

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

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Judgment delivered on: 13.07.2012

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W.P.(C) 4093/2012

U.V.ENTERPRISES

..... Petitioner

versus

NEW BHARAT RICE MILLS

..... Respondent

Advocates who appeared in this case:

For the Petitioner:	Mr. S.K. Bansal, Mr. Vikas Khara and Mr. Praveen Kumar, Advocates
For the Respondent:	None

CORAM :-

HON'BLE MR JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J

CM No. 8555/2012 (Exemption)

Allowed subject to just exceptions.

WP(C) No. 4903/2012 & CM No. 8554/2012 (stay)

1. This is a writ petition filed under Article 226 and 227 of the Constitution of India against the judgment and order dated 11.11.2011 passed by the Intellectual Property Appellate Board (hereinafter referred to as IPAB). The IPAB by virtue of the impugned order has set aside a order of the Assistant Registrar of Trade Marks dated 06.11.2000, whereby the opposition filed by the respondent to the application for registration of the trade mark 'Taj' with the device of 'Taj Mahal Label' (collectively referred to hereinafter as trade mark) was rejected. In other words, the Assistant Registrar directed registration of the petitioner's application for registration

of trade mark in class 30; a direction which has been reversed by the IPAB in the appeal before it.

2. With this preface in place, let me advert to facts which are relevant for the purposes of adjudication of the present writ petition.

2.1 The writ petitioner before me is one, M/S U.V. Enterprises (in short U.V.), which is apparently a registered partnership firm, set up and established in Australia; with its office situate at 9/5, Wharf Road, Gladesville, Sydney, NSW 2111, Australia. The two partners in the said partnership firm are one Sh. Sid Varma and his wife Praveen Varma. U.V. is apparently a trading associate of a company by the name of Taj Foods Sales Pvt. Ltd.

2.2 It would be pertinent to note at this stage that Sh. Deepak Varma, who is the son of Mr Sid and Mrs Praveen Varma, is a shareholder in Taj Foods Sales Pvt. Ltd.

2.3 I have referred to the details with regard to the place where the aforementioned partners are based, the names of the partners and the factum of son being a share holder in the above referred company, since the entire case before the authority below appears to have turned, largely, on the finding that U.V., i.e., the writ petitioner, was not the user of the trade mark in issue, in respect of "export of Basmati rice from India", as claimed by the writ petitioner before the authority below. This is apart, based on the pleadings and the state of the evidence, as presented before the IPAB, it has come to the conclusion that the writ petitioner was neither an exporter of basmati rice from India, nor was it able to establish prior user of the trademark in issue vis-a-vis the respondent.

2.4. Continuing with the narrative, the writ petitioner on 30.08.1989 filed an application bearing no. 515459 for registration of the trade mark in class 30 qua export of basmati rice to Australia.

2.5 On 01.05.1996, the aforementioned application was advertised in the trade mark journal no. 1106 datelined 01.05.1996. The advertisement appeared at page 231 of the said trade mark journal. Admittedly, the respondent with due expedition, on 27.06.1996 registered his opposition to the said application. Both parties, upon receiving due notice, filed their evidence in support of their respective stands taken before the Registrar of Trade Marks.

2.6 It may be pertinent to note at this stage that evidence before the Registrar on 02.09.1998 was filed by Deepak Varma and not the partners of U.V. (i.e., the writ petitioner) in support of its application for registration of the trade mark. The Assistant Registrar thereafter set down the matter for hearing and by an order dated 14.03.2000 rejected the opposition petition filed by the respondent, and consequently, directed that the petitioner's trademark be registered.

2.7. Against the aforementioned order, the respondent preferred a petition before this court being: CM(M) 370/2000. By an order dated 31.07.2000, this court set aside the order of the Assistant Registrar dated 14.03.2000 and remanded the matter to the Assistant Registrar for re-consideration.

