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(A) INTELLECTUAL PROPERTY LAW

I Filing of TM application does not arise cause of action for passing off

In an important ruling¹, the Supreme Court of India has observed that “mere filing of an application for registration of a trade mark does not constitute a part of cause of action in a suit for passing off.”

Facts: The appellants are engaged in the business of manufacturing and selling Banana Chips and had adopted the trade mark A-ONE with respect to the said Banana Chips in 1986. The appellants had filed an application for registration of the trade mark A-ONE before the Trade Mark Registry in December, 1999 with respect to the said Banana chips. The respondent also filed three trade mark applications in January, 2000 before the Trade Mark Registry seeking registration as user of the mark A-ONE throughout India since 1995. Thereafter, the appellants filed an injunction application in the Appellate Court seeking to restrain the respondent from passing off his goods using the trade mark A-ONE claiming “that when the respondent filed a trade mark application at the Trade Mark Registry, a threat was communicated regarding the use of the trade mark, and it was immaterial whether there was actual use or not and the appellants would be entitled to an injunction (being a prohibitive remedy) against the said mark.” The appellants also filed an application before the Appellate Court for leave to institute the suit which was granted by the court. However, the Appellate Court dismissed the injunction application and also revoked the leave to sue, granted by it to the appellants. The Division Bench of the Appellate Court upheld the said decision. Hence this Special Leave Petition before the Apex court.

Ratio Decidendi: The Court after reviewing its own rulings² observed that “.....mere filing of a trade mark application cannot be regarded as a cause of action for filing a suit for passing off since filing of an application for registration of trade mark does not indicate any deception on the part of the respondent to injure business or goodwill of the appellants.”

Specifically referring to its own decision in Dhodha House³ case, wherein it was held that “A cause of action will arise only when a registered trade mark is used and not when an application

¹ K. Narayanan and Anr. vs. S. Murali (See <http://judis.nic.in/supremecourt/qrydisp.aspx>)

² Wander Ltd. and Anr. v. Antox India P. Ltd. 1990 (Supp) SCC 727 and Dhodha House v. S.K. Maingi (See <http://judis.nic.in/supremecourt/qrydisp.aspx>)

³ Id.

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is filed for registration of the trade mark. In a given case, an application for grant of registration certificate may or may not be allowed. The person in whose favor a registration certificate has already been granted indisputably will have an opportunity to oppose the same by filing an application before the Registrar, who has the requisite jurisdiction to determine the said question. In other words, a suit may lie where an infringement of trade mark or copyright takes place but a cause of action for filing the suit would not arise within the jurisdiction of the court only because an advertisement has been issued in the Trade Marks Journal or any other journal, notifying the factum filing of such an application”, the Supreme court held that the appellants cannot file the suit in the Appellate Court seeking an injunction to restrain the respondent from passing off his goods using the trade mark A-ONE, based only on the claims made in the trade mark application of respondent filed before the Trade Mark Registry, since the necessary requirements of an action for passing off are absent.

II SC explains provisions regarding non-use of trademarks and their removal from register⁴

Facts: The Supreme Court of India made clear the law regarding the non-use of a trademark and removal from the register. Appellants (Toshiba), one of the largest manufacturers of Heavy Electrical apparatus in Japan, adopted the mark TOSHIBA. The Respondents (Tosiba Appliances), an Indian company claims to have been carrying on business of various electrical appliances and marketing auto irons, toasters, washing machine, extension cords, table lamps, etc. under the trademark TOSIBA since 1975.

Appellants submitted that they had acquired about 35 trademark registrations in India. The period of seven years also expired in 1978. They contended that on the expiry thereof, it became conclusive of its validity in terms of Section 32⁵ of the Trademarks Act, 1958 (the Act). The said registration has been extended from time to time, and the mark stands registered until 2016. On the premise that TOSIBA had although not been producing or marketing washing machines or spin dryers, but has been using the trade name, which was deceptively similar to that of the appellant, appellants served a notice upon respondents. Accordingly, proceedings took place forth the Deputy Registrar of Trade Marks whereby respondents filed an application for removal

⁴ *Kabushiki Kaisha Toshiba vs. Tosiba Appliances Co. and Ors.* (See <http://judis.nic.in/supremecourt/qrydisp.aspx>)

⁵ *Registration to be conclusive as to validity after seven years.* Subject to the provisions of section 35 and section 46, in all legal proceedings relating to a trade mark registered in Part A of 103 the register (including applications under section 56), the original registration of the trade mark shall, after the expiration of seven years from the date of such registration, be taken to be valid in all respects unless it is proved-- (a) that the original registration was obtained by fraud; or (b) that the trade mark was registered in contravention of the provisions of section 11 or offends against the provisions of that section on the date of commencement of the proceedings; or (c) that the trade mark was not, at the commencement of the proceedings, distinctive of the goods of the registered proprietor.

