

(2008) 07 IPAB CK 0004

In the Intellectual Property Appellate Board

Case No : Diary No. 600 776/2007/TM/IPAB

Rahimfrooz Batteries Limited

APPELLANT

Vs

Debraj Dey Trading As Akuram Enterprises And Deputy
Registrar Of Trade Marks

RESPONDENT

Date of Decision : 04-07-2008

Acts Referred:

Trade Marks Act, 1999 — Section 91, 91(1)
Code Of Civil Procedure, 1908 — Section 11

Citation : (2008) 07 IPAB CK 0004

Hon'ble Judges : Z.S. Negi, J;S. Usha, Technical Member

Bench : Division Bench

Judgement

Z.S. Negi, J

1. The above Diary No. 600/2007/TM/IPAB is an appeal under Section 91 of the Trade Marks Act, 1999 (hereinafter referred to as the Act) filed by

Shri Obaidur Haque on behalf of M/s. Rahimfrooz Batteries Limited against the order dated 20.10.2006 passed by the Deputy Registrar of Trade

Marks whereby he disallowed the opposition No. CAL-156852 and ordered to proceed further the application No. 673973 for registration of the label

mark consisting of the word 'VOLTA'.

2. The brief facts leading to present appeal is that on 8.10.1999, the respondent No. 1 herein filed application No. 673973 for registration of a label

mark consisting of the word 'VOLTA' in class 9 for goods 'lead acid accumulator' claiming user since 1st April, 1990 and the said application was

advertised before acceptance in the Trade Marks Journal No. Mega 1 Vol. D, dated 25.8.2003 at page 392. Thereupon, M/s. Voltas Limited, Mumbai

opposed the registration by filing opposition being No. CAL-156852 which was

dismissed on 20.10.2006 by the respondent No. 2 and the application was ordered to proceed further for registration of the impugned label mark.

3. The appellant has preferred this appeal on the ground that it being a person aggrieved is entitled to file the appeal who is not a party to the

proceedings before the Registrar of Trade Marks. The averment made by the appellant is that according to Section 91 of the Act, any person

aggrieved by an order of the Registrar can prefer an appeal within three months from the date of communication of such order to him. It is further

averred that the appellants came to know about the order from the respondent No. 1 in connection with G.A. No. 2936 of 2006 and C.S. No. 228 of

2006 and in view of the order received from the respondent No. 1, the appellant is a person aggrieved and is entitled to prefer the appeal. The

appellant has in this appeal prayed that the order dated 20.10.2006 given by the learned Deputy Registrar of Trade Marks may be set aside and

respondent No. 1's mark may be allowed to proceed in the name of the appellant.

4. The appeal has not so far been admitted as the same is found to be preferred by a person who was not a party before the Deputy Registrar of

Trade Marks. The Registry of this Appellate Board has taken the view that Section 91(1) of the Act provides that an appeal may be preferred by any

one of the parties to the proceedings before the Registrar. Upon the clarification sought from M/s. Daswani & Daswani, Mr. M.S. Daswani sent the

following clarification vide his letter MSD/M-370 dated May 9, 2007:

According to Section 91 of the Trade Marks Act, 1999 ""any person aggrieved"" by an order or decision of the Registrar under this Act or rules made

thereunder may prefer an appeal to the Appellate Board. There can be more than one person who may be aggrieved. In view of above, Trade Marks

Act is not a bar for filing of appeal by any person who is not one of the parties in the matter. In application No. 1350036 filed for registration of trade

mark PUJA in class 3, oppositions were filed by three parties Star Cosmetics, Dalip Soap Factory and S. Roychoudhury & Co under opposition Nos.

CAL 234535, CAL 235553 and CAL 236060 respectively and naturally all three parties are aggrieved parties and they can prefer appeal against the

decision of Registrar. Same example applies to this case. As per the Act, it is not necessary that a person should be a party in the matter but only he

should be an aggrieved person.

In the present case we have already established how M/s Rahimafrooz Batteries Limited is an aggrieved party. It is humbly requested that in view of

our submission the appeal may be taken on record.

The letter dated 9.5.2007 containing the above extracted clarification of Mr. M.S. Daswani has been diarised as Diary No. 776/2007/TM/IPAB and

both the matters (Diary Nos. 600 & 776/2007) are placed before the Appellate Board for deciding the maintainability of the present appeal.

5. The matter came up before us on 17.6.2008 for deciding the maintainability thereof, when Ms. H. Chakrabarty & Shri Atish Ghosh, Advocates

appeared on behalf of the appellant and Shri Sudhakar Prasad & Ms. Anju Aggarwal, Advocates appeared on behalf of respondent No. 1.

