

In Re: R.T. Engineering and Electronics Co.

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Court : Mumbai

Decided On : Jul-23-1970

Reported in : (1971)73BOMLR586

Judge : Vimadalal, J.

Acts : [Trade and Merchandise Marks Act, 1958](#) - Sections 11, 12, 12(1), 18, 20 and 20(1)

Appeal No. : Misc. Petn. No. 58 of 1970

Appellant : In Re: R.T. Engineering and Electronics Co.

Advocate for Def. : K.S. Cooper, Adv.

Advocate for Pet/Ap. : J.I. Mehta, ;Shavksha, Adv. i/b., ;Daruvalla & Co.

Judgement :

ORDER

1. This is an appeal under Section 109(2) of the Trade and Mercantile Marks Act, 1958 from the decision of the Assistant Registrar of Trade Marks under Section 18(4) of that Act refusing to register the Petitioners' trade mark on the ground that the same conflicts with registered trade mark No. 213586-B as also with the mark in application No. 253772-B with both of which the Petitioners' mark was held by him to be 'deceptively similar'. The petitioners had originally applied to the Trade Marks Registry for the registration of his mark in Part A of the Register in Class 7

in respect of diesel oil engines, but subsequently the same was converted by the Petitioners into one for registration in Part B and the designation of the goods was modified so as to read 'Diesel Oil Engines' (not for land vehicles) for sale in the State of Gujarat.' The Assistant Registrar, after hearing counsel on behalf of the Petitioners, declined to accept the application and dismissed the same under Section 18(4) of the Act. In the grounds which were furnished by the Assistant Registrar for arriving at the said decision, it was stated that neither visually nor phonetically was the Petitioners mark similar to registered mark No. 213586-B or with the mark in application 253773-B. The Assistant Registrar, however, took the view that, though the Petitioners' mark had no visual or phonetical resemblance to the said mark or the said application, confusion was likely to ensue as to trade origin in so far as there was 'a definite possibility that a substantial number of purchasers would assume that the two sets of goods sold in the market come from the same trade source.' He also held that the Petitioner was not entitled to concurrent registration under Section 12(3) of the Act. In the result, he refused the Petitioners' application, as stated above, and it is from that the present appeal has been preferred.

2. Learner counsel on behalf of the Petitioners contended that in view of the conclusion arrived at by the Registrar that the Petitioners' mark was neither visually nor phonetically similar to registered mark No. 213586-B or to the mark in application No. 253773-B, it was not open to him to refuse the Petitioners' application summarily under Section 18(4) without advertising the same in accordance with Section 20 of the Act and taking evidence in regard to the likelihood of confusion on other grounds. In order to deal with that contention of the Petitioners, it is necessary to refer to Sections 11(a) and 12(1) of the Act and to compare the scope of those two sections. The relevant portion of Section 11 is in these terms :-

'11. Prohibition of registration of certain marks -

A Mark :-

(a) The use of which would be likely to deceive or cause confusion; or shall not be registered as a trade mark'. The relevant portion of Section 12 reads as follows :-

'12. Prohibition of registration of identical or deceptively similar trade marks - (1) Save as provided in sub-section (3) no trade mark shall be registered in respect of any goods or description of goods which is identical with or deceptively similar to a trade mark which is already registered in the name of a different proprietor in respect of the same goods or description of goods'.

The expression 'deceptively similar' which is to be found in Section 12(1) is defined in Section 2(1)(d) in the following terms :- '(d) 'deceptively similar' :- A mark shall be deemed to be deceptively similar to another mark if it so nearly resembles that other mark as to be likely to deceive or cause confusion;'

In almost all the English authorities in which any question under either of these sections fell to be decided, the scope of Section 11 was considered in relation to Section 12, or vice versa, and these two sections have been dealt with in a comparative way. It may be mentioned that Section 11 of our Act corresponds to Section 11 of the U. K. Trade Marks Act, 1938, and Section 12 of our act corresponds to Section 12(1) and (2) of the U. K. Trade Marks Act, 1938.

