

(2015) 04 IPAB CK 0003

In the Intellectual Property Appellate Board

Case No : R.P. No. 7/2013 In OA/44/2012/TM/CH And M.P. Nos. 313 And 314/2013 And 153/2014 In R.P. No. 7/2013 In OA/44/2012/TM/CH

Anil Appalam & Chips

APPELLANT

Vs

K.S. Raja And Ors

RESPONDENT

Date of Decision : 15-04-2015

Acts Referred:

Trade Marks Act, 1999 — Section 3, 3(2), 21(2)

Citation : (2015) 04 IPAB CK 0003

Hon'ble Judges : K.N. Basha, J; Sanjeev Kumar Chaswal, Technical Member

Bench : Division Bench

Advocate : S.P. Chockalingam, Sunil Paul

Final Decision : Disposed Of

Judgement

K.N. Basha, J

1 . This Review Petition is preferred challenging the order of Intellectual Property Appellate Board dated 3/6/2013 passed in OA/44/2012/TM/CH.

2. Mr. S.P. Chockalingam, the learned counsel for the Review Petitioner and Mr. Sunil Paul, the learned counsel for the first respondent are present today.

3. Mr. Chockalingam, the learned counsel for the Review Petitioner would submit that the petitioner preferred writ petitions challenging the common order passed in OA/44 of 2012 and ORA/247 of 2010 as both the matters are arising between the same parties in W.P. Nos. 27703 and 27704 of 2013. The learned counsel for the petitioner would submit that the Hon'ble High Court of Madras considering that a review petition has already been filed and pending on the file of this Bench, directed the petitioner to approach the Intellectual Property Appellate Board and dismissed the writ petition as withdrawn with a liberty to pursue the review application. It is submitted that both the writ petitions have been dismissed as withdrawn and not pressed with a liberty to agitate again if they are advised so based on the outcome of the decision in the review application.

4 . Mr. Chockalingam would contend that the impugned order passed by IPAB in OA/44/2012/TM/CH is only on the basis of non serving of notice by the Registry enabling the first respondent herein to file their counter statement. The learned counsel for the petitioner would contend that at the time of disposal of the appeal, the petitioner was not able to produce any evidence to substantiate their contention that notice was already served on the first respondent herein by the Registry. It is contended that while passing the impugned order, the entire records had not been called for from the Registry. The learned counsel would further contend that the petitioner filed an application under Right to Information Act on 17/6/2013 seeking for the information about serving of notice in respect of opposition No. 763112 to application No. 1496379 in class 30 and in response to the same, the learned counsel for the petitioner received a reply dated 25/7/2013 from the Assistant Registrar of Trade Marks/Central Public Information Officer stating that the applicant in the above said opposition matter has been served with a copy of the notice of opposition as per letter No. TOP/1735 dated 19/7/2010 and the copy of the letter was also enclosed. Therefore, it is contended that in view of non-serving of notice, as per provision under section 21(2) of the Trade Marks Act 1999, the failure of the applicant to file counter statement as per TM-6 within a period of two months, the application itself is deemed to have been abandoned. Mr. Chockalingam would further contend that the order of abandonment was rightly passed in view of non-filing of the counter statement through filing TM-6 resulting in abandonment of the application and the opposition No. 763112.

5 . The learned counsel for the petitioner would also contend that even the second ground namely the additional ground mentioned in the impugned order of IPAB to the effect that the impugned order in OA/44/2012/TM/CH was passed by the Examiner of Trade Marks who had no jurisdiction is also unsustainable in view of the provision under section 3 of the Act. The learned counsel would submit as per provision under section 3(2) of the Act, periodical orders have been passed authorizing the Examiner of Trade Marks and Dy. Registrar of Trade Marks to deal with such matters and as such there is no illegality in the impugned order passed in the application by the Examiner of Trade Marks. The learned counsel for the petitioner would contend that in view of the above said reasons, the impugned order in the appeal was passed mainly on the basis of suppression of material factors, which amounts to error apparent on the face of the record warranting the interference of this Bench.

6 . Mr. Sunil Paul, the learned counsel appearing for the first respondent would vehemently contend that as a matter of fact, the notice was not served on the first respondent and thereby they were not able to file Form TM-6 and as such there is no illegality or infirmity in the order passed by the Intellectual Property Appellate Board in the appeal OA/44/2012/TM/CH. The learned counsel for the first respondent would also submit that this Bench rightly allowed the appeal even on the second ground namely that the impugned order under challenge in OA/44/2010/TM/CH was passed by an incompetent officer, who had no

jurisdiction and as a result rightly set aside the said order.

7. We have given our careful and thoughtful consideration to the rival contentions put forward by either side and also perused the materials available on record including the order passed by the IPAB dated 3/6/2013 and the reply given under the Right to Information Act to the petitioner herein enclosing a copy of the notice dated 19/7/2010.

8. At the outset, it is to be stated that the crux of the question involved in the appeal OA/44/2012/TM/CH is to the effect that whether the notice was served on the first respondent herein enabling him to file the counter statement. The contentions before our predecessor Bench is to the effect that the notice was not at all served and as a result the Examiner of Trade Marks passed an order dated 13/1/2012 holding that the application in the matter of opposition No. 763112 was deemed to have been abandoned by operation of section 21(2) of the Trade Marks Act 1999 and the said order was challenged in the appeal. It is seen that in the appeal the above said order was set aside mainly on the ground that there is no evidence for sending the notice by the Registry.

9 . Now, the learned counsel for the Review Petitioner produced the information sent by the Assistant Registrar of Trade Marks/Central Public Information Officer dated 25/7/2013, which reveals that the notice of opposition has been served as per letter No. TOP/1735 dated 19/7/2010 and the said letter was also enclosed along with the reply. It is pertinent to note that the learned counsel for the first respondent would fairly submit that the address mentioned in this said notice in respect of the first respondent herein is also the correct address and as such as per the provisions of the General Clauses Act the notice of opposition sent as per letter No. TOP/1735 dated 19/7/2010 is deemed to have been served on the first respondent herein and that is the settled position of law. We are also constrained to state that the Examiner of Trade Marks while passing the impugned order challenged by the appeal dated 13/1/2012 could not have stated to the effect that the first respondent/applicant has not filed TM-6 within the prescribed time of period without verifying the records of the Registry. The reference number given to the said notice clearly indicates that the Registry is maintaining the register in respect of dispatching the notices etc. The fact remains that the said original records have been called for from the registry and in the records the particular vital document is missing and it is submitted by the learned counsel that the entire records have not been produced and the records are incomplete during the course of production of the same before this Bench. Therefore, we are of the considered view that the impugned order in OA/44/2012/TM/CH was passed due to the suppression of material factors. We are also constrained to state that had the review petitioner filed the query under Right to Information Act even during the pending proceedings of the appeal before this Bench, it would have very well avoided the unpleasant event. Further, we are of the considered view that it is a clear case of suppression of material factors and the IPAB cannot be blamed for passing an order in the appeal on the basis of

materials produced at the time of hearing. With a view to secure the ends of justice, we are left with no other alternative except to set aside the order dated 3/6/2013 in OA/44/2012/TM/CH. Accordingly, the review petition is allowed in so far as the order relating to OA/44/2012/TM/CH is concerned as per the common order passed dated 3/6/2013. Consequently, Miscellaneous Petition Nos. 313/2013, 314/2013 & 153/2014 in R.P. No. 7/2013 in OA/44/2012/TM/CH are closed.