
(2013) 10 IPAB CK 0006
In the Intellectual Property Appellate Board
Case No : ORA/78/2006/TM/DEL

Dr. Reddy's Laboratories Ltd.

APPELLANT

Vs

M/S. Reddy Pharmaceutical Limited And Registrar Of
Trademarks

RESPONDENT

Date of Decision : 29-10-2013

Acts Referred:

Trade And Merchandise Marks Act, 1958 — Section 1(3), 9(2)(a), 9(3), 11, 11(1), 11(6), 12, 12(3), 18(1), 28, 29, 32, 33, 35, 46, 56, 92(1), 158,
Evidence Act, 1872 — Section 1, 3, 78, 165
Companies Act, 1956 — Section 20, 20(2), 22
Code Of Civil Procedure, 1908 — Order 39 Rule 1, Order 39 Rule 2, Order 18 Rule 4, Order 19 Rule 1, Order 19 Rule 2, Order 19 Rule 3

Citation : (2014) 1 MIPR 56 : (2014) 57 PTC 372 (IPAB)

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

Bench : Division Bench

Advocate : Sushant Singh, Amarjeet Singh

Final Decision : Allowed

Judgement

V. Ravi, Technical Member

1. The applicant herein are seeking the removal from the register of the trade marks 'REDDY' under No. 1192732 in Class 5. The brief facts of the

case are indicated below:-

â?¢ The applicant company was established in 1984 by Dr. K. Anji Reddy to create and deliver innovative pharmaceutical health solutions. It is the

second largest pharmaceutical company in India and an emerging global pharmaceutical power house. It has acquired world class expertise in the

development and manufacture of organic intermediaries, active pharmaceutical ingredients (bulk drugs) and finished dosage. Its operation spans

across the globe in USA, Europe, South Africa, Australia, UK, France, Singapore, Netherlands, Russia, Hong Kong and CIS countries. By virtue of

integrated research and development facilities with scale up capabilities for commercialization, the applicant has established itself as a leading

company for value added finished segment in respect of many branded pharmaceutical preparations such as OMEZ, NISE, ENAM, STAMLO,

CIPROLET, RECLIDE and STAMLO BETA which figures among the top 300 brands in India. The applicant has also set up a separate entity called

Dr. Reddy's Research Foundation employing some of the best scientists in the country to develop new molecules and also tied up with renowned

organization like National Cancer Institute, USA; Daichi Pharmaceutical company, Japan; Centre for Cellular and Molecular Biology; Indian Institute

of Science and University of Hyderabad in frontier areas of research like cancer and diabetics.

â?¢ The applicant adopted trade mark Dr. Reddy's in 1984 and started using it since then. It has been promoting the brand image of its trading style

comprising the symbol of a man with outstretched arms and the word Dr. Reddy's. They had applied for the registration of their mark on 22nd June,

2001 in various classes under Nos. 1020529 to 1020562. The trade mark has acquired immense goodwill, reputation and it is solely associated with the

applicant.

â?¢ The impugned trade mark is registered under No. 1192732 in Class 5 in favour of Reddy Pharmaceutical Limited on 25th May, 2005 in respect of

'medicinal and pharmaceutical preparations'. The applicant submit that the entry pertaining to impugned mark is liable to be expunged as it has been

made without sufficient cause and continues to wrongly remain in the register. The respondent cannot be the proprietor of the impugned mark as its

adoption and use is neither honest nor concurrent. The impugned mark is incapable of distinguishing the goods of the respondent. The impugned mark

has also been registered in contravention of Section 11 of the Act.

â?¢ The respondent have been restrained by an ex-parte interim injunction vide order dated 19.12.2003 in IA. 11847/2003 of Suit No. 2194/2003 by

the Hon'ble Delhi Court which was confirmed on 24th August, 2004 and the civil suit is pending trial before the Hon'ble High Court. It came to the

knowledge of the applicant in September, 2003 that the respondents have

started manufacturing and marketing finished pharmaceutical formulations under the name 'Reddy' and had represented themselves to be of the applicants group assuming a false address for fraudulent purpose in Hyderabad when in fact the respondents business is located at New Delhi and the packaging and selling of their goods is very similar to that of the applicant.

