
(1974) 05 DEL CK 0014

In the Delhi High Court

Case No : Regular First Appeal No. 388 of 1969

Bawa Masala Company

APPELLANT

Vs

Gulzari Lal Lajpat Rai

RESPONDENT

Date of Decision : 27-05-1974

Acts Referred:

Citation : (1975) 11 DLT 270

Hon'ble Judges : Prakash Narain, J; Narain Andley, J

Bench : Division Bench

Advocate : Anoop Singh and N.K. Anand, for the Appellant;

Judgement

Prakash Narain, J.

(1) The appellant/plaintiff brought an action against the respondent/defendant for infringement of a registered trade mark and passing off. It was prayed that the respondent be restrained by means of a permanent injunction from infringing the registered trade mark of the appellant either by itself or through its servants, agents etc; respondent be restrained by means of a perpetual injunction from using the registered mark of the appellant or any other mark deceptively similar to the said registered mark; render accounts to the appellant of the profits earned by the respondent by sale of goods under the alleged offending mark and pay the amount found due on such rendition of accounts to the appellant; the respondent should deliver unto the appellant for destruction all cartons bearing the infringing trademark, all blocks, dies, printed matter, stationery bearing the offending mark; and pay costs of the suit filed by the appellant against the respondent.

(2) The claim of the appellant as set out in the plaint was that it was a registered partnership carrying on business in spices and chillies etc. Bawa Sardar Singh was one of the partners and had signed and verified the plaint in the suit filed on behalf of the firm. The respondent was also carrying on business in spices, chillies etc. in Khari Baoli, Delhi. The appellant was a registered partnership of

trademark bearing No. 227794 with effect from March 16, 1965 in class 30. A copy of the trade mark as registered as well as the registration certificate was filed in court. According to the plaint, however, "the main feature of the plaintiff's said trade mark is the device of chef carrying a bowl in his hands. There are other characteristic features and get up of the multi-coloured mark, which attract the attention of the mark and make it a distinctive mark. "The mark is for "Meat Masala"."

(3) It was claimed that the appellant was selling its goods in packets bearing the registered trade mark since January, 1965 in large quantities in India and was also exporting such packets of "Meat Masala". The "Meat Masala" thus sold by the appellant "under the above said mark have acquired enviable reputation in trade and the public". It was further stated in the plaint that the purchasers of the appellant's goods include both literate and illiterate persons, women and children who recognise the goods by the distinctive device of the chef displayed on the carton and referred to in paragraph 3 of the plaint which has been extracted above. Extensive advertisement through newspapers, cinema slides, cinema reels, hand carts and hand bills was claimed to have been made. In February, 1965, it was alleged, the appellant came to know that the respondent had started selling "Meat Masala" in cartons, specimen of which was filed, deceptively similar in its main features to the appellant's registered trade mark. It was further contended that "the device of the chef has been copied along (with) other distinctive parts and features, words and colour scheme of the trade-mark". (The word "with" has been added as otherwise the sentence in paragraph 6 of the plaint would not be intelligible). The mark adopted by the respondent was claimed to be an infringement of the registered trade mark of the appellant and the selling of goods by the respondent in cartons bearing the mark complained of was claimed to be passing off of its goods for the goods of the appellant in spite of having full knowledge of the registered trade mark of the appellant. A notice dated February 29, 1968 was, accordingly, served by the appellant on the respondent to desist from the alleged infringement and act of passing off but to no avail.

