

(2013) 01 IPAB CK 0003

In the Intellectual Property Appellate Board

Case No : M.P. No. 202/2011 In ORA/168/2011/TM/DEL, ORA/168/2011/TM/DEL

M/S. Pawan Kumar Sushil Kumar Agro(P) Ltd., 2601, Nai Basti, Naya Bazar, Delhi 110006 APPELLANT

Vs

M/S. Shriniwas Jhawar, Trading As M/S. Jai Hind Traders, 4099, 3rd Floor, Naya Bazar, Delhi 110006 And Registrar Of Trade Marks, The Registrar Of Trade Marks Registry Sector 14, Plot No. 32, Dwaraka, New Delhi RESPONDENT

Date of Decision : 04-01-2013

Acts Referred:

Trade And Merchandise Marks Act, 1958 — Section 9, 9(2)(a), 11, 11(1), 11(2)(a), 11(3), 12, 12(3), 17, 18, 18(1), 32, 47, 57, 100

Trade Marks Act, 1999 — Section 46, 56

Intellectual Property Appellate Board (Procedure) Rules, 2003 — Rule 8

Citation : (2013) 1 MIPR 269

Hon'ble Judges : S. Usha, J;V. Ravi, Technical Member

Bench : Division Bench

Advocate : Ajay Sahni, Prathiba M. Singh, Umesh Mishra

Final Decision : Dismissed

Judgement

V. Ravi, Technical Member

1. Application is for removal of registered trade mark No. 1028224 in Class 30 of the respondent. The trade mark in question is PRT. The ground for

rectification is summarized below:

(a) The applicants through its predecessors has been engaged in the business of milling, sorting, processing, preparing, refining, packaging, packing,

trading & marketing all types and qualities of ""rice"" since 1992 and under the trade mark KRT since 1995.

(b) For the first time in the last week of November 2010, the applicant came to know that the respondents are dealing with similar products and are

using a deceptively similar trade mark/package PRT. Consequently the applicant filed a civil suit for passing off and infringement of his trade mark

KRT under No. 1159069 and 973101 in Class 30 (as of 16th December, 2002 and 27th November, 2000 respectively) against the respondent in the

Hon'ble Delhi High Court in suit No. C.S. (296/2011). However, the respondents took the plea that they were the registered proprietor for the

impugned trade mark PRT under No. 1028224 in Class 30 as of 18th July, 2001. The said suit was eventually compromised between the parties with

the respondent admitting the proprietary right of the applicant in its distinctive packagings and undertook not to reproduce any package identical or

deceptively similar to the applicant. However, the Hon'ble Court directed the applicant and respondent to agitate its respective trade marks rights.

(c) It is the case of the applicant that on a plain visual examination of the two competing marks KRT & PRT both are identical/deceptively similar and

that the applicant are the prior user of the trade mark KRT and therefore, the impugned mark is hit by Section 11 of the Act.

(d) Further, the impugned trade mark PRT is not being used in the manner in which it has been registered and the respondent has no bonafide intention

of using the same till the date of this application.

(e) The applicant assert that the impugned trade mark PRT is barred by the section 11(2)(a) of the Act as it is of such a nature likely to deceive the

public and cause confusion.

(f) The applicants are 'person aggrieved' as the impugned mark is deceptively similar to his prior registered trade mark KRT and the respondent is

passing off his goods and business as that of the applicant.

(g) The predecessor of the applicant filed an application for the registration of the trade mark KRT (label) at New Delhi under No. 763464 in Class

30. The predecessor reapplied for the registration of the same mark under 1159006 in Class 30 which has not proceeded for registration. The

applicants have also applied to substitute its name in place of his predecessor which request is still pending at the registry. The applicants are thus the

subsequent proprietor of the registered trade mark KRT (label).

(h) Earlier, on 27.11.2000, the predecessor of the applicant had applied for registration of KRT label as a 'proposed to be used' mark under No.

973101 in Class 30 in respect of ""Coffee, tea, coco, sugar, tapioca, Sago, coffee

substitute, floors and preparation made from cereal, biscuits, pastry and confectionery, ices, honey, yeast, baking powder, mustard, pepper, vinegar, sauce & spices"". With respect to this application also the applicants

have sought substitution of the name as the subsequent proprietor. The said trade mark has since been duly registered, valid and subsisting.

