

(2012) 05 IPAB CK 0003

In the Intellectual Property Appellate Board

Case No : OA/109, 113/2004/TM/DEL

M/s. Haldiram (India) Private Limited B-1/H8, Mohan
Cooperative Industrial Estate Ltd., Mathura Road, New Delhi
– 110044

APPELLANT

Vs

Prabhushanker Aggarwal, Shri Mahesh Kumar Aggarwal, Shri
Ashok Kumar Aggarwal And Shri Aggarwal (Minor) Through
His Mother & Natural Guardian, Smt. Shobha Aggarwal All
Trading As M/S. Haldiram Bhujawala 7, Jagmohan Mullick
Lane, Kolkata - 700007 (West Bengal) And Mr. Ramji Lal, The
Assistant Registrar Of Trade Marks, Trade Marks Registry,
Okhla Industrial Estate, Okhla, New Delhi – 110020

RESPONDENT

Date of Decision : 18-05-2012

Acts Referred:

Trade Marks Act, 1999 — Section 4

Citation : (2012) 51 PTC 636 (IPAB)

Hon'ble Judges : Prabha Sridevan, J;S. Usha, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Prabha Sridevan, J

1 . There are five appeals, they are against the order passed in an Interlocutory Petition. The brief facts which are necessary are given hereunder.

One Mr. Ganga Bishan adopted the mark HALIDRAM BHUJIAWALA. He expanded his business i various cities including Kolkata. He took his

sons as partners. One son retired from the firm in 1958 and he shifted to Kolkata and was permitted to use the trade mark HALDIRAM

BHUJIAWALA at Kolkata. His wife Smt. Kamala Devi was inducted as partner. In 1972, an application for registration of trade mark HALDIRAM

BHUJIAWALA ""HRB"" (Logo) as represented in 'V' shape was filed in the year in

the name of four sons including the aforesaid Smt. Kamala Devi.

The four sons had been trading as HALDIRAM BHUJIAWALA. In 1974, it is claimed that the partnership was dissolved and the right to use the

mark was given to Smt. Kamala Devi in respect of the territory of West Bengal. According to the appellant thereafter there was an understanding

that one would use the mark in West Bengal alone and other would not use it in West Bengal and use it elsewhere. In 1980, the founder Shri Ganga

Bishan died. There were several oppositions between the parties and the oppositions to the appellants mark were listed for final disposal on

10.03.2004. On 14.02.2004, the respondent herein filed a petition for stay of the main proceedings for registration. This was objected to by the

appellant. Another application was filed for taking further evidence on record. On 29.03.2004, the arguments were heard by Shri M.C. Gupta, Deputy

Registrar of Trade Marks and orders were reserved. Orders were not pronounced. Then the respondent filed a petition for Condonation of Delay for

filing evidence and this was taken up for hearing on 01.07.2004 by Mr. K.K. Sharma, Joint Registrar of Trade Marks. The respondent objected to him

hearing the matter and also made personal allegations of bias, it was also stated that as no order under Section 4 of the Act was passed by the

Controller General, Mr. K.K. Sharma could not hear the matters.

2 . On 12.07.2004, a letter was forwarded by the respondent stating that unless a specific order was passed for withdrawing the case from Mr. M.C.

Gupta and assigning the same to Mr. K.K. Sharma, the matters cannot proceed further. A request was filed on TM-46 for the copy of the order

passed by the Controller General in terms of Section 4 of the Act.

3 . On 13.07.2004, the matters were listed before Mr. Ramji Lal who was the only hearing officer on that day. It appears, he refused to take up the

hearing and informed the appellants that since orders were already reserved in the proceedings by Mr. M.C. Gupta and since the senior officer Mr.

K.K. Sharma was also seized of the matter, he will not hear it. Then several objections were filed with, which are really not relevant to the main issue,

but on 23.07.2004, the hearing was taken up by Mr. G.L. Verma, Assistant Registrar of Trade Marks. According to the appellant, none of the

objections filed by the opponents were served on the appellant. The respondent took objections to Mr. G.L. Verma hearing the matters and also

contended that a review petition against the order of Mr. K.K. Sharma was pending so the matter cannot be heard by Mr. G.L. Verma. Then a Writ

Petition was filed making various allegations. This was disposed off by the Hon'ble Delhi High Court directing the Registry to issue the certified copy

of the orders and that the Interlocutory Petitions and all connected proceedings should be taken up for disposal on 16.08.2004. The certified copies were furnished.

