

(2008) 08 IPAB CK 0012

In the Intellectual Property Appellate Board

President And Fellows Of Harvard College	APPELLANT
Vs	
Mahipal Dugar	RESPONDENT

Date of Decision : 04-08-2008

Acts Referred:

Trade Marks Act, 1999 — Section 47, 57, 125
Code Of Civil Procedure, 1908 — Order 7 Rule 11
Intellectual Property Appellate Board (Procedure) Rules, 2003 — Rule 17(2)

Citation : (2008) 08 IPAB CK 0012

Hon'ble Judges : Z.S. Negi, J; Syed Obaidur Rahaman, Technical Member

Bench : Division Bench

Final Decision : Allowed

Judgement

Z.S. Negi, J

1. The review petitioner, through its Constituted Power of Attorney, has filed this review petition for the review of order No. 77 of 2007 dated

6.6.2007 passed by this Appellate Board.

2. The petitioner herein had filed the rectification application No. ORA/21/2006/TM/CH for the removal of trade mark HARVARD registered under

No. 1063777 in class 25 in the name of the respondent herein, from the register or rectification of the register under Section 47/57/125 of the Trade

Marks Act, 1999 (hereinafter referred to as the Act). This Appellate Board heard the rectification application in the absence of the counsel for the

applicant and dismissed the same as defective and as such not maintainable. Hence, this review petition has been filed by the review petitioner on the

grounds, inter alia, that the presence of proxy counsel having not been recognised by the Appellate Board, the legal effect is that the applicant was ex-

parte and as such no order on merits on any aspect of the case could have been

passed; that the issue of power of attorney raised by the respondent could be considered at the preliminary stage only on the touchstone of principle of Order 7, Rule 11 of the C.P.C; that the order of the Appellate Board shows that it was handicapped to judicially decide the matter in the absence of proper representation from the applicant which amounted to denial of justice to the applicant; that an opportunity to the applicant ought to have been granted to file another proper power of attorney; that there is mistake of fact in the order which is apparent on the face of the record; that the power of attorney dated 24.8.2007 given in favour of Shri K.K. Malik is valid; that there are sufficient reasons warranting review of the order and that the present order is otherwise fit for review and recall of the same.

3. Whereas a copy of review petition was sent to the respondent on 17.8.2007 but the respondent did not file any counter-statement to the review

petition. The review petition came up before us for hearing when Shri R.K. Aggarwal, Advocate appeared on behalf of the review petitioner and Shri

P.P.A. Sajeev, Advocate appeared on behalf of the respondent.

4. Shri R.K. Aggarwal, learned Counsel for the review petitioner, submitted that on the date of hearing of the rectification application he was held up

at Bangalore in a matter which was listed on 5.6.2007 in the Civil City Court, Bangalore but was adjourned to 6.6.2007 and in his absence Shri Ram

Prasad Advocate appeared as proxy counsel for seeking adjournment and the presence of Shri Prasad was not recognised and adjournment was not

granted; the Appellate Board proceeded with the matter and decided the matter on merits against the applicant. He submitted that the presence of

proxy counsel having not been recognised, the legal effect is that the hearing proceeded in the absence of counsel for the applicant and in that

eventuality no order on merits on any aspect of the case could have been passed. Learned Counsel further submitted that an error of law which is

apparent on the face of law has occurred by deciding the controversy regarding the validity of the power of attorney. The validity of power of

attorney, which is a mixed question of law and fact, could be considered at the preliminary stage on the principle of Order 7, Rule 11 of the Code of

Civil Procedure. It transpires from the order of the Appellate Board that it was handicapped to effectively and judiciously decide the matter in the

absence of proper representation on behalf of the applicant of the rectification

application. The learned Counsel relying upon the judgment of the Supreme Court in the case of United Bank of India v. Naresh Kumar AIR 1997 SC 3 submitted that, assuming that the power of attorney available on the record was defective, an opportunity ought to have been given to the applicant to file another proper power of attorney. Learned Counsel advanced his submission by differentiating between power of attorney dated 24.8.2004 and general power of attorney dated 26.8.2004. It was submitted that the power of attorney dated 24.8.2004 appointing Shri K.K. Malik as attorney for the appointer is for the purpose to do and perform certain acts, deeds, matters or things, inter alia, to file, prosecute, conduct and carry on any civil or criminal proceedings commenced or to be commenced by the appointer in relation to appointer's intellectual property rights before any court, tribunal or authority; to prefer any appeal, revision or review from the judgments or orders passed in the said proceedings; to compromise, refer to arbitration, abandon, submit to judgment in any proceeding, to file withdraw or receive any documents and money from any court, tribunal, authority or opposite party during the course of any proceeding; to engage and appoint solicitors/advocates and senior advocates to conduct any proceedings whereas on the other hand by the general power of attorney dated 26.8.2004 the company appointed and authorised M/s. Aggarwal and Associates, Solicitors and Advocates to conduct the affairs of the company in getting their trade marks/service marks registered, protection of their intellectual property rights in India, filing notices of opposition to applications for registration of trade marks, etc. and the respective scopes and fields of operation of both power attorney are totally different; what the power of attorney dated 26.8.2004 revokes are all previous authorisations given for filing notices of opposition to the registration of trade marks, etc., but no such authorisation has specifically been conferred upon Shri Malik by the power of attorney dated 24.8.2004. It cannot, therefore, be said that the power attorney dated 26.8.2004 has annulled the power of attorney dated 24.8.2004. Therefore, in misreading both the power of attorneys, an error of law has occurred which is apparent of the face of the record. The observation made in the order that the affidavit of Shri K.K. Malik was on 15.5.2007 returned to M/s. Aggarwal and Associates, Solicitors and Advocates requiring them to properly stamp and notarise

