

(2013) 02 DEL CK 0067

In the Delhi High Court

Case No : LPA 564 of 2012

Union of India and Others

APPELLANT

Vs

Malhotra Book Depot

RESPONDENT

Date of Decision : 27-02-2013

Acts Referred:

Constitution of India, 1950 — Article 226, 300A

Trade and Merchandise Marks Act, 1958 — Section 2(r), 25, 25(3), 25(4), 26

Citation : (2013) 134 DRJ 504 : (2013) 54 PTC 165

Hon'ble Judges : D. Murugesan, C.J.;Rajiv Sahai Endlaw, J

Bench : Division Bench

**Advocate : Sachin Datta, CGSC with Ms. Ritika Jhurani, for the Appellant;
Gaurav Pachnanda, With Ms. Sangeeta Goel, Mohit Goel, Sidhant Goel and Mr.
Rahul, for the Respondent**

Final Decision : Dismissed

Judgement

Rajiv Sahai Endlaw, J.—This intra-court appeal impugns the judgment dated 29th November, 2011 of the Single Judge of this Court allowing W.P.(C) No. 7882/2010 preferred by the respondent by directing the restoration and renewal of the Trademark of the respondent. Notice of this appeal and of the application for condonation of delay of 224 days in filing the appeal was issued. Though the respondent has filed a reply opposing condonation of delay but considering the fact that the question raised is of interpretation of statutory provisions and likely to have widespread ramifications, the senior counsel for the respondent at the time of hearing did not oppose the hearing of the appeal on merits. We, for the reasons stated in the application for seeking condonation of delay in filing the appeal, condone the said delay. The writ petition from which this appeal arises was filed by the respondent pleading:-

(i). that the predecessors of the respondent, (which is stated to be a partnership firm of Ms. Satish Bala Malhotra, Ms. Monica Malhotra Kandhari and Ms. Sonica Malhotra Kandhari) namely Shri Ashok Kumar Malhotra and late Shri Balbir

Singh, trading as M/s. Malhotra Book Depot had applied for and were granted registration of the Trademark "MBD" in Class 16 for the goods "publications (printed) and books" vide Trade Mark Registration dated 23rd November, 1970;

(ii). the said trademark was thereafter duly renewed from 23rd November, 1977 to 23rd November, 1984;

(iii). on 1st April, 1992 the constitution of M/s. Malhotra Book Depot was changed and a fresh Partnership Deed was executed between the new partners i.e. Shri Ashok Kumar Malhotra and Ms. Satish Bala Malhotra;

(iv). on the demise of Shri Ashok Kumar Malhotra the constitution of the respondent M/s. Malhotra Book Depot was again changed and a fresh Partnership Deed was executed between Ms. Satish Bala Malhotra, Ms. Monika Malhotra Kandhari and Ms. Sonica Malhotra Kandhari on 30th December, 2009;

(v). that in April, 2010 the respondent filed a suit for permanent injunction restraining infringement of the Trademark MBD and in connection with the said suit applied for Certificate for Use in Legal Proceedings - however the application was returned by the appellant no. 3 Registrar of Trade Marks as no records/details of the said Trademark could be traced in the database of the Registrar - in the consequent investigation by the respondent it was realized that the Trademark had not been renewed after 23rd November, 1984;

(vi). the petitioner on 7th October, 2010 applied for renewal and restoration of the said Trademark but which application was not accepted.

The respondent accordingly sought a writ of mandamus for restoration and renewal of the Trademark. It was inter alia the case of the respondent that the statutory Notice in Form O-3 under the Trade and Merchandise Marks Rules, 1959 (the Rules) (which were applicable at the relevant time) informing the petitioner that the registration of the mark was expiring and can be renewed was not sent by the Registrar to the respondent and the Registrar could not thus deny restoration/renewal of the Trademark.

