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# SMELL MARKS AND THE GRAPHICAL REPRESENTATION REQUIREMENT: A CRITICAL ANALYSIS ON THE SUMITOMO DECISION IN INDIA

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Dr. Gulafroz Jan, Sr. Assistant Professor, Department of Law, School of Legal Studies,  
Central University of Kashmir

## ABSTRACT

The acceptance of a rose-scented tyre as a trademark by the Indian Trade Marks Registry marks a significant development in the jurisprudence of unconventional trademarks<sup>1</sup>. While the decision signals India's willingness to engage with emerging forms of brand identification, it simultaneously exposes gaps in the doctrinal framework governing graphical representation, distinctiveness, and enforceability<sup>2</sup>. This research paper critically evaluates the Sumitomo ruling and its implications for the future of scent marks in India.

## I. Introduction

The landscape of trademark law has expanded beyond traditional indicators such as names, logos, and symbols to include non-conventional signs—colours, sounds, shapes, motions, and increasingly, scents<sup>3</sup>. The registration of smell as a trademark is not always easy and becomes highly controversial all times and poses challenges on the count of distinctiveness and graphical representation<sup>4</sup>. In India, the principal barrier to recognising smell marks has been the *graphical representation requirement* under Section 2(z)(b) of the Trade Marks Act, 1999<sup>5</sup>.

A recent application by Sumitomo Rubber Industries Ltd., seeking registration for a rose-like scent applied to tyres, brought this issue to the forefront<sup>6</sup>. The Registry's decision to accept the mark represents a noteworthy departure from longstanding interpretive conservatism<sup>7</sup> but

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<sup>1</sup> *Trade Marks Journal*, Application No. 5860303 (India, 2024).

<sup>2</sup> *Dev Gangjee*, Non-Conventional Trademarks: Functionality and Representability, *JIPR* (2010).

<sup>3</sup> *Daniel Gervais*, The TRIPS Agreement: Drafting History and Analysis (4th ed., 2012).

<sup>4</sup> Gulafroz Jan [https://www.researchgate.net/publication/371110672\\_Non-Conventional\\_Trademarks\\_with\\_Special\\_Reference\\_to\\_Smell\\_and\\_Sound\\_A\\_Cross\\_jurisdictional\\_analysis](https://www.researchgate.net/publication/371110672_Non-Conventional_Trademarks_with_Special_Reference_to_Smell_and_Sound_A_Cross_jurisdictional_analysis) [accessed Dec 03 2025].

<sup>5</sup> *Trade Marks Act, 1999*, § 2(z)(b) (India).

<sup>6</sup> *Sumitomo Rubber Industries Ltd.*, TM Application No. 5860303.

<sup>7</sup> P. Narayanan, *Law of Trade Marks & Passing Off* (7th ed.).

raises substantive doctrinal and practical questions that remain unanswered.

## II. Facts and the Applicant's Claim

A Japanese company, Sumitomo Rubber Industries Ltd, developed a distinctive rose-like scent for one of its tyres. The smell was described as emerging from “a complex mixture of volatile organic compounds released by the petals interacting with human olfactory receptors<sup>8</sup>,” resulting in a rose-like aroma. The scent was technically described as arising from volatile organic compounds interacting with human olfactory receptors. Using technology from IIT Allahabad, the aroma was represented through:

1. A seven-dimensional vector model covering categories such as floral, fruity, woody, minty, nutty, sweet, and pungent; and
2. A sensory pie-chart visually depicting the scent's composition<sup>9</sup>.

This fragrance was encoded as a vector, with the seven-dimensional vector representing fundamental smell categories such as floral, fruity, woody, nutty, pungent, sweet, and minty.

Under Section 2(z)(b) of the Trade Marks Act, 1999, a trademark must be capable of *graphical representation*<sup>10</sup>. This requirement has traditionally posed a significant barrier for unconventional marks like scents, where visual depiction is inherently difficult<sup>11</sup>. Sumitomo's application initially faced objections on precisely this ground—namely, that a smell could not be rendered graphically with sufficient clarity and precision<sup>12</sup>.