and return within 15 days, which requirement until now remains to be complied with is a mistake of fact which is apparent on the face of record, as

the affidavit after stamping and notarising was returned to the Registry through courier on 23.5.2007.

5. The learned Counsel for the respondent vehemently opposing the review petition submitted that it is a matter of record that the date 6.6.2007 for

hearing of the rectification application was fixed in the presence of the learned Counsel for the applicant but despite that he did not appear and the

proxy counsel who appeared for counsel for the applicant was neither prepared to argue nor he had any letter of authority from the counsel for the

applicant and the Appellate Board has rightly not recognised and recorded the presence of the proxy counsel and proceeded with the hearing. He

reiterated the objection raised by the respondent in its counter-statement to the rectification application that power of attorney submitted along with the

application was not in order and not valid under law. Learned Counsel submitted that in the averment made by the review petitioner, there is no

disclosure or clarification whether Mr. Joyce Briton was authorised to sign for the President and Fellows of Harvard College & Trademark Licensing

and as to why no seal of Harvard College was affixed on the impugned Power of Attorney.

6. From the perusal of the order sought to be reviewed it is clear that the order has not been passed on merits, as has been averred by the review

petitioner and submitted by the counsel for the review petitioner, as none of the grounds on which rectification was sought has been taken up for

consideration or discussed by the Appellate Board. In paragraph 3 of the order it was, on the grounds given therein, concluded that the application is

defective and as such not maintainable. In view of the observation in the order that ""Further, the General Power of Attorney dated 26.8.2004 revokes

all the previous authorisations, if any, in respect of the matters or proceedings mentioned in that General Power of Attorney. If that be so, Shri K.K.

Malik cannot file application for rectification dated 12.12.2005 and also not authorised to affirm any affidavit in this matter. However, there is no

person before us who would clarify as to whether Mr. Joyce Briton has authority to sign such a document and whether Shri K.K. Malik is still

authorised to file such application and affirm any affidavit in the matter."" After having heard both sides and having regard to this observation in the

order under review, we are of the opinion that the applicant ought to have been given an opportunity of being heard to enable it to explain the factual position. We are of the further view that the hearing ought not to be proceeded when the counsel was not present and the case should have been treated as abandoned under Sub-rule (2) of Rule 17 of the Intellectual Property Appellate Board (Procedure) Rules, 2003.

7. However, the inadvertent error committed by the Appellate Board, by concluding that the Power of Attorney dated 26.8.2004 revokes all previous authorisation (including authorisation given to Shri Malik) and hence Shri Malik cannot file the application and also not authorised to affirm any affidavit in the matter, must be corrected by setting aside the order sought to be reviewed. In so far as objection of respondent that the power of attorney submitted with the application was not in order is concerned, the same is a curable defect and for that the applicant may be directed to file the proper power of attorney within six weeks period. In the case of *Narshi Thakershi v. Pradyumansinghji*, the Hon'ble Supreme Court held that no review lies on merits unless a statute specifically provides for it. It was also held that when a review is sought due to a procedural defect, the inadvertent error committed by the Tribunal must be corrected *ex debito justitiae* to prevent the abuse of its process, and such powers inheres in every Court or Tribunal.

8. This Appellate Board has no power to review its own orders passed on merits. In the case of *Safari Bikes Limited v. Safari Cycles Pvt. Ltd.* and Ors. 2008 (36) PTC 650 (IPAB) wherein review was sought on the merits of the order of the Appellate Board, the Board while dismissing the review petition observed at paragraph 12 thus:

12. Review applicant herein is not seeking a review of our orders due to a procedural defect or inadvertent error committed or even on the grounds of violation of principles of natural justice. As already noticed neither the Trade Marks Act, 1999 nor the Rules framed thereunder confer power on this Board to review its own orders.

9. In view of the above, we allow the Review Petition No. 06/2007 with the condition that the petitioner shall file the proper power of attorney within six weeks after the receipt of copy of this order and set aside order No. 77 of 2007 dated 6.6.2007 passed by this Appellate Board.