

# CONSUMER PROTECTION VIS A VIS TRADEMARK LAW

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## I. Introduction

History reveals that both trademark and consumer laws were evolved with the sole aim of protecting consumers and safeguarding consumers' interest. However, in the modern world of global trade, the trademark law focuses more on the proprietors' rights than on the consumers' rights. Trademark law, undoubtedly, has turned from a consumer protection law into a valuable intellectual property asset for the trading organizations. The trademark law is no more a consumer specific legislation. With the inclusion of intellectual property rights in the WTO<sup>1</sup> negotiations and the conclusion of TRIPS Agreement,<sup>2</sup> trademark is being treated as a tradable intellectual property with little or no attention to the rights of consumers.

The ambit of trademark and consumer laws is indescribable in specific terms as it applies to everyone in the globe. Every person is a consumer<sup>3</sup> of goods and services and as a corollary the term 'consumer' can virtually be equated

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1 World Intellectual Property organization.

2 Agreement on Trade Related Aspects of Intellectual property Rights.

3 Sec 2 (d) of the Consumer Protection Act, 1986 defines "consumer" as any person who (i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or (ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person but does not include a person who avails of such services for any commercial purposes.

with the term 'human being'. Every person remains a consumer from cradle to grave. We live in a consumer society surrounded by many goods and services, and the decision to purchase a particular good or service depends in large part on the trademarks.<sup>4</sup>

The consumer laws assist the consumers by imposing certain obligations on manufacturers and suppliers of goods and services towards consumers. The notion of 'consumer protection' is aiming at the protection of the interests of the consumers. Consumer protection laws thus primarily safeguard the rights of consumers by preventing unfair trade practices.<sup>5</sup>

Similarly, trademark law too tries to protect consumers by preventing deception in the market by a number of ways. The essential function of trademark is that it is a badge of origin.<sup>6</sup> A trademark performs the role of identifying the goods of a particular manufacturer and establishes a connection in the course of trade. A trademark performs other functions such as advertising function as well. A trademark advertises the product and creates an image in the mind of the ultimate purchaser. The advertising function relates to the *cachet or aura* which the consumers associate with the marks.<sup>7</sup> The trademark thus serves to reduce the search cost by assuring quality of the product and acts as a symbol representing the goodwill<sup>8</sup> of the business.

Therefore, promoting consumer welfare is the underlying philosophy of both consumer law and trademark jurisprudence. Nevertheless, certain notions in the trademark law are in consumer detriment. Overreaching economic laws, particularly laws relating to monopolies and competitions, influence consumer protection laws. As such, trademark law has an overreaching effect on the consumers. However, such laws generally fall outside the ambit of most consumer law texts, though its primary importance on consumer laws should

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4 HàTh Nguýt Thu, Well-Known Trademark Protection Reference to the Japanese Experience, Final Report in Fulfillment of the Long Term Fellowship 11 (WIPO, 2010).

5 Sec 2 (r) unfair trade practice" means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice.

6 David Kitchin, David LlewelynEt. Al. *Kerly's Law of Trade Marks and Trade Names*,8, (Sweet & Maxwell, London, 2007).

7 *Id.* p. 9.

8 The reputation of trademark associated with the business is generally termed as the goodwill.

never be forgotten.<sup>9</sup> When the subject of trademark is approached from a consumer perspective, one can find grave lacunae in the existing trademark system which directly or indirectly resulting in the consumer detriment. Over the years, a substantial statutory framework has been developed to design various measures to protect consumers. On the other hand, the relevance of trading malpractices, the sale of counterfeit goods, lack of consumer education and awareness and so on remain rampant. Many trends and notions in trademark jurisprudence are unfavorable to consumers examples of which are the principle of honest concurrent use, practice of dual registration and so on.

