

IP UPDATE

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INSIGHT

Thwarting cultural pirates: The 'Ponni' story from Malaysia



In Indian culture, rice is considered to be a sign of prosperity and fertility. This cultural significance is evident from several Indian traditions and customs that accompany a person from birth to death such as celebrating the feeding of cooked rice as the first solid food to a baby, throwing of raw rice on a newly wed couple, entry of the new bride to the groom's family by spilling a pot full of raw rice at the doorstep, offering balls of cooked rice to the departed souls in death ceremonies etc. Indians, therefore, rarely tolerate any affront to their rice. The not-so-recent act of crumbling of a US patent for 'Basmati rice lines' vide a rectification action by the Indian Government is just one instance of this intolerance.

In this edition of our newsletter, we bring you yet another success story concerning yet another variety of rice called

'Ponni'. Ponni rice is cultivated in the State of Tamil Nadu in Southern India, and, in Tamil language (spoken by the people of Tamil Nadu), 'Ponni' means 'golden'. It is also another name for the river Kaveri, a large part of which flows through the State of Tamil Nadu. For those unversed in the linguistic diversity of India, while English is the common language that connects most of urban India, there are over 27 languages (of which about 22 are officially recognized) spoken by the various States in India. It is also relevant to note here that there is a huge Tamil speaking population in Malaysia and Singapore mainly as a result of the migrations that happened in the 19th and 20th centuries.

In the year 1971, inspired by the japonica-indica (japonica and indica are two varieties of rice) hybridisation project undertaken by the International Rice Commission in India, the Tamil Nadu Agricultural University (TNAU) released a variety of hybrid rice under the name 'Ponni'. Subsequently, a few improved varieties of the same were also released, all with the name Ponni and suitable adjuncts to indicate that these were improved varieties of Ponni rice. The region where Ponni rice has been cultivated in Tamil Nadu is also the region where the river Kaveri flows.

Ponni rice has been exported from the State of Tamil Nadu to several Asian countries including Malaysia for many years. The dispute between the Indian Government, TNAU and the Ponni rice trade on the one hand and Syarikat Faiza Sdn Bhd (SFSB), a Malaysian rice trader who imports into and markets Ponni rice in Malaysia, on the other hand began in January 2010. In the year 2006 SFSB applied for registration of the trade mark "PONNI" in class 30 in Malaysia. The registration dated back to

June 6, 2000, the date on which the application was made. Armed with this registration, SFSB obtained an order of injunction from a Malaysian Court on January 13, 2008 against another Malaysian importer of Ponni rice wherein the latter was enjoined from using SFSB's registered mark PONNI on its rice bags.

Sensing that this could affect even Indian exports of Ponni rice, the Agricultural and Processed Food Products Export Development Authority of India (APEDA), a statutory body under the Ministry of Commerce, Government of India, vested with the functions, inter alia, of the development of exports of rice, along with TNAU, two Ponni rice farmers and two exporters of Ponni rice from India filed an action before the High Court of Kuala Lumpur, Malaysia in January 2010 for expunging the PONNI registration owned by SFSB from the Malaysian Register.

The first issue raised by the applicants in the action was that the registration of the PONNI trade mark of SFSB is an entry made without sufficient cause under Section 45(1) of the Malaysian Trade Marks Act, 1976 ('the Act' for brevity). Under the said section, if an entry was wrongly made in the Register, any person aggrieved could file an action for expunging such entry. The Court, therefore, first considered whether the applicants in the case were aggrieved persons and found in their favour for various reasons as follows:

- The impugned registration was blocking the use of the name Ponni by others who had trading interests in Ponni rice;
- The exclusive claim by SSB could further adversely affect the interests of the applicants;
- APEDA's ability to develop and promote the Ponni rice industry in Malaysia could be affected by such registration;
- TNAU was the one to author and first adopt the name Ponni for this rice from India;
- The registration could affect the ability of the farmer and exporter applicants to distribute and trade in Ponni rice in Malaysia and elsewhere.

