

(2006) 07 IPAB CK 0002

In the Intellectual Property Appellate Board

Case No : M.P. No. 15/2006 In TA/47/2003/TM/CH (TMA6/2003), OA/34/2004/TM/CH, OA/69/2004/TM/CH, TA/305/2004/TM/KOL

Brooke Bond Lipton India Ltd.

APPELLANT

Vs

Girnar Exports And Anr.

RESPONDENT

Date of Decision : 07-07-2006

Acts Referred:

Trade And Merchandise Marks Act, 1958 — Section 9, 9(5)(b)
Code Of Civil Procedure, 1908 — Order 41 Rule 27

Citation : (2006) 33 PTC 412 (IPAB)

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

Bench : Division Bench

Advocate : W.S. Kane, Satish Parasaran, T.N. Darwalla

Final Decision : Dismissed

Judgement

Z.S. Negi, J

1. The appellant has filed appeal Nos. TA/47/2003/TM/CH, OA/34/2004/TM/CH and OA/69/2004/TM/CH against the orders of the Deputy

Registrar of Trade Marks, Chennai, rejecting the application Nos. 398076, 398077 and 397359 filed by the applicant for registration of trade marks

consisting of the words 'Red Label'.

2. The appellant filed M.P. Nos. 86& 87/2004 both dated 20.9.2004. M.P. No. 86/2004 was made praying this Board to accept the additional

documents together with the common additional affidavit of Assistant Manager (Legal) of the appellant Co. and M.P. No. 87/2004 was made

seeking permission of this Board to conduct a market survey, requesting three months' time to file such survey report and to adjourn the matter till

such time. After hearing, M.P. No. 86/2004 was directed to be posted along with

the main appeals for disposal and M.P. No. 87/2004 was dismissed on the grounds that the application is a misconceived one, especially considering the date of application for registration it would only prolong the litigation and no early disposal can be made determining the rights of the parties.

3. As there was no sitting of the Board for want of quorum since March, 2005, the appellant engaged the services of IMRB International,

Bangalore for the market survey. The IMRB International prepared its report duly supported by an affidavit of Ms. Lalitha Shivaprasad, Senior

Project Director. On 1.3.2005, this Board, after dismissing M.P. Nos. 5 & 6/2005, adjourned hearing of the appeals to 22.2.2006. Before the date

of hearing i.e. 22.2.2006, the appellant on 20.2.2006 filed the present M.P. No. 15/2006 praying this Board to accept as additional evidence the

report along with the affidavit of Ms. Lalitha Shivaprasad of IMRB International in support of the same and the evidence filed in support of the

petitioner's TM application No. 583757 in opposition proceedings under No. KOL 55361 together with the affidavit filed in support of the same.

4. Shri Harendra Shantilal Shah, a partner of respondents No. 1, filed an affidavit affirmed on 21.3.2006 vehemently opposing the M.P. The M.P.

was heard on 5.6.2006.

5. The learned Counsel for the appellant submitted that the provisions of Rule 27 of Order 41 of the Code of Civil Procedure empowers the

Appellate Court to allow, in certain circumstances, production of additional evidence. Even the expression 'or any other circumstances' occurring in

clause (b) of Sub-section (5) of Section 9 of the Trade and Merchandise Act, 1958 enjoins upon the Tribunal to have regard to other circumstance

in determining whether a trade mark is distinctive or is capable of distinguishing under that section. The learned Counsel further submitted that

production of additional evidence should be allowed which will be of help to this Appellate Board to decide the issues in the appeals. The learned

Counsel in support of his submission relied on the decision in the K. Venkataramiah v. A. Seetharama Reddy and Ors. Hunt-Wesson INC.'s Trade

Mark Application, (1996) 7 RPC, Pound Puppies, (1988) 23 RPC, S.N. Hasan Abubucker v. Kottikulam St Mohideen Pallivasal Therkku

Mohindeen Pallivasal, Nirvagi Mutheru Committee through its Secretary M.S.

Buhari and Anr. 2000 (III) CTC 193 and Billa Jagan Mohan Reddy and Anr. v. Billa Sanjeeva Reddy and Ors.