2. The Registrar of Trademarks contested the writ petition aforesaid by filing a counter affidavit pleading:-

(I). that the renewal of the mark had become due on 23rd November, 1984 i.e. 26 years prior to the filing of the writ petition and the writ petition suffered from delay and laches;

(II). that the factum of removal of the Trademark was notified in the Trade Mark Journal No. 997 dated 16th December, 1990 for nonpayment of renewal fees;

(III). that such removal could not be without following the due process as per the provisions of law and the respondent was taking advantage of the fact that the 26 years old records of dispatch of Notice in Form O-3 would not be available with the Registrar;

(IV). that on receipt of complaints regarding non-receipt of Registration Certificates and non-issuance of the Form O-3 Notices, Public Notices dated 24th September, 2010 and 31st November, 2010 were issued advising the public at large to file the petitions in the prescribed manner;

(V). that the respondent was also advised to file a petition in this regard vide letter from the Trade Mark Registry issued on 24th January, 2011.

Though certain other defences were also taken but the same neither form part of the judgment of the learned Single Judge nor have been urged before us and need is thus not felt to dilate on the same.

3. The learned Single Judge allowed the writ petition observing/finding/holding: -

(a). that the Registrar in its counter affidavit, in response to the unequivocal plea in the writ petition, that the Notice in Form O-3 was not received by the respondent, had merely stated that removal of the mark could not have been done without following the due process as per the provisions of law and had thus made only a presumptive statement; further, the Registrar in para 7 of the counter affidavit had admitted that in various cases O-3 Notices had not been issued; the learned Single Judge thus concluded that in the respondent's case O-3 Notice had not been issued as provided for in Rule 67;

(b). that u/s 25 of The Trade and Merchandise Marks Act, 1958 (the Act) (which was applicable in the year 1984 when the Registration of the mark of the respondent expired), the application for renewal of the registration could be made upon receipt of the Notice in Form O-3;

(c). that the Registrar could remove the Trademark from the Register and advertise the factum of removal in the Journal only after a Notice in Form O-3 had been issued;

(d). that the removal of the registered Trademark from the Register entails civil consequences for the registered proprietor of the mark;

(e). the said removal of the registered Trademark cannot be done without prior notice to the registered proprietor in the prescribed form;

(f). mere expiration of the registration by lapse of time and the failure of the registered proprietor of the Trademark to get the same renewed, by itself, does not lead to the conclusion that the same can be removed from the Register by the Registrar of Trade Marks without complying with the mandatory procedure prescribed in Section 25(3) of the Act r/w Rule 67 of the Rules;

(g). removal of the registered Trademark from the Register without complying with the mandatory requirements of Section 25(3) would itself be laconic and illegal;

(h). that the plea of the Registrar that the application for restoration and renewal of the mark was beyond the time prescribed in Section 25(4) and Rule 69 could

not be accepted because the removal of the mark from the Register was not in terms of Section 25(3) r/w Rules 67 & 68;

(i). that under the Act and the Rules, mere lapse of the time does not result in its removal and for which Notice in Form O-3 is required to be given;

(j). that in the facts of the present case, since the mandatory Notice in Form O-3 had not been given prior to the removal of the mark, the application seeking its restoration and renewal could not be said to be barred by time.

The learned Single Judge, for holding so, relied on A. Abdul Karim Sahib and Sons, Tiruchirapalli Vs. The Assistant Registrar of Trade Marks 1983 PTC 55 (Mad) followed by a Single Judge of this Court in W.P.(C) No. 8950/2006 titled Kalsi Metal Works Pvt. Ltd. Vs. Union of India decided on 16th May, 2007.

4. The counsel for the appellants has argued that removal of a trademark is an administrative act akin to removal of deadwood and any deficiency in such removal does not give any right for restoration of the trademark beyond the time prescribed therefor. Reliance is placed on Administrator, Municipal Committee, Charkhi Dadri and another Vs. Ramji Lal Bagla and others, where Section 44A of the Punjab Town Improvement Act, 1922 was held to be not mandatory in the sense that non-compliance with it leads to nullification of the acquisition which had already become final. It was further held that such non-compliance cannot also result in divesting of title or any obligation to restore the unutilized portion (s) of the acquired land to its erstwhile owners. The Supreme Court held that since the said Section 44 A, though using the expression "shall", did not provide the consequence of non-compliance with its requirement, it could not be held to be mandatory. On the basis of the said judgment it is argued by the counsel for the appellants that no consequences have been provided of non-compliance with Section 25(3) requiring issuance of the Notice in Form O-3 and thus the issuance of Notice in Form O-3 cannot be said to be mandatory. It is further argued that non-issuance of Notice in Form O-3 would not extend the duration of registration indefinitely. Reliance has also been placed on Order dated 16th April, 2012 of the Intellectual Property Appellate Board (IPAB) in OA No. 59&60/2011/TM/KOL titled Pernod Ricard India Private Ltd. Vs. The Controller General of Patents, Designs and Trade Marks holding that the Act does not make the renewal of the trademark dependent upon the service of Notice in Form O-3 and does not make the factum of removal of the mark dependent on the issuance of such notice.