The next issue decided by the Court was whether the impugned mark PONNI met the requirements of the Act

to qualify for registration. The Court once again found in favour of the applicants for the following reasons:

- Based on the evidence available on the record of the case, Ponni rice was available for sale and consumption in Malaysia and elsewhere before June 6, 2000, the date of the impugned application by SFSB. Hence PONNI could not have been an invented word.
- Considering the consumer and trade recognition of the name PONNI as a rice from India and the available evidence on the record of the case, PONNI was found to be directly descriptive of a particular variety of rice originating from the Tamil Nadu region of Southern India
- As such, its registration would prevent others from legitimately using the same to describe such rice and could not be held to be distinctive of SFSB's goods.

Thereafter, the Court went into the aspect of whether the use of the impugned registration was likely to cause confusion and deception. In deciding the issue, the Court took note of the relevant English precedents and applied the test in the Bali Trade Mark case [(1969) RPC 472]. The Court posed the question whether the impugned trade mark PONNI, if used in a normal and fair manner as a trade mark by SFSB in the course of trade of rice, would confuse and deceive the public into thinking that the same was merely used as a description of the variety of rice. The Court noted that the registration permitted SFSB to use the impugned mark on any variant of rice be it from any country, including rice grown in Malaysia, Thailand or Indonesia and that it could permit SFSB a monopoly over the name PONNI in Malaysia in respect of rice. The Court further noted that PONNI was recognizable in the trade and consuming public as the name of a variety of rice from Tamil Nadu in India. In view of the same, the Court found that since the impugned mark was for 'rice' generally without any limitation on use, the use of the same by SFSB as a trade mark for rice in general was bound to cause confusion. It was also found by the Court that consumers would be misled into buying rice which is not in fact Ponni rice originating from Tamil Nadu. Considering all these factors, the Court found

that the impugned registration was bound to cause confusion if it remained in the Register.

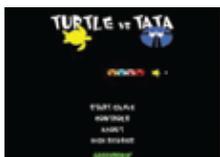
Though the decision is a relief to hundreds of Indian exporters of Ponni rice to Malaysia as well as importers and retailers of Ponni rice in Malaysia, the larger issue raised here is that of cultural piracy. It is not the first time India has been subjected to such cultural piracy. Thwarted attempts to patent the antiseptic properties of turmeric powder and fungicidal properties of neem, both part of India's traditional knowledge, are still fresh in public memory. While the Traditional Knowledge Digital Library (TKDL) (covered in Volume VIII Issue 1 of India IP Update) put together by India helps as a reference point to patent examiners, what could assist trade mark examiners in such situations is a debatable issue.

(APEDA and other petitioners in this case were represented by Ms. Karen Abraham of Shearn Delamore & Co, Kuala Lumpur, Malaysia under instructions from K&S Partners)

CASE LAW UPDATE

TATA locks horns with Greenpeace over trade mark and turtles

Tata Sons Limited v. Greenpeace International & Anr
MIPR 2011 (1)0107



TATA, a well-known mark owned by the Tata Group is not only a house mark, but also used as a brand for several of the products by the group companies. The operations of the TATA Group are global and vastly diversified.

The suit in question was filed by Tata Sons Limited ('Tata') against Greenpeace International and Greenpeace India ('Greenpeace'). The genesis of the suit was an online game by Greenpeace called "Turtle v. TATA" wherein Greenpeace had allegedly used the registered trade mark of Tata being 'T' within a circle device ('Tata Mark').

The game was apparently part of the awareness program by Greenpeace to enhance public participation

against the Dhamra port project in the Indian State of Orissa, which Greenpeace claimed, threatened the environment and in particular caused harm to the Olive Ridley Sea Turtles. The said project was a joint collaboration between Tata and Larsen and Toubro. Greenpeace argued that the port's ongoing expansion work had serious long-term environmental and social implications as it endangered the surrounding mangrove forests and the wildlife, particularly the endangered Olive Ridley Sea Turtles, a protected species under Schedule I of the Indian Wildlife (Protection) Act, 1972.

The aim of the colourful and noisy video game was to help the yellow turtles featured therein eat as many little white dots as possible without running into the Tata demons namely, Ratty (presumably named after Ratan Tata, Chairman of the Tata Group), Matty, Natty or Tinku. Further, while dodging the Tata demons, if a turtle ate a power-pill, it was to be 'gifted with super turtle powers to vanquish the demons of development that are threatening' their homes!

