

REPLY TO EXAMINATION REPORT

From: Adv. Mr. Daksh Sareen,

Date: 24/08/2020

On behalf of the Applicant, Mr. Rahul Sharma

To: The Registrar of Trade Marks, New Delhi

The impugned mark, under application number NTMC2020007 is ‘CLEANTIZE’; and as per an email from The Registrar of Trade Marks, New Delhi, dated 16.08.2020, it stands objected under section 11(1) of the Trade Marks Act 1999 as the mark is identical with or similar to the mark ‘SUPERTIZ’, bearing application number 1478084, in respect of identical or similar description of goods or services and because of such identity or similarity there exists a likelihood of confusion on the part of the public. The following is a reply to the objection under section 11(1) and a compendium has been attached in the email for reference.

Section 11(1) reads as:

“Relative grounds for refusal of registration

(1) Save as provided in section 12, a trade mark shall not be registered if, because of—

(a) its identity with an earlier trade mark and similarity of goods or services covered by the trade mark; or

(b) its similarity to an earlier trade mark and the identity or similarity of the goods or services covered by the trade mark,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.”

It is humbly submitted that the mark ‘CLEANTIZE’ is not identical or similar to the mark ‘SUPERTIZ’, and that the goods and services covered by such marks are also not similar, let alone identical, and thus, there doesn’t exist any likelihood of confusion of ‘CLEANTIZE’ with the trademark ‘SUPERTIZ’. This contention is founded on the following grounds:

- (1) The non-similar and distinct scope of goods and services covered by the trademarks;
- (2) (Arguendo) The inexistence of any element of deceptive similarity between the two marks as a whole;

(3) (Arguendo) The non-similarity between the two trademarks even if they're broken down.

(1) THE NON-SIMILAR AND DISTINCT SCOPE OF GOODS AND SERVICES COVERED BY THE TRADEMARKS

It is submitted that the goods covered by the two trademarks are entirely different, and that there is no trade-relation between such goods so as to create a possibility, in the minds of the public, that the producer of 'SUPERTIZ' is also the producer of 'CLEANTIZE'. This, it is thereby submitted, as a result, not only puts the scope of the present objection beyond section 11(1), but also removes any cause of confusion in the minds of the public.

The goods covered by 'SUPERTIZ' as per its trade description 'MEDICINAL AND PHARMACEUTICAL PREPARATION', would pertain strictly to medicinal substances designed to cure a disease or infirmity, relieve pain and cause healing effect; since 'pharmaceutical' means 'a medicinal drug'¹, and 'medicinal' means 'tending or used to cure disease or relieve pain'².

On the other hand, the goods covered by 'CLEANTIZE' pertain solely to an alcohol-based sanitizer, which in effect are classified as 'DISINFECTANTS'. The same was further held in June 2020 by the *Authority for Advanced Rulings in an application filed by Springfields (India) Distilleries* seeking the classification of 'hand sanitizers'. The tribunal observed as follows³:

“General sanitizer is used as an alternative to wash hands (to maintain hygiene) hence general alcohol based hand sanitizer without any curative or preventive ingredients may not be considered as a medicament.”

“Applicant is of the opinion that Hand Sanitizers are covered under HSN 30049087 and to be taxed (S) 12% under GST.

On going through the submissions made by the applicant and through the provisions of the GST Act, this authority is of the opinion that Hand Sanitizers manufactured by

¹ <https://dictionary.cambridge.org/dictionary/english/pharmaceutical>.

² <https://www.collinsdictionary.com/dictionary/english/medicinal>.

³ Advance Ruling No. GOA/GAAR/1 of 2020-21/531: MANU/AR/0121/2020.

the applicant are of the category of Alcohol based hand sanitizers and are classifiable under heading 3808 of HSN to which rate of GST applicable is 18%.”

“Tariff Item: 3004 refers to medicaments for therapeutic or prophylactic uses.”

Thus, the authority while classifying alcohol-based sanitizer as a ‘Disinfectant’ under HSN 3808, further expressly rejected the contention that the good could be classified as ‘*medicaments for therapeutic or prophylactic uses*’. The same was held in a statement by the Finance Ministry as well (in compendium)⁴.