3. The scope of Sections 11 and 12 was considered in the case of Hans Emanuel Enoch (1947) 64 RPC 119 which was strongly relied upon by Mr. Mehta on behalf of the Petitioners. The facts of that case were that Enoch applied to register the word mark 'Vivicillin' for products of mould metabolism prepared for pharmaceutical purposes. The word 'Cyllin.' and two other marks incorporating that word had already been registered by M/s. Jeyes' Sanitary Compounds Co. Ltd. for articles of the same class. The Acting Registrar was of opinion that there might be likelihood of confusion, but offered to allow the application go to an advertisement if the applicant obtained the consent of the said Jeyes' Sanitary Compounds Co. Ltd., for registration of the mark. The applicant was unwilling to apply for such authorization and the application was accordingly refused. The applicant appealed to the court and Cohen, J. allowed the appeal and set aside the order of the Registrar, holding that there was not sufficient similarity between 'Vivicillin' and 'Cyllin' to render confusion likely. In the course of his judgment Cohen, J. observed (at p. 122) that it was common ground that in dealing with the said case which was a case under Section 12 of the U. K. Act, the court must

consider only the marks side by side, when written as well as when spoken and decide whether there was risk of confusion either in sight or in sound. He then stated that he approached the matter with some hesitation because he was hearing an appeal from somebody who was dealing with these matters with great frequency and was a man of great experience in cases of that kind, but in his opinion, the Registrar had gone astray in the said case when, for refusing registration he gave the reason as being : 'Even if the distinction between the two words be clearly appreciated there will, I think, be many persons who will detect the similarity between them and who will think that 'Vivicillin' goods have some connection with the proprietors of the 'Cyllin' marks already on the register.' The learned judge then went on to observe (at p. 124) that it was admitted that the said passage could not be supported as 'it was a matter which would have been relevant under Section 22 and may well become relevant again if this application is opposed after it is advertised.' This passage from the judgment of Cohen, J. was strongly relied upon by Mr. Mehta on behalf of the Petitioner before me as supporting his contention that the bar of Section 11 would be attracted only after the mark was advertised and was opposed and evidence taken in regard to the likelihood of confusion or deception. I am not prepared to accept the statement in the passage from the judgment of Cohen, J. quoted above as authority for that proposition, or to accept that proposition itself. Whilst, generally speaking, the court would follow the procedure of advertising the mark and deciding the question of confusion or deception only when it is opposed and evidence taken in regard to the same, before it applies the bar of Section 11(a) of the Act, there is nothing in the said section to deprive the Registrar of the power which he has under Section 18(4) of the Act, in proper case, to refuse to accept an application for registration without advertising it or calling for evidence of likelihood of deception or confusion. It is not difficult to conceive of case in which the likelihood of confusion or deception may be so patent that to compel the Registrar to advertise and call for evidence would be sheer waste of public time, and it is for that reason that the Legislature has advisedly not made it obligatory on the Registrar to do so in every case under Section 11(a). The observation of Cohen, J. quoted above which is relied upon by Mr. Mehta only brings out the possibility of such evidence becoming relevant after the mark is advertised and opposed, but does not, in my opinion, lay

down the proposition of law that in every case under Section 11 of the Act the mark must be advertised and evidence considered by the Registrar, if it is opposed. The scope of Sections 11 and 12 again came up for consideration before the Assistant Comptroller in the case of John Fitton and Co. Ltd. (1949) 66 RPC 110 in which the facts were that the application for registration of the mark 'Easy jest' for medicated sweets was opposed by Jests Ltd. as proprietors of three registered trade marks consisting of or including the word 'Jests'. At the hearing, the applications restricted their specifications to medicated boiled sweets, and the evidence established that the applicants and the opponents' goods would normally be made up in different forms and sold through different channels by sweet dealers and chemists respectively. The evidence also established that the applicants had prior use of their mark. It was held by the Assistant Comptroller that, although no actual confusion had been proved, there was a probability of traders and the public being confused as to whether goods under the two marks had a common origin and that that probability would have been sufficient to justify the refusal of the mark if there had been no user. The Assistant Controller, however, then proceeded to register the applicants' mark with the limitation that it was to be in respect of specification of different medicated boiled sweets for sale in England and Wales. In considering the matter under Sections 11 and 12(1) of the U. K. Trade Marks Act, 1938, the Assistant Comptroller referred to the observations of Cohen, J. in Enoch's case cited above, but declined to follow the same in view of the decision of the Court of Appeal in the Australian Wine Importers' Case (1889) 6 RPC 311 which, being a decision of the Court of Appeal, was binding upon him. The Assistant Comptroller observed (at p. 113) that the evidence furnished on behalf of the opponents was directed not so much towards showing that the two marks 'Jests' and 'Easy jest' might themselves be confused either visually or orally, as towards establishing that confusion would result owing to the presence of the common element 'Jest' in each mark, in traders and the public being induced to under the marks emanated from one and the same trade source. Following the view taken in the Australian Wine Importers' case, the Assistant Comptroller stated that the issue upon deception of the Character involved in the case before him was one to be dealt with under Section 12(1) of the U. K. Trade Marks Act, 1938, and he then proceeded to state as follows (at p.

