

(2008) 02 DEL CK 0210

In the Delhi High Court

Case No : LPA No's. 1961-1962 of 2006

Safari International and Another

APPELLANT

Vs

Subhash Gupta and Others

RESPONDENT

Date of Decision : 06-02-2008

Acts Referred:

Trade Marks Act, 1999 — Section 100

Citation : (2008) 36 PTC 610

Hon'ble Judges : Dr. M.K. Sharma, C.J.; Sanjiv Khanna, J

Bench : Division Bench

Advocate : Shailen Bhatia, Amita Kapur and D.K. Dhingra, for the Appellant; Neeraj Grover, for the Respondent

Final Decision : Dismissed

Judgement

Mukundakam Sharma, C.J.—This appeal is directed against the judgment and order dated 28th July, 2006 whereby the learned Single Judge dismissed the writ petition filed by the appellant herein against the order of the Intellectual Property Appellate Board. Vide order dated 9th March, 2006 the Intellectual Property Appellate Board allowed the application of the Respondent No. 1 against the order of Assistant Registrar of Trade Marks.

2. Respondent No. 1 herein had been manufacturing tricycles, bicycles and baby cycles under his sole proprietorship concern M/s. Shagun Udyog since 1974 under the trademark "SAFARI". In April 1979 he filed an application for registration of the said trademark and the same was registered in July, 1988 bearing registered trade mark No. 348290. In the meantime, in the year 1981 respondent No. 1 incorporated a private limited company under the name and style "M/s. Safari Cycles Private Limited" wherein the respondent No. 1 and his brother were equal shareholders. Though the said company did not carry on any business but the respondent No. 1 continued the business in his individual capacity. In December 1984 brother of respondent No. 1 resigned from the company transferring his shareholding in the name of the respondent No. 1 and

respondent No. 1's wife. Consequently, the respondent No. 1 and his wife became shareholders in the ratio of 70:30. From January 1985 business activities of manufacture and sale of goods under the trade mark "SAFARI" were taken over and continued by Safari Cycles Private Limited.

3. In February, 1995, the appellant herein filed an application before the Trade Marks Registry, New Delhi for registration of a similar trade mark and also initiated rectification proceedings on the ground of non user by the respondent No. 1. In the said proceedings, the learned Assistant Registrar of Trade Marks allowed the said application and directed removal of the respondent No. 1's registered trade mark "SAFARI" on the ground that the respondent No. 1 had obtained the said registration by playing a fraud and also on the ground of non user by the respondent No. 1.

4. Being aggrieved by the said order, the respondent No. 1 filed an appeal being CM(M) No. 793/2000 in this Court. However, the said appeal was transferred to the learned Intellectual Property Appellate Board in terms of Section 100 of the Trade Marks Act, 1999. The learned Appellate Board considered the pleadings of the parties and thereafter allowed the appeal filed by respondent No. 1 holding that respondent No. 1 did not commit any fraud at all inasmuch as respondent No. 1 remained the managing force of the company and under that impression and without knowing the consequences of the technicalities he might have stated that he was the proprietor of the trademark without any intention to deceive anybody. It was also held that the use of trade mark by a private limited company where the respondent No. 1 and his wife are the shareholders to the extent of 70% and 30% respectively should be and must be construed as use of trade mark either by the respondent No. 1 himself or with his implied permission or licence. Consequently, the order passed by the learned Assistant Registrar of Trade Marks was set aside and quashed.

5. Being aggrieved by the said order, the appellant filed a writ petition in this Court. Having heard the learned Counsel for the parties and having perused the records, the learned Single Judge, agreeing with the conclusions arrived at by the Appellate Board, dismissed the writ petition filed by the appellant herein by order dated 28th July, 2006. The said order of the learned Single Judge is under challenge in this appeal, on which we have heard the learned Counsel appearing for the parties and have also perused the records placed before us.

6. The arguments of the learned Counsel for the appellant mainly centered around the contention of fraud allegedly played by the respondent No. 1 on Registrar of Trade Marks. It was contended that the finding of facts of the Registrar should not have been upset by the Appellate Board and also by the learned Single Judge. It was also submitted that the Appellate Board did not deal with the findings of the Registrar with regard to user of the trademark and, therefore, the conclusions arrived at by the Board are liable to be set aside and quashed. Next it was contended that it was a case of non-user as the the proprietor never used the trade mark "SAFARI". The learned Counsel appearing

for the respondent however refuted all the said allegations.

