

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 08.09.2014

+ **W .P.(C) 7357/2012**

JENSON AND NICHOLSON (I) LTD

..... Petitioner

versus

**THE JOINT REGISTRAR OF TRADE MARKS
AND ANR.**

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Anirudh Sharma, Mr Yashvardhan &
Mr Piyush Singh.

For the Respondents : Mr Akshay Makhija, CGSC for R-1.
Mr Kamal Kishore Arora, Mr Gaurav Arora
& Ms Smriti Arora for R-2.

**CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU**

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner impugns an order dated 03.02.2012 (hereinafter referred to as the 'impugned order') passed by the Intellectual Property Appellate Board (in short 'IPAB') whereby the appeal filed by the petitioner against an order dated 20.04.2009 passed by Joint Registrar of Trade Marks, Kolkata (Jt. Registrar), was dismissed.

2. Brief facts of the case are that the petitioner is in the business of manufacturing paint materials, varnish and other allied products. On 14.12.1998, the petitioner made an application (being No.832185) to the Trade Mark Registry at Kolkata for registration of its mark 'Umbrella

Synthetic Enamel’ for its enamel paints in class II, claiming to be a user since 1965. The said application was re-advertised in Trade Mark Journal No.1384 dated 16.01.2008. Pursuant to the said advertisement, respondent no.2 filed an objection petition with the Trade Mark Registry at Kolkata claiming that, in the year of 2000, they had applied for registration of its mark ‘Chhatri Chhap’ with the Trade Mark Registry at Delhi being a user since 1996 and the said mark was registered in 2004.

3. By an order dated 20.04.2009, the Jt. Registrar of Trade Marks at Kolkata held that petitioner’s application stood abandoned by operation of Section 21(2) of the Trade Marks Act (the Act). It was so held because the petitioner had not responded to a notice under Section 21(2) of the Act sent to the petitioner at the address provided; the notice was returned with the remark ‘Left’.

4. On 12.10.2009, the petitioner filed an appeal before IPAB challenging the said order dated 20.04.2009 and an application seeking condonation of delay of eighty two days in filing the said appeal. The petitioner also filed an application for bringing on record additional documents to show that there was change in address of the petitioner in the year 2003 and neither the notice under Section 21(2) of the Act nor the order dated 20.04.2009 was received by the petitioner.

5. IPAB dismissed the application for condonation of delay, by the impugned order dated 03.02.2012, on the ground that the change of address was not notified to the Trade Mark Registry and therefore, sufficient

reasons for the delay in filing the appeal were not shown. Aggrieved by the dismissal of the said appeal, the petitioner has filed the present petition.

6. The petitioner has assailed the impugned order, *inter alia*, on the ground that IPAB had erred in not appreciating that the petitioner had specifically mentioned the address for service to be that of its agent L.S. Davar & Company and a notice/order sent at any other address would not constitute valid service. The petitioner has further produced a copy of the application for registration of the Trademark in question (Application No. 832185 dated 14.12.1998) that specifically mentions the address of service to be that of petitioner's agent. It was stated that although the address of service was specifically provided in the application, the petitioner's agent was, concededly, not informed. It was further stated by the petitioner that it had changed its address in the 2003 and had informed the same to the Trade Mark Registry.

7. The learned counsel for the petitioner submitted that on account of erosion of networth of the petitioner, a reference was made by the petitioner to the Board of Industrial and Financial Reconstruction under the Sick Industrial Companies (Special Provisions) Act, 1985 and the petitioner was declared a sick company on 20.04.2006. It was, candidly, submitted that in view of the mitigating circumstances, the petitioner could not pursue its application and relied implicitly on its agent. Certain communications *inter se* the petitioner and its agent were also referred to by the petitioner.

8. The learned counsel for the petitioner also referred to the provisions of Rule 19 of the Trademark Registration Rules, 2002 which *inter alia*

indicates that a separate address for the purposes of service can be provided. It was submitted, that in any event, the actions of the petitioner were bonafide and the delay in preferring the appeal was not for any ulterior purposes or a dilatory tactic but was caused despite the best intention of the petitioner to pursue its remedies. The learned counsel for the petitioner has also relied upon the decision of the Supreme Court in N. Balakrishnan v. M. Krishnamurthy: (1998) 7 SCC 123 in support of his contention that if the explanation for delay does not smack of malafides and is not a dilatory strategy, the approach of the courts ought to be liberal and the delay ought to be condoned.