(4) The suit was resisted by the respondent. It was denied that the respondent had, in any way, infringed the registered trade mark of the appellant or that the mark adopted by the respondent was either identical with or deceptively similar to the mark of the appellant. Receipt of notice" issued by the appellant was admitted but it was contended that the notice was duly replied to deny the claim of the appellant. It was further pleaded that the device of the chef claimed as a distinctive mark by the appellant was not available to the appellant. It was further pleaded that the device of the chef claimed as a distinctive mark by the appellant was not available to the appellant in view of a disclaimer filed by it before the Registrar of Trade Marks at the time of the registration of the trade mark No. 227794. As such, the appellant had no exclusive right to use the device of a chef and further that this device of chef was common to the trade in respect of edibles. According to the respondent there was no similarity in the cartons in

which "Meat Masala" was sold by it and the appellant. The registration of the appellant-firm and Bawa Sardar Singh being one of its partners and so, entitled to file the suit in the firm name was also denied.

(5) In the replication filed on behalf of the appellant it was reiterated that it had exclusive right of using the device of the chef in the particular form in which it was used. What was now contended was that the respondent had substantially copied the device of the chef, colour scheme and get up of the appellant's trade mark. It was also alleged that the respondent had deliberately copied the appellant's trade-mark in all respects to make it as near as possible, similar to the appellant's mark the result being that the respondent's mark was deceptively similar to the trade mark of the appellant.

(6) On the pleadings of the parties the trial court settled the following issues:

1.Is the plaintiff firm duly registered under the Indian Partnership Act and the person suing is shown as a partner in Form A issued u/s 69 of the said Act? If not, to what effect? Onus objected to.

2.Is the plaintiff firm registered owner of the trade mark No. 227794 in respect of special meat masala with chef device? If so, has the defendant committed infringement of the plaintiff's registered trade mark?

3.Have the defendants so designed the labels and trade mark in respect of their products called Grover-Meat Masala so as to pass off their goods as those of the plaintiff's goods or are the defendants goods so marked and designed that they are likely to pass off as the goods of the plaintiff?

4.Are the plaintiffs entitled to rendition of accounts from the defendants in respect of their goods Grover Meat Masala as shown in Annexure X?

5.Relief.

(7) The trial court held that the appellant was a duly registered partnership firm and Bawa Sardar Singh was a partner of that firm who had validly filed the suit. There was no dispute that the appellant was the registered proprietor of trade mark No. 227794 but it was held that the device of the chef was not a part of the registered trade mark. After comparing the cartons of the appellant and the respondent and looking at the evidence produced the trial court dismissed the appellant's suit both in respect of infringement of trade mark as well as passing off. Aggrieved by the judgment and decree the appellant has filed the present appeal.

(8) Before us the only question that have been agitated are with regard to infringement of the trade mark claimed by the appellant and the alleged passing off by the respondent of its goods in the cartons complained of as the goods of the appellant. In other words the question to be decided is whether the carton of the respondent infringes the registered trade mark of the appellant and whether the cartons in which the respondent markets its goods can be passed off as

containing goods marketed by the appellant.

(9) There is no dispute that the appellant is the proprietor of the registered trade mark No. 227794. The question is what is that that is registered. The certificate of registration is Exhibit Public Witness 8/2. According to it the reproduction of the mark, as annexed to the application for registration, was registered as the trade mark of the appellant with effect from March 16, 1965 in class 30 subject to the following disclaimer:-

"REGISTRATION of this Trade Mark shall give no right to the exclusive use of the device of a chef except substantially as shown in the representation annexed hereto."

(10) In the representation annexed to this registration as well as disclaimer a chef is shown carrying a bowl in his hand containing some articles. The attachment is in black and white and not in any particular colour scheme. There is no mention of any colour scheme in the certificate. It is claimed by the appellant that this chef is carrying a bowl of meat inasmuch as the spices sold in the carton with this mark are meant for preparation of meat dishes. The carton which is actually used by the appellant to market its goods is similar to Exhibit P.1. It is identical to the black and white replica attached to the registration certificate except for the fact that Exhibit P. 1 has various colours while the annexure to registration certificate is in black and white.

