

(2010) 07 IPAB CK 0013

In the Intellectual Property Appellate Board

Case No : M.P. Nos. 264/09, 79/10 In OA/83/09/TM/MUM

Gurmukh Khemchand Chawla, Proprietor

APPELLANT

Vs

Vanita Dilip Chawla, Proprietrix And The Assistant Registrar
Of Trade Marks

RESPONDENT

Date of Decision : 16-07-2010

Acts Referred:

Citation : (2010) 07 IPAB CK 0013

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

Bench : Division Bench

Judgement

S. Usha, J

1. The original appeal filed against the order of the Assistant Registrar of Trade marks dated 25.08.2009 dismissing the opposition and accepting the application for registration under No. 1397101 in class 42.

2. The miscellaneous petition No. 79/2010 has been filed for early hearing of the matter. The miscellaneous petition No. 264/09 has been filed by the

Appellant praying that the order of stay of the operation of the impugned order dated 25.08.2009 be granted and that not to further proceed with the registration and / or not to issue the certificate pending disposal of the appeal.

3. The petition has been made on the grounds that the evidence was not filed in the opposition proceedings under appeal, instead a letter stating that

they rely on the notice of opposition was sent by their counsel and that the evidence was requested to be taken on record after the matter was heard

by way of an interlocutory petition. The same was not considered by the Registrar while passing the impugned order. The letter addressed to the

Registrar stating that they rely on the notice of opposition was made by the

counsel without the knowledge of the party / Appellant. The registration certificate if issued would definitely cause unnecessary loss and hardship to the Petitioner who is the prior user of the trade mark and also would prejudice the exclusive rights of the Petitioner.

4. The first Respondent though entered appearance through a counsel did not file any counter to the miscellaneous petitions.

5. We have heard the miscellaneous petition on 10th June, 2010 in the Circuit Bench Sitting at Mumbai. Learned Counsel Shri Vinod Bhagat appeared for the Petitioner/Appellant and learned Counsel Ms. Jemi appeared for the Respondent/Respondent.

6. Learned Counsel for the Petitioner mainly contended that the Petitioners were prior users of the trade mark since the year 1961 whereas the first Respondent is subsequent user and their adoption itself is dishonest. The second Respondent/Registrar had not issued any letter calling for evidence.

In fact, the form TM-7 informing the intention to appear for the hearing which is the procedure to be followed was not filed by the first Respondent

and the second Respondent had heard the matter which itself is not lawful. The counsel further brought to our notice the various documents to show

that they are prior users of the impugned trade mark.

7. The learned Counsel for the first Respondent orally made submissions though had not filed their counter to the miscellaneous petition. The counsel

pointed out to the letter dated 14.1.2008 at page 13 of the typed set of documents filed along with the appeal and stated that the Appellant having

stated they are not desirous of filing any evidence and that they rely on the notice of opposition cannot now raise this either after the matter was heard

and orders reserved by the Registrar or at this appellate stage. It is also an admitted fact that the present counsel was aware of the date of hearing.

The Appellant has not made out a case for grant of stay.

8. We have heard and considered the arguments of both the counsel and have gone through the pleadings and documents. The only issue is whether

the Petitioner has made out a case for the grant of an order of stay of the operation of the impugned order. The Petitioner's only defence was that the

evidence could not be filed as no intimation was given by the counsel to the party and also that the party was not aware of the time limit. The other

reason was that though there was an understanding between the counsel that

they would seek adjournment on the ground of settlement, the erstwhile counsel argued the matter without evidence. We do not think it a valid ground for grant of stay in such circumstance.

9. The other submission was the delay is a curable defect and could be done at any stage. We think that it is an issue which is to be dealt with at the stage of deciding the main appeal and not at this stage.

10. In our considered opinion, we do not find any prima facie case made out by the Petitioner for granting any stay of the operation of the impugned

order. The miscellaneous petition No. 264/2009 is dismissed. M.P. No. 79.2010 is allowed.