During multiple hearings, the Applicant argued that although graphical representation is mandatory, the sensory pie chart and vector description submitted were adequate to satisfy the statutory standard<sup>13</sup>. They further contended that a rose-like smell is widely recognisable and thus requires no elaborate visual depiction. The Applicant also noted that the scent served no functional or technical purpose in tyres, thereby fulfilling the essential non-functionality requirement<sup>14</sup>. The acceptance of similar smell marks in the UK and other jurisdictions was

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<sup>8</sup> Applicant's Written Submissions, Hearing Note (2024).

<sup>9</sup> IIT Allahabad Olfactory Tech Report (2023).

<sup>10</sup> Trade Marks Act, 1999, § 2(z)(b).

<sup>11</sup> *Sieckmann v. Deutsches Patent- und Markenamt*, C-273/00 (ECJ 2002).

<sup>12</sup> Examination Report, Sumitomo Application (2023).

<sup>13</sup> Applicant's Response to Examination Report (2023)

<sup>14</sup> *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159 (1995).

also cited as persuasive evidence of global —most famously, the “floral fragrance reminiscent of roses” registered by Vennootschap onder Firma Senta Aromatic Marketing.<sup>15</sup>

The Applicant asserted that these methods satisfied the statutory requirement of graphical representation and cited successful registrations in the UK and other jurisdictions to demonstrate the acceptability of such representations internationally.

### III. The Registry’s Decision

Despite initial objections, the Registry ultimately held that the representation was clear, intelligible, precise, objective, self-contained, and durable—an articulation reminiscent of the Sieckmann criteria<sup>16</sup>, though never explicitly adopted in Indian law. On this basis, the Registry admitted the scent mark for registration<sup>17</sup>.

### IV. Critical Analysis

#### 1. Graphical Representation: Adequacy and Accessibility

The graphical representation of the scent relied heavily on technical tools such as vector mapping and sensory analysis. These may satisfy scientific precision but fail to communicate meaningfully to the average consumer<sup>18</sup>, who is central to trademark perception. This disconnect problematises the extent to which the submitted representation aligns with the statutory purpose of trademarks: to function as identifiers in the marketplace<sup>19</sup>.

#### 2. Absence of a Guiding Framework

While the decision signals willingness, it lacks procedural clarity. India has not defined what constitutes an acceptable graphical representation for smell marks<sup>20</sup>. Without guidelines analogous to the EU’s post-Sieckmann standards, applicants face uncertainty, and the Registry risks at inconsistent decision-making, unpredictable outcomes, and doctrinal instability<sup>21</sup>. This

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<sup>15</sup> UK Trade Marks Registry, TM No. 2001416 (Floral Fragrance Mark).

<sup>16</sup> *Sieckmann*, C-273/00

<sup>17</sup> Order of Acceptance, Sumitomo Application (2024).

<sup>18</sup> Vicki J. H. Sato, “Olfactory Perception in Branding,” *Trademark Reporter* (2015).

<sup>19</sup> Barton Beebe, *Trademark Law: An Open-Source Casebook* (2023).

<sup>20</sup> N.S. Gopalakrishnan & T.G. Agitha, *Principles of Intellectual Property* (2019).

<sup>21</sup> EUIPO, *Guidelines for Examination of Non-Traditional Marks* (2020).

ambiguity undermines the decision's precedential value.

### 3. Enforceability Challenges

Smells are inherently subjective and unstable:

- They change with temperature, moisture, storage, and product degradation<sup>22</sup>.
- Human perception varies widely across age, environment, and sensitivity<sup>23</sup>.

The Registry did not address critical enforcement issues:

- How will olfactory similarity be tested?
- What constitutes infringement of a smell mark<sup>24</sup>?
- How will the consistent reproduction of the scent be verified<sup>25</sup>?

These unresolved questions could complicate both prosecution and litigation.

