

(1980) 01 DEL CK 0027

In the Delhi High Court

Case No : Civil Writ Appeal No. 960 of 1979

J.M.A. Industries Ltd. and Another

APPELLANT

Vs

Union of India and Another

RESPONDENT

Date of Decision : 30-01-1980

Acts Referred:

Citation : AIR 1980 Delhi 200 : (1980) 17 DLT 476

Hon'ble Judges : V.S. Deshpande, C.J.; Harish Chandra, J

Bench : Division Bench

Advocate : A.R. Lal, M. Lahiri, P.N. Sewak, D.L. Fray, S.L. Watel, Arun Kumar, for the Appellant;

Judgement

V.S. Deshpande, C.J.

(1) It is high time the administrative authorities exercising powers under statutory provisions should realise that whether they are issuing a show cause notice why a certain action should not be taken or are communicating the reasons for decisions it is not sufficient merely to recite the language of the statutory provisions but it is also necessary that the actual facts on which action is proposed to be taken or on which the decision is based should also be stated or indicated. The truth of this observation is borne out by this case in relation to section 49(3) of the Trade and Merchandise Marks Ad. 1958 (The Act), and Rule 86 of the Trade and Merchandise Marks Rules, 1959.

(2) The facts out of which the question arose may be briefly stated. The Indian company, petitioner No. 1, and the foreign company, petitioner No. 2, entered into a collaboration agreement which was approved by the Government of India from 1961 to 1971 only. The proprietary trade mark "HELLA" of petitioner No. 2 has been registered in India and as a result of the collaboration agreement the petitioner No. 1 has been using it in respect of goods manufactured by it in pursuance of the collaboration agreement. After the collaboration agreements ceased to be in force, the second petitioner agreed to license the first petitioner

to use the said trade mark "HELLA" in relation to the goods to be manufactured by the petitioner in pursuance of the quondam collaboration agreement. The two petitioners applied to the Registrar of Trade Marks under the provisions of sections 48 and 49 of the Act for the recordal of the first petitioner as the registered user in respect of the said trademark of petitioner No. 2 in September October, 1971. The application was in accordance with sub-section (1) of section 49. It was forwarded by the Registrar of Trade Marks to the Central Government u/s 49(2). The consideration of the powers of the Central Government under sub-section (3) of section 49 being material for the decision of this case, section 43(3) is reproduced below :

"(3)On receipt of an application under sub-section (2), the Central Government, having regard to all the circumstances of the case and to the interests of the general public, and the development of any industry, trade or commerce in India, may direct the Registrar (a) to refuse the application; or (b) to accept the application either absolutely or subject to any conditions, restrictions or limitations which the Central Government may think proper to impose : Provided that no direction for refusing the application or for its acceptance conditionally shall be made unless the applicant has been given an opportunity of being heard."

(3) The meaning of the expression "opportunity of being heard" used in section 49(3) is to be spelt out by reading it with rule 86(1) of the Rules which is as below :

"(1)Before the Central Government decides to direct the Registrar to refuse an application for registration as registered user or to accept the application subject to any conditions, restrictions or limitations, it shall give notice thereof in writing to the applicant through the Registrar. The notice shall state the grounds on which the Central Government proposes to issue such direction and shall inform the applicant that they are entitled to be heard."

The notice which was actually given under Rule 86(1) of the Rules on 3rd January, 1976, stated that "the Government of India proposes to refuse the above application on the grounds that having regard to all the circumstances of the case, the registration as registered user sought by the applicants is not in the interest of the general public and the development of indigenous industry in India". Since the notice did not state the facts which constituted public interest or the interest of the development of indigenous industry in India, but merely recited the language of section 49(3), the petitioners wrote to the Government on 9th January, 1976 that no reasons had been given why acceptance of the user applications will be detrimental to the interests mentioned in the notice and requested that reasons for coming to such a conclusion may be submitted in relation to such facts and reasons. Though the Registrar of Trade Marks wrote to the petitioners on 11th May, 1976 that the Central Government had been requested to furnish the information asked for by the petitioners, the information was not supplied but instead oral hearing was granted on 31st July, 1976. As a

result of the oral hearing the Government asked the petitioners on 4th August, 1976 to supply the following information :

"(A)Whether the collaboration agreement between M/s. J.M.A. Industries Private Limited, New Delhi and M/s. West falische Metall Industries, GmbH West Germany (F) had the approval of the Government and wether the necessary approval has been conveyed by Government or not; (b) What was the licensed capacity of M/s. J.M.A. Industries for the individual items, the present production of these articles; and (c) The approximate extent of the market requirements the applicant's production did cater."