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of appellant's trademark from the register for non-use under Section 46 and 56⁶ of the Act. Deputy Registrar of Trade Marks partially allowed the application for rectification filed by the respondent. Appellants appealed but the Single Judge as well as the Division Bench of the Appellate Court upheld the order of the Deputy Registrar so far as the application related to Section 46(1)(a)⁷ of the Act but rejected the plea as regards Section 46(1)(b)⁸ thereof.

Hence, this appeal before the Supreme Court.

Ratio Decidendi: Referring to its earlier decision⁹, the Apex Court said "the distinction between Clause (a) and Clause (b) is that if the period specified in Clause (b) has elapsed and during that period there has been no bona fide use of the trade mark, the fact that the registered proprietor had a bona fide intention to use the trade mark, at the date of the application for registration becomes immaterial and the trade mark is liable to be removed from the Register unless his case falls under Section 46(3)¹⁰, while under Clause (a) where there had been a bona fide intention to

⁶ Power to cancel or vary registration and to rectify the register. (1) On application made in the prescribed manner to a High Court or to the Registrar by any person aggrieved, the tribunal 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 register, or by any error or defect in any entry in the register, may apply in the prescribed manner to a High Court or to the Registrar, and the tribunal may make such order for making, expunging or varying the entry as it may think fit.....

⁷ Removal from register and imposition of limitations on ground of non-use. (1) Subject to the provisions of section 47, a registered trade mark may be taken off the register in respect of any of the goods in respect of which it is registered on application made in the prescribed manner to a High Court or to the Registrar by any person aggrieved on the ground either-- (a) that the trade mark was registered without any bonafide intention on the part of the applicant for registration that it should be used in relation to those goods by him or, in a case to which the provisions of section 45 apply, by the company concerned, and that there has, in fact, been no bona fide use of the trade mark in relation to those goods by any proprietor thereof for the time being up to a date one month before the date of the application; or (b) that up to a date one month before the date of the application, a continuous period of five years or longer had elapsed during which the trade mark was registered and during which there was no bona fide use thereof in relation to those goods by any proprietor thereof for the time being: 110 Provided that, except where the applicant has been permitted under sub-section (3) of section 12 to register an identical or nearly resembling trade mark in respect of the goods in question or where the tribunal is of opinion that he might properly be permitted so to register such a trade mark, the tribunal may refuse an application under clause (a) or clause (b) in relation to any goods, if it is shown that there has been, before the relevant date or during the relevant period, as the case may be, bona fide use of the trade mark by any proprietor thereof for the time being in relation to goods of the same description, being goods in respect of which the trade mark is registered.

⁸ Id.

⁹ American Home Products Corporation v. Mac Laboratories Pvt. Ltd and Another AIR 1986 SC 137

¹⁰ An applicant shall not be entitled to rely for the purpose of clause (b) of sub-section (1) or for the purposes of sub-section (2) on any non-use of a trade mark which is shown to have been due to special circumstances in the trade and not to any intention to abandon or not to use the trade mark in relation to the goods to which the application relates.

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use the trade mark in respect of which registration was sought, merely because the trade mark had not been used for a period shorter than five years from the date of its registration will not entitle any person to have that trade mark taken off the Register.”

The Supreme Court commented that in the event of no evidence being placed on record to depict Toshiba's intention to abandon the use of the said trademark and to the contrary, issuing of advertisement in the year 1985, renewal of registration every seven years and maintaining services centers to render services to those who had been importing the said machines, by appellants, the Appellate Court ought to have held that appellants had the intention to bona fide use the trade mark not only at a point of time when an application for registration was filed but also continuously thereafter.

The Court also took notice of the fact that respondent had not been manufacturing washing machine and spin dryers and, in fact, never had any intention to manufacture the said goods.

III SC explains doctrine of acquiescence in IP cases

The Supreme Court of India has explained the legal position regarding the doctrine of acquiescence and how it should be interpreted in the Intellectual Property cases. In a detailed opinion¹¹, the Apex Court held that “...the conduct of the person aggrieved in filing the application for rectification would be relevant”.

