

MANU/DE/0501/2005

Equivalent Citation: 119(2005)DLT410, 2005(30)PTC353(Del)

IN THE HIGH COURT OF DELHI

OCJ. A. No. 2/1997

Decided On: 08.04.2005

Appellants: **Fedders Lloyd Corporation Ltd. and Lloyd Sales Corporation Pvt. Ltd.**
Vs.

Respondent: **Fedders Corporation and The Registrar of Trade Marks**

Hon'ble Judges/Coram:

Vijender Jain and Anil Kumar, JJ.

Counsels:

For Appellant/Petitioner/plaintiff: Sandeep Sethi, Sr. Adv. and Prathibha M. Singh, Adv

For Respondents/Defendant: Neeraj Kishan Kaul, Sr. Adv., Vikas Goel, Manmohan Singh, Shelly Kumar, Siddharth Aggarwal and Mishi Choudhary, Advs.

Subject: Intellectual Property Rights

Subject: Limitation

Acts/Rules/Orders:

Trade and Merchandise Marks Act, 1958 - Section 2, Trade and Merchandise Marks Act, 1958 - Section 4(2), Trade and Merchandise Marks Act, 1958 - Section 46, Trade and Merchandise Marks Act, 1958 - Section 46(1), Trade and Merchandise Marks Act, 1958 - Section 46(3), Trade and Merchandise Marks Act, 1958 - Section 48(2), Trade and Merchandise Marks Act, 1958 - Section 56, Trade and Merchandise Marks Act, 1958 - Section 107, Trade and Merchandise Marks Act, 1958 - Section 108, Trade and Merchandise Marks Act, 1958 - Section 109(5), Trade and Merchandise Marks Act, 1958 - Section 111; Limitation Act, 1963 - Section 137, Limitation Act, 1963 - Schedule - Article 137

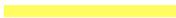
Cases Referred:

American Home Products Corporation v. Mac Laboratories Pvt. Ltd., AIR 1986 SC 137, 1986 (1) SCC 465; Vishu Das Trading v. Wazir Sultan Tobacco Co. Limited, 1996 (PTC) 512; A.J. Vulcan v. S.V. Palanichamy, AIR 1969 Calcutta 43; Kabushiki Kaisha Toshiba v. Toshiba Application Company, Appeal No. 530 of 1992; Cluette Peabody & Co. v. Arrow Apparels, 1998 PTC 156; J.N. Nicholas (Vimto) Ltd. v. Rose & Thisle, AIR 1994 Calcutta 43; Hardie Trading Ltd. & anr. v. Addison Paint and Chemicals Ltd., 2003 (27) PTC 241 (SC); Express Bottlers Services Pvt. Ltd. v. Pepsi Inc. & Inc and Ors., 1989 PTC 14; Toshiba Corporation v. Toshiba Appliances Co. and Ors., Appeal No. 530 of 1992; J.K. Jain v. Ziff Davies, 2000 PTC 244; Express Butler Pvt. Ltd. v. Pepsi Inc. and Ors., 1989 PTC 14; Philips Morris Ltd. v. GTC Industries Ltd. and Ors., PTC (Supp) (1) Bom 673; Bali Trade Mark Case, 1966 RPC 387; Fair Growth Investment Ltd. v. The Custodian, JT 2004 (9) Supreme Court 124; Rajender Singh and Ors. v. Santa Singh and Ors., (1973) 2 SCC 705; Ciba Ltd. Basle Switzerland v. M. Ramalingam, AIR 1958 Bombay 56; Patel Field Marshal Agencies v. P.M. Diesels Ltd., 1998 PTC (18) 463

Disposition:

Appeal dismissed

Citing Reference:

Discussed		9
Distinguished		2
Mentioned		7

Case Note:

Intellectual Property Rights - Removal of Trademark - Non-use - Sections 46 and 46(3) of the Trade & Merchandise Marks Act, 1958 - Whether non use of trade mark by respondent no.1 was on account of restriction on import, Constituting special circumstances? - Held, evidence produced by respondent no.1 and statement made on his behalf leads to probable inference that import of goods would have been impractical in business sense as import was banned under Import Policy for general public - In Hardie Trading Ltd. & anr. v. Addison Paint and Chemicals Ltd., it was held that

law is that even an economical impracticality would amount to special circumstances - On account of special circumstances, respondent no. 1 is entitled to non-suit appellants for removal of his trade mark on account of alleged non-use as contemplated under Section 46(3) of Act - Trade mark of respondent no.1 is not liable to be removed on ground of non use as contemplated under section 46 of Act as there were special circumstances on account of ban under import policy entailing non use of trade mark by respondent no.1 - Appeal dismissed accordingly

Limitation - Determination of Delay in Filing Application - Section 46 of the Trade and Merchandise Marks Act, 1958 and Article 137 of Limitation Act, 1963 - Whether appellant's application under Section 46 of Act, 1958 for removal of trade mark of respondent no.1 on account of non-use was within time and whether non use by respondent no.1 was on account of restriction on import, Constituting special circumstances? - Held, on conjoint reading of provisions under Act, 1958 and Act, 1963, it is apparent that application under Section 46 of Act, 1958 can be filed after there has been 'non-use' of trade mark for continuous period of five years and one month - Provision does not contemplate that application has to be filed just after completion of five years and one month of 'non use' and cause of action will crystallize on that date irrespective of continuous non use by proprietor of trade mark - Provision also does not stipulate as to when cause of action will start - Respondent no.1 had not been using trade mark continuously for five years and one month prior to institution of application and respondent no.1 relied on special circumstances on account of ban imposed under Import Policy for import of such articles - Before institution of application under Section 46 of Act, 1958 respondent no.1 had not been using trade mark for five years one month prior to institution of application by appellants - Since rectification application under Section 46 of Act, 1958 is an application governed by provisions of Civil Procedure Code before High Court, consequently provisions of Act, 1963 would govern rectification application - Residuary Article 137 of Act, 1963 will not govern applications under Section 46 of Act, 1958 - Thus, it cannot be inferred that application of appellants under Section 46 of Act, 1958 was barred by limitation under Article 137 of Act, 1963 - Finding of Single Judge that application of appellants was barred by limitation under Article 137 of Act,1963 is erroneous and is accordingly set aside

JUDGMENT

Anil Kumar, J.

1. The questions for determination in this appeal are whether the appellants(tm) application under Section 46 of the Trade and Merchandise Marks Act, 1958 for removal of the trade mark of the respondent no.1 on account of non-use was within time and whether non use by respondent no.1 was on account of restriction on import, Constituting special circumstances.