Tata certainly was not amused by the game. It objected to the projection of Tata as a demon as a malafide expression. It alleged that the use of the Tata Mark in the online game by Greenpeace amounted to defamation with the ulterior motive of damaging its reputation as well as the reputation of Mr. Ratan Tata. Further, it was aimed to create a false impression with the members of the public about its activities. It claimed an injunction against infringement under Section 29(4) of the Trade Marks Act, 1999 and damages to the extent of Indian Rupees 10,00,00,000 (approximately USD 2 million).

The online game, Greenpeace argued, was one of the peaceful and non-violent means of highlighting the concerns posed by the said project and was in line with their usual method of participatory campaigning in addressing such issues. Depicting Tata in a diabolic light was hyperbolic and exaggerative according to Greenpeace and it alleged that the suit was filed only with the motive of stifling honest and bona fide criticism by threatening to burden the defendants with heavy financial consequences.

While Tata had placed evidence in support of the environmental clearances obtained by it in respect of the project, Greenpeace had placed evidence consisting of reports discussing the adverse effect of the port project and its impact on the Olive Ridley turtles. Such evidence from Greenpeace even included a proceeding before the Supreme Court of India in which three reputed environmentalists had filed intervening petitions raising serious concerns regarding the impact of the project on the endangered Olive Ridley turtles.

Having heard Tata and Greenpeace, the Court was unpersuaded that the projection of Tatas as diabolic to be a malafide expression. On the other hand, the Court found Greenpeace's position, that the use of the term and depiction of the TATA logo and device was hyperbolic and exaggerative, to be more reasonable. The Court pointed out that it was not as if Tata was being painted as a demon in all its activities and that what was attacked through the game was the potential or likely destruction, which Greenpeace believed would occur due to the project. The Court also found justification in Greenpeace's position as it had placed on record opinion on the threat to environment contrary to what Tata claimed to be a project that got all statutory clearances.

As for the violation of Section 29(4) of the Trade Marks Act, it was noted by the Court that a reading of the statute made it clear that the intent of the draftsmen was that a breach of Section 29(4) would take place when another commercial/ entrepreneurial body is exploiting that same trade mark. In the present case, the Court found that, Greenpeace was not involved in any profit making endeavour or competitive business with Tata. The Court relied on the judicial precedents proffered by Greenpeace to the effect that a bona fide use of the trade mark would be an infringement of the trade mark only when the user is a similar/ competitive profit making endeavour like Tata. The Court was also of the opinion that Greenpeace could make reasonable comment, ridicule and parody of the registered trade marks of Tata. A man who found his trade mark disparaged by a rival trader in a comparative advertisement could obtain a prior restraining order only if he could show that it was more likely than not that the disparagement was wrong and misleading.

As for the fair use defence of parody by Greenpeace, the Court found that the less redeeming social value in the use of the parody, the greater the chances of injunctive relief. Hence while Greenpeace's use of a parody as a mark did not support a fair use defence, it may be considered in determining whether Tata, owner of a famous mark, had proved its claim that Greenpeace's parody mark was likely to impair distinctiveness of a famous mark.

Based on the above observations, the Court found that through the medium of the game, Greenpeace only sought to convey their concern and criticism of the project and its perceived impact on the turtle habitat. The Court could not, therefore, anoint itself as a literary critic to judge the efficacy of use of such medium nor could it don the robes of censor. Greenpeace may or may not be able to establish that there was underlying truth in the criticism of the Dhamra port project and Tata's involvement in it. Yet, the Court held that, at this stage, the materials on record did not reveal defamation and, therefore, grant of an injunction would freeze the entire public debate on the effect of the port project on the Olive Ridley habitat.