2.8 Curiously, neither the order of the Assistant Registrar dated 14.03.2000, nor the order of this court dated 31.07.2000 is filed with this writ petition. However, on perusal of the order of the IPAB, it is observed that this court had apparently remarked while disposing of the petition that the Assistant Registrar had proceeded “on a weak wicket and had ...misdirected himself”. In the order of remand this court evidently had

permitted parties to supplement their pleadings before the Asstt. Registrar. In consonance with the direction of remand the Asstt. Registrar permitted parties to file additional pleadings.

2.9 Resultantly, while the respondent incorporated two paragraphs, i.e., paragraph 21 A and B in their original notice of opposition, the petitioner chose not to amend its pleadings. It is another matter that the petitioner before the IPAB and the Asstt. Registrar took recourse to written submissions to bring on record additional averments in support of its case. The IPAB has commented on this aspect of the matter and in my view, correctly stated the position that written submissions cannot supplant pleadings, however, relaxed the rules of pleadings may be, as the rule of fairness requires the opposite party to know what evidence it is required to meet or lay before the adjudicating authority.

3. Upon completion of pleadings and placement of requisite material before him, the Asstt. Registrar heard arguments in the matter, and consequently, disposed of the applications before him vide order dated 06.11.2000. It may be of some significance to note that the Asstt. Registrar, who passed the order on remand, as noted by the IPAB appears to be the same officer whose orders had been set aside by this court in the first round. The Asstt. Registrar by the impugned order once again rejected the respondent's application of opposition and directed registration of the writ petitioner's trade mark in class 30.

3.1 The respondent being aggrieved, once again, approached this court by way of a petition which was numbered as : CM(M) 69/2001. During the pendency of the said petition the Trade & Merchandise Marks Act, 1958 (hereinafter referred to as the 1958 Act) came to be repealed by the Trade Marks Act, 1999 (hereinafter referred to as 1999 Act). Consequently, the

aforementioned petition was transferred to the IPAB and was renumbered as TA/175/2003/TM/Del. On remand, the IPAB, as indicated above, considered the matter and passed the impugned order propelling the institution of the present writ petition.

SUBMISSIONS OF COUNSELS

4. In support of the writ petition arguments were advanced by Mr S.K. Bansal, Advocate assisted by Mr Vikas Khera & Mr Praveen Kumar, Advocates. Mr Bansal after taking me through the broad facts of the case, which I have already detailed out above, made the following submissions:

(i) The IPAB had erred in reversing the decision of the Asstt. Registrar by ignoring the evidence on record, that U.V., i.e., the writ petitioner, was using the trade mark in issue, for the purposes of carrying on its business of exporting basmati rice from India to Australia. In support of his contention the learned counsel relied upon documents appended at pages 158 to 162 of the paper book. At this juncture, it may be relevant to note that the documents appended at pages 158 to 160 are "*whomsoever certificates*" dated 26.08.1998, 24.08.1998 and 26.08.1998 issued by Sh. Vishnu Eatables (India) Ltd., Jac Bros. and Wastiram & Sons Private Ltd. The documents appended at page 161 and 162 are two (2) bills of lading dated 26.12.1979 and 15.01.1977, issued by Mitsui OSK Lines Ltd. and NYK Line. Apart from this reliance was also placed on the affidavit of Sh. Deepak Varma, which is appended at page 107 of the paper book. The aforementioned documents were cited by Mr Bansal to demonstrate that the writ petitioner's claim of usage of the trade mark since 15.01.1977 was clearly established which was disregarded by the IPAB. These arguments were made by Mr Bansal in the context of Section 55 of the 1958 Act which broadly envisages recognition of the use of the trade mark in India by creating a statutory

fiction, in relation to the use of trade mark qua goods which are exported from India.

(ii) Since Mr Bansal claimed prior user, he also sought to take recourse of the provisions of Section 33 of the 1958 Act which recognizes the prior user principle even qua the proprietor or a registered user, of a registered trade mark. The condition, though being that there has to be a continuous user by a person, who claims vesting of rights by virtue of Section 33 of the 1958 Act.