113) :-

'Now under Section 12(1) of the present Act the Registrar is required to postulate a simultaneous use of the two marks under consideration, whether or not one is already in use, and to assess to the best of his ability the likelihood of ensuring confusion or deception, and no limitation is, to my mind, placed upon the nature of the confusion or deception so envisaged, whether it be visual or phonetic confusion of the marks themselves, or what is termed contextual confusion, or confusion or deception as to the trade provenance of the goods.'

He then took the view that on the facts of the case and the evidence before him there was likelihood that a substantial number of persons would assume that the two sets of goods sold under the trade marks emanated from the same trade source and that, though he would not describe that likelihood as very considerable, it was sufficient to constitute a bar to the registration of the mark 'Easy jest' as a new mark. Contrary to the view expressed in Enoch's case (1947) 64 RPC 119 , the law as laid down by the Court of Appeal in the Australian Wine Importers' case (1889) 6 RPC 311 which was followed by the Assistant Comptroller in John Fitton and Co.'s case (1949) 66 RPC 110 was that in dealing with a case under Section 12 of the Court was not confined to considering visual or phonetic confusion of the marks themselves, but could also take into account contextual confusion or confusion or deception as to the trade origin of the goods. The relative scope of Sections 11 and 12 was laid down by the Court of Appeal in England in the case of Harker Stagg Limited's Trade Mark (1954) 71 RPC 136. It is not necessary for me to go into the facts of the said case but in regard to the scope of Sections 11 and 12 of the Act, Evershed M. R. stated the legal position as follows (at p. 141) :-

'As Mr. Mould pointed out, Section 11 may be invoked by a person who has not got a registered mark at all, but, whether he has or whether he has not got a registered mark, the question under Section 11 is as I myself stated in the 'Hives' case, whether, having regard to the use made of the objector's or applicant's mark and the inferences to be drawn from its use, confusion is likely under Section 12 which is only available to a registered proprietor of a mark the question of

confusion has to be considered with regard to any possible user by the registered objector or applicant of his mark in regard to any of the subjects in respect of which it is registered, Prima facie, therefore, it must follow that the scope for possible confusion under Section 12 is wider than the scope for confusion under Section 11, so that if the Court concludes adversely to the present applicants, or an applicant in a similar situation under Section 12 such applicants must also fail under Section 11.'

It is important to note that whereas the Court has s under Section 11 to consider the actual user of the mark in question, under Section 12 the question of confusion has to be considered with regard to any possible or notional user, Mr. Cooper who appeared for the Registrar of Trade Marks whom I had directed to appear in the present case, relied on the decision in the case of *Bulova Accutron Trade Mrk 1969 RPC 102* as being very similar to the present case as far as facts are concerned: The facts of that case were that the High Court dismissed the appeal from the decision of the Assistant Registrar and confirmed his Order refusing registration of the applicant's mark 'Bulova Accutron' on the ground that it so nearly resembled the opponent's mark 'Accustom' as to be likely to cause deception and confusion. Though the mark sought to be registered in that case was a combination mark, a part of which resembled a mark already on the register as in the present case. I am afraid, as far as facts are concerned, one case cannot be regarded as authority for another, and I am unable to derive any assistance from the decision in *Bulova Accutron's* case. The distinction between Sections 11 and 12 of the Act has, however, been very carefully considered by the House of Lords in the recent case relating to the '*Bali*' Trade Mark 1969 RPC 472. The facts of that case were that, in 1938, a trade mark of the word 'Bali' in respect of the brassieres, in script set in a device had been registered. In 1959 the Bali Company applied for registration of the word 'BALI' in block capitals and the said application was opposed by another company named Berlei Co. which had previously sold brassieres in the U. K. under a registered trade mark, and the Berlei company also applied for rectification of the register by the removal therefrom of the 1938 Bali registration, inter alia, as offending Section 11 of the Act, in that the mark was likely to cause deception or confusion having regard to the Berlei Company's reputation in their own mark. The Registrar found in favour of the Berlei Company,