5. On the contrary the senior counsel for the respondent has argued that if removal of the mark is wrong, its restoration cannot be denied; that Rule 68, while providing for removal of the mark on non-payment of renewal fees at the expiry of last registration, uses the word "may" and not "shall"; that it is for this reason only that the Registrar, inspite of the validity of the mark having expired in the year 1984 did not remove it till the year 1990; that if the mark is not removed, its renewal can be applied for at any time; that if the removal of the mark is wrongful, the limitation prescribed in Section 25(4), of one year for

applying for renewal thereof, does not apply. Reliance is placed on *Tetragon Chemie (P) Ltd. Vs. Government of India and Another*, where a Single Judge of the Karnataka High Court held that in the absence of Notice in Form O-3, the order of removal of the mark on the ground of non-payment of renewal fees within the prescribed time is bad and directed renewal. Reliance is also placed on *Polson Ltd. Vs. Polson Dairy Ltd. and Others*, whereof it was observed that no restriction is placed on renewal of trademark retrospectively. The senior counsel for the respondent has also informed that the order in *Kalsi Metal Works Pvt. Ltd. supra* was also followed in Order dated 17th July, 2007 in W.P.(C) No. 2610/2007 titled *Havana Club Holdings S.A. Vs. Union of India*. It is contended that the Registrar has complied with the said orders and is thus not entitled to appeal against a similar order in favour of the respondent.

6. The counsel for the appellant in rejoinder has contended that the judgment in *A. Abdul Karim Sahib and Sons, Tiruchirapalli (supra)* relied upon by the learned Single Judge, is in the context of the 1940 Act which did not have the equivalent Section 25(4) of the 1958 Act. He has further contended that the Act as well as the Rules use the word "expiration" in terms of the trademark and such expiration has not been made dependent upon the issuance of Notice in Form O-3.

7. We have considered the aforesaid rival contentions. In fact we have condoned the considerable delay in filing this appeal on the plea of the counsel for the appellant that if the view taken by the learned Single Judge is to be followed, it would open floodgates of applications for renewal/registration of trademarks which have lapsed long time ago, in as much as the Registrar does not have available with him the records of dispatch of Notices in Form O-3 prior to the removal of the trademarks.

8. Considering the importance of the issue raised and the difference in the opinion of the learned Single Judge of this Court and the IPAB, we embark upon interpreting the relevant provisions of the Act and the Rules. Section 25 of the Act is as under:-

25. Duration, renewal and restoration of registration -

(1) The registration of a trade mark shall be for a period of seven years, but may be renewed from time to time in accordance with the provisions of this section.

(2) The Registrar shall, on application made by the registered proprietor of a trade mark in the prescribed manner and within the prescribed period and subject to payment of the prescribed fee, renew the registration of the trade mark for a period of seven years from the date of expiration of the original registration or of the last renewal of registration, as the case may be (which date is in this section referred to as the expiration of the last registration).

(3) At the prescribed time before the expiration of the last registration of a trade mark the Registrar shall send notice in the prescribed manner to the registered

proprietor of the date of expiration and the conditions as to payment of fees and otherwise upon which a renewal of registration may be obtained, and, if at the expiration of the time prescribed in that behalf those conditions have not been duly complied with, the Registrar may remove the trade mark from the register.

