

31 & 37.

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ W.P.(C) 8801-02/2009

% **Date of decision : 18th September, 2009**

LIBERTY FOOTWEAR COMPANY Petitioner
Through Mr. Pravin Anand, Ms. Hima Lawrence,
Advocates.

versus

M/S. FORCE FOOTWEAR COMPANY & OTHERS Respondents
Through Mr.S.K.Bansal, Mr.Pankaj Kumar,
Mr.Ranjeet Rana, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA

ORDER (ORAL)

1. Heard. With the consent of the parties, the writ petitions are taken up for final disposal.
2. This Order will dispose of both the writ petitions filed by the petitioner herein against the Order dated 19th August, 2008 passed by the Intellectual Property Appellate Board (hereinafter referred to as IPAB, for short) refusing to take on record the additional documents filed by the petitioner along with the affidavit by way of evidence. Learned IPAB has observed that the application for taking on record additional documents does

not disclose sufficient ground for extending the time to file documents. It has been recorded as under:

“....Even if any plausible reason or ground is given justifying for the condonation of delay, there is no provision which empowers this Appellate Board to condone such delay.”

3. IPAB has been constituted under Section 83 of the Trade Marks Act, 1999 (hereinafter referred to as Act, for short) and is a quasi judicial tribunal which exercises power as an appellate forum against an order/decision of the Registrar. It also exercises original jurisdiction in respect of rectification petitions against the orders of registration passed by the Registrar. Section 93 of the Act stipulates that no court or authority shall have or is entitled to exercise any jurisdiction, power and authority in relation to matters referred to in Section 91(1) of the Act. Section 100 of the Act provides for transfer of all pending appeals and applications for rectification in the High Courts, against any order or decision passed by the Registrar, to IPAB w.e.f the date notified by the Central Government.
4. Section 92 of the Act states that IPAB shall not be bound by the procedure laid down in the Code of Civil Procedure, 1908 (hereinafter referred to as Code, for short) but shall be guided by the principles of natural justice, subject to the provisions of

the Act and the Rules made there under. IPAB has powers to regulate their own procedures including fixing place and time of hearing. Sub-section (2) to Section 92 states that IPAB shall for the purpose of discharging its functions under the Act have the same power as are vested in the civil courts under the Code while trying a suit for receiving evidence, issuing commission for examination of witnesses, requisitioning of public records and any other matter which is prescribed. Under sub-section (3) of Section 92 proceedings before IPAB are judicial proceedings under Sections 193, 228 and for the purpose of Section 196 of the Indian Penal Code, 1860 and Section 195 of the Code of Criminal Procedure, 1973.

5. It is well settled that quasi judicial tribunals on procedural matters are entitled to adopt a procedure which they feel is just and fair. Unless there is a specific or implied bar or prohibition by the statute, a quasi judicial tribunal has flexibility and can follow procedure, which is fair and compliant with the principles of natural justice. Every procedure is acceptable and permissible until it is shown to be prohibited by law (See, ***Hansraj Harjiwan Bhate versus Emperor*** AIR 1940 Nag. 390 following ***Narasingh Das versus Mangal Dubey*** 1882 ILR (5) All 583). Further quasi judicial tribunals have ancillary and

incidental powers to ensure that there is effective adjudication and decision. In ***Suresh Jindal versus BSES Rajdhani Power Ltd.*** (2008) 1 SCC 341, the Supreme Court has observed that a statutory authority while exercising statutory powers may do all things, which are necessary for giving effect thereto. Similarly, in ***Income Tax Officer, Cannanore vs M.K. Mohammed Kunhi*** AIR 1969 SC 430, the Supreme Court while examining the question whether Income Tax Appellate Tribunal has inherent right to grant stay of the impugned demand during pendency of an appeal before them, had observed as under :

“.....It is a fairly established rule that an express grant of statutory power carries with it by necessary implication the authority to use all reasonable means to make such grant effective (Sutherland Statutory Construction, Third Edition, Articles 5401 and 5402). The powers which have been conferred by Section 254 on the Appellate Tribunal with the widest possible amplitude must carry with them by necessary implication all powers and duties incidental and necessary to make the exercise of those powers fully effective. In Domat’s Civil Law, Cushing’s Edition, Vol.1 at page 88, it has been stated:

“It is the duty of the judges to apply the laws, not only to what appears to be regulated by their express dispositions but to all the cases where a just application of them may be made, and which appear to be comprehended either within the

consequences that may be gathered from it.”

Maxwell on interpretation of Statutes, Eleventh Edition contains a statement at p. 350 that “where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution. Cui jurisdiction data est, ea quoque concessa esse videntur, sine quibus iurisdictione explicari non potuit”. An instance is given based on *Ex Parte, Martin*, (1879) 4 QBD 212 at p.491 that “where an inferior court is empowered to grant an injunction, the power of punishing disobedience to it by commitment is impliedly conveyed by the enactment, for the power would be useless if it could not be enforced.”

