

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 05.02.2019

+ **W.P.(C) 4882/2013**

NGK SPARK PLUG CO. LTD.

..... Petitioner

Versus

UNION OF INDIA & ORS.

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. Gautam Panjwani and Sheikh F. Kalia,
Advs.

For the Respondents : Mr. G. Tushar Rao and Mr. Mayank
Sharma, Advs for R 1 and 2. Mr. Umesh
Mishra, Adv. for R4.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

Introduction

1. The petitioner has filed the present petition impugning an order dated 25th July, 2011 (hereafter 'the impugned order') rejecting the petitioner's application under Section 22 of the Companies Act, 1956 (hereafter 'the Companies Act').

2. The petitioner had, *inter alia*, filed the aforesaid application praying that directions be issued to respondent no.4 to delete the

letters 'NTK' from respondent no.4's corporate name – NTK Bearings Private Limited. The said application was founded on the petitioner being the proprietor of the registered Trademark 'NTK'. Respondent no.2 (hereafter 'RD') rejected the aforesaid application on the ground that it was highly belated, and more than five years had passed from the date of incorporation of respondent no. 4 company. The petitioner claims that its application was filed within a period of five years of becoming aware of the respondent no. 4 company and, therefore, within the period as stipulated in the proviso to Section 22(1)(ii) of the Companies Act.

Factual Background

3. The petitioner is a company organized under the Laws of Japan. The petitioner claims that it was established on 26th October, 1936 and is a company of international repute. The petitioner is engaged in the business of manufacturing and marketing spark plugs and related products for internal combustion engines and new ceramics and applicable products. The petitioner further claims that it has more than 5000 employees.

4. The petitioner claims that it is the proprietor of the Trademarks 'NGK' and 'NTK' in respect of its products, and the said trademarks are registered in more than 80 countries in the world. The petitioner claims that NTK is its registered trademark in Class 9 and in Class 7 bearing the registration No. 522466 and 698501, respectively. The

petitioner claims that the application for registration of the trademark 'NTK' in Class 9 was filed as early as on 09th January, 1990.

5. Respondent no.4 company was incorporated under the Companies Act on 19th June, 2001. It is stated that at the material time, the petitioner's application for registration of the Trademark 'NTK' (Application No. 753700) in Class 7 – which was filed on 24th February, 1997 – was pending. The said application was advertised and on 03rd April, 2006, respondent no.4 filed its opposition against registration of the said trademark.

6. The petitioner claims that it became aware of the existence of respondent no.4 for the first time on receipt of the aforesaid opposition.

7. On 27th October, 2008, the petitioner filed an application under Section 22 of the Companies Act, seeking rectification of the corporate name of respondent no.4 by deleting the letters 'NTK'.

8. Respondent no.4 contested the aforesaid application, *inter alia*, on the ground that Central Government did not have jurisdiction to pass any orders after the expiry of twelve months of its registration as an incorporated company.

9. The RD rejected the petitioner's application as not maintainable on the ground that it was filed belatedly and after more than five years had expired from the date of incorporation of respondent no.4 company.

10. Thereafter, on 11th August, 2011, the petitioner sent a letter to RD, *inter alia*, contending that the limitation of five years as prescribed in terms of the proviso to Section 22(1)(ii) of the Companies Act could be reckoned from the date of the petitioner becoming aware of the incorporation of the respondent and not the date on which respondent no.4 was incorporated.

11. The petitioner claims that its counsel visited the office of RD on 15th March, 2013 in connection with another matter and was informed that the order dated 25th July, 2011 was a final order rejecting the petitioner's application.