(4) Where a trade mark has been removed from the register for non-payment of the prescribed fee, the Registrar may, within one year from the expiration of the last registration of trade mark, on receipt of an application in the prescribed form, if satisfied that it is just so to do, restore the trade mark to the register and renew the registration of the trade mark either generally or subject to such conditions or limitations as he thinks fit to impose, for a period of seven years from the expiration of the last registration

9. Rules 66 to 70 under Chapter III titled RENEWAL OF REGISTRATION AND RESTORATION of the Rules are as under:-

66. Renewal of Registration.

An application for the renewal of the registration of a trade mark shall be made on Form TM - 12 and may be made at any time not more than six months before the expiration of the last registration of the trade mark.

67. Notice before removal of trade mark from register.

At a date not less than one month and not more than two months before the expiration of the last registration of a trade mark, if no application on Form TM - 12 for renewal of the registration together with the prescribed fee has been received, the Registrar shall notify the registered proprietor or in the case of a jointly registered trade mark each of the joint registered proprietors and each registered user, if any, in writing on Form O-3 of the approaching expiration at the address of their respective principal places of business in India as entered in the register or where such registered proprietor or registered user has no principal place of business in India at his address for service in India entered in the register.

68. Advertisement of removal of trade mark from the register.

If at the expiration of the last registration of a trade mark the renewal fee has not been paid the Registrar may remove the trade mark from the register and advertise the fact forthwith in the Journal.

69. Restoration and renewal of registration.

An application for the restoration of a trade mark to the register and renewal of its registration under sub-section (4) of section 25, shall be made on Form TM - 13, within one year from the expiration of the last registration of the trade mark accompanied by the prescribed fee.

70. Notice and advertisement of renewal and restoration.

Upon the renewal or restoration and renewal of registration, a notice to that

effect shall be sent to the registered proprietor and every registered user and the renewal or restoration and renewal shall be advertised in the Journal.

10. The reasoning of the IPAB, adopted by the counsel for appellants, is predicated on renewal, removal and restoration being distinct matters and the deficiency even if any in removal, not affecting the renewal. The said reasoning however to us appears to be contrary to the legislative intent. The legislature and its delegatee, not only in the Act but also in the Rules, have clubbed "Duration, renewal and restoration of registration" and "Renewal of Registration and Restoration". The Supreme Court in *K.M. Nanavati Vs. The State of Bombay*, held that there is ample authority for the view that one is entitled to have regard to the indicia afforded by the arrangement of sections and from other indications and *Craies on Statute law*, authoring that arrangement of sections and their headings are gradually winning recognition as a preamble to the enactments which they precede, limiting or explaining their operation, was quoted with approval. The Supreme Court further held that headings and arrangement of sections may be looked at as a better key to construction than a mere preamble. From the juxtaposition of various Articles of the Constitution, the intention of the framers of the Constitution was deduced. (Though the aforesaid is in the minority view but the efficacy thereof is not affected by the majority view.) Again, in *Industrial Finance Corporation of India Ltd. Vs. The Cannanore Spinning and Weaving Mills Ltd. and Others*, and *N.C. Dhoundial Vs. Union of India (UOI) and Others*, it was reiterated that section headings and marginal notes can be relied upon to clear any doubt or ambiguity in the interpretation of the provision and to discern the legislative intent. Mention may also be made of *Mahendra Kumar and Another Vs. State of Madhya Pradesh and Others*, where also placement of the various sections was used as an interpretative tool. Chapter headings were similarly accorded the status of an interpretative tool and preamble of the sections thereunder, to be resorted to for resolving doubts, in *Tata Power Company Ltd. and Another Vs. Reliance Energy Ltd. and Others*, .

11. It is thus legitimate to infer that the legislature and the rule making authority intended the subjects of duration, renewal and restoration of registration as interlinked to each other and we are unable to concur with the reasoning of the IPAB of renewal, removal and restoration being distinct matters. A holistic reading of the Act and the Rules is clearly indicative of the legislative intent to the contrary. In the light of the judgments of the Apex Court aforesaid we are of the view that there is solid and respectable authority for the rule that one must begin at the beginning and legislative provisions cannot be read bereft of their placement and context.

