



2023:DHC:8567



\$~32

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**+ **C.A.(COMM.IPD-TM) 40/2022****YASHODA HOSPITAL AND
RESEARCH CENTER LIMITED**

..... Appellant

Through: Mr. Abhimanyu Bhandari, Ms.
Charu Mehta, Mr. Rishi Raj Sharma and Mr.
Kunal Khanna, Advs.

versus

**YASHODA SUPER SPECIALTY
HOSPITAL AND ANR**

..... Respondents

Through: Mr. Sandeep Sethi, Sr.
Advocate with Mr. Saikrishna Rajagopal,
Ms. Anu Paarcha, Ms. N. Parvati, Mr.
Abhinav Rao, Ms. Riya Kumar and Mr.
Sumair Dev, Advs. for R-1Mr. Harish Vaidyanathan Shankar, CGSC
with Mr. Srish Kumar Mishra, Mr.
Alexander Mathai Paikaday and Mr.
Krishnan V., Advs. for Registrar of Trade
Marks for R-2**CORAM:****HON'BLE MR. JUSTICE C. HARI SHANKAR****JUDGMENT (ORAL)**

%

29.11.2023**C.A.(COMM.IPD-TM) 40/2022**

1. This Review Petition – which has, probably for want of suitable categorization, being registered by the Registry as an appeal – was instituted by the petitioner before the learned Intellectual Property Appellate Board (“the learned IPAB”) under Rule 23¹ of the

¹ 23. Review Petitions –

(1) A petition in triplicate for review of an order of the Appellate Board may be made to the



2023:DHC:8567



Intellectual Property Appellate Board (Procedure) Rules, 2003 (“the IPAB Rules”), seeking review of order dated 21 January 2020 passed by the learned IPAB. By said order dated 21 January 2020, the learned IPAB allowed Rectification Petition No. ORA/13/2017/TM/DEL filed by Respondent 1 seeking rectification of the register of trade marks by removal, therefrom, of the mark , registered in favour of the petitioner *vide* Registration No. 1340261 in Class 42 w.e.f. 22 February 2005.

2. There is no dispute, therefore, that the impugned order invalidates the petitioner’s trade mark 15 years after it had been registered. The prejudice caused to the petitioner by the passing off the impugned order is, therefore, painfully apparent. Yashoda Super Speciality Hospital & Heart Institute happens to be one of the leading hospitals in Ghaziabad and, according to Mr. Abhimanyu Bhandari, learned Counsel for the petitioner, a forefront in cancer research and treatment. On the repute of the petitioner’s hospital, Mr. Sandeep Sethi, learned Senior Counsel for the respondents, does not join issue.

3. Various submissions were advanced at the Bar by Mr. Bhandari, learned Counsel for the petitioner and Mr. Sandeep Sethi, learned Senior Counsel for the respondents. One may deal with them *seriatim*.

Registry in the prescribed Form 6 under these rules within two months from the date on which the order is communicated accompanied by a statement setting forth the grounds on which the review is sought. Where the order in question concerns more than one respondent, sufficient extra copies of such petition and statement shall be filed.

Signature Not Verified

Digitally Signed
By: HARIOM
Signing Date: 01.12.2023
14:38:20

C.A.(COMM.IPD-TM) 40/2022

Page 2 of 23



2023:DHC:8567



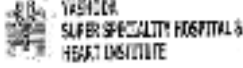
4. Mr. Bhandari's principal contention was that the impugned order had been passed *ex parte* without due service on the petitioner either of the rectification petition filed by the respondents or of the notice of hearing of the rectification petition. It was also, therefore, passed in violation of the principles of natural justice.