4 . On 13.08.2004, the appellant claims that he ascertained from Mr. Ramji Lal, Assistant Registrar of Trade Marks about the time of hearing. Now

we come to the crucial date ie. 16.08.2004. According to the appellant, he spoke to the counsel for the respondent and 3.00 pm was fixed for hearing

but at 11.45 he was informed that the matter was already taken up for hearing at 11.30 itself. At 12.30 pm counsel for the appellant rushed to the

Trade Mark Registry and he commenced the arguments. The counsel for the appellant was required to attend other work and he requested the 2nd

respondent that the arguments may be adjourned to the next date on 17.08.2004. According to the appellant, his request was granted. But he was

shocked to find that on 16.08.2004 itself an order was passed and also communicated to the appellant on 17.08.04, he was informed that the orders has been passed.

5. By the impugned order, stay was granted and these appeals have been filed. There has been no progress in the opposite proceedings till date.

6 . The learned counsel for the appellant submitted that the entire proceedings was vitiated, there was no occasion ever in the history of the Trade

Mark Registry when the arguments have been heard and orders have been pronounced and communicated on the same day. The learned counsel

submitted that there is something more than meets the eye. The fact that the respondent who objected to all other officers hearing the matters had

with alacrity argued before Mr. Ramji Lal indicates malafide. The learned counsel submitted that the record do not show that orders were reserved on

16th August but it only says Interlocutory Petition heard. It would support his case that originally the 2nd respondent had acceded to his request to

hear the arguments on 17.08.2004. The learned counsel submitted that though when the respondent has insisted on specific orders from the Controller

General as to which officer should hear the matter when the Assistant Registrar

heard the case no such request was made. The learned counsel referred to the letters issued by the same officer who had expressed doubts about jurisdiction. The learned counsel submitted that though on the date of hearing five Interlocutory Petitions were supposed to be heard, what was listed and what was disposed off was only the stay petition. The learned counsel submitted that he had given detailed objections but none of them were considered and in one paragraph, the Assistant Registrar had simplified the issue and rejected his objections. The learned counsel submitted that the order reeks of non application of mind and therefore must be set-aside. The learned counsel also made his submission on merits. He submitted that Smt. Kamala Devi cannot after so many years challenge the dissolution deed. The learned counsel submitted that on the one hand the respondent contended that the deed of dissolution was forgery and on the other hand that it was got by undue influence. He submitted that both these allegations cannot stand together and if it was undue influence made it is understood that the executant had signed the documents whereas in the case of forgery some one had forged signature.

7. The learned counsel submitted that infact the respondent's plea for amendment of the plaint to amend the case of undue influence to one of forgery was rejected. The Hon'ble Supreme Court also confirmed the order and directed the trial court to proceed on the basis of the plea of undue influence and that thereafter if the trial court had some prima facie reasons to accept the case of forgery to allow the parties to lead such evidence. The learned counsel submitted that there was no justification to stay the registration of this mark, since even if the deed of dissolution of the partnership is set-aside. Smt. Kamala Devi would become a proprietor of the mark No. 285062 alongwith the other proprietors. If Smt. Kamala Devi's plea is not accepted the mark No. 285062 will remain as it is. In any event registration of this mark will not be affected by the finding regarding the deed of dissolution.

8 . The learned counsel for the appellant referred to decisions on onus to prove concurrent user and the power to stay opposition proceedings.

9 . The counsel for the appellant also submitted that in many of the cases that are pending, inter-parte plea of forgery had not been taken.

10. The learned counsel for the respondent submitted that there was no error in

the particular officer Mr. Ramji Lal passing the order. The Hon'ble Delhi High Court in its order had specifically mentioned that the officer at Delhi should hear the matter and had fixed the date of hearing. He also submitted that a review should have been filed if the appellant felt that no opportunity was given to the appellant on 16.08.2004. He submitted that when the counsel for the appellant had not chosen to do so this allegation cannot be accepted. He referred to various decisions to the effect that what is recorded in the order by the judicial authority can be set right only by review and not by an appeal.

11. The learned counsel submitted that there was no error in the officer taking up only the Interlocutory Petition for stay since that was the only petition surviving at that time.