12. Even otherwise, on a plain reading of Section 25, the inescapable conclusion is that though the period of registration was prescribed as seven years, renewable from time to time on application in the prescribed manner within the prescribed time [under Sub-Sections (1) & (2)] but the removal of the mark from the register has been made subject to sending of a notice in the prescribed

manner calling upon the registered proprietor to renew the mark and permitted only upon the failure of the registered proprietor to do so [under Sub-Section (3)] and not merely on the failure of the registered proprietor to apply for renewal within the prescribed time.

13. The Supreme Court, though in the context of a Rent Legislation, in *E. Palanisamy Vs. Palanisamy (D) by Lrs. and Others*, reiterated in *Sarla Goel and Others Vs. Kishan Chand*, , emphasized the importance of following the statutory procedure step by step and held an earlier step to be a precondition for the next step and it being impermissible to straightaway jump to the last step. It was further held that the last step can come only after the earlier step has been taken. The Trade Marks Act is an Act for the benefit of the proprietors of trademarks (refer *Thukral Mechanical Works Vs. P.M. Diesels Pvt. Ltd. and Another*,). When the Act itself has prescribed the procedure for removal, we do not find any justification for holding the said procedure to be not mandatory or not binding on the Registrar or to uphold the removal even if such procedure is not followed. We are here concerned with the legislative interpretation and cannot be guided by the consequences as argued by the counsel for the appellants, which may follow as a result of the said interpretation. Where the statute is clear, the Court has to give effect to the right created and should not restrict that right merely in order to minimize litigation. It has been held in *Coal India Ltd. and Others Vs. Saroj Kumar Mishra*, that legislative interpretation cannot be rejected merely for the reason of opening the floodgates of applications or litigations.

14. The Supreme Court in *Sukhnandan Saran Dinesh Kumar and Others Vs. Union of India (UOI) and Others*, also held that where the power conferred to do a certain act is a conditional one, the satisfaction of that condition giving rise to the occasion to exercise the power is a must. Similarly in *Competent Authority Vs. Barangore Jute Factory and Others*, it was observed that when each step is a consequence of an earlier step in the sense that all steps are linked to the initial one, upon the initial step being not in accordance with law, the foundation goes and the rest of the edifice falls.

15. Section 25(3) providing for sending of a notice prescribes removal of the trademark only "if" at the expiration of the time prescribed in the notice, the conditions required therein to be fulfilled have not been complied. The Supreme Court recently in *Head Master, Lawrence School Lovedale Vs. Jayanthi Raghu and Another*, held that the use of the word "if" is meant to indicate a condition. Thus, Section 25(3) cannot be interpreted as permitting removal without the condition of sending of notice being complied with. Earlier also, a Full Bench of the Punjab & Haryana High Court in *Harbans Singh and Others Vs. State of Punjab*, held that the word "if" is always expressive of a condition.

16. The scheme of the Rules regarding renewal of registration and restoration also suggests so. Rule 66 permits an application for renewal of registration to be made any time within six months before the expiration of the last registration.

However the removal for non-renewal has not been made automatic. If the registered proprietor does not make an application for renewal till two months prior to the expiration of the last registration, the Registrar is required to notify the registered proprietor of the approaching expiration (under Rule 67) and is to remove the trademark from the register only thereafter, as is evident from Rule 68 having been placed after Rule 67. If removal pursuant to non-renewal was to be de hors the notice for removal, Rule 68 would have followed Rule 66 and not Rule 67. Though Rule 68 permits removal upon expiration of last registration and non-payment of renewal fee and does not make the same dependent upon compliance of Rule 67 but to read Rule 68 as permitting removal de hors compliance of Rule 67 would be contrary to Section 25(3) which as aforesaid permits removal only if at the expiration of the time prescribed in the notice required to be sent thereunder, the registered proprietor has not applied for renewal. It is a settled principle of law that rules framed under a statute cannot override the statute. In *Ispat Industries Ltd. Vs. Commissioner of Customs, Mumbai*, it is held that the Rules are subservient to the Act and cannot deviate from the provisions of the parent Act. It was further held that the Rules are created to serve the object of the legislation and if there are two possible interpretations of a Rule, one which sub-serves the object of the provision in the parent statute ought to be adopted, as an interpretation to the contrary will make the Rule ultra vires the Act.

17. We are therefore unable to appreciate the view of the IPAB that the two i.e. removal and renewal have no relation with each other.