12. Thereafter, the petitioner filed the present petition on 01st, August, 2013.

Discussion and Conclusion

13. Before proceeding further, it would be relevant to refer to Section 22 of the Companies Act, which reads as under:-

“22. Rectification of name of company.— (1) If, through inadvertence or otherwise, a company on its first registration or on its registration by a new name, is registered by a name which-

- (i) in the opinion of the Central Government, is identical with, or too nearly resembles, the name by which a company in existence has been previously registered, whether under this Act or any previous companies law, the first-mentioned company, or
- (ii) on an application by a registered proprietor of a trade mark, is in the opinion of the Central Government

identical with, or too nearly resembles, a registered trade mark of such proprietor under the Trade Marks Act, 1999, such company,

- (a) may, by ordinary resolution and with the previous approval of the Central Government signified in writing, change its name or new name ; and
- (b) shall, if the Central Government so directs within twelve months of its first registration or registration by its new name, as the case may be, or within twelve months of the commencement of this Act, whichever is later, by ordinary resolution and with the previous approval of the Central Government signified in writing, change its name or new name within a period of three months from the date of the direction or such longer period as the Central Government may think fit to allow.

Provided that no application under clause (ii) made by a registered proprietor of a trade mark after five years of coming to notice of registration of the company shall be considered by the Central Government.

(2) If a company makes default in complying with any direction given under clause (b) of sub-section (1), the company, and every officer who is in default, shall be punishable with fine which may extend to one thousand rupees for every day during which the default continues.”

14. It is relevant to note that proviso to Section 22(1)(ii) Companies Act was included by virtue of Section 158 of the Trademarks Act, 1999 (Act 47 of 1999) with effect from 15th September, 2003.

15. It is apparent from the above that there is a repugnancy between the provisions of Section 22(1)(ii)(b) of the Companies Act and the

proviso so included. A plain reading of Clause (ii) of Sub-Section 1 of Section 22 of the Companies Act indicates that if the Central Government is of the opinion that the corporate name too nearly resembles the registered trademark of a proprietor, then such company shall, if directed by the Central Government within the 12 months of its registration, change its corporate name. Thus, undeniably, prior to 15th September, 2003, there was no obligation on the part of any company to change its corporate name if such direction was not issued by the Central Government within a period of twelve months of its first registration, or registration of its changed name.

16. In *Mondelez Foods Private Limited v. The Regional Director (North), Ministry of Corporate Affairs & Ors.: W.P.(C) 5289/2014, decided on 07.07.2017*, this Court had, *inter alia*, held that if an application is filed within the period of twelve months, the applicant could not be prejudiced by the delay on the part of the Central Government in issuing a direction within the period of 12 months as contemplated under Section 22(1)(ii) of the Companies Act.

17. The proviso to Section 22(1)(ii) of the Companies Act clearly indicates that a proprietor of a registered trademark is not precluded from making an application within a period of five years “*of coming to notice of registration of company*”. Thus, this Court is of the view that the power of RD to examine such a complaint, which is not beyond the period as prescribed under the proviso, has to be inferred.

18. The provisions of the statute must be interpreted to ascertain the intention of the legislature. In cases where there is no ambiguity in the language of the statute, the same must be literally construed. However, in another cases, it would be necessary for the Court to press into service other principles of statutory interpretation to ascertain the legislative intent. The proviso to Section 22(1)(ii) of the Companies Act is to preclude the registered proprietor of the Trademark from making an application under Section 22(1)(ii) of the Companies Act beyond the period of five years of such proprietor coming to notice of the company. It is clearly implicit from the language of the said proviso that a proprietor of a registered trademark can make an application under Section 22(1)(ii)(b) of the Companies Act within a period of five years. This is the clear intention of the legislature in including the proviso.

19. It necessarily follows that the power of the RD to issue a direction under Section 22(1)(ii)(b) of the Companies Act beyond the period of twelve months must be read the provision of Section 22(1)(ii)(b) of the Companies Act. In ***Technova Tapes (India) P. Ltd. v. Regional Director, Ministry of Company Affairs, Southern Region and Another: (2010) 155 Comp. Cas. 395 (Kar)***, the Karnataka High Court had observed as under:-