(i) In 2004, the applicant applied for registration of the artistic work of the label KRT under the Copyright Act and the same is duly registered under

No. A-67336/2004 dated 12.05.2004.

(j) The applicants have been using the trade mark KRT since 1995 continuously, extensively and exclusively throughout India on a very large scale

and have thus acquired tremendous reputation for impeccable quality, pleasing aroma and palatable taste for the food products sold by them. They

have also advertised its product in the leading newspapers, and other promotional literature extensively to build brand reputation.

(k) The applicants have a sales figure running into Crores of Rupees on the date of application for cancellation (12.05.2011). In the three years

preceding the same, the applicants had a turnover of over Rs. 26 crores in (2007-08); over Rs. 33.5. crores in (2008-09) and over Rs. 37.08 crores

(2009-10).

(l) By virtue of continuous use over the last fifteen years, the applicants trade mark KRT has acquired reputation and valuable goodwill in the eyes of

the public and the trade and the said mark is exclusively associated with the applicant.

(m) It is apparent that the impugned trade mark PRT of the respondent has been inspired from the mark KRT in as much as the first alphabet 'K' of

the applicant has been merely replaced and substituted by the alphabet 'P' which does not dilute the deceptive nature of the competing mark. Further,

the applicants have been using their mark since 1995 which is much earlier than even the claimed user of the respondent which in any case is false

and not supported by any cogent documentary evidence.

(n) In view of the foregoing, the registration of the impugned mark PRT is invalid and violative of the sections 9, 11, & 18 of the Act and is liable to be

taken off the record. In particular, the impugned mark offends the express provision of Section 9(2)(a) and the registration is in total disregard of the

mandatory provision of Section 11.

(o) Most importantly, the deceptive similarity of the two marks namely KRT & PRT has been admitted by the respondent in Para 10. of the

Compromise Petition filed in C.S. in OS No. 296/2011 which forms part of the decree passed by the Hon'ble Delhi High Court on 01.04.2011 and the

only the question before the tribunal is to ascertain who amongst the two is the prior user of the respective trade mark?.

(p) The applicant also state that the impugned mark is bound to lead to passing off and cause embarrassment, inconvenience and hardship to the

applicant and section 11(3) is also a bar to the registration of the impugned trade mark.

(q) The registration of the impugned trade mark has been obtained by concealing material facts, untrue statement and misrepresentation and is,

therefore, contrary to law and liable to be cancelled. Further, the registration of the mark offends the provision of the sections 9, 11, 18(1), 47 & 57 of

the Act.

(r) In view of the foregoing, the impugned mark has been registered without sufficient cause and is liable to be expunged from the register.

(s) Evidence in support of the application is an affidavit of Shri Bhagwan Saraf, Director of applicant company; Memorandum of Article of

Association of M/s. Pawan Kumar, Sushil Kumar Agro Pvt. Ltd.; sample bills of sale under the applicant's trade mark KRT in respect of rice,

newspaper cuttings in Vernacular newspapers advertising the applicants brand and copy of the petition filed in the Hon'ble Delhi High Court.

2. The respondent Shri Srinivas Jawaar, the sole proprietor of M/s. Jai Hind Traders has denied all the material averments, allegations and contentions

raised by the applicant. Firstly, he has raised a technical objection under Rule 8 of IPAB rules in as much as the application is not in the form of

affidavit and what has been stated therein has not been made on oath before competent authority and therefore, the subject petition is liable to be

dismissed in limini.

3. The respondent state that the present petition is not maintainable as the applicant is not a 'person aggrieved'. The rival marks are totally different

and distinct. The respondents are in business of processing of rice, pulses and other food grains since 1985 and are also in the business of

trading/commission agent for the same. In 1985, the respondent started a

business styled M/s. Jai Bharat Traders trading in rice, makka, bajra pulses, wheat, etc. The sales tax return for the assessment year 1986-87, 1987-88 and 1990-91 is attached with the Counter Statement as Exhibit -R1. Later

on M/s. Jai Bharat Traders was dissolved and the respondent started a business styled M/s. Jai Hind Traders being its sole proprietor. They have been

doing business since 1998. In 2000, they launched a new brand of rice under the trade mark PRT coined from the name of the respondent's son &

daughter namely Pawan & Ritu respectively. On 18th July, 2001, the respondent applied for the registration of the trade mark PRT in Class 30 for rice

and it was duly registered in 2006.

