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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**% *Date of Decision: 15th September, 2023*

+ C.O. (COMM.IPD-TM) 2/2021 & I.A. 9633/2021

KIA WANG

..... Petitioner

Through: Ms. Rajeshwari H. and Ms.
Sugandh Shahi, Advocates.

versus

THE REGISTRAR OF TRADEMARKS & ANR.

..... Respondents

Through: Ms. Nidhi Raman, Central
Government Standing Counsel with Mr.
Zubin Singh and Mr. Akash Mishra,
Advocates for R-1.**CORAM:****HON'BLE MS. JUSTICE JYOTI SINGH****JUDGEMENT****JYOTI SINGH, J.**

1. Present rectification petition has been filed on behalf of the



Petitioner seeking removal of the registered trademark ,
bearing T.M. No.4400360, in Class 09 in respect of goods such as
*'Mobile Phone and Mobile Phone Accessories including Mobile
Phone Charger, Adaptor and Travel Charger, Battery, Tempered
Glass Screen Protectors for Smartphones, Power-Bank, Mobile
Cover, Memory Card, Card Reader, Handsfree included in Class 09'*,
from the Register of Trade Marks under Sections 47, 57 and 125 of



the Trade Marks Act, 1999 (hereinafter referred to as the '1999 Act').

2. Notice was issued in the petition on 05.08.2021 to Respondent No.1/Registrar of Trade Marks and Respondent No.2/Mr. Sachin Garg, proprietor of Pooja Creations. Despite service, there was no representation on behalf of Respondent No.2 and thus, fresh notice was issued to Respondent No. 2 on 07.09.2021, returnable on 26.11.2021 and time was granted to Respondent No.1 to file counter affidavit, if any. On 28.01.2022, the Court proceeded *ex parte* against Respondent No.2 as there was no representation despite service. Respondent No.1 has chosen not to file any response to the rectification petition, save and except, a written submission dated 30.08.2023.

3. Factual matrix as captured in the petition is that Petitioner is an individual, who along with his wife started ROCKPAPA, a brand founded in the year 2014, primarily involved in designing products for children including Headphones, Pencil Boxes, School Bags, etc. as well as manufacturing, distributing, developing and researching on Headphones, Headphones for audio apparatus, Stereo Headphones, Hi-fidelity Loudspeakers, Telephone earpieces, Earphones, Portable media players, Audio speakers, etc.

4. Products of the Petitioner are stated to be extremely popular amongst the consuming public and are available across the globe. Petitioner has operations in various countries around the world, including but not limited to Australia, Canada, Europe, USA and India. Global headquarter of the Petitioner is in USA. Petitioner invests heavily in research and development. In the course of trade, Petitioner uses several marks many of which are well known and one



such mark is the Rockpapa device mark, which is used for goods such as Headphones, Loudspeakers, Earphones, Portable media players, etc.

5. The trademark 'ROCKPAPA' was first adopted in and around 2014 in UK and rapidly grew worldwide, including in USA and Canada in the year 2016, in Australia in 2019 and in India in 2020. Domain name www.rockpapa.com was registered by the Petitioner on 09.04.2014 and has been used for sales and promotions of his products. Petitioner is selling his products through Amazon e-commerce platform in various countries such as Australia, Canada, Germany, Italy and India. Owing to the continuous and global use of the trademark 'ROCKPAPA', Petitioner has acquired enviable reputation in the market. Petitioner has secured registrations of the mark 'ROCKPAPA' in several countries around the world and details of some of the registrations are as under:

S. No.	Trademark	Class	Registration Date	Country/Jurisdiction
1.	 Rockpapa	9	11 th May 2018	United Kingdom TM No.UK00003288950



