

(1994) 10 DEL CK 0028

In the Delhi High Court

Case No : I.A.No. 11047 of 1992 in C.O. No. 8 of 1992

M/s. Colgate-Palmolive Co.

APPELLANT

Vs

M/s. Hindustan Rimmer and Others

RESPONDENT

Date of Decision : 17-10-1994

Acts Referred:

Citation : (1994) 4 AD 717 : AIR 1995 Delhi 95 : (1995) 1 ARBLR 64 : (1994) 31 DRJ 334

Hon'ble Judges : P.K. Bahri, J

Bench : Single Bench

Advocate : V.P. Singh and Sanjeev Sen, for the Appellant; H.L. Tikku and B.L. Wali, for the Respondent

Judgement

1. This application has been moved seeking condensation of delay made in filing the appeal. The appeal has been brought u/s 109 of the Trade and Merchandise Marks Act, 1958 (hereinafter referred as the Act) against the order of the Deputy Registrar of Trade Marks" dated October 25, 1991, which was received by the appellant on November 20, 1991, holding that the opposition filed by the petitioner to the registration application of the respondent of a particular label of the respondent under the Act stood abandoned. The appeal u/s 109 of the Act admittedly could be filed within 90 days of the impugned order. The appellant before filing the appeal had filed a review application u/s 97(c) of the Act before the Deputy Registrar, Trade Marks. This review application was filed on November 27, 1991. After issuance of notice to the opposite party and after hearing both the parties, the review application was dismissed on March 9, 1992, which order was communicated to the appellant on March 17, 1992 and the appeal against the impugned order was filed on May 1, 1992.

2. It is the case of the appellant that the appellant had diligently and in a bona fide manner pursued the remedy of review and the period spent in pursuing the aforesaid remedy ought to be excluded in computing the period of limitation for filing the appeal. It was further pleaded that the appellant is based in United

States of America and had appointed Crawford Bayley and Co.. Solicitors and Advocates, at Bombay for pursuing the trade mark cases on its behalf and after the impugned order dated October 25, 1991, was received, there took place delay in filing the appeal 35 it took time for getting necessary material and instructions from the appellant for filing the review petition and thereafter for filing the appeal.

3. The application seeking condensation of delay has been strongly contested by the respondent. I have heard the arguments in detail for deciding this application. Before I deal with the various contentions raised before me, I may refer briefly to the background of the litigation. As far back as in May 12, 1959, the appellant had got registered Colgate Dental Cream label showing colour red and white as shown in the representation attached to the petition Ex. B1 and in October. 1976 modified the said label without altering the main substantive features, the said representation being Ex. B2. The mark was also amended in style of letters as Ex. B3 in 1984. The respondent is stated to have adopted an identical label mark for its dental cream "COSMO", colour representation Ex. B4. The appellant filed a civil suit in 1978 in Bombay Court in which interim injunction was sought restraining the respondent from using such deceptively similar label which infringes the registered label of the petitioner and interim injunction was obtained against the respondent on March, 31, 1981 which was made absolute vide order dated April 11, 1985.

4. In 1984 the respondent is stated to have again adopted another trade mark which was again deceptively similar to petitioner's trade mark and a notice was served requiring the respondent to cease and desist. On failure of the respondent to comply with the notice, a suit was again filed in Bombay High Court in 1984 for injunction restraining the respondent from using such impugned trade mark and injunction had been obtained on November 27, 1984.

5. On September 6, 1984, the respondent had made an application for registration of a label which is again said to be deceptively similar to the appellant's registered label and the said application was advertised in the Trade Marks Journal on January 1, 1989 only to which the appellant filed an opposition on April 19, 1989. Counter statement was filed on October 18, 1989, by the respondent and the appellant from time to time moved applications in TM Form 56 seeking extension of time for filing the evidence. Last such application was moved on November 3, 1990. It is the case of the appellant that the counsel, who was handling the matter, had a heart attack and suffered hospitalization in 1991 but the impugned order dated October 25, 1991, was received by which the Deputy Registrar of Trade Marks held that the opposition of the appellant stood abandoned.