â?¢ In view of the foregoing, the impugned trade mark 'Reddy' is incapable of serving as the badge of origin of the respondent's goods and there is no other special circumstances"" under Section 12 enabling the Registrar to grant registration of the impugned mark. The impugned trade mark is calculated to prejudice and interfere with the applicant's business and applicants are person aggrieved by the presence of the impugned mark on the register. The applicant, therefore, prays that the impugned mark be removed from the register forthwith.

The case of the respondent /registered proprietor is summarized below-

â?¢ They are engaged in the business of marketing pharmaceutical preparations, basic drugs and medicinal formulations since 1996. The name of the company is based on the name of its founder and its present Managing Director Mr. Konda Raghu Rami Reddi. The respondent denies that the applicant have created any goodwill in Research and Development and the alleged turn over is false, concocted and misconceived. The media clippings furnished by the applicants clearly indicate that it promoted its trade name only from 2001 and therefore the applicants averments cannot be trusted. The respondent further state that the applicants have been extremely casual and negligent. The respondent have evidence to prove that export rejected drugs were pushed into the Indian market by the applicant which was nearing expiry date and hence all claims of first class quality control are false and baseless. There is no link between the applicant and foreign companies as claimed in the averments. The truth of the matter is that the applicants have never used Dr. Reddy's as its trade mark. The applicants rectification petition is completely misconceived and no case of passing off made out by them. Moreover, the drugs in question are Scheduled Drugs which are dispensed with by trained and qualified pharmacist and chemists on medical prescription by qualified physician. These are not goods which are purchased or taken of from the shelves by consumers exercising their own discretion. The competing packages have nothing in similar in terms of

colour combination or get up or lay out. There is no likelihood of confusion taking place between the competing goods merely by the use of the impugned mark REDDY. It is also pertinent to note that invoices annexed by the applicant shows use of their mark since 1991 and hence the claim of using it since 1984 by the applicant is false on its own showing. In each and every application filed by the applicant at the trade marks registry, the user claim is stated as since 2001 whereas the respondents have been using the trade name REDDY since 1996 to the knowledge of the applicant. In fact both the parties are using their trade name in accordance with common trade practice in the pharmaceutical trade upon the packagings as per examples that are cited below:-

¶ The respondents state that the applicant was itself dealing with respondent/registered proprietor since 1997 and there cannot be any case of dilution of trade mark when the applicant himself had appointed the respondent as their Del Credere agent on 1st April, 2003. It is an admitted position of the applicant before the Hon'ble Delhi High Court that the respondents have been using ""Reddy Pharmaceutical Limited ""as its trade name since 1996 and further the applicant had regular business relation with the respondents since 1997 and by virtue of written agreement dated 1st April, 2003 appointed the respondent as ""Del Credere agent for North India"" without any objection to the use of Reddy as part of its trade name by the respondent. Also, the applicant have allowed the respondent to use the mark REDDY to their own knowledge for over 10 years and therefore it is entitled to the protection of Section 12 of honest concurrent user.

¶ The respondent also submit that the applicant had obtained interim order of injunction by concealing material facts from the Hon'ble Delhi High Court and it has been unable to produce even a shred of evidence to prove proprietary rights over the trade name Reddy. The Hon'ble High Court by its order dated 27.09.2006 imposed a fine of Rs. 50,000/- on the applicant for not producing any evidence whatsoever in delaying the trial. The applicants itself has entered into a business relation with the respondent/registered proprietors for over 6 years and as thus acquiesced to the use of the trade name by the respondent as a trade mark. Further, the injunction order is not a bar to secure registration of the impugned mark as an appeal has been admitted before the Division Bench of the Hon'ble Delhi High Court and