9. The respondent has stoutly contested the present petition, essentially on two grounds. First of all, a preliminary objection was taken that this Court would not have the jurisdiction to entertain the present petition, since the office of the petitioner is in Kolkata and the application was also made to the Trade Marks Registry at Kolkata. The learned counsel for the respondent also pointed out that the proceedings before IPAB were initially conducted at Kolkata and were subsequently, continued at Delhi by virtue of a consent order that was passed on 23.06.2011. He submits that in the given circumstances, the parties are neither resident within the National Capital Territory of Delhi nor has any part of the cause of action arisen at Delhi. Therefore, this court would not have any jurisdiction to entertain the present petition and the present petition should be dismissed. The learned counsel for respondent No.2 also placed reliance on a decision of the Supreme Court in Ambika Industries v. Commissioner of Central Excise: (2007) 6 SCC 769 in support of his contention that in cases where a

Tribunal exercises jurisdiction over several States, the writ petition would not be entertained by a Court merely on the basis of the location of the Tribunal. He submitted that IPAB exercised jurisdiction over several states and merely because the impugned order was passed in Delhi, did not confer jurisdiction on this court to entertain this petition.

10. Secondly, it is submitted that the petitioner has failed to disclose sufficient reasons for condoning the delay in filing the appeal. It was contended that the petitioner could not rely on the address of service provided in its application for registration since the Power of Attorney in favour of its agent, whose address was listed as the address for service, was not provided by the petitioner.

11. These contentions were contested by the learned counsel for the petitioner who placed reliance on the decision of the Supreme Court in **Kusum Ingots & Alloys Ltd. v. Union of India: (2004) 6 SCC 254** in support of his contention that the High Court exercising jurisdiction over territories where the Tribunal is located, would have the territorial jurisdiction to entertain a writ petition against any order passed by the Tribunal. The learned counsel for the petitioner also referred to a decision of a Special Bench of this Court in **Sterling Agro Industries Ltd. v. Union of India and Ors.: AIR 2011 Delhi 174** and contended that it is not mandatory for a Court to exercise jurisdiction merely on the basis that the Tribunal's order, which is impugned, had been issued within the territorial jurisdiction of the Court and the Court may consider the issue of *forum conveniens* also. He stated that in this case, the petitioner's principal place of business is in Kolkata, respondent no.2's principal place of business is

in Punjab but the parties had agreed to shift the hearing of the appeal before the IPAB to Delhi. The learned counsel for the petitioner submitted that in the given circumstances, the question of forum conveniens was not an issue and, since the impugned order was passed within the territorial jurisdiction of this Court, this Court should not decline to exercise jurisdiction over the subject matter. The learned counsel also submitted that the present writ petition had been filed in the 2012, almost two years ago and thus, the petition ought not to be returned only on account of forum conveniens.

12. The controversies that need to be considered are, whether the IPAB had erred in not condoning the delay of eighty two days in preferring an appeal against the order dated 20.04.2009 passed by the Joint Registrar. And, whether this Court has the territorial jurisdiction to entertain the petition and, if so, whether in the given facts and circumstances, the Court should entertain the petition given that the proceedings before the IPAB emanated from an application filed before the Registrar of Trademarks at Kolkata.

13. Article 226 of the Constitution of India as it stood prior to the Constitution (Fifteenth) Amendment Act, 1963, did not refer to accrual of cause of action for the purposes of exercise of jurisdiction by a High Court. The Supreme Court in the case of **Lt. Col. Khajoor Singh v. Union of India**: AIR 1961 SC 532 authoritatively pronounced that “*the concept of cause of action cannot in our opinion be introduced in Article 226, for by doing so we shall be doing away with the expressed proviso contained therein which requires that the person or authority to whom the writ is to be issued should be resident in or located within the territories over which*

the High Court has jurisdiction". In wake of this decision, Article 226 of the Constitution of India was amended and by virtue of the Constitution (Fifteenth) Amendment Act, 1963, Clause (1A) was introduced, which reads as under:-

“(1A) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.”