4. It was never the intention of the respondent to copy any trade mark of the applicant nor it has gained any unlawful advantage or gain as alleged by

the applicant. Any similarity in the lay out, colour scheme and artistic design was unintentional and to avoid further litigation, the respondent amended

their packaging material bearing the trade mark PRT and produced the same before the Delhi High Court.

5. There has been no complaint of any confusion or deception by the use of the trade mark PRT by the respondent since the last 7 to 8 years.

Therefore the allegation of dishonesty is baseless. The respondent state that both the applicant and the respondents shop is located in Naya Bazaar,

Delhi and the applicants have never objected to the use and registration to the respondent mark all these years. However, the Hon'ble Delhi High

Court had restrained the respondent from manufacturing/selling, or offering for sale, advertising directly or indirectly and deal in rice and other cognate

goods bearing their trade mark. Subsequently, the matter was compromised between the parties.

6. The respondent state that the trade mark PRT has been used openly, extensively, continuously and uninterruptedly in the Indian market since 2000.

It was only in 2010 that an objection was raised by the agent of the applicant in Guwahati regarding similarity of bags of both the parties and after

discussion, the respondent agreed to modify his packaging containing the impugned mark. The respondent have furnished evidence of sales under the

impugned trade mark PRT since 2001 onwards and on the date of filing of the impugned mark application, the respondent had the sales turn over of

Rs. 1.85 crores per annum. The respondent have been using the impugned mark

since 2000 without prejudice to the applicant.

7. The respondent state that while they applied for registration of the Trade Mark 'PRT' in June 2001 which was duly registered in 2006. The

applicant on the other hand applied for the trade mark KRT in 2000 for products falling in Class 30 but not expressly including rice. It is only in

December, 2002 that the applicants have sought registration for KRT in respect of 'rice' which was subsequently registered in June, 2005. The

respondent mark are completely different from that of the applicant. Not a single instance of confusion has been brought to notice. The respondent

denied that the registration is hit by provision Sections 9, 11, 18(1), 47 & 57 as alleged and that no case has been made out for the removal of the

impugned mark.

8. The evidence in support of registration is an affidavit of Shri Srinivas Jawaar, the sole proprietor of the respondent company; copy of audit report

for the assessment years 1986-87, 1987-88 & 1990-91; copy of invoices regarding advertisement of the business of respondent No. 1; copy of

documents/invoices regarding the business of respondent No. 1 under the name & style of M/s. Jai Hind Traders; copy of packaging material bearing

the trade mark PRT with different lay out and colour scheme; photographs of jute bags used by the respondent; and copy of sale figure of the

respondent from the year 1998-1999 to 2010-2011; etc.

Applicants relied on the following authorities:

1. ""M/s Ashoka Dresses (Regd.) Vs M/s. Bonn'S Shirts & Others""-- (Delhi HC)

Our attention was drawn to the observation of His Lordship that there was a misrepresentation in the advertisement. Held defective advertisement

could create confusion and uncertainties in mind of general public and therefore such advertisement was not a fair representation to the public at

large.

2. 1998 PTC (18)--MRF Limited Vs NR Faridabad Rubbers & Another (Delhi HC)

Held--the test to be applied in such matters is as to whether a man of average intelligence and of imperfect recollection would be confused. Plaintiff

was a reputed manufacturers of tyre bearing trade mark MRF. Defendant adopted NRF. Held, purchasers can be easily misled by phonetic similarity.

Why out of tens of thousands of words, the defendant hit upon NRF? Prima facie

case for grant of ad-interim injunction made out.