## II. Honest Concurrent Use

Trademark law permits the notion of honest concurrent use. This notion is an exception to the general principles of trademark law. As per this notion, a trademark will not be refused registration, where honest concurrent use have been made of it notwithstanding that it conflicted with an earlier trademark.<sup>10</sup> Section 12 of the Trademark Act, 1999 gives statutory recognition in India to the notion of honest concurrent use. The Section reads thus:

In the case of honest concurrent use or of other special circumstances which in the opinion of the Registrar, make it proper so to do, he may permit the *registration by more than one proprietor of the trade marks which are identical or similar* (whether any such trade mark is already registered or not) *in respect of the same or similar goods or services*, subject to such conditions and limitations, if any, as the Registrar may think fit to impose.

This Section enables the registration of same or similar trademark by more than one proprietor in case of honest concurrent use or other special circumstances. This Section provides that the Registrar may allow an application which conflicts with an earlier mark, notwithstanding the marks are identical and deceptively similar, under Section 11(1) or 11(2)<sup>11</sup> if the applicant can demonstrate that his mark has built up a sufficient amount of goodwill in the market. This section is an exception to the prohibition of registration of similar

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9 C. J. Miller, Brain, W. Harvey, Et Al. Consumers and Trading Law: Test, Cases and Materials, 3, (Oxford University Press, Oxford, 1998).

10 An "earlier trade mark" is a registered mark or an applied-for mark.

11 Sec 11 provides for relative grounds for refusal of registration.

words/marks contained in Section 11 and it permits by more than one proprietors of identical or similar trademarks in respects of same or similar goods/services. Concurrent use of trademark is a notion prevalent in many jurisdictions.

To attract this provision, a mere concurrent use is not sufficient but the concurrent use should be an *honest* concurrent use. Honesty of adoption and user is the *sine quo non* for evoking this principle. Where the adoption or subsequent user of the mark is proved to be dishonest, no amount of user recognition will help the applicant. The claim for concurrent user implies simultaneous and contemporaneous use.<sup>12</sup> Lord Tomlin's test, developed in *Alex Pirie*<sup>13</sup> to evaluate the claim of honest concurrent use, comprises the following steps:

- (1) the extent of use in time and quantity and the area of trade;
- (2) the degree of confusion likely to ensue from the resemblance of the marks which is to a large extent indicative of the measure of public inconvenience;
- (3) the honesty of the concurrent use;
- (4) whether any instances of confusion have in fact been proved; and
- (5) the relative inconvenience which would be caused if the mark were registered.

These factors are not exhaustive and in exercising discretion of the Registrar, any relevant circumstance may be considered.<sup>14</sup> Further, a two-stage analysis adopted in *C.S.S. Jewellery* in determining whether registration should be allowed on honest concurrent use, involves the following considerations:<sup>15</sup>

- (1) whether there has been an honest concurrent use of the mark applied for and the earlier mark; and
- (2) if the answer is in the affirmative, whether after considering all relevant circumstances, including public interest, the discretion should be exercised to accept the application for registration of the mark, despite the fact that

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12 Sushil Jindal Trading v. Jindal Electricals and Assistant Registrar of Trade Marks, 2008 (37) PTC 145 (IPAB).

13 Alex Pirie and Sons Limited's Application , (1993) 50 RPC 147.

14 Electrix Lds Application for Trade Mark,[1957] RPC 369

15 C.S.S. Jewellery Company Limited v. The Registrar of Trade Marks, (HCMP 2602/2008)

the use of the mark in relation to the goods or services in question is likely to cause confusion on the part of the public.

Let us examine the impact of this doctrine on an average Indian consumer. In respect of contentions on honest concurrent use, the *prima facie* importance is given to the owners of the trademark. In the proceedings relating to the application of honest concurrent use, most of the arguments are surrounded by and decisions are based on the relative inconvenience that would be imposed on the owners of the registered mark if the subsequent application is allowed.<sup>16</sup> The public inconvenience or public confusion is always overlooked, though the issue lying at the heart of the matter should be the likelihood of confusion to the public if registration is allowed. The deception and confusion may relate to the proprietor or to the place of origin of goods, place of production and so on. Even Lord Tomlin firmly held the view that 'certain degree of confusion between the two marks is tolerable if the overall equitable considerations outweigh the risk of widespread confusion.'