Thus, while ‘SUPERTIZ’ would deal with goods pertaining to curing and preventing ailments, referring to the drugs that are bought with the general intention of dealing with a particular and specific medical problem, ‘CLEANTIZE’ is a disinfectant, which is applied on the surface to kill germs and bacteria and keep safe in general, and not as a remedy or treatment for a specific medical issue. Thus, the two trademarks are distinctly classified in different category of goods, even when they are in the same class.

It is submitted that even from the point of the general public consumer, there exists no trade relation, which was expounded as a ground to cause confusion by the Supreme Court in ***Corn Products Refining Co. Vs. Shangrila Food Products Ltd.***⁵, between the two trademarks in the present objection. Medicinal products and disinfectants are extremely distinct in terms of their purpose, application, working, composition, specificity, all the factors that an average purchaser considers.

The purpose of medicinal drugs is to cure or prevent diseases, and thus, by way of application on the body or intake inside the body with a specific dosage, they work on the body’s immunity or functioning. They are generally composed on chemical compounds in certain specific formula, and they are bought to treat a specific medical problem.

On the other hand, the purpose of the disinfectants is simply to kill germs and clean, thus the composition generally consists of alcohol-based gel or liquid, which is harmful for human intake, and thus they are limited to outside application, with no specific dosage. They work

⁴ <https://www.pib.gov.in/PressReleaseDetail.aspx?PRID=1638769>.

⁵ AIR1960SC 142.

by killing the germs and causing a cleaning effect on the surface to which they are applied and thus, are bought with a much more generic purpose.

Thus, an average consumer would understand the stark difference in the nature of the goods covered by the two trademarks, and thus there is no likelihood of trade-relation in the mind of the public. This reasoning can be seen to be manifested in trademark decisions as well, where the courts have applied a high degree of care, to cases involving two medicinal products in the promise of public interest⁶, while the same level of strictness is not extended to disinfectants. Further, even popular cleaning products like Dettol and Lifebuoy are associated with a range of disinfectant products from sanitizers to hand-washes and soaps, but never to medicinal and pharmaceutical drugs; pharmaceuticals being products which are bought keeping in mind name of the specific product and not the range of products.

The Supreme Court in *Nandhini Deluxe Vs. Karnataka Co-Operative Milk Producers Federation Ltd.*⁷, deliberating on section 11(1), held two otherwise identical marks in the same class to be permissible since they pertained to entirely different nature of goods, and thus there was hardly a question of deception or confusion. It observed thus:

“30. Having arrived at the aforesaid conclusion, the reasoning of the High Court that the goods belonging to the Appellant and the Respondent (though the nature of goods is different) belong to same class and, therefore, it would be impermissible for the Appellant to have the registration of the concerned trade mark in its favour, would be meaningless. That apart, there is no such principle of law. ...

*31. We may mention that the aforesaid principle of law while interpreting the provisions of Trade and Merchandise Act, 1958 is equally applicable as it is unaffected by the Trade Marks Act, 1999 inasmuch as the main object underlying the said principle is that **the proprietor of a trade mark cannot enjoy monopoly over the entire class of goods and, particularly, when he is not using the said trade mark in respect of certain goods falling under the same class. In this behalf, we may usefully refer to Section 11 of the Act which prohibits the registration of the mark***

⁶ Cadila Healthcare Limited vs Cadila Pharmaceuticals Limited, 2001 (21) PTC 300.

⁷ AIR2018SC3516.

in respect of the similar goods or different goods but the provisions of this Section do not cover the same class of goods.”

Having established that the good covered by the marks are not similar or identical and would not have any trade-relation in the minds of the public, it is humbly submitted that in accordance with the aforementioned decision that there is no likelihood of confusion between the two marks.

Further, since the goods covered by the two trademarks are not identical or similar, the present factual matrix would lie beyond the scope of section 11(1), and may come under section 11(2) which deals specifically with non-similar goods and well-known trademarks; and by virtue of section 11(5), a trademark cannot be refused registration under section 11(2), unless opposed by the proprietor of an earlier mark itself in opposition proceedings.

Thus, it is humbly submitted that the objection under section 11(1) with the mark ‘SUPERTIZ’ is not tenable, and the same must be set aside to make way for the registration of the mark.

Further, it is submitted that the Delhi High Court in the case of *Nestle India Ltd. v. Mood Hospitality Pvt. Ltd.*⁸ observed, as a condition for the applicability of section 11(2), that the mark should be ‘well-known’ and must have a reputation in India. On a preliminary internet search it can be certainly said that ‘SUPERTIZ’ does not fulfil that criteria. Thus, even an objection under section 11(2) would not have been tenable in the present circumstances either.