2.	 Rockpapa	9	13 th September 2018	Australia Trade mark number: 1906077
3.	 Rockpapa	9	23 rd October 2018	United States of America Reg. No. 5,589,707
4.	 Rockpapa	9	2 nd November 2018	Japan Appl.No.2018-022263 Reg.No.6094491
5.	 Rockpapa	9	8 th November 2019	Canada Appl.No.1 882 570 Reg. No. TMA1,062,555 File No.1882570

6. Respondent No.2 had applied for registration of the impugned



mark on 07.01.2020 and it was finally registered with Certificate No.2500462 dated 13.09.2020 and notified in the Trade Mark Journal No.1966. Petitioner, however, learnt of the impugned mark only when it came across its registration in June, 2021 and immediately filed the present petition for removal of the said mark and rectification of the Register of Trade Marks.



CONTENTIONS ON BEHALF OF THE PETITIONER



7. Petitioner's trademark **Rockpapa** is a globally known trademark and Petitioner's products sold under the said mark are extremely popular amongst the consuming public in several countries, including India. By continuous and extensive use of the trademark, Petitioner has earned formidable and enviable reputation across the globe and even in India the products under the said trademark are well known and extremely popular, especially amongst the children. Petitioner has secured trademark registrations in various countries such as USA, UK, Canada, Japan, Australia etc. in respect of goods falling in Class 09, prior to the registration of the impugned trademark. By registration and proposed use of the impugned trademark by Respondent No.2, which is similar to Petitioner's mark and used for identical goods, there is every likelihood of confusion amongst the unwary consumers and this in turn will dilute the distinctive character of Petitioner's trademark and will adversely impact Petitioner's reputation, built over the years. The impugned trademark is not capable of distinguishing Respondent No.2's goods from the goods/services of others and its registration is liable to be cancelled in terms of Section 9(1)(a) of the 1999 Act, which provides '*absolute grounds for refusal of registration of trade marks which are devoid of any distinctive character*'.

8. Respondent No.1 has erroneously registered a trademark which by its very nature is sure to deceive the public and cause confusion and since the impugned trademark is wrongly appearing on the



Register, it is liable to be removed under the provision of Section 9(2)(a) read with Section 57 of the 1999 Act. As the impugned trademark is deceptively/confusingly similar to Petitioner's trademark and there is commonality of goods such as *'Mobile Phones and accessories including Mobile Phone Charger, Adaptor and Travel Charger, Battery, Tempered Glass Screen Protectors for Smartphones, Power-Bank, Mobile Cover, Memory Card, Card Reader, Handsfree included in Class 09'*, the registration violates provision of Section 11(1) of the 1999 Act and the trademark cannot continue on the Register. Registration is also hit by Section 11(2) inasmuch as the earlier trademark 'ROCKPAPA' of the Petitioner is well known and the use of the impugned deceptively similar trademark is to take unfair advantage of and is detrimental to the distinctive character and reputation of the earlier trademark of the Petitioner.

9. It is unfathomable that Respondent No.2 was unaware of Petitioner's brand and has clearly adopted the same only to show association with the Petitioner and his brand 'ROCKPAPA' and is evidence of bad faith. The adoption is with a dishonest intention to ride upon the hard earned goodwill and reputation of the Petitioner. Petitioner is a "person aggrieved" under Section 57 of the 1999 Act and entitled to seek cancellation of registration of the impugned trademark and its removal from the Register. Continued existence of the impugned trademark on the Register is also detrimental to public interest. Reliance was placed on the judgment in ***Hardie Trading Ltd. and Another v. Addisons Paint & Chemicals Ltd., (2003) 11 SCC 92***, for the purpose of highlighting the judicial interpretation of the phrase



“person aggrieved”.