Facts: Khoday Distilleries Ltd., manufacturers of whisky under the trademark "Peter Scot" (applied for in May 1968), got the said trademark registered without any opposition from the respondent Scotch Whisky Association (SWA) around 1971. While the respondent came to know of the appellant's mark on or about September, 1974, they filed an application for rectification of the said trade mark in April, 1986 which was decided in their favor.

The defense of acquiescence/delay raised by appellant was rejected by Registrar on the ground that as the plea of deceptive element in the impugned mark having neither been displaced nor rebutted by evidence on the part of the appellant, the pleas of delay and acquiescence cannot be

¹¹ *Khoday Distilleries Limited vs. The Scotch Whisky Association and Ors.* (See <http://judis.nic.in/supremecourt/qrydisp.aspx>)

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allowed in favor of the appellant and the impugned registration contravenes Section 11¹² of the Trademark Act (the Act).

An appeal was preferred by Khoday before the Appellate Court in terms of Section 109(2)¹³ of the Act. The arguments submitted therein governed the aspects of SWA having prior knowledge of the infringement, delay of 14 years and that acquiescence on part of SWA amounted to a waiver. The principles of passing off were also elucidated and they opined that their actions did not fall in that ambit and hence this appeal to Supreme Court by appellants.

Ratio Decidendi: The Supreme Court opined that the Appellate Court had committed a serious error insofar it failed to take into consideration the arguments vouched by appellants and the contents of its label. Taking into consideration the averments of SWA and various provisions of the Act, the Supreme Court opined that the principle consideration revolved around the delay in filing a rectification application and whether the lower courts had been misdirected in law by SWA.

The Court, while allowing the appeal, observed that under Section 56¹⁴ of the Trademarks Act, an aggrieved person can file an application for rectification and the Tribunals make such order as it may think fit. It may not, therefore, be correct to contend that under no circumstances the delay or acquiescence or waiver or any other principle analogous thereto would apply. So, when a discretionary jurisdiction has been conferred on a statutory authority, the same although would be required to be considered on objective criteria but as a legal principle it cannot be said that the delay leading to acquiescence or waiver or abandonment will have no role to play. So, in determining the said question, therefore, conduct of the person aggrieved in filing the application for rectification would be relevant.

The Court further held that since the appellant's trademark has been in existence for more than 7 years, it would be presumed to be valid, unless the use of such trademark would likely to deceive or cause confusion in public as per Section 32¹⁵ of the Act.

¹² *Prohibition of registration of certain marks. A mark-- (a) the use of which would be likely to deceive or cause confusion; or (b) the use of which would be contrary to any law for the time being in force; or (c) which comprises or contains scandalous or obscene matter; or (d) which comprises or contains any matter likely to hurt the religious susceptibilities of any class or section of the citizens of India; or (e) which would otherwise be disentitled to protection in a court; shall not be registered as a trade mark.*

¹³ *Save as otherwise expressly provided in sub-section (1) or in any other provision of this Act, an appeal shall lie to the High Court within the prescribed period from any order or decision of the Registrar under this Act or the rules made thereunder.*

¹⁴ *Supra, Note 6, Page 3*

¹⁵ *Supra, Note 5, Page 2*

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“We are concerned with the class of buyer who supposed to know the value of money, the quality and content of Scotch Whisky. They are supposed to be aware of the difference of the process of manufacture, the place of manufacture and their origin. The lower courts, therefore, failed to notice the distinction, which is real and otherwise borne out from the precedents operating in the field”, the Court ruled.

IV SC thoroughly reviews “Compulsory License” provisions in Copyright Act

In a very important and detailed ruling¹⁶ concerning “compulsory license” for copyrights, the Supreme Court of India has resorted to “purposive construction” of Section 31¹⁷ of the Copyright Act, 1957 (the Act) keeping in mind International Covenants and Treaties to which India is a signatory.

Facts: Respondent Super Cassette Industries Ltd. (SCI) is one of the leading music companies engaged in the production and/or acquisition of rights in sound recordings. It has copyright over a series of cassettes and CDs commonly known as T- series. It has copyrights in cinematographic films and sound recordings. Appellant (ENIL) is a leading FM radio broadcaster and broadcasts under the brand name "Radio Mirchi". Disputes and differences arose between ENIL and SCI as regards the playing of the songs of which copyrights belongs to SCI.