6. u/s 29(2) of the Limitation Act, the provisions of Section 3 of the said Act shall apply to special or local laws which lay down any special period of limitation and provisions of Sections 4 to 24 of the Limitation Act also have been made applicable to such proceedings which are taken under the special or local law. So,

it cannot be disputed with any stretch of reasoning that Section 5 read with Section 14 of the Limitation Act can be invoked for seeking condensation of delay in filing the appeal u/s 109 of the Trade and Merchandise Marks Act.

7. The learned counsel for the respondent has contended that the impugned order has been passed by a quasi judicial authority which is not a Court and thus, Section 5 and Section 14 of the Limitation Act cannot be invoked. There is no merit in this contention. The appeal u/s 109 of the Act lies to the High Court which is admittedly a Court for purposes of Limitation Act. The period of limitation prescribed for filing the appeal is 90 days. The High Court can, for sufficient reasons as mentioned in Section 5 of the Limitation Act, condone the delay in filing the appeal. The learned counsel for the appellant has argued that in law if this Court is to hold that the appellant had diligently and in a bona fide manner availed of the remedy of review then in view of the principles laid down in Section 14 of the Limitation Act, this Court can condone the delay in filing the appeal in the manner that the period spent in pursuing the remedy of review has to be excluded while computing the period of limitation. If that is done, the appellant had filed the appeal within 90 days of such computation.

8. The provisions of Sections 5 and 14 of the Limitation Act came up for consideration before the Privy Council in the case of Brij Indar Singh v. Lala Kanshi Ram, (1918) 45 Cal 94 : AIR 1917 PC 156. It was laid down in this case that for the exercise of the judicial discretion allowed by Section 5 of the Limitation Act, to admit, for "sufficient cause", an appeal which would be otherwise barred as being out of time, the case of Karm Baksh v. Daulat Ram (1888) P. R. No. 183, lays down a general rule that the true guide is whether the appellant has acted with reasonable diligence in the prosecution of his appeal and he ought to be deemed to have so acted where, after deducting the time spent in prosecuting with due diligence a proper application for review of judgment, the period between the date of the decree appealed from and the date of presenting the appeal does not exceed the period prescribed for preferring an " appeal. It was laid down in this very judgment that this general rule, or one practically similar, has been adhered to by all the High Courts in India and the Judicial Committee will not interfere with such a rule of procedure so laid down. So, this judgment of the Privy Council makes it clear that once the Court comes to the conclusion that a review application has been diligently and in a bona fide manner prosecuted, then the period spent in pursuing the said remedy has to be excluded from the limitation period prescribed for filing an appeal and if the appeal is filed within the limitation after excluding such period, then that would furnish sufficient cause for purposes of condoning the delay in Section 5 of the Limitation Act.

9. The view expressed by the Madras High Court in the case of Baiznath Lala Vs. Ramdoss, , cannot be termed to be in consonance with the law laid down by the Privy Council. The Madras High Court has held that where a person files a revision petition to the High Court against an order of a Subordinate Court when

he had another remedy open to him, he is not entitled to a deduction of the time occupied in prosecuting the revision petition u/s 14 of the Limitation Act.

10. The remedy of review is in addition to the remedy of appeal. If the review has been diligently and in a bona fide manner pursued, there is no reason as to why the principle of Section 14 of the Limitation Act could not be made applicable by analogy to the provisions of Section 5 of the Limitation Act. At any rate, the judgment of Privy Council is very clear on this point. I need not say anything more. The Privy Council has based its judgment on another Privy Council judgment given in *Dry Indar Singh v. Lala Kanshi Ram* AIR 1917 PC 156.

11. The learned counsel for the respondent has referred to *Hamida Bibi Vs. Fatima Bibi*, . This judgment is on a different aspect. In the said case, a suit was brought before the Judge, Small Cause Court. The Court directed the return of the plaint for presentation to a proper Court. The plaintiff refused to take back the plaint and lodged a revision. The revision was dismissed and three months after dismissal of the revision the plaintiff asked for the return of the plaint. The Court found that for a period of three months the plaintiff has not shown that the plaintiff was acting with any due diligence. So, the Court refused to condone the delay of three months. This judgment is totally inapplicable to the facts of the present case.