2. The appellants have impugned the judgment of the learned Single judge under Section 109(5) of Trade and Merchandise Marks Act, 1958 in the present appeal. The appellants(tm) application under section 46 of the Trade and Merchandise Marks Act, 1958 was dismissed by order dated 19th September,1997 in CO no.10 of 1982 by a learned Single Judge holding that the application of the appellants under Section 46 of Trade & Merchandise Marks Act, 1958, hereinafter referred to as `Act(tm) was barred under Section 137 of the Limitation Act,1963 and that the respondent no.1 had established his intention to use the trade mark and he could not effectively use the trade mark owing to the restriction imposed by the Government.

3. To comprehend these disputes, the following relevant facts need consideration. Fedders Quiogan Corporation had entered into an agreement dated 21st May, 1956 with M/s Llyod Electric and Engineering Company, a partnership company of Pandit Kanhaia Lal Punj, Mr. Suraj Prakash Punj, Mr. I.P. Punj, Mr. V.P. Punj and S.P. Sawhney. Under this agreement, Fedders Quiogan Corporation had to furnish technical information to the partnership concern and a license was granted for five years to deal in air-conditioners, manufactured with parts and technology provided by the said Corporation under the trade name and label Fedders. The partnership firm applied for registration of the trade mark `FEDDERS(tm) under Application no. 175253 dated 18th July, 1956. On 19th February,1957 the said Trade Mark was registered. It seems that on objection being raised by respondent no.1, the registration of trade mark was assigned by the partnership firm on 24th February, 1958 and thereafter the mark `Fedders(tm) was registered in the name of respondent no.1 on 20th August, 1958.

4. On 16th January, 1957, a company Fedders Llyod Corporation Private Limited, appellant no.1 herein was incorporated which was controlled by the persons who were in control of M/s Lloyd Electrical and Engineering Company, a partnership firm. Appellant no.1 was incorporated to take over the business of M/s Llyod Electrical & Engineering Company, the original partnership firm.

5. Appellant no.1 sought permission from respondent no.1 to use the trade mark `Fedders(tm). In 1963, an agreement was executed between the respondent No.1 and appellant No.1 which incorporated grant of exclusive license to manufacture and sell air-conditioners with technical information to be provided by the respondent no.1 and the air-conditioners were to be sold under the brand name Fedders. The appellants availed the benefits under the agreement. However, later on they contended that the agreement dated 11th

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October, 1963 though was signed by a Director of respondent No.1, however, clause 13 of the agreement provided that the agreement could be binding only when a duly executed counterpart was received by Fedders Corporation at its principal office. It was contended by the appellants that they had written to Fedders Quiogan Corporation on 8th November, 1963 that the terms of the agreement were not acceptable and consequently, the agreement did not become binding between the parties. Despite the contention of the appellant no.1 that there was no binding agreement with the respondent No.1, they continued to use the trade mark 'Fedders(tm)' of respondent no.1, which was assigned to respondent No.1 in February 1958 by the original partnership firm. In any event of matter the term of the agreement of five years expired in 1968. In October 1968, the parties negotiated for continuance of the agreement, but it did not materialize. Therefore, the respondent no.1 called upon the appellant no.1 to cease and desist from using the trademark 'Fedders(tm)'. The appellant no.1, however, did not comply with the demands and continued using trade mark 'Fedders' without any agreement and authorization from respondent no.1.

6. In view of unauthorized use of trade mark 'Fedders(tm)' by appellants, a suit for injunction for infringement of copy right and passing off was filed by respondent no.1 on 26th July, 1972 before the Calcutta High Court against the appellants. A single Judge of the Calcutta High Court granted an interim injunction by order dated 31st May, 1974 in favor of respondent No.1 and against the appellants. However, the operation of the interim injunction was stayed by a Division Bench of the Calcutta High Court and subsequently, the order staying the injunction was confirmed by order dated 21st January, 1975 till the disposal of the appeal. The said appeal filed by the appellants was disposed off by an order dated 4th March, 1980 and the injunction order granted by the single Judge, which was stayed, was confirmed and the suit for infringement of trade mark and passing off filed by the respondent No.1 against the appellants was expedited.

7. On 10th August, 1982, the appellant filed an application under Section 46 and 56 of the Trade and Merchandise Marks Act, 1958 in Delhi High Court for removal of the trade mark of respondent No.1 alleging that there has been a continuous period of more than five years and one month before filing of application during which there has been no bona fide use of the trade mark by the respondent No.1. After filing the application under Section 46 of the Trade and Merchandise Marks Act, 1958 in Delhi High Court, another application under Section 111 of the Trade and Merchandise Marks Act, 1958 was filed in the suit by the appellants pending before the Calcutta High Court, for stay of the suit for injunction and passing off till disposal of the application under section 46 of the Act, filed in Delhi High Court. On the said application of the appellants for stay of suit of respondent no.1, vide order dated 2nd June, 1983, the suit for injunction and passing off filed by the respondent no.1 was stayed by the High Court of Calcutta. Later on, the said suit filed by the respondent no.1 was dismissed in default.

8. In the application for removal of the trade mark of the respondent no.1 in this Court under section 46 of the Act, the appellants in para 11 of the application categorically admitted that the appellant no.1 had entered into a technical collaboration agreement with respondent no.1 which was concluded in the year 1968. The relevant para 11 of the application reads as under:

In the year 1963 the petitioner No.1 had entered into a technical collaboration arrangement with the respondent No.1 with regard to the manufacture of window type Air-conditioner which arrangement concluded in the year 1968. Thereafter in spite of the efforts made by the parties no further arrangement could be entered into.

9. The appellants contended that the appellant no.2 is a registered partnership firm carrying on its business at Delhi and Calcutta and is in the same trade as dealer as respondent no.1 and Therefore, the appellant no.2 is also a 'person aggrieved' within the meaning of Section 46 of the Trade and Merchandise Marks Act, 1958. The appellants filed affidavits of various persons contending that the appellants are using trade name 'Fedders Lloyd(tm)' and products under trade name 'Fedders(tm)' are not in the market.