(11) Looking at the registration certificate as well as Exhibit P.1 we are of the opinion that as far as the action for infringement is concerned the contention of the appellant made in paragraph 3 of the plaint is baseless and that the appellant cannot be heard to say that the main feature of its registered trade mark is a device of the chef carrying a bowl in his hands. It seems the appellant was suffering under some misconception that the device of the chef on the carton was its registered trade mark. This is evident from the averment made in paragraph 3 of the plaint. Indeed, Bawa Jagmohan Singh, a partner of the appellant-firm, appearing as Public Witness 8, maintained in his deposition in court that the appellant had the exclusive right to the device of a chef. When cross-examined on this question, he asserted: "In fact we claim right to its exclusive use and we get such right by the registration of the trade mark". The contention made in the plaint as well as the deposition in court cannot be accepted in the face of the disclaimer incorporated in the registration certificate. Exhibit P.W. 8/2.

(12) Mr. Anoop Singh, learned counsel for the appellant, concedes that the appellant is bound by the -disclaimer but asserts that the get up of the respondent's carton is such that despite the disclaimer the device adopted by the respondent would amount to infringement or at least passing off because the device of chef adopted by the respondent is substantially as shown in the carton of the appellant. The respondent's carton shows two chefs instead of one, wearing somewhat different type of headgear and one of them holding a plate

with some edibles on it looking like a dressed chicken, duck or a turkey. It has been urged that this device is substantially the same as that of the appellant showing a single chef carrying a bowl in his hands.

(13) Before we examine the relevant merits of the above contention it may be advantageous to notice a few provisions of the Trade and Merchandise Marks Act, 1958. Clause (V) of sub-section (1) of Section 2 defines a trade mark to mean :

"(I)in relation to Chapter X (other than section 81), a registered trade mark or a mark used in relation to goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods and some person having the right as proprietor to use the mark; and

(II)in relation to the other provisions of this Act, a mark used or proposed to be used in relation to goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods and some person, having the right, either as proprietor or as registered user, to use the mark whether with or without any indication of the identify, of that person, and includes a certification trade mark registered as such under the provisions of Chapter VIII;"

Clause (c) of sub-section (1) of Section 2 lays down .

"(C)"certification trade mark" means a mark adapted in relation to any goods to distinguish in the course of trade, goods certified by any person in respect of origin, material, mode of manufacture, quality, accuracy or other characteristic, from goods not so certified and registrable as such under the provisions of Chapter VIII in respect of those goods in the, name, as proprietor of the certification trade mark, of that person;"

Clause (b) of sub-section (1) of Section 2 lays down:

"(D)"deceptively similar".-A mark shall be deemed to be deceptively similar to another mark if it so nearly resembles that other mark as to be likely to deceive or cause confusion".

Clauses (p), (q) and (r) of sub-section (1) of sub-Section 2 read as under:

"(P)"registered" (with its grammatical variations) means registered under this Act;

(Q)"registered proprietor", in relation to a trade mark means the person for the time being entered in the register as proprietor of the trade mark;

(R)"registered trade mark" means a trade mark which is actually on the register;"

A trade-mark is registered under the provisions of Sections 18 and 23 of the Act subject to any disclaimer provided for by Section 17 which reads as under:-

"17.If trade mark-

(A)contains any part-

(I)which is not the subject of a separate application by the proprietor for registration as a trade mark; or

(II)which is not separately registered by the proprietor as a trade mark; or

(B)contains any matter which is common to the trade or is otherwise of a non-distinctive character the tribunal, in deciding whether the trade mark shall be entered or shall remain on the register, may require, as a condition of its being on the register, that the proprietor shall either disclaim any right to the exclusive use of such part or of all or any portion of such matter, as the case may be, to the exclusive use of which the tribunal holds him not to be entitled, or make such other disclaimer as the tribunal may consider necessary for the purpose of defining the rights of the proprietor under the registration:

PROVIDED that no disclaimer shall affect any rights of the proprietor of a trade mark except such as arise out of the registration of the trade mark in respect of which the disclaimer is made".