the matter has not attained any finality. In short, the impugned mark has been used by the respondent since 1997 whereas the applicants have filed all the application before the registrar of trade marks claiming use of their mark only since 2001. The respondent had inserted a newspaper advertisement way back in November, 2002 on all India basis proposing to launch various pharmaceutical formulations. These advertisements were regularly repeated. The applicant are making misrepresentation to the Board by stating that the adoption of the impugned mark is from September, 2003 whereas in fact, the respondent have started releasing advertisement on All India basis from November, 2002 at least 5 months prior to agreement dated 1st April, 2003 by which the applicant have entered into a business relation with the respondent for supply of bulk drugs. The applicant had terminated the agreement with the respondent by filing a suit in the High Court and raising the claim of Rs. 1.65 crores to pressurise the respondent to pay the said amount. In fact, the respondent had already paid over Rs. 2 crores between October, - December, 2003 to the applicant even though they had failed to execute the pending orders. The respondent had requested the applicant to send complete statement of account to resolve discrepancies in payment. Therefore, the present proceeding is an abuse of process of law and an arm twisting exercise. The respondents state that they have substantial reputation in the pharmacy trade and applicants are now estopped from raising an objection to the use of REDDY as a key and distinguishing feature of the trade name of the respondent. The respondent denies that they have played a fraud in obtaining the impugned registration. It is also significant to mention that the advertisement of the impugned trade mark as well as the trade mark application of the applicant for Dr. REDDY Laboratories was published in the same TM journal. It is, therefore, a misconception to suggest that the respondent mark Reddy Pharmaceutical Limited infringes the trade mark of the applicant. There is no likelihood of confusion or deception as alleged and the entire petition is totally misconceived and should be rejected straightaway.

2. The mater was listed for hearing on 20.08.2013. We have heard the detailed arguments of the both counsel, gone through the pleadings, documents and records.

3. Appellants have relied on the following authorities:

1. ""Reddy Pharmaceuticals Ltd. Vs Dr. Reddy's Laboratories Ltd."" -- 2007(35) PTC 868(Del.) (DB)

Relying upon several decisions rendered by the Supreme Court as also by other courts in the country, the learned Single Judge made the following

observation:

There is identity of goods, identity of trade mark and identity of consumers. The defendant is not at all an honest and concurrent user of the trade

mark ""Reddy"" and it is apparent from record that it has started using the trade mark ""Reddy"" on its pharmaceutical preparations in bad faith knowing

fully well that the plaintiff company has enormous trade reputation and goodwill in the trade mark 'Dr. Reddy' which is completely associated with

plaintiff and has acquired a secondary meaning in business circles.

There is no dispute that the plaintiff had without any manufacturing facilities launched a number of pharmaceutical preparations under various brand

names in which it was using the name ""Reddy"". That the defendant appellant had given a Hyderabad address on the packaging even when the

registered office of the company was in Delhi and all disputes in relation to the supplies were to be subject to the jurisdiction of the Delhi Court is also

common ground before us. Such being the position, the short question that falls for consideration before us is whether the defendant appellant was

passing off its products under the trademark ""Reddy"" by confusion and misleading the customers and making them believe that the products being sold

to them were manufactured by the plaintiff company.

2. ""Bajaj Electricals Limited, Bombay Vs Metals & Allied Products, Bombay and another"" - AIR 1988 Bombay 167.

In our judgment, the plaintiffs have made out a case for grant of injunction. The learned single Judge is not correct while observing that the plaintiffs

have not prima facie established with sufficient evidence that the plaintiffs would suffer irreparable damages. The damages which would be suffered

by the plaintiffs cannot be counted in terms of money because the damages would be untold and would be spread over for a number of years till the

suit is decided. On the findings recorded by the learned trial Judge it is difficult to suggest that the plaintiffs are not entitled to relief.

3. ""Dr. Reddy's Laboratories Ltd."" Vs Reddy Pharmaceuticals Ltd. "" - 2004 (29) PTC 435 (Del.)

Interim Injunction-Infringement and passing off action-Deceptive similarity Acquiescence and laches-Plaintiff appointing defendant as its

distributor/agent for bulk drugs manufactured under its trade mark "'Dr. Reddy's'" in 1997 and subsequently as Del Credere agent in April 2003 -

Defendant starting marketing pharmaceutical preparations of its own under similar trade mark "' Reddy'" in August 2003 -Plaintiff immediately coming

to know of it raised objections and meetings were held between parties but nothing came out-Initiation of action by plaintiff thereafter not barred by

laches or acquiescence--Trade and Merchandise Marks Act, 1958, Sections 28,29--Civil Procedure Code, 1908, Order 39, Rules 1 & 2.