10. The respondent no.1 contested the application of the appellant for removal of its trade mark contending that it had used and had the intention of using trademark 'Fedders(tm)' in relation to air conditioners and air conditioning machinery and parts & fittings and, Therefore, was included in Class 11 under the Trade and Merchandise Marks Act, 1958. The respondent no.1 has made use of the trademark 'Fedders(tm)' in relation to its goods within India, but was not able to make more extensive use of this trade mark on account of the restriction placed under the Import Policy at the relevant time. The respondent no.1 propounded restrictions under import policies as 'special circumstances' and filed affidavit dated 30.10.1986 of Mr. Sam Muscarnera along with appendix of import policies and other documents Exhibits A to I. Exhibit A is the agreement dated 21.05.1956. Exhibit B is the agreement dated 10.10.1963. Exhibit C is the agreement dated 11.10.1963. Exhibit D is the photocopy of the Appendix 4 to the Import Policy for the period from April 1978 to March 1979 published by the Government of India. That Appendix provides for a list of banned items and Item 96 in that list reads as under:

Any consumer goods, however described, of industrial, agricultural or animal origin, not appearing individually in Appendices 5 and 8 or specifically allowed for import under Open General license (750).

Exhibit E is photocopy of Appendix 4 of the Import Policy but that is for the period from April 1977

to March 1980. Item No.65 reads in the following terms:

All consumer goods, howsoever described, of industrial, agricultural or animal origin, not appearing individually in Appendices 5 and 8 or specifically listed for import under Open General license (667).

Exhibit F is again photocopy of Appendix 4 of the Import Policy for the period from April 1980 to March 1981. Item No.65 is the banned items which reads as under:

All consumer goods, howsoever described of industrial, agricultural or animal origin, not appearing individually in Appendices 5 and 8 or specifically listed for import under Open General license (669).

Exhibit G is again a photocopy of Appendix 4 of Import and Export Policy from April 1981 to March 1982. Item No.70 under the heading of 'Absolute Banned List' reads as under:

All consumer goods, howsoever described of industrial, agricultural of animal origin, not appearing individually in Appendices 5 and 8 or specifically listed for import under Open General license (695).

Exhibit H is a photocopy of the appendix 4 Export and Import Policy from April 1982 to March 1983 under the heading of 'Raw Materials, Components, Consumables, Tools and Spares List of non-permissible items' (banned) Item no.77 is in the following terms:

All consumer goods, howsoever described, of industrial, agricultural or animal origin, not appearing individually in Appendices 3, 5, 8 and 9 or specifically listed for import under Open General license.

Exhibit I has been filed to show that a new branch of Trade Marks Registry was opened in the Industrial Estate Okhla with effect from 06.07.1959.

11. On the basis of aforesaid restriction imposed in the import policy, it was contended by the respondent no.1 before us that despite their intention to use the trade mark 'Fedders' in relations to their goods, they were prevented to do so on account of legal disability and claimed that said disability constituted special circumstances.

12. Considering the pleadings of the parties and the documents filed and relied by the parties, the learned Single Judge framed the following issues on 9.5.1984:-

1. Did respondent no.1 not use the trademark 'Fedders(tm)' as alleged in the petition and the trademark is liable to be rectified on that ground? OPP
2. Is the petition liable to be allowed for any of the reason stated in the petition? OPP
3. Have Delhi Courts no jurisdiction to entertain and try the petition? OPR
4. Is the petition mala fide and if so what is its effect?
5. Are the petitioners or any of them, not persons aggrieved within the meaning of Section 56 of the Trade and Merchandise Marks Act, 1958? OPP
6. Relief

13. The appellants(tm) application under Section 46 of the Trade and Merchandise Marks Act, 1958 was dismissed by order dated 19th September,1997 in CO no.10 of 1982 by the learned Single Judge holding that the application of the appellants under Section 46 of Trade & Merchandise Marks Act, 1958 was barred under Section 137 of the Limitation Act,1963 and that the respondent no.1 had established his intention to use the trade mark and he could not effectively use the trade mark owing to the restriction imposed by the Government.

14. In the present appeal, appellants have impugned the judgment of the learned Single Judge contending, inter alia, that they are 'persons aggrieved' within the meaning of the Trade and Merchandise Marks Act, 1958. Appellant No.1 has built-up a large goodwill and reputation by sale of its goods in India bearing the trade mark 'Fedders Llyod' by virtue of long and established user. Appellant No.2 is also in the same trade and Therefore, he is also a 'person aggrieved' within the meaning of Section 46 of the Trade and Merchandise Marks Act, 1958. Appellants contented that the mark has not been used by the respondent No.1 for five years and one month before the date of application and consequently, respondent no.1's trade mark is liable to be removed from the register of trade marks.

15. Though no issue was framed by the Learned Single Judge, however, he decided the question of limitation

manupatra holding that the application of the appellants was barred by time. Before us regarding limitation, the appellants contended that since non-use is a continuous process, it would give them, as persons aggrieved, a recurring cause of action for removal of the impugned mark from the register. Since Section 46 of the Act does not envisage any relief period but only provides for a qualifying period of five years and one month where after a petition for rectification can be filed and, Therefore, the finding of the learned Single Judge that the petition is barred by limitation is not correct. The appellants also contended that the filing of the suit for infringement in 1972 had no bearing on the application for rectification filed by the appellants under Section 46 of Trade and Merchandise Marks Act, 1958. According to appellants filing or pendency of the suit for infringement cannot shift a qualifying period anterior to date of filing of the suit and thus their application is not barred by limitation. The appellants also contended that Article 137 of the Limitation Act has no application to an application for rectification of trade mark under section 46 of the Act, as specific period for filing the application is provided. Section 137 of the limitation act is applicable only to applications under the Code of Civil Procedure where the period of limitation is not provided whereas, the application for rectification of trade mark is a creation of the Trade and Merchandise Marks Act, 1958 and its provision shall not be governed by the Limitation Act.

16. Impugning the judgment of the learned Single Judge on the ground of existence of special circumstances, the appellants contended that the respondent No.1 has failed to satisfy that non-use was due to special circumstances in the trade. It was contended that the plea of the respondent No.1 that there was a complete ban on the respondent No.1's articles is wrong as the import of air-conditioners and refrigerators under the Import Policy for the period July 1977 to August 1982 was allowed for the Government or agencies and undertakings owned and controlled by the Central Government for defense purposes. It was further contended that goods were importable by diplomatic personnel, consulate officers and trade commissioners in India and thus, there was not a complete ban as has been alleged by the respondent No.1 and the he could not contend that nothing could be imported and marketed in India on account of ban under Import Policies.

