

(2008) 08 IPAB CK 0009

In the Intellectual Property Appellate Board

Embiotic Laboratories Private Limited

APPELLANT

Vs

Lincoln Pharmaceuticals Limited And The Deputy Registrar Of
Trade Marks, Trade Marks Registry

RESPONDENT

Date of Decision : 04-08-2008

Acts Referred:

Trade Marks Act, 1999 — Section 91, 91(1)
Limitation Act, 1963 — Section 5

Citation : (2008) 08 IPAB CK 0009

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

Bench : Division Bench

Final Decision : Allowed

Judgement

Z.S. Negi, J

1. The appellant has preferred an appeal against the order dated 10.7.2007 passed by the Deputy Registrar of Trade Marks whereby he allowed the

opposition No. MAS- 168173 and refused the registration of trade mark under application No. 994463B in class 5. Since the appeal has been

preferred after the expiry of the period of limitation specified under Section 91 of the Trade Marks Act, 1999 (hereinafter referred to as the Act), the

appellant has filed the present miscellaneous petition seeking condonation of delay in preferring the appeal.

2. The appellant has claimed in the instant miscellaneous petition that the order appealed against was received by its attorneys on 19th July, 2007 and

the appeal and documents along with the memo of appeal in the prescribed form was forwarded to the Appellate Board through courier on 17th

October, 2007. Though the letter and documents were addressed to the correct party but, due to unintentional and inadvertent error, the physical

address of the Appellate Board was written on the envelope containing the appeal and documents, etc. as IPR Building, G.S.T. Road, Guindy,

Chennai- 32 instead of Guna Complex Annexe-1, 2nd Floor, 443 Anna Salai, Teynampet, Chennai-18 and hence the same was delivered on 18th

October, 2007 at the address recorded on the envelope. Subsequently, the envelope containing the appeal, etc. was delivered by the Trade Mark

Office to the Appellate Board on 31.10. 2007. It is further submitted that the confusion caused due to incorrect address recorded in the envelope

leading to late delivery of the appeal was a bonafide and unintentional mistake. The appellant has prayed that, under the circumstances setout In the

application, the delay may be condoned.

3. The respondent No. 1 filed its reply to the application for condonation of delay by refuting the material averments made in the instant application

and stating that there is no case whatsoever made out by the appellant to invoke the discretion of this Appellate Board in their favour. The respondent

documents containing appeal papers, though to a wrong address, the respondent No. 1 has demonstrated that no event as stated by it in its application

ever took place. The respondent No. 1 has contended that the appellant has not given any cogent explanation whatsoever for filing application for

condonation of delay after three months of preferring the appeal.

4. The instant application came up before us for hearing when Mr. Prabakar Reddy & Ms. S.B. Nirmalatha, Advocates appeared on behalf of the

appellant and Mr. T.D. Selvan Babu, Advocate appeared on behalf of the respondent No. 1.

5. Learned Counsel for the appellant submitted that the appeal was prepared within the limitation period but due to unintentional error In writing

address on the envelope the same was delivered to the Trade Marks Registry on 18.10.2007 and in proof thereof a photocopy of receipt showing

despatch of envelope on 17.10. 2007 through the Blue Dart Courier Services and delivery report have already been sent to the Registry of the Board

by letter dated 30.11.2007. The mistake was realised only when the Registry by their letter dated 18.12.2007 in response to our letter dated 30.11.2007

directed us to file application for condonation of delay of 12 days. The Registry had in that letter pointed out that the letter dated was addressed to the

Deputy Registrar, Intellectual Property Appellate Board, IPR Building,, G.S.T.

Road, Guindy, Chennai-600032 and the same was forwarded to the Registry of the Board by the Registrar of Trade Marks, Chennai without any reference on 31.10.2007. He submitted that the delay has caused due to bonafide mistake and such mistake was not deliberate or intentional. The learned Counsel relying upon the judgment of the Supreme Court in N. Balakrishnan v. M. Krishnamurthy 1998 (11) CTC 533 submitted that in every case of delay there can be some lapse on the part of the litigant concerned but that alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is put-forth as part of a dilatory strategy the court must show utmost consideration to the suitor. He urged that under these circumstances the Appellate Board may condone the delay of 12 days and admit the appeal.

6. The learned Counsel for the respondent No. 1 opposing the application submitted that the appellant has not approached this Appellate Board with clean hands as it has tried to mislead the Appellate Board and tried to camouflage its negligence and delay and therefore the application deserves to be rejected at the threshold. Learned Counsel pointed out that a perusal of the affidavit dated 17.10.2007 in support of the appeal at page 207 discloses the malafide on the part of appellant and support the submission made by the respondent No. 1 that appellant has tried to camouflage its negligence and delay. He submitted that the said affidavit is neither notarised nor the deponent is identified by any Advocate. The reason for not notarising the affidavit is evident the affidavit was not affirmed on 17.10.2007 but prepared subsequently by predating the same and the appellant knew that it could not get the predated affidavit notarised at a later date. He lastly submitted that the application for condonation of delay is sans any evidence showing the appellant's bonafide and deserves to be rejected and the appellant be ordered to pay exemplary costs to the respondent No. 1.

