

Intellectual Property Appellate Board

Flower Tobacco Company vs Registrar Of Trade Marks And Anr. on 6 August, 2004

Equivalent citations: 2004 (29) PTC 474 IPAB

Bench: S Jagadeesan, R Singh

JUDGMENT Raghbir Singh, Vice-Chairman

1. This appeal is against the order of the Registrar of Trade Marks dated 3rd December, 1993 filed in the High Court of Delhi as CM(M)/201/94 and it has been transferred to this Board in terms of Section 100 of the Trade Marks Act, 1999.

2. M/s. Flower Tobacco Company, appellant/applicant filed application No. 358881 consisting of label containing a device of 'Abudalla' alongwith other expressions mentioned therein in respect of tobacco for hukka for export only included in class 34. Respondent/opponent filed their opposition alleging that the impugned mark is barred by Sections 12(1) and 12(2) of the Act. The mark applied for comprises of the device of 'coffee pot' and words 'Mumtaz Number Wahid' which is similar to that of the opponents label The goods for which the applicant sought registration are same and/or of the same description. They submitted that they are in the business of manufacturing, trading and export of brass artwares and various other items including smoking tobacco falling in different classes since 1975. Their mark having the works 'Mumtaz Number Wahid', with device of coffee pot' has attained goodwill and reputation in the market and they have filed an application in class 34 for its registration under application No. 471762. Besides, they claimed that the applicant cannot claim to be proprietors of the mark applied for under Section 18(1) of the Act. The appellant/applicant lodged their counter statement on 29th August, 1980 refuting the allegations of the opponent. The appellant/applicant refuted that the trade mark propounded by it for registration is similar to the trademark of the opponent. The appellant agreed that the goods in relation to the appellant and the opponent are the same. The appellant further submitted that its mark comprising of device of 'Coffee Pot' is already registered under No. 339005 as of 27th July, 1978 in respect of tobacco for hukka for export only. The learned Registrar examined the matter under Sections 11(a), 11(e), 18(1) and 18(4) of the Act and allowed the opposition and refused the registration of application No. 358881 in class 34.

3. The appeal against the decision of the Registrar came up for hearing before this Board on 13th July, 2004. Learned counsel Shri Amarjit Singh appeared for the appellant and the respondent neither by himself nor through his counsel was present. Learned counsel for the appellant vehemently argued that the Registrar has erroneously reached the conclusion that the appellant has failed to establish his user and as such his mark is non-registrable. He further argued that the Registrar was wrong in reaching the conclusion that he cannot take the judicial notice of the decision in the appellant/applicant's application No. 339005 where the present respondent was the opponent. His opposition in that case was dismissed and the registration was allowed in favour of the appellant/applicant. The learned counsel for the appellant drew our attention that the impugned mark under application No. 358881 advertised in class 34 in the Trade Mark Journal No. 960 dated 1st June, 1989 at page 317 is nothing but a label mark consisting of the exact replica of the marks registered under application No. 339005 referred to by the Registrar in his order. The said mark has been registered in class 34 for tobacco for hukka for export only. The impugned mark is a label mark

and the exact replica of the registered trade mark referred to just now. There are more descriptive materials in English and Arabic referring to the name of the company, its address and phone number which have nothing to do with the trade of the company. Since there is nothing in the findings of the Registrar to indicate that the opponent has established his proprietorship of his mark for the purpose of Section 11(a) of the Act, we feel that he was wrong in concluding that the impugned mark is hit by Section 11(a) of the Act. Similarly, there is nothing in the order of the Registrar to conclude that the impugned mark is violative of Section 11(e) of the Act. In view of our above conclusions and further for the fact that the appellant already has a registered mark under application No. 339005, which forms a major part of the impugned mark, the right of proprietorship under Section 18(1) in relation to the appellant/applicant is beyond doubt.

In view of the above we allow the appeal and set aside the order of the Registrar of Trade Marks dated 3.12.93 and direct the Registrar to proceed with the registration of the applicant's trade mark in application No. 358881. There shall not be any order as to costs.