
(2016) 04 GAU CK 0028
In the Gauhati High Court
Case No : W.P. (C) No. 2830 of 2007

Polycon Industries Pvt. Limited	Vs	APPELLANT
Union of India and Ors.		RESPONDENT

Date of Decision : 19-04-2016

Acts Referred:

Companies Act, 1956 — Section 22
Constitution of India, 1950 — Article 226

Citation : (2016) 4 GauLJ 233 : (2016) 3 GauLT 21 : (2016) 2 NEJ 475

Hon'ble Judges : Hrishikesh Roy, J.

Bench : Single Bench

Advocate : Mr. S. Banik, Advocate, Ms. B. Sarma, Advocate & Ms. B. Bora, Advocates, for the Appellant; Mr. S.C. Keyal, Asstt. Solicitor General, for the Respondent

Final Decision : Allowed

Judgement

Hrishikesh Roy, J. (Oral) - Heard Mr. S. Banik, the learned counsel appearing for the petitioner. The respondent Nos. 1-3 are represented by Mr. S.C. Keyal, the learned Asstt. Solicitor General of India. However the 4th respondent is unrepresented in this proceeding.

2. The challenge here is to the order dated 29.03.2007 (Annexure-IV), whereby the powers under Section 22 of the Companies Act, 1956 (hereinafter referred to as "the Companies Act") was invoked by the Regional Director, Eastern Region, Ministry of Company Affairs, at the instance of "M/s. Jai Silnter Polycon Private Limited" (Respondent No.4) and the petitioner company was directed to change their name to exclude the word "Polycon " from the registered name of the incorporated company.

3. In their complaint made on 6.9.2006, under Section 22 of the Companies Act, the respondent No.4 claimed to be the owner of the Trade Mark "Polycon" in respect of Rigid PVC pipes and PVC fittings, as per the certificate issued by the Registrar of Trade Marks and accordingly the respondent company sought

direction from the Regional Director on M/s. Polycon Industries Private Limited (writ petitioner), to change the Company's name, to exclude the Trade Mark "Polycon", in the nomenclature of the writ petitioner.

4. Responding to the notice issued by the Regional Director, the petitioner at first questioned the maintainability of the complaint filed by the 4th respondent, since it was filed 8 years after incorporation of the petitioner company on 2.11.1998. It was further contended that provisions of Section 22 (1)(ii) of the Companies Act was incorporated by way of amendment w.e.f. 15.9.2003 and the same has prospective application and the power under the amended provisions can't be invoked retrospectively, to direct change of name of an existing company, incorporated on 2.11.1998. The petitioner also contended that the Trade Mark registration of the complainant, is under Class 17 of the 4th schedule of the Trade Marks Rules, 2002 (hereinafter referred to as "the T.M. Rules"), whereas the writ petitioner applied for categorisation under Class 19 and therefore it was argued that the direction for change of name for one, when the concerned entities are categorized under separate classes, can't be directed by the Regional Director and it is not a case of infringement of the Trade Mark of the complainant company.

5. The Regional Director did note that the complaint of the 4th respondent was filed after 8 years of incorporation of the petitioner company but nevertheless applying the proviso to Section 22 (1)(ii)(b) of the Companies Act, the authority concluded that since the complainant learnt about the T.M. infringement by the writ petitioner only on 4.10.2003, from the letter written by their Patent & Trade Mark Attorney, the complaint was found to be within time. On the merit of the complaint, the Regional Director observed that the name "M/s. Polycon Industries Private Limited" closely resembles the trade mark "Polycon", owned by the complainant company and therefore it was found to be a fit case for issuing direction for omitting the Trade Marked word. Subsequently in exercise of powers under Section 22 of the Companies Act, the writ petitioner was directed to change their name so as to exclude the word "Polycon", from the registered name of the company.

6.1. Assailing the legality of the impugned order, Mr. S. Banik, the learned counsel submits that under the un-amended provision of Section 22, rectification of the name of a company could be directed only when the Central Government is of the opinion that the said name is identical with/or too nearly resembles the Trade Mark name, by which a company in existence has been previously registered. But the Section 22, as it stood prior to amendment, did not envisage entertainment of complaint by a registered proprietor of a Trade Mark. But only through the change in law inserted by the Act 47 of 1999, the proviso to Section 22 (1)(ii)(b) was included w.e.f. 15.9.2003 and this permitted an application to be made by a registered proprietor of a Trade Mark. Therefore it is argued that change of name can't be directed for a company, which was in existence prior to the amendment of 15.9.2003 in the Companies Act.

6.2. According to the writ petitioner, the registered name approved for their company by the Registrar of Companies at Shillong should not be changed, as the business operation of the writ petitioner is primarily within the North Eastern Region, whereas the business of the 4th respondent, which is registered under the Registrar of Companies at Jaipur, is in a different zone of the country. Thus there is little possibility of good will clash hinging on the Trade Mark between the two entities.