(2) (ARGUENDO) THE INEXISTENCE OF ANY ELEMENT OF DECEPTIVE SIMILARITY BETWEEN THE TWO MARKS AS A WHOLE

Assuming but not conceding that the two marks pertain to similar goods, and thus the present case would still lie under the scope of section 11(1), it is humbly submitted that even then the

⁸ MANU/DE/0399/2010 : (2010) 42 PTC 514 (Del) (DB).

two marks are not deceptively similar and thereby, would not cause any confusion in the mind of the public.

It is humbly submitted that while deciding a case of deceptive similarity, the two marks must be judged as a whole and must not be broken down into their components while being judged for deceptive similarity.

The same has been observed by the Supreme Court in *F. Hoffmann-la Roche & Co. Ltd. Vs. Geoffrey Manner & Co. Pvt. Ltd.*⁹:

“It is also important that the marks must be compared as wholes. It is not right to take a portion of the word and say that because that portion of the word differs from the corresponding portion of the word in the other case there is no sufficient similarity to cause confusion. The true test is whether the totality of the proposed trade mark is such that it is likely to cause deception or confusion or mistake in the minds of persons accustomed to the existing trade mark. Thus in Layroma case, Tokalon Ltd. v. Davidson & Co. 32 R.P.C.133 Lord Johnston said:

“...we are not bound to scan the words as we would in a question of comparatio literarum. It is not a matter for microscopic inspection, but to be taken from the general and even casual point of view of a customer walking into a shop.””

The Delhi High Court in *United Biotech Pvt. Vs. Orchid Chemicals & Pharmaceuticals Ltd.*¹⁰ upholding the anti-dissection rule, observed the following:

“The anti-dissection rule is based upon a common sense observation of customer behaviour as explained in McCarthy on Trade Marks and Unfair Competition¹¹ under the subheading "Comparing Marks: Differences and Similarities". The treatise further states:

⁹ AIR1970SC2062.

¹⁰ 2012 (5) PTC 433 (Del.) (DB).

¹¹ [J Thomas McCarthy, IV Ed., Clark Boardman Callaghan 2007].

*“23.15.... The typical shopper does not retain all of the individual details of a composite mark in his or her mind, but retains only an overall, general impression created by the composite as a whole. **It is the overall impression created by the mark from the ordinary shopper's cursory observation in the marketplace that will or will not lead to a likelihood of confusion, not the impression created from a meticulous comparison as expressed in carefully weighed analysis in legal briefs.**”*

The court also laid certain rules of comparison.

*“32. **Following Rules of Comparison can be culled out from various pronouncements of the Courts from time to time.***

I. Meticulous Comparison not the correct way.

II. Mark must be compared as a whole.

III. First Impression.

IV. Prima Facie view not conclusive.

V. Structural Resemblance.

VI. Similarity in Idea to be considered.”

There are various other instances of the court expounding on the test for deceptive similarity. The Supreme Court in **Hoffmann-la Roche (supra)** also discussed the test of deceptive similarity as was famously laid down in the **Pionotist case**:

“The tests for comparison of the two word marks were formulated by Lord Parker in Pionotist Co., Ltd.'s application(2) as follows:

"You must take the two words. You must judge of them, both by their look and by their sound. You must consider the goods to which they are to be applied. You must consider the nature and kind of customer who would be likely to buy those goods. In fact, you must' consider all the surrounding circumstances; and' you must further consider what is likely to happen if each of those trade marks is used in a normal way as a trade mark for the goods of the respective owners of the marks. If, considering all those circumstances, you come to the conclusion that there will be a confusion--that is

to say, not necessarily that one man will be injured and the other will gain illicit benefit, but that there will be 'a confusion in the mind of the public which will lead 'to confusion in the goods--then you may refuse the registration, or rather you must refuse the registration 'in that case.'"

