

(2015) 01 IPAB CK 0001

In the Intellectual Property Appellate Board

Case No : Ora/147/2011/Tm/Del (Form-3)

Heinz Italia Spa

APPELLANT

Vs

Stokely-Van Camp INC

RESPONDENT

Date of Decision : 22-01-2015

Acts Referred:

Intellectual Property Appellate Board (Procedure) Rules, 2003 — Rule 14
Patents (Appeals And Applications To The Intellectual Property Appellate Board) Rules, 2011 — Rule 3
Intellectual Property Appellate Board (Patents Procedure) Rules, 2010 — Rule 16
Trade Marks Act, 1999 — Section 84(2), 84(3), 84(4), 84(5), 84(6), 87, 92, 95, 96, 124, 124(1)(ii)
Limitation Act, 1963 — Section 2, 5
Patents Act, 1970 — Section 117A(4), 117B

Citation : (2015) 62 PTC 410 (IPAB)

Hon'ble Judges : K.N. Basha, J; Sanjeev Kumar Chaswal, Technical Member

Bench : Division Bench

Advocate : Mehak Sethi, Ashutosh Kumar, Prashant Kumar

Judgement

K.N. Basha, J

1 . Ms. Mehak Sethi the learned counsel for the applicant and Mr. Ashutosh Kumar learned counsel for the respondent are present today.

2. This matter is posted today for considering the extension of time sought for by the first respondent under Form 3 seeking for extension of time for filing the counter statement of the rectification application. Mr. Ashutosh Kumar the learned counsel for the respondent would submit that they have assigned valid reasons and shown sufficient cause in seeking the relief under Form 3 for extension of time for 22 months in filing the counter statement. It is contended that already the first respondent has initiated civil proceedings by filing a suit in CS(OS) 514/2010 and in the said proceedings, the present applicant has preferred IA No. 10795/2011. The learned counsel would contend that the application seeking for stay of relief of civil proceedings has been dismissed by

the Hon'ble Delhi High Court by the judgment delivered on 03/09/2012 wherein it was observed that the Defendant in the said IA namely the applicant herein should have followed the conditions contemplated under section 124 clause 1 of the Trade Marks Act, 1999 (hereinafter referred to as the Act) and it is further observed that the applicant herein has violated the conditions contemplated under section 124 of the Act and filed their rectification application without leave of the court and on the said ground, their application for rectification is liable to be dismissed. It is contended that the first respondent was under the impression that they will not peruse the rectification application and coupled with the fact that the first respondent is a foreign company situated at United States of America and further there is some communication gap between the first respondent and their attorneys in respect of the notice despatched by the Registry of IPAB and ultimately the first respondent through their attorneys of India approached the IPAB Registry and they have received the copy of the rectification application by paying necessary fee as per the procedure, on 04/06/2013 which resulted in the above said delay. It is contended that the delay is neither willful nor wanton but only due to the above said circumstances.

3. Per contra Ms. Mehak Sethi, the learned counsel appearing for the applicant in the main rectification application would contend that the first respondent has not shown sufficient cause or given any valid reasons for the delay. It is contended that there is a delay of more than three years, if the date is computed from the date of serving of notice to the first respondent at their U.S. address. It is further contended that even the first respondent in the present application under Form 3 stated in para 2 that they have approached the Registry of this Bench and ultimately got the copies and they have informed that the Form C was already despatched on 17/08/2012 and the said information they got from the Registry on 29/03/2013. It is contended that thereafter, the learned counsel for the respondent received the copy of the rectification application on 04/06/2013 and in spite of the same there is a further delay in filing the counter statement. Therefore, it is contended that the request is liable to be rejected.

4 . We have given our careful consideration to the rival contentions put forward by either side and also perused the contents of Form 3 presented by the first respondent herein seeking for the relief of extension of time in filing the counter statement.