12. In *Ramdhani Muchi Vs. Khakshardas Tati and Another*, , the Calcutta High Court has held that in an application for extension of time by an appellant who has been prosecuting review proceedings, the applicant must show that the application for review was prosecuted with due diligence and there were reasonable grounds for filing such an application. It was held that the test of a bona fide application for review is not the prospect of success of the applicant and issuance of a notice on the opposite party is sufficient to show the bona fide prosecution of the review application.

13. In the present case, in the review application, notice was issued, elaborate arguments were heard and elaborate order was given in rejecting the review application. There is a bona fide issue which needs decision on the merits of the order passed by the lower authority in holding that the opposition of the appellant stood abandoned. The legal question which would require consideration is whether Section 53 and the relevant rules make it a mandatory provision for declaring the opposition as abandoned if the evidence is not filed within stipulated period or within the extended period and whether there remains no jurisdiction with the Trade Marks Registrar for entertaining an application for extension of time for filing the evidence even though the period prescribed under the rules stood elapsed and whether Section 101 of the Act would be still available to the Registrar of Trade Marks or not for extending the time. These were the points which were highlighted for invoking the review jurisdiction of the Registrar. The Registrar had dismissed the review application holding that the same is not made out on merits as well as on the ground of lack of power of the Registrar to review the order as the grounds mentioned in the review application

are not covered by the principles on which the review could be obtained. The review application has been dismissed on the ground that the Registrar has no jurisdiction to review the order on the grounds furnished in the review application.

14. In AIR 1937 276 (Privy Council) , it has been again laid down that in applying the principle of sufficient cause within the meaning of Section 5 of the Limitation Act, the principle of Section 14 should be applied by analogy. A Division Bench of the Madras High court in the case of Sri Rajah Tyada Pusapati Simhadriraju Dakshinakavata Dugarajulum Garu and Another Vs. The Unlimited Aryan Bank of Vizagapatam, , also held that the principle of Section 14 of the Limitation Act is that if and so long as a person has been bona fide and with due diligence seeking the relief that he was entitled to in a Court which he believed to be a Court competent to grant him that relief, he ought not to be penalised for having instituted that action in the wrong Court,

15. In Ramlal, Motilal and Chhotelal Vs. Rewa Coalfields Ltd., , the Supreme Court has clearly laid down that the failure of the appellant to account for his non-diligence during the whole of the period of limitation prescribed for the appeal does not disqualify him from praying for the condensation of delay u/s 5. In the said case, the appellant had not taken any step diligently for filing the appeal within the whole period of limitation but took steps for filing the appeal only on the last day of limitation on which date he fell ill. It was held that his want of diligence till the last day of limitation would not disqualify him from applying for the condensation of delay occurring on the last day of the limitation. In this very judgment the Court held that consideration of bona fide or due diligence are always material and relevant when the Court is dealing with the applications u/s 14 of the Limitation Act and in dealing with such application the Court is called upon to consider the effect of the combined provisions of Sections 5 and 14 and the consideration which has been expressly made material and relevant by the provisions of Section 14 cannot to the same extent and in the same manner be invoked in dealing with applications which fall to be decided only u/s 5 without reference to Section 14.

16. It is quite clear that where Section 14 of the Limitation Act is invoked even as an analogy for purposes of Section 5 of the said Act the principle requisite laid down in Section 14 of the said Act have to be satisfied in order to have the finding from the Court for existence of a sufficient cause for not preferring the appeal within time.

17. The learned counsel for the respondent has made reference to Kesharibhai Jesingbhai Vs. Bai Lilavati and Others, , wherein it has been held that ignorance of law resulting in inaction on the part of the litigant to assert his rights of which he has no knowledge as a result of such ignorance does not constitute sufficient cause within the meaning of Section 5 of the Limitation Act. I do not understand how these observations made in this judgment are applicable to the present situation. Here the appellant has exercised his statutory right to file the review

application under the bona fide belief that he could possibly get the relief from the authority which passed the impugned order and he diligently pursued that remedy but without success. So, when it is shown that he has pursued a particular remedy and in a bona fide manner and had not succeeded in getting the said remedy from the Court or the authority on account of finding given that the review was not competent on the grounds taken in the review application, it cannot be said that ingredients of Section 14 have not been fulfilled in the present case. In this very judgment, the Gujarat High Court had held that the time spent in prosecuting with due diligence and in good faith another proceeding in a wrong tribunal or before a wrong forum would liable to be excluded on the analogy of principle embodied in Section 14 of the Limitation Act and if after excluding such time the appeal is within period of limitation that would constitute sufficient cause within the meaning of Section 5 of the Limitation Act. Reliance is placed on various previous Privy Council judgments already referred by me above.

