

IN THE HIGH COURT OF SINDH, KARACHI

Miscellaneous Appeal No.63 of 2008

Present: Mr. Justice Nazar Akbar

Appellant : RAJEE (Pvt) Limited
through Ms. Tayyaba Saadia, Advocate.

Respondent No.1 : The Registrar of Designs. (Nemo).

Respondent No.2 : M/s. Aruj Garments Accessories,
through Mr. Irfanullah Khan, Advocate.

Date of hearing : **13.12.2018**

Date of Judgment : **15.01.2019**

J U D G M E N T

NAZAR AKBAR, J:- This appeal under **Section 11(2)** of the Registered Designs Ordinance, 2000 is directed against the order dated **01.7.2008** passed by Registrar of Designs (Respondent No.1) whereby the registered Design of the appellant under Registration No.12730-D has been cancelled.

2. The brief facts leading to this Miscellaneous Appeal are that the appellant company was incorporated in the year 1989 and since then it is doing its business. In the year 1994, the appellant imported Fusible-interlining machine from Switzerland and installed the same at its Factory premises situated in district Kasur (Punjab) and introduced a new interlining in the country. In the year 2006 the appellant introduced a new Design in the Fusible interlining after getting the same registered as industrial Design before Respondent No.1, The Patent Office, Karachi being Registration No.12729-D and 12730-D and by virtue of **Section 7** of the Registered Designs Ordinance, 2000 (Design Ordinance, 2000), the applicant enjoys exclusive rights in the said Design to apply or caused to be applied

on the products for which they are registered and the Copyright in the said Design were granted to them for the initial period of 10 years, extendable for a further two period of 10 years. It is averred that according to **Section 7(2)** of the Design Ordinance, 2000 the owner of a registered Design shall have the right to exclude third parties, not having his consent from making, selling or working articles bearing or embodying a Design which is a copy of the registered Design when such acts are under taken for commercial purposes. Therefore, the appellant filed petition against Respondent No.2. Thereafter as Counter Blast to the said proceedings, Respondent No.2 submitted application for cancellation of said Designs before Respondent No.1. The said petition was fixed for hearing before Respondent No.1 on **20.01.2007** which was duly attended by counsel for the appellant, who requested for time to file counter statement and one week time was granted to counsel for the appellant and the hearing was adjourned for **27.01.2007**. It was further averred that it was not possible to file 8 counter statements within one week as two registered Designs were involved against which four applications were filed by different applicants who were pushing hard for early cancellation of the Designs as Civil Courts have granted interim injunction restraining the applicants not to infringe registered Designs of the appellant, therefore, the appellant filed Constitution Petition No.D-110/2007 before this Court, whereby Respondent No.1 was directed to act strictly in accordance with Rules and grant adequate opportunity to all the parties. Thereafter the appellant filed its counter statement on **27.3.2007**, whereas rejoinder/ evidence was filed by Respondent No.2 on **04.01.2008**. During proceedings a complaint was also made to the Director General Intellectual Property Organization of Pakistan, Islamabad regarding misuse of Power and misconduct of Respondent No.1 at the

hearing. The complaint against Respondent No.1 was that she has forced the counsel for the appellant to give undertaking that pending cancellation proceedings, the appellant will not pursue remedy against infringement of design by the Respondents. The Director General IPO was also requested to transfer the cases from Respondent No.1 to some other officer of the Patent Office but said request was not considered. Ultimately Respondent No.1 decided the cases without observing due process of Law and the Rules and ordered cancellation of Registered Design No.12730-D. Therefore, the appellant filed instant Miscellaneous Appeal against the order of Respondent No.1.

3. Respondent No.2 filed counter affidavit to the main Appeal and affidavit in rejoinder from the appellate side is also on the record.

