

(2004) 09 IPAB CK 0014

In the Intellectual Property Appellate Board

Case No : Transferred Appeal No. 287/2003/TM/MUM (A. No. 216/2002 (T, M))

Prashant Sharma

APPELLANT

Vs

Assistant Registrar Of Trade Marks And Anr.

RESPONDENT

Date of Decision : 02-09-2004

Acts Referred:

Trade And Merchandise Marks Act, 1958 — Section 3
Trade Marks Act, 1999 — Section 3(b), 83, 100, 159, 159(1)

Citation : (2004) 29 PTC 742 (IPAB)

Hon'ble Judges : S. Jagadeesan, J;Raghubir Singh, J

Bench : Division Bench

Advocate : Haridas Gupta, Prashant Sharma

Judgement

Raghubir Singh, J

1. The appeal No. 216/2002 (T&M) has been transferred from the High Court of Judicature at Jabalpur to this Board and numbered as TA/287/03.

The case was listed for consideration and was heard on 9.8.2004. Learned counsel Shri Haridas Gupta appeared for the appellant and learned counsel

Shri Prashant Sharma appeared for the second respondent.

2. Appellant filed Appeal No. 216/2002 (T&M) in the High Court of Judicature at Jabalpur against the order dated 25.11.2002 passed by the Assistant

Registrar of Trade Marks, Mumbai in matter of opposition of appellant in application No. 596305 in the name of M/s. Bharat Auto Products, Gwalior.

3. The issue about maintainability of the appeal in the High Court of Judicature at Jabalpur was taken at the outset. Learned counsel for the appellant

argued that this Hon'ble Board should not sit on the technicality of the issues and in the interest of justice should hear the appeal and decide the same

on merits. Learned counsel for the respondent vehemently opposed and

contended that it is time-barred and as such it should be dismissed.

4. The Trade Marks Act, 1999 was brought into force on 15th September, 2003. The Intellectual Property Appellate Board has been established with

effect from 15.09.2003 under Section 83 of the Trade Marks Act, 1999 vide Government of India S.O. 1049 (E) dated 15.09.2003. Sub-section (4) of

Section 159 of the Trade Marks Act, 1999 provides as under :-

(4) Subject to the provisions of Section 100 and notwithstanding anything contained in any other provision of this Act, any legal proceeding pending in

any court at the commencement of this Act may be continued in that court as if this Act had not been passed".

The impugned appeal filed in the High Court of judicature is a legal proceeding pending in a court at the commencement of the Trade Marks Act, 1999.

5. Section 100 of the Trade Marks Act, 1999 provides as under :-

100. Transfer of pending proceedings to Appellate Board:-All cases of appeals against any order or decision of the Registrar and all cases pertaining

to rectification of register, pending before any High Court, shall be transferred to the Appellate Board from the date as notified by the Central

Government in the Official Gazette and the Appellate Board may proceed with the matter either do novo or from the stage it was so transferred.

Relevant notification under Section 100 of the Trade Marks Act, 1999 was issued vide Government of India Notification No. S.O. 1150 (E) dated 1st

October, 2003 notifying 6th October, 2003 as the date for the purposes of that section. The impugned appeal has been transferred by the High Court

of Judicature at Jabalpur in terms of that notification. Now the said appeal is to be heard in terms of Section 159(4) read with Section 100 of the Trade

Marks Act, 1999 by this Board established under Section 83 of the said Act. In terms of Section 159(4), appeal is to be heard as per the provisions of

the Trade and Merchandise Marks Act, 1958.

6. Appeal as against any order or decision of the Registrar under the Trade and Merchandise Marks Act, 1958 lies to the High Courts having the

jurisdiction. Section 3 of the Trade and Merchandise Marks Act, 1958 provides for the jurisdiction of the High Courts as under:-

3. High Court having jurisdiction - The High Court having jurisdiction under this Act shall be the High Court within the limits of whose appellate

jurisdiction the office of the Trade Marks Registry referred to in each of the following cases is situated, namely: -

(a) xxx

(b) in relation to a trade mark for which an application for registration is pending at or is made on or after commencement of this Act, the office of the

Trade Mark Registry within whose territorial limits the principal place of business in India of the applicant as disclosed in his application is situated.

(c), (d), (e) XXX.

Since the Trade Mark Registry offices are located in five principal cities of the country, namely, Mumbai, Kolkata, Delhi, Chennai and Ahmedabad,

the High Court at Mumbai, Kolkata, Delhi, Chennai and Ahmedabad only have the jurisdiction in their respective areas. In the instant case the

principal place of business in India of the applicant is in Madhya Pradesh. Thus, the Trade Mark Registry at Mumbai has the jurisdiction. In view of

that in terms of Section 3 of the Act the appeal should have been filed in the High Court at Mumbai.

7. The appellant has chosen to file the appeal against the decision of the Assistant Registrar of Trade Marks, Mumbai in the High Court of Judicature

at Jabalpur. The matter of jurisdiction of the High Court was agitated in that High Court also on an application of the appellant to transfer the records

of the appeal to the Intellectual Property Appellate Board, consequent upon the bringing into force of the Trade Marks Act, 1999 and establishment of

the IPAB as from 15.9.2003. Learned counsel for the respondent/applicant opposed the application for transfer on the ground that since the High

Court had no jurisdiction to entertain that appeal, that could not be considered as that was an appeal pending in that High Court. The Hon'ble High

Court, without going into the merits of its jurisdiction in the matter, by its order dated 18th December, 2003 decided to transfer the appeal papers to

IPAB, Chennai as it was of the opinion that even to appreciate the pica that it was not an appeal pending in that High Court, there has to be an appeal

or a case. So, in essence what they transferred was a case pending with them which has some nexus or relatability to the IPAB without going into the

jurisdictional aspect of the matter under the case / appeal.

8. Section 100 read with Section 159(4) of the Trade Marks Act, 1999 provides for transferring to IPAB the jurisdiction of all the High Courts hitherto

being exercised in matters of appeals against the decisions of the Registrar. It is important to note at this juncture that it is only the High Courts at the above-mentioned five places which had the jurisdiction to exercise the power of appeal as against the decisions of the Registrar in their respective jurisdiction. Thus, IPAB has stepped into the shoes of the five High Courts only and nothing more. It has been held that the High Court within whose appellate jurisdiction the Office of the Trade Marks Registry referred in Section 3(b) is situate would have the jurisdiction, *Vikas Mfg. Co. v. Bharaj Mfg. Co.*, 1981 PTC 87 P&H. Thus, the filing of appeal at Jabalpur High Court was without jurisdiction and thus bad in law ab initio and continued to be so and no amount of transference of jurisdiction in the IPAB by virtue of Section 100 read with Section 159(4) of the Trade Marks Act, 1999 can clothe it with legality. Since IPAB stands in the shoes of designated five High Courts only, any assumption of jurisdiction by it in a matter which has been transferred from a judicial body which did not have the jurisdiction ab initio will be wrong assumption of jurisdiction by the IPAB. When the matter was taken up by the Hon'ble High Court on 18.12.2003, it left it undecided consciously to be decided by the IPAB.

9. In the meantime an application without payment of appropriate fee as laid down under the IPAB Rules to treat the impugned appeal filed in the High Court as a fresh appeal filed in the IPAB by condonation of the delay has been received in the Registry on 13.8.2004 from the appellant. This belated appeal in no way can cure the jurisdictional infirmity in the impugned appeal. In view of this, the appeal is dismissed. However, the appellant is at liberty to file a fresh appeal before the IPAB with a request for condonation of delay by affixing proper fees.