“The language of the Section is certainly found wanting in clarity. If the section is construed, on a plain reading, that the Central Government or such other competent authority is empowered to direct rectification of the name of a company which is identical with or resembles the

name of a (WP5173.12) company which is already in existence, within twelve months of the registration of such company. The proviso affording a registered proprietor of a trade mark five years time, after coming to its notice of a registered company, with an identical or nearly resembling its own registered trade mark, while there is no corresponding enabling power or jurisdiction afforded to entertain an application by the competent authority or the Central Government in the section, it is only to be implied, this is an apparent incongruity. But in order to avoid rendering the provision nugatory, where it seeks to protect the interest of a registered proprietor of a trade mark, the section would necessarily have to be given the interpretation suggested by respondent No. 2 herein, namely, that under the unamended section, the limitation of one year was prescribed for applications by a registered company. The proviso however makes a separate provision for the new category of applicants namely, the holders of registered trade marks and for such applicants, the period of five years would run from the date when the applicant who is the registered trade mark holder came to know of the existence of the company with a similar name and the limitation of one year for the authority to exercise the power would necessarily have to be read as having been enabled to accommodate the applications filed within the period contemplated under the proviso.”

20. It is important to note that the proviso to Section 22(1)(ii) of the Companies Act was inserted by virtue of Section 158 of the Trademarks Act, 1999 (Act 47 of 1999) with effect from 15th September, 2003.

21. Section 33(1) of the Trademarks Act, 1999 also provides that a proprietor of a registered trademark would not be entitled to challenge the registration of a trademark if he has acquiesced in use of that

trademark for a continuous period of five years. Section 33(1) of the Trademarks Act, 1999 is set out below:-

“(1)Where the proprietor of an earlier trade mark has acquiesced for a continuous period of five years in the use of a registered trade mark, being aware of that use, he shall no longer be entitled on the basis of that earlier trade mark –

(a) to apply for a declaration that the registration of the later trade mark is invalid, or

(b) to oppose the use of the later trade mark in relation to the goods or services in relation to which it has been so used,

unless the registration of the later trade mark was not applied in good faith.”

22. It is apparent that the legislative intent of introducing of proviso to Section 22(1)(ii) of the Companies Act was to incorporate the principle of acquiescence in the said provision in conformity with the intent of enacting Section 33(1) of the Trademarks Act, 1999. However, it is apparent that the legislature had failed to carry out corresponding amendment in the language of Section 22(1)(ii)(b) of the Companies Act.

23. In view of the above, this Court is of the view that the power of the Central Government to issue a direction for change in the name of the company, even beyond the period of twelve months from the date of first registration or from the date of registration of the change of name, must be read in the provisions of Section 22(1)(ii)(b) of the

Companies Act. This was also the observations of this Court in an earlier decision in *Mondelez Foods Private Limited (supra)*, where this Court had, *inter alia*, observed as under:-

“12. Section 22 of the Act is not happily worded. Whereas Section 22(1)(i) of the Act, does not indicate that the Central Government is precluded from directing change of name in case the same is found to be undesirable; Section 22(1)(ii)(b) of the Act indicates that the company with an undesirable name is obliged to change its name only on receipt of such directions within a period of twelve months from the date of registration. Further, the introduction of proviso to Section 22(1) must also be given some meaning; plainly, if the owner of a registered trade mark is not precluded from making a complaint within a period of five years of becoming aware of a company with a deceptively similar name, the power of the RD to examine and address such complaint should be read in the statutory provision.”

24. The next issue to be examined is whether the petitioner's application was within the time specified.

25. Admittedly, respondent no.4 company was registered on 19.06.2001. It is not disputed that the fact of registration of respondent no.4 company was duly placed in public domain by the respondent no.3 (Registrar of Companies). It is not contested that respondent no.1 has been carrying on its business since its incorporation. The petitioner claims that it had become aware of respondent no.4 for the first time on 03.04.2006. Plainly, this claim cannot be accepted. The language of proviso to Section 22(1) of the Companies Act is clear

and it provides that no application under Clause (ii) can be made of five years “*of coming to notice of registration of the company*”.

26. The details of all companies that are incorporated are placed in public domain by the Registrar of Companies, and it is necessary to be presumed that all persons have due notice of the same. There is no provision of providing separate notices of such incorporation. Plainly, it is not open for the respondents to extend the period of limitation by claiming ignorance of the incorporation of respondent no.4 company for a period of almost six years.

