
(2009) 07 AHC CK 0169
In the Allahabad High Court

Badli Ram Sharma Proprietor A.B.S. Bidi Company	APPELLANT
Vs	
Manglore Ganesh Bidi Works	RESPONDENT

Date of Decision : 17-07-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 96
Trade and Merchandise Marks Act, 1958 — Section 105, 115, 2, 23, 28

Citation : (2010) 43 PTC 103 : (2010) 7 RCR(Civil) 920

Hon'ble Judges : Rakesh Shrama, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Rakesh Shrama, J.—Heard Sri K.N. Saxena, learned Counsel for the appellant and Sri Himanshu Kane, assisted by Sri Shasi Kant Shukla, counsel for the respondent.

2. Through this present first appeal filed u/s 96 C.P.C., the appellant Badli Ram Sharma, Proprietor A.B.S. Bidi Company, Baragon Gate, Jhansi has challenged the judgment and decree dated 21.12.82 passed by the learned Special Judge/ Addl. District Judge, Jhansi in original suit No. 25 of 1979 partly decreeing and partly dismissing the suit filed by the plaintiff respondent. The pith and substance of the case is whether appellant Bidi Company can use the trade mark "501" on its label affixed on Bidi bundles, packages whereas respondent Manglore Ganesh Bidi Works, 5 Vindoha Road, Mysore 570005. Karnataka has claimed that this trade mark "501" is its registered trade mark under the Trade and Merchandise Marks Act, 1958 (briefly, the Act). The trial court at Jhansi had decreed the suit in favour of Manglore Ganesh Bidi Works, holding that the trade mark "501" cannot be used by the present appellant, the defendant before the trial court at Jhansi.

3. It emerges from the record that Manglore Ganesh Bidi Works, had filed a suit No. 25 of 1979 Manglore Ganesh Bidi Works v. Sri Badli Ram Sharma in the trial court at Jhansi seeking permanent injunction against the defendant to restrain it,

its servants, agents from infringing its registered trade marks No. 6426 and 127573 by putting it on the labels of packets, bundles of Bidis manufactured by the defendant firm at Jhansi. According to the plaintiff, his firm alone can use the trade marks labels (shown as ex. B and B1) inter alia containing the numerals "501" and the respondent firm could not have used the numeral "501" on its label or any other numeral deceptively similar to plaintiff's registered trade mark "501". The plaintiff further sought recovery of Rs. 5000/- as damages and direction for destruction of all Bidi bundles and packets bearing the impugned trade mark, wrappers and label including the impugned seal, wrappers and labels as per ex. B and B-1. It is noteworthy that these labels have been placed for perusal of this Court at pages 73,74,75 &76 of the paper book filed by the appellant.

4. According to M/s Manglore Ganesh Bidi Works, it is a registered firm under the Indian Partnership Act and it carries on business of manufacture and sale of Bidis and their predecessor in title have also been engaged in the manufacture and sale of Bidis for over last about 76 years. According to the learned Counsel for the plaintiff-respondent, the firm was established in the year 1932 and since then it has been manufacturing Bidi and using the labels "501" as its registered trade mark and putting a seal on the packets of Bidis. The trade mark labels are affixed on the main wrapper and a top seal is also affixed on the wrapper bearing numeral "501". The specimen of the said seal was placed before the trial court as ex. A and A-1. The same has been placed on the record of this appeal. The top label "A" inter alia has numerals "501" as its leading and distinctive feature and wrapper "A-1" inter alia contain motif of Lord Ganesh on that numeral "501" flanked on its two sides. The plaintiff is a registered proprietor of these trade marks. According to the Act of 1958 their registration is valid and subsisting in the name of the plaintiff Manglore Ganesh Bidi Works and by virtue of its registration it has clear exclusive right of the use of the above trade mark. The definition of the mark, packages, permitted use, trade marks etc. have been given in Section 2 of the Act. When the plaintiff firm was registered in the year 1932, the Indian Merchandise Marks Act, 1989 (Act No. 4 of 1989) and Trade Marks Act, 1940 (Act No. 5 of 1940) were in vogue. The plaintiff, respondent herein have large and regular sale of Bidi bearing the said trade mark throughout the Country including the State of U.P., M.P., Rajasthan, Union territory of Delhi, Karnataka Maharashtra etc. They have also spent a large amount of money for promoting the sale of their Bidis bearing the said trade mark labels (501 with Ganesh motif). The annual turnover of the sale of Bidis throughout India under the said trade mark label at the time of the filing of the suit in 1979 had exceeded 50 crores. At the time of the filing of the suit the sale in U.P. alone exceeded Rs. 2 crore. By virtue of long standing since 1932, large and regular sales and wide publicity, the plaintiff's Bidis bearing the said trade mark labels have become popular amongst the members of trade and public at large. Since these trade marks labels have become so popular amongst the members of Bidi trade and public and are so distinct, it is demanded and sold as by referring