5. Mr Bhandari advanced this contention in two distinct segments.

6. The first was that the petitioner had, in its application dated 22 February 2005, for registration of the mark , provided "Vijay Pal Dalmia, Advocate, Neelam Dalmia. Advocate, Everest Trade Mark Co. (1947), Ch. N0.718, Western Wing, Tis Hazari Courts, Delhi-110054" (hereinafter "the Tis Hazari address"), as the "address for service". The application also provided, however, "C-10/112, Yamuna Vihar, Delhi" (hereinafter "the Yamuna Vihar address") as the address of the petitioner's proprietor. Vijay Pal Dalmia was, admittedly, dealing with the petitioner's trade mark affairs at that point of time. Subsequently, Mr. Bhandari points out, on 11 November 2014, the petitioner informed the Registrar of Trade Marks that its Constituted Attorney had changed and that the address of the new Trade Mark agent, which was to be treated as the petitioner's address for service was the following:

Deepak Gupta, Advocate,
Flat No. S-3, IInd Floor,
II-A/20, Nehru Nagar (Near Jain Mandir Crossing),
Ghaziabad, UP
e-mail: deearch_2006@yahoo.com
Ph. No. 9810615693/9910337693



7. Instead of effecting service at either of these addresses, communications were addressed by the learned IPAB to the Yamuna Vihar address of the proprietor of the petitioner as provided in its application seeking registration of the mark .

8. Mr. Bhandari's first submission, predicated on Rules 17 and 18² of the Trade Marks Rules, 2017, is that once an address for service is provided by an applicant to the Trade Marks Registry, that address for service has necessarily to be the address at which all communications are addressed to the said applicant, in connection with any proceeding under the Trade Marks Act, which would include rectification proceedings under Section 57³ of the thereof. Inasmuch as no

² 17. **Address for service. –**

(1) Every applicant or opponent or any person concerned in any proceeding under the Act or rules shall furnish to the Registrar an address for service in India comprising of a postal address in India and a valid e-mail address and such address shall be treated as the address for service of such applicant or opponent or person:

Provided that a trade mark agent shall also be required to furnish a mobile number registered in India.

(2) Any written communication addressed to a person as aforesaid at an address for service in India given by him shall be deemed to be properly addressed.

(3) Unless an address for service in India as required in sub-rule (1) is given, the Registrar shall be under no obligation to send any notice that may be required by the Act or the rules and no subsequent order or decision in the proceedings shall be called in question on the ground of any lack or non-service of notice.

18. **Service of Documents by the Registrar. –**

(1) All communications and documents in relation to application or opposition matter or registered trade mark may be served by the Registrar by leaving them at, or sending them by post to the address for service of the party concerned or by email communication.

(2) Any communication or document so sent shall be deemed to have been served, at the time when the letter containing the same would be delivered in the ordinary course of post or at the time of sending the email.

(3) To prove such service, it shall be sufficient to prove that the letter was properly addressed and put into the post or the email communication was sent to the email id provided by the party concerned.

³ 57. **Power to cancel or vary registration and to rectify the register. –**

(1) On application made in the prescribed manner to the High Court or to the Registrar by any person aggrieved, the Registrar or the High Court, as the case may be, may make such order as it may think fit for cancelling or varying the registration of a trade mark on the ground of any contravention, or failure to observe a condition entered on the register in relation thereto.

(2) Any person aggrieved by the absence or omission from the register of any entry, or by any entry made in the register without sufficient cause, or by any entry wrongly remaining on the



2023:DHC:8567



communication was ever addressed to the petitioner either at the address for service provided in the application seeking registration of the trade mark or at the new address for service reflected in the communication dated 11 November 2014, Mr. Bhandari's submissions that it cannot be said that service either of the rectification petition filed by the respondents or of any communication from the learned IPAB in that regard could be said to have been made on the petitioner. The impugned order, therefore, he submits, was passed *ex parte* under a mistaken impression that the petitioner had been duly served.

9. Without prejudice to this submission, Mr. Bhandari points out that the initial notice which had been issued by the learned IPAB in the rectification petition filed by the respondents, was addressed to the proprietor's Yamuna Vihar address, and was returned by the postal authority with the postal endorsement "Insufficient Address". He submits that, on such return, the learned IPAB addressed a communication to the respondents through their Trade Mark Attorney on 30 May 2018, intimating the respondents that the communication effected on the petitioner at Yamuna Vihar address had been returned unserved with the remark "refused by person" and, therefore,

register, or by any error or defect in any entry in the register, may apply in the prescribed manner to the High Court or to the Registrar, and the Registrar or the High Court, as the case may be, may make such order for making, expunging or varying the entry as it may think fit.

(3) The Register or the High Court, as the case may be, may in any proceeding under this section decide any question that may be necessary or expedient to decide in connection with the rectification of the register.

