

IN THE HIGH COURT OF SINDH, KARACHI

M.A No. 48 of 2007

Fazal Ahmed.....Versus.....Mohammad Qamar Hashmi and four others

ORDER

Date of hearing : 29TH March, 2018.
 Date of Judgment : 29TH June, 2018.
 Appellant : Mr. Monawwer Ghani, advocate.
 Respondents No.1to4 : Mirza Mehmood Baig, advocate.

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Kausar Sultana Hussain, J:- This Miscellaneous Appeal under Section 114 of Trade Marks Ordinance, 2001 assails decision dated 09.08.2007 passed by the learned Registrar of Trade Marks in opposition No. 548 of 2005 to the Registration of Trade Mark "HUSNA' under Application No. 121715 in class-3 dated 13.9.1993, the appellant prefer this appeal.

2. A short factual background of the case is that the appellant submitted an application No.121715 in class-3 on 13.9.1993 for registration of Trade Mark "HUSNA" claiming user of the mark since 1987. The business was converted to a partnership firm duly founded in the year 1974, between the family members and was duly registered with the Registrar of Firms. The said partnership was re-constructed on 01.07.1993, wherein the third partner of the appellant, namely, Jamil Ahmed son of Abdul Ghaffar attained majority. Later on the partnership was dissolved on 01.07.1998 and the entire business of the partnership firm was entrusted to the appellant and the appellant assumed the business of the firm as sole proprietor. The appellant and/or his predecessors have been engaged in an old and established business of manufacturing and selling, marketing, and exporting of several house-hold and

general items including but not limited to Kajal, surma, eye make-up, hair style, eye-brow, hair-dye, cosmetics, herbal shampoo and other make-up preparations. The appellant is duly registered with the Central Excise and Land Customs, City Division, Karachi since 1982 and was granted license for the business of excisable goods/products as required under Central Excise Rules, 1944. In order to distinguish his products/goods from the products of other manufactures and traders, the appellant adopted several Trade Marks and label device and submitted several applications for registration under the Trade Marks Act 1940/Trade Ordinance 2001 as well as for registration of Copyrights under Copyright Ordinance, 1962. Among these Trade Marks, one is "HUSNA" under Application No. 121715 in class-3, which was accepted and advertised in the Trade Marks Journal-647 dated December, 2004. Thereafter respondents No. 1 to 4 filed opposition No. 548 of 2005 to the Registration of Trade Mark "HUSNA" under Application No. 121715 in class-3, upon receipt of copy of notice of opposition from respondents No. 1 to 4, the appellant filed counter statement on form TM-6 under Rule 40 (2) of the Trade Marks Rules, 2004. Thereafter respondents No. 1 to 4 filed affidavit in support of opposition. Then the respondent No. 5/Registrar of Trade Marks after completing the formalities heard the appellant and the counsel of respondents No. 1 to 4 and by impugned decision dated 09.08.2007 allowed opposition No. 548 of 2005 and application No. 121715 in class-3 to proceed to registration with the condition that the appellant will not use similar color scheme and eye design as used by the respondents.

3. The aforesaid Miscellaneous Appeal No. 48 of 2007 was preferred on 12.11.2007 alongwith an application bearing CMA No. 3412 of 2007 under

Section 5 of Limitation Act, Read With Rule 85 of Trade Marks Rules, 2004 for condonation of delay from 14.10.2007 to 12.11.2007 in filing the present appeal. The appellant has enclosed his own affidavit alongwith CMA No. 3412 of 2007.

4. The learned counsel for the appellant has submitted that the appellant has received the copy of the decision dated 09.08.2007 of respondent No. 5 (Registrar, Intellectual Property of Pakistan, Government of Pakistan, Trade Marks Registry, at Karachi) under cover of letter dated 27.9.2007, but after receiving the same, the appellant kept it in one of his file as such, misplaced it, which was found recovered after hectic efforts from said file. He further argued that immediately upon receipt of whereof, the appellant handed over the said decision to his counsel for filing appeal. Per learned counsel due to the reasons of misplacing the decision, impugned here, the appellant could not submit appeal before this Court within the statutory time, therefore, neither I was deliberate nor intentional. He prayed for condoning delay in filing appeal.

5. In rebuttal, the learned counsel for the respondent has strongly refuted the above submissions of learned counsel for the appellant and contended that the appellant has not retained a single valid reason for the unexplained delay, and the present appeal is against the prescribed rule of law that is "law helps the vigilant and not the indolent". The learned counsel for the respondent has further argued that the appellant failed to maintain such circumstances, which refrained the appellant to obtain another certified copy of the said decision of the Registrar of Trade Mark. Per learned counsel for the respondent, Trade Mark Ordinance, 2001 and Trade Marks Rules, 2004 being special enactments, provides special period of two months for filing an

appeal against the order of the Registrar of Trade Marks, therefore, the provisions of Section 5 of Limitation Act, 1908 are neither applicable nor attracted. He further argued that delay of each and every day has to be explained while the appellant described illogical and invalid reasons, which are not sufficient for seeking condonation of such a long delay under the principles of equity and fair play. The learned counsel for the respondent finally argued that rule of equity says that "delay defeats equity" hence the present application (CMA No. 3412 of 2007) for condonation of unexplained delay is not sustainable under the law and the appeal being hopelessly barred by time, is liable to be dismissed with special cost.

6. The learned counsel for the appellant has submitted affidavit of rejoinder of the appellant, wherein he has denied the contents of counter affidavit of the respondent and reiterated the contents of his affidavit enclosed with his present C.M.A. No. 3412 of 2007.

7. Considered the submissions of the learned counsel for the parties, perused the available material in the perspective of relevant provision of law as well as case laws referred by the learned counsel for the appellant i.e. SBLR 2009 SC 137. Rule 85 of the Trade Mark Rule, 2004 provided two month time for filing appeal against the decision of the Registrar Trade Mark. I would like to reproduce here Rule 85 of Trade Mark Rules, 2004 for ready reference :-

Rule 85: Time for appeal. An appeal to the High Court from any decision of the Registrar under the Ordinance or these rules shall be made within two months from the date of such decision or within such further time as the High Court may allow.

8. Per rule, referred supra, an express forum of appeal coupled with time period has been provided. It may be noted that the Trade Marks Rules, 2004

is a special law and above rule itself provides limitation for filing of the appeal, as such it prevail over the general law of limitation. Caption Misc. Appeal under Section 114 of Trade Mark Ordinance, 2001 was presented on 12.11.2007 against the order dated 09.08.2007. The appeal is admittedly having been preferred beyond the period of limitation as provided under the above stated statute rather such fact having been concealed by the learned counsel for the appellant.

9. Reverting to the explanation of delay highlighted above, same is found with no substance owing to the fact firstly it is quite far fetched to a prudent mind that after receiving copy of decision dated 09.09.2007 from Trade Marks Registry it was kept in another file, which was recovered on 10.11.2007 after passing 90 days, while within two months, it should have been challenged before this Court, but the appellant did not take care of it and in careless manner it was searched. They did not go for alternative way of getting its second certified copy from Trade Marks Registry keeping in view that limited time period of two months would be expired and then they have to clear their position and have to give reasons of delay before the court. The contention of the appellant found with no legal substance.

10. In the attending circumstances, application under section 5 of the Limitation Act R/W Rule 85 of Trade Marks Rules, 2004 merits no consideration, stands dismissed. In the result, Misc. Appeal No. 48 of 2007 is also dismissed being barred by Limitation alongwith all listed applications. Order accordingly.

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