(14) In support of his contention that the device or get up of the carton of the respondent is deceptively similar to that of the appellant, it examined several witnesses. Ajit Singh, Public Witness 1, was the artist who designed the label of the barton Exhibit P. 1 in December. 1964. He claimed it to be his creation and deposed that the device of chef was also his creation. In cross-examination he admitted that the dress shown in the drawing as worn by the chef was a common type of dress. He claimed originality only in the light and shade of the drawing. When asked to compare the carton of the appellant and the respondent he admitted that some of the colours used in the two cartons were the same but in the carton of the respondent two chefs were shown and the dish in Exhibit D. 1 was different from the dish shown in Exhibit P. 1. He admitted that the monogram in Exhibit P. 1 did not exist in Exhibit D. 1. The names of the firms were also admitted by him to be different.

(15) Gurcharan Singh, Public Witness 2, only deposed that his firm had been purchasing Meat Masala from the appellant packed in cartons like Exhibit P. 1 for 2 1/2 years for sale by his firm as Behra Chhap (Waiter Brand). His sale was to the tune of Rs. 100 to Rs. 125 per month with each packet being sold at the rate of Rs. 1.70 p. This witness had not produced any records or books of his firm nor any orders placed on his firm. According to him the appellant's goods" were sold because there was "a photo of Behra but the words Behra chhap are not written on these packets". When shown the respondent's carton. Exhibit D.1, he admitted that the colours in Exhibit D. 1 were different and that it mentioned "Grover Meat Masala" and had two chefs on it. According to this witness of the appellant the designs of the two cartons were different.

(16) Gurbakhsh Singh, Public Witness 3, deposed that his firm exported general goods to United Kingdom, West Germany, Italy etc. His firm exported spices manufactured by appellant since August, 1967 including Meat Masala in cartons like Exhibit P. 1. He deposed to exporting large quantities of such goods and

identified the appellant's goods as Waiter Brant. According to him that is how the goods were advertised. When cross-examined he could not produce any order received from abroad demanding waiter brand goods. On being shown respondent's carton, Exhibit D. 1, this witness was of the opinion that the dish shown in Exhibit D. I was the same as in Exhibit P. 1. Later he modified his testimony to say that there was similarity in both the dishes because "both show similar type of chicken". He admitted that Exhibit D. I shows device of two chefs and the goods were stated to be "Grover Meat Masala". Further confronted, he admitted that the colours on Exhibit P. I and Exhibit D. I were not same.

(17) Gurbachan Singh, Public Witness 4, stated that he was carrying on business in Simla and had been selling packets of Meat Masala like Exhibit P. I for three years. According to him the purchasers asked for "waiter brand" Meat Masala and purchased the packet by seeing the device of the chef thereon. In cross-examination he admitted that the dish shown in Exhibit D. I was different "from the dish shown in Exhibit P. I, that Exhibit D. I showed two behares and the name of defendant-firm but maintained that the colours were similar.

(18) Daijit Singh Public Witness 6, deposed : 1 cannot tell exactly but we are selling Meat Masala in packets like Exhibit P. I for the last three or four years. The purchasers come and ask for "Behra brand Meat Masala". He had never seen a carton like that of the defendant but maintained that the colours of the appellant's and the respondent's cartons were the same.

(19) Joginder Singh, Public Witness 7, deposed that his firm had been purchasing meat masala from the appellant in cartons like Exhibit P. I for the last two or three years and -that this commodity had a good sale. According to him the literate people asked for "Bawa Meat Masala" and illiterate people asked for "Behra Chhap Meat Masala". In cross-examination he had to admit that his total sale of appellant's goods during the year 1966-67 was Rs. 288.54. When asked to see the carton of the respondent Exhibit D. I, he maintained that both of them had the same colour scheme although the respondent's carton had the device of two chefs and did not have the BMC monogram as shown on the , appellant's carton with the word trade mark.