The information was supplied on 13-8-1976 and 14-9-1976. By the impugned letter of 16th June, 1978 the Registrar of Trade Marks informed the petitioners that "the Central Government have carefully considered all the materials in connection with the above noted applications and the arguments advanced at the hearing and have directed the Registrar to refuse the said applications on the grounds already set out in this office letter No. (RU-5037 & 5038)/382 dated 3rd January, 1976", namely, the interest of the general public and that of the development of indigenous industry in India. It would be thus seen that neither in the notice to show cause why the recordal of the petitioners as a registered user should not be refused, nor in the decision that the recordal has been refused are any facts stated which would constitute the public interest or the interest of the indigenous industry or from which an inference could be drawn that the recordal of the petitioners as a registered user would be detrimental to such interest.

(4) The present writ petition prays that the impugned decision be quashed. Mr. A. R. Lall, learned counsel for the petitioners, attacked the impugned decision as follows : (1) The petitioners did not have a true opportunity to showcause why the recordal should be refused because the notice to show-cause did not state any facts which could be rebutted by the petitioners. (2) That the impugned decision communicated to the petitioners was without reasons. Neither the petitioners know why their application was rejected, nor can they properly challenge the rejection before this court as no grounds for the rejection are known. (3) The interests of the general public or of the indigenous industry in India referred to in section 49(3) should be construed in the context of the Trade and Merchandise Marks Act, 1958, as would be seen by reading Rule 85 of the Rules framed there under, which is as below :

"85.The Central Government, on receipt of an application for registration as registered user forwarded to it by the Registrar under sub-section (2) of section 49, shall, if satisfied that the application and the accompanying documents comply with the provisions of the Act and the rules, consider whether the application should be allowed having regard to the matters specified in sub-section (3) of that section, and in doing so may take into account all or any of the following matters : (1) whether the permitted use if allowed would contravene the policy of the Act which is to prevent trafficking in trade marks;

(2) whether the registered proprietor has registered the trade mark without any bona fide intention to use it in relation to his goods in the course of trade or solely or mainly for the purpose or permitting others to use it under agreement for registered user ; and (3) whether the registered proprietor has acquired title to the trade mark by assignment without any bona fide intention to use it in relation to his goods in the course of trade or solely or mainly for the purpose of permitting others to use it under agreements for registered user. Explanation 1. For considering the bona fides of the registration of the trade mark under clause (2) regard shall be had inter alias to (a) whether the goods for which the trade mark is registered are similar to or are different from the goods in which the registered proprietor has been trading or dealing before the registration of the mark; (b) whether the registered proprietor has ever used to mark in question in relation to his goods in the course of trade before the date of the agreement for registered user, and if so, the amount and duration of such user; (c) whether the terms as to royalty and other remuneration payable by the proposed registered user are reasonable taking into account the expenses which the registered proprietor is likely to incur in exercising control over the permitted use. Explanation. II. For considering the bona fides of the acquisition of title under clause (3) regard shall be had, besides the matters set out in Explanation I, to the following further matter, namely, whether the registered proprietor has obtained assignment of other registered trade marks and if so, whether he has dealt with such other marks by way of assignment or registered user."

In so far as the Central Government took into account wider considerations it exceeded its jurisdiction u/s 49(3)(4) Petitioner No. 1 itself is indigenous industry and it could not be against public interests and the interests of the indigenous industry to grant the application of the petitioners.