numeral "501". According to the learned Counsel for the respondent, even an ordinary customer demands from a shop keeper to give him "501" Bidi. The Bidi bundle packets are demanded making a reference to number "501" only. In fact the trade mark "501" has been exclusively connoting and denoting the goods of the plaintiff alone and of none else.

5. The appellant defendant i.e. Badli Ram Sharma proprietor of A.B.S. Bidi Company started a similar business of manufacturing Bidi at Jhansi. On their Bidi, Bidi bundles, packets, wrappers, the said Jhansi firm had put a trade mark label inter alia containing the numerals "501" in big letters. These have been exhibited as B and B-1 in the record of the trial court and the same has been brought on record of this appeal also. The paper book contains original wrappers.

6. The plaintiff respondent M/s Manglore Bidi works had learnt about the business being carried out in Jhansi in the year 1978. They came to know that M/s Badli Ram Sharma of ABS Bidi work was selling Bidis at Jhansi not of the plaintiff but bearing the trade mark and label inter alia containing the number "501". This Jhansi firm had been using the label prominently depicting numeral "501" as trade mark which is deceptively similar to the trade mark of plaintiff respondent. The defendant has been using the label, permanently depicting numeral "501" as trade mark which is deceptively similar to the plaintiff's trade mark used by them and registered in the name of Mysore firm for a long time. A legal notice was served on the defendant on 20.11.78. The Jhansi firm was called to desist from using the numeral "501" as its label and in respect of the Bidis to be manufactured at Jhansi. The defendant firm sent a reply to the said notice and denied the allegations. Another notice was served by the Manglore Bidi Works on the Jhansi firm on 26.2.79. but despite this, the said firm, defendant did not stop using numerals "501" on its label packets of Bidi. Ultimately the above suit was filed. In addition to above facts it was pleaded before the trial court that the above Jhansi firm had been using the said trade mark of 501 and particularly the numerals 501 in relation to the said goods only with a view to trade upon the valuable reputation of the plaintiffs in the aforesaid trade marks. The plaintiffs were entitled to claim Rs. 5000/- as damages from the above Jhansi firm for passing his goods as and for the plaintiff's manufactured goods.

7. Following issues were framed by the trial court for determination:

1. Whether the defendant has infringed the trade mark of the plaintiff as alleged?;
2. Whether the defendant has been passing off the goods of the plaintiff? If so to what effect?;
3. Whether there is any deceptive similarity between the trade mark of the plaintiff and defendant? If so what effect?;
4. Whether the plaintiff's firm is registered partnership firm ?;
5. Whether the suit is barred by time?

6. Whether the suit is barred by principle of estoppel and acquiescence?;
7. Whether the defendant is honest and concurrent user of the trade mark?
8. To what relief, if any, is the plaintiff entitled?