5 . At the outset it is to be stated that the first respondent is a foreign company situated in U.S. and coupled with the fact that the first respondent also initiated civil proceedings in CS(OS) 514/2010 before the Hon'ble Delhi High Court and the same is pending as on date. It is seen that in the said civil proceedings, the applicant in the main rectification application herein has preferred IA No. 10795/2011 seeking for relief of stay of further proceedings pending disposal of the rectification application. The fact remains that the rectification petition was filed without resorting to the procedure contemplated under section 124 of the Act. It is relevant to refer the following observations of the Hon'ble Delhi High

Court while passing the judgment on 03/09/2012 in which the Hon'ble Delhi High Court has observed hereunder:--

"26. In the present case, the defendant initially came up with an application u/s. 124(1)(ii) of the Act to seek leave of the court in order to initiate proceedings before the IPAB and according to me that was the correct approach taken by the defendant. Things went wrong when the defendant chose not to press that application and later, without taking recourse of following the mandate of section 124(1)(ii), initiated the rectification proceedings before the Appellate Board on his own free will. The defendant, himself acting contrary to the clear provision of statute, cannot expect the court to take a step forward and go out of the way by giving a hypothetical construction to the statute in order to rescue the defendant from his untenable acts.

27. It is a well settled law that when the words of the statute are clear, plain or unambiguous i.e. they are reasonably susceptible to only one meaning; the courts are bound to give effect to that meaning irrespective of the consequences. The literal interpretation should be given to a statute if the same does not lead to any absurdity. It has been observed by the Apex court in *Nandi Devi v. Radha Devi Gupta*, AIR 2005 SC 648, that.

"The interpretative function of the Court is to discover the true legislative intent. It is trite that in interpreting a statute the Court must, if the words are clear, plain, unambiguous and reasonably susceptible to only one meaning, give to the words that meaning, irrespective of the consequences. Those words must be expounded in their natural and ordinary sense. When a language is plain and unambiguous and admits of only one meaning no question of construction of statute arises, for the Act speaks for itself. Courts are not concerned with the policy involved or that the results are injurious or otherwise, which may follow from giving effect to the language used. If the words used are capable of one construction only then it would not be open to the Courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act."

28. In *Nasiruddin and Ors. v. Sita Ram Agarwal*, AIR 2003 SC 1543, this Court stated the law in the following terms:--

"The court's jurisdiction to interpret a statute can be invoked when the same is ambiguous. It is well known that in a given case the court can iron out the fabric but it cannot change the texture of the fabric. It cannot enlarge the scope of legislation or intention when the language of provision is plain and unambiguous. It cannot add or subtract words to a statute or read something into it which is not there. It cannot re-write or recast legislation....."

29. Hence, keeping the legal principles as discussed above in mind, it is concluded that in a suit for infringement of a trademark, the applicant cannot ask for a relief of the stay of the suit until he fulfills the conditions stated in 124(1) of the Act. If the rectification proceeding are not pending the institution of the suit,

it is obligatory on part of the applicant to follow the provision laid down under section 124(1)(ii) of the Act in order to initiate rectification proceedings before the Appellate Authority. In case he fails to adhere to the same and yet initiates rectification proceedings, then he will not be entitled to the relief of stay of the suit under section 124 of The Trade Mark Act, 1999."

6 . With the above said findings, the Hon'ble Delhi High Court has dismissed the application filed for stay by the applicant in the present rectification application.

7. By keeping the above said factors in mind let us now consider the reasons assigned by the petitioner seeking for the relief of extension of time for filing counter statement. It is seen that the Registry of this Bench has already despatched the Form C to the first respondent on 17/08/2012 and this factor was disclosed to the attorneys of the first respondent on 29/04/2013 and thereafter the learned counsel for the first respondent filed appropriate fees on 15/05/2013 and obtained a copy of the rectification petition on 04/06/2013. It is quite natural for the first respondent to take some time for consulting their attorneys in respect of filing the counter statement and further the pendency of their civil suit and filing of stay petition by the applicant herein in the main petition is also to be taken note of. As it is pointed out by the learned counsel for the applicant that there is further delay from the date of receipt of the copy of the rectification petition on 04/06/2013. In respect of such a gap we have to consider the difficulties of a foreign party to contact the attorneys at India and thereafter to go through the contents and draft the contents of Form 3 could have taken some more time. We cannot ignore the said factor we are of the considered view that there was not any deliberate evasion or negligence on the part of the first respondent as they have already initiated proceedings for infringement by filing a civil suit as pointed out earlier before the Hon'ble Delhi High Court and as such we have to consider the matter mainly on merits of the respective parties to render real justice to the parties. We cannot forget for a moment that absolutely no prejudice would be caused to the applicant in the main rectification application to argue the matter on merits and enabling the first respondent to contest the same.