4. "'M/s. L.D. Malhotra Industries Vs M/s. Ropi Industries'" - CM (Main) 67 of 1974 - ILR (1976) I Delhi : ILR 1976 Delhi 278

Trade and Merchandise Marks Act (1959), S. 11(a)(e) & 109(2) -Appeal under-rectification of register-User of a trade mark-expression "'likely to

deceive'" -meaning of.

Held further, that the word 'likely' is of considerable importance. It is not necessary that it should be intended to deceive or cause confusion. The crux

of the matter is not the intention of the defendant in taking a certain name but the probable effect of such action on the minds of the public. However,

innocent may be his intentions, he will be restrained from trading under a name so much like that under which the plaintiff who was first in the field

trades, that the public are very likely to be deceived into systematic, and not mere occasional confusion. It is its probable effect on ordinary public and

unwary purchasers and incautious persons which has to be considered. The essence of a trade mark is the association that it bears in the mind of a

potential buyer of the goods to which it is applied. (Paras 21 & 23).

Held further, that the discretion under section 12(3) of the Trade and Merchandise Marks Act, can only be exercised when two or more parties

unknown to each other and unaware of the mark used by each other innocently adopt and use the same trade mark in respect of their respective

goods of the same nature. If the origin or the adoption of the mark is tainted it cannot be said that its adoption by the trader is honest and bona fide.

(Paras 26 & 27).

4. Respondent have relied on the following authorities:

1. "'A.K.K. Nambiar Vs Union of India and another '" - AIR 1970 SC 652-(V 57 C

125)

The reasons for verification of affidavits is to enable the Court to find out which facts can be said to be proved on the affidavit evidence of rival

parties. Allegations may be true to knowledge or allegations may be true on information received from persons or allegations may be based on

records. The importance of verification is to test the genuineness and authenticity of allegations and also to make the deponent responsible for

allegations. In essence verification is required to enable the Court to find out as to whether it will be safe to act on such affidavit evidence. In absence

of proper verification, affidavits cannot be admitted in evidence.

2. ""F.D.C. Ltd. Vs Federation of Medical Representatives Association India (FMRAI) and others "" - AIR 2003 BOMBAY 371.

As regards the evidence in the form of affidavit it is also to be borne in mind that such evidence can only be in relation to the fact or the facts required

to be proved by the parties in a suit. Affidavits by very nature are the statement of facts known to the deponent either on the basis of his personal

knowledge or on account of information derived by him from certain records or received from some other source and it is necessary for the deponent

in cases of statement of facts made on the basis of such information to disclose the source of information otherwise the statement based on

information can have no evidentiary value. In fact, the law on the point of the contents of the affidavit is very clear from Rules 1 and 3 of Order XIX

of CPC. The Rule 1 read that ""Any court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or

that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable."" The Rule 3(1) thereof provides that

Affidavit shall be confined to such facts as the deponent is able of his own knowledge to prove, except for interlocutory applications, on which

statement of his belief may be admitted; provided that the grounds thereof are stated.

21. In case of evidence in the form of affidavit in a suit to be considered for the decision on merits, it should confine to the facts known to the

deponent either of his personal knowledge or based on information which the deponent has reason to believe. Albeit, in latter case the source of

information as well as the reason to believe has to be disclosed in the affidavit,

otherwise, the statement based on information without disclosure of the source and the reason to believe cannot have any evidentiary value. There can also be facts based on belief. However, grounds of belief are

necessarily to be stated with sufficient particulars to enable the court to judge whether it would be safe to rely upon the deponent's belief. (Vide:

Barium Chemicals Ltd., v. Company Law Board)

3. ""Cetano Dias, Vs Caetano Rodrigues and others "" - AIR 1978 Goa, Daman and Diu (12)