10. Petitioner is the ‘prior adopter’ and ‘prior user’ of the trademark



Rockpapa and hence by being ‘first in the market’ to adopt and use the trademark, Petitioner enjoys a superior right in his trademark, over the registration of the impugned trademark, in view of the settled law in *Milmet Oftho Industries and Others v. Allergan Inc.*, (2004) 12 SCC 624; *N.R. Dongre and Others v. Whirlpool Corporation and Another*, (1996) 5 SCC 714; *S. Syed Mohideen v. P. Sulochana Bai*, (2016) 2 SCC 683 and *Neon Laboratories Limited v. Medical Technologies Limited and Others*, (2016) 2 SCC 672. Having known Petitioner’s popular trademark, there is no plausible or justified reason with Respondent No.2 for adopting and registering the impugned trademark, save and except, the dishonest and *malafide* intention of misappropriating the enormous goodwill and reputation in the



trademark Rockpapa for making illegal and unlawful gains. In the context of dishonest adoption, reliance was placed on the judgements in *Midas Hygiene Industries (P) Ltd. and Another v. Sudhir Bhatia and Others*, (2004) 3 SCC 90; *Rolex SA v. Alex Jewellery Pvt. Ltd. & Others*, 2014 SCC OnLine Del 1619 and *Somany Ceramics Limited v. Shri Ganesh Electric Co. and Others*, 2022 SCC OnLine Del 3270.

11. The documents/additional documents placed on record such as the certificate from the Chartered Accountant; screenshots of



Amazon/Flipkart listings etc. not only evidence humongous sales by



the Petitioner under the trademark *Rockpapa* but are also reflective of the fact that Petitioner was ‘first in the market’ to adopt and use the trademark and are sufficient to pass an order for rectification of the Register of Trade Marks by cancelling the registration of the impugned trademark in respect of similar/identical goods falling under Class 09.

CONTENTIONS ON BEHALF OF RESPONDENT NO. 1

12. The impugned mark has been correctly registered in accordance with the provisions of the 1999 Act. Application submitted by Respondent No.2 on 07.01.2020 underwent scrutiny on 10.01.2020. Examination report was issued on 01.02.2020 and the application for registering the impugned mark was marked as “accepted”. Application was subsequently published in the Trade Mark Journal 1940-0 on 10.02.2020, inviting objections from the public in consonance with Section 20(1) of the 1999 Act. The impugned mark was not contested by the Petitioner and thus, the same proceeded for registration.

ANALYSIS AND FINDINGS

13. Petitioner seeks cancellation of registration of the impugned



trademark *Rockpapa* for goods falling under Class 09 with respect to similar/identical goods as aforementioned. The challenge is on manifold grounds: (a) Petitioner is ‘first in the market’ to adopt and



use the trademark *Rockpapa* and has a superior right in the trademark over Respondent No.2 and thus, the registration cannot subsist; (b) impugned trademark is devoid of any distinctive character and is incapable of distinguishing the goods or services in respect of which it is registered from goods or services of another and does not satisfy the conditions laid down in Section 9(1)(a); (c) impugned trademark is inherently capable of deceiving the public and causing confusion by its similarity to Petitioner's mark and is liable to be removed under Section 9(2)(a) read with Section 57 of the 1999 Act, from the Register; (d) impugned trademark is deceptively/confusingly similar to Petitioner's trademark in respect of similar goods in the same Class and there exists a likelihood of confusion or association in the minds of the public with the Petitioner and registration violates Section 11(1) of the 1999 Act; (e) registration of Respondent No.2's trademark is in violation of Section 11(2) of the 1999 Act inasmuch as Petitioner's trademark is a well-known trademark and use of the impugned deceptively/confusingly similar trademark by Respondent No.2 is leading to Respondent No.2 continuing to take unfair advantage of and is detrimental to the distinctive character and reputation of Petitioner's earlier trademark; and (f) use of the impugned trademark is liable to be prevented under the common law of passing off by virtue of Section 11(3) of the 1999 Act. Pithily put, according to the Petitioner, the impugned registered trademark deserves to be taken off the Register under Sections 47, 57 and 125 of the 1999 Act and the Register calls for rectification to this effect.