6. In the subsequent portion of the judgment it was further observed as under :-

“8. Section 255(5) of the Act does empower the Appellate Tribunal to regulate its own procedure, but it is very doubtful if the power of stay can be spelt out from that provision. In our opinion the Appellate Tribunal must be held to have the power to grant stay as incidental or ancillary to its appellate jurisdiction. This is particularly so when Section 220(6) deals expressly with a situation when an appeal is pending before the Appellate Assistant Commissioner but the Act is silent in that behalf when an appeal is pending before the Appellate Tribunal. It could well be said that Section 254 confers appellate jurisdiction, it impliedly grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution and that the statutory power carries with it the duty in proper cases to make such orders for staying proceedings as will prevent the appeal if successful from

being rendered nugatory.”

7. Courts and tribunals during hearing of any case do pass orders fixing and granting the time and giving directions to the parties like file documents, replies, etc. The courts or the tribunal in such cases retain the power to extend the time granted, unless there is a specific bar or prohibition in the Act or the Rules. Time once fixed by the Court or the tribunal is not sacrosanct or the final word. These orders or directions fixing the time for compliance are procedural orders and *in terrorem* and are passed for a purpose to avoid delay and expedite the proceedings. Courts or tribunals do have the power to extend the period/time fixed by them. Extension of time does not amount to review of the earlier order.
8. There is difference between procedural review and substantive review. As explained by the Supreme court in the case of ***Grindlays Bank Ltd. versus Central Government Industrial Tribunal and others*** 1980(Supp) Supreme Court Cases 420, the Court or a tribunal have inherent power of procedural review but right to substantive review has to be specifically conferred. In the said case, application for setting aside of ex parte award was held to be maintainable on the ground that it falls in the category of procedural review and

cannot be categorized as substantive review. It was observed as under:-

“The Tribunal had the power to pass the impugned order if it thought fit in the interest of justice. It is true that there is no express provision in the Act or the rules framed there under giving the Tribunal jurisdiction to do so. But it is a well known rule of statutory construction that a Tribunal or a body should be considered to be endowed with such ancillary or incidental powers as are necessary to discharge its functions effectively for the purpose of doing justice between the parties. In a case of this nature, we are of the view that the Tribunal should be considered invested with such incidental or ancillary powers unless there is any indication in the statute to the contrary.”

9. The Supreme Court in ***Mahanth Ram Das versus Ganga Das*** AIR 1961 SC 882, had examined the question whether the courts have the inherent power to extend the time when a case is not covered by any specific provision. In the said case time for payment of deficient court fee as fixed had expired. The order fixing the time was peremptory. Referring to the powers of the Court to extend the time, when by an earlier order a specific time limit was fixed and had expired, it was observed as under:-

“Such procedural orders, though peremptory (conditional decrees apart) are, in essence, in terrorem, so that dilatory litigants might put

themselves in order and avoid delay. They do not, however, completely estop a Court from taking note of events and circumstances which happen within the time fixed. For example, it cannot be said that, if the appellant had started with the full money ordered to be paid and came well in time but was set upon and robbed by thieves the day previous, he could not ask for extension of time, or that the Court was powerless to extend it. Such orders are not like the law of the Medes and the Persians. Cases are known in which Courts have moulded their practice to meet a situation such as this and to have restored a suit or proceeding, even though a final order had been passed."

10. In ***Ganesh Prashad Sah Kesari versus Lakshmi Narayan Gupta*** (1985) 3 SCC 53, the Supreme Court observed that when a time is fixed or granted by a court for doing any prescribed act or thing, the court in its discretion can enlarge the time fixed though the period originally fixed/granted had expired. Time once fixed, does not whittle down the discretion of the court to further extend the time. In the said case the question was whether a court can extend the time to enable a tenant to deposit rent.
11. The Calcutta High Court in ***Sethia Mining & Manufacturing Corporation Ltd versus Khas Dharmaband Colliery Company Pvt Ltd*** AIR 1982 Cal. 413 examined the question whether after passing an order fixing specific time, the court becomes *functus officio* and has no jurisdiction to entertain a

prayer for extension of time. It was observed that courts in procedural matters do pass conditional or even peremptory orders but these orders are in terrorem for purpose of compelling a litigant to comply with the procedure and avoid prolongation of a suit or proceeding. It would be incorrect to state that the court is rendered powerless to extend time initially granted. Similar view has also been expressed by the Bombay High Court in the case of ***Marketing and Advertising Associates Pvt. Ltd versus Telerad Private Ltd.*** (1969) 39 Comp. cases 436 (Bom). While dealing with the Companies (Court) Rules, 1959, it was observed that in procedural matters time granted and fixed by the court can be extended. In the said case by a consent order, time was fixed for payment of amounts in a petition for winding up. There was a default. However, referring to Rule 7 of the Company (Court) Rules, 1959, it was observed that power of Courts to extend time applied even to consent orders, as long as the matter is alive and not disposed of. The Division bench quoted with approval the following observations in ***Haridas Gangalbhai v Vijayalakshmi Navinchnadra Mafatlal***, Appeal No 84 of 1956:

“Now the principle of law is well settled and

does not require much elaboration. The Court has always the jurisdiction to extend time for the doing of any act by a party. Section 148 of the Civil Procedure Code deals with those matters which have got to be done under the Code or allowed under the Code, but independently of Section 148 the Court has inherent jurisdiction to extend time for the doing of any order made by the Court, and there can be no question that the Court has jurisdiction to extend the time for payment."