18. The Act and the Rules have prescribed the manner in which the trademark, which is universally identified as intellectual "property", is to be removed from the register and which removal has the effect of divesting the registered proprietor of his property rights in the registered trademark. Once the matter is seen in this light, we fail to see as to how a registered proprietor can be divested of his property rights in the registered mark in any manner other than the manner prescribed under the Act and the Rules. The Constitutional principles applicable to tangible property would apply to intangible intellectual property also and which bar a person from being deprived of his property save in the manner prescribed by law. The Constitution Bench of the Supreme Court recently in *K.T. Plantation Pvt. Ltd. and Another Vs. State of Karnataka*, held that the expression "Property" in Article 300A which proclaims that no person can be deprived of his property save by authority of law meaning thereby that a person cannot be deprived of his property merely by an executive fiat without any specific legal authority or without the support of law made by a competent legislature, is confined not to land alone, but includes intangibles like copyrights and other intellectual property and embraces every possible interest recognised by law. In *Thukral Mechanical Works (supra)* also it was held that registration of a trademark confers a very valuable right and removal of a mark from the register takes away the valuable right of a registered proprietor and has civil or evil consequences and therefore can be done only when the conditions laid down

therefor are satisfied. It was yet further held that as removal takes away somebody's right, it deserves strict construction.

19. The next question which arises for consideration is, what would be the effect of a removal from the register, without following the prescribed procedure. Section 25(4) makes the period of one year, prescribed for restoration of the mark to the register and renewal thereof, begin from the expiration of the last registration and not from the date of removal. We find it strange that though the right to restoration accrues on removal but the time prescribed to apply for restoration is from the expiry of the last registration. What will happen if removal itself is after one year from the expiry of the last registration as is the case here. Section 25(4) if literally read, applies only if the mark has been removed. If it were to be held that under Rule 66 renewal has to be applied for only within six months prior to the expiration of the mark and not after the expiration, then owing to the mark being not removed, the registered proprietor would not be entitled to avail of Section 25(4). The period of one year provided u/s 25(4) for applying for renewal would then become illusory. Section 25(4) can thus be held to be applicable only where removal is simultaneous to the expiration and not where removal is not so and is effected much after the date of expiration, as in the present case. Neither the Act nor Rules prescribe any limitation for applying for restoration and renewal in a situation where the removal of the mark from the register is without issuing the notice in Form O-3. In the absence of any limitation having been prescribed, the only inference is that such application can be made at any time and in the decision whereon the Registrar would be entitled to take into consideration the relevant factors such as whether the same or a similar mark has in the interregnum being registered by any other person etc.

20. We may in this regard record that though the learned Single Judge has vide impugned judgment directed the Registry to restore and register the mark without prejudice to the rights of any third parties but the senior counsel for the respondent has fairly suggested that the said direction be modified to a direction to the Registrar to consider renewal of the mark after satisfying itself that the respondent is the registered proprietor of the mark which has expired and/or is the successor of the said proprietor and that there is no other impediment viz. of registration in the interregnum by any other person of the same or similar mark.

21. The learned Single Judge on the basis of the pleadings in the writ petition has concluded that in the present case no notice in Form O-3 has been given. We see no reason, in exercise of appellate jurisdiction and in the absence of anything to the contrary being shown, to interfere with the said conclusion of the learned Single Judge in exercise of discretionary powers under Article 226 of the Constitution of India.

22. Further, once it is held that for the Registrar to invoke the bar of limitation of one year for applying for renewal, the notice under Form O-3 is mandatory, the Registrar cannot be permitted to invoke the presumption of the removal having been done in the manner prescribed in law. The learned Single Judge is right in