4. This appeal was filed on **04.09.2008**. Almost after ten years on **08.11.2018** it was partly heard by me when I have categorically ordered as follows:-

*Heard learned counsel for the Petitioner. For further arguments the matter is adjourned to **20.11.2018**. No adjournment will be granted to either side on the next date because this is a part heard matter, however, whoever will seek adjournment for any reason, the same shall be granted subject to cost.*

Yet on **20.11.2018** both the counsel by consent got the case adjourned for **13.12.2018**. On **13.12.2018** after hearing learned counsel for Respondent No.2 at some length, the counsel were directed to file written arguments within three days and the case was reserved for judgment. Only counsel for the appellant submitted her written arguments but counsel for Respondent No.2 has not filed written arguments till date. Therefore, relying on the dictates of the Hon'ble Chief Justice of Pakistan in the case of *Messrs MFMY Industries ..Vs.. Federation of Pakistan* reported in **2015 SCMR 1550**,

I cannot wait for his written arguments. The relevant observations of Hon'ble Supreme Court is as under:-

If parties, despite the opportunity granted by the court to make oral submissions do not avail the same, the court is not bound to wait indefinitely for them and keep on adjourning the matter. This is highly deprecated and should be discouraged, rather the Court should pronounce the judgment without their arguments and this (such judgment) shall not be in violation of the rule of hearing.

5. Learned counsel for the appellant has mainly contended that the basic requirement of **Section 10** of the Designs Ordinance, 2000 for seeking cancellation of registered design has not been fulfilled by the Respondents. She has contended that the Design was registered on **24.12.2005** and the appellant had filed a suit for permanent injunction restraining Respondent No.2 from infringing the registered design(s). In response to the suit, Respondent No.2 filed the petition for cancellation of Registered Design under **Section 10** of the Designs Ordinance, 2000. She contended that Respondent No.2 has not pointed out any irregularity in getting the design registered for cancellation of Design before the Registrar of Designs or even before this Court in the counter affidavit. This is also not the case of Respondent No.2 that the Design registered by the Patent Office was against the public order or morality. Learned counsel for the appellant contended that even otherwise the impugned order is devoid of any reasoning for cancellation of a Registered Design, if at all, on the point that it was registered without complying with any **“specific substantive requirement”** prescribed in the Design Ordinance, 2000 by the learned Registrar of Designs.

6. Learned counsel for Respondent No.2 after the arguments of counsel for the appellant on **08.11.2018** has sought time to advance his arguments on the next date of hearing which was **20.11.2018**

when by consent this part heard case was adjourned for **13.12.2018**. On the said date learned counsel for Respondent No.2 in the first call was busy before some other bench. However, on second call he did advance his arguments at some length and this being an old matter for more than 10 years, parties were directed to file their written arguments within three days. However, no arguments were filed by the counsel for Respondent No.2. Luckily, he has filed counter affidavit on behalf of his client and I have gone through the contents of counter affidavit. Even in counter affidavit I could not find any contention of Respondent No.2 with reference to the failure of the authorities to register the industrial design in dispute by ignoring any **“substantive requirement prescribed in the Designs Ordinance, 2000”**. The counsel for Respondent No.2 has not referred to any **morality issue** or that the design is **contrary to the public order**. The perusal of the cancellation application available at page-133 onwards reveals that the appellants have not taken any of the grounds available to any party aggrieved by registration of Design to challenge the same by invoking the provisions of **Section 10** of the Designs Ordinance, 2000 which is reproduced below:-

10. **Cancellation of Registration**----(1) *Any person interested may be a petition made at any time after the registration of a design, to the High Court or within two years of the registration of a design to the Registrar, seek cancellation of the registration of a design on the **following grounds**, namely:----*
- (a) *the industrial design should not have been registered because the specific substantive requirement prescribed in this Ordinance have not been fulfilled.*
 - (b) *the industrial design is contrary to public order or morality; or*
 - (c) *person in whose name the industrial design is registered has no right to it.*

In the impugned order the learned Registrar of Designs has reproduced **Section 10** as well as the definition of **design** given in

Section 2(e) of the Design Ordinance, 2000 which I also reproduce as follows:-

2(e) **“design”** means features of shape, configuration, pattern or ornament applied to an article by any industrial process or means, being features which in the finished article appeal to and are judged solely by the eye, but does not include a method or principle of construction or features of shape or configuration which are dictated solely by technical and functional considerations:

However, the learned Registrar of Designs has not mentioned in the impugned order that what was relevance of quoting the law in the order when it was not discussed with reference to the pleadings of the parties in the order itself. As already stated even after quoting **Section 10** of the Design Ordinance, 2000 she has not been able to point out that in the process of registration of the impugned design there was any lapse on the part of Patent Office which shows that **“the specific substantive requirement provided in the Ordinance have not been fulfilled”** or the design was **“contrary to public order or morality”** and, therefore, it was liable to be cancelled.