8. The trial court had after taking into account the rival submissions and appreciating the relevant law and precedents has held that the above Jhansi firm's trade mark is deceptively similar to the plaintiff's trade mark and the defendant had infringed the plaintiff's trade mark. The trial court has held while deciding the issues No. 6&7 that the defendant firm at Jhansi had failed to establish that it has been manufacturing Bidi since 1957 and has been legally selling it under the trade mark "501". The licence was issued in the year 1959. The court had found that the licence produced by the defendant firm was issued in the year 1959 for trading in tobacco and this licence remained valid upto 1964 only. No licence of excise department for manufacturing and sale of Bidi was obtained by the defendant firm at Jhansi . The trial court was of the view that the defendant had failed to establish that he is honest and bonafide user of the trade mark. On the point of limitation after discussing the issue No. 5, the court had held that the suit was within time. The plaintiff's firm was a registered partnership firm. The plaint was properly signed by Sri M. Suresh Rao who was duly authorised by the firm to present the plaint. The court had further held considering the provisions of the Act that the plaintiff's firm Manglore Ganesh Bidi Works, a registered firm having registered trade mark of using numerals "501" had a right of exclusive use of their registered trade mark and accordingly they were held entitled for permanent injunction. The destruction of labels and wrappers of defendant having numerals "501" was also ordered. However, the court had declined to grant Rs. 5,000/- as damages . The suit was decreed. The order of permanent injunction was passed restraining its agent and servants from infringing the plaintiff's registered trade mark 6426 and 127573 by using it upon or in relation to Bidi having trade marks as indicated above containing numeral "501". The defendants were directed to deliver to the plaintiff all the wrappers as per specimen B and B-1 placed before the Court and pay Rs. 1000/- as cost damages.

9. Sri K.N. Saxena, learned Counsel for the appellant has assailed the impugned judgment and order on various grounds . According to him, the plaintiff respondent was not a registered partnership firm and it had no right to sue in the trial court at Jhansi. Initially one Deshi Sahu used to do business of manufacturing and sale of Bidi bearing numerals 501 at Jhansi. In the year 1943, the defendant Sri Badli Ram Sharma, proprietor of A.B.S. Bidi Work purchased the good will from Deshi Sahu. The rolling/manufacturing of Biris commenced in the year 1957 and since then they had been manufacturing and selling Bidis bearing numeral 501 openly to the knowledge of the plaintiff and their agents. Much stress was laid that when the business of manufacturing and sale of "501" Bidi commenced in Jhansi, the Bidis of plaintiff were not available there. The trade mark used by the defendant on their Bidi is different from the trade mark

used by the plaintiff. It was not deceptively similar.

10. Sri K.N. Saxena, learned Counsel placed before the court the wrappers, labels and Bidi bundles to demonstrate that the Bidis manufactured by Mangalore firm are marketed as Ganesh Biris or Manglore Ganesh Biris and not as Bidi No. "501". The Jhansi firm uses No. 501 in bold letters (not with Ganesha or some deity's mark) on the sides. Behatarin Bidi has been written and the name of Badli Ram has been put above 501 mark and the name of company A.B.S. has been placed before the numeral "501". The original wrapper has been placed at p.75 and 76 of the paper book supplied by Sri K.N. Saxena, learned Counsel for the appellant which is on record. After demonstrating two labels, Sri K.N. Saxena, learned Counsel for the appellant has contended that the manner of packing on defendant Bidi is certainly not similar to that of plaintiff. The plaintiff (respondent herein) are using the trade mark on which numeral "501" is written at top seal whereas the defendant is using the trade mark on which numeral "501" has mentioned as its logo. Numeral "501" is not a registered trade mark of the plaintiff nor it could be registered under the Act. The plaintiff had knowledge about the manufacture and sale of the defendant Bidi at Jhansi since a long time, they never objected to the manufacture and sale of the Bidi with label "501" on the bundles packs. The suit was in fact barred by the principle of estoppel and acquiescence.