The Division Bench of Bombay High Court in the case of *Hiralal Parbhudas vs Ganesh Trading Company And Ors.*¹² has summarized the law relating to deceptive similarity as under:

"5. What emerges from these authorities is

*(a) what is the **main idea or salient features,***

*(b) marks are remembered by **general impressions** or by some **significant detail** rather than by a photographic recollection of the whole,*

*(c) **overall similarity** is the touchstone,*

*(d) marks must be looked at from the view and **first impression of a person of average intelligence and imperfect recollection,***

*(e) **overall structure, phonetic similarity** of idea are important and **both visual and phonetic tests** must be applied,*

*(f) the purchaser must **not be put in a state of wonderment,***

*(g) marks must be **compared as a whole,** microscopic examination being impermissible,*

*(h) the **broad and salient features must be considered** for which the marks must not be placed side by side to find out differences in design and*

(i) overall similarity is sufficient. In addition indisputably must also be taken in-to consideration the nature of the commodity, the class of purchasers, the mode of purchase and other surrounding circumstances."

The Supreme Court in *Nandhini case (supra)* while discussing the test of deceptive similarity held:

*"27. This Court in **National Sewing Thread Co. Ltd. v. James Chadwick and Bros.**¹³ accepted the following principles which are to be applied in such cases:*

¹² AIR 1984 Bom 218.

*“22. The principles of law applicable to such cases are well settled. The burden of proving that the trade mark which a person seeks to register is not likely to deceive or to cause confusion is upon the applicant. It is for him to satisfy the Registrar that his trade mark does not fall within the prohibition of Section 8 and therefore it should be registered. Moreover in deciding whether a particular trade mark is likely to deceive or cause confusion that duty is **not discharged by arriving at the result by merely comparing it with the trade mark** which is already registered and whose proprietor is offering opposition to the registration of the mark. **The real question to decide in such cases is to see as to how a purchaser, who must be looked upon as an average man of ordinary intelligence, would react to a particular trade mark, what association he would form by looking at the trade mark, and in what respect he would connect the trade mark with the goods which he would be purchasing.**”*

It is submitted that the test for similarity would thus be on the lines of visual, conceptual, structural and phonetic similarity, and the overall cumulative effect of all of them on the mind of an average purchaser. For that, let us compare the two marks.

“CLEANTIZE” and “SUPERTIZ”

I. Visual Similarity:

It is submitted that the marks aren't visually similar at all. Only the last 3 letter from the “SUPERTIZ” are present in the other mark, and even then they are succeeded by another letter at the end. The mere existence of 3 letters doesn't impart any sense of visual similarity.

II. Conceptual Similarity:

The two marks are inventive words as they aren't actual words that mean anything. They are prefixed by common English words “CLEAN” and “SUPER”, but the said words aren't similar to each other in meaning in any way. Further, even the latter part of the two marks “TIZE” and “TIZ”, aren't actual words and don't impart any meaning or thought into the

¹³ MANU/SC/0063/1953 : AIR 1953 SC 357.

mind of the purchaser. On a comparison of the marks as a whole, the two marks do not, thus, put out any conceptual resemblance.

III. Structural Similarity:

Examining the structure of the two marks, there is no element of structural similarity either since the mark, must be viewed as a whole, and thus, the common part “TIZ” in two marks of 8 and 9 letters, does not provide any semblance of structural similarity either.

IV. Phonetic Similarity:

This refers to the sound and pronunciation of the two marks. This may as well be the most important aspect for comparison. Two marks are confusingly similar to an ordinary purchaser if the memory of one mark in the mind of the consumer, closely resembles that of the other. The mind of an ordinary person is far more likely to remember the phonetics and the rhyming pattern of a word, than any other aspect. This is so because when a person generally reads, even if in their mind, they subconsciously pronounce the word in their mind; and that is how, in case of the wordmark, the word gets registered the way it is pronounced.

In this regard, in the present case, the two marks offer no element of phonetic similarity. To closely examine phonetic similarity, the words must be broken down according to the sound of the vowel syllables. The beginning of the two words “CLEAN” and “SU-PER” clearly offer no phonetic similarity. Even the common part “TIZ” in the ending would have a different pronunciation in “CLEANTIZE” (**tA-iz**), due to the presence of the letter ‘E’ after “TIZ”; while the same is not present in ‘SUPERTIZ” (**t-iz**). In addition, the length of the sound “TIZE” (**tA-iz**) is distinctly more than “TIZ” (**t-iz**). The cumulative effect of all this, would render the two words phonetically, completely dissimilar.