(4) The Register or the High Court, as the case may be, of its own motion, may, after giving notice in the prescribed manner to the parties concerned and after giving them an opportunity of being heard, make any order referred to in sub-section (1) or sub-section (2).

(5) Any order of the High Court rectifying the register shall direct that notice of the rectification shall be served upon the Registrar in the prescribed manner who shall upon receipt of such notice rectify the register accordingly.

Signature Not Verified

Digitally Signed
By: HARIOM
Signing Date: 01.12.2023
14:38:20

C.A.(COMM.IPD-TM) 40/2022

Page 5 of 23



2023:DHC:8567



requesting the respondents' Attorney to furnish the correct present postal address of the petitioner. Mr. Bhandari submits that, in fact, the learned IPAB was not correct in stating that the communication addressed to the Yamuna Vihar address had been returned unserved with the remark "refused by person" as, in fact, the records of the postal authorities reflected that it was returned on the ground of address being insufficient. Be that as it may, the learned IPAB passed the following order on 10 December 2018:

"1. The respondent no. 1 is not served. Fresh notice be issue to the respondent no. 1 for 08/04/2019."

10. Though the learned IPAB had thus directed fresh notice to be issued to the petitioner treating service on the petitioner as not having been effected till then, *no fresh notice was issued on any address of the petitioner*. Despite this, the learned IPAB, on 8 April 2019, proceeded to pass the following order:

"1. *The Respondent has refused to accept the service. As per the report of the Postal Department.* The applicant has filed the Written Synopsis before the next date.

2. List for final argument on 09/10/2019."

(emphasis supplied)

11. Mr. Bhandari submits that the learned IPAB, thus, on 8 April 2019, erroneously presumed that the petitioner had refused to accept service as directed to be effected by its earlier order dated 10 December 2018. In actual fact, fresh notice, as was directed to be issued by the learned IPAB on 10 December 2018, was never actually



2023:DHC:8567



issued or served on the petitioner. Had the learned IPAB been cognizant of this fact, Mr. Bhandari submits that it would never have proceeded on 8 April 2019 on the premise that the petitioner had been duly served. It was on the basis of this erroneous premise that the learned IPAB proceeded to list the matter for final hearing and proceeded to decide it against the petitioner. He submits that the interests of justice would clearly justify reconsideration of the rectification petition filed by the respondents after granting of an opportunity of hearing to the petitioner.

12. In this context, Mr. Bhandari has also drawn my attention to Rule 16⁴ of the IPAB Rules, which requires the date of hearing fixed by the learned IPAB to be notified to all parties. He submits that this requirement is independent of the requirement of issuing notice issued on the rectification application. There was no compliance, whatsoever, by the learned IPAB with Rule 16. Mr. Bhandari submits that a case of review of the impugned order is clearly made out on this ground as well.

13. The third submission of Mr. Bhandari was that certain relevant documents, which pertained to the order passed by the City Civil Court, Hyderabad (hereinafter “the learned Hyderabad Court”) in COS No. 2/2017, instituted against the petitioner by the respondents, were never brought to the notice of the learned IPAB. COS 2/2017 alleged that the petitioner’s  mark infringed the

⁴ **16. Date of hearing to be notified.** – The Appellate Board shall notify the parties the date and place of hearing of the application or appeal in such manner as the Chairman may by general or special order direct.



2023:DHC:8567



registered mark of the respondents. The respondent's prayer for interim injunction against the petitioner's  mark had specifically been rejected by the learned Hyderabad Court by order dated 12 June 2018. Even though this order was passed after ORA/13/2017/TM/DEL had been filed by the respondents before the learned IPAB, he submits that the defects in ORA/13/2017/TM/DEL were cleared only after the suit had been instituted in the Hyderabad Court. The Hyderabad Court had, on 12 June 2018, rejected the respondents' prayer for interim injunction against the petitioner's  mark. The learned IPAB came to pass order under review only thereafter, on 21 January 2020. As such, he submits that the respondents were duty bound to bring the events relating to the Hyderabad suit, including the order dated 12 June 2018, to the notice of the learned IPAB. The learned IPAB having passed the order under review without being made conversant of the said facts, a clear case for review is, according to him, made out.