27. There is yet another perspective which persuades this Court to accept that the power of the Central Government to issue a binding direction would not extend beyond the period of five years from the date of first registration or from the date of registration of the name of the change in the name of the company.

28. As noticed above, there is a conflict in the plain language of the main provision – Section 22(1)(ii)(b) – and the plain language of the proviso to Section 22(1)(ii) of the Companies Act. Whereas, the proviso to Section 22(1)(ii)(b) precludes a proprietor of a registered trademark to make an application after a period of five years of coming to notice of registration of the company, Clause (b) of Section 22(1)(ii) of the Companies Act obliges a company to change its corporate name, if so directed by the Central Government within a period of twelve months of the registration of the name. Clearly, if the said clause is construed on the basis of the literal interpretation of its

language, a company would be obliged to change its name only if the Central Government so directs within twelve months of the registration. In other words, a company would not be obliged to change its name if the Central Government does not issue directions to the aforesaid effect within a period of twelve months from the first registration or registration by its new name.

29. However, in view of the inclusion of the proviso, the period as prescribed under the main provision – Clause (b) of Section 22(1)(ii) is required to be correspondingly enhanced. If the period of five years is now read in Clause (b), the same would oblige a company to follow the directions of the Central Government for change in its name within a period of five years from the date of first registration. The basic scheme of the provisions of Section 22(1)(ii)(b) of the Companies Act cannot be altered by the proviso.

30. The basic scheme of Clause 22(1)(ii)(b) of the Companies Act is to provide for an period of limitation for the Central Government to issue binding directions, and that period is stipulated to be twelve months from the date of registration of the name. This period has to be read as implicitly enhanced by inclusion of the proviso. However, the same cannot be enhanced indefinitely.

31. The object of precluding a registered proprietor from making an application after expiry of five years is to disentitle the registered proprietor to make such an application on the principle of acquiescence. If the said proviso is read with the scheme of the main

clause, it would stand to read the limitation of five years from the date of incorporation of a company, which is also the date when notice of such incorporation is available in the public domain.

32. In view of the above, this Court finds no infirmity with the decision of the RD to reject the petitioner's application under the provisions of Section 22(1) of the Companies Act.

33. The learned counsel for respondent no.4 had contended that the limitation for filing an application under Section 22(1)(ii) of the Companies Act had expired on 18th June, 2002, that is, after expiry of twelve months from the date of incorporation. He had submitted that at the material time, the proviso to Section 22(1)(ii) of the Companies Act was not enacted. He contended that the operation of the proviso should be construed prospectively and would not revive the right of a proprietor of a registered trademark to apply under Section 22(1)(ii) of the Act in cases where such right had already elapsed.

34. In view of the discussion above, this Court does not consider it necessary to examine the aforesaid contention. Further, this is also not the ground on which the petitioner's application was rejected by the RD.

35. Quite apart from the merits of the impugned order, this Court is also of the view that no interference by this Court would be warranted in the facts of this case. Even according to the petitioner, the petitioner was fully aware of the existence of respondent no.4 as early

as on 03 April, 2006. Yet the petitioner waited for over more than two and a half years for filing an application before the RD.

36. The RD had rejected the petitioner's application by the impugned order dated 25th July, 2011. The petitioner once again waited for more than two years to file the present petition. The explanation that the petitioner was not aware that its application had been rejected, cannot be accepted. The language of the impugned order is clear and the RD had found the petitioner's application to be not maintainable. Further, the petitioner has not pursued this petition diligently, as is apparent from the fact that the same had been dismissed in default on two occasions but had subsequently been restored. Remedy under Article 226 of the Constitution of India is a discretionary remedy and this Court is of the view that in these facts, exercise of discretion in the petitioner's favour would not be warranted.

37. The petition is, accordingly, dismissed.

38. It is clarified that nothing stated in the present petition would preclude the petitioner to file an appropriate action against respondents, if otherwise such remedy is available in law.

VIBHU BAKHRU, J

**FEBRUARY 05, 2019
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