

(2012) 02 IPAB CK 0001

In the Intellectual Property Appellate Board

Case No : ORA/93/2009/TM/CH

D.P. Parimala, 471, Avinashi Road, Coimbatore - 641004

APPELLANT

Vs

D. Devarajan, No. 15, Doctor Thottam, Vailiyampalayam,
Kalapatti (P.O.), Coimbatore - 641035 And The Registrar Of
Trade Marks, Office Of The Trade Marks Registry, Intellectual
Property Building, G.S.T. Road, Guindy, Chennai - 600032

RESPONDENT

Date of Decision : 03-02-2012

Acts Referred:

Trade Marks Act, 1999 — Section 9, 11, 12, 18, 21, 57

Citation : (2012) 1 MIPR 350

Hon'ble Judges : S. Usha, J; V. Ravi, Technical Member

Bench : Division Bench

Final Decision : Allowed

Judgement

S. Usha, J

1. Application for removal of the trade mark PVG (a label mark) registered under No. 1384443 in class 7 for the register of Trade Marks under the provisions of the Trade Marks Act, 1999 (hereinafter referred to as the Act).

2 . The respondent No. 1 was working as a Manager. The applicants concern was under the control of the applicant's father and the applicant. The applicant's father died in the year 1995. By virtue of a deed of family settlement dated 02.03.1998, the entire business was given to the applicant with the consent of the other legal heirs. The respondent No. 1 was the applicant's husband. Due to the estranged relationship between the applicant and the respondent No. 1, the respondent No. 1 left the applicant's concern and was looking after "Dev International".

3 . Dev International was developed by both the applicant and the respondent together. Later, the applicant came to know that there were some mismanagement. The authorizations given to the respondent were revoked by

the Court order. The applicant was shocked to see a similar mark being registered in the name of the respondent. Even while working along with the applicant, the respondent had no proprietary right in the trade mark.

4. The trade mark was registered in the name of the applicant's father and necessary steps have been taken for bringing on record the change. The applicant and her predecessors had been using the trade mark for two decades. Their turnover runs to several lakhs of rupees. The trade mark label PVG has acquired immense reputation and goodwill among the trade and public. The applicants are the prior adopter and user of the trade mark label PVG.

5 . The applicants are the proprietors of the identical trademark prior to that of the respondent and thus a person aggrieved within the meaning of Section 57 of the Act. The application for rectification is filed on the following grounds that :

a) the Registrar has erroneously granted registration without considering the fact that the trade mark label PVG is already registered in the applicants name;

b) the respondent has fraudulently, malafidely and by false claim obtained registration;

c) the respondent is not the proprietor of the trade mark;

d) the respondents adoption is malafide and dishonest;

e) the impugned registration is in contravention of the provisions of Section Nos. 9, 11, 12 & 18 of the Act;

f) the impugned trade mark is made without sufficient cause and is wrongly remaining on the register, and

g) the impugned trade mark be removed in the interest of justice, equity and good conscience.

6 . The matter was listed on 25.07.2011 and was adjourned to 26.09.2011. On 26.09.2011, there was no representation by the applicant. One Mr. K. Sudhakar represented the respondent. As there was no vakalath for the respondent, the matter was adjourned to 22.12.2011. On that day, the Board directed the respondent to file the counter statement along with necessary application and fees to condone the delay on or before 19.01.2012. On 19.01.2012 neither the counter statement was filed nor the respondent was represented. As per the earlier orders on 22.12.2011, the respondent was set ex-parte and the applicants were heard.

7. We have heard Shri Ramesh Venkatachalapathy, counsel for the applicant on 19th January 2012.

8. The learned counsel for the applicant reiterated the facts of the case. The counsel relied on (1) 2006 (32) PTC 393 (Del) - Harmohan Singh Vs Gurbux Singh and (2) 2003 (27) PTC 63 (Del) - Shaw Wallace & Co. Ltd. & Anr. Vs. Superior Industries Ltd. in support of his case.

9. The main issue for consideration in an application for rectification is whether the applicant is a person aggrieved. As per Section 21 of the Act, any person may file an opposition to the registration of the Trade Mark, whereas an aggrieved person may alone file an application for rectifications as per Section 57 of the Act. The applicant herein has been dealing with goods falling in class 7 with the respondent's knowledge. Persons who are in some way or the other substantially interested in having the mark removed it includes person who are substantially damaged or prejudiced if the mark remained on the register are persons aggrieved. The applicant is unable to carry on her business lawfully because of the impugned registration. The applicant is therefore a person aggrieved.

10. The other ground of rectification is that the applicant's have obtained registration by fraud and false claim. On perusal of the records that the PVG label mark has been registered in the name of the applicants as of 24.12.1998 for the goods falling in class 7. The respondent who was working as the manager of the company and the applicant's husband had the knowledge of the applicants use and registration. The respondent adoption cannot be said to be bonafide. When the adoption is dishonest the respondent cannot be the proprietor of the trade mark. The registration is therefore in contravention of Section 18 of the Act.

11. When the registration is obtained by suppression of material fact from the notice of the Registrar, the entry is deemed to be an entry made without sufficient cause. The respondent has falsely claimed to be the proprietor of the trade mark.

12. The authorities who are the custodian of register are to be more cautious while granting registration. They are to look into their records before the registration is granted. We find an identical trade mark for identical goods are also registered in the year 1998, the present impugned application has been filed in the year 2005. If the officer had been more careful this impugned mark would not have been registered.

13. The impugned trade mark therefore deserves to be expunged. Consequently, the application is allowed with a direction to the Registrar of Trade Marks to remove/cancel the trade mark registered under No. 1384443 in class 7. No order as to costs.