### 4. Distinctiveness and Consumer Perception

A key requirement for trademark registration is that the sign must indicate trade origin<sup>26</sup>. Although the Applicant argued non-functionality, the Registry did not demonstrate that consumers perceive scent as a source identifier for tyres—or indeed, for any automotive product<sup>27</sup>. Novelty alone does not equal distinctiveness<sup>28</sup>, without empirical or market-based evidence, the decision's reasoning appears incomplete.

## V. Implications for Indian Trademark Jurisprudence

The Sumitomo ruling may inspire more applications for scent and other unconventional marks<sup>29</sup>. However, the absence of doctrinal clarity raises a fundamental question: Is India

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<sup>22</sup> R. Herz, "Environmental Impact on Odour Perception," *Chemical Senses* (2010).

<sup>23</sup> S. Witzel, "Variability in Olfactory Responses," *Neuroscience Letters* (2012).

<sup>24</sup> WIPO Standing Committee on Trademarks, SCT/29/5, "Protection of Olfactory Marks."

<sup>25</sup> C. Chachereau, "Reproducing Scents: Technological Limits," *JIPLP* (2018).

<sup>26</sup> *Phillips v. Remington*, ECJ C-299/99.

<sup>27</sup> McKenna, "Distinctiveness and Consumer Perception," *IPQ* (2018).

<sup>28</sup> *Linde AG*, C-53/01 to C-55/01 (ECJ).

<sup>29</sup> INTA Bulletin (2024), "India Opens Doors to Scent Marks?"

genuinely evolving its jurisprudence, or merely following global trends without developing its own normative framework<sup>30</sup>?

Unless clear standards are established—through legislative amendment, rule-making, or judicial interpretation—the acceptance of smell marks risks being more aspirational than transformative<sup>31</sup>.

## VI. Conclusion

The decision reflects India's gradual progression toward recognising unconventional trademarks, aligning itself with international trends and acknowledging the diversity of modern branding practices. However, the ruling leaves several critical issues unresolved.

First, the mark's representation relies on technical descriptors—such as sensory graphs and seven-dimensional vectors—that may be intelligible to experts but are unlikely to provide meaningful clarity to the average consumer. Since trademarks must function as identifiers *from the consumer's perspective*, this gap between expert comprehension and public understanding raises concerns regarding the adequacy of the representation.

Second, although the Registry accepted the smell mark, it did so without articulating any structured framework or guidelines for representing non-traditional marks. In the absence of clear standards, applicants lack guidance on how to satisfy the Act's requirements of precision, clarity, and objectivity. This regulatory ambiguity may result in inconsistent examination, uncertainty for applicants, and difficulties in enforcement.

Third, the decision does not sufficiently address the enforcement challenges inherent in smell marks. Olfactory perception is subjective and affected by environmental factors and product conditions. The Registry did not clarify how infringement will be determined, how smell similarity will be tested, or how consistent reproduction of the scent will be verified. Such gaps may complicate litigation and weaken the practical enforceability of smell marks.

Finally, although the Applicant asserted that the fragrance had no functional role in tyres, the Registry did not adequately consider whether consumers would perceive the smell as a source identifier rather than a mere novelty. Distinctiveness—an essential requirement for trademark

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<sup>30</sup> Cornish, Llewelyn & Aplin, *Intellectual Property: Patents, Copyright, Trademarks* (9th ed.).

<sup>31</sup> Shamnad Basheer, "Non-Traditional Marks in India," *SpicyIP Essays* (2016).

registration—cannot be presumed simply because a scent is unusual in a particular product category.

In essence, while this decision may encourage businesses to explore innovative branding strategies, it raises a broader question: Does this mark truly represent a principled evolution in Indian trademark law, or is it an attempt to emulate developments in jurisdictions like the UK, US, and Australia? The long-term significance of this acceptance will depend on whether India develops coherent, well-defined standards for unconventional marks—standards grounded in statutory mandates and practical enforcement, rather than aspirational alignment with global trends.