

(2009) 09 IPAB CK 0007

In the Intellectual Property Appellate Board

Amarjeet Singh And Ors

APPELLANT

Vs

Sardar Food Products And Ors

RESPONDENT

Date of Decision : 11-09-2009

Acts Referred:

Trade Marks Act, 1999 — Section 83, 92, 100

Code Of Criminal Procedure, 1973 — Section 107, 150

Citation : (2009) 09 IPAB CK 0007

Hon'ble Judges : Z.S. Negi, J; Syed Obaidur Rahaman, Technical Member

Bench : Division Bench

Final Decision : Allowed

Judgement

Syed Obaidur Rahaman, Technical Member

1. The Respondent No. 3 has filed the above mentioned Miscellaneous Petition under Section 92 of Trade Marks Act, 1999 seeking permission of the

Hon'ble Appellate Board to take his evidence by way of affidavit filed on 04.02.09 on record without filing the counter statement. The said petition is

fixed for arguments and to show cause as to why the said petition should not be allowed on 10.07.09. The Respondent No. 3 has filed the above said

miscellaneous petition on 24.03.09 with a copy to the Counsel for the Respondent Nos 1 & 2. The Counsel for the Respondents Nos. 1 & 2 has

supplied his copy of reply to the Respondent No. 3's petition at the time of argument on 10.07.09 . Though the Counsel for the Respondent No. 3 as

well as the Respondents Nos. 1 & 2 and the petitioner for rectification have argued at length but as the reply by Respondents Nos. 1&2 was supplied

during the continuation of argument, the counsel for the Respondent No. 3, who has moved the above said miscellaneous petition, could not argue on

that reply.

2 . The matter was taken up for hearing at the Circuit Bench sitting at Delhi on 10.07.2009. Shri S.M. Gupta appeared for applicants. Shri Saurab

Kapoor appeared for Respondents No. 1&2 and Shri Nitin Gupta for Respondents No. 3. The fact of the case is that the Respondent No. 3 does not

want to contest the said petition as he has impleaded as performatory party and no relief is claimed against him. Hence, the Respondent No. 3 did not opt

to file any written/counter statement against the application/petition for the rectification filed by the petitioners in the Hon'ble Delhi High Court.

Respondents Nos. 2 & 3 are the contestants for the petition on the plea that the mark in dispute was adopted by them though the petitioner claims that

it was adopted by Respondent No. 3 based on the documentary evidence. The dispute is in between the petitioner and the Respondents Nos. 1&2.

The Respondent No. 3 being in possession of the relevant documentary evidence to assist the Appellate Board and being the proprietor/originator and

inventor of the impugned mark, rely upon the petition itself, as the Respondents Nos. 1 & 2 fraudulently procured registration of the impugned mark in

their favour by misrepresentation and concealment of material fact. The evidence filed by the Respondent No. 3 is very much necessary to decide the

real controversy between the parties herein, hence, required to be taken on record. After the implementation of Trade Marks Act, 1999 the said

Rectification Petition was transferred to this Hon'ble Appellate Board by virtue of Section 83 & 100 of the Trade Marks Act 1999. The Respondents

No. 1 & 2 have filed their evidence just before a year or so, i.e. after 23rd February, 2008 with an application to take the same on record and the

Hon'ble Board allowed the application keeping in view the various precedents laid down by the Apex Court that the evidence can not be shut down.

The Respondent No. 3 has never intended to file written statement or oppose the rectification proceedings initiated by the petitioner against

Respondent No. 1 & 2 as the Respondent No. 1 has fraudulently got registered the trade mark ""SONI"" in his name by concealing the material fact

from all the family members as well as the Registrar. It is also submitted that the Trade mark of ""SONI' in question was first time originated by the

Respondent No. 3. He has honestly and beneficially adopted the said mark in respect of the sugar boiled confectionery and toffees in or about the

year 1982 for family business under the trading style M/s Sardar Confectionery Works being its proprietor. The Respondent No. 3 has also moved for

the registration of the said trade mark under application No. 446193 in class 30 in November 1985 through M/s Delhi Registration Service the counsels

for the Respondent. The same number is also used by Respondent No. 1 on his packing material till the another application is moved by him without

taking consent of other family members. The Respondent No. 1 was pursuing the registration of trade mark for and on behalf of the Respondent No.