(5) In the counter affidavit the reasons for the decision which existed on the file were disclosed. After the petitioners supplied the information asked for by the Government after the oral hearing given to the petitioners, the following order was passed by Mr. A. Mubayi, Deputy Secretary to the Government of India, who had given hearing to the petitioners on the application of the petitioners :

"IT is seen that collaboration agreement between J.M.A. and their German principals was valid up to 1971 and Government's approval thereafter has not been accorded. In regard to the installed capacity of the production and the percentage of the indigenous market to this unit caters, the figures are available. In the case of horns, the applicant caters to 25 per cent of the total indigenous market, similarly, in the case of flascher units, it is 25 per cent. In the case of lamps which includes head-lights etc., it is roughly 10 per cent. In the absence of Government's approval to the collaboration agreement, there seems to be no reason why the trade mark should be allowed to continue further. The extent to which the party's production caters to the local markets is also fairly substantial, particularly in the case of flashers and automative horns. It is quite likely that the continued use of the trade mark would have an adverse effect upon the other

indigenous industries of these products. This was also the view of D.G.T.D. initially. I, Therefore, reject the application. Rtm may be informed accordingly."

It was also contended for the Government that petitioner No. 1 company has 34% of foreign share holding and since petitioner No. 1 supplies a substantial share of the market demand for the goods in India it did not need the advantage of being able to use the foreign trade mark. After the advantage obtained by it by having a collaboration agreement with petitioner No. 2 for a period of 10 years, petitioner No. 1 is expected to be able to stand on its own legs in competing with the rest of the indigenous industries and it would be unfair for the Government to give to petitioner No. 1 the additional advantage of being able to use a foreign trade mark. This consideration is: germane to section 49(3) and justified the rejection of the application by the government.

(6) In the light of the above, the contentions of the petitioners may be dealt with as below ; Contentions (1) and (2) :

(7) Section 49(3) which gives the discretion to the Central Government to direct the Registrar to refuse the application or to accept it either absolutely or subject to conditions also lays down the guidelines for the exercise of such discretion. They are three-fold. The Government has to consider firstly all the circumstances of the case. secondly the interests of the general public and thirdly, the development of any industry, trade or commerce in India. These guidelines are only headings or topics or the names or description of consideration which would be relevant in dealing with the application. But none of these headings by itself spells out any particular facts which may amount to the description of the heading. For instance, interests of the general public by itself does not consist of any one or more particular facts. It is a general concept which can be applied to such facts as may amount to public interest in a particular case. What the facts are would have to be seen, by considering the particular case. The very fact that the decision u/s 49(3) is left to the discretion of the Government itself means that the facts to which section 49(3) applies are not themselves stated therein otherwise the power u/s 49(3) would be merely to decide on the existence or non-existence of the facts stated therein. But since no facts are stated in section 49(3), the discretion to be exercised there under is to bear on the particular facts of a case in which the decision is to be made.

(8) It is a common frailty on the part of the administrative authorities to take recourse to generalities and evade facing the actual issues in a case. They, Therefore, merely repeat the statutory language in the hope that nobody will be able to catch them on the wrong foot because of the shield afforded by the statutory language.

(9) It is easy to see, Therefore, that when on 3rd January, 1976 the Government of India proposed to refuse the application of the petitioners on the grounds of "interest of the general public and the development of indigenous industry in India", the petitioners could not have a true idea as to what facts or

circumstances or reasons arising out of their application could be described as coming under the headings interest of the general public and the development of indigenous industry in India. These general phrases could not indicate the facts which had to be explained or rebutted by the petitioners or what additional facts had to be pleaded by the petitioners to surmount the objections raised by the Government. If the petitioners are merely asked as to why the recordal of registered user in its favor would not be against public interest how could the petitioners answer such a question ? The petitioners cannot be expected to imagine all the possible circumstances and facts which should make the registration of their user contrary to public interest. It is true that as a result of the oral hearing some pointed queries were made by the letter of the Government, dated 4-8-1976 and the answers to these queries given by the petitioners could give some idea to the petitioners as to what particular facts were considered relevant by the Government in deciding on their application. But, Mr. Lall contended that the petitioners had no opportunity to tell the Government why these facts should not be construed to mean that the grant of the application of the petitioners would be contrary to public interest and the interest of the indigenous industry. The petitioners could have appended to the information supplied by them such Explanation or argument, but the question is not whether the petitioners could have done it. The question is whether the petitioners were asked to explain why these facts should not be construed against the petitioners. Of course, the calling of such information by the Government was some notice to the petitioners that these facts would be taken into account. But one general consideration has to be borne by the courts in considering whether adequate hearing has been granted by the Government to the petitioners or a person to be affected by a subsequent order to be passed by the Government. While nothing is lost by the Government in giving an additional opportunity of hearing, when justified by circumstances, irreparable loss would be caused to the petitioners or the affected persons by not being given an opportunity to controvert specific facts. In the peculiar circumstances of this case we are of the view that though the petitioners must have expected that the information supplied by them after the oral hearing was likely to be taken into account by the Government in deciding on their application, the petitioners could not know why these facts were called for and how they would be regarded as being relevant in considering the public interest or the interest of the Indian industry. It is to be noted, however, that if initially or subsequently before taking decision against the petitioners, the Government had called upon the petitioners to show cause why on these facts the Government should not reject the application of the petitioners as being not in the public interest or not in the interest of the indigenous industry in India, then the petitioners should not have been left any ground for complaint. The distinction between asking the petitioners to supply information giving a hint thereby that the said information would be taken into account and specifically asking the petitioners to show cause why such information should not be taken into account against them is perhaps subtle, but the benefit of doubt should be given to the individual and not to the