3. Panipat Co. Operative Sugar Mills Ltd. And another Vs. Mohan Meakin Breweries Ltd. (Punjab & Haryana, HC) F.A.O No. 35 of 1978

Plaintiff's label was 'MMB' for whisky with distinctive colour of words written on it. Defendant's label contained letter 'BMB'. Before the Additional

District Judge defendant could not explain what 'BMB' stood for. In appeal defendant stated it is 'Best Marketing Brand'. While appreciating the

ingenuity of the Counsel, Court held that the explanation was only to satisfy the query of court and not convincing. Proof of actual confusion not

necessary. Plaintiff had made out a case for grant of temporary injunction.

4. Aktiebolaget SKF Vs Rajesh Engineering Corporation--""(1996) (16) PTC-160 (Del) 1996 (16)PTC 160 (Del)

Competing trade mark 'SKF' who opposed registration of trade mark 'SKI'. Our attention was drawn to Para 10 which is quoted below:-

As is manifest from the two trade marks the first two letters thereof are common. Only the last letters in the two marks are different. Since the first

two letters of the competing marks are identical they bear a close similarity. There is a possibility and likelihood of mistake being committed by an

average man of ordinary prudence and intelligence in identifying the trade mark SKI with the goods of the appellant. The trade mark, therefore, is

likely to cause deception and confusion in the minds of the customers. Such a possibility is sufficient to disentitle the respondent from getting the mark

registered. It cannot be disputed that both the trade marks cover goods of the same description as the appellant's trade mark SKF is in respect of the

goods which fall in class 7 and the respondent's trade mark SKI which is sought to be registered is also in regard to goods falling in the same class.

Both the parties deal in ball bearings. Therefore the trade channels for the out flow of the goods to the customers are also the same.

5. ""Shri Harmohan Singh Vs Shri Gurbax Singh""-- AIR 2001 Delhi 507

The plaintiff and the defendant were real brothers carrying on business under terms contained in the partnership deed--The deed was dissolved and

the defendant relinquished and surrendered his rights, interests in the business-- He started using 'GP' T. M. for pipes, oil seals, water cooling pipes,

thermostats etc. -- The packing material used by the defendant was identical to that of plaintiffs--The question arose whether the defendant should

continue to be the owner of trade mark 'GP' in spite of dissolution deed --It was held that the defendant should discontinue to use of the trade mark

'GP' in spite of the dissolution deed--The interim injunction was made absolute.

6. S. Mehar Singh Vs M.L. Gupta & Co.- (CMA--143 of 1980)-Delhi HC

Trade Marks Act--Section 12--Registration of--Prohibition--Identical and deceptively similar trademarks--Sewing machine parts--Applicant/appellant

applied for registration of trademark ""MLI"" objections raised by opponent who claimed they are proprietors of trademark ML --Concurrent continuous

and uninterrupted user --Likely to deceive--Cause confusion--Entitled to protection--Applicants pleaded acquiescence--Asst. Registrar rejected the

application--Appealed against--Registration is prohibited under the provisions of--Phonetic and visual similarity--Dismissed.

7.: ""Banwaridas Pugalia Vs. Colgate Palmolive Co. and Others""- AIR 1979 Cal-133

Intellectual Property Rights--Grant of trade mark--Application for grant of trade mark rejected--Hence, present appeal under the Trade and

Merchandise Marks Act, 1958 (the Act) -- Held - it was to be noted that Appellant had started the use of mark just one month prior to the date of

application -- Therefore, Deputy Registrar held the Appellant was not entitled to the benefit under Section 12(3) of the Act--Section 12(3) of the Act

requires concurrent user or other special circumstances--In present case use for one month in the background of user for a long period by respondent

of their own mark, could not be described as concurrent user-- Section 12(3) of the Act was not attracted--Appeal dismissed.

8. ""Nirex Industries (P) Ltd. Vs Man Chand Foot Wears Industries"" -- 1984 (4) PTC 97 (Del)

Competing trade marks--NIREX and MIREX--Held the defendant have tried to copy the registered mark of the plaintiff.