The case of Dalip Chand Aggrawal v. Escorts,<sup>17</sup> is a good illustration of this point. The respondent company manufactured and sold various agricultural equipment, razor blades, tractors, washing machines, motor cycles, shock absorbers, thermometers and other medical appliances since 1951 under the trademark 'Escorts' and in 1961 the respondents sought and obtained registration of the trademark 'Escorts'. In 1963 the appellant sought registration of a trademark of the word 'Escort' in respect of electric irons, electric kettles, soldering irons and elements of electric irons and kettles. Though the Assistant Registrar found that the applicant/appellant's trade-mark was similar to the opponent's/ respondent's trademark, however, he held that as the goods had been sold by the appellant under the trademark 'Escort' since 1958, the case of the appellant was covered under Section 12 of the Act and therefore entitled for registration. On appeal to the High Court of Delhi, both the single bench and the division bench concurrently ruled that the onus on the appellant to establish considerable prior use, was not reasonably discharged and thus the registration was denied. What is interesting in the case is that though the respondent's trademark 'Escort' which was in the market since 1951 was a reasonably known name, and there were all chances of public confusion, this point was neither considered by the Registrar and nor addressed by the Court!

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16 See, *Paul Wheeler Application* (No. 2337401) order dated July 18, 2005.

17 AIR 1981 Del.150.

As the notion of concurrent use enables the applicant to overcome an objection to a trademark registration that conflicts with, or would take unfair advantage of, or would be detrimental to, an earlier mark; and permits, to the discretion the registrar registration of even same and deceptively similar trade mark,<sup>18</sup> it is a practical means of consolidating goodwill accrued to use into a registered trademark. But in fact, simultaneous, normal and fair use of the competing marks will always lead to confusion or deception among the members of the public. This is more evident when there is a 'triple identity': same goods, identical or substantially identical marks, and same area of use. In such situations, the public confusion will be more rampant.

As a practice, in trademark litigations the courts have a presumption that if the rival marks are conceptually similar it is not sufficient to give rise to a likelihood of confusion.<sup>19</sup> The matter of the likelihood of confusion is generally judged through the eyes of the average consumer of the goods in question. The average consumer is deemed to be reasonably well informed, reasonably circumspect and observant. But this presumption is not correct in respect of an Indian consumer who has less or no chance of information and who generally identifies goods not through microscopical examination or comparison but from his imperfect memory of the earlier mark. The average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. An average Indian consumer, especially when the consumer is illiterate, assesses the marks from the overall impressions of the competing marks, their visual, aural and conceptual similarities.

"Kerly's Law of Trade Marks and Trade Names" when it explains the term 'public interest', says: <sup>20</sup>

The tribunal should always consider the public interest. This has long been a matter taken into account in determining whether there is honest concurrent use. Accordingly, the Registrar should always consider whether the public are adequately protected. The tribunal will consider whether it is just to register, *even if there is some confusion.*

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18 See, *Osram Gesellschaft Mit Beschränkter Haftung v. Shyam Sunder*, 2002 (25) PTC 198 (Del), wherein the notion of honest concurrent use was upheld in favor of the mark 'osham'.

19 *Sabel BV v. Puma AG*, [1998] R.P.C. 199, decided by European Court of Justice

20 David Kitchin, David Llewelyn Et Al., "Kerly's Law Of Trade Marks And Trade Names, 262, (13<sup>th</sup> ed. 2000).

The similar or identical features in the rival marks would undoubtedly generate confusion in the mind of an ordinary consumer who bears in mind an overall impression of the mark with no reference to its distinctive components.<sup>21</sup> Any association between the marks causes the public to wrongly believe that the respective goods come from the same or economically linked undertakings.<sup>22</sup> Confusion occurs when a consumer encounters one product under the similar mark just some time after the other. Then a holistic analysis occurs in the mind of the average consumer who does not disassemble marks in his mind but compares whole with whole. In situations where marks are highly distinctive, or contain a highly distinctive element, confusion is more likely than in those where marks are relatively weak. Marks are compared in their entirety. The consumers seldom stand in front of two products and measure the differences in their branding.

