
(2013) 04 IPAB CK 0007

In the Intellectual Property Appellate Board

Case No : OA/11/2012/TM/DEL, M.P. Nos. 165, 166/2012

Itc Limited

APPELLANT

Vs

Registrar Of Trade Marks & Anr.

RESPONDENT

Date of Decision : 05-04-2013

Acts Referred:

Citation : (2013) 55 PTC 169 (IPAB)

Hon'ble Judges : Prabha Sridevan, J;V. Ravi, Technical Member

Bench : Division Bench

Advocate : Pravin Anand, M.S. Bharath, Manav Dev, Marbaniang , Sushant Singh

Judgement

Prabha Sridevan, J

1. This appeal is filed against the order treating the TM (6) filed on 8th March 2006 as time barred and the application in class 42 as deemed to have been abandoned. The appellant applied for the mark ""DARJEELING LOUNGE"" and it was advertised in the journal on 07.02.2005. Notice of opposition was filed by the respondents herein which was served on the applicant. The appellant filed their counter statement on 08.03.2006. The deputy Registrar held that since the notice of opposition was served on the applicants on 22.12.2005, the counter statement was filed beyond the statutory period. The impugned order also shows that notice was given vide letter late 01.08.2008, to show cause why this time-barred counter statement should be taken on record. But there was no reply, and hearing was fixed on 11.12.2008. It is seen from the impugned order that no one appeared on behalf of the applicants to show cause why there was a delay in filing the counter statement. The respondent was represented by a counsel. After hearing the respondent and the pleadings, the impugned order

was passed.

2. The learned counsel appearing for the appellant submitted that the impugned order is arbitrary and there is no application of mind. According to the

learned counsel, in TM(6) it was specifically stated that the notice of opposition was received only on 10.01.2006. And if the time is calculated from

10th January, the counter statement was within time. The learned counsel submitted that the notice of opposition was sent on 22.12.2005 by the Trade

Mark Registry. It means that at least two or three days would have elapsed from the date of despatch. And therefore, Impugned order stating that the

notice was received on 22.12.2005 is clearly erroneous. The learned Counsel also submitted that since it was the time of Christmas and New Year,

the postal delay cannot be ruled out.

3. The learned Counsel cited several judgments to show how the issue must be decided in such cases.

1. ""Hedges & Butler Limited v. Mohan Meakin Limited & Others""--1999 PTC (19) 605

2. ""J. Kohli & Anr. v. Ram Bhagwat & Ors.""- 2003 (27) PTC 161 (Del)

3. ""N. Balakrishnan v. M. Krishnamurthy""-- (1998) 7 SCC 123

4. ""Tea Board, India v. ITC Limited""--GA No. 3137 of 2010, CS No. 250 of 2010

4. The learned Counsel for the respondent submitted that the application should be rejected at the threshold since Darjeeling is a mark that belongs to

the respondent. It is geographical indication. The learned Counsel also submitted that a person who comes to Court with delay must show that his

application is in time.

5. The matter was argued at length. But the issue is really the Counter Statement cited was filed on time or not. It is clear from the records that the

Notice of Opposition was dispatched to the appellant with a copy marked to the respondent on 22.12.2005. Therefore, the Impugned Order is

erroneous in its conclusion that the Notice of Opposition was served on the appellant on 22.12.2005. The TM(6) clearly stated that ""We ITC Limited

hereby give notice that the following grounds of which we rely for our application against which opposition has been received on 10.01.2006, by our

attorneys."" This was received by the Registry on 08.03.2006. This is within time if the averment that the notice of opposition was received on

10.01.2006, is correct.

6. The impugned order states that the applicant has not disclosed the date of receipt of the notice of opposition and therefore, the Registrar presumed

that there is a delay in filing the counter statement. According to the learned counsel for the appellant, the appellant did not receive the notice of

hearing. If they had received they would have definitely be present for the hearing, since they were interested in prosecuting their application on

01.08.2008.

7. The Trade Mark Registry had sent TOP 1558 which called upon the appellant to show cause why the Counter statement should be taken on

record. This was sent to the party i.e. the appellant herein as well as their counsel at No. 10 Hailey Road, New Delhi. This was received by the

appellant on 13.08.2008. They wrote to the registry that the letter dated 01.08.2008 was received and that the notice of opposition was received in the

office on 10.01.2006 and therefore the TM(6) is on time. Therefore it was requested that the objection must be waived. On 4.11.2008, the notice of

hearing for 11.12.2008 was intimated to the counsel on both sides. According to the appellant, this was not received by them and that is why they

were absent. We see from the records that there are several exchanges of letters between the parties regarding this mark. And, therefore, we will

give the benefit of doubt to the appellant for their absence on 11.12.2008. However, the appellant will have to show that the notice of opposition was

received by them only on 10.01.2006. The party seeking the authorities discretion for condonation of delay must satisfy us why the period of limitation

should be extended. The registrar had not taken a note of the statement that it was received on 10.01.2006 and had dealt with it as if they had

received it on 22.12.2005. This is an error. The notice of opposition was sent on 22.12.2005 therefore, it could not have been received on 22.12.2005.

Further when there is an averment that it was received on 10.01.2006 that must be dealt with. Therefore, we send the matter back to the registrar

who will hear both sides and the appellant shall prove by satisfactory evidence that the notice of opposition was received on 10.01.2006 as stated by

them. This must be proved by acceptable evidence. Thereafter the Registrar may pass appropriate orders thereafter. We are not going into the

question whether the mark is registrable or not. That decision will follow later

only after the above order is passed. The appeal is allowed and the matter is sent back for re-hearing as indicated above. The Registrar shall send notice to the parties and decide the matter within 4 months from the date of receipt of this order. Miscellaneous Petition Nos. 165 & 166/2012 are closed.