17. The appellants further impugned the existence of special circumstances relied on by respondent No.1 under Section 46(3) of the Act on the ground that no publicity or promotion of the impugned mark was undertaken by the respondent No.1 as there was no restriction on promotion and publicity of the mark. The appellants(tm) counsel relied on American Home Products Corporation v. Mac Laboratories Pvt. Ltd. MANU/SC/0204/1985 : AIR1986SC137 and Vishu Das Trading v. Wazir Sultan Tobacco Co. Limited 1996 PTC 512 to contend that the intention of the respondent No.1 was not bonafide as there was no restriction relating to refrigerator. As to what constitute non use the appellants relied on A.J. Vulcan v. S.V. Palanichamy MANU/WB/0009/1969 : AIR1969Cal43 ; Kabushiki Kaisha Toshiba v. Toshiba Application Company, Appeal No. 530 of 1992 decided on 27/28.9.1993; Cluette Peabody & Co. v. Arrow Apparels, 1998 PTC 156; J.N. Nicholas (Vimto) Ltd. v. Rose & Thistle MANU/WB/0005/1994 : AIR1994Cal43 and Vishnudas v. Vazir Sultan, 1996 PTC 512.

18. During the pendency of appellants(tm) application for removal of trade mark and present appeal after its dismissal by the learned Single Judge, the suit of the respondent no.1 for injunction filed in Calcutta High Court was dismissed in default. In 1998 the respondent No.1 filed another suit for infringement and passing off on 8th June, 1998 before the Delhi High Court and the appellants have also filed another application under Sections 46 and 56 of the Trade and Merchandise Marks Act, 1958 on 21st September, 1998. The appellants have also filed a suit for passing off against the respondent no.1 on 16th December, 1998 which is also pending adjudication. In this appeal we are not concerned with these proceedings.

19. Considering the respective contentions, it is apparent that on 21.05.1956 the respondent no.1, which was at that time Fedders Quigan Corporation, entered into an agreement with M/s Lloyd Electrical and Engineering Company, a partnership firm. Under the said agreement permission was granted to partnership firm to use the trade name of the respondent no.1 `Fedders(tm)`. It was also agreed categorically and stipulated in that agreement that the trade name `Fedders(tm)` is and shall at all times be and remain the exclusive property of respondent no.1 and on termination of the agreement, the partnership firm shall forthwith discontinue the use of word `Fedders`. Despite this the partnership firm applied for registration of trade mark `Fedders` in India in its name on 18th July,1956 and got it registered in the name of partnership on 19th February,1957. On protest being made by the respondent no.1, the partnership assigned registration of the trade mark `Fedders` in favor of the respondent no.1 and it got registered on 20th August,1958 in the name of respondent no.1. However, on 16th January, 1957, a company Fedders Llyod Corporation Private Limited, appellant no.1 herein was incorporated which was controlled by persons who were in control of M/s Lloyd Electrical and Engineering Company, partnership firm and had taken over the business of M/s Llyod Electrical & Engineering Company. The appellant no.1 had also sought permission from respondent no.1 to use the word `Fedders(tm)`. An agreement dated 11.10.1963 was executed between the appellant no.1 and the respondent no.1. This agreement of 1963 categorically stipulated that the appellant no.1 will not represent in any way that it has any right or title to the ownership of the trade name of respondent no.1. It was also categorically incorporated in the agreement that the trade name or trademark and the registration thereof will continue to be in the ownership of respondent No.1.

20. The appellant no.1 even after expiry of the term of five years of agreement which was executed in 1963, continued to use the trade mark `Fedders(tm)`. The respondent no.1, Therefore, filed a suit for injunction against the appellants in Calcutta High Court. The appellants though took a plea that there was no binding agreement between the respondent no.1 and them but at no point of time, the appellants stopped or

manupatra discontinued the use of trade name `Fedders(tm) which was allowed to the appellant no.1 under 1963 agreement. The plea of the appellant no.1 that agreement of 1963 is not a binding agreement is an after-thought of the appellant no.1 as during the term of five years of the agreement, no such objection was ever raised by the appellant nor the appellant declined to avail the benefits under the agreement on the ground that there was no concluded agreement because of non compliance of Clause 13 of the agreement.

21. Regarding the trade name/trade mark under 1963 Agreement, under Clause 8 the parties had agreed in the following terms:-

Lloyd agrees that in using the said trade name and/or trade mark upon the products made by it under this authorization. It will not represent in any way that it has any right or title to the ownership of the said trade name and/or trade mark, or to the eventual registration thereof, since it is understood that such trade name and /or trade mark and the registration thereof will continue to be in the ownership of Fedders and will be used by Lloyd on behalf and in the interest of Fedders, any Lloyd will first obtain the approval of Fedders as to the form and manner in which the said trade name and/or trade mark shall be used upon or in connection with or in relation to the products, labels, container, advertisements or other materials.

Lloyd specifically recognizes Fedders title in and to the trade name and/or trade-mark Fedders and it will not at any time do or suffer to be done any act or things which will in any way impair the rights of Fedders in and to the said trade name and/or trade-mark and to its registration, provided, however, the accepting of a license to use and use of the trade-mark Fedders under this agreement shall not be deemed any breach of this paragraph 8 by Lloyd and Lloyd further covenants that it shall not either directly or indirectly, at any time challenge the title of Fedders to such trade name and/or trade-mark, or the validity of such registration obtained by Fedders for such trade-mark.

Upon termination of this license for any reason, including, without limitations the willful default of either party, all finished stocks of the said products manufactured by Lloyd and already bearing the trade name and/or trade-mark of Fedders, in compliance with the provisions of this agreement, may be sold by Lloyd in the usual and customary manner. Subject to the preceding sentence, Lloyd shall destroy all material containing any reference to trade-mark, and shall no longer use any such trade name or trade-mark in the addition to, but not in limitation of any other rights and remedies to which Fedders may be entitled by the terms of this agreement or otherwise, and despite any provision for arbitration hereinafter contained, Fedders shall have the right to seek, apply for and obtain by independent application in the Supreme Court of the State of New York, and in Lloyd, a mandatory injunction to enforce the provisions of this paragraph 8 of this agreement, and Lloyd does hereby consent to the entry of a decree or decrees to that effect in all or any of said courts.

22. It is a common ground that even under the agreement dated 21.05.1956 between Fedders Quiogan Corporation and M/s Lloyd Electric and Engineering Company, a partnership consisting of Kanhiya Lal Punj and Suraj Prakash, sole and exclusive right and license for a period of five years from June 30, 1956 were granted to assemble, manufacture and sell room air-conditioners manufactured by or incorporating parts manufactured or sold by Fedders under `Fedders' trade name and label.

23. Though the object of the Trade Marks Act is to protect the proprietary rights of a registered trademark holder, at the same time the object is not to facilitate any monopoly of such registered trade mark holder, despite non use of the trademark by him as contemplated by the Act. A trademark has no meaning, even if it is registered, unless it is used in relation to goods and/or services. A Trademark which drops out of the use, dies when there are no goods offered for sale as there is no use of the trademark. The mark can lose its distinctiveness by non use, where non use is on the part of registered trade mark holder but not on account of external factors beyond the control of such registered trade mark holder.

