

(2014) 04 GUJ CK 0003
In the Gujarat High Court

Case No : Letters Patent Appeal No. 1590 of 2009 in Special Civil Application No. 10329 of 2007 and Letters Patent Appeal No. 1591 of 2009 in Special Civil Application No. 1927 of 2008 and Letters Patent Appeal No. 1592 of 2009 in Special Civil Application No. 1923

Pathiath Babu Rajendran

APPELLANT

Vs

Asst. Registrar of Trade Marks

RESPONDENT

Date of Decision : 10-04-2014

Acts Referred:

Trade and Merchandise Marks Act, 1958 — Section 107, 108, 11, 46, 56
Trade Marks Act, 1999 — Section 100, 125, 46(1)(b), 92

Citation : (2014) 60 PTC 272

Hon'ble Judges : K.S. Jhaveri, J; Abdullah Gulamahmed Uraizee, J

Bench : Division Bench

Advocate : Mehul Suresh Shah and Y.J. Jasani, Advocate for the Appellant; G.N. Shah, G.V.S. Jagannadha Rao, Minoo A. Shah and M.S. Sejal V. Sutaria, Advocate for the Respondent

Judgement

K.S. Jhaveri, J.—These appeals arise out of the common judgment and order passed in a group of petitions being Special Civil Applications No. 10329/2007, 1923/2008, 1927/2008 and 1922/2008 decided 01.07.2009 whereby, the said group of petitions was dismissed. The aforesaid group of petitions were filed for quashing and setting aside the orders dated 20.01.2005 and 23.02.2007 passed by the Intellectual Property Appellate Board (for short, "the IPAB") in rectification applications filed by respondent No. 3 herein under Section 107 of the Trade and Merchandise Act, 1958. Upon new enactment, the Trade and Merchandise Act, 1958 came to be repealed and the Trade Marks Act, 1999 came into force and the proceedings of rectification applications No. 1 to 4 of 1999 were transferred to the IPAB. By order dated 20.01.2005, the IPAB directed the Registrar of Trade Marks to remove the entry of all the four registered trade marks of the appellant, original petitioner. The review applications, along with the applications for transfer and misc. applications for stay of the order dated 20.01.2005, were

rejected vide order dated 23.02.2007. Both these orders were challenged before the learned single Judge unsuccessfully.

2. Mr. Mehul Suresh Shah learned counsel appearing with Mr. Y.J. Jasani for the appellant, original petitioner, submitted that the learned single Judge did not appreciate the matter in its proper perspective. He submitted that the IPAB has not granted sufficient opportunity to the appellant to lead evidence nor did the IPAB made its stand clear as to whether it intends to decide the rectification application proceedings "de novo" or from the stage at which they were transferred by the High Court u/s. 100 of the Trade Marks Act, 1999 (for short, "the Act") to it. He submitted that pursuant to the transfer of proceedings u/s. 100 of the Act, the IPAB straightaway fixed the final hearing without granting any opportunity to the appellant to present its case. The learned single Judge did not appreciate the provisions of the Act in its proper perspective and erred in dismissing the group of petitions. He submitted that Section 92 of the Act empowers the IPAB to examine the evidence on record, which was not exercised.

2.1 Learned counsel for appellant contended that the learned single Judge ought to have held that the proceedings before the IPAB were not original rectification proceedings u/s. 125 of the Act but were transferred proceedings u/s. 100 of the Act and therefore, it was obligatory on the part of the IPAB to first decide as to whether it intends to proceed with the matter "de novo" or at the stage at which it was transferred by the High Court.

2.2 Learned counsel further submitted that the rectification applications filed by respondent No. 3 were time barred as they were filed under the old Act. However, neither the IPAB nor the learned single Judge appreciated the above aspect of the case. He, therefore, submitted that the impugned judgment and order passed by the learned single Judge deserves to be quashed and set aside.

3. Mr. Jagannadha Rao learned counsel appearing for respondent No. 3 submitted that in the rectification proceedings, the: appellant, original petitioner, had filed affidavit-in-reply defending its case. Therefore, it was not that sufficient opportunity was not granted to the appellant. He submitted that the titles of the rectification applications mentioned that the same was under Sections 9, 11, 46 and 56 r/w. Sections 107 and 108 of the Act. He supported the impugned judgment passed by the learned single Judge and submitted that the learned single Judge has not committed any error warranting interference of this Bench.

4. We have heard learned counsel for both sides and have perused the impugned judgment as also the records of the case. The main contention raised on behalf of the appellant is that the IPAB had not afforded proper opportunity to the appellant to defend its case and therefore, the orders passed by the IPAB deserve to be quashed and set aside on the ground of violation of the principles of natural justice. However, we do agree with the submission canvassed on behalf of the appellant. The respondent No. 3 herein had filed the rectification applications u/s. 9, 11, 46 and 56 r/w. Sections 107 and 108 of the old Act.

Various contentions were raised in the rectification applications pertaining to the invalidity of the registration of Trade Mark.

5. It is pertinent to note that in the proceedings before the IPAB, the appellant had filed necessary affidavit-in-reply along with some documents. The record reveals that enough opportunities were granted to the appellant, which the appellant did not avail. We believe that in the absence of an application for "de novo" hearing of the rectification applications, the IPAB was justified in proceeding from the stage at which it was transferred to it by the High Court. No provision has been pointed out by the appellant which requires the IPAB to make its stand clear before the parties about the transferred proceedings.

6. Considering the above aspects of the case, we do not find any infirmity with the order passed by the IPAB as confirmed by the learned single Judge. We do not find any breach of the provisions of the Act. The IPAB has observed that the rectification applications were filed by respondent No. 3 herein along with documents before this Court in the year 1999 and the appellant had filed its reply along with documents in the year 2000. However, for reasons best known to the appellant, it held back those copies of invoices at the relevant, which, it subsequently, attempted to place on record of the IPAB after conclusion of the hearing. Nothing prevented the appellant to file copies of those invoices at the time of filing reply. It is not even the case of appellant that those invoices were not within its knowledge or possession. Thus, the appellant had waived its right by deliberate inaction or laches.

7. Insofar as the merits are concerned, it is the claim of respondent No. 3 that since the date of registration or the date of claim of user in the application for registration of the appellant, there is absolutely no evidence for the use of the said mark "PRIYA" by the appellant. The IPAB observed that the only document available is of the year 1993 and subsequent to this sale voucher, there is no evidence that the appellant is in trade and that its products are in the market. Therefore, the IPAB concluded that the appellant was not using the registered trade mark and was, thereby, liable for deprivation of its rights under the said registration as per Section 46(1)(b) of the Act. In view of the above discussion, we are of the opinion that the IPAB has rightly concluded that respondent No. 3 has successfully established the non-user of the trade marks by the appellant. We are in complete agreement with the reasonings given by the IPAB as also by the learned single Judge in the impugned judgment and hence, find no reasons to entertain these appeals. Consequently, the appeals are dismissed with costs which is quantified at Rs. 5000/- in each of the appeals.