

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

OA/52/2007/TM/CH

THURSDAY, THIS THE 28TH DAY OF JANUARY, 2010

HON'BLE Ms.S.USHA

VICE CHAIRMAN

HON'BLE SHRI SYED OBAIDUR RAHAMAN

TECHNICAL MEMBER

Shakti Bhog Foods Limited,
24, Laghu Udyog Nagar (SSI),
G.T.Karnal Road,
Delhi – 110 033

...Appellant

(By Advocate Shri M.K.Miglani)

Vs.

1. Jayakrishna Flour Mills Limited,
Plot No.A-2/3 SIDCO Industrial Estate,
Kappalpur, Madurai – 625 008.
2. Deputy Registrar of Trade Marks,
Trade Marks Registry,
Intellectual Property Rights Building,
G.S.T.Road, Guindy,
Chennai – 600 022.

....Respondents

(By Advocate Shri S.Balachandran)

ORDER No. 32/2010

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

The instant appeal arises out of order dated 20/08/2007 by the Deputy Registrar of Trade Marks dismissing the opposition No. MAS-165136 and allowing application No. 1000752 in class 30 to proceed for registration under the provisions of the Trade Marks Act 1999(hereinafter referred to as the Act.)

2. The 1st respondent herein filed an application for registration on 02/04/2001 for the trade mark "LION" under No. 1000752 in class 30 in respect of wheat products such as maida, sooji, atta and bran claiming user since

23/01/2001. The said application was advertised before acceptance in Trade Marks Journal Mega 2 dated 25/09/2003 at page 4670.

3. The appellants herein filed notice of opposition on various grounds. The appellants are the proprietor of the trade mark "TIGER" registered under No. 487836 in class 30 as of 23/03/1988 in respect of atta, maida, sooji and other wheat products for sale except in the state of Gujarat. The appellants have obtained registration under No. 671394 in class 30 in respect of other products falling under the said class. The appellants have been using the said mark since 1975 and have thus gained goodwill and reputation among the public. The respondent's adoption is dishonest and the user claim is false. The marks are deceptively similar and the goods are same. The registration of the impugned trade mark would be in contravention of the provisions of the Act.

4. The respondent herein filed their counter statement denying the statement that the Trade marks are the same and also that they adopted and started using the trade mark since the year 1997 and there was no scope for confusion or deception.

5. On completion of the formal procedure, the matter was set down for hearing on 12/06/2007 and subsequently adjourned to 27/07/2007. On 23/07/2007 the appellants herein received a telephone call from the office of the respondent's counsel stating that they would be requesting for an adjournment on 27/07/2007 and the appellant's counsel consented for the same. The counsel for the appellant immediately wrote to the Registrar on 23/07/2007 and informed the Registrar about the telephone call and the consent given by them and that the appellant's counsel was not traveling to Chennai from Delhi to attend the hearing for the said reason.

6. In spite of the above, the respondent's counsel attended the hearing and the Registrar too heard the matter in the absence of the appellant's counsel and the impugned order was passed on 20/08/2007. Aggrieved by the said order the appellants are before us on appeal on the grounds hereunder –

- (a) the impugned order is contrary to law and the facts are not sustainable and,
- (b) the order has been passed without considering the letter dated 23/07/07 sent by the appellant's counsel;
- (c) the impugned order is in complete contravention of the principle of natural justice which is the outcome of misrepresentation and fraudulent conduct of the respondent's counsel;
- (d) the respondent's counsel has not refuted the letter dated 23/07/2007;
- (e) the impugned order has been passed without hearing the appellants;
- (f) the impugned order is contrary to principles of natural justice, fair play, equity and good conscience;
- (g) the impugned order is not sustainable even on merits of the case;
- (h) the 2nd respondent failed to consider the fact that the appellants were prior adopters and users of the trade mark;
- (i) the 2nd respondent erred to consider the aspect of actual confusion or deception;
- (j) the impugned order is in contravention of the provisions of section 11 of the Act;
- (k) the 2nd respondent failed to consider the fact that the respondent's adoption was dishonest as the appellants were prior registered proprietor;
- (l) the 2nd respondent erred in law and on facts to hold that balance of convenience is in favour of the respondent;
- (m) the 2nd respondent failed to refer to the evidence of the parties or record any finding thereof;
- (n) the impugned order does not record any reason for the finding that the marks are not deceptively similar;

7. The appellant therefore prays for quashing and setting aside the impugned order.

8. The 1st respondent filed their counter statement denying the allegations made in the memorandum of grounds of appeal. The 1st respondent had stated that they adopted the trade mark in the year 1996 and their first commercial transaction was in the year 1997. Their sales are only in the states of Kerala,

Karnataka, Andhra Pradesh, Tamil Nadu and Pondicherry. On a search made, it was found that there was no conflicting trade mark available. In fact, they have made an application for registration earlier and as no application was available, the respondent made this second application.

9. In one another opposition No. MAS 162503 to the same application No.1000752 in class 30 which was decided in favour of the respondent, an application on Form TM 16 to restrict the area was filed. The rest of the allegation were denied.

10. We have heard Mr. M.K.Miglani, counsel for the appellant and Shri S. Balachandran counsel for the 1st respondent on 23/12/2009 at Chennai.

11. Learned Counsel for the appellant submitted that the opposition was heard on 27/07/2007 and orders were reserved. The final orders were pronounced only on 20/08/07. The counsel drew over attention to evidence filed already with the counter statement of the respondent and submitted that on 26/08/2007 i.e. even after the pronouncement of the order the respondent has filed an application for amendment of the specification of goods on Form TM 16 which was allowed in another opposition for the same trade mark application number. He also pointed out that there were 2 applications filed for the same trade mark registration. The counsel further reiterated what was stated in the grounds of appeal.

