ORDER SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

C.M.A. No.139 of 2022
Shoaib Yasin
Versus
Mansoor Majeed Ayat

S. No. of order / proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	28.03.2023	**Ms. Mehak Ali, Advocate for the appellant.** **Mr. Saqib Naseer and Nadir Ishaq, Advocates for the respondent.**

Through the instant appeal under Section 19 of the Intellectual Property Organization of Pakistan Act, 2012, the appellant, Shoaib Yasin, impugns the *ex-parte* judgment and decree dated 30.08.2022 passed by the learned Presiding Officer, Intellectual Property Tribunal, Islamabad, whereby the suit instituted by the respondent was decreed.

2. Learned counsel for the appellant submitted that on 26.02.2015 and 25.03.2015, the appellant filed applications before the Registrar of Trade Marks, Karachi for registration of trade marks "Rockshield Coatings" and "Rockshield" in classes 19 and 37 respectively; that the respondent has filed objections to the applicant's said applications; that the appellant has filed Constitution petition No.D-4797/2020 before the Hon'ble High Court of Sindh praying for a direction to the Registrar, Trade Marks to decide the appellant's pending applications expeditiously; that the said petition has not been decided as yet; that the respondent's trade mark "Rock Shield" is registered in class 2; and that the appellant has no intention of infringing the respondent's registered trade mark.

3. Learned counsel for the appellant further submitted that vide order dated 08.06.2022, the appellant was proceeded against *ex-parte*; that

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after the said order, the learned Presiding Officer, Intellectual Property Tribunal, Islamabad decreed the respondent's suit by restraining the appellant from using the trade mark "Rockshield" or "Rockshield Coatings;" and that the appellant has already filed a written statement and if one more opportunity is granted to the appellant, he would defend the suit instituted by the respondent.

4. On the other hand, learned counsel for the respondent submitted that the impugned judgment and decree dated 30.08.2022 passed by the learned Presiding Officer, Intellectual Property Tribunal, Islamabad does not suffer from any legal infirmity; that the respondent is the holder of a registered trade mark "Rock Shield", whereas the appellant's applications for the registration of trade mark have not been allowed as yet by the Registrar of Trade Marks, Karachi; that even though the respondent's registered trade mark is in class 2 whereas the appellant's applications for the registration of trade mark is for class 19 and class 37, Section 40(4)(b) of the Trade Marks Ordinance, 2001 provides *inter alia* that a person shall infringe a registered trade mark if the person uses in the course of a trade a mark which is used in relation to goods or services which are not similar to those for which the trade mark is registered, where the trade mark is a well known trade mark or has a reputation in Pakistan, and the use of the mark, being without due course, takes unfair advantage of, or is detrimental to the distinctive character or the repute of the trade mark; and that the appellant was proceeded against *ex-parte* on two occasions before the learned Tribunal below. Learned counsel for the respondent prayed for the appeal to be dismissed.

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5. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance.

6. It is not disputed that a certificate of registration of trade mark was issued on 26.05.2010 by the Trade Marks Registry, Karachi in favour of the respondent. The registration was in class 2 for the trade mark "Rock Shield" in respect of textured wall coating and building materials, being goods included in class-02. On 26.05.2020, the said registration was renewed. The copy right for the artistic work titled "Rockshield" has also been registered by the Intellectual Property Organization of Pakistan in the respondent's favour on 12.07.2002.

7. The appellant has applied to the Trade Mark Registry for the registration of trade mark "Rockshield" in classes 19 and 37 but till date the appellant's applications have not been allowed. The respondent is contesting the appellant's said applications.

8. Learned counsel for the respondent relied on Section 40(4) of the Trade Marks Ordinance, 2001 in support of his contention that the appellant was taking undue advantage of the respondent's registered trade mark by the respondent's goodwill and reputation created due to the registered trade mark. If that was so, the impugned judgment and decree dated 30.08.2022 should have adverted to this aspect of the case.

9. The appellant has not been diligent in defending the suit instituted by the respondent. The record shows that vide order dated 16.02.2022, the appellant was proceeded against *ex-parte*. The appellant's application for the setting aside of the *ex-parte* proceeding was allowed by the learned Tribunal below on the basis of a concession shown by the respondent.

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Thereafter, on 08.06.2022, the appellant was again proceeded against *ex-parte*. The order sheet shows that the learned Tribunal below did not straight away decree the suit but adjourn the matter on three occasions. For this laxity, the appellant needs to be adequately penalized.

10. Since the impugned judgment and decree dated 30.08.2022 does not discuss the contents of the respondent's affidavit-in-evidence in order to make out a case of an infringement of the respondent's registered trade mark, I am inclined to allow the instant appeal and set-aside the order dated 08.06.2022 and *ex-parte* judgment and decree dated 30.08.2022. Since it was the appellant's negligence which has resulted in the impugned judgment and decree, I deem it appropriate to impose costs of Rs.100,000/- on the appellant which shall be paid to the respondent on the next date of hearing before the learned Tribunal below. Since throughout the proceedings before the learned Tribunal below, there was an interim order in the field, such interim order shall continue until the matter is finally decided.

11. The instant appeal is allowed in the above terms.

(MIANGUL HASSAN AURANGZEB)
JUDGE

Ahtesham*

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