3 under above number but in or about the year 1992. Respondent No. 1 moved another application in his own name through the same attorneys and

dropped the earlier application stated above which was filed in the name of Respondent No. 3. The Respondent No. 3 wants to rely upon the petition

for rectification of Trade Mark "'SONI' filed by the petitioner hence there was no need to file any counter/written statement and he filed the evidence

by way of affidavit in support of the said petition to bring the true material fact before the Appellate Board. When he was regularly appearing before

the Board and he was asked to engage counsel.

3 . Learned Counsel submits that the Respondent No. 3 has not filed any counter statement at the initial stage just because he was made as a per-

forma party by the petitioner and no relief was claimed against him. The petitioner and the Respondents No. 1, 2 and 3 are related to each other as the

family members of late Shri Trilok Singh. Recently, a quarrel arose in between the Respondents No. 1 & 3 and Respondent No. 1 with the intention to

usurp the trade mark "'SONI'" alone filed a criminal complaint against respondent No. 3 and a case Under Section 107/150 Cr.PC was registered. It

was observed by the I.O. of the concerned police station that the trade mark "'SONI'" is the family property. Since the trade mark "'SONI'" honestly

and bonafidely adopted by the Respondent No. 3 in the year 1982, is in dispute, the presence of the Respondent No. 3 as well as his evidence became

necessary to the Hon'ble Tribunal in granting justice, Respondent No. 3 filed documentary evidence through his Counsel. In support of his contentions,

Respondent No. 3 has filed evidence by way of affidavit along with the exhibits in support of the petition filed by the petitioner for rectification on

04.02.2009. These documents are very much relevant for the purpose of present petition and for deciding the real matters in controversy. Some are

required to be taken on record.

4. Learned Counsel also further submits that the present petition, Respondents

Nos. 1 & 2 have also filed their evidence which before a year with the application to take the same are required to be taken on record and the Hon'ble Board has allowed the application keeping in view the various precedents. It is also submitted that the Respondent No. 3 could not file his counter statement or reply earlier as no relief was sought against him and there was no restrain order against him. Due to the recent quarrel and the police complaint made by the respondent No. 1 against the Respondent No. 3 with the sole intention to usurp the trade mark ""SONI"" which is originated, invented and first time adopted by Respondent No. 3, it becomes necessary for the Respondent No. 3 to bring the material facts on record. Since the evidence by way of affidavit filed by Respondent No. 3 is in support of the petition for rectification filed by the petitioner, it will cause no harm to the petitioners in case the instant application is allowed. The reason for non-filing the counter statement by Respondent No. 3 in reply to the petition for rectification is bonafide and genuine as cleared from the facts and averments stated above. The evidence filed by the Respondent No. 3 by way of affidavit on 04.02.09 along with documents is necessary for the proper adjudication of the petition. Moreover, the Respondent No. 3 is an affected person because of the impugned registration, he intend to assist Hon'ble Tribunal by bringing true material facts into picture. It is also in the interest of fair justice, application & evidence by way of affidavit of Respondents No. 3 to be taken on record and present application is being moved. It deserves to be allowed in the interest of Justice.

5 . Learned Counsel on behalf of Respondents Nos. 1 & 2 submitted that the application is not maintainable as it has been filed at the highly belated stage. TRA/161/04/TM/DEL was filed 8 years back. Respondent No. 3 tried to file affidavit in support of Rectification Petition vide evidence by way of affidavit on 4th February, 2009. The filing of affidavit was vehemently opposed by the Respondent 1 & Respondent 2 being collusive in nature.

6 . The petitioner filed Rectification Petition and alleged made Respondent No. 3 as Performa Party. The filing of affidavit is highly belated and hence, liable to be dismissed with heavy costs. The petitioner made Respondent No. 3 as per-forma party. It is pertinent to mention here that even after filing the Rectification Petition, Performa party did not file its counter statement at the appropriate stage. All of a sudden, in the year 2009, the Respondent

No. 3 is trying to file evidence in support of Rectification Petition. The Respondent No. 3 can not play the part of the Petitioner. In other words, the Respondent No. 3 is fulfilling the lacuna left by the Petitioner. Respondent is performing the part of petitioner, hence the application is not maintainable and liable to be dismissed.