12. The counsel for the appellant further pointed out about the attitude of the respondent's counsel where they had stated that they would be seeking adjournment on the date fixed for hearing and had argued the matter without bringing it to the notice of the Registrar. The counsel vehemently submitted that there was no reply to this submission in the counter statement either admitting or denying. The counsel also submitted that on 23/07/2007 the counsel for appellant had informed the 2nd respondent about the respondent's intention of seeking adjournment for the hearing on 27/07/2007 as well on receipt of the order dated 20/08/2007, wrote to the Registrar about his non-appearance and also about not offering an opportunity to the appellant of hearing and hence filed this appeal.

13. Learned counsel for the 1st respondent pointed out to the findings of order passed by the Appellate Board in MP No. 143/07. He submitted that the respondent made 2 applications – 1st application was not traceable and hence had to file the 2nd application. The counsel also submitted that he had filed the application for amendment on form TM 16 after the orders were reserved. The counsel further submitted on the merits of the case.

14. We have heard both the counsel and have gone through the pleadings and documents. We think it not necessary to go into the merits of the case, instead we shall deal with the aspect of an opportunity being granted to the appellant of hearing. No person should be deprived of his property without his having an opportunity of being heard and that this has been applied to many exercise of power which in common understanding would not be at all a mere judicial proceedings. Lord D Plock in the House of Lords has said that, "*the right of a man to be given a fair opportunity of having what is alleged against him and of presenting his own case is no fundamental to any civilized legal system that is to be presumed that Parliament intended that a failure to observe it should render null and void any decision reached in breach of his requirement*".

15. In this context it is worthwhile to quote the observation of various High Courts and the Apex Court. The Delhi High Court in the decision in a trade marks case reported in **AIR 1969 Delhi 324 Radha Kishan Khandelwal Vs. Assistant Registrar of Trade Marks**, the learned Judge held thus:

"I am firmly of the view that a proceedings for making an alteration of this nature in the Register of Trade Marks can by no means be regarded as a purely administrative proceedings and that the Registrar while discharging his duties in that behalf performed quasi judicial functions whereby he decided prima facie at least, the rights of the parties. It is, therefore, of the essence of the procedure required for performing that duty that the party whose rights are going to be adversely affected by the decision taken by the Registrar should have a notice of those proceedings and the decision should also be supported by reasons. The necessity for reasons in support of the decision arises also from the fact that the Registrar's

decision is open to an appeal before the High Court. Assuming I am wrong there and it is held that the function performed by the Registrar is of an administrative character the necessity for a notice and same kind of inquiry will still be there and since the order made by the Registrar is open to appeal before the High Court, the party aggrieved by his decision will obviously be entitled to a copy of the order being supplied to him on payment of usual charges. It is true that the rules do not expressly require a notice to be issued or a hearing to be given to the party adversely affected by the order when an application on Form TM 24 is made before the Registrar but there is in the eye of law a necessary implication that the party adversely affected should be heard before an order for the removal of his name can be made against him....."

In (1981), 1 Supreme Court Cases 664 (Swadeshi Cotton Mills Vs. Union of India), their Lordship of the Supreme Court had occasion to consider the scope of "natural justice" and held thus:

"A quasi judicial or administrative decision rendered in violation of the audi alteram partem rule, wherever it can be read as an implied requirement of law, is null and void. In the facts and circumstances of the instant case, there has been a non compliance with such implied requirement of the audi alteram partem rule of natural justice at the pre-decisional stage. The impugned order, therefore, could be struck down as invalid on that score alone."

In (1988) 2 Supreme Court Cases 602 (A.R.Antulay Vs. R.S.Nayak) in paragraph 55 (at page 660) their Lordships have said thus:

".....No prejudice need be proved for enforcing the fundamental rights. Violation of a fundamental right itself renders the impugned action void. So also the violation of the principles of natural justice render the act a nullity."

In **Administrative Law by P. P. Craig – 2nd Edition (1993)**, it is stated thus at page 337 and 338:

“ The problem whether decisions are void or voidable has been particularly prevalent in the context of natural justice.

(1) *Hearings: The view taken by the majority in Ridge Vs. Baldwin, that failure to comply with the rules as to hearings makes a decision void, accords with precedent and principle. The rationale for regarding such a failure as leading to a decision which is void is expressed by Lord Salborne L.C.,*

“There would be no decision within the meaning of the statute, if there were anything of that sort done contrary to the essence of justice.” There have been many other cases where the courts have stated that a failure to hear renders the decision void or a nullity. Thus, the action of a committee which purported to expel a person from a club without a hearing was held to be null and void, as was the refusal of a pension to a policeman who has resigned from the force. Cases of collateral attack are also instructive. A number of these cases explicitly state that a failure to hear renders the decision void. Even where this is not so stated it is implied in the ability to attack the decision collaterally; if a failure to hear constituted only an error within jurisdiction the decision could not be attacked collaterally.”

16. In the instant case, it is seen that there is no denial about the telephone call made by the respondent wishing to make a request for adjournment. We understand the letter stating the facts has been sent to the Registrar as well as to the respondent. In such circumstances we are of the opinion that the matter be heard afresh giving an opportunity to the appellants.

17. The impugned order is, therefore, set aside and the appeal is allowed remanding back the matter to the Registrar for hearing the matter afresh and to dispose the matter in accordance with law. No order as to costs.

Sd/-
(SYED OBAIDUR RAHAMAN)
TECHNICAL MEMBER

Sd/-
(S.USHA)
VICE-CHAIRMAN

sjr