18. The learned counsel for the respondent has made reference to Commissioner of Sales Tax, U.P., Lucknow Vs. Parson Tools and Plants, Kanpur, , wherein it has been held that having regard to the context of sub-section (2) of Section 14, the word "Court" signifies a Court in strict sense and does not include an authority who acts as a tribunal or a quasi judicial tribunal and may be regarded as a Court in the wider sense of the term. However, the Full Bench of the Allahabad High Court has held that Section 14(2) of the Limitation Act applies to the appeal which is brought u/s 9 of the U. P. Sales Tax Act. In this very judgment, it was held that proceedings before the Sales Tax Officer would be civil proceedings to come up within the consideration of Section 14(2) of the Limitation Act. If that is so, the proceedings being done by the Registrar of Trade Marks would be also civil proceedings and thus, it cannot be said that principle of Section 14 cannot be taken advantage of as analogy for purpose of Section 5 of the Limitation Act by the appellant merely the fact the review application was not decided by any Court as understood by the meaning of word "Court" in strict sense.

19. In the case of Balbir Singh Vs. Bogh Singh, , keeping in view the provisions of Section 5 of the Limitation Act, the Supreme Court held that the appellant is entitled to the deduction of period during which he prosecuted the appeal before the Additional District Judge and excluding such period the appeal was entertained condoning the delay on account of sufficient cause as mentioned in Section 5 of the Limitation Act.

20. Reference was made to The The Commissioner of Sales Tax, U.P., Lucknow Vs. Parson Tools and Plants, Kanpur, . In the said case, provision of U. P. Sales Tax Act came up for interpretation. The Supreme Court noticed that Legislature has deliberately excluded the application of the principles underlying Sections 5 and 14 of the Limitation Act, except to the extent and in the truncated form embodied in sub-section (3-B) thereof and thus, it was held that provisions of Sections 5 and 14 of the Limitation Act cannot be brought into play. But the

provisions of Trade and Merchandise Marks Act, 1958 do not have such provisions by which Sections 5 and 14 of the Limitation Act have been made inapplicable to the appeal brought u/s 109 of the said Act. So, this judgment does not help the respondent in any manner.

21. The learned counsel for the respondent also cited Gurdit Singh and Others Vs. Munsha Singh and Others, . The judgment is based on totally different facts which have no applicability to the present case. The three important conditions appearing in Section 14 of the Limitation Act have been summarised by the Supreme Court as follows: (1) that the plaintiff must have prosecuted the earlier civil proceeding with due diligence; (2) the former proceeding must have been prosecuted in good faith in a Court which from defect of jurisdiction or other cause of a like nature was unable to entertain it, and (3) the earlier proceeding and the later proceeding must be based on the same cause of action. It was held that the scope of the words "or other cause of a like nature" which follow the words "defect of jurisdiction" in Section 14 aforesaid has to be determined according to the rule of Ejusdem Generis. According to that rule, they take their colour from the preceding words "defect of jurisdiction" which means that the defect must have been of an analogous character barring the Court from entertaining the previous suit.

22. The learned counsel for the respondent has contended that the Registrar under the Act had the jurisdiction to entertain the review petition and so, the review petition has not failed on account of lack of jurisdiction on the part of the Registrar or any other cause of a like nature. This contention is without merit because perusal of the order dismissing the review petition shows that the Registrar has held that there was no grounds made out in the review petition which could give the jurisdiction to the Registrar for reviewing the order. So, the dismissal of the review petition is of the kind which pertained to defect of jurisdiction. It is not necessary that there should be any inherent lack of jurisdiction in entertaining the review petition. The jurisdiction to entertain the review petition may be existing in the particular Court or authority but if the review petition is not entertained on a ground that it is not covered by the well known grounds of review laid down in the Act even then it can be said that the review has failed on account of defect of like nature pertaining to lack of jurisdiction.