24. Under Section 46(1) of the Act the following conditions must be satisfied before removal of registered trade mark can be ordered:

- i. The application should be by a 'person aggrieved';
- ii. that the trade mark has not been used by the proprietor of trade mark for continuous period of at least five years and one month prior to the date of the application;
- iii. there are no special circumstances which affected the use of the trade mark during this period by proprietor.

25. The onus to establish the condition that an applicant is a 'person aggrieved' and that the trademark has not been used by the proprietor lies upon the applicant. However, the onus of proving existence of special circumstances is on the proprietor of the trademark. It has been held that these conditions are not to be proved cumulatively but have to be established Serialtum. For this reliance can be placed on MANU/SC/0705/2003 : 2003(27)PTC241(SC) , Hardie Trading Ltd. & anr. v. Addison Paint and Chemicals

manupatra Ltd. In the facts and circumstances, the first two conditions are to be established by the appellants and thereafter, the existence of special circumstances is to be established by the respondent only after the first two conditions are established.

26. The expression 'person aggrieved' appears in a number of sections under the Trade and Merchandise Marks Act, 1958 and is to be construed depending upon the context in which it occurs. Since Section 46 deals with the removal of the registered trade mark from the register on the ground of non-use, it presupposes that the registration was made validly and is liable to be taken off on account of subsequent non-use. Considering the connotation of 'person aggrieved' in different Sections, it is apparent that the said phrase has different connotation under Section 46 of the Act than the same phrase occurring in other sections of the Act for canceling or expunging or varying any trade mark entry wrongly made. A non-use of trade mark does not render the entry incorrect but gives the right to a person whose interests are affected to apply for its removal. Under Section 46 of the Act, an applicant claiming to be a 'person aggrieved' has to show that in some possible way he has suffered damages or will suffer damages and has been injured or will be injured, if the trade mark is allowed to stand and not removed despite its non use. In a case where the original registration is improper and the trade mark is to be removed, the requirements are different. However, on account of non-use, the applicant must show something which is sufficient and proper in practical sense for removal of the trade mark. Applying these criteria there is no doubt that the appellants are in the same trade as that of the respondent no.1. By virtue of an agreement between M/s Lloyds Electrical & Engineering Company and Fedder Quigan Corporation, the trade mark 'Fedders' was claimed by partnership, however, later on it was assigned and registered in the name of 'Fedder Quigan Corporation' with effect from 24th February, 1958. The injunction suits are pending between the parties regarding the trademark 'Fedders'. Appellants have alleged that the trademark has not been used by the respondent no.1 and they are entitled to market their similar product under trade name 'Fedders Lloyd(tm)'. If the appellants who are in the same trade are not allowed to raise the issue of non use of trade mark by the respondent no.1, it can not be inferred that their interest will not suffer or that they will not suffer damages. In the circumstances, it will be reasonable to infer that appellants are 'person aggrieved' as contemplated under Section 46(1) of Trade Marks & Merchandise Act, 1958. Reliance can be placed on A.J. Vulcan v. V.S. Palanichamy Nadar and Ors. MANU/WB/0009/1969 : AIR1969Cal43 ; Express Bottlers Services Pvt. Ltd. v. Pepsi Inc. & Inc and Ors., 1989 PTC 14 and Hardie Trading Ltd. and Anr. v. Addisons Paint & Chemical Ltd. In A.J. Vulcan (supra) it was held that any person whose legal rights are limited by the existence of the entry on the register so that he could not lawfully do that which but for the existence of the mark upon the register, he could lawfully do. In Hardie Trading Ltd. (supra) the Supreme Court defined the term 'person aggrieved(tm)' in following terms:

But if the ground for rectification is merely based on non user i.e under section 46 of the act, that is not really on account of any public mischief by way of an incorrect entry. The non-user does not by itself render the entry incorrect but it gives a right to a person whose interests is affected to apply for its removal. An applicant must Therefore show that in some possible way he may be damaged or injured if the trademark is allowed to stand and by possible(tm) it is meant possible in a practical sense, and not merely in a fantastic view.. All cases of this kind, where the original registration is not illegal or improper, ought to be considered as questions of commonsense, to a certain extent, at any rate; and the applicants ought to show something approaching a sufficient to proper reason for applying to have the Trade Mark expunged. It certainly is not sufficient reasons that they are loggerheads with the Respondents or desire in someway to injure them.

27. Applying these yard sticks and test, it is inevitable to infer that the appellants are persons aggrieved and we, thus agree with the submission of Learned counsel for the appellants that the appellants are persons aggrieved as contemplated under Section 46 of the Act and had locus standi to file the application for removal of the trade mark of the respondent no.1 as has been held by the learned Single Judge.

28. For the appellants to succeed, the second requirement which they have to establish under Section 46 of the Act for removal of trade mark of respondent no.1 on account of non-use, is that the trade mark has not been used by the respondent no.1 for a continuous period of five years and one month before filing of application during which period there has not been bona fide use of the trade mark. The appellants have relied on the testimonies of Mr. Charan Dass who alleged that the respondent no.1 has not used the trade mark 'Fedders(tm)' in India. Similar depositions have been rendered by Shri Abdul Hamid Khan, an Assistant Manager in Hotel Ambassador; Mr. R.K. Bali, a dental surgeon; Mr. D.N. Chawla, a partner of M/s. Chawla Radios; Mr. L.P. Gaur, Senior Office Assistant, National Counsel of Applied Economic Research and Mr. S.S. Mutta, an officer of the Photo Division of Ministry of Information and Broadcasting in support of the plea of appellants about non use of trade mark by respondent no.1. It has been contended on behalf of appellants that the word 'use' would mean actually putting the mark in the business and utilizing the same for selling the goods.

29. Can the word 'use' in Section 46(1) be limited to the use in business and selling of the goods only? The phrase used in Section 46 is 'bona fide use thereof in relation to those goods' which has been defined in Section 2(2)(b) of the Act as;

(b) to the use of a mark in relation to goods shall be construed as a reference to the use of the mark open, or in any physical or in any other relation whatsoever, to such goods.

30. A perusal of the said definition of 'bona fide use thereof in relation to those goods' unequivocally reflects that the use may be other than physical use and it may be in any other form in relation to the goods, There is no rational to limit the `use(tm) to sale of goods bearing the trade mark and not to any other use. In Section 2(2)(b) the words 'any' and 'whatsoever' qualifying the expression 'other relation' give the said expression a much wider meaning and thus the word 'use' in Section 46(1) may encompass actions other than actual sale.