In view of the specific provisions of Rule 3 (1) a verification is necessary. Rule 3 (1) makes it incumbent upon the parties swearing affidavits to state

that the deponent is able of his own knowledge to prove the facts stated in the affidavit. The main reason why a verification of an affidavit must be

strictly made is that the deponent must be made responsible for the statements made by him. In the absence of a statement that the facts deposed to

are of his own knowledge, it will always be open to the deponent to escape any criminal liability by stating that the statements he made in the affidavit

are of his belief and not of his knowledge. Proof by affidavits is a weak manner of proofs. Such proof is however allowed with a view to expediting

proceedings. It would be well-nigh impossible to dispose of interlocutory applications within a short time if proof by affidavits was not allowed. For all

these reasons verification of affidavits is of paramount importance. Absence of such verification is fatal to the affidavit and the evidence contained

therein should not be admitted or relied upon. (Para 4).

It could not be contended that in view of the provisions of Rule 3(1) affidavits filed in interlocutory applications are deemed to contain only facts which

the deponent is able to prove of his own knowledge, unless it is stated in the affidavit that some of the statements relate to his belief. AIR 1970 SC

652 : AIR 1968 Punj 406).

4. ""Dipendra Nath Sarkar Vs State of Bihar and others""- AIR 1962 Patna 101 (V 49 C 26)

Civil P.C. (1908), 19 r. 3 - Deponent of affidavit not clearly stating how much of the statement is a statement of the knowledge of deponent and how

much of it is a statement of his belief-There is violation of 0.19 R. 3 - Such affidavit cannot be accepted 37 Cal 259 Relied on.

5. Messrs. Shamsunder Rajkumar, Vs Messrs. Bharat Oil Mills- AIR 1964 Bombay

(11) What evidence means and includes, is described in section 3 of the Indian Evidence Act, but affidavits are not included within that description. On

the contrary, affidavits have been expressly excluded by section 1 of the Indian Evidence Act. That means that affidavits cannot be used as evidence

under any of the provisions of the India Evidence Act. Affidavits can however, be used as evidence, only under Order 19, of the Civil Procedure

Code. In accordance with Order 19, Rule 1, of the Civil Procedure Code, the Court has, for sufficient reasons, to pass an order that any particular fact

or facts may be proved by affidavit. That would mean that affidavit evidence cannot be entertained unless the Court passes an order, for sufficient

reasons, that any particular fact or facts may be proved by affidavits while passing an order under Order 19, Rule 1 and with the requirements of Rule

2, under order 19 as the circumstances of each case may require. I would also like to point out the decision in *Kanhaiyalal Vs Meghraj*, ILR (1954)

Nag 03 : AIR 194 Nag 260) wherein it was held that in cases where affidavits are filed in support of applications and are received by the Court, the

order receiving the affidavit would tantamount to passing an order under Order 19, Rule 1, of the Civil Procedure Code and the instructions in Chapter

XXIII, Civil Manual, Volume I. If it is not properly drawn up or verified, it ought not to be received and the parties should be required to file a proper

affidavit. A judge ought not to act upon an affidavit which is not properly drawn up and verified in accordance with the requirements explained in the

rulings cited supra.

6. ""Gujarat Housing Board Vs Dhamji Vijendra Mehta and others"" -- AIR 1997 Gujarat 106

The affidavits are not on oath and further the affirmation is not in accordance with law, as it has not been stated that which of the paras or part of the

para are true to the personal knowledge of the deponent and which paras are true on the basis of information and belief. Thus, they are not affidavits

in the eye of law. However, I will also deal with the objections raised in the said so-called affidavits.

7. ""National Bell Co. Vs Metal Goods Manufacturing Co. (P) Ltd. and another"" - AIR 1971 SC 898

Section 32, with which we are immediately concerned, read as follows:

Subject to the provisions of Section 35 and Section 46, in all legal proceedings relating to a trade mark registered in Part A of the Register (including applications under sec. 56), the original registration of the trade mark shall, after the expiration of seven years from the date of such registration, be taken to be valid in all respects unless it is proved__

- (a) That the original registration was obtained by fraud; or
- (b) That the trade mark was registered in contravention of the provisions of Section 11 or offends against the provisions of that section on the date of commencement of the proceedings; or
- (c) That the trade mark was not, at the commencement of the proceedings, distinctive of the goods of the registered proprietor.