The mark 'MIREX' which is now being used by the defendants is phonetically and visibly similar to the mark of the plaintiff. The difference is only in

the first letter, namely the defendants have substituted the letter 'M' for 'N'. The plaintiff has admittedly been carrying on the manufacture and sale of

goods with the said mark 'NIREX' long prior to the defendants entering the field. I have, therefore, no hesitation in coming to the conclusion that the

plaintiff is entitled to have the interim order confirmed. I accordingly confirm the

interim order dated 5th September, 1983 till the disposal of the suit.

This application stands disposed of. No costs.

Respondents relied on the following authorities:

1. ""P.P. Jewellers Pvt. Ltd. & Another Vs P.P. Buildwell Pvt. Ltd."" -- 2010(43) PTC 1 (Del.) (DB)-

On a thoughtful consideration of the rival contentions, we are of the prima facie view that the Appellant not being a holder of registered trade mark

PP"" no case for infringement is made out and thus no injunction is liable to be granted against the Respondent PP Prime Properties in FAO (OS) No.

534/2009 on this count. The only actionable claim by the Appellant being of passing off, there has to be evidence to show that the Appellant is a prior

user and has attained exclusivity in the mark ""PP"". The registered logo of the Appellant in class 14 is not merely ""PP"" but specifically ""PPJ"". The

appellant has filed for registration of its trade marks in a number of classes with the Registrar of Trade Marks for the registration of its firm in the

name of ""PP Jewellers Pvt. Ltd."" and not as ""PP Towers"" and logo ""PPJ"" or ""pp"".

2- ""Kabushiki Kaisha Toshia Vs Toshiba Appliances & Co. ""- 2007(34) PTC-621 (IPAB)

Sections 46 & 56--Trade Marks Act, 1999--Sections 11, 18 & 100--Petition for rectification of register of trade marks to cancel the registration of

mark 'Toshiba' registered in class 5--Deceptive similarity with well known brand 'Toshiba' which was a coined word--Application for registration filed

in the year 1989 claiming user since 1975 -- Mark on the register for nine years on the date of filing of application for rectification -- Rectification

application rejected.

3. ""In the Supreme Court of New Zealand--Solavoid Trade Mark"" -1977--RPC-in the Privy Council

Trade mark--Rectification--New Zealand--Possibility of confusion with mark already on register at date of registration-Standard of proof of deception

or confusion required for rectification--Mark originally registered on advice of Commissioner of Trade Marks--Weight to be given to this advice--

Mark ordered to be expunged from register--Proprietor's appeal allowed.

Where the question of the likelihood of deception or confusion arises upon an application to expunge a registered mark which has already been the

subject of substantial use, the absence of evidence of actual confusion having occurred is a potent factor in determining whether or not the court

should exercise its discretion to expunge the mark from the register. But it does not decide the relevant hypothetical question which must be answered

in the affirmative before any question of discretion to expunge the mark arises: Would any normal and fair future use of the marking the course of

trade be likely to cause deception or confusion? If actual confusion in the past is proved, this is a strong indication that continued confusion is likely;

but the absence of evidence of past confusion may be accounted for by the small extent to which the mark has been used or by special circumstances

affecting its past use which may not continue to operate to prevent confusion in the future" ([1972] 1 W.L.R. 729, 737; [1973] R.P.C. 297, 321; [1972]

2 All E.R. 507, 514).

4. " B. Braun-Dexon, S.A. Vs Philippe Mailhebiau "- 2002(24) PTC 486 (UK)

Community Trade Mark Regulation Act, Sections 57, 58 & 59--Registration--Opposition-Likelihood of confusion on the part of the public because of

similarity of the marks especially from a phonetic point of view and the goods covered by the two marks are identical or very similar, should be judged

taking into account all factors relevant to the circumstances of each case.

2. Comparison of signs-The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect (see Judgment of

the Court of Justice, Case C-210/96, Gut Springenheide and Rudolf Tusky v. Oberkreisdirektor des Kreiss Steinfurt {1998}, OJ OHIM 3/99 p. 575

paragraph 31; Judgment of the Court of Justice, Case C-342/97 Lloyd Schuhfabrik Meyer v Klijsen Handel, BV{1999}. OJ OHIM 12/99, paragraph

26), The consumers' level of attention is likely to vary according to the category of goods or services involved, and he normally perceives a mark as a

whole and does not proceed to analyse its details.