6. Learned Counsel for the appellant contended that from the plain reading of Section 91(1) of the Act, it is clear that any person aggrieved by an

order or decision of the Registrar under the Act or the rules made thereunder may prefer an appeal to the Appellate Board within three months from

the date on which the order or decision sought to be appealed against is communicated to such person preferring the appeal. She stressed that since

the order of the respondent No. 2 allowing the application to proceed for registration affects the rights of the appellant, who is using the trade mark

VOLTA (label) since May, 1996, and as such the appellant is a person aggrieved within the meaning of Section 91 of the Act. She contended that in

our country innumerable statutes provide for the right of appeal to a person aggrieved and the expression person aggrieved must be construed liberally

by reference to the context of the statute in which it appears and all the circumstances. For the purpose of interpreting the expression 'person

aggrieved', the learned Counsel relied upon the decision of the Apex Court in the matter of *Adi Pheroze Shah Gandhi v. H.M. Seervai* wherein it was

held that a person who feels disappointed with the result of a case is not a person aggrieved; the order must cause him a legal grievance by wrongfully

depriving him of something. She advanced her contention by stressing that the Act does not provide that the appellant should necessarily be a party

before the Registrar whose order is appealed against; if the legislative intent would have been otherwise, the words used in Section 91(1) of the Act

would have been 'Any party aggrieved by an order or decision' instead of 'Any person aggrieved by an order or decision'. She claimed that the

appellant honestly and bonafidely conceived its artistic label trade mark 'VOLTA' in the year 1988 in Bangladesh and commenced export of batteries

under its trade mark to India in 1996 and the respondent No. 1 or any one concerned with which it is connected was a distributor or dealer of the

appellant's goods in eastern region. The appellant has filed on or about January 1996, November 1996 and October 1999 applications in India for

registration of trade mark VOLTA. We, however, think that it is not necessary for us to record all the other allegations contained in the appeal as we

are presently concerned only with a limited issue of maintainability of the present appeal.

7. Learned Counsel for the respondent No. 1 strongly objected to the allegation that the respondent No. 1 was ever a dealer or distributor of the

appellant for its goods in eastern region. The learned Counsel submitted that the appellant has no locus standi to prefer an appeal against an order

wherein it was not a party.

8. Section 91 of the Act deals with appeal to the Appellate Board. Sub-section (1) of that section reads thus: ""(1) Any person aggrieved by an order or

decision of the Registrar under this Act, or the rules made thereunder may prefer an appeal to the Appellate Board within three months from the date

on which the order or decision sought to be appealed against is communicated to such person preferring the appeal."" A plain reading of this sub-

section clearly envisages three conditions to be there for filing an appeal, that are firstly, the person should be a person aggrieved by an order or

decision of the Registrar, secondly, the appeal may be filed within 3 months and thirdly, 3 months be computed from the date on which such order or

decision is communicated to the person preferring the appeal. The question of communicating the order or decision of the Registrar to a person, who is

not a party to the proceedings before the Registrar, does not arise. We are not in agreement with the contention of the learned Counsel for the

appellant that the words used in the section is 'any person aggrieved' and not 'any party aggrieved' for the simple reason that acceptance of such

contention would negate the period of limitation specified in the section. Any person who has not filed an opposition to an application for registration of

trade mark will file appeal if he comes to know after lapse of any period of time that his proprietary interest in the trade mark is going to be adversely

affected. In the present context, an order or decision of the Registrar presupposes that there is some controversy or dispute between the parties and the Registrar has after hearing the party/parties or on the basis of certain materials placed by the party/parties before him, as the case may be, has passed an order or decision thereon. The Appellate Board has to decide the issues raised in the appeal with reference to the material placed or submissions made before the Registrar and the findings of the Registrar vis-a-vis such material/submission. If a person is not a party to a controversy/issue before the Registrar, then there can be no question of his making any submission or placing any material before the Registrar and also no question of any findings thereon by the Registrar. An appeal is a continuation of proceedings. In appeal the entire proceedings are before the appellate authority and it has power to review the evidence subject to the statutory limitation prescribed. The right of appeal carries with it a right of rehearing on law as well as on facts. For the purpose of meeting such a situation, the statute has provided different remedial provisions. In the decision case law relied on by the appellant for the purpose of expression ""person aggrieved"", the Apex Court has at para 47 quoted the observation of James, L.J. made in re Sidebotham (1880) 14 Ch D 458 thus: "" But the words ""person aggrieved"" do not really mean a person who is disappointed of a benefit which he might have received if some other order had been made. A ""person aggrieved"" must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him of something, or wrongfully affected his title to something."" Further, in the same case at page 399, the Apex Court has observed as under:

Generally speaking, a person can be said to be aggrieved by an order which is to his detriment, pecuniary or otherwise or causes him some prejudice in some form or other. A person who is not a party to a litigation has no right to appeal merely because the judgment or order contains some adverse remarks against him. But it has been held in a number of cases that a person who is not a party to suit may prefer an appeal with the leave of the appellate court and such leave would not be refused where the judgment would be binding on him under Explanation 6 to Section 11 of the Code of Civil Procedure.

9. Now coming to the clarification furnished by Mr. M.S. Daswani, there is no dispute that where three different persons oppose an application for registration any or all the aggrieved opponents can file appeal or appeals as they were parties to the opposition proceedings and the Registrar has to communicate them the order passed or decision arrived at by him. The illustration of PUJA trade mark given by Mr. Daswani in his clarification is self defeating his own argument. Again, the appellant has not shown as to how the order of respondent No. 2 has caused him a legal grievance by wrongfully depriving of something. The prayer made in the appeal that the order dated 20.10.2006 passed by the Deputy Registrar of Trade Marks may be set aside and respondent No. 1's mark may be allowed to proceed in the name of the appellant is not sustainable.

In view of the above, the appeal is not maintainable. We, accordingly, reject Diary Nos. 600/2007 and 776/2007.