14. This clause was renumbered as Clause (2) by the Constitution (Forty-Second Amendment) Act, 1976. The question, whether a High Court would have jurisdiction where a part of the cause of action has arisen in the territories over which it exercises jurisdiction, has been the subject matter of various decisions of the Supreme Court. In **Alchemist Ltd. & Anr. v. State Bank of Sikkim & Ors.**: (2007) 11 SCC 335, the Supreme Court held as under:-

“37. ... It is no doubt true that even if a small fraction of the cause of action arises within the jurisdiction of the court, the court would have territorial jurisdiction to entertain the suit/petition. ...”

15. The Supreme Court in the case of ***Kusum Ingots & Alloys Ltd.*** (*supra*) referring to an earlier decision in **Nasiruddin v. State Transport Appellate Tribunal**: (1975) 2 SCC 671 observed as under:-

“25. The said decision is an authority for the proposition that the place from where an appellate order or a revisional order is

passed may give rise to a part of cause of action although the original order was at a place outside the said area. When a part of the cause of action arises within one or the other High Court, it will be for the petitioner to choose his forum.”

16. Thus, it is now well settled that even if a part of the cause of action has arisen within the territories of a High Court, the court would have the jurisdiction to entertain a writ petition with respect to such cause of action. In this view, it cannot be contended that this Court does not have the jurisdiction to entertain the present petition.

17. A Special Bench of this Court in ***Sterling Agro Industries Ltd.*** (*supra*) had also held that:

“33. An order of the appellate authority constitutes a part of cause of action to make the writ petition maintainable in the High Court within whose jurisdiction the appellate authority is situated. Yet, the same may not be the singular factor to compel the High Court to decide the matter on merits. The High Court may refuse to exercise its discretionary jurisdiction by invoking the doctrine of forum conveniens”

18. Thus, the issue to be considered is, whether in the given facts, this court should decline to entertain the petition on the ground of *forum non conveniens*. As explained by the Special Bench of this Court in ***Sterling Agro Industries Ltd.*** (*supra*), the concept of *forum conveniens* fundamentally means that it is obligatory on the Court to see the convenience of all parties before it. In the present case, the contesting parties – the petitioner and respondent no.2, had by consent agreed for the appeal before the IPAB to be heard at Delhi. Respondent no.2 has his principal place of business in the State of Punjab and the petitioner has its principal place of business at Kolkata. Since the parties themselves had

agreed to have a hearing at Delhi, it is clear that a hearing in Delhi met with their convenience. The learned counsel for the respondent has also not argued that the present writ petition be dismissed on account of *forum conveniens*, and has limited his arguments to the contention that this Court does not have the jurisdiction to entertain the present petition. The present petition is pending before this Court since almost two years and, in my view, it would not be appropriate to decline exercising jurisdiction in the given facts and circumstances of the case.

19. The next question that needs to be addressed is whether the IPAB at Delhi had erred in rejecting the petitioner's application for condoning the delay of eighty two days in filing the appeal.

20. It is not disputed that the petitioner had shifted its office from 225, Acharya Jagdish Chandra Bose Road, Kolkata 700020 to 7B, Middleton Street, Kolkata w.e.f. 17.06.2003. Although, there is some controversy whether the change of address had been informed to the Registry of the Trademarks at Kolkata, the fact that the petitioner had changed this address, is not disputed. The notice of opposition filed by respondent no.2 had been sent to the earlier address of the petitioner and had been returned with the noting 'left'. Admittedly, the notice of opposition was not served on the agent of the petitioner. The application produced by the petitioner clearly indicates that the address of its agent was specified for the purposes of service. It is, thus, apparent that the proceedings before the Registrar Trademarks had proceeded without the knowledge of the petitioner. The controversy, whether the petitioner should have been more vigilant or more proactive in pursuing its application before the Trademark Registry or

whether its agent should have been more diligent, is not germane to the question whether, in fact, the petitioner had received the notice of opposition filed by respondent no.2. The fact that the impugned order was also not received by the petitioner on account of change in address is not in doubt. In my view, the application for condonation of delay before the IPAB ought to have been considered in the above context.