11. Sri K.N. Saxena has further submitted that the suit was barred by law of limitation. The defendant had not committed any infringement of the trade mark of the plaintiff. The wrappers and packets of the defendant are not deceptively similar with that of the plaintiff. The trial court has failed to appreciate that only "501" was not the registered trade mark of the plaintiff and as such there was no infringement of the plaintiff's trade mark by the defendant using "501" in the labels of his Bidis. In fact the plaintiff's registered trade mark is Manglore Ganesh Bidi works 501 while the defendant is using only 501 on the label. The get up colour scheme , packets and use of numeral "501" in bundle of Bidis were entirely different and they cannot be said to be in infringement of trade mark. In the Mysore firm on the wrapper photo of two Ganeshas are printed along with numeral "501" written in smaller letters. Manglore Ganesh Bidi was written in different language. However, label at the top of the bundles contained a numeral "501". At the top of the wrapper "501" is printed on read leaf. The broad and essential features of the two labels do not show any work of similarity so as to mislead a person dealing in one brand to accept the other if offered to him. The size of packets, quantity, numbers and colours scheme, get up , mode of packing etc. was entirely different. There was no over all similarity and the goods of one firm cannot be mistaken for the other . Sri K.N. Saxena has laid much stress that the numeral "501" cannot be registered as trade mark. The plaintiff's Bidis were sold as Ganesha 501 and defendant's Bidis were sold as "501" only. No evidence was placed that the customers mistook the defendant's Bidi 501 as plaintiff's Bidi. There was no infringement of plaintiff's trade mark by the Jhansi Firm and the suit ought not to have been filed and decreed.

12. Sri K.N. Saxena has placed reliance on a judgement rendered by Hon''ble Supreme Court in Parle Products (P) Ltd. Vs. J.P. and Co., Mysore, Mysore in support of his submission. Relying on various observations of the Hon''ble Supreme Court of India, Sri K.N. Saxena has submitted that the defendant firm''s packing, wrappers were not deceptively similar to the plaintiff. The findings of the trial court were erroneous and the court had not properly appreciated the evidence on record and law on subject.

13. Sri Himanshu Kane, learned Counsel for the respondent has strongly opposed the appeal by putting forth detailed submissions and placed various pronouncements of the Hon''ble Supreme Court of India and a Division Bench decision rendered by Hon''ble High Court of Mumbai . He has lead the Court to the chronology of events, contents of the two legal notices and the judgment and order rendered by the court of Special Judge/Addl. District Judge, Jhansi on 21.12.82 impugned in this appeal. The judgment and decree passed by the said court is unassailable as the court has carefully appreciated the facts of the case and law on the subject. Learned Counsel for the respondents has submitted that M/s Manglore Bidi Works is a registered partnership firm carrying out the business of manufacturing and sale of Bidi since 1932. It has two registered trade marks No. 6426 and 127573 to be used upon or in relation to Bidi manufactured by the firm. He has taken the court to the definition clauses contained in Section 2 of the Act. The definition of trade mark has been given in this section which means a mark adopted in relation to any goods to distinguish in the course of trade. The words associated trade marks, certification trade marks have been defined in this section. The definition of trade marks has also been indicated in the same section vide 2(1)(v). Chapter II and III deals with the registration of trade mark and the procedure prescribed for the same. u/s 23, the trade marks are registered and a certificate to this effect is issued by the Registrar. In chapter IV, the effects of registration have been provided. Section 28 deals with the rights conferred by the registration. Relevant Sections 28 & 29 are quoted below:

28.Rights conferred by registration--(1) Subject to the other provisions of this Act, the registration of a trade mark in Part A or Part B of the register shall, if valid, give to the registered proprietor of the trade mark the exclusive right to the use of the trade mark in relation to the goods in respect of which the trade mark is registered and to obtain relief in respect of infringement of the trade mark in the manner provided by this Act.

(2)The exclusive right to the use of a trade mark given under Sub-section (1) shall be subject to any conditions and limitations in which the registration is subject

(3) Where two or more persons are registered proprietors of trade marks, which are identical with or nearly resemble each other, the exclusive right to the use of any of those trade marks shall not(except so far as their respective rights are subject to any conditions or limitations entered on the register) be deemed to

have been acquired by any one of those persons as against any other of those persons merely by registration of the trade marks but each of those persons has otherwise the same rights as against other persons(not being registered users using by way of permitted use) as he would have if he were the sole registered proprietor."

29. Infringement of trade marks-(1) A registered trade mark is infringed by a person who, no being the registered proprietor of the trade mark or a registered user thereof using by way of permitted use, uses in the course of a trade mark which is identical with, or deceptively similar to, the trade mark, in relation to any goods in respect of which the trade mark is registered and in such manner as to render the use of the mark likely to be taken as being used as trade mark.