We are not concerned with Clause (a) as no such case was even averred in the applications as pointed out both by the Trial Judge and the Division

Bench. As regards Clause (b), it will be at once noticed that the clause relates to facts existing both at the time of and after registration. If a mark at

the time of registration was such that it was likely to deceive or cause confusion or its use would be contrary to any law or contained or consisted of

scandalous or obscene matters or matter likely to hurt religious susceptibilities or which would otherwise be disentitled to protection of a Court, and

therefore, was under Section 11 prohibited from being registered, Clause (b) would apply, and the rule as to conclusiveness of the validity of the

registration cannot be invoked. That would also be so, if the trade mark at the date of the rectification proceedings was such as to offend against the

provisions of that Section 11. But, unlike Clause (b), Clause (c) relates to facts, existing at the date of the commencement of the proceedings. If the

trade mark at such stage is not distinctive in relation to the goods of the registered proprietor, the rule as to conclusiveness enunciated in Section 32

again would not apply. It would seem that the word 'distinctive' in Clause (c) is presumably used in the same sense in which it is define in Section 9(3),

as the definition of the expression therein commences with the words ""for the purposes of this Act"" and not the words: ""for the purposes of this

section"", the intention of the legislature, thus, being to give uniform meaning to that expression all throughout the Act. Section 56 deals with the power

to cancel or vary registration and to rectify the register. Sub-section (2) thereof confers a right to any person ""aggrieved"" by an entry made in the

register without sufficient cause or by an entry wrongly remaining in the register to apply to the tribunal for expunging or varying such an entry. The

expression ""aggrieved person"" has received liberal construction from the Courts and includes a person who has, before registration, used the trade

mark in question as also a person against whom an infringement action is taken or threatened by the registered proprietor of such a trade mark. The

words ""without sufficient cause"" in the section have clearly relation to the time of the original registration. Therefore, a person can apply for

cancellation on the ground that the trade mark in question was not at the date of the commencement of the proceedings distinctive in the sense of

Section 9(3). The burden of proof, however, in such a case is as aforesaid, on the applicant applying under Section 56.

8. ""Metro Playing Card Co., Vs Wazir Chand Kapoor, Respondent"" AIR 1972 Delhi 248 (V 59 C 64)

We are entirely in agreement with the learned Single Judge that the mere acceptance of an application for registration for a trade-mark or it

advertisement confers no right on the appellant and, prima facie there is a infringement of the trade-mark. There is also, prima facie no evidence on

the record to show honest concurrent user.

5. GIST OF APPLICANT'S ARGUMENTS:

a. The applicant submit that they adopted Dr. Reddy's Laboratories and started using the trade name as a trade mark since 1984. At the time of filing

of this rectification application, the applicant had a turnover of \$ 380 million and is considered a pharma giant particularly in the generic sector. Their

trade mark Dr. Reddy's Laboratories is regarded as a well known mark. The respondent applied for the registration of the impugned mark on

17.04.200 and the registration certificate was issued on 25th May, 2005. Within 6 month after the applicant filed for the cancellation of the impugned

mark. A suit was filed by the applicant against the respondent on 19th December, 2003 and the comments of Hon'ble Mr. Justice R.C. Chopra are

significant as mentioned in Para IV(1) aforementioned. An appeal to the Division Bench of Hon'ble High Court was also dismissed. The only defence

of the respondent was it had secured trade marks registration. The adoption and use of the impugned mark by the respondent is rank dishonesty meant

only to hoodwink customers.

b. The respondent were their agent for nearly 10 years. Production of Memorandum of Association is no proof that the respondent are carrying of business independently. The respondent suddenly surfaced in 2003 posing a an independent entity. The applicant rushed to the High Court in 2003 and fortunately realising the truth of the matter, baled it out. Prior to 2003, the respondent was not a manufacturer. The Hon'ble Delhi High Court had rejected personal name defence. Section 35 cannot also come to the rescue of the respondent. The respondent went to the Division Bench in appeal which also affirmed that the respondent was the applicant's agent.