(iii) Almost as last resort, Mr Bansal also sought to invoke provisions of sub-section (3) of Section 12 to contend that the writ petitioner's case fell within the zone of "honest concurrent use" or of other "special circumstances" as delineated in the said provision.

REASONS

5. Having heard Mr Bansal, I am of the view that the result of the petition would really depend on my conclusions on the scope of jurisdiction of this court, while exercising power under Article 226 and 227 of the Constitution of India, and my view on the manner, in which, evidence has been appreciated by the IPAB. The latter can be examined on the touchstone of perversity. Its yet another matter that the IPAB in the impugned order has at length recorded the fact that there is absence of relevant pleadings and also the fact that most of the material produced before it, was either inadmissible or had very little evidentiary value.

5.1 Therefore, in this particular case, I would take it that Mr Bansal had no quarrel with the applicability of the provisions of Section 55 of the 1958 Act; as no objection was taken before me in that regard. If that is so, the writ petitioner would necessarily have to establish that it was using the trade

mark in issue, for exporting basmati rice from India and that too prior to 01.07.1978, which is the date from which user is claimed by the respondent.

5.2 A perusal of the five (5) documents cited before me, demonstrate the following:

5.3 The three (3) whomsoever certificates have been issued by three (3) different entities; out of which two claim to be exporters in their own right (Vishnu Eatables India Ltd. and Jac Bros), while the third entity is a rice miller (Wastiram & Sons Private Ltd.). A close scrutiny of certificate of Vishnu Eatables India Ltd. dated 26.08.1998 would show that it certifies that U.V. (i.e., writ petitioner) ***"is a regular buyer of Taj Brand Rice since the year 1977"***. In the very next line the said certificate says that ***"M/s U.V Enterprises Sydney sometimes during the year 1990 for the supply of Taj Brand Rice and we Have Been progressively supplying the same regularly from that time onward"***. A perusal of this document would show that the U.V. (i.e. the writ petitioner) is the buyer and the issuer of the certificate is the supplier/ the seller.

5.4 The second document, which is issued by Jac Bros. and is dated 24.08.1998, on which much stress was laid, also suggests that the issuer of the certificate was ***"one of the suppliers of Taj Brand basmati rice with or without logo to U.V. Enterprises T/A Taj Foods Sale Pvt. Ltd. Sydney, Australia since the year 1980. During the current year we have exported basmati rice under the brand name TAJ to Australia worth approx. Rupees 60 lakhs. The art work of the brand TAJ was received by us from Australia and we have been printing the same with their address on each bag since our first shipment which we dispatched in the year 1980 "***. The aforesaid certificate once again establishes that the supplier/exporter/seller was the issuer of the certificate. There is undoubtedly a reference to the art

work of the brand Taj being received by the supplier from Australia; which the supplier, evidently printed on the bags in which supplies were made. Mr Bansal attempted to contend that this would show that the exports were made by U.V. Enterprises under its trademark Taj. I tend to disagree. When the certificate is read in its entirety, it is quite clear that the supplier, was the issuer of the certificate, i.e., Jac Bros. The fact that the art work was sent from Australia, creates some element of doubt, but does not still further the case of the writ petitioner, for the reason that it still does not establish that the writ petitioner was the owner of the trade mark 'Taj', which it used for the purposes of carrying out the business of export of basmati rice from India to Australia. On the contrary, the issuer of the certificate claims to be the supplier. More significantly, the issuer adverts to the supplies made since **1980**. It would be important to bear in mind that the respondent has claimed usage trade mark in issue, since 01.07.1978 and, therefore, this document, in my view, does not help the cause of the writ petitioner.

5.5 The third document simply states that the ***“issuer had shipped Dehraduni Basmati Rice with Trade mark TAJ with logo Tajmahal to U.V. Enterprises, Sydney, Australia regularly during the period 1977-1979. The first order was executed by us on 15/01/77 and the last on 20/11/79”***. This again, in my view, does not establish export of basmati rice under the trade mark in issue, from India to Australia.