31. Section 46(1) and 46(3) also reflect that there is a distinction between the intention to abandon which is a part of the 'no bona fide use in relation to those goods' in sub-Section 1 of Section 46, which gives a ground for removal of the trade mark; and the intention which is contemplated under sub-Section 3 of Section 46 which provides a defense on account of existence of special circumstances. Under Section 46(1) of the Act, the intention to abandon for non-use is an essential component. Under Section 46(1)(a), the trade marks which are registered without any bona fide intention to use them in relation to the goods and which have, in fact, not been used by the proprietor from the date of such registration up to the date of application of registration, are liable to be taken off the register. It has been held by the Courts that the intention of the proprietor not to use the trade mark at the time of registration and also the actual non-use of the trade mark subsequent thereto is also to be established. In *American Home Products Corporation v. Mac Laboratories Pvt. Ltd. and Anr.* MANU/SC/0204/1985 : AIR1986SC137 , the Supreme Court had dismissed an application for rectification and had held: -

A person who intends to manufacture goods or has made preparations for the manufacture of goods but the manufacture has not commenced and, Therefore, goods have not been marketed is nonetheless entitled to get the trade mark which he proposes to use in relation to those goods registered. In the present day world of commerce and industry, a manufacturing industry can neither be commenced nor established overnight. There are innumerable preparatory steps required to be taken and formalities to be complied with before the manufacture of goods can start and the manufactured goods marketed. The process must of necessity take time. If the position were that the mere non-user of a trade mark for the period mentioned in clause (a) of Section 46(1) would make a trade mark liable to be taken off the Register, it would result in great hardship and cause a large number of trade marks to be removed from the Register because the moment one month has elapsed after the registration of a trade mark has been ordered, a trade rival can make an application on the ground set out in clause (a) of Section 46(1) claiming that there has been no bona fide use of the trade mark up to a date one month before the date of his application.

32. It is also apparent that an intention to use does not necessarily mean that the proprietor of the trade mark has to establish marketing of the goods. Intention to use would also include the intention to permit the use of the trade mark by the registered user. Such an inference is also inevitable on reading Section 46(1) and Section 48(2) of the Act. Thus, what is to be considered is : whether there is no evidence of the intention of the respondent no.1 regarding his trade mark 'Fedders' to use the same.

33. Reliance has been placed by the appellants on *Kabushiki Kaiha Toshiba (Toshiba Corporation v. Toshiba Appliances Co and Ors.)* Appeal No. 530 of 1992 decided on 27/28.8.1993 by the Calcutta High Court, where it was held that if a registered trademark is not used for more than five years and if there is no legal or administrative constraint, it amounts to abandonment of the mark. It was also held that a series of advertisements, prior to the placement of actual goods on the market under a mark may be a relevant factor to constitute use of the mark in trade but a single advertisement does not prove the intention to use it. The ratio of the said case is clearly distinguishable from the present case as the effect of a single or multiple advertisements was considered in a situation when there was no restriction or ban by the Government. Lack of advertisements by the owner of trade mark in view of the special circumstances will not negate the `use(tm) of trade mark. The plea of the appellants that despite the ban, to constitute user the respondent no.1 ought to have established user by demonstrating that they had been advertising their product, is not born out from the requirement of the relevant provision. A mere use of trade mark in advertising or other publication media is insufficient as `use(tm) because if advertisement will connote `use' within the meaning of Section 46 of the Act, it will give impetus to legal trafficking in trade mark by not using it but keeping it alive by advertisements only and such an act without other circumstances, can not be constituted as `use(tm) under Section 46 of the Act. Similarly it was held that use abroad and advertisement abroad outside the place where the mark is registered are not material in *A.J. Vulcan (supra)* which is clearly distinguishable from the facts of the present case. The case of *Cluett Peabody & Co (supra)* was also regarding passing off and infringement and clearly distinguishable from the case of appellants. In *M/s J.N. Nichols (supra)* it was rather held that use of mark does not postulate actual sale of the goods bearing such a mark and `use(tm) can be in any form or way and does not necessarily mean and imply actual physical sale and even mere advertisement without

34. The respondent No.1 earlier had not been trading in air-conditioners directly. However, it was granting dealership rights to the parties and initiating legal proceedings against illegal use of its trade mark after expiry of the term of license to protect its interest in the trade mark. Can it be said that the respondent no.1 was not doing anything pertaining to its trade mark. To prove abandonment, there had to be satisfactory evidence of definite acts indicating an intention to permanently give up the use of the mark. Although, it has been argued vehemently that filing of suit against infringement and passing off the trade mark by the respondent no.1 at Calcutta against appellants does not constitute the `use(tm) of the trade mark, however, on a closer scrutiny, it is apparent that it reflects intention on the part of registered trade mark holder to do something about his trade mark in the present facts and circumstances of the case. Filing of the suit by the respondent no.1 against infringement of its trade mark and passing off against the appellant no.1 will definitely negate the allegation of having no intention on the part of respondent no.1 to use trade mark. Ordinarily, a lawsuit against any infringing user is not a sufficient excuse for failure to use a mark, as a lawsuit does not substitute for the required use of the mark in the marketplace, however, where a lawsuit is instituted against an infringer, who had earlier been a licensee, despite Government ban to import the product, such an act should inure to the benefit of registered mark holder to negate the intention of not to `use(tm) the trade mark in the facts and circumstances of this case. Rather looking from a different angle, if the intention of the respondent no.1 was not to use the trade mark in India at that time in view of controlled economy under which the goods of the respondent no.1 could not be marketed in view of rigor of import policy, the action of initiation of suit or proceedings regarding infringement in Calcutta High Court is a manifestation of the design of the respondent no.1 to protect its mark. It is apparent that in the present facts and circumstances, on considering the entire gamut of facts, it can be reasonably inferred that there was intention on the part of the respondent no.1 to use the trade mark. In any case an ex-license can not deny the rights of an owner of trade mark as was held in *J.K. Jain v. Ziff Davies*, 2000 PTC 244. The appellant no.1 has admitted the technical collaboration agreement of 1963 in which in clause 8 it was specifically incorporated that appellant no.1 agrees that in using the said trade name and/or trade mark upon the products made by it under authorization, it will not represent in any way that it has any right or title to the ownership of the said trade name and/or trade mark, or to the eventual registration thereof, since it was understood that such trade name and /or trade mark and the registration thereof will continue to be in the ownership of `Fedders(tm) respondent no.1.