In the modern era of multi-class registration of trademark – wherein a single entrepreneur registers the same trademark under various classes in respect of a number of goods/services – even sophisticated customers would reasonably presume that goods/services under similar trademark are originating from same trade source.<sup>23</sup>

This doctrine overrides the general provisions contemplated under Sections 9 and 11 of the Act and this doctrine operates even where there exists resemblance between two or more marks which are likely to deceive or cause public confusion. Under this doctrine, presence of actual confusion is not decisive to the later applicant. In this connection wide discretion has been granted to the Registrar. The degree of likelihood of confusion takes a back seat where the honesty of the applicant is established. It follows that simultaneous registration is justified under this doctrine even if the mark is likely to result in consumer confusion/deception. The scope of this section is not limited only to cases where there exists only a slight possibility of confusions/deception. Hence, the notion of concurrent use undoubtedly creates confusion and deception amongst the consumers.

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21 *Supra* note 18.

22 Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc. [1999] RPC 117.

23 Under the Trademark Act, the goods are classified in about 45 different classes. The main objective of trademark classification is to group together the similar nature of goods and services.

### III. Registration of Trademark Under Special Circumstances

Apart from the instances of honest concurrent use, the Trademark Act provides in Section 12 for the registration of same or similar trademarks, by more than one proprietors in case of 'other special circumstances'. Special circumstances include peculiar factors in relation to the mark such as the nature of mark, quantum of use, area of use, degree of resemblance between the marks, the nature in the difference of the goods, the area of consumption, the sale channels and so on.<sup>24</sup> A similar trademark can be allowed registration by the Registrar, if the proprietor of the earlier trademark or proprietor of earlier rights consents to the registration. For example, the trademark 'cowslip brand' in respect of condensed milk used for over 25 years was allowed registration, against a registered mark 'cowslip' for butter and cheese by consent.<sup>25</sup> If such consent is granted, then the Registrar is empowered to register the mark under special circumstances under Section 12. However, in practice and application, such registrations always create public confusion and deception.

### IV. Dual System of Registration

Trademark law allows dual system of protection, one based on registration of trademarks and the other based on actual use in the market. A trademark can be protected either as a registered trademark under the relevant statute or can alternately be protected by a common law action in passing off. All municipal laws follow the dual system of protection. Thus, statutory registration is not sine qua non to establish rights in a trademark. Common law rights arise from the actual use of a mark. The common law user can legally challenge a registration or an application resembling his mark.

This provision is in consumer detriment. To elaborate further, when an entity applies for registration of a trademark, a search will be conducted in the trademark registry to overcome the test of Section 11, to find out whether the proposed mark is identically or confusingly similar to an earlier trademark. The data available with the examiner at the registry for search and examination

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24 London Rubber Co. v. Durex Products Inc., AIR 1959 Cal 56.

25 Maeder's Appln.(1916) 33 RPC 77.

consists of registered trademarks, registration - pending trademarks, abandoned or rectified trademarks. There is no database as to the unregistered trademark which can be protected by passing off action. Hence, a mark would successfully get through the examination process even though there is a similar unregistered trademark. As per the statutory provisions, subsequent publication of the application in the Trademark Journal would entitle an interested person to oppose the registration. However, for practical purposes, the common men are not aware of the publication/advertisement in the Trademark Journal, and as such they may not have the essential knowledge to oppose a registration of a similar trademark. Moreover, the opposition should be filed in the stipulated period by the 'interested person' and the public has no role though someone in the public wants to oppose the mark.

This discussion reveals that there can be chances wherein similar or confusing trademarks – one registered and the other unregistered - may co-exist in the market resulting public confusion. This can be undone only by mandating registration of trademarks as in the case of other forms of intellectual property like patents. This requirement is a must in the consumers' interest.

## V. New Generation Trademarks

Another trend in the trademark jurisprudence which adversely affects the consumers is the legal recognition of novel kinds of trademarks. Unconventional trademarks are being recognized as protectable trademark.<sup>26</sup> Use of non visible signs such as smell, colour, sound, taste, texture, touch etc. as trademark is not uncommon in the contemporary market. It may be a boon in low literacy areas where consumers may better identify goods with vibrant colour or a pleasant aroma.