5.6 The fourth (4th) and the fifth (5th) documents, which are bills of lading; in the description column advert to the fact that the bags in which the consignments were sent were marked ‘Taj’. In the bill of lading issued by Mitsui, there is the following endorsement made "Brand New Bags marked Taj U.V. Enterprises Sydney". This document which is appended at page 161 indicates that the shipper is one R.J. Chatha Rice Mills; while in the

bill of lading issued by NYK, the shipper is Wastiram & Sons Pvt. Ltd., which is a rice miller. Therefore, there is no doubt in my mind that the writ petitioner was not exporting basmati rice from India to Australia at the relevant time; what it did was actually import rice into Australia, the seller being a separate entity. Whether or not the writ petitioner has obtained registration of the mark under the Australian law would not enable him to secure the benefit of provisions of Section 55 of the 1958 Act.

6. Apart from the above, it is quite clear to me that the said documents by themselves cannot enable the writ petitioner to establish its case of export of basmati rice out of India or the user of the trade mark in issue, since 15.01.1977 as these are self serving documents, which were not proved by producing as witness persons who issued the three certificates or the two bill of ladings.

7. This brings me to the affidavit of Deepak Varma, which, once again does not advance the case of the writ petitioner. First and foremost, as noticed by IPAB, the affidavit in evidence is of the son of the partners, who is a share holder in a company known as Taj Food Sales Pty. Ltd. of which U.V., i.e., the writ petitioner, is a trading associate. A perusal of paragraphs 3, 4 and 5 of the said affidavit of Sh. Deepak Verma seems to indicate in no uncertain terms that the U.V., i.e., the writ petitioner was importing basmati rice from India. Paragraphs 6 and 7 of the said affidavit seems to suggest to the contrary; or at least obfuscates the issue. What has not come through in Sh. Deepak Verma's deposition, when he says that U.V. imported rice from India, that the export of rice from India was by it, albeit through an agent. The "whomsoever certificates" when read along with affidavit clearly establishes that he was receiving supplies as a buyer in Australia from an Indian Supplier/seller. The affidavit cannot be read in isolation. Therefore, the evidentiary value of the testimony of such a witness, who is neither a

partner nor an employee of the writ petitioner is doubtful to say the least. The assertions on oath inspire very little confidence.

8. More importantly, as indicated right at the outset, this aspect which pertains to appreciation of evidence in the context of the pleadings filed before the authority below is within the domain of the IPAB being the first appellate authority and not within the scope of the jurisdiction of this court, since it is not a case of no evidence or a case where the IPAB has adopted a perverse approach in appreciating the material on record.

9. Therefore, in my view, as rightly found by the IPAB, there is no credible evidence on record to establish that the writ petitioner was either an exporter or a prior user of the trade mark in issue; which brings me to the aspect of "honest and concurrent user" or "user in special circumstances" in terms of Section 33 of the 1958 Act.

9.1 In this regard I agree with the conclusions of the IPAB, that this was not a plea which was taken at the earliest stage, and that, by itself belies the credibility of the stand taken by the writ petitioner that the usage of the trade mark in issue was honest and concurrent.

9.2 I also agree with the view of IPAB that this argument if accepted would in a sense turn on its head the consistent stand, both before the authorities below and before me, that the writ petitioner was the prior user of the trade mark in issue. A defence of "honest concurrent user" necessarily implies that the opponent was quicker off the blocks and that one who takes this defence concedes, in effect, that he unknowingly adopted and used the same mark concurrently. The IPAB appears to have come to the same conclusion in paragraph 31 of the impugned order, to which, I fully subscribe.