rectified the existing 1938 Bali registration and also refused the 1959 application of the Bali Co. to register the mark. After intermediate proceedings by way of appeal to the Court of Appeal, the House of Lords upheld the decision of the Registrar that to establish that a mark offended against Section 11 it was necessary only to show the likelihood of deception or confusion, and not necessary to show something further, such as possible, probable or certain success in a passing off action. Lord Upjohn, after tracing the legislative history of Section 11 stated (at p. 495) that the said section was designed not so much for the protection of other traders in the use of their marks or their reputation as for the protection of the public. He then formulated the distinction between Section 11 and Section 12 in the following terms (at p. 496).

'Section 12 is principally a weapon in the hands of a registered proprietor though it is not necessary that he personally should object. Here no user by the registered proprietor need be shown: it is purely a question of similarity. Section 11 is, as I have said, for the protection of the public and anyone may object, but if he relies only on similarity he must prove the practical likelihood of confusion to the public and this he can only do, for the purposes of the section, by proving the existing user by another, not necessarily by himself, which is likely to cause deception or confusion; but if he does not establish likelihood of confusion by some present user of a similar mark likely to cause deception or confusion the court would not treat that as sufficient to disentitle the mark in suit to protection.'

Lord Upjohn then proceeded to clarify that, under Section 11, what the court had to consider was whether, having regard to the user of the opponents' marks, the court was satisfied that the mark applied for, if used in a normal and fair manner in connection with any goods covered by the registration proposed, would not be reasonably likely to cause deception and confusion amongst a substantial number of persons. The view taken in the Bali Trade Mark's case, therefore, is that since the Court is not concerned in considering a case under Section 12 with actual user, the question was purely one of similarity of marks; whereas in a case under Section 11 the Court was concerned with the practical reason of the existing user by another which was likely to cause deception or confusion. The legal position in regard to the scope of Sections 11 and 12 of the Act emerging from the decisions

of English Courts discussed above, has been set out in Kerly's Law of Trade Marks and Trade Names (9th Edition) at pp. 169171, where it is pointed out that if an opposition is based upon a registered trade mark, the inquiry under Section 12, embracing as it does notional and fair use upon any of the goods concerned, is wider than that under Section 11 under which the earlier mark must be considered precisely as it has in fact been used. In considering the question of deception under Section 12(1) of the U. K. Trade Marks Act, 1938 a passage from a judgment of Parker, J. in the Pianotist Co. Ltd.'s case 23 RPC 774 has been quoted by Kerly (at p. 453) and adopted as laying down the correct rule. Passage is as follows :-

'You must take the two words. You must judge 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.'

In further considering the rules of comparison it is stated in Kerly (at pp. 465466) that the marks ought not to be merely looked at as they stand side by side, because from the very nature of the case they would not be so put before any customer when it was sought to the question would be whether a person who sees the proposed trade mark in the absence of the other trade mark of which he has an imperfect recollection was liable to be deceived.

4. As far as Indian cases are concerned, reference may be made to the case of N. S. Thread Co. v. James Chadwick & Bros. Ltd., : [1953]4SCR1028 . The facts of that case were that the appellants before the Supreme Court carried on the business of manufacturing cotton sewing thread, and the respondents were a company registered in England who were also manufacturing sewing thread. One of the trade marks used by the English company consisted of the device of an eagle with outspread wings and was known as the 'Eagle Mark', and that mark was first advertised in the Gazette on 5th June 1896 and goods bearing the said mark had since then been regularly imported into and sold in India on an extensive