However, consumer problem arises in respect of single colour trademarks. In *Libertel*<sup>27</sup> the European Court of Justice by granting registration for the colour orange in relation to telecommunications services clearly established that single colours are capable of acting as trademarks and can be registered providing that they are defined in a sufficiently clear way. A single colour may constitute a sign for the purpose of trademark registration. A colour can be

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26 See, Lisa P. Lukose, *Protection of Unconventional Trademarks*, 1 CNLU LJ. 22-33 (2010).

27 *LibertelGroep v. Benelux Merkenbureau* (Case C-104/01) dated May 6, 2003 by ECJ.

a trademark if it is (i) a sign, (ii) capable of graphic representation and (iii) capable of distinguishing the goods or services of one under-taking from those of other undertakings. In *Heidelberger* case<sup>28</sup> the views expressed By ECJ on registration of colour trademark got reiterated in respect of the registration of the colours blue and yellow as a trademark though the German Patent Office rejected the registration initially.

Though single colours are not inherently distinctive, when it acquires secondary meaning through use, the colour *per se* may be registrable as a trademark.<sup>29</sup> The U.S Supreme Court found in *Qualitex Co. v. Jacobson Products Co.*,<sup>30</sup> a green-gold colour used on dry cleaning press pads registrable as a trademark where the colour had acquired distinctiveness. According to the court, it is the 'source-distinguishing ability' of a sign that permits it to serve as a trademark and not its ontological status as colour, shape, fragrance, word or sign. However, even with acquired distinctiveness a colour may not succeed registration if the colour is required generally in the trade. In order to constitute a trademark, a colour or combination of colours must be capable of distinguishing the goods or services of one trader from those of other traders<sup>31</sup> *In Re Ownes-Corning Fiberglas*<sup>32</sup> a colour pink could be registered for the fibrous glass residential insulation.

In most cases colour marks are not inherently distinctive. Hence, the registration can be granted only on the clear proof of acquired distinctiveness. The examination of single colour thus requires very careful analysis as its any imitation may bring about widespread public confusion.

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28 Case (ECJ 24 June 2004, C-49/02) however, the ECJ confirmed its reticence regarding the registration of signs consisting of combinations of colours by ruling that the applicant will have to prove that it has been established that, in the context in which the colours or combinations of colours are used, those colours or combinations of colours in fact represent a sign, and that the application for registration should include a systematic arrangement associating the colours concerned in a predetermined and uniform way. For further reading on colour trademark please see *Non-Traditional Trademarks in Europe – Shape and Colour Trademarks – Common Issues with Obtaining, Exploiting and Enforcing Rights*, Report by the 2004-2005 Europe Legislation Analysis Subcommittee, March 2005 available at <http://www.inta.org/Advocacy/Documents/INTAShapeColorEurope2005.pdf>.

29 M.M.S. Karki, *Nontraditional Ares of Intellectual Property Protection*, (JIPR 10, Nov.2005, pp- 499-506.).

30 514 U. S. 159 (1995).

31 For example a pea-green colour for travel services.

32 774 F.2D 1116 Oct.8,1985

The main difficulty, from a consumer perspective, associated with the practice of granting registration for single color, is the probable innocent infringement by the public. It can be illustrated with reference to well-known trademarks which fall in the special category marks. Well-known trademarks<sup>33</sup> benefit from a protection even beyond the similarity of the goods and services, in the case where the later mark would take unfair advantage of, or be detrimental to, the distinctive character or the reputation of the earlier mark. A well-known trademark protection extends to goods/services which are not similar to those in respect of which the trademark is registered when all other trademark protection extends only to the particular class of goods. Any reproduction, imitation, translation of the well-known trademark is prohibited. The term well-known trademark finds place in Article 6 *bis* of the Paris Convention (as revised in 1925) in which better protection and special treatment to this concept is sought to be ensured. TRIPS Agreement, 1994 requires additional special treatment in favour of well-known trademarks. When a consumer, on seeing a trademark on goods/services relates it to a trademark already used on some other goods/services, such a trademark becomes well-known trademarks.