(20) Jagmohan Singh, Public Witness 8, is a partner of the appellant's firm and reiterated the appellant's case as laid in the plaint. We have already noticed his testimony , this aspect earlier.

(21) Sardar Singh, Public Witness 9, a partner of the appellant-firm only proved his signatures and verification on the plaint as well as the power of attorney in favor of the counsel. According to him, the sale of Meat Masala by the respondent in the alleged infringing cartons had affected his business, according to what was told to him by his son.

(22) It is not necessary to deal with the respondent's evidence because in our opinion, the oral evidence produced by the appellant "completely fails to prove the infringement of a registered trade mark. The principles governing

infringement are now well-settled.

(23) Section 29(1) of the Trade and Merchandise Marks Act, 1958 lays down that " a registered trade mark is infringed by a person who not being the registered proprietor of the trade mark or a registered user thereof using by way of permitted use, uses in the course of trade a 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 a trade mark". There would be no difficulty in cases where the infringing mark is identical to the registered mark. The difficulty arises only where the mark complained of is alleged to be deceptively similar to the registered trade mark. It is not the appellant's case that the respondent's mark is identical. The contention is that it is deceptively similar to the registered trade mark and has, indeed, been adopted from the appellant's mark.

(24) In *The Registrar of Trade Marks Vs. Ashok Chandra Rakhit Ltd.*, the Supreme Court was concerned with an appeal from the judgment and order of the Calcutta High Court reversing the decision of the Registrar of Trade Marks whereby the Registrar had rectified the register by inserting a disclaimer in respect of a particular registered trade mark. This decision was relied upon by Mr. Anoop Singh to contend that despite the disclaimer in his case he is still entitled to claim the device of chef as forming part of his registered trade mark and the device of chefs used by the respondent is an infringement of the appellant's proprietary rights. The argument cannot be accepted. Indeed, as was observed by the Supreme Court in this decision the real purpose of requiring a disclaimer, and "for the matter of that the giving of a disclaimer, is to define the rights of the proprietor under the registration so as to minimise, even if it cannot wholly eliminate, the possibility of extravagant and unauthorised claims being made on the score of registration of the trade marks. In other words, disclaimer is only for the purpose of the Act and if infringement is claimed, the disclaimer will have to be looked into. It may not affect the rights of the proprietor in passing off action but where infringement of the registration is claimed, the disclaimer part of the mark has to be ignored. No authority could be cited in support of the observations in *Dr. Venkateswaran's Law of Trade and Merchandise Marks* to the following effect :-

" WHERE the two marks have both in common a part which is disclaimed as being non-distinctive by the respective owners of the marks, the comparison must nevertheless be made of each mark as a whole without leaving out the disclaimed matter, but as already stated, greater attention should be paid to the non-disclaimed and distinguishing parts of each of the marks."

(25) In *Kaviraj Pandit Durga Dutt Sharma Vs. Navaratna Pharmaceutical Laboratories*, the Supreme Court inter alia, observed :-

"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 different from that of the registered proprietor of the mark would be, immaterial; where as 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 those of the plaintiff."

(26) 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 question 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 S. 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 times 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 not being capable of definition by laying 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 prentice ,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."

(27) In a bench of this Court after a review of substantial case law laid down the following principles :