12. The Punjab & Haryana High Court in the case of ***Hukma and others versus Manga and others*** AIR 2003 P&H 287 examined Sections 148 and 149 of the Code and has observed that extension of time to pay court fee when the extended time originally granted has expired, exists and the power to further extend time is not exhausted. The court retains the power to grant further extension. Time in such cases can also be enlarged even where the first extension of time has expired. In ***United Commercial Bank versus Mani Ram*** AIR 2003 HP 63 it was observed that when time is fixed by the court and not by any statute, the court retains the inherent power to extend the time. However when time is fixed by a statute and the provision is mandatory then the position may be different.
13. Rules of procedure, it is well settled, are handmaid of justice and are normally treated as directory and not mandatory unless

legislative intent is opposite. Most of the procedural rules are enacted with the object to ensure expeditious trial and do not normally impose a prohibition and bar on the power of the court/tribunal to extend time. A prohibition or bar requires a penal consequence which should flow from non-compliance of a procedural provision. In ***Kailash versus Nankhu*** AIR 2005 SC 2441 and ***Salem Advocate Bar Association, Tamilnadu versus Union of India*** AIR 2005 SC 3353 it has been held that there may be many cases where non-grant of extension would amount to failure of justice. The object of procedural rules is not to promote failure of justice. Procedural rules deserve to be read down to mean that where sufficient cause exists or events are beyond the control of a party, the Court would have inherent power to extend the time.

14. In the impugned order, IPAB has referred to Rule 14 of the Intellectual Property Appellate Board (Procedure) Rules, 2003 which reads as under:-

"14. Extension of time.- (1) If the Appellate Board is satisfied, on an application made to it in the prescribed Form 3 under these rules, that there is sufficient cause for extending the time for doing any act prescribed under these rules (not being a time expressly provided for in the Trade Marks Act, 1999), whether the time so specified has expired or not, it may subject

to such conditions as it may think fit to impose, extend the time and inform the parties accordingly.

(2) Nothing in sub-rule (1) shall be deemed to require the Appellate Board to hear the parties before disposing off an application for extension of time and no appeal shall lie from any order of the Appellate Board under this rule."

(emphasis supplied)

15. The aforesaid Rule permits and allows IPAB to extend the time for doing any act prescribed under the IPAB Rules whether such time as specified has expired or not. Thus IPAB has been given power to extend the time even if the time is specifically fixed under the Rules but cannot extend time fixed under the provisions of the parent Act. It will be incongruous to hold that IPAB has power to extend the time fixed under the statutory Rules but is *functus officio* and barred from extending time fixed in an order or direction given in an earlier order passed by them. It follows that IPAB has the power to extend the time even when it has fixed a specific time in their earlier order. Rule 14 certainly does not bar or expressly or impliedly prevent the IPAB from extending time fixed by them in an order. IPAB retains inherent right and power to extend time. IPAB is required to follow fair and just procedure. Section 92 of the Act gives wide discretion to IPAB in following and adopting its own

procedure but the procedure should be fair and prevent injustice. Principles of natural justice do not state that the time once fixed by the Court or forum cannot be extended.

16. The second question which arises for consideration is whether the petitioner has disclosed sufficient cause and justification for condonation of delay in filing of documents. During the course of hearing before me, it is pointed out that the petitioner has already paid Rs.75,000/- as cost to the respondent pursuant to an interim directions passed by this court. It also transpires that the respondent have filed six additional affidavits by way of evidence which have not been taken on record because of the delay in filing of the same. It does appear that the petitioner is somewhat responsible for the delay and has defaulted in filing of documents within time. The petitioner, it is apparent, did not realize the significance and importance of filing a detailed application explaining the reasons why there was delay in filing of documents. However, it is noticed that in the present case final arguments were heard on 25-26th October, 2007. Orders were not passed and the matter was relisted for hearing to enable the parties to file affidavit by way of evidence. There are two proceedings pending before the IPAB, one filed by the petitioner and the other by the respondent for rectification.

Keeping these aspects in mind and to ensure that there is effective and complete adjudication of disputes, one last opportunity should be granted to the petitioner and the respondent to file documents and also file affidavit by way of evidence in support of their cases. The petitioner and the respondents will file additional documents if any within four weeks from today and affidavits by way of evidence within four weeks thereafter. No further extension of time will be granted as agreed and accepted by the learned counsel for the parties. Additional documents and affidavits by way of evidence already filed will be taken on record.

17. Impugned orders are accordingly set aside and modified to the extent indicated above. Parties will appear before IPAB on the date already fixed.

The writ petitions are disposed of. In the facts and circumstances of the case, there will be no further order as to costs.

SANJIV KHANNA, J.

**SEPTEMBER 18, 2009
P/VKR**