14. Opposing the Review Petition, Mr. Sandeep Sethi, learned Counsel for the respondents first emphasised the limited scope of review jurisdiction, pointing out that a review could not be an appeal and disguise. Through a Review Petition, he submits that the petitioner could not seek a rehearing of the rectification petition which stood decided by the learned IPAB.

15. On the various issues raised by Mr. Bhandari, the response of Mr. Sethi is as under:



(i) Mr. Sethi submits that the “address for service”, as envisaged in Section 143 of the Trade Marks Act, is irrelevant to proceedings before the learned IPAB. According to him, the provisions of the Trade Marks Rules, on which Mr. Bhandari places reliance, are applicable only to proceedings before the Registrar of Trade Marks. Proceedings before the learned IPAB, on a rectification petition, according to him, follow an entirely distinct trajectory, for which ample and self-contained provisions are to be found in the IPAB Rules. He submits that Rule 6(2) of the IPAB Rules requires the rectification applicant to state, in the rectification application, the full address of the respondent, i.e. in the present case, the present petitioner. It is that address, he submits, at which the petitioner was required to be served, and not the address for service provided by the petitioner at the time of applying for registration of the mark. As such, Mr. Sethi’s contention is that the “address for service” provided by the petitioner at the time of applying for registration of the mark was of no relevance insofar as the rectification proceedings before the learned IPAB were concerned, inasmuch as there is no provision in the Trade Marks Rules which refer to proceedings before the learned IPAB.

(ii) That apart, Mr. Sethi laid considerable emphasis on paras 2 and 3 of the present review petition, which read thus:



“2. It is stated that the Petitioner had no knowledge of the concerned Order and any prosecution of the subject rectification petition at all. It was only on July 14, 2020 that the Petitioner was informed of the concerned Order by a person known to its directors. The Petitioner was shocked to learn about such developments as the concerned Order was neither served on the Petitioner nor the attorney then acting on behalf of the Petitioner nor communicated to the Petitioner by any means.

3. Counsel for the Petitioner called the office of the Hon'ble Board on July 14, 2020 and was informed that the concerned order had been passed in the matter on January 21, 2020. Thereupon, Counsel for the Petitioner checked the website of the Hon'ble Board at www.ipab.gov.in and found that the concerned Order or for that matter no order pertaining to the subject rectification petition was uploaded on the said website. It is surprising and noteworthy that, while the other orders passed on the same date as the concerned Order, i.e. on January 21, 2020, were uploaded and available on the website www.ipab.gov.in, the concerned Order had not been uploaded. The original printouts/screenshots from the website www.ipab.in evidencing the position of other orders of January 21, 2020 being uploaded on the website www.ipab.gov.in are being filed herewith as **Annexure 3.**”

(iii) He submits that the averment, in para 2 of the present Review Petition, that the petitioner was unaware, till 14 July 2020, of the order under review, is clearly incorrect, and relies, for the said purpose, on para 24 of the plaint filed by the respondents, before the learned Hyderabad Court, which reads thus:

“24. In light of the aforementioned facts, the Plaintiffs have sought to have the impugned mark under Registration No. 1340261 in Class 42 rectified by removing the same from the Register before the Intellectual Property Appellate Board (IPAB) on 16-11-2016, on the grounds that the same was applied for and registered without any sufficient cause and is an entry wrongly remaining on the Register, under



Section 57(2) of the Trademarks Act, 1999. However, the Plaintiffs' need for a remedy has become more pressing now, as it has come to their notice that the Defendants are taking advantage of the pending adjudication before the Trade Marks Registry, and intend to further expand its business in Ghaziabad, Delhi and also to the other regions of the country to further encash upon the unique identity and reputation associated with the Plaintiffs' trademark 'YASHODA', by mischievously and deliberately using the trademark comprising of word 'Yashoda'. Office Copy of the rectification application filed before the Intellectual Property Appellate Board, New Delhi along with acknowledgment are being filed herewith as **Document No. 155**. Copy of the newspaper report is being filed as **Document No. 156**.”