observing that the appellants by inserting the public notices have admitted to default in issuing the notice in Form O-3. It is significant to note that the respondent had applied for restoration and renewal within one year therefrom. One of the two judges of the Supreme Court, in *Delhi Airtech Services Pvt. Ltd. and Another Vs. State of U.P. and Another*, after noticing the distinction between mandatory and directory provisions held that where a statute imposes a public duty and proceeds to lay down the manner in which the duty shall be performed, the injustice or inconvenience (to the public authority) resulting from a rigid adherence to the statutory prescriptions may not be a relevant factor in holding such prescription to be only directory. Though the said matter is referred to a larger Bench, but that does not affect the efficacy of the aforesaid. Earlier, a five Judge Bench in *The Mysore State Electricity Board Vs. Bangalore Woollen, Cotton and Silk Mills Ltd. and Others*, also, faced with an argument that if a question between the Electricity Board and the consumer were to be referred to arbitration, then there may be thousands of arbitration, which the legislature could not have contemplated, held that it was an argument based on inconvenience and that inconvenience is not a decisive factor in interpreting a statute. We are of the opinion that Section 25 having imposed a duty on the Registrar to effect removal of the mark only after sending the notice and upon failure of the registered proprietor to comply therewith, the argument, and which also prevailed with the IPAB, that Registrar should not be held bound by such duty merely for the reason of the proof of dispatch/service of such notices being not available, is fallacious.

23. Though we have held that Section 25(4) prescribing the time of one year from the expiration of the last registration for restoration is applicable only where removal is in compliance of Section 25(3) and Rule 67 but Section 26 which is as under:

26. Effect of removal from register for failure to pay fee for renewal.--Where a trade mark has been removed from the register for failure to pay the fee for renewal, it shall nevertheless, for the purpose of any application for the registration of another trade mark during one year next after the date of the removal, be deemed to be a trade mark already on the register, unless the tribunal is satisfied either-

(a) that there has been no bona fide trade use of the trade mark which has been removed during the two years immediately preceding its removal; or

(b) that no deception or confusion would be likely to arise from the use of the trade mark which is the subject of the application for registration by reason of any previous use of the trade mark which has been removed.

appears to suggest that the said period of one year in Section 25(4) is also to be read as commencing from the date of removal and not from the date of expiration of the last registration, where removal is not immediately after the expiration of the last registration. Else, there would be no logic/sense in Section

26 providing for deeming the mark on the register for the purposes of any application for registration of the same or similar mark. The only answer, according to us, can be that the registered proprietor of the trademark which has been removed, during the said one year has a right of seeking restoration and renewal thereof. If the legislative intent was to vest a right of renewal only for a period of one year from the expiration of the last registration, the operation of Section 26 would also have been for one year from the date of expiration of the last registration of the trademark and not one year from the date of removal.

24. Section 2(r) of the 1958 Act defines the "registered trademark" as a trademark which is actually on the register and not as a trademark, registration of which is valid/has been renewed. Similarly Section 29 provides that a registered trademark is infringed when a person not being the registered proprietor uses in the course of the trade, a mark which is identical with or deceptively similar to the trademark which is registered. Since as per Section 2(r) a registered trademark is a trademark which is actually on the register, u/s 29, registered trademark would be infringed even though its registration may have expired, so long as it has not been removed from the register.

25. Section 26 supra would become otiose/redundant if it were to be held that the rights of a registered proprietor to restoration and renewal of mark extinguish on the expiry of one year from the expiration of the last registration and irrespective of whether the trademark is actually removed from the register immediately on such expiration or after considerable time. If the registered proprietor whose trademark has expired, irrespective of whether the same had been removed or not from the register were to be left with no right therein, there would not have been any need in Section 26 to preserve such rights for a period of one year from the removal.

26. In the light of the view which we have taken, that removal without following the mandatory procedure prescribed therefor is bad, the judgment of the Supreme Court in Administrator, Municipal Committee, Charkhi Dadri (supra) relied upon by the appellants is of no application. Moreover, the Supreme Court in that case held that once acquisition had become final and the title to the land stood divested, the subsequent non-compliance could not undo what already stood done. However, in the present case, we are concerned with different statutory provisions whereunder according to us removal had not attained finality owing to the procedure prescribed therefor having not been followed. The appeal therefore fails and is dismissed save that the direction given in the impugned judgment to the Registrar to restore and renew the mark is modified to a direction to the Registrar to restore/renew the mark after satisfying that the respondent is the registered proprietor/successor of the registered proprietor of the registered trademark which has expired and that in the interregnum same or similar marks have not been registered.

No costs.