High Court of Delhi on descriptive marks

[Marico Limited v. Agro Tech Foods Limited MIPR 2010(3) 226 & Stokely Van Camp Inc & Anr v. Heinz India Private Limited MIPR 2010(3)273]

A Division Bench of the High Court of Delhi recently laid down certain principles governing the adoption, use and registration of descriptive marks in two different cases. The plaintiff in the first case objected to the defendant's use of the descriptions "Low Absorb" and "Low Absorption Technology" (used along with the defendant's trade mark 'SUNDRIP'), claiming statutory rights in the marks LO-SORB and LOSORB. Both the plaintiff and the defendants were using their respective marks in respect of edible oils in this case. In the second case, the plaintiff's objection was to the defendant's use of the expression "Rehydrates Replenishes Recharges" (along with the defendant's trade mark "Glucon D Isotonik") on the ground that it infringed the registered trade mark of the plaintiff "Rehydrates Replenishes Recharges". Both the parties were using the disputed mark in respect of health drinks.

In both these cases, the defendants relied on Sections 30(2) and 35 of the Trade Marks Act, 1999 which read as follows:

30. Limits on effect of registered trade mark-.....

(2) A registered trade mark is not infringed where-

(a) the use in relation to goods or services indicates the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of services or other characteristics of goods or services.

35. Saving for use of name, address or description of goods or services- Nothing in this Act shall entitle the proprietor or a registered user of a registered trade mark to interfere with any bona fide use by a person of his own name or that of his place of business, or of the name, or of the name of the place of business, or any of his predecessors in business, or the use by any person of any bona fide description of the character or quality of his goods or services.

Both the decisions discussed here were passed in appeals filed by the plaintiffs concerned from the orders in their respective suits before the Single Judge rejecting the claims of the respective plaintiffs and holding the registered marks of the plaintiffs to be descriptive of the goods in question. The principles laid down in the first case were applied to the second case while rejecting the appeal by the plaintiff-appellant in that case. These principles are summarised below:

- When a descriptive trade mark is used only by one person undisturbed for a very long period of time, without anyone else attempting to use the same during such period, a case of such descriptive word having achieved distinctiveness and a secondary meaning may be established.
- Merely because the person is first off the block in adopting a descriptive trade mark and files legal actions and temporarily prevents or seeks to prevent others from using the descriptive trade mark does not mean that there is undisturbed user of the trade mark.
- Once others claim a right to the descriptive trade mark before the end of the long period essential for

a descriptive trade mark to become distinctive, then the original user of a descriptive trade mark cannot ordinarily establish “distinctiveness”.

- Those persons who are first off the block in using a trade mark which is a purely descriptive expression pertaining to the subject product ought to be discouraged from appropriating a descriptive expression, or an expression which is more or less a descriptive expression as found in the English language, for claiming the same to be an exclusive trade mark and which descriptive word mark bears an indication to the product’s kind, quality, use or characteristics.
- A position that, because of the success of a person in getting registered a minor modification of a descriptive word or expression of the English language, such person can prevent a purely descriptive use of a normal word or expression as found in the English language dictionary on the ground that it would be identical with or deceptively similar to a registered trade mark, must be struck down with a heavy hand.
- A mark which falls under Section 9(1)(a) to (c) of the Act, respectively, that is devoid of distinctive character, that consists of indications which may serve in trade to designate the kind, quality, quantity, intended purpose etc., and that consists exclusively of marks or indications which have become customary in the current language or in the bona fide and established practices of trade, ordinarily ought not to be afforded protection as a trade mark.
- A trade mark which falls under Section 9(1)(a) to (c) cannot be registered on an intent to use basis. Evidence of distinctiveness with respect to such trade marks falling under Section 9(1)(a) to (c) should be the evidence of user showing distinctiveness as on the date of application for registration or at the best of evidence up to the date of registration.
- A civil court in a suit filed for infringement of a registered trade mark is entitled (if there is no earlier judgment which has achieved finality in cancellation proceedings) to consider the validity of registration of the mark for the purpose of passing an interlocutory

order including for grant or refusal of an interim injunction.

- In infringement actions, the court is entitled to consider the evidence of distinctiveness up to the date of registration for the purpose of passing any interlocutory order and not evidence showing distinctiveness post registration. However, in cancellation proceedings evidence of distinctiveness post registration of the trade mark can also be considered.
- Even if there is finality to registration of a trade mark, the defendant in an infringement action can take statutory defences under Sections 30 to 35 (respectively, limits on effect of registered trade mark, registration to be prima facie evidence of validity, protection of registration on the ground of distinctiveness in certain cases, effect of acquiescence, saving for vested rights and saving for use of name, address or description of goods or services) to defeat the infringement action.

