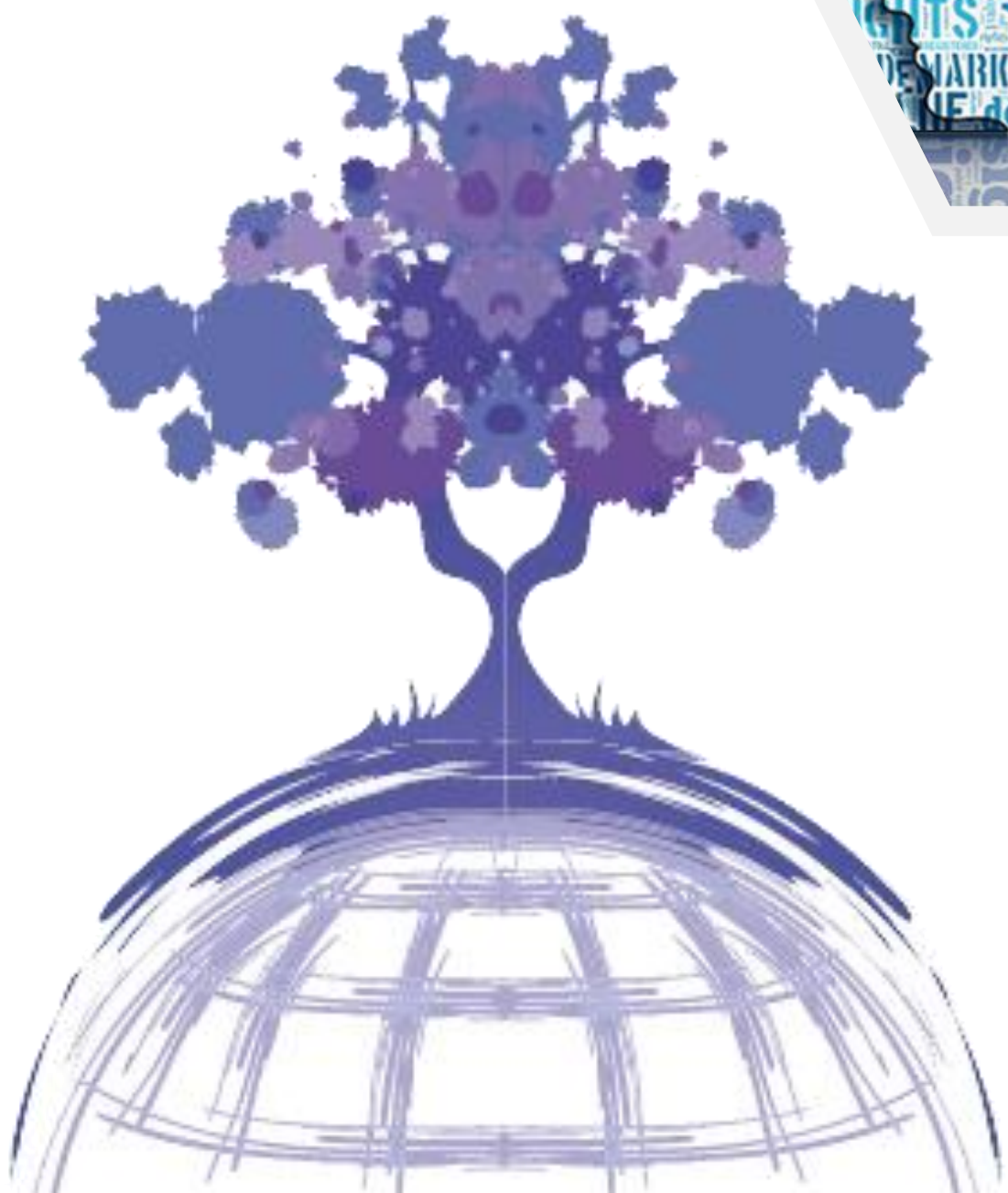
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