c. The impugned mark is wrongly remaining in the register and the date of grant of registration was wrongly entered in the register. The impugned mark is hit by Section 9 and the Registrar had a bounden duty to refuse the impugned mark as it is squarely hit by Section 9(2)(a). The Registrar gave Nelson's eye while registering the impugned mark. Even if the respondent escapes all these hurdles, he is easily caught and comes under the clutches of Section 1(3). The entire matter has to be looked at holistically. The Hon'ble High Court had rejected each and every argument of the respondent.

Even on the date of hearing the impugned mark is wrongly remaining in the register. The person who seeks equity must come with a clean hand.

Section 12 cannot come to the rescue of the respondent. The adoption and use of the impugned mark is blatantly dishonest. There is also no 'Special

Circumstance' to justify the registration of the impugned mark. Trade marks law does envisage creation of parallel proprietor. Hence the impugned mark should be expunged from the register.

6. GIST OF RESPONDENT'S ARGUMENTS:

The learned counsel began his argument by reminding the dictum that a case should be argued on pleadings. What is pleaded must be proved in

accordance with law. The respondent state his company was established and incorporated by him that he should manufacture for the applicant. To

say that the respondent was the agent of the applicant and not involved in manufacturing is self contradictory and not raised in pleadings. The

rectification petition makes no reference to the use of Dr. Reddy's Laboratories as a trade mark. The respondent submit in pharma trade, brands are

segregated from the name. Section 47 can't be invoked by the applicants as the respondent has been restrained in the infringement action. The

respondent asserts dishonesty has not been pleaded. Nowhere a case has been set up on this ground. Further, facts set up in the pleading must be proved. The initial onus is on the applicant to prove his case and then the burden shifts to the opposite side. There is no evidence on record to prove the rectification petition. The applicant has not discharged preliminary onus. Newspaper cuttings is no evidence in law (Order 18 Rule 4) and Order 19 (Rule 1 and 3). The applicant has not filed any documents or provided supporting citation. The respondent submit in law bulk or retail sale does not affect proprietary rights. It was in 1997 that the applicant started dealing with respondent. The relation between the two was in the nature of distributor. But in practice, they went beyond initial area of operation. The applicant do not have single document to prove Dr. Reddy Laboratories was used as a trade mark. The applicant's use as a trade mark has not been proved. Why did the applicant enter into an agreement with the respondent? There was no termination clause. How is the applicant a person aggrieved? Moreover, interim orders are just prima facie findings and not of any legal consequence. The parties are before the Board for final hearing. The applicant have not amended the pleadings to cover subsequent events on which the applicant had placed reliance. Thus it cannot be brought at the final stage of arguments as the opposite party (respondent herein) is taken by surprise. Section 18(1) has no application to this case. The essential feature of respondent's mark is Reddy Pharmaceutical Ltd. Right from 1997 the applicant have acquiesced to the use of respondents trade name as a trade mark. There is no question of bad faith. Further, Section 11(1) will not come to the rescue of the applicant as applicant himself stated that Dr. Reddy's Laboratories is being used as a trade mark only from April, 2001. This is a clear cut case of acquiescence covered under Section 33. In these circumstances, the applicant can't seek invalidation of the impugned mark.

7. GIST OF REJOINER:

a. The respondent are talking in the air and no one disputes the various legal proportions advanced by him. But he has shut his eyes to basic home truth by harping on technicalities. What about natural justice? There is not a whisper in the counter-statement concerning the rules of pleading. The respondent is wasting every ones time by teaching law. All his arguments are curable defects. IPAB has been set up as the fountain head to render

justice on IP related matters. Even in SLP before Hon'ble Supreme Court it is affidavits that are relied on and supporting documents and exhibits are perused only for identification purposes. The applicant submit that the plaint should be read as a whole to render complete justice. The purpose of an affidavit is to prove a fact for the reception of evidence having probative value. The Board should import CPC principles with justice oriented approach. The applicant's affidavit was filed in 2005 when IPAB was in its embryonic stage. The Board is not guided by strict rules of evidence. The respondent has zero case. Under Section 165 of Evidence Act the ultimate purposes is to find out the truth. The Board can take cognizance of Government documents. Newspaper reports are not fake report but based on true and verifiable information. The applicant have not relied on private documents. Judicial proceedings are public documents in terms of Section 78 of the Evidence Act. The respondent are estopped from claiming ownership of impugned mark.