8. It is well settled by the following catena of decisions of the Hon'ble High Courts and as well as the Hon'ble Apex Courts that the word "sufficient cause" should be given a liberal construction to advance the interest of justice coupled with the rights of the parties:--

1. In a similar situation on the basis of similar set of facts, as in the instant case, the Hon'ble Delhi High Court rendered a decision dated 05/01/2012 in W.P. No. (C) 7640/2011 & CM. No. 17304/2011 in Gilead Sciences Inc. v. Intellection Property Appellate Board through the Dy. Registrar and Ors held as under:--

"27. The respondent has failed to satisfy me as to how it has been prejudiced due to the late filing of the appeal by the petitioner. By delaying the filing of its appeal, the petitioner has only lost time. Even if the petitioner is held entitled to

grant of patent registration in respect of the application in question, the same has been delayed due to the petitioner's own conduct. On the other hand, the respondent No. 4 continues to enjoy the rights available to it, which it would have exercised had the appeal been preferred in time. Respondent No. 4 would be entitled to contest the said appeal on merits. There is no prejudice caused to or suffered by respondent No. 4 or any other person by the delayed filing of the appeal and it is not shown that the petitioner is guilty of deliberate delay in filing the appeal with any particular object in mind.

28. The Supreme Court in *N. Balakrishnan (supra)* held that the rules of limitation are not meant to destroy the fights of parties. They are meant to see the parties do not resort to dilatory tactics but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. Refusal to condone delay would result in foreclosing a suitor from putting forth his case. There is no presumption that the delay in approaching the court is always deliberate. The expression "sufficient cause" under Section 2 of the Limitation Act should receive a liberal construction so as to advance substantial justice (see *Shakuntala Devi Jain v. Kuntal Kumari* AIR 1996 SC 575 and *State of West Bengal v. The Administrator Howrah Municipality*: AIR 1972 SC 749). There could be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the doors against him.

31. I may now deal with a submission of Dr. Singhvi that the Board cannot condone the delay beyond the period of three months, as, according to him, further period is not specified in the Rules. Section 117B of the Patents Act provides that:

The provisions of sub-sections (2) to (6) of section 84, section 87, section 92, section 95 and section 96 of the Trade Marks Act, 1999 (47 of 1999) shall apply to the Appellate Board in the discharge of its functions under this Act as they apply to it in the discharge of its functions under the Trade Marks Act, 1999.

32. Section 92 of the Trade Marks Act, 1999 states that the Appellate Board shall not be bound by the procedure laid down in the Code of Civil Procedure, 1908 but shall be guided by principles of natural justice and subject to the provisions of the Trade Marks Act and the rules made thereunder. The Appellate Board shall have the powers to regulate its own procedure including the fixing of places and the times of its hearings.

34. Rules 14 of the Intellectual Property Appellate Board (Procedure) Rules, 2003 framed under the Trade Marks Act states that If the Appellate Board is satisfied that there is sufficient cause for extending the time for doing any act prescribed under the rules (not being a time expressly provided for in the Trade Marks Act, 1999), it may, subject to such conditions as may think fit to impose, extend the time and inform the parties accordingly. This power is exercised upon making of an application to the Appellate Board in the prescribed form. The procedure for preferring an appeal under the aforesaid rules is prescribed from Rule 3 onwards.

Therefore, the Appellate Board is empowered to extend the time for preferring an appeal under Rule 14 of the Intellectual Property Appellate Board (Procedure) Rules, 2003 framed under Section 92 of the Trade Marks Act.

35. A reading of Section 117A(4) shows that the Board has the power to extend the time beyond three months. This is evident from the use of the words "or even such further time as the Appellate Board may, in accordance with the rules made by it allow". The submission of Dr. Singhvi that the period of limitation for preferring an appeal is three months and the Board cannot relax the same any further, therefore, cannot be accepted. A reading of Section 117A(4) read with Rule 14, as aforesaid, shows that there is no outer limit in respect of the period for which the Board may condone the delay. However, the delay can be condoned upon the Board being satisfied that sufficient cause for extending the time for preferring an appeal has been disclosed.

36. Even under Rule 16 of "The Intellectual Property Appellate Board (Patents Procedure) Rules, 2010" and Rule 3 of "The Patents (Appeals and Applications to the Intellectual Property Appellate Board) Rules 2011", the Board is empowered to condone the delay in cases disclosing sufficient cause therefore."