(2) In an action for infringement of a trade mark registered in Part B of the register an injunction or other relief shall not be granted to the plaintiff if the defendant establishes to the satisfaction of the court that the use of the mark of which the plaintiff complains is not likely to deceive or cause confusion or to be taken as indicating a connection in the course of trade between the goods in respect of which the trade mark is registered and some persons having the right, either as registered proprietor or as registered user , to use the trade mark.

14. Section 105 of the said Act provides that a suit for infringement of trade mark etc. has to be instituted before a district court and the same has been done by the plaintiff's firm in the present case.

15. After displaying the scheme of legal provisions contained in the Act, Sri Kane has demonstrated before the Court that the trade mark labels used by the contesting parties, M/s Manglore uses numeral 501 on the main label and top seal also . The said numeral "501" is its leading and distinctive feature. These trade marks were registered with the Registrar of the trade mark. Certificate of registration (ex.2) was placed before the trial court and the same was considered and appreciated by the said court. The trade marks were registered on 28.1.47. These were renewed from time to time, i.e., on 28.1.54, 1969 and thereafter on 14.3.75 and on 29.1.76. The trade mark 6426 was registered on 26.10.42 and the same was duly renewed on various dates indicated in the copy of the impugned judgment. The procedure prescribed in Section 115 of the Act was duly followed. These trade marks find place in the register of trade marks. Section 32 of the aforesaid Act was also read before the Court in support of the submissions put forth by the respondents. The trial court had found the registration certificate of the plaintiff Manglore Bidi Works as admissible and validity of the registration was conclusive. The plaintiffs were found to be registered proprietor of the trade marks (ex. A and A-1) used on their Bidi packets. As per Section 28(1) of the aforementioned Act, 1958, the plaintiff (respondent herein) had exclusive right to use the trade mark in relation of good (Bidi) in respect of which trade mark was registered and in case of infringement they had right to seek relief from the court of District Judge. The provisions contained in Section 28(1) , Section 29 and other provisions were taken into

account and dealt with by the court below. Here was a case where the appellant firm at Jhansi used a trade mark which is identical to the plaintiff respondent trade mark and was deceptively similar to the trade mark used by it on its package, bundles. The expression deceptively similar is defined u/s 2(d) of the Act which was read before the Court. The Court had found that the plaintiff firm was not registered firm nor its trade mark 501 was registered with the Registrar of trade mark as provided under the aforementioned Act.

16. Sri Himanshu Kane, learned Counsel for the respondent has displayed before the Court the findings recorded by the trial court in respect of each of the issues to persuade the Court that there was no error in the judgment and in fact the trial court considered each and every issue and the legal provisions brought before it by the parties. The Court had found that the defendants were using label (Ex. B) which contained numeral "501" in its centre. In addition to this mark on label, wrappers, the top seal contains numeral "501" printed on it. The labels of the plaintiff and defendant firm were compared and the court after detailed discussion, analysing the two versions had rightly found that the defendant trade mark is deceptively similar to the plaintiff's trade mark and the defendant had infringed the plaintiff's trade mark. The Bidis are mostly consumed by illiterate person, labourers and villagers rather common man of the lower strata of the society. Such consumers cannot be expected to read the name of the firm on the label. The guiding factor would be the numeral "501". The most significant and eye catching feature of this trade mark was numeral 501.

17. Sri Himanshu Kane has placed reliance on the following judgements in support of his submission:

1. Kaviraj Pandit Durga Dutt Sharma Vs. Navaratna Pharmaceutical Laboratories,
2. Ruston and Hornsby Ltd. Vs. The Zamindara Engineering Co.,
3. M/s. Haldiram Bhujawala and Another Vs. M/s. Anand Kumar Deepak Kumar and Another, and
4. Hiralal Parbhudas Vs. Ganesh Trading Company and Others,

18. Sri Kane has summed up that the trial court had rightly concluded that the appellant's mark is deceptively similar to that of the respondent. The judgment is not erroneous and in fact it deserves to be upheld by this Hon'ble Court..

