

INTELLECTUAL PROPERTY APPELLATE BOARD

Guna Complex, Annexe-I, 2nd floor, 443, Anna Salai, Teynampet, Chennai 600 018

(Circuit Bench Sitting at Ahmedabad)

M.P.NO.66 of 2008 in OA/32/2008/TM/AMD

AND

OA/32/2008/TM/AMD

THURSDAY, THIS THE 28TH DAY OF JANUARY, 2010

HON'BLE MS. S. USHA

VICE-CHAIRMAN

HON'BLE SHRI SYED OBAIDUR RAHAMAN

TECHNICAL MEMBER

Bhavsar Meenaben Vijaykumar,
Proprietor of Shivam Home Industries,
24, Bhavsar Society,
New Wadaj, Ahmedabad – 380 013.

... Appellant

(By Advocate Shri U.B. Brahmbhatt)

Vs.

The Deputy Registrar of Trade Marks,
Trade Marks Registry,
15/27, National Chambers,
Ashram Road,
Ahmedabad – 380 009.

... Respondent

(By Advocate - None)

ORDER No. 29/2010

Hon'ble Ms. S. Usha, Vice-Chairman:

1. Appeal arising out of the order dated 01.08.2007 that notice under section 57(4) be issued for suo-motto cancellation of registration and as already a rectification petition is filed the same be clubbed together.

The brief facts of the case are:

2. The appellant herein filed an application for registration of the trade mark "NATIONAL CHALK STICKS" under No.842945 in class 16 on 26.02.1994. On 12.09.2003 the application was accepted with disclaimer of the word "NATIONAL" letter 'N' in Chalk Sticks except as substantially shown in the representation of the mark as agreed. On 13.12.2004, the application was advertised in the Trade Mark Journal No.1324 (Supp.I). The applicants also obtained Copyright registration under No.A-76021/2006 dated 16.03.2006. The appellant filed a criminal complaint against one Mr. Pankajbhai S. Naik for copying the appellants trade mark and the copyright. A civil suit was also filed and by a joint compromise settlement the matter

was settled and the same was recorded by a decree being passed by the Civil Court. Even after the settlement arrived at, the said Mr. Pankajbhai S. Naik continued to use the trade mark which he had undertaken not to do so before the Civil Court.

3. Mr. Pankajbhai S. Naik filed a criminal complaint against the appellant, the complaint was dismissed as no offence was made out. In 2007, the appellant again filed a civil suit based on the consent decree. The Civil Court was pleased to grant an order of injunction. Mr. Pankajbhai S. Naik again filed a criminal complaint against which the appellant moved the Hon'ble High Court of Gujarat for quashing the same, the High Court was pleased to stay the proceedings.

4. On 14th December, 2006, Mr. Pankajbhai S. Naik filed a rectification petition against the trade mark 842945. On 08.02.2007, the respondent herein issued a notice stating that the application was advertised before acceptance through an error and intended to withdraw the same. The trade mark was already registered as seen from the records though certificate not issued. The respondent after registration when rectification petition is already pending cannot initiate proceedings under section 18 and 19 of the Act. The notice under section 18 and 19 of the Act has been issued only after the rectification proceedings have been initiated.

5. The appellant immediately moved the Hon'ble Gujarat High Court for proper remedy. The High Court disposed of the petition with a direction to move the Intellectual Property Appellate Board even after the expiry of the period of limitation. The appellants are therefore before us on appeal.

6. We have heard Shri. U.B. Brahmbhatt, Counsel for the appellant on 2nd December, 2009 during Circuit Bench Sitting at Ahemadabad.

7. The learned counsel re-iterated what was stated in the grounds of appeal and prayed that the impugned order be set aside and the appeal be allowed.

8. We have gone through the pleadings and records and have considered the arguments of the appellants counsel. We on perusal of the record understand that a notice has been issued on 08.02.2007 calling upon the appellant to show cause why the acceptance order should not be withdrawn. The appellants have been heard

and an order has been passed based on the computer report regarding the status of the application.

9. We produce the order dated 01.08.2007 under appeal – "Notice under section 57(4) be issued for suo-moto cancellation of registration.

File clubbed with Rectification filed before putting up as above under section 57(4)".

10. We therefore understand there is a direction for issue a show cause notice under section 57(4) for suo-moto cancellation of registration as well as the rectification application to be clubbed with this file. From the records it is seen that the instant appeal has been filed on 21.04.2008, the hearing of the notice under section 57(4) has not been heard when the last date given was 17.03.2008. An opportunity is therefore being afforded to the appellant. This is just a show cause notice issued to the appellant and hence cannot be considered to be an order or decision within the meaning of sub section (2) of the section 91 of the Act. This is not an order a decision for us to interfere as the appellant is given an opportunity to put-forth his arguments to satisfy the Registrar.

11. We think it not desirable to interfere with in the matter when the appellant has been called for to appear in person and give his explanation as to why the order of acceptance should not be cancelled. We therefore find no final order passed except for a notice alone issued

12. In view of the above, the appeal is disposed of with a direction to the Registrar of Trade Marks, Ahmedabad to hear and dispose the notice issued under section 57(4) of the Act and the rectification application as it has been decided to club both together within a period of nine months from the date of receipt of this order as the application for registration is pending for more than 15 years. Nothing survives in the Miscellaneous Petition No.66/2006 and the main appeal is disposed of in the above terms. There shall be no order as to costs.

Sd/.
(SYED OBaidUR RAHAMAN)
TECHNICAL MEMBER

Sd/
(S.USHA)
VICE-CHAIRMAN