21. The IPAB has referred to the decision of the Supreme Court in *N. Balakrishnan* (*supra*) and has quoted the following passage:-

“11. Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The law of limitation fixes a lifespan for such legal remedy for the redress of the legal injury so suffered. Time is precious and wasted time would never revisit. During the efflux of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a lifespan must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is thus founded on public policy. It is enshrined in the maxim *interest reipublicae up sit finis litium* (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.

12. A court knows that refusal to condone delay would result in foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the court is always deliberate. This Court has held that the words “sufficient cause” under Section 5 of the Limitation Act should receive a liberal

construction so as to advance substantial justice vide *Shakuntala Devi Jain v. Kuntal Kumari* [AIR 1969 SC 575] and *State of W.B. v. Administrator, Howrah Municipality* [(1972) 1 SCC 366].

13. It must be remembered that in every case of delay, there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy, the court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time, then the court should lean against acceptance of the explanation. While condoning the delay, the court should not forget the opposite party altogether. It must be borne in mind that he is a loser and he too would have incurred quite large litigation expenses. It would be a salutary guideline that when courts condone the delay due to laches on the part of the applicant, the court shall compensate the opposite party for his loss.”

22. After referring to the aforementioned passage, the IPAB has held that the reasons for delay given by the appellant are not sufficient and cannot be accepted. In my view, the IPAB has failed to appreciate the *ratio decidendi* of the aforementioned decision of the Supreme Court in *N. Balakrishnan (supra)* and has erred in not applying the principles enunciated therein. The Supreme Court had clearly held that in every case of delay there may be some element of laxity or some lapse on the part of the litigant concerned but that would not be the only consideration to turn down his plea for condonation of delay. The Supreme Court clarified that if the explanation does not smack of malafides or is not put forth as a dilatory strategy, the Court must show utmost consideration. In the present case, it is apparent that the delay in filing the appeal is not a dilatory tactic. In the given facts

of the case, the bonafides of the petitioner are also not questionable. It is not disputed that the financial condition of the petitioner had deteriorated to the extent that it had become a sick company. It is not unusual that the affairs of a company fall into disarray when it becomes sick and its net worth is eroded. The delay of eighty two days also cannot be described as gross delay. In this perspective, the delay in filing the appeal ought to have been condoned by the IPAB, even if it is assumed that the notice of opposition was duly sent by the Trade Mark authorities.

23. The petitioner has produced material to indicate that it had engaged the services of an agent. The application filed by the petitioner itself clearly specifies the address for service. The learned counsel for the respondent contended that the petitioner had defaulted in filing the power of attorney in favour of its agent and, therefore, service at the address of its agent could not be effected. In my view, this contention is without merit. The petitioner had clearly stated the address for the purposes of service. It was not necessary for the petitioner to provide a power of attorney for the said purpose. Once the address of service has been notified in the application, the Trademark authorities were required to accept the same. Absence of requisite authority in favour of the agent may have impeded it from acting on behalf of the petitioner but that would not in any manner absolve the Registry from taking note of the address of service as provided in the application.

24. The petitioner has referred to certain decisions where the Court has condoned the delay by holding that a litigant should not suffer from *bonafide* mistakes of his legal advisor. However, it is not necessary to refer

to all those decisions in the given facts and circumstances, as it is not disputed that in certain circumstances the Courts do condone delay which accrue on account of certain laxity on the part of the practitioners engaged by litigants. In **Concord of India Insurance Co. Ltd. v. Nirmala Devi & Ors.:** (1979) 4 SCC 365, the Supreme Court had held that there is no particular reason why, when a company or other person retains a lawyer to advice it or him on legal affairs, reliance should not be placed on such counsel. If there is a gross delay even for a layman or there is incomprehensible indifference, the shield of legal opinion may still be vulnerable.

25. For the reasons stated above, the impugned order is set aside. The matter is remitted to IPAB to decide the appeal of the petitioner on merits at its convenience preferably within a period of four months from today.

26. The petition is allowed, in the aforesaid terms. The parties are left to bear their own costs.

SEPTEMBER 08, 2014
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VIBHU BAKHRU, J