7 . That the lis between the Respondent 1 & 2 is pending since the year 2001. The Respondent No. 3 was very much aware about pendency of the

litigation. Disputes involved between them since the initiation of the proceedings. Petitioner never mentioned the status of the Respondent No. 3 in the

Civil Suit. The Petitioner, the Respondent 3 and Mr. Kawaljeet Singh are the real brothers. The lis between the parties is very much within the

knowledge of the Respondent 3. Hence, the evidence of the Respondent 3 cannot be taken into consideration and cannot be taken on record as sought

to be filed at the belated stage. The corresponding application is liable to be dismissed being misconceived and filed with the intention to grab the trade

mark ""SONI"", the LABEL of the Respondents No. 1 & 2. The Respondent No. 3 has nothing to do with the SONI LABEL. It is pertinent to mention

here that a raid was carried by the Excise Commissioner at the premises of M/s Jagjeet Foods Pvt. Ltd on 21.11.1997 whereas the petitioner admitted

that the trade mark SONI belongs to M/s Sardar Food Products, which is a proprietorship concern and Shri Kawaljeet Singh is the proprietor of the

firm. The Petitioner also submitted that the Respondent No. 3 is the performa party now Respondent No. 3 performed as a full party of the petitioner.

The respondent No. 3 are in collision with the petitioner. The performa party had not filed the counter statement and straightaway filed the evidence

by way of affidavit. The same cannot be taken into account as highly belated and exceed to the part of Performa party without filing the Counter

Statement filed in evidence which is against the law and which cannot be taken into account, hence the application is liable to be dismissed. So the

applicants for Rectification have already availed the opportunity to file its evidence along with the documentary evidence in support of Rectification

Petition. Granting opportunity to Respondent 3 for filing the documentary evidence at this state will re-establish the fact which earlier could not be

done by the Applicants for Rectification. The affidavit filed by Respondent along with the instant Miscellaneous Petition is not in accordance with the

Intellectual Property Appellate Board (Procedure) Rules, 2003. The said affidavit have not been filed in proper stamping.

8. It is also submitted that Respondent No. 3 did not have anything to file, the same thing has been filed highly belated. Respondent No. 3 have filed

the Rectification Petition after the lapse of 9 years in collusion with petitioner. The reasons for filing the evidence by way of affidavit along with

documents are malafide and is not genuine. The evidence filed in support of the petition, the Respondent No. 3 is trying to ratify and justify the act of

petitioner. The Respondent No. 3 is trying to be the full party and in collusion with the supporting Rectification Petition of the Petitioner and thus trying

to cause irreparable loss and injury to the Respondents Nos. 1 & 2. The applicant/ Respondent No. 3 wants to deprive the Respondents Nos. 1 & 2

from using their registered trade mark. In other words, the Respondent No. 3/ applicant wants to be and trying to be benefited the petitioner. So the

application be dismissed with heavy costs in favour of Respondents Nos. 1 & 2.

9 . After hearing all the three parties, we are of the view that the Respondent No. 3 raised the point that the counter statement was not filed by the

Respondent because he is a per-forma party. As a per-forma party, he need not to file any counter statement. Subsequently, the new development

was created and in last year, just one year back, the suit was finally filed by the petitioner in the year 2001 before the High Court Delhi. Thereafter,

the matter was transferred before the Appellate Board. In the year 2008, Respondents Nos. 1&2 filed the same documentary evidence, which is

against the Respondent No. 3. That application was returned by the Appellate Board vide letter dated 23.02.08 with the observation that the evidence

by way of application to take the same on record . Keeping in view the various precedents laid done by the APEX Court, the evidence cannot be shut

down. That the ""SONI"" trade mark obtained fraudulently by the Respondents No. 1&2. Recently, a quarrel arose between the Respondents Nos. 1 &

3. The Respondent No. 1 with the intention to usurp the trade mark. ""SONI"" alone filed a criminal complaint against Respondent No. 3. Accordingly,

the case was registered under Section 107&150 of Cr. P.C. The I.O. observed that the ""SONI' is the family property. The Respondent No. 3 filed

documentary evidence in support of subsequent development of the new facts. In view of the above, we are of the view that the counter argument

made by the Respondent No. 3 is genuine, hence this application be allowed. Although, he has not filed any counter statement before the Board.

10. In view of the above, we allow the instant application on the ground that the respondent could not file any counter statement/reply earlier as no

relief was sought against him. And there was no order for restrain against him. But due to recent quarrel and the complaint made by the Respondent

No. 1 against the Respondent No. 3 with the sole intention to usurp the trade mark ""SONI"" which was originated/invented and first time adopted by

the Respondent No. 3, it become necessary that Respondent No. 3 to bring the material facts on record.

11. In view of the above, we are of the view that the documentary evidence filed by the Respondent No. 3 should be taken on record. Accordingly,

the Miscellaneous Petition is allowed.