$~5 (09.03.2023)

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ C.A.(COMM.IPD-TM) 155/2021

ABRO INDUSTRIES, INC. ..... Appellant

Through: Mr. Rajesh Roshan and Ms. Vatsala Kaushik, Advocates.

versus

THE REGISTRAR OF TRADE MARKS, MR. BIRENDRA JAISWAL ..... Respondent

Through: Mr. Harish Vaidyanathan Shankar, CGSC with Mr. Srish Kumar Mishra, Mr. Sagar Mehlawat, Mr. Alexander Mathai Paikaday, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

O R D E R

% 10.03.2023

Matter has been taken up today as 09th March, 2023 was declared as a holiday of the Court pursuant to an Office Order bearing No. 767/I-G-4/Genl.I/DHC dated 07th March, 2023.

1. Present appeal under Section 91 of the Trade Marks Act, 1999 [hereinafter, '***the Act***'] is directed against order dated 11th March, 2019, read along with Statement of Grounds of decision dated 29th August, 2019, both passed by Senior Examiner, whereby Appellant's application No. 2448607 in class 17 for the mark "999" [hereinafter, '***subject mark***'] has been refused.

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2. The relevant portion of Statement of Grounds is as follows:

*"*The applicant advocate R.S. Mittal appeared. I have heard the argument and also perused the documents available on record, The trade mark is highly descriptive and no supporting document filed for claiming of user. Objection under section 9 is sustained, application is refused for registration.*

** In the present case, the impugned trade mark 999 in Class 17 for goods, namely, LIQUID GASKET MAKER.*

The application for the registration of the mark had been filed on 26/12/2012 claiming user of the same since 30/07/2003. The fact that the impugned mark is being filed with the use since the year 2003 is of no help to the applicant in this case whereas the user document filed alongwith the affidavit does not validate the claimed user show from the goods of year 2003 as claimed in the application and not compliance of Rule 25.

As per provision of the Rules 25 of Trade Marks Rules, 2017-

Statement of user in applications.-

(1) An application to register a trademark shall, unless the trademark is proposed to be used, contain a statement of the period during which, and the person by whom it has been used in respect of all the goods or services mentioned in the application.

(2) In case, the use of the trademark is claimed prior to the date of application, the applicant shall file an affidavit testifying to such use along with supporting documents. In the light of the Vivek Kochher & Anr vs M/S KYK Corporation Ltd & Anr on 3 November, 2017 judgement of Hon'ble Delhi High Court regarding the user of the mark, the this case also failed to prove any established user since the claimed year of 2003.

The filed mark clearly lacks distinctiveness and falls with the purview of Absolute Ground of refusal so envisaged under Section 9 (1)(a) of the Trade Marks Act, 1999 which contemplates as follows:

(1) The trade marks-

(a) as the mark is a common surname/personal name/geographical name/ornamental or a non- distinctive geometrical figure and as such it is not capable of distinguishing the goods or services of one person from those of others.
...shall not be registered

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The impugned mark is not only purely descriptive in nature. The mark is not inherently distinctive and can only be registered if it has acquired reputation by virtue of long use and/or acquired the status of the well known mark prior to the filing of the application as per the proviso of Section 9. Which is not a situation as the present application is concern, admittedly the present mark has been claimed to be used 30/07/2003, but documents available on record does not support user claim since 2003, therefore is of no help to the applicant to overcome the objection under Section 9 (1) (a) as such.

The law was clearly laid down in British Sugar Plc v. James Robertson & Sons Ltd. (1996) RPC 281 at 302, in a passage cited by MR JAMES, JACOB J. stated: "I have already described, the evidence used to support the original registration. You have really no more than evidence of use. Now it is all too easy to be beguiled by such evidence. There is an unspoken and Illogical assumption that use equals distinctiveness. The illogicality can be seen from an example. No matter how much a manufacturer made use of the word 'Soap' as a purported trade mark for Soap the word would not be distinctive of the goods. He could use fancy lettering as much he liked, whatever he did would not turn the word into a trade mark. Again, a manufacturer may coin a new word for a product and be able to show massive use by him alone of that word for the product. Nevertheless the word is apt to be the name of the product not a mark." Also, In Paine & Co.'s Trade Marks, (1893) 10 RPC 217 at p. 232, it was observed that "The purity of Register of Trade Marks is of much importance to trade in general, quite apart from the merits or demerits of particular litigants', and it is duty of the tribunal to see that no word not 'adopted to distinguish' shall be put on the Register in the interest of other traders, wholesale and retail, and of the public. If this were not so, the large and wealthy firms with whom the smaller folk are unwilling to litigate, could by a system of log-rolling divide among themselves all the ordinary words of description and laudation in the English language." In view of the foregoing discussion, I find the impugned mark taken as a whole is clearly non- distinct, purely descriptive and nothing but a common words which can't be subject matter of exclusive monopoly of any person.

Also, the mark cannot be allowed in the interest of purity of register. As such the Application no- 2448607 is hit by objections under Section 9(1)(a) of the Act and, therefore, application is refused for registration."

3. The Senior Examiner has objected to the registration of the subject mark under Section 9(1)(a) of the Act, finding the same to be purely descriptive in

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nature and lacking distinctiveness. Further, the Examiner has also observed that the Appellant has not been able to support its user claim since 30th July, 2003.

4. Under the Act, the definition of 'mark' expressly includes a numeral. Only if the numeral designates characteristics of the goods, can it be excluded from registration. In the instant case, the subject mark "999" has been applied for "Liquid Gasket Maker", falling under class 17. In the opinion of the Court, numeric combination of three digits (999), bears no association with the aforenoted goods and cannot be said to be non-distinctive or descriptive. Therefore, the grounds for refusal are not valid.

5. Insofar as the issue of user affidavit submitted by the Appellant not being in the prescribed format is concerned, it must be noted that application for the subject mark was made on 26th December, 2012 under the provisions of Trademarks Rules, 2002, which do not provide for filing of a user affidavit. Therefore, the Senior Examiner has erroneously applied the provisions of Trademarks Rules, 2017 and rejected the application.

6. For the foregoing reasons, present appeal is allowed with the following directions:

(a) Impugned order dated 11th March, 2019 and Statement of Grounds of decision dated 29th August, 2019, are set-aside.

(b) Trade Marks Registry is directed to process the registration of application No. 2448607 in class 17.

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(c) Subject mark be advertised within a period of three months from today.

(d) If there is any opposition, the same shall be decided on its own merits, uninfluenced by observations made hereinabove.

7. With the above directions, the appeal is disposed of.

8. Registry is directed to supply a copy of the present order to the Trademark Registry at llc-ipo@gov.in for compliance.

SANJEEV NARULA, J

MARCH 10, 2023
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(Corrected and released on 22nd March, 2023)

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