19. I have heard the learned Counsel for the parties at length, perused paper book , judgment of the trial court and materials placed on record. All the exhibits pleadings have been taken into account.

20. It is borne out from the record that the contest in respect of trade mark labels used on the packets of Bidis, bundles was between the above said two firms. One was a registered firm having a valid licence to manufacture and sale of Bidis and armed with duly issued registration certificates by Registrar of Trade

and Merchandise as provided under the Act, and the other firm rolling/ manufacturing and selling Bidis at Jhansi without having a valid licence issued by the Excise Department to manufacture and sale of Bidis. It was also using an unregistered trade mark putting numeral 501 on its labels and wrappers. The trial court after considering and appreciating the submissions put forth in the pleadings by the rival parties has given a verdict in favour of the plaintiff firm which was a registered firm carrying out business of manufacture and sale of Bidis since 1932. The registered trade marks 6426 and 127573 were found to be legal and valid. These were held to be used by the Mysore firm only.

21. In the light of the fatural matrix and finding and conclusions recorded by the learned Special Judge/ Additional District Judge , Jhansi , it emerges that most of the issues framed were decided in favour of the plaintiff . The Court after going through various provisions contained in the Act put forth by the contesting parties as indicated above, has found that M/s Manglore Bidi works respondent herein was a duly registered firm, having its business activities head quarter at Mysore, Karnataa. The registration certificate of 127573 was issued on 28.1.1947 and it was renewed for a period of 7 years from 29.1.76. Similarly trade mark No. 6426 was registered on 26.10.42 and the same was renewed for a period of 7 years from 26.10.71 and alteration was allowed on 14.3.75. The trial court after taking into account had found the registration certificates and the renewal of the trade marks containing numeral 501 and Lord Ganesh Picture and seal of numeral 501 found to be legally valid and in order. These two trade marks labels could not have been used by any other firm, manufacturer of Bidis as per scheme contained in the Act. Thus the two trade marks labels of 501 in connection with the manufacture and sale of Bidi could not have been used by any party except the Mysore firm which had been duly registered . The legal provisions which have been quoted above find place in the discussion in detail in the judgement of the learned trial court. The trial court has taken note of alll the relevant provisions contained in the Act of 1958 while writing its opinion and conclusions. The court has found that the expression mark includes numerals or in combination thereof. Numeral 501 was , therefore, found to be trade mark as contemplated in the Act. The trade mark containing numeral 501 had already been registered with the Registrar of Trade Marks in favour of the Mysore firm. The numeral 501 written in the centre of the label and the name of the firm Manglore Bidi Works was also found written on the said label. The top seal bore the number 501 on the Bidi Bundles rolled by the Mysore firm.

22. The trial court had found that in case of the packets of Bidi bundles manufactured by M/s ABS Company with its proprietor Badli Ram Sharma numeral 501 was written in bold letters on the label. This Court has also minutely observed the two labels . Even on the wrappers number 501 was indicated by the Jhansi firm. This shows that there is substance in the submission of Mr. Himanshu Kane, learned Counsel for the Mysore firm. Certainly the Trade Marks used by the Jhansi firm is deceptively similar to the Mysore firm.

23. The trial court and this Court has appreciated paras 28 & 29 of the judgements contained in AIR 1965 SC (Supra) wherein it was observed as follows:

Para 28: The other ground of objection that the findings are inconsistent really proceeds on an error in appreciating the basis differences between the causes of action and right to relief in suits for passing off and for infringement of a registered trade mark and in equating the essentials of a passing off action with those in respect of an action complaining of an infringement of a registered trade mark. We have already pointed out that the suit by the respondent complained both of an invasion of a statutory right u/s 21 in respect of a registered trade mark and also of a passing off by the use of the same mark. The finding in favour of the appellant to which the learned Counsel drew our attention was based upon dissimilarity of the packing in which the goods of the two parties were vended, the difference in the physical appearance of the two packets by reason of the variation in their colour and other features and their general get up together with the circumstance that the name and address of the manufactory of the appellant was prominently displayed on his packets and these features were all set out for negating the respondent's claim that the appellant had passed off his goods as those of the respondent. These matters which are of the essence of the cause of action for relief on the ground of passing off play but a limited role in an action for infringement of a registered trade mark by the registered proprietor who has a statutory right to that mark and who has a statutory remedy in the event of the use by another of that mark or a colourable imitation thereof.