He has also relied on para 64 of the response by the petitioner to para 24 of the said plaint, which read thus:

“64. Contents of paragraph III. 24. of the Plaint are false, misleading and are denied. After being aware of the mark under no. 1340261 dating back to February 22, 2005 and its registration and renewal for more than a decade, the Plaintiffs have now purportedly sought to have the impugned trade mark rectified or by removing from the same from the Register before IPAB on November 16, 2016 on false grounds that the same was applied and registered without any sufficient grounds or is an entry wrongly remaining on the Register of Trade Marks. It is reiterated without prejudice that the alleged rectification action has been brought to the knowledge of the Defendants for the first time in the present proceedings and the purported rectification application filed by the Plaintiffs has not even been served on Defendant No. 2 as on date. The said registration is subsisting and is in full force. At any rate, in view of the purported rectification application pending before IPAB, the present Suit is liable to be stayed under the provisions of Section 124 of the Trade Marks Act. The Plaintiffs' contentions that the Plaintiffs' need for a remedy has become more pressing now, as it has come to their notice that the Defendants are taking advantage of the pending adjudication at the Trade Marks Registry and intend to further expand their business in Ghaziabad, Delhi and also to the other regions of the country to encash upon



the identity and reputation of associated with the Plaintiffs' trademark YASHODA, by mischievously and deliberately using the trade mark comprising of word YASHODA; are false, misleading, contrived and are denied. It is submitted without prejudice that any proceedings before the learned Registrar of Trade Marks could never and cannot, irrespective of the outcome, restrain the Defendants from using the mark YASHODA at any rate. It is reiterated that the Defendants are the independent, honest and *bona fide* adopter and user of the trade mark/name YASHODA for more than 2 decades. The Plaintiffs have never taken any legal action to restrain the Defendants' open, uninterrupted and extensive use of the trade mark/name YASHODA since 1990 at least and in spite of the Plaintiffs self-admitted knowledge since 2006. Further, the Plaintiffs are rightfully entitled to use their longstanding mark/name YASHODA and have been continuing to expand their use of the trade mark YASHODA over the years, as evident from the opening of YASHODA SUPER SPECIALITY HOSPITAL in Kaushambi in Ghaziabad in 2006 and of which the Plaintiffs are admittedly aware of, as also indicated *inter alia* in their legal notice dated January 12, 2006. However, the Plaintiffs have presented a contrived "fresh" cause of action by claiming that there is some news report of which no material particulars have been presented in the Plaint stating that the Defendants are further expanding its business in Ghaziabad, Delhi and also to other regions of the country. Without prejudice to the contention that the Defendants have been using the trade mark/name YASHODA for more than 25 years and are well-entitled to do so for their business activities and growth/expansion, it is submitted that the Document No. 156 purported to be a newspaper report does not provide any basis to the Plaintiffs' claims or alleged cause of action inasmuch as it does not talk about any prospective expansion, as alleged or at all. It is further submitted that the purported newspaper report is not complete and does not even indicate the name of the publication and is inadmissible at any rate. It is submitted that the Plaintiffs' alleged justification to file the Suit now is nothing but an underhanded ploy to seek relief at this belated stage, which they are not entitled to on facts and in law. The Plaintiffs' contentions are thus contrived and contorted and the present Suit is liable to be dismissed in law and equity on the ground of suppression and distortion of material facts by the Plaintiffs and their not approaching this Hon'ble Court with clean hands."



2023:DHC:8567



(iv) Mr. Sethi further points out that, on the basis of the present rectification petition, the petitioner instituted an application under Section 124 of the Trade Marks Act in the Hyderabad suit, para 6 of which read as under:

“6. The Plaintiffs have averred in paragraph 24 of the Complaint and paragraph 14 of the Rejoinder that they have filed a rectification application on November 16, 2016 before the learned Intellectual Property Appellate Board for removal of Defendant No. 2's registration under no. 1340621. The purported rectification/cancellation action was filed before the institution of the present Suit in January 2017. The purported rectification/cancellation action was filed on the grounds that Defendant No. 2's trade mark under registration no. 1340261 was applied for and registered without any sufficient cause and is an entry wrongly remaining on the Register under Section 57 (2) of the Trade Marks Act, 1999. A copy of the purported rectification application has been filed by the Plaintiffs as Document No. 155 with the Complaint. The purported rectification application is yet to be served on Defendant No. 1 and is pending adjudication.”