14. Insofar as argument of the Petitioner with respect to Sections 11(1) and (2) is concerned, the same is devoid of merit as the provisions *per se* are inapplicable. A bare perusal of Section 11 shows that it deals with relative grounds for refusal of registration. Sub-section (1) proscribes registration of a trademark if it is identical with an earlier trademark and there is similarity of goods/services covered by the trademark or where the trademark sought to be registered is similar to an earlier trademark, there being identity or similarity with goods/services covered by the trademark, because of which there is likelihood of confusion on the part of the public including likelihood of association with the earlier trademark. It is clear from a reading of sub-section (2) that a trademark shall not be registered if it is identical with or similar to an earlier trademark and is to be registered for goods/services which are not similar to those for which the earlier trademark is registered in the name of a different proprietor, if or to the extent the earlier trademark is a well-known trademark in India and use of the later mark, without due cause, would take unfair advantage of or be detrimental to the distinctive character or repute of the earlier trademark. The common thread that runs in Section 11(1) and (2) is the identity/similarity with an 'earlier trade mark'. This expression has been defined in the 'Explanation' following Section 11(4) and is as follows:

"Explanation.— For the purposes of this section, earlier trade mark means—

(a) a registered trade mark or an application under Section 18 bearing an earlier date of filing or an international registration referred in section 36E or convention application referred to in section 154 which has a date of application earlier than that of the trade mark in question, taking account, where appropriate, of the priorities claimed in respect of the trade marks;



(b) a trade mark which, on the date of the application for registration of the trade mark in question, or where appropriate, of the priority claimed in respect of the application, was entitled to protection as a well-known trade mark.”

15. Petitioner is unable to make out a case under any of the categories mentioned in the Explanation. Petitioner’s trademark



Rockpapa is neither a registered trademark in India nor a trademark covered by an application relatable to Section 18 or Section 36E or Section 154 of the 1999 Act and pertinently, this is not even a pleaded case of the Petitioner. Petitioner’s trademark is also not a ‘well-known trade mark’ as defined under Section 2(1)(zg) of the 1999 Act, which *‘means a mark which has become so to the substantial segment of the public which uses such goods or receives such services that the use of such mark in relation to other goods or services would be likely to be taken as indicating a connection in the course of trade or rendering of services between those goods or services and a person using the mark in relation to the first-mentioned goods or services’*. Section 11(6) enumerates the factors which are required to be taken into consideration by the Registrar of Trade Marks while deciding whether a trademark qualifies to be a well-known trademark. Pleadings in the petition do not sufficiently indicate that Petitioner’s mark fulfills all parameters to qualify as a well-known trademark as required by Section 11(6) *albeit* Petitioner has set up a case of the trademark being popular and known in several countries abroad such as UK, where it is stated to have been launched in 2014/2015, Japan, Canada, Australia as well as in India since the year 2020. It is also not the case of the



Petitioner that the said trademarks have been declared as well-known trademarks by the Registrar of Trade Marks or any other Court.



Therefore, seen holistically, Petitioner's trademark **Rockpapa** cannot be classified as 'earlier trade mark' for the purpose of Section 11(1) and (2) and the contention to this extent is rejected.

16. A similar issue arose before this Court in **BPI Sports LLC v. Saurabh Gulati and Another, 2023 SCC OnLine Del 2424**, where a petition was filed under Section 57 of the 1999 Act, seeking rectification of the Register of Trade Marks by removal of the trademark 'BPI SPORTS' registered as a word mark in favour of Respondent No.1 therein for health food supplements, dietary supplements, etc. Petitioner therein was a company incorporated in Florida, USA and claimed to be a leading player in the dietary and nutritional supplements sector and the word mark 'BPI SPORTS' and a device mark was registered in its favour for the said supplements in USA. After examining and deliberating on the issues raised, the Court held as under:-

"18. Without going into the niceties of the differences between these expressions as employed in Section 57(2), it is clear that, into whichever category the case may fall, the mark must be shown to be incapable of registration on one of the absolute grounds envisaged by Section 9 or on one of the relative grounds for refusal to register envisaged in Section 11. Section 9 of the Trade Marks Act, admittedly, does not apply in the present case. However, the plaint avers that the impugned mark is liable to be removed from the register as it was not entitled to registration under any of the clauses (1), (2) and (3) of Section 11 of the Trade Marks Act.