While an action for passing off is a Common Law remedy being in substance an action for deceit, that is, a passing off by a persons of his own goods as those of another, that is, not the gist of an action for infringement. The action for infringement is a statutory remedy conferred on the registered proprietor of a registered trade mark for the vindication of "the exclusive right to the use of the trade mark in relation to those goods" (Vide Section 21 of the Act). The use by the defendant of the trade mark of the plaintiff is not essential in an action for passing off, but is the sine qua non in the case of an action for infringement. No doubt, where the evidence in respect of passing off consists merely of the colourable use of a registered trade mark, the essential features of both the actions might coincide in the sense that what would be a colourable imitation of a trade mark in a passing off action would also be such in an action for infringement of the same trade mark. But there the correspondence between the two ceases. In an action for infringement, the plaintiff must, no doubt, make out that the use of the defendant's mark is likely to deceive, but where the similarity between the plaintiff's and the defendant's mark is so close either visually, phonetically or otherwise and the court reaches the conclusion that there is an imitation, no further evidence is required to establish that the plaintiff's rights are violated. Expressed in another way, if the essential features of the trade mark of the plaintiff have been adopted by the defendant, the fact that the get

up, packing and other writing or marks on the goods or on the packets in which he offers his goods for sale show marked differences, or indicate clearly a trade origin difference from that of the registered proprietor of the mark would be immaterial whereas in the case of passing off, the defendant may escape liability if he can show that the added matter is sufficient to distinguish his goods from that of the plaintiff.

Para 29: When once the use by the defendant of the mark which is claimed to infringe the plaintiff's mark is shown to be in the course of trade, the question whether there has been an infringement is to be decided by comparison of the two marks. Where the two marks are identical no further questions arise; for then the infringement is made out. When the two marks are not identical, the plaintiff would have to establish that the mark used by the defendant so nearly resembles the plaintiff's registered trade mark as is likely to deceive or cause confusion and in relation to goods in respect of which it is registered. (Vide Section 21). A point has sometimes been raised as to whether the words "or cause confusion" introduce any element which is not already covered by the words "likely to deceive" and it has some time been answered by saying that it is merely an extension of the earlier test and does not add very materially to the concept indicated by the earlier words "likely to deceive". But this apart, as the question arises in an action for infringement the onus would be on the plaintiff to establish that the trade mark used by the defendant in the course of trade in the goods in respect of which his mark is registered, is deceptively similar. This has necessarily to be ascertained by a comparison of the two marks- the degree of resemblance which is necessary to exist to cause deception not being capable of definition by lay down objective standards. The persons who would be deceived are, of course, the purchasers of the goods and it is the likelihood of their being deceived that is the subject of consideration. The resemblance may be phonetic, visual or in the basic idea represented by the plaintiff's mark. The purpose of the comparison is for determining whether the essential features of the plaintiff's trade mark are to be found in that used by the defendant. The identification of the essential features of the mark is in essence a question of fact and depends on the judgment of the Court based on the evidence led before it as regards the usage of the trade. It should, however, be borne in mind that the object of the enquiry in ultimate analysis is whether the mark used by the defendant as a whole is deceptively similar to that of the registered mark of the plaintiff.

24. This Court has taken note of another judgment rendered by the Apex Court. It has been observed in paras 4 & 5 in *Commissioner of Income Tax, Uttar Pradesh and Others Vs. Jawahar Lal Rastogi*, as follows:

Para 4 "The distinction between an infringement action and a passing off action is important. Apart from the question as to the nature of trade mark the issue in an infringement action is quite different from the issue in a passing off action. In a passing off action the issue is as follows:

"Is the defendant selling goods so marked as to be designed or calculated to lead

purchasers to believe that they are the plaintiffs' goods?