2. The Hon'ble Division Bench of the Madras High Court in a decision rendered on 08/12/2011 in W.P. No. 28033 of 2011 in Schering-Plough Ltd. v. Intellectual Property Appellate Board held hereunder:--

"5. Prima facie we are of the view that the Appellate Board has not correctly appreciated the reasons for delay disclosed in the affidavit accompanying the delay petition. It was categorically stated in the affidavit filed in support of the delay petition that upon receipt of the order of the 2nd respondent the petitioner-company had to receive technical support from its experts. Further, the petitioner-company is a foreign company situated in Switzerland and requires time to brief their advocate in India on the technical information. It was further stated that the petitioner-company had done everything in their control to file the appeal against the order of the 2nd respondent, but because of the intervening circumstances the delay occurred, which was beyond their control. It was also stated that the petitioner company has a good case on merit and the interest of justice and fairness requires that the delay in filing the appeal be condoned and the appeal be heard on merits.

6 . Although the Appellate Board noticed the ratio decided by the Supreme Court in N. Balakrishnan v. M. Krishnamurthy, (1998) 7 SCC 123 yet it has not correctly appreciated the law in favour of the appellant/writ petitioner while considering the application for condonation of delay.

7 . It is well settled by the Supreme Court that there cannot be any hard and fast rule to laid down as to what constitutes sufficient cause. The expression "sufficient cause" should receive liberal construction. In the case of O.P. Kathpalia v. Lakhmir Singh, AIR 1984 SC 1744 a three-Judge Bench of the Supreme Court held that if the refusal to condone the delay result in grave mis-carriage of

justice, it would be a ground to condone delay.

8 . In another decision in the case of Collector, Land Acquisition v. Mst. Katiji, AIR 1987 SC 306 'their Lordships observed:--

"The legislature has conferred the power to condone delay by enacting Section 5 of the Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on 'merits'. The expression 'sufficient cause' employed by the legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner which subserves the ends of justice that being the life-purpose of the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy."

9 . Similar view has been taken by the Supreme Court in a catena of decisions holding that the expression "sufficient cause" should be liberally construed. In the instant case, the Appellate Board has not correctly appreciated the law laid down by the Supreme Court. Hence, the impugned order needs interference."

3 . The Hon'ble Apex Court in 1987 SCR (2) 387 in Collector Land Acquisition, Anantnag & Anr. v. Mst. Katiji & Ors held hereunder:--

"2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and use of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3 . "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

4 . When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5 . There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so."

4. The Hon'ble Apex Court in AIR 1998 SC 3222 in N. Balakrishnan v. M. Krishnamurthy held as under:--

"9. 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 no matter; acceptability of the explanation is the only criterion sometimes delay of the shortest range may be uncontainable 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 regional 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 finding even untrammelled by the conclusion of the lower court.

10 . The reason for such a different stance is thus: The primary 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.

11. Rules of limitation are not meant to destroy the right of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the 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 *Interesse reipublicae ut 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.

12 . 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*, [1969] 1 SCR 1006 and *State of West Bengal v. The Administrator, Howrah Municipality*, [1972] 2 SCR 874a.

13. It must be remembered that in every case of delay there can be some lapse on the part of the litigant concerned. 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 not 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 when the court should lean against acceptance of the explanation. While condoning delay the Court should nor forget the opposite party altogether. It must be borne in mind that he is a loser and he too would have incurred quite 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 for his loss."

9. The principles laid down in the decisions cited Supra are squarely applicable to the issues involved in this matter. It is pertinent to note that the applicant in the main rectification application has not chosen to file any separate counter for the Form 3 filed by the first respondent seeking for the relief of extension of time for filing the counter statement. It is seen that they have raised certain objections while filing the main rejoinder to the counter statement in the main matter regarding the delay in filing the counter statement. The applicant is also ready for contesting the main matter on merits. In view of the above said factors, we have no doubt in our mind to come to the conclusion that the first respondent has not only showed sufficient cause but also assigned valid reasons for extending the time in filing the counter statement. Accordingly, the delay is condoned and the counter statement filed by the first respondent herein is taken on record along with the rejoinder to the counter statement. We are also constrained to impose a cost of Rs. 20,000/- to be paid to the learned counsel for the applicant in the main rectification application. The next date of hearing will be informed by the Registry by sending notice to both the parties as well as to the respective counsel after completion of pleadings.