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21. The plaint invokes sub-sections (1), (2) and (3) of Section 11 of



the Trade Marks Act.

22. In my view, none of these provisions would apply.

23. Sub-sections (1) and (2) of Section 11 are both applicable where the mark, of which registration is sought, is identical with, or similar to, an “earlier trade mark”. The expression “earlier trade mark” is defined, in the Explanation following Section 11(4), for the purposes of the entire Section 11, thus:

“Explanation.— For the purposes of this section, earlier trade mark means—

(a) a registered trade mark or an application under Section 18 bearing an earlier date of filing or an international registration referred to in Section 36-E or convention application referred to in Section 154 which has a date of application earlier than that of the trade mark in question, taking account, where appropriate, of the priorities claimed in respect of the trade marks;

(b) a trade mark which, on the date of the application for registration of the trade mark in question, or where appropriate, of the priority claimed in respect of the application, was entitled to protection as a well-known trade mark.”

24. The petitioner's BPI SPORTS trade mark is neither a registered trade mark, nor a trade mark covered by an application relatable to Sections 18, 36-E or Section 154 of the Trade Marks Act. Nor does the petition so aver.

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26. There is, admittedly, no declaration of the petitioner's mark as a “well-known trade mark”. Given the fact that the petitioner has entered the Indian market only in 2019, it is extremely questionable as to whether the petitioner's BPI SPORTS mark qualifies as a well-known trade mark on the basis of criteria that envisaged in Section 11(6).

27. The petitioner's marks, therefore, do not qualify as “earlier trade marks” for the purposes of Section 11. Sub-sections (1) and (2) of Section 11 would not, therefore, apply in the present case.”

17. Having examined the matter further, this Court is of the view that Petitioner has been able to substantiate his case of ‘prior user’ of



the trademark *Rockpapa* which was coined and adopted by the Petitioner in 2014 and for which he subsequently secured the domain name www.rockpapa.com. To buttress the case of ‘prior user’, learned counsel relied upon the judgments in *Milmet Oftho (supra)*, *Neon Laboratories (supra)* and *S. Syed Mohideen (supra)*. In *Milmet Oftho (supra)*, the Supreme Court held that the ultimate test should be, who is ‘first in the market’, where the trademarks are similar. In *Neon Laboratories (supra)*, the Supreme Court observed that ‘first user’ rule is a seminal part of the 1999 Act and in fact recognized that the right of a ‘prior user’ is superior to a registrant of the trademark, reiterating and reaffirming the law declared in *S. Syed Mohideen (supra)*. Therefore, it is a well settled principle of Trademark law that a prior user’s rights will override the rights of a subsequent user even though the latter’s mark may be a registered trademark. Petitioner has



categorically pleaded use of the trademark *Rockpapa* from 2014 and claimed that the same is prior to that of Respondent No. 2, who despite being impleaded as a party by the Petitioner and being served with the notice of this petition, chose to remain absent, instead of contesting the position. In the absence of a reply controverting the pleadings, the same have to be treated as admitted *albeit* in this case Petitioner has been able to show ‘prior user’. Therefore, in wake of



prior use of the trademark *Rockpapa* by the Petitioner, coupled with several registrations abroad, in support of which registration certificates, whose validity is unrefuted and unrebutted, have been filed, as well as the continuous and uninterrupted use of the mark in course of trade in respect of the goods aforementioned, the trademark has become distinctive of the goods of the Petitioner and is associated with him.

