
(2011) 08 IPAB CK 0005

In the Intellectual Property Appellate Board

Case No : TA/195/2003/TM/Del

Rameshwar Dayal Gupta

APPELLANT

Vs

Amit Arora And Ors

RESPONDENT

Date of Decision : 05-08-2011

Acts Referred:

Code Of Civil Procedure, 1908 — Order 47 Rule 7

Trade And Merchandise Marks Act, 1958 — Section 11(a)(e), 12(3), 18(1)

Trade Marks Act, 1999 — Section 91, 92, 100

Citation : (2011) 08 IPAB CK 0005

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

Bench : Division Bench

Final Decision : Dismissed

Judgement

Prabha Sridevan, J

1. This appeal has been filed against the order of the Registrar of Trade Marks on the review petition filed by the Appellant herein dated 02.07.2002.

The Respondent applied for registration of the trade mark Tiger Brand in Class 6 in respect of wire and wire nettings. The Respondent claimed user

since 30.06.1965. The application was allowed to be advertised in Trade Marks Journal No. 1158 dated 01.09.1997. The Appellant herein gave his

notice of opposition claiming that though they had adopted the trade mark Brown Tiger with respect to the same goods since 1971, according to the

Appellants, the Respondents were prohibited from using the trade mark under Section 11(a) (e), 12 (3), and 18 (1) of the Trade and Merchandise

Marks Act, 1958. The Respondent filed their counter statement denying the allegations. The Appellants filed their evidence in support of opposition on

28.03.2000 and the Respondents filed their evidence on 14.12.2000. The

Appellant filed their evidence in reply on 16. 08.2001. The matter was taken up for hearing and the Respondent's application proceeded to registration and opposition was disallowed on 05.12.2001. The Appellant filed their review petition and this was also dismissed on 03.06.2002. It is against this the present appeal has been filed.

2. The Learned Counsel for the Respondent raised a preliminary objection regarding the maintainability and referred to 2004 (13) SCC 675 Suseel

Finance & Leasing Company, v. M. Lata and Ors. : 1994 (2) SCC 753 Shanker Motiram Nale v. Shiolalsing Gannusing Rajput and 2009 ELR

(APTEL) 0856Tamil Nadu Electricity Board, Chennai v. Central Electricity Regulatory Commission, New Delhi (order of the Appellate Tribunal for

Electricity). He submitted that an appeal against an order rejecting the review petition is not maintainable and therefore, this appeal must be rejected

outright.

3 . The Learned Counsel for the Appellant on the other hand submitted that on the principles of natural justice the appeal must be entertained and

allowed. The Learned Counsel submitted that the entire proceedings had gone about in a manner which cannot be legally accepted. According the

Learned Counsel though the Hon'ble Delhi High Court had directed the records of the Registrar to be requisitioned by an order dated 27.03.2003, the

registration was granted on 09.10.2006. The Learned Counsel submitted that the original order was passed not following the principles of natural

justice. When the matter was originally listed for hearing on 17.10.2001 the counsel for the Appellant reported that he was unwell. No one appeared

for the Appellant before the Registrar and the matter was adjourned to 31.10.2001. Since the counsel for the Appellant was reported to be unwell both

the Registrar and the counsel for the Respondent informed the counsel for the Appellant that the matter had been adjourned to 31.10.2001 to be heard

at 2.30 p.m. On 31.10.2001 there was no appearance on behalf of the Appellant. The Learned Counsel for the Appellant had submitted that he had

filed Form TM-56 for adjournment of hearing but without granting adjournment the matter had been heard on that day. The Learned Counsel

submitted that an interlocutory application was filed on 12.11.2001 and therefore the order should not have been passed without the interlocutory

application still remaining to be disposed of. The Learned Counsel submitted that

the Registrar ought to have granted time to the parties before proceeding to pass order and had no right to pass an order. Once the IA had been filed it should not have been ignored. On the other hand an opportunity should have been granted.

4 . The Learned Counsel for the Respondent submitted that the Appellant cannot attack the order passed in review and the original order. The appeal was in time only with regard to the order in review, but it was hopelessly time barred with reference to the original order. The Learned Counsel submitted that for a review to be entertained grounds for review ought to be made out. Otherwise the appeal cannot be allowed. These submissions were made by the Learned Counsel for the Respondent without prejudice to his objections regarding maintainability.

5. This Board has been entertaining appeals against orders rejecting review since the language of Section 91 of the Act does not restrict the appeal

power to this Board. The appeal power of this Board extends to 'an order or decision of the Registrar'. Therefore, it should be understood as any

order or decision of the Registrar so long as there is no restrictive clause in the Act itself. We are not sure whether the limitations that Order 47 Rule

7 shall apply to us in view of the language of Section 92 of the Act. Section 100 of the Trade Marks Act, 1999 empowers the Board to proceed with

the matter 'either de novo or from the stage it was so transferred'. A really piquant situation is created here. If we take note of the judgement of the

Hon'ble Supreme Court then the appeal before the Hon'ble High Court was not maintainable and therefore it was this appeal that was not

maintainable that was actually transferred to this Board. But once it was transferred to the Board it is our discretion to either proceed with it de novo

or from the stage it was transferred. But we will not examine the issue here since even on merits the appeal deserves to be dismissed for the reasons

which we shall give hereafter.

6. In the original order, the objections which was rejected by the Registrar were (a) the Appellant had failed to show why the mark is not defective;

(b) the Appellant had failed to discharge the burden of deception or confusion and (c) that the Respondent had lead in evidence to establish user from

1965. The order shows that the counsel for the Appellant was not present on the first date of hearing which was on 17. 10.2001 and the second date

of hearing which was on 31.10.2001 and thereafter they had filed an application for reception of additional evidence. We find that the reception of additional evidence pertains to assessment orders of the Respondents from 1989-90 to 1995-96. When the Registrar has in his impugned order observed that the Respondent had established user from 1965 we do not see what purpose would be served by production of these orders. In any event once the Registrar had reserved orders, the Appellant who had chosen not to be present at the time of hearing had obviously only to prolong the matter has filed this application. The grounds for review are limited. There must be an error apparent on the face of the records and the principles of natural justice should be observed. The Registrar had observed that once the matter had been argued and order had been reserved, the interlocutory application filed 12 days later could not be entertained. We can neither find any fault with this conclusion nor hold that there was any error apparent on the face of the records.

7 . Now we come to the grievance of the Appellant that adjournment ought to have been granted. It is needless to say that if the counsel falls sick on the appointed date of hearing for which he can have no forewarning he must seek adjournment. But in this case it is recorded by the Registrar that the reason for adjournment being illness was not supported by any authentic proof. Even before us the counsel for the Appellant has not stated that he furnished a medical certificate which was ignored by the Registrar. Therefore, the conclusion of the Registrar of Trade Marks does not appear to us to suffer from any error or illegality. In view of the above, the appeal is dismissed. No order as to costs.