In regard to phonetic and structural dissimilarity, recently the Bombay High Court in *Macleods Pharmaceuticals Ltd. Vs. Swisskem Healthcare & Ors.*¹⁴, while comparing the marks “PANDERM+” and “POLYDERM+”, observed:

“44. The essential and distinguishing features of the Plaintiff's and the Defendants' marks are the prefixes "PAN" and "POLY". Had the case been that the Defendant was using a similar sounding prefix such as "TAN", "DAN", "BAN" etc. or other

¹⁴ 2019(80)PTC 303(Bom).

similar term, the case would have been different. However, the structure of the rival marks and the phonetical dissimilarity does not permit any likelihood of confusion or deception amongst the public. Compared as a whole, the Defendants' trade mark is both visually and phonetically dissimilar with the Plaintiff's mark.

48. In any event, before considering the features of the rival cartons, the Court must satisfy itself that the rival word marks are visually similar, and only when it is satisfied, the Court may go on to consider whether the added matter upon the Defendant's carton out-weighs the impression created by the visual similarity of the marks themselves.”

The marks in question in the aforementioned judgement are in fact, much more similar than the marks in the present objection. “PANDERM” and “POLYDERM”, both have a common ending, and both begin with the same letter and sound of ‘P’. The marks in the present situation, as mentioned before, only have a common phrase at the end, which also is pronounced differently in both the marks. In light of the aforementioned judgement, there can be no doubt as to the apparent phonetic as well the structural dissimilarity of the marks “CLEANTIZE” and “SUPERTIZ”

Thus, it is humbly submitted that the two marks, when viewed as a whole, in accordance with the anti-dissection principles, are not deceptively similar or likely to cause confusion the minds of the public, and thus, the objection against the “CLEANTIZE” must be set aside, and the mark must be granted registration.

(3) (ARGUENDO) THE NON-SIMILARITY BETWEEN THE TWO TRADEMARKS EVEN IF THEY'RE BROKEN DOWN

Assuming but not conceding that the abovementioned principles of anti-dissection of the trademark, in a comparison for deceptive similarity, would not hold, and the present mark would be dissected as such, it is submitted that even then, the mark “CLEANTIZE” is dissimilar from “SUPERTIZ” and is not likely to cause confusion in the minds of the public.

Although, even upon breaking down there are no significantly parts to the two marks that are actually common in their sound (letters) or phonetics, for the sake of the argument, it may be

assumed that the marks would be split into their prefix and suffix, and thereby compared. Thus, a comparison would be made between “CLEAN” and “SUPER”, and between “TIZE” and “TIZ”.

On a bare perusal, it is humbly submitted that there is no link of similarity between the words “CLEAN” and “SUPER”, since the two words, do not look or sound similar, aren’t rhyming or phonetic, and in no way do they mean anything even closely related to each other.

On the other hand “TIZE” and “TIZ”, also do not constitute any deceptive similarity, since the words, aren’t dictionary words, and thus carry no conceptual resemblance. As proved above they are phonetically absolutely different due to their vowel-syllables causing a stark distinction in pronunciation and even the length of the sound.

And even though, the existence of the phrase “TIZ”, by itself, cannot be said to cause any likelihood of confusion as also proved in the previous section, for the sake of argument, even if it is assumed, though not conceded, to be similar, the marks cannot be said to cause confusion in the mind of the public. This contention is founded on the fact that the suffix can be said to be a derivative of the word “SANITIZER”, and additionally as such is also common to trade as a suffix in class 5.

- 1. Derivative of “SANITIZER”:** It is evident that “TIZE” and “TIZ” are part of the word “SANITIZER”, which is the product of the mark “CLEANTIZE”.
- 2. Common To Trade:** Upon a search in the trademark public search, it is found that class 5 contains over 1000 marks with the term “TIZ” or “TIZE” in them, out of which 437 are already registered. A search report, of first 49 marks amongst many others not mentioned, has been prepared for words containing “TIZ” or “TIZE” as suffix in most of them, and prefix otherwise. This is sufficient to show that the term “TIZE” and “TIZ” are common to trade under class 5.

Any counter-argument regarding class 5 being too wide for a “common to trade” determination would not be tenable since, this very section is premised on the assumption, and not concession, that the two trademarks “CLEANTIZE” and “SUPERTIZ”, despite trading in completely different products, would by virtue of being in the same class, be part of the same category of goods, and thereby likely to cause confusion in the mind of the

public. Otherwise, the entire objection would be set aside by virtue of the case laid out in section 1 itself.

