

(2011) 08 IPAB CK 0015

In the Intellectual Property Appellate Board

Case No : ORA/80/2008/TM/CH

Rajesh Chhajer, TRADING AS M/S. Prithvi World Wide Inc.,
Shanthi Bhavan, 2ND Floor, No. 64-A.M. Lane, Chickpet
Cross, Bangalore-560 053, Karnataka

APPELLANT

Vs

Paavan Devi, Trading As Peetex, 1st Floor, Rajatha Complex,
Chickpet, Bangalore

RESPONDENT

Date of Decision : 10-08-2011

Acts Referred:

Trade Marks Rules, 2002 — Rule 37

Citation : (2011) 08 IPAB CK 0015

Hon'ble Judges : Prabha Sridevan, J;S. Usha, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Prabha Sridevan, J

1. This application is for rectification of the trade mark 'tanjore' No. 1315842 in class 24. No counter statement has been filed and there is no

representation on behalf of the Respondent herein in person or through counsel.

2. The rectification application was filed on 29.4.2008. It was taken on file and notice was issued on 19.5.2008 to the Respondent, calling upon her to

file the counter statement within two months of receipt of the notice. The notice was not returned either undelivered nor was the acknowledgement

card returned. So the counsel for applicant was asked to intimate the correct postal address. The correct address was also furnished. The information

served from India post was that on 10.08.2009 article was delivered to Ms. Paavan Devi. The vakalathnama was filed on 20.06.2011. The

Respondent sought adjournment for one month by filing Form-5 and prayed that

the matter may be adjourned by one month. When the matter was listed on 27.06.2011, the counsel Shri G. Ramji reported that he was instructed only on that day and that they wanted one more month's time. The Respondent was clearly protracting the matter. Since the counsel G. Ramji was present in Court, while adjourning the matter to 27.7.2011, we informed him that a sum of Rs. 25000/- should be paid to the counsel for the Appellant as costs and if it was not paid the Respondent will be set ex-parte. Though the counsel was present in Court, the order was not complied with. He received the order on 21.07.2011. The matter was adjourned to 27.07.2011. On this date, no one was present on behalf of the Respondent, no adjournment was sought for. The Respondent had not paid the costs. So we proceeded to hear the matter, setting the Respondent ex-parte.

3. The Learned Counsel for the applicant narrated the fact and submitted that the applicant has proved prior user and the Respondent has clearly copied the applicants mark. The fact are as follows. The applicant is engaged in the manufacture and sale of 'Silks and Textile' goods. He had adopted the trade mark 'tanjore' since 10.03.1998, and had been using it since that date. It had become distinctive with his goods. His sale figures run into crores. The applicant has appointed Prithvi Silk Creations as sole selling agent and bills are in the agents name.

4. He filed an application for registration of trade mark 'tanjore' under 922517 in class 24. It was advertised in the Trade Mark Journal No. 1336 dated 01.11.2005. The Respondent has filed an opposition. The application is pending.

5. The Respondent applied for trade mark 'tanjore' in class 24 and obtained registration. She claims user from 01.04.2000. By over sight no opposition was filed.

6. Documents have been filed alongwith the application, they are

a) The Respondent's application is dated 18.10.2004 showing the mark tanjore with a peacock to the left and a mango motif on the right in class 24.

b) The certificate of registration dated 18.10.2004 of the mark as described above. This is the impugned mark.

c) The certificate of registration dated 4.5.2000 in class 14 in favour of applicant. The mark is tanjore.

d) The certificate of registration dated 4.5.2000 in class 16 of the trade mark tanjore.

e) Application dated 3.10.2000 by applicant for registration of his copyright. User claimed in 1998. This artistic work is identical to the impugned trade

mark with peacock on left and mango motif on right. The Respondents font is slightly different.

7. On 4.5.2000 an additional representation was made for use of the trade mark as described above, in class 24. User was claimed from 10.3.1998.

There are invoices from 1998 showing sale of sarees with the name of tanjore. There are invoices from 2000 showing the trade mark tanjore for

which registration was obtained in class 16. These are the documents in support of the application.

8. We have considered the matter. The applicant and the Respondent are in the same business and the place of business of both is in chickpet. It is

difficult to believe that the Respondent did not know of the existence of the applicant. From 1998, the applicant has been selling sarees. The

applicant's application is dated 4.5.2000. The Respondent's application is dated 18.10.2004. The applicant's user is claimed from 1998. The

Respondent's user is claimed from 1.4.2000. These are the two marks.

Respondent's Mark

(Editor: The text of the vernacular matter has not been reproduced. Please write to contact@manupatra.com if the vernacular matter is required.)

Applicant's Mark

(Editor: The text of the vernacular matter has not been reproduced. Please write to contact@manupatra.com if the vernacular matter is required.)

9. The claim of user by the Respondent is too close (1.4.2000) to the date of application of the applicant (4.5.2000) for it to be coincidental. It is

clearly a slavish imitation of the applicants trade mark. The fact that they are in the same business and same locality supports our conclusion. The

pleadings and evidence of the applicant stand un rebutted.

10. We are unable to understand why the applicant's application for registration in 2000 is still pending, while the Respondent's application in 2004 had

proceeded to registration with alacrity. Rule 37 reads as follows:

Acknowledgement and Search -(1) Every application for the registration of a trade mark in respect of any goods or services shall on receipt, be

acknowledged by the Registrar. The acknowledgement shall be by way of return of one of the additional representations of the trade mark filed by the

applicant along with his application, with the official number of the application duly entered thereon.

(2) Upon receipt of the application for registration of trade mark, the Registrar shall cause a search to be made amongst the registered trade marks

and amongst the pending applications for the purpose of ascertaining whether there are on record in respect of the same goods or services or similar

goods or services any mark identical with or deceptively similar to the mark sought to be registered and the Registrar may cause the search to be

renewed at any time before the acceptance of the application but shall not be bound to do so.

11. So had the Registrar only searched when the Respondent made an application, he would have known that the applicant's application is pending.

Rule 37 cannot be ignored. Such failure to follow the procedure gives rise to unwanted and unhealthy speculation which is not in the interest of the

Trade Mark Registry. This is not the first time we have found that a prior application is kept pending and a later application is granted registration. In

these days of computerisation in just one second, the required information will be available. Litigation can be reduced if the Rule 37 is scrupulously

followed. The Rules must be followed, otherwise any decision ignoring the rules is liable to be attacked.

12. On the facts and materials and for the reasons set out above, the application is allowed and the Respondents mark shall be removed from the

register.