

(2008) 04 BOM CK 0058
In the Bombay High Court
Case No : Writ Petition No. 3026 of 2008

Shiba Health Care

APPELLANT

Vs

M.J. Pharmaceuticals Ltd. and Another

RESPONDENT

Date of Decision : 24-04-2008

Acts Referred:

Constitution of India, 1950 — Article 227

Trade Marks Act, 1999 — Section 111, 111(2), 111(3), 111(4), 124(1)

Citation : (2008) 38 PTC 57

Hon'ble Judges : Naresh H. Patil, J

Bench : Single Bench

Advocate : A.B. Kale, for the Appellant; S.B. Deshpande and N.S. Deshpande for respondent Nos. 1 and 2, for the Respondent

Final Decision : Dismissed

Judgement

Naresh H. Patil, J.—Heard learned Counsel for the parties.

2. I have perused the order dated 3rd April 2008 passed by learned Single Judge of this Court (Coram: B.R. Gavai, J.) in Writ Petition No. 2496 of 2008 filed by the petitioner.

3. The learned Counsel for the petitioner submitted that at the time of passing of the order by the learned Single Judge of this Court (Coram: P.V. Kakade, J.) on 2nd March 2007 in Appeal from Order No. 44 of 2005 the fact that rectification application was pending was not known to the Court. The order passed by this Court on 2nd March 2007 would, therefore, be applicable in view of the provisions of Section 124(1)(b)(ii) of the Trade Marks Act 1999. The petitioner/plaintiff has filed application on 7-4-2008 for stay of further proceedings of the suit till decision of Appeal bearing No. ORA/139/2006/TM/MUM/5261 pending before the Intellectual Property Appellate Board, Chennai, as, according to the petitioner, defendant No. 2 has filed said proceedings before the above said Appellate Board at Chennai.

4. The trial Court in its order observed that the plaintiff has produced evidence and thereafter the defendant has adduced the evidence. A reference was given to the order passed by this Court on 2nd March 2007 in the proceedings of Appeal from Order No. 44 of 2005.

5. From the material placed on record it seems that the parties have proceeded with the hearing of the suit and are leading evidence. It was informed across the Bar that the suit was filed in the year 2005 and the application for rectification was filed on 10-11-2006 notice of which was received by the petitioner/plaintiff on 22-11-2006.

6. In spite of the fact that the petitioner received notice of such rectification proceedings he proceeded to participate with the hearing of the suit. At one stage, he filed a Writ Petition being Writ Petition No. 2496 of 2008 challenging order of the trial Court dated 11th March 2008.

7. The issue raised before me at this stage is whether on the application of the plaintiff proceedings of the suit are required to be stayed.

8. Some judgments are cited before me by the learned Counsel for the respondents.

(i) In the case of Mayor Brothers v. Vijay Industries 1985 PTC 208 the Delhi High Court took a view in the facts of the case that the suit was not only for infringement of trade mark but was also for passing off.

(ii) In the case of Pfizer Products Inc. Vs. Rajesh Chopra and Others, the Delhi High Court in the facts of the case observed in para 75 thus:

75. It is noteworthy that the present suit was filed by the plaintiff on or about 7th March, 2005, this Court had issued summons in the suit and notice in the application by orders passed on 10th March 2005 and the defendant was duly served with the same. The defendant first entered appearance in the case on 3rd May, 2005. The application seeking cancellation of the registered trademark GEODON and ZOLOFT of the plaintiff was filed by the defendant on 29th November, 2005. There is no dispute that the defendants have not sought leave of this Court before filing the petition before the Registrar of Trademarks.

(iii) In the case of Ganga Engineering Works v. Ganga Foundry 1996 (16) PTC 213, the Madras High Court, in the facts of the said case, observed in para 4 thus :

4. In the present case, counsel for the petitioner is not in a position to give the exact date on which the issues are framed in the suit. However, the order of the lower court shows that the suit was included in the list for trial on 10-6-1993 initially. That means the issues were framed long before that and the suit was ready for trial. Thereafter the petitioner herein was getting adjournments and once an ex parte decree was also passed and the ex parte decree was set aside by order dated 31-3-1994 and the suit was restored to file. It was transferred

from the court of Principal District Judge to the court of the I Additional District Judge. Then it was posted to 29-6-1994 for trial as last chance. On that date, the petitioner filed the present application, I.A. No. 94 of 1994 for stay of further proceedings in the suit, O.S. No. 93 of 1991 u/s 111 of the Act. The court below has rightly understood the provisions of Sections 111(2), (3) and (4) of the Act and held that it is not open to the petitioner to seek stay of the proceedings at this stage. Consequently, there is no error whatever in the order of the lower court. The revision is without merits. Accordingly, it is dismissed.

9. In view of the peculiar facts of this case and the judgments cited before me I find that the application filed by the petitioner does not call for consideration. I, therefore, find that there is no patent error for exercising writ jurisdiction under Article 227 of the Constitution.

10. The Writ Petition stands dismissed. The learned Counsel for the petitioner at this stage prays for staying of the operation of this order. I do not find any convincing reason for staying this order. The prayer stands rejected.