Trade marks have to be compared by making a global appreciation of the visual, aural or conceptual similarity between them bearing in mind, in

particular, their distinctive and dominant components (Judgment of the Court of Justice, Case C-342/97 Lloyd Schuhfabrik Meyer v. Klijsen Handel

Lloyd/Loint's", OJ OHIM 12/99, PARAGRAPH 25).

The trade marks to be compared are the following BBD (Earlier mark) and (CTMA)

Any conceptual comparison seems to be irrelevant, as no clear meaning can be connected with either part of the marks in question.

From a phonetic point of view, although the signs contain the same three letters in the same order, they are likely to be pronounced with all their letters

BE-BE-DE--and E--O--BE--DE, according to Spanish rules of pronunciation. The rest of the elements of the later mark are unpronounceable

graphical features.

A visual comparison of the two trade marks shows that they contain the same three letters in the same order. The figurative elements in the later

mark, contribute to visually differentiating the marks. However, as the opponent claims, they are figurative elements closely related to the goods in

question.

Therefore, the dominant elements of the marks are the two respective acronyms, BBD and EOBDD. It cannot be denied that there is a certain level

of visual and phonetic similarity owing to the common letters BBD, the Office considers that the earlier mark is a three letter-mark and the first parts

of the marks in question are different, the difference being represented by the two vowels EO, which are totally different from the following letters.

Considering the above, reasons and the fact that the letters composing the five letter CTMA are to be seen as equally dominant and that a mark has to

be considered as a whole, the Office concludes that the marks are dissimilar overall.

Conclusion

The risk that the public might believe that the goods or services in question come from the same undertaking or, as the case may be, from

economically-linked under-takings, constitutes a likelihood of confusion within the meaning of Article 8(1)(b) CTMR (see Judgment of the Court of

Justice, Case C-251/95 Sabel BV v. Puma AG, Rudolf Dassler Sport [1997] OJ OHIM 1/98, p.89, paragraphs 16 to 18;

5. ""Pignons S.A. De Mecanique de Precision et al Vs Polaroid Corporation et al.""- Court of Appeals First Circuit

212 USPQ. Held, inter-alia, "" Evidence of actual confusion is not invariably necessary to prove likelihood of confusion; on the other hand, absent

evidence of actual confusion, when marks have been in same market, side by side, for substantial period of time, and trademark owner's inability to

bring forth during this period, more than single feeble and indirect example of possible consumer confusion strongly indicates that use of mark has not caused likelihood of confusion.

9. The applicant have also filed a Miscellaneous Petition 202/2011 in ORA/168/2011-TM(DEL) to stay the effect of the registered trade mark. This was also heard along with the main matter as the grounds agitated are identical.

10. The matter was listed for hearing on 29.08.2012. We have heard the arguments of the Ld. Counsel and perused the records of the case.

11. Before we proceed further it would be appropriate to look at the competing trademarks.

Applicant Registered TM--973101 filed on 27-11-2000

User claimed-proposed to be used.

Applicant Registered TM--1159069 filed on 16.12.2002

User claimed 06.01.1995

Respondent's Registered TM--1028224 filed on 18.07.2001

PRT

User claimed June 2001

12. At the hearing the Learned Counsel for the respondent argued that one of the objection raised was ordered for ABA in Part B which is only a

technical objection. The impugned trademark is a word mark PRT where as the applicant's trademark is KRT label embossed in an elliptical globe.

The two marks are different and distinct. There has no defect in the Journal publication and the Learned Counsel of the applicant's interpretation of

section 159(2) is not correct. On merit, the argument was applicant does not have word mark registration. As per section 17, the rules of comparison

of competing mark is to compare it as a whole. Further, the applicant do not have a pending word mark. Also, the adoption claimed by the applicant is

from 1995 whereas the earliest user invoice tendered is of 1999. The first sale invoice tendered is only of 23rd June 2001.

13. At the hearing the applicant counsel argued that sections 11, 17 and 159 (2) is a complete bar for the impugned mark from being registered. The

counsel tried to distinguish the various case laws relied on by the respondent. In rejoinder, the respondent submitted that registration certificate in

respect 973101 for the label mark KRT does not include 'rice' and it is because of

this the applicant was constrained to file a second application under no. 1559069 in December 2002 to include 'rice' as part of the specification of goods after the respondent had its application in 2001 for the impugned mark.