scale. Some time in the year 1940, the applicant started selling cotton sewing thread under a mark consisting of the device of a bird with wings fully spread out perched on a cylinder of cotton sewing thread with the words 'Eagle Brand' and the name of the appellant company printed on the mark. On the respondent company objecting to the mark, the appellant substituted the words 'Vulture Brand' in place of the words 'Eagle Brand', but the mark remained the same in all other respects. A passing off action filed by the respondent failed on the ground of want of evidence. Thereafter, in the year 1942, the appellants applied to register their trade mark, whereupon the respondents gave notice of their opposition to that application. The Registrar of Trade Marks allowed the opposition and rejected the application of the appellants for registration of their mark on the ground that the mark applied for so closely resembled the respondents' mark as to be likely to deceive or cause confusion. On appeal to this Court, Shah, J. allowed the appeal, set aside the order of the Registrar and directed the Registrar to register the appellants' mark. On a Letters Patent Appeal, however, the decision of Shah, J. was set aside and the order of the Registrar restored. The matter was thereafter taken to the Supreme Court in further appeal, and the Supreme Court in dismissing that appeal held (para 23) that the appellants had failed to discharge the onus that rested heavily on them to prove that the trade mark which they wanted the Registrar to register was not likely to deceive or cause confusion, within the terms of Section 8 of the Indian Trade Marks Act, 1940, which it may be stated corresponds to Section 11 of the present Act. In arriving at that decision, the Supreme Court observed (para 21) that, under the said Section 8, an application to register a trade mark which was likely to deceive or to cause confusion had to be refused notwithstanding the fact that the mark might have no identity or close resemblance with any other trade mark and that the Registrar had to come to a conclusion on that point independently of making a mere comparison of the mark applied for with any other registered trade mark. It was further laid down in the judgment of the Supreme Court that what the Registrar had to see under that section was whether, looking at the circumstance of the case, a particular trade mark was likely to deceive or to cause confusion. Mahajan, J. in delivering the judgment of the court, further observed (para 22) that the real question to decide in such cases was 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.

5. There is another and a later decision of the Supreme Court in the case of *Amritdhara Pharmacy v. Satya Deo Gupta*, : [1963]2SCR484 in which Section 8 of the Trade Marks Act, 1940 which corresponds to Section 11 of the present Act, and Section 10 of the Act of 1940 which corresponds to Section 12 of the present Act, came up for consideration. The facts of that case were that an application for the Registration of the trade name 'Lakshmandhara' in respect of a medicinal preparation for the alleviation of various ailments was opposed by the proprietors of the trade name 'Amritdhara' which was already registered as a trade name in respect of a similar medicinal preparation of the opponents. The Supreme Court held that, on a consideration of all the circumstances, the overall similarity of the two names in respect of the same description of goods was likely to cause deception or confusion within the meaning of Section 10(1) of the Trade Marks Act, 1940. It was observed in the judgment of the Supreme Court (para 7) that the Act did not lay down any criteria for determining what was likely to deceive or cause confusion, and that every case must depend on its own particular facts and the value of the authorities lies not so much in the actual decision as in the test applied for determining what was likely to deceive or cause confusion. It was then laid down that for deceptive resemblance, two important questions arise viz. (1) who are the persons whom the resemblance must be likely to deceive or confuse; and (2) what rules of comparison are to be adopted in judging whether such resemblance exists. The Supreme Court then took into account (para 8) of the fact that the medicinal preparations of the nature in question before them would be purchased mostly by people who, instead of going to a doctor, wish to purchase a medicine for the quick alleviation of their suffering, both villagers and townfolk, literate as well as illiterate, and laid down (para 9) that the question had to be approached from the point of view of 'an unwary purchaser of average intelligence and imperfect recollection.' It was then observed (para 11) that what degree of resemblance was necessary to deceive or cause confusion must, in the nature of things be incapable of definition a priori, and (para 12) that the question had to be

determined as a case of first impression and irrespective of earlier decisions. The Supreme Court however, took the view that the circumstances of the case before them established the plea of acquiescence on the part of the appellant in the use of 'Lakshmandhara' in the State of Uttar Pradesh so as to bring the case within sub-section (2) of S. 10 of the Trade Marks Act, 1940 (corresponding to Section 12(2) of the present Act), and that the Registrar was, therefore, right in imposing the limitation allowing registration of 'Lakshmandhara' for sale in the State of Uttar Pradesh.