To declare a trademark well-known there is no requirement that it must be well-known to the 'public at large'. If the mark is known to a 'relevant section of the public', it can be treated as a well-known mark. In other words, the public at large need not necessarily be aware of the existence of a well-known mark.<sup>34</sup> Well-known trademark protects even trans-border reputation. Thus when a small scale manufacturer who may not have sophisticated knowledge about the intricacies of well-known trademark uses a particular colour trademark in the local market, he can be treated as an infringer irrespective of the class of goods in respect of which he has applied the single colour trademark. The practice of granting protection to single colour trademark is not a consumer friendly provision. It is worth mentioning that there has not been full agreement on the

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33 Sec (zg) of the Trademark Act, 1999 defines thus: "well-known trade mark "in relation to any goods or service, 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."

34 As per Art 16.2 of TRIPS, in determining whether a trademark is well-known, Members shall take account of the knowledge of the trademark in the relevant sector of the public, including knowledge in the Member concerned which has been obtained as a result of the promotion of the trademark.

concept of well-known trademark between countries in the WIPO negotiations.<sup>35</sup> The European Court of Justice also observed that in examining the potential distinctiveness of colour sign, regard has to be had to the general public interest of not unduly restricting the availability of colours for other traders.<sup>36</sup>

## VI. Suggestions

The trademark law should not overlook the public confusion theory. In cases of concurrent use, the focus must be on probable public confusion and possibility of consumer deception than on the interests of the trademark proprietors. There must be a shift from the emphasis on the proprietary rights of the trademark owners to the rights of consumers. The consumer deception is a socio-economic offence which in some way affects the material welfare of the entire community.<sup>37</sup> Utmost care must be taken to ensure that simultaneous, normal and fair use of the competing marks will not lead to confusion or deception among the members of the public.<sup>38</sup>

For concurrent use, no minimum period of use is prescribed by the Act. Concurrent use need not be uninterrupted or of great extent. Leave of the court is not required for the same, and wide discretion is granted to the Registrar. Generally, the court will not interfere with the Registrar's order. Hence the Registrar must not exercise his discretion arbitrarily. For preventing confusion in circumstances of concurrent use etc. the Registrar must impose conditions and limitations pertaining to important factors like colour, the goods, mode, place of use and so on. Where there is triple identity position, no registration shall be granted either under honest concurrent use or under special circumstances. Even in cases of fair use – where two or more parties unknown to each other and unaware of the mark used by each other innocently adopt and use the same mark in respect of their respective goods, the Registrar must impose conditions and limitations to eliminate possible public confusion. The dominant purpose of law for registration of trademark being the prevention of public deception from the use of similar trademark by different sources, how could the legislature

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35 V. A. Mohta, *Trademark, Passing Off and Franchising*, 14, (All India Reporter Pvt. Ltd. 2004).

36 (2004) FSR 65.

37 H. N. Giri, *Consumer, Crimes and The Law*, 7, (Asish Publishing House, 1987).

38 See, *Sham Lal v. Parley Products Manufacturing Co. (P) Ltd.*, AIR 1967, 116.

possibly permit registration of same or similar trademark by different persons? The public rights of the consumers not to be deceived must be given priority over the private rights of the proprietors.

## VII. Conclusion

The trademark law has been trending recently to promote competition in the global market by conferring exclusive rights on the proprietors conveniently ignoring the rights of the consumers. The essence of trademark law is the protection of consumers from deceit and confusion. Any deviation from this intended purpose is a manifest abuse of law. Concurrent use by two or more persons of the trademark for the same goods is quite contrary to the basic of trademark law, because the trademark is intended to denote that the goods come from one source only. There must be no compromise whatsoever from the fundamental principle of trademark law that no trademark can be registered if it is of such nature as to deceive the public or create confusion in the consumers' mind. The trademark must be non-deceptive and no-confusing. It should persuade people that the goods or services are what they want and should not be confused with the trademark of a similar product which has been already registered or in use for a considerable period of time. Legislatures, trademark examiners, Registrars, and the court while balancing the competing interests of consumers and trademark proprietors, must focus on the interests of consumers firmly realizing that trademark protection is primarily for consumer welfare.