9.3 What is of greater significance is that the IPAB notes and, in respect of which, I did not hear Mr Bansal quibbling, is that, this was a case set up by the Registrar with no pleadings in that behalf made by the Registrar. In this regard, the relevant observations of the IPAB are extracted hereinafter:

"32..... The Assistant Registrar here appears to harbour under the misapprehension that even if the applicant has not pleaded that his case comes under Section 12(3) of the Act, the Registrar may invoke on his behalf such plea. It must be remembered that questions like honest concurrent user or any other special circumstances for the purpose of Section 12(3) must not only be pleaded but proved by acceptable evidence. It is true that the Registrar may go beyond the pleadings under Section 21 of the Act but it is only for the purpose of invoking his power to deny registration as claimed, even though such plea was not taken by the appellant. This power does not allow him to go beyond the pleadings in favour of the applicant and grant registration on a ground not pleaded by the applicant. The Registrar has exceeded his jurisdiction under Section 21(5) of the Act and found that there was special circumstance to justify grant of registration."

10. During the course of the arguments, Mr Bansal had attempted to get out of a tight situation, i.e., his inability to satisfy that the writ petitioner had carried out any exports from India by suggesting that the respondent was no better. In this regard, I may only extract the finding of the IPAB which reads as follows:

"The appellant in his evidence has produced through the partner of NBP Om Parkash Khosla, the invoices of consignment bills, export bills, supply orders in the name of the respondent or their sister concerns, advertisement through the trade magazines have also been marked. The appellant has also marked the earliest certificate in TM No. 338004 dated 30th June 1978 and the mark with device in TM No. 387177 dated 3rd March 1982 associated with 338004. It is true their earliest evidence of user is from 1980, their explanation is that the records from 1978 is not available. But the respondent has no better evidence to prove prior user in India as an exporter, and it is the respondent who

should first prove that it is entitled to registration. The burden is fixed on the applicant. This burden has not been discharged”.

10.1 Being conscious of this aforementioned observations of the IPAB, Mr Bansal reiterated his submission based on ‘the whomsoever certificate’ dated 24.08.1998 issued by Jac Bros., which seems to suggest that supplies had been made since 1980 to the writ petitioner. As indicated above, the certificate by itself will not establish the veracity of its contents, i.e., that the mark in issue was being used by the writ petitioner since 1980. The settled law is that the existence of the document, assuming that it is so proved, does not amount to proof of its contents. Therefore, this submission of Mr Bansal will also have to be rejected. [See *Chandrakantaben vs. Vadilal Bapalal Modi* (1989) 2 SCC 630; *Subhas Maruti Avasare vs State of Maharashtra* (2006) 10 SCC 631 and *Madholal sindhu vs Asian Insurance Co. Ltd. & Ors.* (1954) 56 Bom LR 147]

12. To sum up the writ petitioner's plea for accepting its application for registration for trade mark in issue, has been rightly overturned by the IPAB. One may only remind oneself that the court, while exercising jurisdiction under Article 226 of the Constitution of India, is not acting as an appellate court and, therefore, findings of fact reached by tribunals, as a result of appreciation of evidence cannot be re-opened or questioned in writ proceedings unless it is a case of no evidence or a case where a tribunal has erroneously refused to admit admissible and material evidence or, has erroneously admitted inadmissible evidence which, propelled it to come to the impugned finding. Apart from these errors, findings of fact arrived at by an inferior court or tribunal cannot be reopened. The other exceptions where the superior courts exercising writ jurisdiction can interfere are cases where principles of natural justice are breached or a subordinate Court or

tribunal acts without jurisdiction or exercises jurisdiction with material irregularity. Therefore, it is often said that a writ court is concerned with the decision making process and not the decision itself. (See *Sayeed Yakoob vs K.S. Radhakrishnan (1964) 5 SCR 64* and *H.B, Gandhi, Excise and Taxation Officer-cum-Assessing Authority, Karnal & Ors. vs M/s Gopi Nath & Sons & Ors. 1992 Supp. (2) SCC 312*).

13. Thus, keeping in mind the findings returned in paragraph 33 of the impugned order, I do not think it is a fit case in which the writ petition ought to be entertained. In these circumstances, the writ petition and the application are dismissed.

RAJIV SHAKDHER, J

JULY 13, 2012

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