"IN an action for an alleged infringement of a registered trade mark, it has first to be seen whether the impugned mark of the defendant is identical with the registered mark of the plaintiff. If the mark is found to be identical, no further question arises, and it has to be held that there was infringement. If the mark of the defendant is not identical, it has to be seen whether the mark of the defendant is deceptively similar in the sense that it is likely to deceive or cause confusion in relation to goods in respect of which the plaintiff got his mark registered. For that purpose, the two marks have to be compared, "not by placing them side by side, but by asking itself whether having due regard to relevant surrounding circumstances, the defendant's mark as used is similar to the plaintiff's mark as it would be remembered by persons possessed of an average memory with its usual imperfections", and it has then to be determined whether the defendant's mark is likely to deceive or cause confusion. For such determination, the distinguishing or essential features (and not every detail) of the two marks and the main idea if any, underlying the two marks which a - purchaser of average intelligence and imperfect memory would retain in his mind after seeing the marks, have to be noticed. It has then to be seen whether they are broadly the same or there is an overall similarity or resemblance, and whether the resemblance or similarity is such that there is a reasonable probability of deception or confusion. In doing so, the approach has to be from the point of view of purchaser of average intelligence and imperfect memory or recollection, and not an ignorant, . thoughtless and incautious purchaser. In an action for passing off, the test for deceptive similarity, i.e. as to the likelihood of confusion or deception arising from similarity of the marks or the get up, packing, etc. is practically the same as in an action for infringement , except that it has also to be seen whether the defendant's mark or the get up, packing etc. of his - goods has besides the essential features of the plaintiff's marks or goods, any additional features which distinguish it from the plaintiff's mark or goods, and whether it is likely or reasonably probable that the defendant can pass off or reasonably probable that the defendant can pass off his goods as those of the plaintiff to a purchaser of average intelligence and imperfect memory or recollection."

(28) It was held that :

" TO decide the question as to whether the plaintiffs' right to a trade mark has been infringed in a particular case, the approach must not be that in an action for passing off goods of the defendant as and for those of the plaintiff. In order to come to the conclusion whether one mark is deceptively similar to another the broad and essential features of the two are to be considered. "They should not be placed side by side to find out if there are any differences in the design and if

so, whether they are of such character as to prevent one design from being mistaken for the other. It would be enough if the impugned mark bears such an overall similarity to the registered mark as would be likely to mislead a person usually dealing with one to accept the other if offered to him. It is of no use to note on how many points there is similarity and in how many others there is absence of it."

(29) In *Arthur Fairest Ltd.'s Application to Register a Trade, Mark, 1951* (68) R.P.C. 197, it was observed that any one of the integers may become a characteristic feature of a particular mark and that despite this disclaimer regarding that aspect due regard has to be given to the get up by the particular integer.

(30) The above cases had been relied upon by the appellant. The respondent had also relied on several cases which may also be conveniently noticed at this very stage to appreciate the exposition of law.

(31) In the House of Lords while considering an appeal in an action for infringement of trade mark observed that the respondents label, though resembling in some respects that of the appellants, had many points of dissimilarity and was a "stock label" in common use in the trade on cheaper brandies for many years. The Court compared to two labels and came to the conclusion that the respondent's label was not likely to mislead any person of ordinary diligence. Lord Loreburn, L.C. during the course of his speech observed : "It would not be sufficient to call a witness to say that there is little difference between them. It would not help if twenty witnesses were called to say that in their opinion there was imitation. I must act upon my own opinion, and I agree with the conclusion arrived at by the Court of Appeal". Lord Macnaghten in considering the complaint posed himself the question:

" IS the defendant passing off his goods as the goods of the plaintiff ?"" He then observed : "I rather think you may be beginning at the wrong end if you start by putting the marks or labels, that happen to be in controversy, side by side, and then, at once and off hand, pick out points of resemblance and points of difference or jump to a conclusion at the first glance as the learned Master of the Rolls declares that he did. The eye no doubt is generally the best test, and you will have to come to a comparison of the marks or labels sooner or later. Generally, but not always, the comparison is enough. But it does not of itself necessarily present the real question. And I cannot help thinking that if the learned Judge, before making up his mind on the view, . so to speak, had "permitted himself to be informed that much of that which caught his eye was no more than ornamentation and embellishment, common to the trade, the case would not have survived the first hearing.