6.The distinction between Sections 11(a) and 12(1) of the Act therefore, is (1) whereas, under Section 11, Actual user must be taken into account including the mode of user, or the fact that the goods are known in the market by a particular name, for the purpose of considering the possibility of deception or confusion, under Section 12, the court has only to take into account what may tersely be called, notional fair user on the basis of the similarity of the two marks, though it must no doubt consider not only visual or phonetic similarity, but also the possibility of contextual confusion or confusion or deception as to trade origin, as well as the other surrounding circumstances such as the nature of the goods and the kind of customers who would be likely to buy those goods. (2) whereas Section 12 comes into play only when the opponent's mark is a registered trade mark, there is no such limitation in regard to the applicability of Section 11; and (3) whereas Section 12 applies only when the mark applied for is identical with or deceptively similar to a registered trade mark, there is no such limitation in regard to the nature of the goods in a case under Section 11. In either case, however, the Court has to consider the position from the point of view of an unwary purchaser who is a man of average intelligence and of an imperfect recollection.

7.I must now proceed to consider the Assistant Registrar's judgment under appeal in the present case in the light of the legal position formulated in the preceding paragraph. The first question that arises is whether the Assistant Registrar has in refusing registration acted under Section 11(a) or under Section 12(1) of the Act. Though the Assistant Registrar has not specifically mentioned the section, in my opinion, reading the grounds of his decision as a whole, having regard particularly to the fact that he has also proceeded to consider the case under Section 12(3) of

the Act in the concluding part of his judgment, it is clear that he has proceeded under Section 12(1) of the Act. That position was not disputed by the learned counsel appearing on his behalf before me. In view, however, of the fact that Section 12 can come into play only when the competing mark is a registered trade mark, the Assistant Registrar is clearly wrong in applying it to the mark in Application No. 253773B which was not yet registered. It, therefore, remains for me to consider whether his decision is correct in regard to registered trade mark No. 213586B.. The Assistant Registrar has, in terms, decided that, visually and phonetically, the applicant's mark and the registered trade mark No. 213586B are not similar and, in my opinion he is right in arriving at that conclusion. He was also right in holding that both by reason of the shortness of the period of user of the applicant's mark as well as by reason of that user not having been shown to be honest as far as the adoption of the word 'Master' therein was concerned, the petitioner's case did not come within the ambit of S. 12(3) of the Act. The Assistant Registrar has held, as the Assistant Comptroller did in John Fitton & Co. Ltd.'s case (1949) 66 RPC 110 cited above, that there was likelihood of contextual confusion or confusion as to trade provenance in respect of the goods to which the applicant's mark related and the goods to which registered trade mark No. 213586B related. The Assistant Registrar has, in the present case stated. 'There may be likelihood of confusion as to trade origin if the competing marks are likely to be understood by the public as complementary marks, because of the presence of the word 'MASTER' in them.' He also took the view that since the word 'MASTER' appeared in the applicant's mark as a separate word 'with the letter 'M' in capital'. it had not lost its identity by association with the coined word 'Rece'. In doing so, the Assistant Registrar has, in my opinion, completely disregarded the nature of the goods and the kind of customers who would buy them which as stated in Kerly (at p. 453) and by our Supreme Court in Amritdhara's case, : [1963]2SCR484 he was bound to consider in comparing the marks in question for the purpose of determining whether they were 'deceptively similar' within the terms of Section 12(1). Diesel oil engines or engines are not goods which are bought and sold over the counter, and persons who buy them would not be illiterate persons. They would be persons who would know what they have come to buy or, at any rate, would be accompanied by persons who are mechanically

knowledgeable. These are factors which the Assistant Registrar has completely overlooked and having regard to the same, I am afraid, I am unable to agree with the conclusion at which he has arrived when he held that the mark applied for is deceptively similar to the competing registered trade mark No. 213586B within the terms of Section 12(1). This appeal must, therefore, be allowed and the decision of the Assistant Registrar set aside. There are no 'exceptional circumstances' which would justify me in directing that the Petitioners' mark be advertised before acceptance under the proviso to Section 20(1) of the Act. I accordingly direct that the Assistant Registrar do accept the Petitioners' application for registration of their mark and advertise the same and proceed in accordance with law. He should bear his own costs in this Court.

8. Appeal allowed.

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