(v) Reliance was also placed by Mr. Sethi on notice of opposition filed by the respondents against other marks of the petitioner in which the respondents had averred that the Rectification Petition ORA/13/2017/TM/DEL/2959 pending before the learned IPAB, had been served on the petitioner. As many as five such opposition proceedings have been brought to my attention.

(vi) In view of these facts, Mr. Sethi's contention is that the assertion, by the petitioner, in paras 2 and 3 of the present Review Petition, that the petitioner was unaware of the



2023:DHC:8567



prosecution of the present rectification petition by the respondents till 14 July 2020 is incorrect. A person who misstates fact before the Court and whose proverbial hands are not, therefore, clean, is not, according to Mr. Sethi, entitled to any relief, much less to relief in review jurisdiction, which is fundamentally discretionary in nature.

(vii) Apropos Mr. Bhandari's second submission that, in fact, the papers relating to the rectification petition were not served on the petitioner as directed by the learned IPAB on 10 December 2018, Mr. Sethi has no submission to offer. He also has, therefore, no submission to offer with respect to the observation of the learned IPAB in its subsequent order dated 8 April 2019, to the effect that the petitioner had refused to accept the service. Significantly, in this context, Mr. Sethi places reliance on the following letter dated 24 July 2020 issued by the learned IPAB to the respondents' trade mark Agent.

“Intellectual Property Appellate Board

Delhi Registry-Cum-Bench

G-62 to 67 & 196 to 204, August Kranti Bhawan, Bhikaji
Cama Place, New Delhi — 110 066.

Tele No: 011-26180613/14 Website:

<http://www.ipabindia.org>

ORIGINAL APPLICATION NO.:
ORA/13/2017/TM/DEL/123I3

(For the removal/rectification of Trade Mark No. 1340261
in class 42)

Dated 24.07.2020

To



2023:DHC:8567



SAIKRISHNA & ASSOCIATES
B-140, SECTOR-51, NOIDA-201301

Sub: YASHODA SUPER SPECIALITY HOSPITAL
YASHODA HEALTH CARE SERVICES PRIVATE LTD.

Vs

- 1) YASHODA HOSPITAL & RESEARCH CENTRE LTD.
- 2) THE REGISTRAR OF TRADE MARKS

With reference to your letter dated 23rd June, 2020.
I herewith forwarding you following document as per your request and details are as follows:

1. Certified copy of Final Order dated 21st January 2020 10 sets (100 pages)
2. Copy of the complete file of Rectification Petition with affidavit alongwith annexures (284 pages)
3. *Copy of the Form-C dated 3rd August, 2018 and 22nd March, 2018 alongwith returned courier envelope (21 pages)*
4. Certified copy of Order sheet dated 19/01/2018, 10/12/2018 and 08/04/2019 (4 pages).

Sd/

24/07/2020

For **DEPUTY REGISTRAR**

(emphasis supplied)

Mr. Sethi's submission, predicated on this letter, is that the postman had, on the envelope in which the papers of the rectification petition had been dispatched to the Yamuna Vihar address of the petitioner's proprietor by the learned IPAB, scrawled the Devanagari endorsement "प्राप्त करता ने लेने से मना कर दिया" (which translates to "the addressee refused to



2023:DHC:8567



accept”). Mr. Sethi’s submission, predicated on this endorsement by the postman, is that the notice, initially issued by the learned IPAB, was not returned on the ground of insufficiency of address, but because the addressee refused to accept service.

(viii) On the merits of the matter, Mr. Sethi’s submission is that there was no default on the part of the respondents in intimating the learned IPAB of the Hyderabad proceedings as the suit was instituted after the present rectification petition was filed before this Court. Besides, he submits that the interim order passed by the Hyderabad Court would have no binding or even persuasive effect on the learned IPAB while adjudicating the respondents’ rectification petition. This, he submits, therefore, cannot constitute a legitimate ground to seek review of the order dated 21 January 2020, passed by the learned IPAB, especially given the limited scope of review jurisdiction.