After prolonged litigation between the parties and having conflicting judgments from Indian Appellate Courts, Supreme Court decided to interpret Section 31 of the Act. The core questions which, therefore, arose for consideration in these appeals were:

¹⁶*Entertainment Network (India) Ltd. vs. Super Cassette Industries Ltd.* (See <http://judis.nic.in/supremecourt/qrydisp.aspx>)

¹⁷ (1) *Compulsory licence in works withheld from public. If at any time during the term of copyright in any Indian work which has been published or performed in public, a complaint is made to the Copyright Board that the owner of copyright in the work- (a) has refused to republish or allow the republication of the work or has refused to allow the performance in public of the work, and by reason of such refusal the work is withheld from the public; or (b) has refused to allow communication to the public by broadcast of such work or in the case of a record the work recorded in such record, on terms which the complainant considers reasonable ; the Copyright Board, after giving to the owner of the copyright in the work a reasonable opportunity of being heard and after holding such inquiry as it may deem necessary, may, if it is satisfied that the grounds for such refusal are not reasonable, direct the Registrar of Copyrights to grant to the complainant a licence to republish the work, perform the work in public or communicate the work to the public by broadcast as the case may be, subject to payment to the owner of the copyright of such compensation and subject to such other terms and conditions as the Copyright Board may determine ; and thereupon the Registrar of Copyrights shall grant the licence to the complainant in accordance with the directions of the Copyright Board, on payment of such fee as may be prescribed. Explanation.-In this sub-section, the expression " Indian work includes- (i) an artistic work, the author of which is a citizen of India; and (ii) a cinematograph film or a record made or manufactured in India.*

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(i) Whether the Copyright Board has jurisdiction under Section 31(1)(b) the Act to direct the owner of a copyright in any Indian work or a registered copyright society to issue compulsory licences to broadcast such as works, where such work is available to the public through radio broadcast?

(ii) Whether in any event such a compulsory license can be issued to more than one complainant in the light of Section 31(2)¹⁸?

(iii) What would be the relevant considerations which the Copyright Board must keep in view while deciding on;

(a) Whether to issue a compulsory license to a particular person; and

(b) The terms on which the compulsory license may be issued, including the compensation?

After going through the provisions of the complete Act, the Copyright Rules and copyright laws in various countries¹⁹, the Supreme Court remitted the case to Copyright Board and observed

¹⁸ *Where two or more persons have made a complaint under sub-section (1), the licence shall be granted to the complainant who in the opinion of the Copyright Board would best serve the interests of the general public.*

¹⁹ *We have noticed the laws operating in other countries only to highlight that broadly it is in two forms, namely:*

(a) free to air broadcasting does not require a copyright licence;

(b) a free to air broadcaster requires a licence - however to commence broadcast all that he has to do is to give an undertaking to pay a reasonable sum which in the event of dispute will be decided by a competent tribunal.

Australia

92. Under Section 109 of the Australian Copyright Act, the form adopted is in the same form as in (b) above. The additional feature of the law is that the royalty for broadcasting of published sound recording is frozen at a ceiling of 1% of the gross earnings of the broadcaster during the specified period. There are also provisions for compulsory licensing.

China

93. China has the form (a) above for domestic recordings. They however, follow the Berne Convention for International recordings. These domestic recordings can be broadcasted on the radio or television without any licence or payment. Even a commercial broadcast is in form (b) above.

Japan

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that “it is necessary to construe the provisions under Section 31 having regard to the International Covenants and the laws operating in the other countries. Interpretation of a statute cannot remain static. Different canons and principles are to be applied having regard to the purport and object of the Act. While India is a signatory to the International Covenants, the law should have been amended in terms thereof. Only because laws have not been amended, the same would not by itself mean that the purport and object of the Act would be allowed to be defeated. If the ground realities changed, the interpretation should also change. Ground realities would not only depend upon the new situations and changes in the societal conditions vis-a-vis the use of sound recording extensively by a large public, but also keeping in view of the fact that the Government with its eyes wide open have become a signatory to International Conventions.”

The Court observed that “In this case, the meaning of the Act is neither clear nor sensible. It is a statute where a purposive construction is warranted. It is a case where Section 31(2) should be kept confined to clause (a) for that purpose. The statute has to be read down. It is not a case of improper interpolation so as to take away a primary purpose of the legislative intent. It is expedient to give effect to the intent of the statute. This itself says that creases can be ironed out. While undertaking the said exercise, the court's endeavor would be to give a meaning to the provisions and not render it otiose.”