Government for the reasons stated above.

(10) The decision conveyed to the petitioners was as cagey as the notice to show cause. A decision to say that the Government is unable to accept the prayer or after fully considering the case the Government rejects the prayer conveys no meaning. Inside these vague phrases are concealed facts which alone can constitute the reasons which may fall under the headings constituted by such phrases. It is not the headings but the facts covered by these headings which have to be stated as reasons for the decision. Then only it would be known why a decision had been arrived at. We are clearly, Therefore, of the view that the decision conveyed to the petitioners was without any reasons.

(11) If the matter had remained there, there could be no valid defense to the writ petition praying that the impugned decision be quashed. But the counter-affidavit filed by the Government disclosed that the order of rejection passed by the Government was a fully reasoned order. The only mistake committed by the Government was not to communicate the order which was passed on the application of the petitioners, but only the conclusion that the real reasons for the rejection of the application fell under the guidelines set out for the Government in section 49(3). It is this tendency of administrative authorities of informing the petitioners only of the conclusion and not the reasons for the conclusion which creates dissatisfaction and which compels the affected persons to challenge the orders of the Government in courts. This habit is reminiscent of what used to be done by administrative authorities and is still done by arbitrators. Knowing that the remedy by way of a certiorari goes against the record of the order of the administrative authority, it was once believed that if the record contained no reasons for the administrative order or action, then no relief by way of certiorari could be given. Similarly, the arbitrators often give a bare award without reasons, so that no judicial review of it is possible. While the arbitrators still enjoy this protection, the administrative authorities no longer do so. In spite of section 12 of the (English) Tribunals and Inquiries Act, 1958 which requires that certain specified Tribunals shall furnish the statement of reasons for the decision if requested on or before giving of the decision. Professor S. A. de Smith could still say as late as 1968 that "there is no general rule of English Law that reasons must be given for administrative (or indeed judicial) decisions," (Judicial Review of Administrative Action, 2nd edition, p. 133). Fortunately, the courts in India were not handicapped by the technicalities which hindered the development of case law in England requiring quasi-judicial authorities to give reasons for decisions.

(12) In *Harinagar Sugar Mills Ltd. Vs. Shyam Sundar Jhunjhunwala and Others*, , *Sardar Govindrao and Others Vs. State of Madhya Pradesh*, , and *Maharashtra State Road Transport Corporation v. Shri Balwant Regular Motor Service* (1969) 1 Scr 808(3), the Supreme Court insisted that reasons must be given for quasi-judicial orders and in the absence of such reasons the orders would be quashed by the courts. "If the immunity from the requirement of giving reasons could

lead to the temptation of giving perverse or corrupt decisions, the court had the power to do justice by insisting upon a statement of reasons from quasi-judicial authorities. Justice itself is treated here as a source of law." (V. S. Deshpande "Speaking" Orders Air 1969 sC 147 .

(13) The order rejecting the application of the petitioners in this case was, however, actually an order supported by reasons even though such reasons were not initially communicated to the petitioners. The only result would be that the petitioners were justified in filing the present writ petition. But after the reasoned order is produced by the Government or incorporated in the counter-affidavit the reasons become known to the petitioners. It "is then open to the petitioners to attack the order in the same way as the petitioners could have attacked it even if the reasons were communicated to the petitioners before the writ petition was filed. It would be wasteful and unjust for this court to refuse to see the reasons which were originally given in the order on the file and to allow the writ petition only because before the writ petition was filed the reasons were not communicated. The petitioners could have filed a replication in this writ petition challenging the validity of the reasons given by the Government for rejecting the petitioners' application. They did not do so. The mistake committed by the Government in omitting to communicate the reasons of the decision which existed on the file to the petitioners was capable of being corrected and has been corrected by the Government by incorporating the reasons for the order contained in the file in the counter affidavit. It is only in so far as the petitioners have by way of anticipation urged the third ground of attack in this writ petition that the validity of the reasons can be considered by us here.