Para5. But in an infringement action the issue is as follows;

Is the defendant using a mark which is the same as or which is a colourable imitation of the plaintiff's registered trade mark

It very often happens that although the defendant is not using the trade mark of the plaintiff, the get up of the defendant's goods may be so much like the plaintiff's that a clear case of passing off would be proved. It is on the contrary conceivable that although the defendant may be using the plaintiff's mark the get up of the defendant's goods may be so different from the get up of the plaintiff's goods and the prices also may be so different that there would be no probability of deception of the public. Nevertheless, in an action on the trade mark, that is to say, in an infringement action, an injunction would issue as soon as it is proved that the defendant is improperly using the plaintiff's mark.

25. The Apex Court has been pleased to observe in paras 8 & 9 in a case reported in Parle Products (P) Ltd. Vs. J.P. and Co., Mysore, as follows:

Para8:. ...It would be too much to expect that persons dealing with trade marked goods, and relying as they frequently do, upon marks, should be able to remember the exact details of the marks upon the goods with which they are in the habit of dealing. Marks are remembered rather by general impressions or by some significant detail than by any photographic recollection of the whole .Moreover, variations in detail might well be supposed by customers to have been made by the owners of the trade mark they are already acquainted with for reasons of their own."

Para9. ...After all, an ordinary purchaser is not gifted with the power of observation of a Sherlock Holms. We have, therefore, no doubt that the defendants' wrapper is deceptively similar to the plaintiffs' which was registered. We do not think it necessary to refer to the decisions referred to at the Bar as in our view each one will have to be judged on its own natures and it would be of no use to note on how many points there are similarity and in how many other there was absence of it.

26. In comparing these two trade mark labels , this Court is also of the opinion that the respondent firm M/s Manglore was registered proprietor of the two aforementioned labels of trade mark. It has statutory right to use that trade mark, i.e., namely 501 on its Bidis. The trial court has rightly come to the conclusion that the trade mark used by the appellant firm at Jhansi was in fact imitation of registered trade mark of the plaintiff respondent. It was a case of infringement of a statutory right of M/s Manglore which had exclusive right to use that trade mark in relation to the goods, i.e., Bidi manufactured by it.

27. This Court has also perused the labels, top seal etc. used by the contesting parties. The trial court was right in observing in the impugned judgment as follows:

It is well established that it is not superficial differences or differences in detail that matter but that the question has to be determined bearing in mind the essential features of the two marks. In doing so the points for consideration are not the simple points of difference which could be discovered by careful scrutiny of the two marks kept side by side. The real object of the investigation is to discover what would be the totality of the impression on the minds of the probable class of customers with average intelligence and average memory subject nevertheless to the common infirmities of human memory. Most significant and eye catching feature of plaintiff's trade mark is numeral 501. The defendant has used the same numeral on his labels. The defendant is thus using the identical basic feature of the plaintiff's trade mark.

28. This Court has also considered the total material placed on record. After hearing the arguments of the parties, this Court finds no infirmity in the judgement and order passed by the learned Addl. District Judge in its judgment rendered on 21.12.1982. All the findings and conclusions recorded by the court below are just, legal proper and valid. The trial court has correctly decided the suit brought before it by the Mysore firm. It has rightly been held that the defendant's trade mark was deceptively similar to the trade mark used by the plaintiff and the defendant had infringed the plaintiff's trade mark. The trial court has rightly permanently injuncted the respondents Jhansi firm (appellant herein) to use the registered trade mark labels on the packets of Bidis manufactured and sold by respondent firm. Respondent's case is squarely covered by the judgements cited by Sri Himanshu Kane, advocate. Interestingly paras 8 & 9 of the judgement in Parle Products (Supra) cited by Sri K.N. Saxena , advocate appearing for the appellant and quoted above supports the Mysore's firm, plaintiff respondent's case. These paras have also been taken note by this Court.

29. In view of the above discussion, I find no merit in the appeal. Accordingly, the appeal is dismissed.