The Supreme Court of India on well-known marks

T V Venugopal vs. Ushodaya Enterprises Limited & Anr [2011(2)UJ871(SC)]

The protection of well-known marks is still an evolving area of jurisprudence in India. The most recent decision on the subject came from the Supreme Court of India wherein the Court had an opportunity to examine the jurisprudence on well-known marks under Indian, American and English law.

The facts of the case revolved around the registered trade mark, 'EENADU', of the respondent-plaintiff before the Supreme Court. 'EENADU' has different meanings in different South Indian languages. For instance, it means 'this land' in the South Indian regional languages Kannada, Malayalam and Tamil and in the Telugu language, it means 'today'. While the appellant-defendant was a company engaged in the business, inter alia, of incense sticks, the respondent-plaintiff was engaged in the business of publishing a newspaper in Telugu language titled as EENADU.

The dispute arose between the parties when the appellant-defendant, along with its trade mark 'ASHIKA' adopted the impugned trade mark 'EENADU'. When a cease and desist letter issued by the respondent-plaintiff did not yield the desired results, a suit for trade mark infringement and passing off and copyright infringement was filed by the respondent-plaintiff in 1999 before the City Civil Court in Hyderabad. By the time the suit was filed, the impugned trade mark of the appellant-defendant was already registered. It was also alleged in the suit that the impugned trade mark of the appellant-defendant used an identical font and style as that of the respondent-plaintiff. The said Court rejected the claims of the appellant-defendant and the appellant-defendant filed two rounds of appeal, the first one before the Single Judge of the High Court of Andhra Pradesh and the second, before the Division Bench of the High Court of Andhra Pradesh. Having lost both these appeals, the appellant-defendant approached the Supreme Court with a petition for special leave to appeal (SLP).

The following grounds of appeal were raised by the appellant-defendant before the Supreme Court:

- That EENADU was a well-known and well understood word in South Indian languages and no monopoly could be claimed by any single proprietor in the same;
- EENADU was a descriptive mark in respect of the products of the respondent-plaintiff;
- That there were several third parties using the name EENADU as part of their trade marks and trading styles;
- The respective businesses of appellant and respondent were entirely different and there was no question of passing-off of the goods of the appellant as that of the respondent;
- There was a delay in bringing the action

The respondent-plaintiff's arguments were focused on the aspect of dilution of the well-known mark EENADU. It countered the appeal on the following grounds:

- EENADU was not a descriptive mark but a suggestive mark which was inherently distinctive;

- The appellant-defendant's adoption was dishonest in view of the similar scripts being used by it;
- The appellant-defendant had not explained why it applied for registration of the name EENADU in as many as 34 classes of the Trade Marks Act for goods which it did not even produce or had no intention to produce. This demonstrated the bad faith of the appellant-defendant in adopting the mark EENADU to capitalise on the goodwill and reputation of the respondent-plaintiff's mark;
- Once there was a dishonest intention to adopt the mark, a mere delay in bringing the action would not be defeated because in the case of a continuing tort, a fresh period of limitation would begin to run every moment of time during which the breach continued;
- Use of similar marks by third parties was not a defence to an illegal act of passing-off. Merely because no action was taken against certain other parties, did not mean that the respondent-plaintiff was not entitled to take action against the appellant-defendant;
- A plaintiff would be entitled to injunctive relief even in respect of a common word, (i) if factors justifying absolute protection for common words had been made out; (ii) if the mark had acquired a secondary meaning; (iii) if the tests of dishonest adoption were satisfied.