(32) I ask then-Is the defendant passing off his goods as the plaintiffs' goods ? It is not suggested that he has ever done anything of the kind. It is not suggested that he has ever tried to do so, unless a comparison of the two labels

is enough to evict him. It is not pretended that any man or any woman has ever been deceived by the Defendant or his servants, or been induced to take the Defendant's brandy when the call was for Hennessy. But it is said deception is possible, and indeed probable. How is it possible ? It does not appear that the Defendant has ever sold an entire bottle except to th(r) gentleman who is Hennessy's inspector, and there was no deception about that sale. Then it is said that the bottles, some Hennessy's and some not, stand in a row" on a shelf at a convenient distance, and when a customer asks for Hennessy the barman, turning round, might serve him out of the wrong bottle. But the label would not be in fault in such a case. The trick might be done just as easily if there were no label on the bottle at all. That would be the dishonesty of the barman-his doing-his original sin-not the mischievous work of the label.

"THENI ask-Is the defendant's label so contrived as to lead people to believe that it represents the plaintiffs' goods ? Is that likely ? It is clear that the Defendant's label has not been copied from Hennessy's. It has none of the characteristics or essential particulars of the plaintiffs' Trade Mark, which Hennessy's tell the public to look for..."

(33) In the House of Lords observed that the infringement of trade mark being negated by the evidence of persons from the limited class of people to whom the goods were tendered that none of them would be deceived, it would not take the contrary view. As to passing off, that, although when an intention to deceive is proved, no court would be astute in concluding that a dishonest defendant had been unsuccessful in his fraudulent design and yet that such a charge ought to be expressly pleaded and also proved by evidence. In other words, what was held was that when a person comes forward and asks the court to interfere because somebody is stealing or is about to steal his trade, he must prove that persons have actually been "deceived or that what the defendant is doing is calculated to deceive.

(34) In the Court of Appeal in England was considering an action to restrain alleged passing off on similarity of names and get up of the bottles of medicated wine. The basis of the decision was to ask the question as to what is thereon which the court can say that there is any deception at all.

(35) In also the Court of Appeal was concerned with a passing off action. The Court asked itself a question: "How are the defendants said to have represented those were the plaintiffs' goods ?"

(36) In the Court of Appeal in an action for passing off observed that if the differences are much more obvious than the resemblances and the resemblances are general or superficial it cannot be said that there was any passing off.

(37) In the Court of Chancery in an action for infringement of trade mark observed that if there is any rank case of dishonesty, and where you see dishonesty, then even though the similarity was less than it was in that case, you ought to pay greater attention to items of similarity and less to items of

dissimilarity.

(38) It was held that where confusion between two labels was probable and that, while no lack of bona fides was to be attributed to the opposite party) the design and adoption of the defendant's label was to be regarded as deliberate with the object of occasioning confusion with the plaintiffs' label.

(39) It is not necessary to notice any further authorities cited by the parties. Suffice it to say that the principles that emerge from a consideration of all the cases cited before us as well as authoritative treatise, like Kerly's Law of Trade Marks and Trade Names, are :

(A)The plaintiff must prove infringement.

(B)The plaintiff must prove passing off by producing witnesses who have actually been deceived or that what the defendant is doing -is calculated to deceive.

(C)The disclaimer in a registration of trade mark has an important bearing inasmuch as the disclaimed portion of the mark has to be ignored while considering infringement.

(D)The plaintiff must prove that the defendant's mark is likely to deceive particularly vis-a-vis the essential features.

(E)In an action for passing off in spite of similarity in, essential features defendant may escape liability if he can show that the added matter is sufficient to distinguish his goods from those of the plaintiff.

(F)The question of infringement or passing off has to be decided by comparison of the two marks.

(G)Irrespective of what witnesses may say, it is ultimately the court which has to come to its own conclusion by seeing the marks in suit and decide whether an unwary purchaser is likely to be deceived. By unwary purchaser is not meant a negligent purchaser but a purchaser who uses due diligence and knows what he is going to purchase but may not have a very clear recollection of what he had purchased earlier or what had been advertised.

(H)If there is some specific mark which has been advertised or popularized which has to be seen in purchasing a party's goods then that would be the most essential feature to be considered in an action for infringement or even passing off.