35. To resist the application of `person aggrieved(tm) for removal of trade mark, an onerous duty is also cast upon the registered proprietor not only to show that there is no intentional abandonment or intent not to use the trade mark, in relation to the goods, but there must also exist a definite intent to use the mark and a continuation of the same throughout the entire period as envisaged in the statute and all his efforts were rendered fruitless by reason of the statutory ban on imports. For section 46(3) to apply, the actual non-use of a trademark must be shown to have been due to special circumstances of the trade and that non use must be not due to any intention to abandon or not to use the trademark in relation to the goods to which application relates. The expression special circumstances in the trade has been held to mean not any special circumstances merely attendant on or attached to any particular individual business, but must be a kind of special circumstances, for all the trade in those particular goods. The non-use must be due to external forces such as the war, prohibitive tariff, ban by Government and not due to any voluntary act or omission on the part or within the control of the trade mark holder. The plea of special circumstances(tm) as the cause of the nonuser is actually a defense in the nature of frustration in a contract. Special circumstances, like frustration, should not be induced by the proprietor himself, nor can it be individual or personal to such proprietor. It must always be circumstances beyond his control and for which he is not responsible in any way. `Special circumstances(tm) must be the direct cause of the non-use. If the non-use is due to causes other than special circumstances then the special circumstances clause cannot be availed of to overcome the handicap of non use during the statutory period of five years and one month before institution of application.

36. The contention of the appellants that the ban was not 'complete' as the Government and certain other undertakings and the diplomatic personnel were entitled to import even during the ban, does not make the import of goods commercially viable. To further augment their allegation that respondent no.1 cannot take shelter under the ban imposed under the import policies for different years, it has been contended that the respondent no.1 has not produced and has failed to show whether they had given any advertisement in respect of its product.

37. Under Section 46(3) what is to be considered is not the existence of an absolute prohibition to import or a complete impossibility of importing but the existence of conditions making impracticable the ordinary usage of international trade. It cannot be disputed that a trade mark is a commercial asset intended to be used commercially by a businessman and consequently, the expression special circumstances has to be understood and applied in a business sense. Token import of a product for consumption by the Government or the diplomatic personnel does not make the trade practical in the business sense. The evidence produced by the respondent no.1 and the statement made on his behalf leads to a probable inference that import of the goods would have been impractical in business sense as the import was banned under the Import Policy for general public. The law that an economic impracticability will amount to special circumstances, as has been laid by the Courts in this country, is accepted as good law. Reliance may be placed on *A.J. Vulcan v. V.S. Palanichamy* MANU/WB/0009/1969 : AIR1969Cal43 and *Express Butler Pvt. Ltd. v. Pepsi Inc. and Ors.*, 1989 PTC 14. In *A.J. Vulcan* (supra) it was held:

For S.46(3) to apply, the actual non-user of the trade mark must be shown to have been due to the special circumstances of the trade and secondly that non-use must be not due to any intention to abandon or not to use the trade mark in relation to the goods to which application relates.

The expression special circumstances in the trade has been held to mean not any special circumstances merely attendant on or attached to any particular individual business. It must be a kind of special circumstances for all the trade in those particular goods. The non-use must be due to certain external forces such as the war or prohibitive tariff and not due to any voluntary act or omission on the part of the trader. This plea of special circumstances as the cause of the non-user is really a defense in the nature of frustration in a contract. Special circumstances like frustration should not be induced by the proprietor himself nor can it be individual or personal. It must always be circumstances beyond his control and for which he is not responsible in any way. Again, such special circumstances must be the direct cause of the non-use. If the non-use is due to other causes apart from special circumstances then the special circumstances cannot be availed to overcome the handicap of non-use of the statutory period of five years. The user or non-user in territories outside India cannot bring the case with S.46(3) of the Act.

38. For the special circumstances what has to be seen is, as to what is the demand for the goods which will make it profitable and not a mere demand. The lack of profitability on account of limited demand should also be on account of external factors beyond the control of the proprietor of the trade mark. Reliance in this regard can be placed on Philips Morris Ltd. v. GTC Industries Ltd. and Ors. PTC (Supp) (1) 673 Bom ; Bali Trade Mark Case; 1966 RPC 387 and Hardie Trading Ltd. and Anr. v. Addisons Paint & Chemicals Ltd. In Bali Trade Mark(tm)s Case it was held as under:

That special circumstances in the trade justifying non use of the trade mark did not end when the Government restrictions on importation from America were eased, but continued as long as importation was impracticable in a business sense.

39. In Hardie Trading Ltd. (supra) it was held that the law is that even an economical impracticality would amount to special circumstances. All these factors are unequivocally reflected in the case of respondent no.1 and on account of special circumstances, he is entitled to non-suit the appellants for removal of his trade mark on account of alleged non-use as contemplated under Section 46(3) of the Trade & Merchandise Marks Act, 1958. We are thus in agreement with the findings of learned single Judge on these issues that the trade mark of respondent no.1 is not liable to be removed on the ground of non use as contemplated under section 46 of the Act as there were special circumstances on account of ban under the import policy entailing non use of trade mark by the respondent no.1.

40. The next point for consideration is whether the application of the appellants was barred by time or not. In the application filed by the appellant it was not pleaded specifically as to when the cause of action arose in favor of the appellants or that the cause of action was continuous. Even the respondent no.1 did not take the plea in reply that the application for removal under Section 46 of the Act was barred by time. In the replication again appellants did not contend that the cause of action on account of non use is continuous and application under Section 46 is within time. The learned Single judge, however, considered the limitation in filing the application by the appellants and held that their application was barred by time.

41. The respondent no.1 has contended that as the alleged non-use was even at the time of institution of the suit for injunction filed against the appellants against violation of trade mark and passing off in 1972, Therefore, the limitation for filing the petition under Section 46 of the Act will start at that time. It has been further contended by respondent no.1 that an application for rectification could be filed after five years and one month when the respondent No.1 did not appoint any other distributor or dealer nor it was marketing his own products in India and after negotiation failed with the appellants to extend the agreement. Respondent no.1 contended that the Appellants could not take such an unduly long time to file the application for rectification in 1982. Respondent no.1 also relied on Section 107 and 108 of the Act.

42. According to the respondent no.1, Article 137, the residuary Article of the Limitation Act, 1963 shall be relevant which reads as under: -

Description of suit	Period of limitation	Time from which period begins to run
Any other application for which no period of limitation is provided Elsewhere in this Division.	Three years.	When the right to apply accrues.