6. The learned Counsel for respondent No. 1 opposed the petition on the ground that the entire evidence in the opposition proceedings was closed

nearly seven years earlier. All facts, documents and information, which the appellant wanted, were available to it and it could have filed them when

the Director of Hindustan Liver Limited, the alleged successor in title of Brooke Bond Lipton India Limited, filed its evidence dated 3.11.1998 in

support of its Application No. 397359 in Opposition No. MAS-3510. The learned Counsel submitted that the appellant in complete disregard of the

this Appellate Board's order dated 17.11.2004 dismissing the M.P. No. 87/2004 which sought the permission to conduct market survey is now

trying to push by this M.P. an alleged market survey and an affidavit of Vice-President of the appellant company filed in the Trade Mark Registry,

Kolkata in a different opposition matter. The learned Counsel relied on the decision of cases in N. Ramaprasad v. C.N. Kumar Arjan Singh v.

Kartar Singh and Ors. AIR (38) 1951 SC 193, Jawala Singh and Ors. v. Jagdish Singh and Ors. AIR 1941 Lahore 144, Mahavir Singh and Ors. v.

Naresh Chandra and Anr. (2001) 1 SCC 309 and Colgate Palmolive Co. and Anr. v. Anchor Health and Beauty Care Pvt. Ltd. 2005 (30) PTC 32

(Bom) (DB).

7. Rule 27 of Order 41 of the Code of Civil Procedure, 1908 reads as under:

27. Production of additional evidenced on Appellate Court. - (1) The parties to an appeal shall not be entitled to produce additional evidence,

whether oral or documentary, in the Appellate Court. But if-

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within

his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce Judgment, or for any other

substantial cause,

the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Whenever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.

The purport of above Rule 27 is that production of additional evidence, whether oral or documentary, is permitted only in certain circumstances, i.e.,

where (a) the trial Court had refused to admit the evidence even though it ought to have been admitted; (aa) the evidence was not available to the

party notwithstanding the exercise of due diligence; (b) the appellate Court required the additional evidence so as to enable to pronounce Judgment.

No recourse to Rule 27 is permissible merely because a party at the stage of appeal finds that some material which could have tilted the decision in

its favour has not, but should have been, adduced in the case. Now, we will see as to whether the additional evidence sought to be produced

satisfies any of the conditions of Sub-rule (1) of this rule. Condition specified in clause (a) is admittedly not satisfied. The appellant has stated in the

petition that 'For the reasons stated in the accompanying affidavit it is prayed that this Hon'ble Board may be pleased to accept as additional

evidence the IMRB report....' There is neither any details in the affidavit affirmed by the Law Officer of the petitioner/appellant company nor the

appellant has established that notwithstanding the exercise of due diligence, such evidence was not within the knowledge or could not, after the

exercise of due diligence, be produced by him at the time when the decree appealed against was passed to satisfy the condition specified in clause

(aa) of Sub-rule (1) of Rule 27. The petitioner has not rebutted paragraph 3 of the affidavit of Mr. H.S. Shah affirmed on 21.3.2006 of respondent

No. 1 opposing the applicant of appellant on hand wherein it is stated as under:

3. The entire evidence in the opposite proceedings for example in MAS-3510 to Application No. 397, 359 of Brooke Bond India Ltd. In class 30

was closed on 24.07.1999, Nearly seven years have passed since then. All the facts, documents and information which appellants (a company with

deep pocket and having legal experts with them) were available and they could have filed them, when Mr. M.K. Sharma, Director-Legal of

Hindustan Lever Ltd., alleged successors-in-title of Brooke Bond Lipton India Ltd. filed their evidence dated 03.11.1998 in support of their

Application No. 397359 in Opposition No. MAS-3510...." This statement was repeated by the learned Counsel for the respondent No. 1 during the course of argument but was not rebutted by the learned Counsel for the appellant. The question of satisfying condition specified in clause (b) of Sub-rule (1) of Rule 27 does not arise as this Appellate Board has not heard the appeal and has not considered the evidence already on record See *Kutiya v. Vaithilinga Pandaram* AIR 1930 Mad. 343. Besides this, the market survey report pertains to the period from 11th to 26th October, 2005 which will be of no help in deciding the issue involved in the appeals especially the evidence should have relevance on the date of making application for registration of trade mark for the purpose of determining distinctiveness, goodwill or reputation. This Appellate Board had while dismissing M.P. No. 87/2004 amongst others observed that the application was a misconceived one, especially considering the date of the application for registration.

8. In view of the above, we are not inclined to allow the prayer made in the Miscellaneous Petition and consequently the M.P. No. 15/2006 is dismissed. However, there will be no order as to costs.