Having heard the parties and examined the case law, the Supreme Court found that the respondent-plaintiff's mark EENADU had acquired extraordinary reputation and goodwill in the state of Andhra Pradesh as EENADU newspaper and television channel were extremely well-known, and it was almost a household word in the said state. The Court further pointed out that the word EENADU may be a descriptive word but had acquired a secondary or subsidiary meaning and was fully identified with the products and services provided by the respondent-plaintiff. The appellant-defendant being a company based in the state of Karnataka had started its manufacture of incense sticks under the trade mark ASHIKA and had started selling its product in the state of Andhra Pradesh in 1995 by using the

impugned trade mark EENADU with the same font and artistic script as that of the respondent-plaintiff. It was noted by the Court that the adoption of the name EENADU accounted for 90% of the sale of its incense sticks. Accordingly, the Court arrived at the following conclusions:

- The respondent-plaintiff's mark had acquired extraordinary reputation and goodwill in the State of Andhra Pradesh;
- There is a high degree of recognition associated with the mark EENADU and the products and services of the respondent-plaintiff and, therefore, the appellant-defendant's adoption could not be referred to as an honest concurrent user;
- The adoption of the impugned mark was ex-facie fraudulent and mala fide from the very inception and that it was done with the intention of riding on the reputation and goodwill of the respondent-plaintiff;
- Permitting the appellant-defendant to carry on its business would in fact be putting a seal of approval of the Court on the dishonest, illegal and clandestine conduct of the appellant-defendant. Further, it would lead to eroding the extraordinary reputation and goodwill acquired by the respondent-plaintiff over a passage of time;
- Permitting the appellant-defendant to sell its product with the mark EENADU in the state of Andhra Pradesh would definitely create confusion in the minds of the consumers because the appellant-defendant was selling incense sticks marked EENADU as to be designed or calculated to lead purchasers to believe that its products are in fact the products of the respondent-plaintiff. In other words, the appellant-defendant wanted to ride on the reputation and goodwill of the respondent-plaintiff and in such a situation, it was the bounden duty and obligation of the Court not only to protect the goodwill and reputation of the respondent-plaintiff but also the interest of the consumers;
- Lastly, honesty and fair play ought to be the basis of the policies in the world of trade and business.

SNIPPETS

Supreme Court dismisses Bayer's patent linkage claim



Volume VIII Issue 2 of India IP Update had carried a report that the Supreme Court of India had admitted the Special Leave Petition (SLP) filed by Bayer in the patent linkage case, though

without any stay. Recently, the Supreme Court dismissed the said SLP filed by Bayer [*Bayer Corporation & Another v. Union of India & Others (unreported)*] against, inter alia, Cipla and the Drug Controller of India (DCI). In the meantime, Bayer had filed an infringement suit before the High Court of Delhi and Cipla had filed its Counter Claim under Section 64 of the Patents Act, 1970 besides filing a post grant opposition under section 25 (2) of the Patents Act. While dismissing the SLP, the Supreme Court considered these developments as well as the fact that the DCI had already granted marketing approval to Cipla and that Bayer's suit for infringement was pending before the High Court of Delhi.

Indian TMO publishes list of well-known marks

The Indian Trade Marks Office has recently published a list of well-known marks on its website. The relevant link is <http://124.124.193.236/tmrpublicsearch/tmsearch.aspx>. The Indian Trade Marks Act, 1999 defines well-known trade marks under Section 2(zg) and also prescribes the criteria for determining a well-known mark under

Section 11(6) thereof. Some of the marks that made it to the list include PEPSI, TATA, PIZZA HUT, TACOBELL, CATERPILLAR, INTEL and BENZ.

Indian Patent office enables online inspections

Patent files are now available for online inspection at the Indian Patent Office as part of the ongoing drive to digitize the files. The documents available for inspection include the correspondence between the applicant and the patent office and specifications and abstracts filed along with the application.

Patents: No need for additional guidelines for compulsory licensing

The debate on Form 27 under the Patents Act, 1970 dealing with the filing of working statements by patentees had sparked off a discussion at the Department of Industrial Policy and Promotion (DIPP) and the DIPP had issued a discussion paper on Compulsory Licensing of Patents in August 2010 seeking responses. A total of 38 responses were received by the DIPP. Upon review of the responses, the Government has now decided that there is no need to issue additional guidelines for the issue of compulsory licenses. However, to ensure that the power to grant compulsory licenses is granted with due care and caution, the Controller General of Patents has been advised not to delegate this power to any subordinate authority. Further, the Controller General has been advised to ensure prompt and effective compliance with all the reporting requirements of patentees stipulated under the Patents Act.

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