It is submitted that where a part of the two marks is common and such mark has a descriptive derivation or is “common to trade”, the comparison between the two marks for deceptive similarity would be based, giving greater regard to the uncommon element in the two marks.

The Supreme Court, in *Amritdhara Pharmacy v. Satya Deo Gupta*¹⁵ while distinguishing between “AMRITDHARA” and “LAKAHMANDHARA” observes:

“9. We agree that the use of the word 'dhara' which literally means 'current or stream' is not by itself decisive of the matter. What we have to consider here is the overall similarity of the composite words, having regard to the circumstance that the goods bearing the two names are medicinal preparations of the same description.”

The Court, despite holding that the two marks were similar, came to such conclusion based on the conceptual similarity between the uncommon element of the two marks, and not due to the common element. In the present case, the uncommon elements as established before have no connection, let alone similarity, in meaning.

The Bombay High Court in *Macleods Pharmaceuticals(2019) (supra)* relied upon *Macleods Pharmaceuticals Limited v. Intas Pharmaceuticals Ltd. and Ors (2013)*¹⁶, wherein while distinguishing the marks “LETHYROX” from “THYROX” and “ANTI THYROX”, the court observed:

“27. ...It is also submitted that the mark THYRO is publici juris and there cannot be any monopoly on the use of the mark THYROX. In cases when the marks are evolved from generic drugs and/or parts of body organs, the emphasis is always on the other parts/features of the marks. In various judgments, the Superme Court and also this Court has held that where a part of a mark is either descriptive or common to trade, greater regard is to be paid to the uncommon element in the two marks.

¹⁵ 1963 AIR 449; AIR 1984 Bom 281.

¹⁶ 2013 (55) PTC 380 (Bom).

...31.1 In *Bal Pharma Ltd. vs Centaur Laboratories Pvt. Ltd.*,¹⁷ the Court while considering the case of infringement and passing off of a mark "AZIWOK" as against another mark "AZIWIN" rejected the same. **The Court held that "AZI" was derived from the generic product Azithromycin and therefore other words "WOK" and "WIN" ought to be considered. On comparing the marks as a whole, the court found no deceptive similarity."**

The court also relied upon *Johann A. Wulfig v. Chemical Industrial and Pharmaceutical Laboratories Limited and Ors*¹⁸, wherein the court distinguished between "COMPLAMINA" and "CIPLAMINA", and observed:

"6. An average person asking for COMPLAMINA would in normal manner and without conscious effort emphasis the prefix "COM", whereas an average person asking for CIPLAMINA would in normal manner and without conscious effort emphasis the prefix "CIP". The totally different manner in which these 2 words are pronounced in normal and natural way of speech, must necessarily eliminate any phonetic similarity between the two. ...

10. ...In the present matter, the Joint Registrar' s emphasis on the starling letter "C" in both the words, does not take into account the total phonetic dissimilarity between the 2 words, namely that the very same "C" is pronounced entirely differently in both the words, it is not the suffix that is the controlling sound. It is the disparate "COM" and the other as written) that is the controlling sound and it is that which makes all the difference. "The first syllable of a word mark is generally the most important". As there is a "tendency of person using the English language to slur the termination of words".¹⁹

...Where the first two syllables are different, there is little likelihood of confusion. So was it observed by the Division Bench of the Madras High Court²⁰, while holding that UTOGYNOL and ORTHOGYNOL were not deceptively similar."

¹⁷ 2002 (24) PTC 226 Bom.

¹⁸ 1984 (4) PTC 81 (Bom).

¹⁹ (Kerly's Law of Trade Marks, 11th ED. Page 416).

²⁰ Mount Mettur v. Ortha Corporation, AIR1975Mad74.