16. Responding to these submissions, Mr. Bhandari points out that the copy of the envelope on which Mr. Sethi places reliance, has been introduced by him in an “additional convenience compilation” dated 28 November 2023, and does not form part of the record of the present case. He also disputes Mr. Sethi’s contention that the said copy of the envelope forms part of the record of the learned IPAB. He submits that the petitioner had obtained the scanned copy of the record of the IPAB from this Court and filed it as such, and the said copy does not contain the aforesaid envelope. Be that as it may, Mr. Bhandari



2023:DHC:8567



submits that, even if the postman had, on the envelope, remarked that the addressee had refused to accept service, it would result in a situation in which there was a discrepancy between the remark on the envelope entered in hand and the tracking report of the postal authorities which, apropos delivery on 12 April 2018 at 15:51 hours records “item delivery attempted insufficient address”. It would, therefore, be hazardous for the Court to proceed solely on the basis of the alleged postal endorsement on the envelope in Devanagari, especially as this document had been introduced now at a belated stage.

17. Mr. Bhandari also places reliance on the notice dated 24 July 2020 addressed by the learned IPAB to the respondents’ trade mark Agent (reproduced in extenso in para 15 (vii) *supra*), but for a different purpose. He points out that the said communication was after both the orders dated 10 December 2018 and 8 April 2019 had been passed by the learned IPAB. The fact that the documents annexed to the said communication only contained the returned courier envelope of 22 March 2018, he submits, indicates that there was, in fact, no attempt at fresh service on the petitioner in accordance with the order dated 10 December 2018 passed by the learned IPAB. Even on this sole ground, he submits, the present review petition is required to be allowed and the petitioner is entitled to be heard on the respondents’ rectification petition, after setting aside the impugned order.

18. Having heard learned Senior Counsel/learned Counsel for both



2023:DHC:8567



sides and applied myself to the issues at hand, I do not deem it necessary to enter into the intricacies of all arguments which were advanced as the petitioner is, in my opinion, entitled to succeed even on the sole ground of the impugned order having been passed without effecting due service on the petitioner as directed by the learned IPAB by its order dated 10 December 2018.

19. As such, I eschew expressing any opinion on other aspects which were argued before me, as they have no effect on the point on which I deem the petitioner entitled to relief.

20. There is no dispute about the fact that, on 10 December 2018, the learned IPAB treated the petitioner as not having been served in the rectification petition prior thereto and, in fact, directed fresh notice to be issued to the petitioner for 8 April 2019. There is also nothing to show that the said fresh notice was ever issued or served on the petitioner. The communication dated 24 July 2020 from the learned IPAB to Saikrishna & Associates encloses, therewith, only the returned courier envelope on 22 March 2018. No document, evidencing any attempt at service having been made on the petitioner, in accordance with the direction to that effect, as passed by the learned IPAB on 10 December 2018 is forthcoming on record. Had the petitioner refused to accept service of the notice issued by the learned IPAB on 8 April 2019, it goes without saying that a copy of the postal endorsement in that regard would also have been enclosed with the communication dated 24 July 2020. The learned IPAB, therefore, was clearly in error in observing, in its subsequent order dated 8 April



2023:DHC:8567



2019, that the petitioner had refused to accept service.

21. In fact, as Mr. Bhandari correctly submits, it appears that the learned IPAB confused the first abortive attempt at service of the papers relating to the rectification petition on the petitioner on 22 March 2018 with the service of the papers as directed by the order dated 8 April 2019. The record reveals, quite clearly, that there was no compliance with the direction passed by the learned IPAB in its order dated 8 April 2019, for fresh service to be effected on the petitioner. Mr. Sethi, too, is unable to answer this submission as advanced by Mr. Bhandari or to advance any argument which could convince the Court that the observation, in the subsequent order dated 8 April 2019, of the learned IPAB that the petitioner had refused to accept service, was not, in fact, incorrect.

22. Apparently, therefore, the learned IPAB, under an erroneous presumption of fact that the petitioner had been duly served, proceeded, on 21 January 2020, to decide the rectification petition filed by the respondents *ex parte* against the petitioner.

23. Mr. Sethi's doubt regarding the cleanness of the petitioner's hands is based on paras 2 and 3 of the Review Petition, reproduced in para 15 (ii) *supra*. While it may not be strictly correct that the petitioner was unaware of the filing of the rectification petition, as it found mention in the plaint in the Hyderabad suit, when the Court pointedly queried of Mr. Sethi whether there is anything to indicate that the petitioner was made aware of the proceedings before the learned IPAB or of the hearing which was fixed before the learned



2023:DHC:8567



IPAB, he is unable to answer in the affirmative.