(14) The learned counsel for the petitioners contended that the impugned order must be quashed merely on the ground that the reasons for the order were not communicated to the petitioners along with the order. Such a contention is contrary to the very theory of certiorari. The certiorari goes against the record of the administrative authority or Tribunal containing the order sought to be impugned by recourse to judicial review. If the record is inadequate the court can direct the administrative authority to make it complete. In Maharashtra State Road Transport Corporation case, referred to above, the decision was taken orally in the presence of the parties, but no reasons were recorded at that time. Reasons were recorded subsequently. The contention of the respondent that giving of reasons subsequently and communicating them to the respondent after the order was delivered does not cure the defect of the order as being without reasons. This contention was rejected by the court by the following observation at pages 824 and 825 :

" APART from any requirement imposed by the statute or statutory rules either expressly or by necessary implication we are unable to accept the contention of Mr. Phadke that there is any general principle that a statutory tribunal should always give its judgment in writing and should always give reasons thereof immediately with the pronouncement of the judgment."

Ramaswami J. who spoke for the court, then proceeded to explain the nature of certiorari in the English, law and pointed out that the reasons for the orders could be given by the administrative authority or Tribunal after the order was made. A court may even direct it to draw up a reasoned order in a case in which this has not been done so that the court may know the reasons for the order when sitting in judicial review over the order. Contention (3) :

(15) What is the extent of the jurisdiction of the Central Government u/s 49(3). It is true that rule 85 requires the Government to take into account all or any of the matters specified therein while considering the application u/s 49(3). But rule 85 cannot be used to restrict the meaning of section 49(3). While it was for the Government to indicate some of the consideration to be taken into account u/s 49(3), it is for the court to consider the true meaning of section 49(3). Mr. Lall urged that the statement of objects and reasons accompanying the Bill which became the Trade and Merchandise Marks Act, 1958, the preamble of the said Act and the scheme of the Act as a whole would show that it was not concerned with anything which did not pertain to trade marks. He argued that the reason of the Government that the recordal of petitioner No. 1 as registered user of the trade mark of petitioner No. 2 was not justified because petitioner No. 1 company had 34 per cent of foreign share holding, that petitioner No. 1 had already enjoyed the benefit of the collaboration agreement for 10 years and was expected to stand on its own lag now and that there was no justification why petitioner No. 1 should continue to get the advantage of foreign trade mark as against the indigenous producers were all irrelevant and extraneous to section 49(3) of the Act. This contention was embodied in the writ petition itself and has been answered by the Government in the counter affidavit. In our view, the use of a foreign trade mark either by the foreign proprietor or by the registered user cannot be considered in isolation. Its effect on public interest and the development of industry in India has to be considered in view of the expressed requirement of section 49(3). Further, it cannot be said that the consideration of such effect is not the consideration of the subject of trade marks. It is only the effect of the use of the trade mark by the recordal of its registration in favor of petitioner No. 1 that was to be considered u/s 49(3) and was considered by the Central Government. Had the Central Government considered the interest of the general public or the development of indigenous industry, apart from the effect of the recordal of petitioner No. 1 as a registered user in rejecting the application of the petitioners, then perhaps the petitioners could have contended that those considerations were not germane to section 49(3). But there is no scope for such a complaint. Both section 49(3) and the reasons given by the Government for rejecting the application are concerned with the effect of the recordal of registration on the public interest and the interests of development of indigenous industry in India. We are clearly of the view, Therefore, that the reasons for the rejection of the application were relevant and germane to section 49(3). We are fortified in this conclusion by an unreported Division Bench decision of the Calcutta High Court in Registrar of Trade Marks v. The J. B. Williams Co. Inc(4),

being an appeal from Original Order No. 259 of 1974, decided on 5th December, 1978, a copy of which was given to us for perusal by Mr. A. R. Lall. Contention (4) :

