

INTELLECTUAL PROPERTY APPELLATE BOARD

Guna Complex Annexe-1, 2nd Floor, 443 Anna Said, Teynampet, Chennai-600018

M.P.No. 37/2010 and M.P. No.46/2010

IN

OA/45/2009/TM/CH

TUESDAY, THIS THE 20TH DAY OF APRIL, 2010

Hon'ble Ms. S. Usha

... Vice-Chairman

Hon'ble Shri Syed Obaidur Rahaman

... Technical Member

T.T. Industries,
1, New Colony,
Model Basti,
New Delhi - 110005.

Presently at:

879, Master Prithvi Nath Marg,
Karol Bagh, New Delhi - 110 005.

Also at:

10, Pollock Street, kolkata-700001

... Appellant

(By Advocate Dr. Alok M. Saha)

Vs.

1. The Registrar of Trade Marks,
TradeWarks Registry at
Chennai, Intellectual
Property Rights Building,
Industrial Estate, SIDCO
RMD,
Godown Area, G.S.T. Road,
Guindy, Chennai - 600 032.
2. The Deputy Registrar of Trade
Marks, Trade Marks Registry at
Chennai, Intellectual Property
Rights Building, Industrial
Estate, SIDCO RMD,
Godown Area, G.S.T. Road,-
Guindy, Chennai - 600 032.
3. M/s D.M.R. Textiles,
No.1, Thirumalai Nagar
1st Street, p.N.Road,
Tirupur - 638602,
District Coimbatore,
Tamil Nadu.

... Respondents

(By Advocate Ms. P.V. Rajeswari for R3)

ORDER, No 80/10**Hon'ble S.Usha, Vice-Chairman:**

The miscellaneous petition has been filed by the appellant to reject the additional documents filed with the counter statement. The grounds of the miscellaneous petition is that there is no mention of the documents in the counter statement and the same were not relied on by the respondent in the opposition proceedings before the Registrar of Trade Marks. The additional documents are filed without any leave of this Appellate Board which is unjustified and illegal. The respondent is now trying to reopen the case by filing new documents. Filing of such new documents will only give rise to a fresh course of action. The additional documents, therefore, ought to be rejected in view of well settled principles of law.

2. The respondent filed their reply along with the application to take those documents on record as there can be no objection raised by the petitioner. The respondent in their counter stated that the additional documents were referred to during arguments though were not filed as exhibits and so the petitioner cannot be stated to have been taken by surprise by these documents. The document Nos. 1 and 2 which are invoices and advertisement were mentioned in their counter statement and the same were never repudiated by the petitioner before the Registrar and hence were not filed by the respondent and are now being filed. In view of the findings of this Appellate Board that mere existence of the mark in the Register will not prove use of the mark the respondent is now filing documents to prove their case and pray that the documents may be taken on record.

3. The matter was taken up for hearing on 17.03.2010 at Chennai. Learned counsel Dr. Alok M. Saha appeared for the appellant and learned counsel Ms. P.V.Rajeswari appeared for the respondent.

4. We have heard the counsel on both sides. The counsel for the petitioner submitted that the application for registration was made on 02.05.1991 as a proposed to be used mark but the documents filed now are of the year 1969 which itself raises a doubt. Documents at pages 1 to 102 are new documents which are now filed, where as documents at pages 103 to the end were produced before the Registrar of Trade Marks. The petitioner also relied on various judgements.

5. In reply, the counsel for the respondent submitted that they had stated in the counter statement filed before the Registrar that they had been using the mark since 1968 and hence the additional documents like invoices are relevant and the petitioner cannot be said to be taken by surprise by those documents. The counsel further submitted that rule 10 of the Intellectual Property Appellate Board (Procedure) Rules, 2003 provides for filing counter statement along with the document and hence the documents ought to be taken on record.

6. We have carefully considered the arguments and have gone through the pleadings and documents. The matter before us is an appeal. The application is to be dealt with under Order XLI, Rule .27 of the C.P.C. which reads as hereunder:

"27. Production of additional evidence in Appellate Court.—(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if —

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

[(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced

by him at the time when the decree appealed against was passed, or]

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission."