7. The only reason given by the learned Registrar of Designs for allowing an application for cancellation of registered design is an alleged indirect **Admission** of appellant and the **admission** of appellant was inferred by declaring that appellant has not filed any “counter affidavit” to the affidavit filed by applicant in support of his main application under **Section 10** of the Design Ordinance, 2000. I am surprised when I noticed the application of mind of learned Registrar of Designs to the legal implication of the term “admission” attributed to the appellant in the given facts of the case in the following observations of the impugned order:-

*Lastly, the learned Attorney for the Applicants/ Petitioner **drew my attention** to the Evidence on record and submitted that the Petitioners’ Affidavit*

*filed in support of the Cancellation Application/ Petition duly sworn before the Oath Commissioner **has not been controverted** on oath by the Respondent; hence remains “**un-rebutted**” and the same amounts to “**Admission**”. Likewise the Petitioners’ **Rejoinder Affidavit** also remains uncontroverted as the same has not been challenged or controverted on oath.*

The above observation was result of a clear failure of the learned Registrar of Designs to apply her mind to the facts on record. In fact even in the above quoted passage from the impugned order, the very existence of the word “Rejoinder affidavit” indicates that a “counter affidavit” has been filed by the appellant to controvert the affidavit in support of the application under **Section 10** of the Design Ordinance, 2000 and the learned Registrar of Designs on the factually incorrect pointation of interested party has literally believed that it has remained “**un-rebutted**” and she held that being **un-rebutted** it is to be treated as an **admission**. Then she misapplied different case-laws reported in (a) **PLD 1996 Kar 365**, (b) **PLJ 1984 Kar 147**, (c) **AIR 1980 Delhi 125** and (d) **1992 MLD 1879** to emphasize that there is no evidence against the cancellation. Not only this, but in para-8 of the impugned order she again refused to apply her judicial mind to the provisions of **Section 10** of the Design Ordinance, 2000 on the ground that there was an admission by the Respondent/ applicant herein and I again quote a stunning observations of the learned Registrar of Designs from the impugned order as follows:-

*In view of **un-rebutted** Affidavit Evidence filed in support of cancellation Application and admission in the Counter Statement of the Respondent. There is no cavil in the proposition of law that the burden is always on the person who alleges. However, in **view of admissions in pleadings and un-rebutted Affidavit, I am not inclined to go into further details to discuss the grounds urged by him as I find great force in his arguments and cited case-law.***

The Registrar of Designs in the last paragraph of impugned order again contradicted her observation that applicant has not filed a reply affidavit to the rejoinder affidavit of Respondent No.2 when she observed in para-9 that:-

Lastly, I have taken into consideration the Affidavits of Muhammad Amer Iqbal, Chief Executive of Rajjee and Sardar Naubahar Khan, Manager (Operation) of the Respondents filed as Evidence in support of titled Design under cover of letter dated 20 June, 2008 which was received late on 21 June, 2008 after hearing was over and orders were reserved.

Be that as it may, whether the learned Registrar of Designs has passed the impugned order on account of bias against the Respondents because they had filed an application to the Director IPO for transfer of the case or otherwise, the impugned order does not reflect application of mind both to the facts and the relevant law. It is settled principle of law that anything which is to be done by the parties or even by the Court it should be done in accordance with law and not by any other extraneous facts and circumstances. In the case in hand, the grounds to challenge the registered design for its cancellation are specifically mentioned in **Section 10** of the Design Ordinance, 2000. Respondent No.2, who sought cancellation, has miserably failed to bring his case within four corners of **Section 10** of the Design Ordinance, 2000, therefore, their application for cancellation of Design ought to have been dismissed by the learned Registrar of Designs.

8. In view of the above facts and circumstances, the impugned order is set aside and this Miscellaneous Appeal is allowed.

JUDGE

Karachi
Dated: 15.01.2019

Ayaz Gul