6.3. Another legal argument to question the merit of the impugned direction is also advanced by the learned counsel and Mr. Banik submits that the registration of Trade Mark of the complainant company is under the Trade & Merchandise Act, 1958, hereinafter referred to as "the 1958 Act". The erstwhile 1958 Act was repealed on account of the extensive amendments necessitated in the old Act and hence the T.M. Act, 1999 was brought into force w.e.f. 15.9.2003. On the same date, amendments were also incorporated in Section 22 of the Companies Act, whereby a registered proprietor of a Trade Mark under the T.M. Act, 1999, could apply to the Central Government for rectification of name of another company, by projecting that the name of the other company is identical with/or nearly resembles the name by which, the complainant is registered. As the "Polycon" Trade Mark was registered in the name of the 4th respondent under the 1958 Act, the learned lawyer argues that invocation of power under Section 22 of the Companies Act, which relates to violation of registered Trade Mark under the T.M. Act, 1999, was not warranted.

7. In the present case, neither the Central Government nor the private respondent have filed any counter affidavit and therefore the Court is constrained to examine the issue on the basis of the available materials.

8. The case papers reflect that the respondent M/s. Jai Silnter Polycon Private Limited was incorporated on 18.12.1987 and they secured the Trade Mark "Polycon" in respect of rigid PVC pipes and PVC fittings on 30.6.1993, under the erstwhile Trade & Merchandise Act, 1958. On the other hand, the writ petitioner company was incorporated on 2.11.1998, without any objection from any quarter. But eight years after their incorporation, the 4th respondent on 6.9.2006 invoked Section 22 of the Companies Act and applied to the Regional Director, for changing the name of the later company, as the registered Trade Mark "Polycon" is used in the description of the other company. Such complaint of an existing company could be entertained under Section 22 of the Companies Act, only after 15.9.2003 but prior to that, direction for change of name could not have been ordered under the old law, at the instance of the proprietor of a trade mark and only sou moto action by the Central Government was contemplated, under the unamended provision. Moreover the Regional Director ought to have considered the limitation on his power to act against an existing company, incorporated prior to 15.9.2003, under the amended provision of Section 22 of the Companies Act, as the power under the amended provision should not permitted to be invoked, retrospectively.

9. The registration for Trade Mark is to be applied under Section 23 of the T.M. Act and under Sub-Section (2) thereof, the Registrar is competent to issue a certificate to the applicant for registration of Trade Mark. In the event of infringement, action can be taken by the Registrar of Trade Mark, under Section 50. A party aggrieved by the decision of the Registrar can approach the Appellate Board under Section 91 of the T.M. Act. But in the instant case, the 4th respondent did not seek any remedial action under the T.M. Act and instead approached the Regional Director, under Section 22 of the Companies Act.

10. As earlier noted, the complaint of infringement of Trade Mark right could not be entertained under the un-amended provision of Section 22 and since entertainment of complaint was envisaged only by the amendment incorporated w.e.f. 15.9.2003, the power to entertain such complaint in my opinion, can't be retrospectively invoked against those companies, which were incorporated prior to the amendment of Section 22 of the Companies Act i.e. 15.9.2003.

11. That apart, the 4th respondent was granted Trade Mark registration of the word "Polycon" under the 1958 Act and it is not discernable from the available materials as to whether the 4th respondent secured the registration of the same Trade Mark, under the T.M. Act, 1999. Therefore when Section 22 of the Companies Act refers to infringement of Trade Mark under the repealed Act, the Regional Director should have examined whether the Trade Mark of the complainant is under the repealed law or under provision of the current Act and the consequent implication.

12. Another aspect on the merit of the direction for change of name of the petitioner company, bears consideration of the Court. The question is whether there has actually been an infringement of Trade Mark right, as is claimed by the 4th respondent. The two litigating companies are dealing with similar products but they conduct businesses in different areas of the country. Whether the use of the word "Polycon" in the registered name of the petitioner company would infringe the Trade Mark right of the 4th respondent, registered under the Jaipur Registrar of Companies, should have been appropriately considered by the Regional Director. But no consideration on this aspect is discernable, in the impugned order of the Regional Director of the Companies.

13. The petitioner company was incorporated on 2.11.1998 and by the time the complaint came to be filed by the 4th respondent on 6.9.2006, the petitioner in their registered name have naturally earned recognition and good will in the North East market. Moreover the pipes manufactured by the 4th respondent are categorized under Class 17 of the Trade Mark Rules, whereas the writ petitioner applied for categorisation under Class 19 for their product. This itself indicates that although the material base for their respective products i.e. P.V.C. may be the same, the final output of the two manufacturers will certainly have distinctive features. More importantly it is not the same market for both the products, as the area of operation for the petitioner is the North East Region, whereas the operational area for the 4th respondent, is the North Western India.

14. In view of the above discussion and having particular regard to the exercises of retrospective power by the Regional Director, under the amended provision of Section 22 of the Companies Act, I am of the view that case is made out for intervention with the impugned order dated 29.03.2007 (Annexure-IV), passed by the Regional Director, Eastern Region, Ministry of Company Affairs. Consequently the said order is declared to be unsustainable in law and the same is accordingly quashed.

15. With the above order, the writ petition is thus allowed, without any order on cost.