12 . In the order passed by the Hon'ble Delhi High Court which is a brief one it merely says that having regard to the facts and consideration of the case. ""Parties are directed to appear before the Registrar of Trade Marks, Delhi on 16.08.2004. The Interlocutory Petition and any other connected proceedings between the parties shall be taken up for disposal on that date.

13. The stay petition has been filed alleging that on 16.11.1974 a deed of dissolution was obtained by getting the forged signature of Smt. Kamala Devi. In 1999, Smt. Kamala Devi who came to know of the forgery filed the suit before the Hon'ble High Court of Kolkata and Hon'ble High Court of Delhi and also criminal complaint. The stay petition lists a number of cases that are pending where the trade marks HALDIRAM BHUJIAWALA, HALDIRAM etc. are involved and they are between the same parties.

14. A reply has been filed in which it is stated that dissolution of the firm had been admitted by the respondent in all the judicial proceedings from 1991 to 1999. It is stated that the stand of the respondent of the dispute in all the legal proceedings is only that Smt. Kamala Devi has a concurrent right to use the mark and there is no attack on the mark itself. It is stated in fact Smt. Kamala Devi has been charged with tampering of judicial records and an FIR lodged against him under the directions of Hon'ble Chief Justice of High Court of Rajasthan. It is also stated that the Hon'ble High Court of Kolkata had already dismissed the suit.

15 . On 28.06.2004, the stay petition was heard by Mr. M.C. Gupta, it was fully argued, so the respondent took the stand that since till date the

decision of Mr. M.C. Gupta has not been received it would not be proper to fix a fresh hearing as the matters were already heard and concluded by

Mr. M.C. Gupta.

16. On 01.07.2004, Mr. K.K. Sharma, Joint Registrar of Trade Mark on receipt of request for adjournment, listed the matter for hearing on

13.07.2004.

16. At this juncture, counsel for the respondent had filed TM-46 alleging that the aforesaid Mr. K.K. Sharma was specially flown to Delhi to take up

hearing of the case and since they had filed a review petition of the order dated 01.07.2004, the matter must be adjourned. There is an order on

23.07.2004 passed by Mr. G.L. Verma recording what the counsel of the respondent had submitted for adjournment. The officer recorded that the

grounds are not satisfactory but a medical certificate has been produced therefore it was adjourned to 28.07.2004 for hearing of the cases and that no

further adjournment will be given. Thereafter the Writ Petition was filed and the order mentioned above was passed.

18. The mark subject matter of these appeals has been applied for in 1991 claiming user from 1941 and also that it should be associated with mark No.

285062. There is no doubt regarding the fact that both parties want to take advantage of the word HALDIRAM and the goodwill generated by Ganga

Bishan. This is seen from the registration application No. 330375 in the name of the respondent herein claiming user from 1968. The legal user

certificate for No. 285062 shows that originally the application was made on 29.12.1972. The registration was granted on 27.02.1981 (it is not very

clear but since the last number 1 is seen, we can safely assume it is 1981). By request filed in TM-24, sometime in 1985 by producing the

controversial ""Dissolution Deed"" the name of Smt. Kamala Devi was removed. The continuance of Smt. Kamala Devi's name in the Registry will

depend upon the out come of the suit. But that pertains to mark No. 285062 and not the present mark No. 559875

19. Haldiram India Private Limited which is a company incorporated under the Companies Act is the applicant mark for No. 559875 which is

opposed, by the respondent here. The applicant for the mark in No. 285062 is an association of persons trading as Haldiram Bhujawala which at the

time of application included Smt. Kamala Devi. If the said Smt. Kamala Devi

succeeds in proving that her signature was forged, she may file an application to include her name as a registered proprietor of that mark. But on that ground we do not see why the present application filed by a company who is a totally different person, should be stayed. The respondent had prayed for stay, and it was granted in 2004. Eight years have passed and the litigation does not appear to have reached any conclusion. We are not going to deal with the submissions made by the learned counsel for the appellant whether the plea of undue influence or forgery can be taken so belatedly. That will be decided by the appropriate court. We are only concerned whether on the facts before us the discretionary order of stay should be continued. We have seen the objections raised by the appellant. The impugned order has not dealt with any of those objections. If the appellant is aggrieved that there is non application of mind, it is justifiably so. On this ground alone we can set-aside the order and terminate the stay.