43. Refuting the contentions of the respondent no.1, the appellants have contended that Article 137 of the Limitation Act, 1963 will not be applicable because the period after which the application can be filed under Section 46 of the Trade and Merchandise Marks Act, 1958 is stipulated within that provision itself. According to the appellants, reading the period prescribed under the residuary Article 137 into the limitation provided under Section 46 of the Trade & Merchandise Act, 1958 will lead to anomalous and conflicting situations.

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Reliance was also placed by the appellants on Fair Growth Investment Ltd. v. The Custodian MANU/SC/0898/2004 : (2004)11SCC472 where it was held, in respect of special Courts (trial offences) relating to Transaction in Securities, 1992 that time limited for filing a petition for objection under Section 4(2) of the Act was mandatory and it could not be extended by the Court under any inherent jurisdiction of special Court nor the provisions of the Limitation Act, 1963 could be applied for computation of period of limitation prescribed.

44. The Supreme Court had held in MANU/SC/0342/1973 : [1974]1SCR381 , Rajender Singh and Ors. v. Santa Singh and Ors. that it is not necessary that the issue framed must mention the provision of law to be applied rather it is the duty of the Court, in view of Section 3 of the Limitation Act, to apply bar of limitation where, on patent facts, it is applicable even though not specifically pleaded. Therefore in the facts and circumstances what is to be considered is whether the application of the appellants was filed beyond the period of limitation. It is also to be considered whether the period of limitation commenced, when the suit for injunction for violation of trade mark and passing off was filed by respondent no.1 in 1972 against the appellants.

45. The plea of respondent no.1 that the appellants ought to have filed the application for rectification within three years after five years and one month of non use after the right to sue accrued in 1972, cannot be inferred from a perusal of the relevant provisions. In our view, as the Trade and Merchandise Marks Act, 1958 is substantive and procedural also in nature, Article 137 of the Limitation Act, 1963 will not be applicable in case of applications to be filed for rectification of a trade mark on account of non-use under Section 46 of the Act, as the provision itself contemplates a period after which such applications can be filed. Every day non use continuing for five years and one month before the institution of application for removal of trade mark on account of non 'use' under Section 46 of the Act will entitle the appellants to maintain the application. Article 137 of limitation Act,1963 will also be not applicable for said application, as the limitation for instituting such application is provided in the provision of said Act itself.

46. Section 46 of the Act does not envisage any relief period but only provides for a qualifying period of five years and one month where after an application for removal can be filed. Therefore filing or pendency of the suit for infringement cannot shift a qualifying period for filing the application anterior to date of filing of suit for infringement and it can not be construed that the limitation will start running from the date, the suit for infringement was filed by the respondent no.1 against the appellants. A Trademark which drops out of the use, dies when there are no goods offered for sale as there is no use of the trademark. The mark can lose its distinctiveness by non use, where non use is on the part of registered trade mark holder but not on account of external factors beyond the control of such registered trade mark holder. Thus it can not be doubted that granting of relief under Section 46 is a discretionary relief and the Legislature in its wisdom has provided period which must lapse before an application may be made, however, the provision of the Act is silent with respect to the starting time of limitation. Therefore, the question of delay in the making of application must be approached from the point of view whether the applicant stood by and thereby caused substantial injury to the respondent no.1 and the injury was so substantial that the injury would out way the interest of the public which the Court must consider where a trade mark is likely to deceive. Reliance in this regard can be placed on Ciba Ltd. Basle Switzerland v. M. Ramalingam MANU/MH/0021/1958 : AIR1958Bom56 . In this case also there was no pleading or contention that the application for rectification was barred by law of limitation. In the present case also, in the application filed by the appellants, it had not been pleaded as to when the cause of action had arisen in their favor nor respondent no.1 took the plea that the application for removal of the trade mark of respondent no.1 on account of non-use under Section 46 of the Act was barred by time. The respondent no.1 also failed to aver that he suffered any substantial injury on account of delayed application under section 46 of the Act.

47. On a conjoint reading of the provisions under the Trade and Merchandise Marks Act, 1958 and the Limitation Act, 1963, it is apparent that the application under Section 46 of the Act can be filed after there has been 'non-use' of the trade mark for a continuous period of five years and one month. The provision does not contemplate that the application has to be filed just after completion of five years and one month of 'non use' and cause of action will crystallize on that date irrespective of continuous non use by the proprietor of trade mark. The provision also does not stipulate as to when the cause of action will start. Emphasis is not on the time when the cause of action will start but that at the time of filing the application, a continuous period of five years and one month must elapse of such non use before an application can be filed. Thus, what is relevant is not when the right to sue commenced but when the right to sue matured for institution of the application under Section 46 of the Trade & Merchandise Marks Act, 1958. The non use in such case on everyday gives a new cause of action and will not extinguish on account of earlier 'non use'. The respondent no.1 had not been using the trade mark continuously for five years and one month prior to the institution of the application and the respondent no.1 relied on special circumstances on account of the ban imposed under the Import Policy for import of such articles. Before the institution of application under Section 46 of the Act in 1982, the respondent no.1 had not been using the trade mark for five years one month prior to institution of application by the appellants. We are also not in agreement with the view that since rectification application under section 46 of the act is an application governed by the provisions of Civil Procedure Code before the High Court, consequently provisions of Limitation Act,1963 would govern the rectification application as enunciated in Patel Field Marshal Agencies v. P.M. Diesels Ltd., 1998 (18) PTC 463 and Patel Field Marshal Agencies v. P.M. Diesels Ltd., 1999 (19) PTC 718. It is not in dispute that there is no specific article of Limitation Act, 1963

manupatra which governs the period of limitation for maintaining an application under section 46 of Trade & Merchandise Marks Act, 1958. As Section 46 of the Act itself provides a period for non use to maintain an application, incorporating any further limitation will be contrary to intention of legislature. In our opinion, residuary article 137 of the Limitation Act, 1963 will not govern the applications under section 46 of the Trade Merchandise and Marks Act, 1958. Thus, it cannot be inferred that the application of the appellants under Section 46 of Trade & Merchandise Marks Act, 1958 was barred by limitation under Article 137 of the Limitation Act. The finding of the learned Single Judge that the application of appellants was barred by limitation under Article 137 of the Limitation Act, 1963 is erroneous and is accordingly set aside.

48. No other point is canvassed before us. Consequently the appeal of the appellants fails and the application under Section 46 of the Trade & Merchandise Marks Act, 1958 for removal of the trade mark of the respondent no.1 from the Register of trade mark is liable to be dismissed.

49. The appeal is, Therefore, dismissed and the parties are left to bear their own costs.

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