18. There is yet another facet of the matter. A comparison of the rival trademarks show that they are similar and Petitioner has also brought forth that Respondent No.2 is using the impugned trademark for identical goods. For ready reference a comparative of the rival trademarks is as follows:-

Petitioner's Mark	Respondent No. 2's Mark
 Rockpapa	 Rockpapa

19. The similarity in the two trademarks is writ large on a bare perusal. Two consequences flow from this conclusion under the Trademarks regime. Firstly, there is every likelihood of confusion amongst the public due to similarity of the rival trademarks and identity of the goods of the competing parties and consequent impact on the reputation and goodwill of the Petitioner. Secondly, this makes



the impugned mark vulnerable to cancellation of its registration under Section 11(10)(ii) of the 1999 Act which requires the Registrar of Trade Marks, while registering the mark, to take into consideration the bad faith involved, either of the applicant or the opponent, affecting the right relating to the trade mark. The provision was considered and interpreted by this Court in **BPI Sports LLC (supra)** and the Court held that a purposive interpretation must be given looking at the intent and purpose of sub-section (10)(ii) of Section 11, which is to disentitle registration of a trademark, the request for registration of which is tainted by bad faith. The expression ‘bad faith’ is not defined under the 1999 Act and the Court cogitated on the concept by referring to some English decisions and dictionaries. Broadly understood, ‘bad faith’ is the opposite of ‘good faith’ and conceptually understood, it is synonymous to ‘dishonest intention’. Relevant paragraphs from the judgment are as under:-

“47. “Bad faith” is not defined in the Trade Marks Act. Courts have, however, cogitated on the concept, in the context of trade mark law. The court of Appeals of England and Wales, in Harrison v. Teton Valley Trading Co. Ltd., (2004) 1 WLR 2577, observed thus :

“29. In Surene Pty. Ltd. v. Multiple Marketing Ltd. C000479899/1, the proprietor, multiple marketing, distributed the applicant for revocation's products under the trade mark BE NATURAL. The cancellation division held that the application had been made in bad faith. It said :

10. Bad faith is a narrow legal concept in the CTMR system. Bad faith is the opposite of good faith, generally implying or involving, but not limited to, actual or constructive fraud, or a design to mislead or deceive another, or any other sinister motive. Conceptually, bad faith can be understood as a ‘dishonest intention’. This means that bad faith may be interpreted as unfair practices involving lack of any honest intention on the part of the applicant of the CTM at the time of filing.

11. Bad faith can be understood either as unfair practices involving lack of good faith on the part of the applicant



towards the office at the time of filing, or unfair practices based on acts infringing a third person's rights. There is bad faith not only in cases where the applicant intentionally submits wrong or misleading by insufficient information to the office, but also in circumstances where he intends, through registration, to lay his hands on the trade mark of a third party with whom he had contractual or pre-contractual relations.

30. In the *Senso Di Donna Trade Mark* case C0006716979/1, 2001 ETMR 5, the first cancellation division said :

17. Bad faith is a narrow legal concept in the CTMR system. Bad faith is the opposite of good faith, generally implying or involving, but not limited to actual or constructive fraud, or a design to mislead or deceive another, or any other sinister motive. Conceptually, bad faith can be understood as a 'dishonest intention'. This means that bad faith may be interpreted as unfair practices involving lack of any honest intention on the part of the applicant of the CTM at the time of filing. Example : if it can be shown that the parties concerned had been in contact, for instance at an exhibition in the respective trade, and where then one party filed an application for a CTM consisting of the other party's brand, there would be reason to conclude bad faith. In this case, however, according to the meaning of the term 'bad faith', there is no evidence that *Senso di Donna Vertriebes — GmbH* was acting dishonestly or that they intended any similar act, or were involved in unfair practices or the like.