b. The Memorandum of Agreement was terminated on 1st April, 2003. The respondent filed impugned trade mark application on 17th April, 2003. It was only in August, 2003 the respondent started newspaper publicity. They back stabbed the applicant. IPAB rule 8 should be read in conjunction with Section 92(1) of the Act. Everything comes out in the pleading. Certain facts are admitted facts such as respondent acting as agents (see para 10 of Counter Statement). Where is the question of proving this fact? Section 33 will not be attracted as applicant have sought cancellation of the impugned mark within 6 months of its registration. Section 11(6) is a legal plea and can be taken at any time. Between 1978 to 2003 much water has flown. If the adoption and use of the impugned mark is lacking in basic honesty no amount of use will cure this defect. Hence, the impugned mark should be expunged.

8. On the issue of 'person aggrieved' the parties are in litigation for ownership right to same/similar mark in respect of identical goods and this gives the applicant the required locus to seek cancellation of the impugned mark.

9. The main focus of this rectification is whether the respondent's adoption and use of 'Reddy' trade mark is honest and justified in law? The settled legal position is anyone who bluntly copies somebody else trade mark or trade name can have no right in that mark or name and cannot be said to be

the proprietor thereof.

10. We in the Board at first got the impression that the respondent was an affiliate or subsidiary company of the applicant and not a competing

business rival. There is little doubt in our mind that the presence of the respondent mark 'Reddy' is bound to cause material confusion and deception in

the market. It clearly indicates a connection with the applicants company name Dr. Reddy's Laboratories. The subject rectification application is a

classic example of how even big companies and business house neglect and ignore to seek statutory brand protection on timely basis.

11. In our judgment the registration of the respondent trade mark was in contravention of Section 158 of the Act. Section 158 consists of a Schedule

to amend Section 20 and 22 of the Companies Act, 1956 in the following terms:

Sub-section (2) of Section 20 of the Companies Act has been amended and the law inter-alia seeks to prohibit the use of someone else's trade mark

as a part of corporate name or name of business concern. Consequently, two kinds of objections would arise under the law:-

(a) when the name of the company is identical with or nearly resembles the name by which a company in existence has been previously registered;

(b) when the name of the new company is identical with or nearly resembles a registered trade mark, or a trade mark which pending for registration

by any other person.

12. The first offence is within the domain of Registrar of Companies. But the second situation is clearly attracted in the instant case. The applicant

were the first to apply for registration in 2001. The respondent applied for a similar mark subsequently in 2003. The registry erred in accepting the

respondent's subsequent application. Therefore, the respondent's trade mark ex-facie is wrongly registered and wrongly remaining on the register. The

applicant company headed by a scientist/technocrat have indulged in benign neglect of not seeking timely protection for their brand name and are now

ruing its decision. The respondent are seeking to justify adoption and use of 'Reddy' by virtue of the owners name coincidently carrying the same

surname. It is true law recognizes and preserves the right which every man has to use his own name including for carrying on trade or business

provided such use is not fraudulent. In the instant case, everything points to the fact that the respondent has deliberately adopted the impugned mark to

deceive the public and is in every way a willful misrepresentation to the customer. Thus, there is not even a prima-facie arguable case to support the contentions of the respondent that his adoption and use is honest. Both Section 12 and 35 are subject to the test of bona fide claim of proprietorship of the mark under Section 18(1). If he fails to prove ownership under Section 18(1), his mark cannot remain on the register. Hence, it should go. In the result, ORA/78/2006/TM/DEL is allowed and registered trade mark 'REDDY' under no. 1192732 in Class 5 is removed from the register. There is no order as to costs.