

(2012) 05 IPAB CK 0007

In the Intellectual Property Appellate Board

Case No : ORA/148/2006/TM/MUM

Govindrao Sakham Mahadure And Others M/S. Dagoba
Engineering Works, 7-8 Shashtri Nagar, Old Bagadganj Road,
Nagpur-400008

APPELLANT

Vs

Shree Vyankateshwara Industries, 94, Chikhli Industrial Area,
Nr. Mini Mata Nagar Railway Crossing, Nagpur-445 008 And
The Registrar Of Trade Marks, Trade Marks Registry, Boudhik
Sampada Bhawan, Delhi

RESPONDENT

Date of Decision : 18-05-2012

Acts Referred:

Citation : (2012) 05 IPAB CK 0007

Hon'ble Judges : Prabha Sridevan, J;S. Usha, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Prabha Sridevan, J

1 . The Original Rectification Application is for removal of the mark JAILAXMI under No. 1303281 in Class 07 in the name of Shree

Vyankateshwara Industries. The original notice of hearing was sent to the respondent on 11.12.2006 but the Registry did not receive either the cover

returned or AD card. This matter has been filed in 2006. The applicant addressed a letter to the Board that since no one was appearing on behalf of

the respondent the matter may be listed. It was accordingly listed on 2.12.2011 after issuing notice to both the parties. On 2.12.2011, no one appeared

on behalf of the respondent. We directed the applicant to send a registered notice which was sent on 2.12.2011 intimating the hearing on 15.03.2012.

On 15.03.2012, there was still no representation on behalf of the respondent. The learned counsel for the applicant submitted that the respondent was

very much at the same place but is avoiding the service.

2. Before we heard the counsel for the applicant, we found that no affidavit to prove the evidence had been filed and therefore we asked the learned

counsel for the applicant, how the documents could be admitted in absence of proof. We said that in the absence of affidavit to prove the evidence, it

cannot be received, unless a petition is filed in this regard and only if a petition is filed an appropriate order can be passed. So an application was filed

(Miscellaneous Petition No. 88 of 2012). This was ordered on payment of cost of Rs. 2000/-. The cost has been paid.

3. The case of the applicant is that their mark is also JAILAXMI and it is for the same goods. According to them, since the applicant is the

predecessor in business and are the prior adaptors and prior user of the trade mark under No. 679795 in class 07. The subsequent user of mark must

be removed. They claim user from 1979 and the trade mark has been applied for on 12.09.1995. They claim that by continuous use of the mark, the

mark has acquired tremendous reputation and in any event, the respondent's mark is proposed to be used mark and therefore the mark does not have

any distinctive character and is liable to be removed. It is also submitted that the registered proprietor who are in the same place i.e. Nagpur are not in

existence in the market. The learned counsel failed to file the counter statement therefore this Board must allow the rectification application.

4. The evidence filed are as follows:

Exhibit-A is the registration certificate in favour of the applicant granted on 12.09.1995 for Thresher Machine in Class 07. It is a word mark

JAILAXMI. The user claim is 1.1.1978 and it was advertised in Trade Marks Journal on 15.09.2005. The mark has been renewed.

Exhibit - B the partner of the applicant firm has filed an affidavit setting out the details of sales from 1.4.984 and advertisement expenditure from the same date.

Exhibit - C is the sales figure and sales promotion expenses/ advertisement expenses

Exhibit - D are the invoices date from 1985 to till date.

Exhibit - E The evidence has also been filed to show that the advertised in the Rashtradoot Hindi Daily, Marati Daily, Lokmat, Lok Samachar.

The applicant cannot attack the mark on the basis of distinctiveness, since their

mark is the same. But their mark is definitely prior in adoption and use.

The marks are the same and the goods belong to the same class. The respondent is a subsequent user of the mark as the use shown is proposed to be used. In these circumstances, since the applicant has proved priority they are entitled to seek rectification. Accordingly, ORA/148/2006/TM/MUM is allowed with no cost.