31. To similar effect was the decision in *Lancôme Parfums et Beauté and Cie's Trade Mark* case, 2001 ETMR 89 .

(emphasis supplied)

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49. In *Gromax Plasticulture Ltd. v. Don & Low Nonwovens Ltd.*, 1999 RPC 367, Lindsay, J., defined "bad faith" in the following terms :

"Plainly it requires dishonesty, as I would hold. It includes also some dealings which fall short of the standards of acceptable commercial behaviour deserved by reasonable and experienced men in the particular area being examined."

50. The High Court of Punjab and Haryana, in *Bhupinder Singh Vohra v. State of Haryana*, 1968 SCC OnLine P&H 74 : AIR 1968 P&H 406, defined "bad faith" thus :

"The term 'bad faith' is a shade milder than malice, and implies breach of faith or wilful failure to respond to one's known



obligation or duty. Bad judgment or negligence is not 'bad faith', which imports a dishonest purpose, or some moral obliquity and implies conscious doing of wrong. It is much more than a mistake of judgment and is synonymous with dishonesty."

20. Clearly, 'bad faith' is an unfair practice involving lack of honest intention, a conscious doing of wrong and not just a mistake. It includes dealings which fall short of standards of acceptable commercial behaviour. When one examines the adoption of the impugned trademark by Respondent No.2 in the present case, there is little doubt that there was a dishonest intention in adopting Petitioner's similar mark for identical goods including the word 'Rockpapa', in the same colour, font and style, as a part of the device mark. The dishonest intention is with a view to encash on the goodwill of the trademark of the Petitioner and this gets pronounced by the fact that Respondent No.2 has allowed the petition to go uncontested without even appearing in the matter, leave alone filing any counter statement or evidence to rebut even the 'prior user'. Therefore, the impugned trademark is liable to be cancelled and removed from the Register of Trade Marks rectifying the Register.

21. Removal of the impugned trademark from the Register of Trade Marks is also essential to maintain the purity of the Register. In ***Paine and Co.'s Trade Marks (L. R. (1893) 2 Ch. 567 at page 584 = 10 RPC 217 at page 232)***, it was observed that "*The purity of the Register of Trade Marks is of much importance to trade in general, quite apart from the merits or demerits of particular litigants, 'and it is the duty of the tribunal to see that no word not 'adapted to distinguish' shall be put on the Register in the interest of other traders, wholesale and retail, and of the public. If this were not so, the*



large and wealthy firms with whom the smaller folk are unwilling to litigate, could by a system of log-rolling --...-- divide amongst themselves all the ordinary words of description and laudation in the English language.”

22. In ***Khoday Distilleries Limited (now known as Khoday India Limited) v. Scotch Whisky Association and Others***, (2008) 10 SCC 723, the Supreme Court highlighted the importance of maintaining purity of the Register of Trade Marks and held that public interest has to be kept in view. It was observed that what is necessary for the Registrar of Trade Marks, when registering a trademark is to first arrive at a conclusion as to whether having regard to the nature of the mark sought to be registered and the use thereof as also the class of buyers, there is a likelihood of deception or confusion and if the answer is in the affirmative, rectification and correction of the Register may be entertained. A Co-ordinate Bench of this Court in ***Mr. Sanjay Chadha trading as Eveready Tools Emporium and Anr. v. Union of India and Anr., W.P.(C) (IPD) 12/2021 decided on 17.02.2022***, has also emphasized that maintaining purity of the Register is in public interest. Section 57 of the Act empowers the High Court and the Registrar to make an order for cancelling or varying the registration of trademark on an application made in the prescribed manner by any person aggrieved. The Supreme Court in ***Hardie Trading Ltd. (supra)***, considered the phrase ‘person aggrieved’ *albeit* referring to Trade and Merchandise Marks Act, 1958 and the interpretation is relevant since grounds of Sections 46 and 56 of the said Act are *pari materia* with Sections 47 and 57 of the 1999 Act. Relevant passages from the judgment are as follows:-