7. After having heard the counsel for either sides, we have to consider whether the explanation given by the appellant constitute sufficient cause for not preferring appeal within the specified time. Sub-section (1) of Section 91 of the Act provide that an appeal against the order of the Registrar of Trade limitation specified under Sub-section (1) of that section and the exception carved out there from provides that an appeal may be admitted after expiry of the period specified under Sub-section (1), if the appellant satisfies the

Appellate Board that he had sufficient cause for not preferring the appeal within the specified period. Before discussing the averments of applicant and submission of the learned Counsel for the respondent No. 1, it

may be worthwhile to quote the following principle laid by the Apex Court in the case of *N. Balakrishnan v. M. Krishnamurthy* (supra):

10. It is axiomatic that condonation of delay is a matter of discretion of the Court. Section 5 of the Limitation Act does not say that such discretion can

be exercised only if the delay is within a certain limit. Length of delay is within a certain limit. Length of delay is within a certain limit. Length of delay

is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to want of

acceptable explanation whereas in certain other cases delay of very long range can be condoned as the explanation thereof is satisfactory. Once the

court accepts the explanation as sufficient it is the result of positive exercise of discretion and normally the superior court should not disturb such

finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a

different matter when the first court refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the

delay afresh and it is open to such superior court to come to its own findings even untrammelled by the conclusion of the lower court.

11. The reason for such a different stance is thus: The primer function of a court is to adjudicate the dispute between the parties and to advance

substantial justice. Time limit fixed for approaching the court in different situations is not because on the expiry of such time a bad cause would

transform into a good cause.

12. Rules of limitation are not meant to destroy the right of parties. They are meant see that parties do not resort to dilatory tactics, but seek their

damage caused by reason of legal injury. Law of limitation fixes a life span for such legal remedy for the redress of the legal injury so suffered. Time

is precious and the wasted time would never revisit. During efflux of time newer causes would sprout up necessitating newer persons to seek legal

remedy by approaching the courts. So a life span must be fixed for each remedy. Unending period for launching the remedy may lead to unending

uncertainty and consequential anarchy. Law of limitation is thus founded on

public policy. It is enshrined in the maxim interest reipublicae up sit finis litium (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the right of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.

13. A court knows that refusal to condone delay would result in foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the court is always deliberate. This court has held that the words ""sufficient cause"" under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice vide *Shakuntala Devi Jain v. Kuntal Kumari* MANU/SC/0335/1968 and *State of West Bengal*

v. The Administrator, Howrah Municipality MANU/SC/0534/1971 . explanation does not smack of mala fides or it is put-forth as part of a dilatory

strategy the court must show utmost consideration to the suitor But when there is reasonable ground to think that the delay was occasioned by the

party deliberately to gain time then the court should lean against acceptance of the explanation. While condoning delay the Court should not forget the

opposite party altogether. It must be borne in mind that he is a loser and he too would have incurred a large litigation expenses. It would be a

salutary guideline that when courts condone the delay due to laches on the part of the applicant the court shall compensate the opposite party of his

loss.

8. Now, we would come to the averments made in the application and submissions of the learned Counsel for the appellant. The appellant has stated

that the appeal was prepared within the period of limitation and delivered, though at a wrong address, within the period of limitation specified under

Sub-section (1) of Section 91 of the Act. The appellant has also filed copies of despatch receipt and delivery report which show that the letter

forwarding the appeal was addressed to the Deputy Registrar, Intellectual Property Appellate Board, IPR Building, Guindy instead of Guna Complex,

Anna Salai; despatched on 17.10.2007 through the Blue Dart Courier Services and delivered by the Courier Service at the given address on

18.10.2007. If the address on the envelope was correctly written, the appeal would have been received at the Registry of the Appellate Board within

the three months limitation period. The defect pointed out in the affidavit in support of appeal, though this not the appropriate stage to consider the stated defect; the same has been rectified by the appellant in response to defect notice of the Registry. We do not find any reason to reject the explanation of the appellant that the delay was caused due to bonafide and unintentional mistake. The wrong address inadvertently written on the envelope containing the appeal papers, etc. can not be treated as malafide unless it is shown that the appellant has deliberately written wrong address to derive some benefit by delayed or wrong delivery of the said envelope. After careful consideration of the application for condoning of delay and the submission made by the learned Counsel for the respondent No. 1, we are of the opinion that the inaction or want of bona fide is found to be imputable to the appellant.

9. we are, therefore, satisfied that the cause shown by the appellant constitute sufficient cause for not preferring the appeal within the time specified under Sub-section (1) of Section 91 of the Act.

10. In view of the above, the condonation of delay application being C.O.D. No. 02/2008 is allowed with the direction to the Registry to allot a number to the appeal and process the same in accordance with law. There shall be no order as to costs.