20. These proceedings have been stayed for 20 years. Even if Smt Kamala Devi's signature was really forged, her name can be recorded only in respect of 285062. That is no reason to stay this mark No. 559875 which has been applied for by Haldiram (India) Private Limited which is a totally different juridic entity.

21. On the question whether the connected proceedings should be stayed, we may look into 1999 (3) SCC 679 - Capt. M. Paul Anthony Vs Bharat Gold Mines Ltd. and another the Supreme Court held that even in a case where departmental proceedings and criminal proceedings are launched on the same set of facts. If the criminal case is being unduly delayed, the departmental proceedings, even if they were stayed on account of the pendency of criminal case, can be resumed and proceeded with.

22. In 2007 (5) CTC 630 - Indian Overseas Bank Vs. P. Ganesan - Supreme Court reversed the judgment of Madras High Court holding that "the departmental proceedings pending criminal proceedings does not warrant an automatic stay and that the discretion must be exercised taking into consideration whether the charges and the evidence of both the proceedings are common and whether any complicated question of law arises. These cases are only referred to by us as an analogy to show why the proceedings shall not be stayed and what are the strict conditions for staying proceedings because of pendency of another case.

23 . Submissions have been made by both counsel with regard to the manner in which this case had proceeded from one officer to the other and the practice adopted by the officers in recording what happened on each date of hearing. So we have to deal with this. The objection of the appellant to the particular officer taking up the matter on 16.08.2004 cannot be sustained. It is because of the order of the High Court that the matter was taken up by that officer and it is not disputed that he was the only person acting as a Registrar at Delhi on that day. Therefore all the objections raised regarding this are not accepted. But we are quite dismayed at the manner in which the proceedings have been taken up. We do not see why Mr. M.C. Gupta who had first heard the case and had reserved orders did not pronounce them. We understand that if an officer who had reserved order is transferred to another jurisdiction he can still pronounce the orders and the order will be sealed by the present incumbent of the jurisdictional office. If that officer had passed orders all these allegations and questions could have been avoided.

24. It is not proper that an officer who is in one particular office for just 1 or 2 day takes up a matter for final disposal. If this practice continues, it must be stopped forthwith. If an officer who is the Registrar/Deputy Registrar/ Assistant Registrar in one place, goes to another place on some work for a day or two, that officer shall not take up a final hearing matter in that office, where he is on duty just for a day or two.

25. It is better in the interest of the officer to record what happened on each day of hearing contemporaneously and with the date. In the present case, the officer could have written on 16.08.2004, that orders were reserved or arguments had concluded. Then the complaint raised by the appellant could have been avoided. Or if the officer had actually granted him time to argue on the next day and had recorded it, then it would not be possible to withdraw the permission granted and proceed to pass orders. It is in the interest of transparency and good governance that these practices are followed.

26. The learned counsel for the appellant submitted that never in the history of Trade Marks Registry had an order been reserved, dictated and communicated on the same day. This case especially has a long history. The parties litigate continuously, even before us, the counsel submitted that

whatever orders may be passed that would be challenged. They are at logger heads with each other. Therefore a contested matter definitely deserves some thought. It is possible that the officer had passed the orders on the same day and communicated the orders too. But, the order failed to reflect the submissions made by the learned counsel for appellant may be because of the haste and this is not correct. The other possible scenario is perhaps those were the only submissions he had made that day hoping to argue on 17.8.2004 ie. next day. The officer could have even recorded that the counsel wants to be heard next day but permission refused. Every order is appealable and this Appellate authority must know what had happened. It is the duty of every quasi-judicial or judicial authority to record what had transpired. In this case, the matter has been treated like a passing the parcel game and this has been a grave miscarriage of justice. We hope that the Registry sets its act right.

27. To sum up the applicant for registration is a different entity from the registered proprietor of Trade Mark No. 285062. The issues are different.

Therefore the interim stay shall not continue. Therefore we set-aside the order impugned herein. The only application/Interlocutory Petition that

survive for consideration is the stay petition. The other Interlocutory Petitions for extension of time, for transfer it have become infructuous. The

Registry concerned shall take up DEL-T-2488/57922, DEL-T-2489/57922, DEL-T-2490/57924, DEL-T-2491/57925 and DEL-T-2515/57972 giving

opportunity to the parties and decide the question whether the mark No. 559875 in Class-30 shall be registered or not and pass orders in all other

cases. Accordingly, the appeal is allowed with the above directions. No order as to costs.