“30. The phrase “person aggrieved” is a common enough statutory precondition for a valid complaint or appeal. The phrase has been variously construed depending on the context in which it occurs. Three sections viz. Sections 46, 56 and 69 of the Act contain the phrase. Section 46 deals with the removal of a registered trade mark from the Register on the ground of non-use. This section presupposes that the registration which was validly made is liable to be taken off by subsequent non-user. Section 56 on the other hand deals with situations where the initial registration should not have been or was incorrectly made. The situations covered by this section include: (a) the contravention or failure to observe a condition for registration; (b) the absence of an entry; (c) an entry made without sufficient cause; (d) a wrong entry; and (e) any error or defect in the entry. Such type of actions are commenced for the “purity of the Register” which it is in public interest to maintain. Applications under Sections 46 and 56 may be made to the Registrar who is competent to grant the relief. “Persons aggrieved” may also apply for cancellation or varying an entry in the Register relating to a certification trade mark to the Central Government in certain circumstances. Since we are not concerned with a certification trade mark, the process for registration of which is entirely different, we may exclude the interpretation of the phrase “person aggrieved” occurring in Section 69 from consideration for the purposes of this judgment.

31. In our opinion the phrase “person aggrieved” for the purposes of removal on the ground of non-use under Section 46 has a different connotation from the phrase used in Section 56 for cancelling or expunging or varying an entry wrongly made or remaining in the Register.

32. In the latter case the locus standi would be ascertained liberally, since it would not only be against the interest of other persons carrying on the same trade but also in the interest of the public to have such wrongful entry removed. It was in this sense that the House of Lords defined “person aggrieved” in the matter of Powell's Trade Mark, Re, (1894) 11 RPC 4 : 1894 AC 8 : 70 LT 1 (HL):

“... although they were no doubt inserted to prevent officious interference by those who had no interest at all in the register being correct, and to exclude a mere common informer, it is undoubtedly of public interest that they should not be unduly limited, inasmuch as it is a public mischief that there should remain upon the register a mark which ought not to be there, and by which many persons may be affected, who, nevertheless, would not be willing to enter upon the risk and expense of litigation.

Whenever it can be shown, as here, that the applicant is in the



same trade as the person who has registered the trade mark, and wherever the trade mark, if remaining on the register, would, or might, limit the legal rights of the applicant, so that by reason of the existence of the entry on the register he could not lawfully do that which, but for the existence of the mark upon the register, he could lawfully do, it appears to me he has a locus standi to be heard as a person aggrieved.”

23. In the present case, in my opinion, case of the Petitioner fits into the description of ‘person aggrieved’ since the registration of the impugned trademark operates in restraint of the legal right of the Petitioner emanating from prior, long, continuous and uninterrupted user since 2014. Surely, the benefit accruing to Respondent No.2 by virtue of the registration of the impugned trademark casts a corresponding disadvantage on the Petitioner and he has the right and locus to assert that registration of the impugned trademark deserves to be cancelled and the Register of Trade Marks rectified to that extent.

24. For all the aforesaid reasons, this Court finds merit in the contentions of the Petitioner and holds that the rectification petition deserves to be allowed. Directions are accordingly issued to the Registrar of Trade Marks to remove from the Register of Trade



Marks the trademark (device mark), registered under No.4400360 on 07.01.2020 in Class 09 in respect of ‘*Mobile Phone and Mobile Phone Accessories including Mobile Phone Charger, Adaptor and Travel Charger, Battery, Tempered Glass Screen Protectors for Smartphones, Power-Bank, Mobile Cover, Memory Card, Card Reader, Handsfree included in Class 09*’ and rectify



the Register to maintain its purity. The needful shall be done within four weeks from the date of receipt of copy of this judgment. Registry is directed to forward a copy of the judgment to the Registrar of Trade Marks for due compliance.

25. Petition is allowed in the aforesaid terms and disposed of. Pending application also stands disposed of.

JYOTI SINGH, J

SEPTEMBER 15, 2023/ck/kks