

(1999) 12 DEL CK 0091
In the Delhi High Court
Case No : C.M. (M) (T and M) No. 149

Charkha Soap Mills

APPELLANT

Vs

Darshan Soap Factory

RESPONDENT

Date of Decision : 20-12-1999

Acts Referred:

Trade and Merchandise Marks Act, 1958 — Section 109(2)

Citation : (2000) 4 AD 474 : (2000) 52 DRJ 729 : (2001) 1 RCR(Civil) 34

Hon'ble Judges : Dr. M.K. Sharma, J

Bench : Single Bench

Advocate : S.C. Chadha, for the Appellant;

Judgement

M.K. Sharma, J.—This petition under 109(2) of the Trade and Merchandise Marks Act has been filed by the petitioner who was opponent in the matter of application filed by the respondent seeking for registration of trade mark "UPHAR" in its field. On 20.4.1975 Darshan Lal and Sohan Lal trading as Darshan Soap Factory filed an application being No. 3049828 for registration of a trade mark "UPHAR" word per se, in Class 3 in respect of a soap. As against the aforesaid application, the petitioner herein lodged a notice of opposition. After filing of the notice of opposition, a counter statement was filed by the respondent who was the applicant before the Trade Mark Registry. The evidence in support of the application as also of the opposition were filed. The aforesaid application as also the opposition were taken up for consideration and by judgment and order dated 14.5.1980, the Assistant Registrar of Trade Marks dismissed the Opposition and allowed the application and ordered for registration of the trade mark as sought for by the respondent. Being aggrieved by the said order, the present petition has been preferred in this Court.

I have heard Mr. S.C. Chadha, counsel appearing for the petitioner.

2. Counsel for the petitioner submits that there is an error apparent on the face of the records in view of the fact that the Assistant Registrar has recorded that

the opponents did not file Form TM-7 to signify their intention to attend the hearing. According to him such a conclusion is erroneous on the face of the records of the case and in support of his contention, he has drawn my attention to Form TM-7 filed by the counsel for the petitioner giving notice of the intention to attend the hearing of the case. He further submits that the Assistant Registrar of the Trade Mark while passing the impugned order allowing the application and rejecting the opposition mainly relied upon the affidavit of Shri Darshan Lal. He has drawn my attention to that portion of the order wherein the Assistant Registrar has discussed the contents of the affidavit filed by Shri Darshan Lal. Relying on the same he submits that there is apparent contradictions in the evidence filed by Shri Darshan Lal and in support of his contention he has drawn my attention to the affidavits filed by Shri Darshan Lal, which are on record.

3. None appears for the respondents when the matter was called out. Accordingly, I proceed to decide this matter after hearing the counsel appearing for the petitioner and on perusal of the records placed before me.

4. The Assistant Registrar of Trade Marks has specifically recorded in his order in his order that at the time of hearing before him, none represented the opponent and that the opponent did not file Form TM-7 to signify their intention to attend the hearing. The said observations and conclusions appear to be erroneous and contrary to the records of the case for the records contain a Form TM-7 application. The said Form is signed by the counsel for the opponent and by filing the same, notice was given expressing the intention of the opponent to attend the hearing. The records also contain Form TM-56 application which was filed by the counsel for the opponent seeking for extension of time of one month on the ground that the notice of hearing was received late and that the counsel for the opponent would be at Ludhiana on the date fixed and, Therefore, request was made for an adjournment in the case. The said application as it appear was not considered by the Assistant Registrar at all and only a bald statement came to be made that none represented for the opponent at the time of arguments. It was necessary for the Assistant Registrar to dispose of the said application filed on behalf of the opponent before proceeding to hear the matter on merit. Besides Form TM-7 is also on record and, Therefore, it is apparent that the Assistant Registrar proceeded on wrong appreciation of the records.

5. I also find force in the next submission of the learned counsel appearing for the petitioner. It transpires from the order passed by the Assistant Registrar that while passing the order, he had mainly relied upon the affidavit of Shri Darshan Lal for his conclusions. It was held by him that the basis of the evidence of the applicants, the mark of the applicants was found to be registrable in Part B of the Register. The evidence of the applicants was only that of Shri Darshan Lal who had filed such evidence by way of affidavit. One such affidavit filed by Shri Darshan Lal is dated 11.2.1976 and it appear at page 12 of the records. In paragraph 3 of the said affidavit, he has stated that his firm is the manufacturer and merchant! of "SOAP" using the Trade Mark "UPHAR" since 1970 whereas, in

paragraph 5 of the same affidavit, he has stated that there is a good demand of his firm goods under the Trade Mark "UPHAR" which is substantiated by the sales for various years. In support of the statement, sale figures have been given from 1965-66 to 1974-75. There is a contradiction in the contents of the paragraphs 3 and 5 of his affidavit for he has specifically stated in his affidavit that he is the manufacturer and merchant of the "Soap" under the Trade Mark "UPHAR" since the year 1970 whereas he has given sales figures from the year 1965-66.

6. There is a contradiction which is apparent on the face of the records for the in the affidavit filed by him on 1.8.1979, he has specifically stated in paragraph 3 thereof that he is the manufacturer and merchant of the washing soap and that his firm has been using the Trade Mark "UPHAR" since 1.4.19970. In paragraph 4 he has given the sales figures from 1970-71. There is, Therefore, apparent conflict between paragraph 5 of the earlier affidavit and the present affidavit, he has also stated in paragraph 3 that the sales figures of his firm are given therein and that major portion of the same is under trade mark "UPHAR" and about 30% of the sales are otherwise, i.e., under other trade mark. There appears to be a contradiction in respect of such statements made in the said affidavit. No reliance could have been placed on such conflicting stand. The petitioner was also not heard and, Therefore, there was violation of the principles of natural justice. In that view of the matter, the judgment and order passed by the Assistant Registrar cannot be sustained and is set aside. The matter stands remitted back to the Assistant Registrar for fresh consideration in accordance with law.

Petition stands disposed of accordingly.

7. On receipt of the records, the Assistant Registrar shall issue notice to the parties and, thereafter, proceed to decide the matter in accordance with law.