The Apex Court said that in between the clauses (a) and (b) of Section 31, the word ‘or’ has been used disjunctively and not conjunctively. Interpreting the word ‘refusal’ in Section 31, the Court observed that “only because an offer is made for negotiation or an offer is made for grant of license, the same per se may not be sufficient to arrive at a conclusion that the owner of the copyright has not withheld its work from public. When an offer is made on an unreasonable term or a stand is taken which is otherwise arbitrary, it may amount to a refusal on the part of the owner of a copyright.....An unreasonable demand if acceded to, becomes an unconstitutional contract which for all intent and purport may amount to refusal to allow communication to the public work recorded in sound recording. A de jure offer may not be a de facto offer.”

94. Japan has form (b) above. The Director General of the Cultural Affairs Agency will determine the compensation required to be paid by a Broadcaster. Non-profit transmission of works already made public is exempted from paying any royalty.

United Kingdom

95. In U.K. statutory licensing and compulsory licensing exists. Copinger & Skone James clearly says:

...In the case of a statutory licence the rate is fixed by law, in the case of a compulsory licence the rate is left to be negotiated, but in neither case can use be refused or prevented....

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“The word ‘communicate the work to the public by broadcast’ is of significance. It provides for a mode of communication. Thus, only because a Registrar of a Copyright would be directed to grant a licence to communicate the work to the public by broadcast would not mean that only a single licence shall be granted. The Board acting as a statutory authority can exercise its power from time to time,” the Court said adding “If a compulsory licence is granted only once covering every single part of the country; the same cannot be lead to a conclusion that no other person can approach the Board.”

The Court also noted that “legislature for all intent and purport equates ‘compensation’ with ‘royalty’. In the context of the Act, royalty is a genus and compensation is a species. Where a licence has to be granted, it has to be for a period. A ‘compensation’ may be paid by way of annuity. A ‘compensation’ may be held to be payable on a periodical basis, as apart from the compensation, other terms and conditions can also be imposed. The compensation must be directed to be paid with certain other terms and conditions which may be imposed.

(B) ARBITRATION LAW

Indian companies cannot seek International Commercial Arbitration

In a landmark judgment²⁰, the Supreme Court of India ruled that “two Indian companies locked in a dispute cannot seek international commercial arbitration (“ICA”) defined under the Indian Arbitration and Conciliation Act, 1996 (“the Act”) as it tantamount’s to condoning the home country’s law. The Court held that the incorporation in India was sufficient to determine the nationality of the Company. The decision clarifies that in case of any domestic arbitration, the arbitration tribunals shall determine the dispute in accordance with the substantive law of India in force at that time and restricts them from using the law of any other country.

Facts: Both petitioner and respondent were companies incorporated under the Indian Companies Act, 1956. The respondent was awarded a project for rehabilitation and upgradation by the National Highway Authority of India and it subcontracted some portion of it to petitioner. Disputes arose between the two companies and a consensus on a common arbitrator could not be reached between them. Petitioner approached the Apex court seeking the appointment of an

²⁰ *TDM Infrastructure Private Limited vs. UE Development India Pvt. Ltd.* (See <http://judis.nic.in/supremecourt/qrydisp.aspx>)

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arbitrator by virtue of Sections 11(5)²¹ and 11(9)²² of the Act by stating that since the control and management of petitioner was in Malaysia, the dispute was an ICA as per Section 2(1)(f)(iii)²³. On the other hand, respondent argued that since petitioner was incorporated and registered in India, the dispute does not fall under the purview of ICA and that the Supreme Court had no jurisdiction to pass an order for appointing an arbitrator.

Ratio Decidendi: After perusing the Act, the Court held that no matter even if the control and management of a company is outside India; just by the virtue of having the entity registered in India makes it a domestic company and in the event of a dispute such a company cannot take recourse to foreign law as the governing law where the opposite party is also an Indian national or entity. “.....When both the companies are incorporated in India, Clause (ii)²⁴ of Section 2(1)(f) will apply and not the clause (iii) thereof.”

The Court observed that only in case where a body corporate which need not necessarily be a company registered and incorporated under the Indian Companies Act, as for example, an association or a body of individuals, the exercise of central management and control in any country other than India may have to be taken into consideration.

The Court held that “the intention of the legislature appears to be clear that Indian nationals should not be permitted to derogate from Indian law. This is part of the public policy of the country.”

²¹ *Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice of any person or institution designated by him.*

²² *In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by him may appoint an arbitrator of a nationality other than the nationalities of the 7 parties where the parties belong to different nationalities.*

²³ *"international commercial arbitration" means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is - a company or any association or a body of individuals whose central management and control is exercised in any country other than India*

²⁴ *“.....a body corporate which is incorporated in any country other than India.*