Concerning 'person aggrieved' which is a pre-requisite to lodge a cancellation petition, as both applicant and respondent are in the same trade, it is evident that the applicant have the requisite locus to seek expulsion of the impugned mark which the applicant apprehend is conducive to source confusion.

14. On the preliminary issue of defective advertisement of the respondents mark PRT in TM Journal No. 1330-1 dated 15.05.2005 we do not find any anomaly as the goods 'rice' is indicated in the next page of the TM journal. Back in 2005 TM Journal were possibly composed manually and sold in CDs to customers. The error in the goods not being reflected in the advertisement page was minor error probably made by the outsourced vendor. It does not materially alter the position that the respondent's mark was published as 'Advertised Before Acceptance' inviting objections.

15. On the interpretation of section 159(2) to the effect that the impugned mark was only ordered for ABA in Part B under the repealed TMM Act, 1958 and it therefore needs to be re-examined under Trade Marks Act, 1999, we do not accept this contention as the provision for the presumption of conclusive validity of a trademark after 7 years as contained in former section 32 of the repealed Act has also been omitted.

16. The main point for determination is whether the competing marks are similar and therefore hit by section 11 on relative grounds. This section exists not merely for the benefit of other traders but for the benefit of the public at large. Section 11(1) prohibits in specific terms the registration of trademarks which are likely to deceive or cause confusion by reason of similarity to trademarks already registered in the name of a different proprietor in respect of the same or similar goods. The competing mark before us is a logo KRT and the impugned word mark PRT. As mentioned, the respondent vehemently argued that the second application of the applicant under No. 1159069 was necessitated in December, 2002 as 'rice' was not included in the specification of goods under No. 973101 filed in November, 2000 whereas the respondent's application was filed in July, 2001

which is subsequent to that of the applicant.

17. The two marks under consideration are not identical but are allegedly closely resembling each other. If that be the case our enquiry is not limited to

a comparison of the two marks. We have also to consider the goods in which respect of which the competing marks are registered. We should also

examine the surrounding circumstances to be properly taken into account. Section 11(1) is a mandatory provision and is a substantive section and it is

incumbent on the registrar to refuse registration when hit by that section. In examining objection under Section 11(1) we have to keep in mind the

average consumer who is deemed to be reasonably well informed, observant and circumspect. Another rule to be borne in mind is more similar the

broad category of goods covered and more distinctive the earlier mark, the greater would be likelihood of confusion. It is recognized that relevant

factors are interdependent. It is not possible to set out in the abstract whether one factor carries more weight than others as factors varies according

to circumstances. Here, the competing marks are in the respect of food articles. In the instant case on an overall assessment, we believe that the

competing marks are deceptively similar. The nature of goods are procured by semi-literate and uneducated masses. Purchase would be made on

trust with an imperfect picture of the goods and the class of customers who would purchase respondent's goods could be easily duped into thinking it is

those of the applicant. Both are located at Naya Bazar at Delhi and there is force in the applicants contention that the impugned mark has been

inspired by the applicant's trade mark. To the extent the respondent has adopted suffix 'RT' as a letter mark, the similarity of idea is evident. The fact

that no one has been confused for last 7/8 years is by itself not conclusive. It the likelihood of confusion that we have to address. On the date of

rectification application, the applicant have an established turnover exceeding twenty times the respondent under their brand KRT. One possible

reason why proof of actual confusion could not be produced is the respondent's being relatively speaking still a small player with turnover of less than