(16) The petitioner No. 1 is indigenous, but has 34 per cent of foreign share holding. Moreover, as an Indian company, it is entitled to be treated only equally but not preferentially as against other Indian producers. The Government is not convinced why it should enjoy the advantage of using a foreign trade mark. This is really a question of policy for the Government with which this court cannot interfere. We may also observe that petitioner No. 1 may be able to use the trade mark registered in favor of petitioner No. 2 even though the Government has not acceded to the request of the petitioners to be recorded as a registered user u/s 49. In view of section 46 of the Act petitioner No. 2 would run the risk of his trade mark being taken off the register of trade marks if for five years such a trade mark is not used in India in respect of goods to which it relates. If the import of the goods manufactured by petitioner No. 2 into India is not allowed the only way the trade mark of petitioner No. 2 can continue to be used in relation to the same goods in India is for petitioner No. 2 to continue to consent to the use of the trade mark by petitioner No. 1 in relation to the goods to which the trade mark relates. Otherwise petitioner No. 2 would be left only with the possibility of obtaining a defensive registration u/s 47. So long as petitioner No. 2 continues to consent to the use of the trade mark of petitioner No. 1, the use of such a trademark by petitioner No. 1 would be exclusive. Petitioner No. 1 has also used the trade mark from 1961 onwards. The petitioners would also be able to prevent other persons from using the trade marks in India by recourse to the law of torts. If the same is insisted in India, passing off action would lie against it at the Instance of the petitioners. The prejudice, if any, to petitioner No. 2, by the impugned order would thus be substantially reduced. This contention is also, thereof, fails.

(17) To sum up, the first contention of the petitioners that the show cause notice was inadequate succeeds. The second contention that the impugned decision was without reasons does not succeed because the decision as given was supported by reasons recorded on the file. The production of the reasoned order in the counter-affidavit made the petitioners aware of the reasons for the decision. It was the duty of the petitioners to show before us that even the reasoned order was illegal for any reason. The petitioners had an idea as to the reasons because of the facts which the Government had obtained from the petitioners. The petitioners pleaded by anticipation that these reasons were irrelevant and beyond the scope of the Act. This is the third contention of the petitioners. It fails on merits. "The second contention also fails on merits and also because the third contention has not succeeded. The fourth contention has already been negatived.

(18) Since the petition fails on the second, third and fourth contentions, can any relief be given to the petitioners on their success on the first contention ? In a sense, even if the show cause notice was inadequate the petitioners had the

opportunity of impugning the order itself and since they have failed to get it quashed, the success of the petitioners on contention No. (1) is only theoretical and it is doubtful if any actual prejudice has been caused to them by the inadequacy of the show cause notice. However, as we have said above, the Government ought to be fair and liberal in dealing with private persons. As held by a Full Bench of this court in *K. R. Raghavan v. Union of India*, 2nd (1979) Del- I the Government has always an inherent power to review its administrative and quasi-judicial orders if they are vitiated by violation of natural justice or they have caused obvious injustice to some-one.

(19) In *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, , the order impounding the pass-port of the petitioner had been passed without giving her a hearing. Even though the order itself could not be said to have been passed by the Government without applying its mind to the facts of the case of the petitioner, nevertheless the Supreme Court thought that the petitioner should have been given an opportunity to show cause against the impounding of the pass-port. As the Government expressed its willingness to give such a hearing to the petitioner, the Supreme Court did not quash the order but apparently left it to the Government to review the said order, if necessary, after hearing the petitioner.

(20) While, Therefore, we refuse to quash the impugned order, the reasons for which have been disclosed by the Government, we direct the Government to give one more hearing to the petitioners to show cause that on the facts of the case of the petitioners no prejudice would be caused to the interests of the general public or to the development of indigenous industry by the recordal of petitioner No. 1 as the registered user of the trade mark of petitioner No. 2. If after such hearing the Government is satisfied that the impugned order should be reviewed the Government would be free to do so. If the Government is, on the other hand, of the view that even after such hearing there is no need to review the impugned order, the Government would say so. In the communication to the petitioners after such a hearing the Government may reaffirm the reasons already stated or may modify them or add to them.

(21) The petition is thus disposed of as above without any order as to costs.