7. On a plain reading of the provision, it is clear that the applicant should satisfy the court to accept the additional documents namely (1) the lower court refused to accept those documents or (2) the applicant in spite of due diligence could not trace those documents to place before the lower court or (3) the appellate court requires those documents for pronouncement of judgement. The respondent herein has not satisfied any of the provisions to take on record the additional documents. In fact no application was filed giving reasons for filing documents at this belated time. In the counter the respondent has stated that the documents were not filed before the Registrar as the petitioner had not denied or raised an objection about the sales figures and other expenses. The other reason given now is that because of the finding of this appellate Board that mere registration will not prove their use and those documents are filed to satisfy the Appellate Board. We make it clear that mere registration of the mark will not prove their user is not the finding of this Appellate board alone whereas it is the observation and well settled principle of law by the Apex Court in Corn Products case which is being followed by all court and this Appellate Board, which is one of the lowest forum. To say that the other side did not object cannot be a valid ground as it is always the burden on a person to defend his case in all ways possible.

8. It is worthwhile here to quote the observation of the Hon'ble Supreme Court in the case of Mahavir Singh and others vs. Naresh Chandra and another 2001 (1) SCC 309 -

"5. Before we proceed further we would like to refer to the scope of an application under Order XLI, Rule 27 CPC. Section 107 CPC enables an appellate court to take additional evidence or to require such other evidence to be taken subject to such conditions and limitations as are prescribed under Order XLI, Rule 27 CPC. Principle to be observed ordinarily is that the appellate court should not travel outside the record of the lower court and cannot take evidence on appeal. However, Section 107(d) CPC is an exception to the general rule, and additional evidence can be taken only when the conditions and limitations laid down in the said rule are found to exist. The court is not bound under the circumstances mentioned under the rule to permit additional evidence and the parties are not entitled, as of right, to the admission of such evidence and the matter is entirely in the discretion of the court, which is, of course, to be exercised judiciously and sparingly."

9. Based on the above observation we are of the view that the additional documents cannot be taken on record as already stated the norms have not been satisfied by the respondent.

10. The other ground was that Rule 10 of the Intellectual property Appellate Board (Procedure) Rules, 2003 provide for filing documents along with counter statement in an appeal. We quote the finding of this Appellate Board in this regard, in M.P.No.124/2004 in TA/303/2004/TM/KOL-

"Under section 92 of the Trade marks Act, 1999 it is laid down that this Board shall not be bound by the procedure laid in the Code of Civil Procedure but shall be guided by the principles of natural justice and subject to the provisions of the Act and the rules made there under.

The Appellate Board shall have powers to regulate its own procedure. It would appear from this provisions that this Tribunal is not bound down by the procedure of law contained in Civil Procedure Code governing civil litigation. The parliament has conferred more liberal powers and less formal and more flexible processes to fulfill the statutory objectives, for which this Board has been constituted. The function of this Tribunal is to take into account the public interest along with private interest (that of traders) liberally. Conferment of liberal powers casts an onerous duty upon this tribunal to exercise the jurisdiction so vested in it on certain well established principles. In other words, in exercising such powers, regard must be had to binding precedents and in the absence thereof certain well defined principle must be followed".

11. In view of the above observations, even though rules provide for filing documents along with the counter based on the well settled principles we are of the view that these documents can not be taken on record.

12. We are of the view that taking on record of the additional documents would only amount to hearing the appeal itself. We are, therefore, not taking on record the additional documents. The miscellaneous petition No. 46/2010 is an after thought only to cure the defects, which deserves to be dismissed.

13. In view of the above, we accordingly allow the miscellaneous petition No. 37/2010. Consequently, the miscellaneous petition No. 46/2010 is dismissed for the above reasons. No order as to costs.

-Sd-
(Syed Obaidur Rahaman)
Technical Member

-Sd-
(S. Usha)
Vice-Chairman