23. Reference was made to Corporation of Calcutta Vs. Pulin Chandra Daw and Others, . In this case the Court found that cause of action in the earlier suit was not identical with the cause of action in the latter suit. It was also laid down that the defect of jurisdiction must be of such character as to make it impossible for the Court to entertain the earlier suit or application either in its inception or at all events as to prevent it from deciding it on merits. This judgment would not apply to the facts of the present case. Here, even if the review application had been rejected on merits but the fact cannot be lost sight of that the Deputy Registrar has held, inter alia, that application for review was not competent on the grounds

mentioned in the application. That indicates the defect in the jurisdiction of the Registrar to entertain the review application.

24. Ram Dawar (since dead and therefore represented by his son Chandrajeet) and Others Vs. D.D.C. Azamgarh and Others, , reiterates the same principle as laid down by the Privy Council that the period between the institution and withdrawal of the earlier civil proceedings should be excluded for the purpose of limitation in respect of the subsequent proceedings.

25. This Court in the case of Babu Ram v. Devinder Mohan Kaura, AIR 1981 Delhi 14, also held that by virtue of Sections 5 and 14 of the Limitation Act even instituting a petition in a forum on a mistaken advice of the senior counsel but if the same has been instituted bona fide, the same would furnish sufficient cause for condoning the delay u/s 5 read with Section 14 of the Limitation Act.

26. The learned counsel for the respondent referred to Mahesh Chander v. Darshan Kaur 1982 R LR 52 : AIR 1982 NOC 69, wherein the Court has held that Section 14 of the Limitation applies to a suit or an application and it does not apply to an appeal. This judgment does not help the case of the respondent in any manner because the Court was not considering the provisions of Section 5 read with Section 14 of the Limitation Act. Admittedly, Section 5 of the Limitation Act does apply to appeal and Section 14 of the Limitation Act can be used for purposes of Section 5 on analogy to show existence of sufficient cause as has been laid down in various judgments discussed above.

27. Zafar Khan and Others Vs. Board of Revenue, U.P. and Others, , the Supreme Court has reiterated the legal position that the expression "defect of like nature" appearing in Section 14 of the Limitation Act would take the hue from the expression "defect of jurisdiction" in view of the principle of adjusted generis.

28. The Supreme Court in Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others, , has laid down the necessity of the Courts adopting the liberal and justice oriented approach in considering the question of extant of sufficient cause for condoning the delay u/s 5 of the Limitation Act. The Supreme Court has laid down as follows (at p. 1354 of AIR):

1. "Ordinarily a litigant does not stand to benefit by lodging an appeal late.
2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause 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."

29. If we keep these principles in view the application seeking condensation of delay of the appellant merits to be considered favorably. The appellant has been diligently trying to protect its rights from being infringed by the respondent time and again and there could be no deliberate abandonment of the rights by the appellant at any stage vis-a-vis the matter in question.

30. Lastly, counsel for the respondent referred to Ram Bhawan Singh and Others Vs. Jagdish and Others, . I have gone through this judgment and I find that on merits which were based on different facts the Supreme Court found that delay of 1198 days had not been sufficiently explained. Present is not such a case.

31. So, in view of the above discussion, I find that in the present case, the appellant has been able to show sufficient cause seeking condensation of delay in filing the appeal, firstly, the appellant diligently and in a bona fide manner prosecuted and pursued the remedy of review and that remedy was held to be not available on account of defect of jurisdiction in the sense that review application was not maintainable on the grounds mentioned therein, and the said review application was based on the same cause of action as the present appeal. So, the ingredients of Section 14 of the Limitation Act stood satisfied. If that is so, they furnish sufficient cause u/s 5 of the Limitation Act to enable the appellant to seek condensation of delay and in view of the ratio of law laid down by the Privy Council in the judgments mentioned above, the period spent by the appellant in prosecuting the review application has to be excluded in computing the period of limitation and in doing so, it is evident that appeal has been filed within the period of said 90 days. Even otherwise there exists sufficient cause for condensation of delay. I allow the application and condone the delay made in filing the appeal.

32. Application allowed.