24. The petitioner's hands are not, therefore, in my view, in any case so unclean, as to disentitle him to relief in a case such as this, in which the learned IPAB has proceeded to disenfranchise the petitioner's



mark *ex parte*, fifteen years after it had been registered.

25. Additionally, the passing of the impugned order would also be liable to be set aside for non-compliance with Rule 16 of the IPAB Rules, which requires the date of hearing of the IPAB to be notified to both parties. Inasmuch as the order dated 8 April 2019 which fixed final hearing in the matter on 9 October 2019 was also passed by the learned IPAB in the absence of the petitioner, the impugned order additionally infracts Rule 16 of the IPAB Rules and is liable to be set aside on that ground as well.

26. As already noticed at the commencement of this order, the impugned order has resulted in serious prejudice to the petitioner as



mark, which was registered in the petitioner's favour as far back as on 22 February 2005, came to be removed from the register fifteen years thereafter, without the petitioner being heard in that regard.

27. The impugned order came to be passed *ex parte* only because of an erroneous impression, harboured by the learned IPAB, that the petitioner had refused service of the notice issued by the learned IPAB



2023:DHC:8567



on 10 December 2018 and, therefore, stood duly served. Once the learned IPAB had deemed it appropriate, in its order dated 10 December 2018, to direct fresh service to be effected on the petitioner, it was duty bound to proceed with the matter only after such service had been effected. That, however, never happened. The earlier default in service on the petitioner on 12 April 2018 ceased to have relevance, whether it was because the address was insufficient or because the addressee refused to accept service. [One may, even if inferentially, borrow a precedential leaf, in this regard, from the judgment of the Supreme Court in *State Bank of India v. Chandra Govindji (Km.)*⁵, which holds that, once the Court decides to grant adjournment, the number of adjournments earlier granted cease to have relevance.] The observation, in the subsequent order dated 8 April 2019, that the petitioner had refused service was, therefore, incorrect. Had the learned IPAB known that there was, in fact, no compliance with the direction, in its order dated 10 December 2018, to issue fresh notice, it appears obvious to me that it would not have proceeded *ex parte* against the petitioner.

28. The facts of the case, as well as the pre-eminent public interest involved in ensuring that justice is, at all costs, done, convince me, therefore, that a case for review of the order dated 21 January 2020, within the meaning of Rule 23 of the IPAB Rules does exist.

29. I may note, here, Mr. Bhandari had, towards the commencement of arguments, drawn attention to a decision of the Full



2023:DHC:8567



Bench of the IPAB in *Aachi Masala Food (P) Ltd v. S.D. Murali*⁶, which holds that the scope of review jurisdiction as conferred on the IPAB by Rule 23 of the IPAB Rules is not confined to the peripheries of the jurisdiction vested in the Civil Court by Order XLVII of the Code of Civil Procedure, 1908 (CPC). I am not entering into that arena as, even on facts, I deem this an appropriate case for the petitioner to be granted an opportunity to contest the rectification petition filed by the respondents.

30. Needless to say, no prejudice would result as a consequence, to the respondents, as they could always plead and argue the rectification petition. Only, this time, it would be a contested, rather than an uncontested, matter. Facing contest, in litigation, cannot be said to be prejudicial.

31. In view of the aforesaid, without making any observation on the merits of the impugned order or on the merits of the rival stands of the parties in the rectification petition instituted by the respondents, and solely on the ground of violation of the principles of natural justice and the requirement of due opportunity to the petitioner to contest the rectification petition, the impugned order dated 21 January 2020 passed by the learned IPAB is quashed and set aside.

32. Rectification Petition No. ORA/13/2017/TM/DEL would be heard afresh, as the learned IPAB stands abolished. The petition would have to be heard by the Intellectual Property Division (learned IPD) of this Court.



2023:DHC:8567



33. Accordingly, list the rectification petition for hearing before the appropriate Bench of the learned IPD of this Court on 24 January 2024.

34. The present petition stands allowed accordingly.

C.HARI SHANKAR, J

NOVEMBER 29, 2023/rb

Click here to check corrigendum, if any