7. The respondent had been using the trade mark "SAFARI" since 1974 for the cycles manufactured under his sole proprietorship concern M/s. Shagun Udyog. In the year 1979 he applied for registration of the said mark and registration certificate was issued in the year 1988. During the pendency of the said application, in 1981 respondent No. 1 incorporated a private limited company with his brother as the Director having equal share, under the name "Safari Cycles Private Limited". There is no dispute to the fact that the said company did not function till 1984. It is also a fact that respondent No. 1 continued the business in his individual capacity. Later, in the year 1984, on resignation of the respondent No. 1's brother from Safari Cycles Private Limited by transferring his shares in the name of respondent No. 1 and his wife, the respondent No. 1 along with his wife became shareholders of the said company with 70:30 shareholding. Therefore for all practical purposes, the respondent No. 1 was running the aforesaid company being the major shareholder whereas the remaining 30% shares were owned by none other than his wife, making the company a family concern. From January, 1985 the business activities of manufacture and sale of goods under the trade mark "SAFARI" were taken over by the said private limited company. When the respondent No. 1 made the statement before the Registrar in 1986, he along with his wife was the owner of the company which was using the trademark. It can be safely assumed that he being the managing force of the company, he might have stated that he is the proprietor of the trade mark, without any intention to deceive anybody as none others were using the said trade mark. In fact the Appellate Board found that the appellant herein did not put forth any plea to the effect that the respondent had any intention to deceive anybody when he stated so. The Appellate Board also recorded that it was also not the case of the appellant herein that the respondent No. 1 herein is using the trade mark which belongs to any other third party and played fraud in claiming the ownership of such trade mark to the detriment of the real owner. We also agree with the conclusion recorded by the Appellate Board that in the absence of any details to establish the allegation of fraud, the said contention was liable to be rejected. In this context we may also refer to the judgment of the Supreme Court in the case of A.C. Ananthaswamy and Others Vs. Boraiah (dead) by LRs., wherein the Supreme Court has held that fraud pleaded has to be proved. The Court in para-5 of the said judgment observed:

...Fraud is to be pleaded and proved. To prove fraud, it must be proved that representation made was false to the knowledge of the party making such representation or that the party could have no reasonable belief that it was true. The level of proof required in such case is extremely higher. An ambiguous statement cannot per se make the representator guilty of fraud. To prove a case of fraud, it must be proved that the representation made was false to the knowledge of the party making such representation. (See: Pollock & Mulla: Indian Contract & Specific Relief Acts (2001) 12th Edn. p. 489)

8. In the present case, except for stating in the statement of the case that the impugned registration was obtained by playing fraud on the Registrar of Trade Mark as well as the honest members of the trade and business, no material was placed on record to support the said claim. It is also pertinent to mention that the respondent No. 1 did not derive any advantage on the assumption of the trade mark "SAFARI" from the proprietorship concern to the private limited company as the private limited company was again a family concern of respondent No. 1. For establishing the allegation of fraud the appellant should have placed on record sufficient and cogent evidence. In the present case there are no details given as to how the fraud of the nature alleged was committed. In our considered opinion no fraud could be deduced on the part of respondent No. 1 on the basis of the pleadings available on record. Pleadings that have been advanced to establish fraud are mere surmises and conjectures. Thus the findings recorded by the Registrar that there was fraud committed, therefore, was rightly not accepted by the Appellate Board as also by the learned Single Judge.

9. Insofar as the contention of non-user is concerned, there is no dispute to the fact that the respondent No. 1 had applied for registration in the year 1979 and obtained the same in the year 1988. Though the private limited company did not do any business immediately after incorporation in 1981 but the respondent No. 1 continued the business in his individual capacity. In 1985 the limited company took over the business under the said trade mark. The mark was continuously in use either by the respondent No. 1 in his individual capacity or later by the private limited company.

10. In view of the above discussion, we are of the opinion that the learned Single Judge has rightly upheld the order of the Appellate Board. We find no merit in this appeal and the same is accordingly dismissed.