Rs. 2 crores. So long the impugned mark could have merely been of nuisance value to the applicant but once he realizes and apprehends confusion is

inevitable in the future, he has moved the machinery of law to expunge the impugned mark which has been registered only in 2006 and the five years

three months window for removal on grounds of non-use has closed only in 2011. Although pleas of non-use has not been raised, the Toshiba case relied on by respondent will not apply here as in that case the mark was in the register for nine years. Most importantly, the level of attention of mostly illiterate customer for the rival goods will be minimal or marginal-probably the cheaper the rice the greater the demand for it. Both the parties are trading in everyday mass consumption product. Both are sold in the same shop and so are in the same trade. In this case the demand for the competing goods would be asking for 'KRT' and 'PRT'. Semi--literate customers cannot be expected to have the skill, acumen and intelligence to make a fine distinction between the two closing resembling mark. Conceptual similarity between the two marks is very evident. Why out of thousands of name the respondent are coveting 'PRT' as a trade mark? Does it not suggest an intent to skim off some of the established goodwill of the applicant? Phonetically too the resemblance is evident. There is no dispute that the applicant were the first in business under their brand 'KRT'. Even accepting the plea of the respondent that applicant had filed a second application to include 'rice' after the respondent filed their application in 2001 well founded doubts arise in our mind whether it was not a mere stage setting to grab a share of the applicant's goodwill under its mark KRT. Records clearly indicate that the applicant were the first adopter of 'KRT'. In comparing the goods, the broad category of goods falling in class 30 have been taken into account for ascertaining confusion. The goods here are not specialized goods on which a purchaser will ponder on. Both the goods can be purchased from a Kirana shop or Supermarket, Apna Bazar or self service shops. Here the goods are ordered orally at the sales counter and noise factor like traffic etc. at sales point is likely. The verbal element between the two mark is confusingly similar. The alleged phonetic dissimilarities of the two mark do not merit particular importance as the goods in question are widely sold and distributed everywhere. The respondent argued that the applicant first use dates back only to 1999 as per invoice proof. The respondent had vehemently agitated that applicant never sought protection for 'rice' prior to them. That is a fact. But the Board has a difficult task of deciding what is fair description of goods. Here, public perception matters. A lot depends on nature of goods. The whole exercise consists in the end of forming a value judgment as to the appropriate specification having regard

to the use made of it. In the present state of law, fair protection is to be achieved by identifying and defining not the particular goods for which there has been genuine use but the particular categories of goods they should realistically be taken to exemplify. The other factor is the conduct of the respondent who seek to come as close as possible to the applicant's mark. There is no set approach on this. In this case in our view there is sufficient similarity between the two marks to sustain the objection under Section 11(1).

18. Once we make a determination that the impugned trade mark is hit by the substantive provision of Section 11(1), it follows that the respondent cannot be said to be the legitimate owner and true proprietor of the trade mark under attack and thus Section 18(1) is also bar to the registration of the impugned application. We are aware of rulings that in comparison of three letter marks, if the first letter is different and the applicant's mark also contains a device such marks may not be considered deceptively similar. But each case has to be decided on its own fact. Rice market is big business and competitors are all the time on the lookout o poach on an established rival to free ride on their goodwill. The realities of Indian market place where less than 5% of the population speak or understand English is an important consideration. In our view the applicant have just marginally tweaked the applicant's mark just enough to go into the register. Considering the vast swath of poverty and illiteracy in interior India, the attention level during purchase and the competing goods being identical all leads to the conclusion that the impugned mark is designed to intrude into the opponents market for the same goods. The explanation for adoption of PRT from name of son (Pawan) and daughter (Ritu), while it may be literally true, is essentially meant to photoshop the applicant's mark with sugarcoated justification. As a corollary, the impugned mark does not even qualify for protection under Section 9 as it is not capable of distinguish the respondent's goods.

In retrospect, we feel had greater care be taken at the Examination or Acceptance stage at the registry, the matter could have been disposed off long ago. By 'greater care' we suggest that the accepting officer in the registry spend a few minutes perusing the ratio of various case laws (in this case letter marks) presumably uploaded the citation module of decided cases, which will curb the proliferation of mounting Oppositions. Examiners and accepting officers should keep learning the fascinating craft of balancing equities

and propositions of trade marks law on a sustained basis. If genuine efforts are made, it will greatly improve the quality of examination by adopting a standard predictable operating procedure and contribute to the purity of the register. In this case, ORA/168/2011/TM/DEL is allowed. Registered trade mark PRT under no. 1028224 in Class 30 is removed from the register. The Miscellaneous Petition is closed. There is no order as to costs.