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## Strict similarity test for pharma brands applies to nutraceuticals

India - [Khaitan & Co](#)

- The dispute arose due to Ajanta's brand GLOTAB, which Sun claimed was similar to its prior mark GLOEYE
- In assessing the similarities between GLOTAB and GLOEYE, the court held that the similarity test for pharmaceuticals also applies to nutraceuticals
- Similarity tests for nutraceuticals have been argued in previous cases, but this decision could put this argument to rest

In *Sun Pharma Laboratories Ltd v Ajanta Pharma Ltd* (CS (COMM) 622/2018 & IA 12663/2014), the Delhi High Court has held that the strict similarity test laid down for pharmaceutical brands in the Indian Supreme Court's decision in *Cadila Healthcare v Cadila Pharmaceuticals* also applies to nutraceutical brands.

### Facts

The dispute arose due to Ajanta's brand GLOTAB, which Sun claimed was similar to its prior mark GLOEYE. Since both marks had proceeded to registration, the action was restricted to a passing-off action. Although the products had certain differences, both brands were nutraceuticals intended for patients with age-related dimness of vision and diabetic retinopathy. Sun claimed that GLOEYE was the only antioxidant eye product with the prefix GLO. Although Ajanta claimed that GLO was common to the trade, it was unable to cite any other party using the prefix GLO in the field of antioxidant ophthalmic products.

Ajanta also urged that the strict test laid down by the Supreme Court may not be fully applicable in the context of nutritional food supplements and nutraceuticals, and some degree of confusion can be tolerated.



## Decision

However, the court rejected this contention, observing that:

*The manner of approval of nutraceuticals and nutritional food supplements under the Food Safety and Standards Act, 2006 (FSSAI Act) regime shows that these are highly regulated products and cannot be manufactured without a license. The product itself, the packaging, the labels, the content of the labels, specific disclaimers and conditions have all to be approved by the Food Authority. They are also, by their definition itself, used in respect of specific physical conditions, physiological conditions, diseases or disorders. They are consumed usually on the advice of medical practitioners. However, some of them do not require prescriptions. These factors clearly show that nutritional food supplements and nutraceuticals are akin to medicines and pharmaceutical preparations. It is the well settled legal position in respect of medicines and pharmaceuticals that deception and confusion need to be avoided.*

*That the mere fact that these products are nutritional food supplements or nutraceuticals and are not pharmaceuticals in the strict sense is not convincing enough for adoption of a less stringent test. Pharmaceuticals and nutraceuticals are used in respect of diseases and disorders. They are both meant to address specific ailments. Both these products are meant to improve the health of patients. The mere fact that nutraceuticals are termed so, as they contain ingredients derived from plants, does not mean that a lenient test needs to be adopted in respect of these products. The effects of the products and the consumers of the products all being similar in nature, the test applicable to pharmaceutical products would be applicable even to nutraceuticals.*

When comparing the suffixes EYE and TAB, the court felt that the similarities were insufficient to create any confusion between the two.

## Comment

In India, pharmaceuticals and drugs are regulated by the Drugs and Cosmetics Act 1940, whereas dietary supplements and nutraceuticals are governed by the Food Safety and Standards Authority of India Act. The regulations for dietary supplements and nutraceuticals have not been in place as long as the regulations for drugs. Similarly, the distinct class heading for dietary supplements (in addition to pharmaceutical preparations) under Class 5 was only introduced in the 10th edition of the Nice Classification in 2012. Before that, dietary supplements were not classified as a class heading and fell under Classes 5, 29 or 30 depending on whether they were for medicinal use. The aforesaid appears to show a difference between pharmaceuticals and nutraceuticals including the different governing statutes in India. These aspects have been argued in previous cases, but this decision appears to put this debate to rest.

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