The Supreme Court in *F. Hoffmann-la Roche & Co. (supra)*, while distinguishing between “DROPOVIT” and “PROTOVIT” observed:

“8. ...The affidavits of the appellant indicate that the last three letters "VIT" is a well-known common abbreviation used in the pharmaceutical trade to denote Vitamin preparations. In his affidavit dated January 11, 1961 Frank Murdoch, has referred to the existence on the Register of about 57 trade marks which have the common suffix "VIT" indicating that the goods are vitamin preparations. It is apparent that the terminal syllable "VIT" in the two marks is both descriptive and common to the trade. If greater regard is paid to the uncommon element in these two words, it is difficult to hold that one will be mistaken for or confused with the other. The letters 'D' and 'P' in "DROPOVIT" and the corresponding letters 'P' and 'T' in "PROTOVIT" cannot possibly be slurred over in pronunciation and the words are so dissimilar that there is no reasonable probability of confusion between the words either from the visual or phonetic point of view.”

In light of the catena of aforementioned judgments, since “TIZE” and “TIZ” are common to trade and a derivation from sanitizer, the comparison must be made between the uncommon elements, “CLEAN” and “SUPER”, which as established earlier are in no way likely to cause confusion.

On the appellant’s contention that the word “DROPOVIT” meant only “DROP OF VITAMIN”, ‘VIT’ being used to denote “Vitamins”, and thus cannot, therefore, be said to be an invented word, the court observed:

12. ...In Diabolo case 25 R.P.C. 565 Parker J., has explained the meaning of "invented word" as follows:

To be an invented word within the meaning of the Act a word must not only be newly coined, in the sense of not being already current in the English language, but must be such as not to convey any meaning, or, at any rate, any obvious meaning to ordinary Englishmen. It must be a word having no meaning or no obvious meaning until one has been assigned to it.

13. ...In this connection the High Court has pointed out that the original application for rectification did not contain the ground that the word of "DROPOVIT" was descriptive. It was, therefore, legitimate to draw the inference that the word "DROPOVIT" did not strike even Messrs Depenning and De-Penning the legal advisers of the appellant as being descriptive. It was also pointed out that in his judgment Mr. Justice Tarkunde has remarked that when the case was opened before him he did not understand that the word "DROPOVIT" meant "DROP OF VITAMIN" till the explanation of that word was given to him. We see no reason, therefore, to differ from the reasoning of the High Court on this aspect of the case. If the word "DROPOVIT" is not a descriptive word it must be held to be an invented word. It is true that the word "DROPOVIT" is coined out of words commonly used by and known to ordinary persons knowing English. But the resulting combination produces, a new word, a newly coined word which does not remind an ordinary person knowing English of the original words out of which it is coined unless he is so told or unless at least he devotes some thought to it. It follows that the word "DROPOVIT" being an invented word was entitled to be registered as a trade mark and is not liable to be removed from the Register on which it already exists."

Thus, based on the contention that "TIZE" was a derivative of the word "SANITIZER", any counter-argument in the manner of "CLEANTIZE" meaning "CLEAN SANITIZER", and thus being descriptive and not inventive, would be rejected on two grounds, in light of the aforementioned case:

1. Prima facie, "CLEANTIZE" does not remind the ordinary person of the phrase "CLEAN SANITIZER", and such an inference can be drawn from the fact that the only objection from the Trade Mark Registry itself was under section 11(1) and not under section 9. Further, "TIZE" itself, is not an abbreviation for "SANITIZER" in common parlance, thus an ordinary consumer would not understand "CLEANTIZE" as "CLEAN SANITIZER".
2. Assuming, but not conceding, that "CLEANTIZE" can be easily understood as "CLEAN SANITIZER", the phrase itself is not descriptive since it doesn't make any grammatical sense. "CLEAN", in a rational sense, is not the description of the product

sanitizer. “CLEAN”, if anything, is the description of the effect of the application of the product, and such a description which does not pertain to the product directly cannot be said to be descriptive.

Thus, it is humbly submitted that in consideration of the fact that the goods covered by the trademark are distinct and not similar, and have absolutely no trade relation; and **even if** they were assumed to be similar, the marks as a whole are completely dissimilar; and **even if** the marks were dissected and if it was assumed, but not conceded, that the suffixes were in fact similar, even then due to greater emphasis to be put on the uncommon element of the marks, there is no likelihood of confusion in any case between the marks “CLEANTIZE” and “SUPERTIZ”.

PRAYER

In light of the contentions reused, arguments advanced and authorities cited, it is humbly prayed that the Hon’ble Trade Marks Registry at New Delhi set aside the objection under section 11(1) and grant registration to the mark “CLEANTIZE”.

SD/-

DAKSH SAREEN

Counsel on behalf of the Applicant, Rahul Sharma