

(2010) 07 IPAB CK 0003

In the Intellectual Property Appellate Board

Case No : M.P. No. 103/10 In ORA/26/10/TM/KOL

Vimal Kumar Sharma Sole Proprietor Laxmi Tea Industrie	APPELLANT
Vs	
Three Leaves India (P) Ltd. And The Registrar Of Trade Marks	RESPONDENT

Date of Decision : 30-07-2010

Acts Referred:

Citation : (2010) 07 IPAB CK 0003

Hon'ble Judges : S. Usha, J; Syed Obaidur Rahaman, Technical Member

Bench : Division Bench

Judgement

S. Usha, J

1. The original rectification application filed for removal of the trade mark 'MAAZA GOLD LABEL' registered under No. 651615 in class 30 from the register of trade marks. The applicant herein filed a miscellaneous petition seeking for an order of staying the effect and operation of the impugned registration and that the Respondent will not use the trade mark against the applicant in any manner.
2. The registration has been obtained by playing fraud upon the registrar. The impugned trade mark was wrongly remaining on the register without sufficient cause. The trade mark advertised in the Trade Marks Journal was not clear and hence the applicant could not oppose the same. The impugned registration is interfering with the applicant's business activities, which is also causing grave, serious and irreversible injury to the applicant's trade in the market.
3. The balance of convenience is in favour of the applicant. The Petitioner has made out a prima facie case for grant of an order of stay.
4. The Respondent herein filed their counter denying the averments made in the

miscellaneous petition. The Respondent denied that the registration was obtained by playing fraud. It was also denied that the continuation of the impugned entry in the register is causing any injury or loss. The balance of convenience is in favour of the Respondent. The applicant commenced the use of the trade mark only since November, 2008 whereas the Respondent was granted registration as early as 1995.

5. The counsel for the Petitioner submitted that the impugned application for registration was made on 10.06.1995 as proposed to be used. The application was for a label mark. The label mark advertised in the Trade Marks Journal was not clear and could not oppose the same. The counsel further submitted that when the application was made in the year 1995 it was proposed to be used whereas in the suit filed by the Respondent against the Petitioner, it is stated to be used since 1990. The counsel also pointed out to the counter-statement filed to the main application for rectification it was stated that the mark was wrongly advertised as proposed to be used and that necessary application to correct the same on Form TM-16 has already been filed where no particulars given as to when the application on Form TM-16 was filed or regarding the status of the application for amendment. That apart, as seen from the additional representation it was only for a word mark and not a label mark whereas the advertisement was for label mark. The counsel further submitted the trade mark was Action Tea as seen from the computer status report as on 26.09.2009 whereas on 23.06.2010 the trade mark is MAAZA GOLD (logo). The counsel finally submitted that the trade mark if not properly advertised has to be re-advertised by giving an opportunity to the public about the full information of the mark to oppose the same. The counsel also relied on some Judgments in this context.

6. The counsel for the Respondent in reply submitted that the Petitioner is subsequent user i.e. since 5th November, 2008 whereas the Respondent is from the year 1990. The counsel drew our attention to the additional representation at page 21 of the counter-statement and submitted that by mistake the user column was left blank. The Respondent has filed an application on Form TM-16 for amending the date of use and the same is pending before the Registrar of Trade Marks. The computer status report cannot be relied on.

7. We have heard both the parties and carefully considered the same and the pleadings and the documents. We are of the view that the trade mark if not clearly advertised or if it is a blurred advertisement, the mark has to be re-advertised giving an opportunity to oppose the said mark with full particulars. Here it is seen that the trade mark has not been published with clear picture of the label mark. That apart the date of user given in the publication and the user claimed now are different. The Respondent's contention to this is that by mistake the user was not mentioned.. we are not going in detail as regards this issue at this stage. We do not find any loss or hardship being caused to the Respondent if an order of stay is granted as the common law rights are always available to them. The Judgments cited by the applicant are not gone into as it relates to the deciding of the main rectification application.

8. We are of the view that the Petitioner has made out a prima facie case for grant of stay of the effect of registration. We therefore grant stay of the effect of the impugned registration till the next date of hearing. There shall be no order as to costs.