(40) Applying these principles to the facts of the present case we find that the appellant's trade mark does not satisfy any of the tests formulated by us. The appellant's case as laid in the plaint as well as in the testimony of Jagmohan Singh, a partner of the appellant's firm, was that the main features of its trade mark were the device of the chef which, it was claimed, had been copied along with other distinctive parts and features, words and colour scheme of the trade mark.

(41) Comparing the two cartons we find that the contention has no force. The appellant's carton has a white background on all the four sides. The front and the back sides of the carton have a sky blue hexagon at the top portion in which the words "Special Meat Masala" are written on one side in Hindi and on the other in English with the letter "R" in a small circle. Beneath this sky blue hexagon is the device of a chef or bearer whose face and hands are in pink and yellow colours while the dress he is wearing is white shaded in places in grey colour. In his hands this figure is holding a plate with a bowl in it with some steaming edibles. In the right-hand bottom corner on both these sides is a red "hexagon within which is a black square with the letters B.M.C. and the words "Regd." written in blue colour. Underneath the words "Regd." is a scroll in white on which are printed in black letterings the words "trade mark". It is this monogram which has been emphasised in the advertisements issued by the appellant. On the two other sides of the appellant's carton the words "Special Meat Masala" are written in various other Indian languages. These words are written in black over pink background, in blue over a black background on both the sides. Apart from the frames in which the words "Special Meat Masala" are written in Indian languages there is a grey portion in which the name of the company and ingredients are written on one side and on the other side is written that the contents are product of Bawa Masala Company situate at 1410, Tilak Bazar, Delhi-6 (India).

(42) The respondent's carton is of the same size as that of the appellant. On one side of it we find a white chequered background with the words "Grover Meat Masala" written in a big circle having a mauve background. The words "Meat Masala" are written in English in yellow colour with black edging while the word "Grover" is written in flowing script in white over black background. Beneath that is the device of two chefs whose faces and hands are shown in pink while dress is in white and grey. One of the chefs is holding a bowl with a steaming fowl or something like it while the other chef is smiling and has one hand raised with the fore-finger and the thumb touching each other. On the opposite side on a similar white chequered background we find an oblong mauve portion covering 3/4 of the size of the carton with the words "Grover Meat Masala" scribed therein. The words "Meat Masala" are in Hindi script written in yellow colour while the word "Grover" is in black Hindi script. At the bottom is stated "Grover Company, Gali Batashan, Delhi" on black background in white Hindi Script. On the former side the name of the company and its address is given over black background in white English script. On the sides there is a deep pink rectangle with rounded top and bottom on white chequered background cut into half by a square in black. In the top portions thus formed on both sides are written "Grover Meat Masala" in various Indian languages while in the bottom pink portion on one side is written the name and the address of the manufacturer while on the other side a recommendation to use the mala for meat preparations is printed.

(43) In our opinion the get up of the two cartons is dissimilar and so there is no infringement of the trade mark.

(44) With regard to passing off also we are of the opinion that there are certain distinctive features between the two cartons and the respondent's carton cannot be said to be deceptively similar to that of the appellant. No purchaser, in our view, could be deceived into buying the respondent's product believing the same to be the product of the appellant. Indeed, the appellant has not produced a single customer to depose that he was ever misled into purchasing respondent's product regarding the same to be that of the appellant. The advertisements of the appellant in newspapers lay more stress on the monogram BMC of the appellant than the get up of the carton or the device of the chef. There is no evidence at all to justify the conclusion that the carton of the respondent was copied from the carton of the appellant. The colour scheme, in our view is also dissimilar. The only similarity that we find is in the writings in various scripts but those writings cannot constitute characteristics or essential particular or features.

(45) The view that we have taken above makes it wholly unnecessary for us to comment upon the extent of sales and advertisements proved by the appellant on the record. We may, however, observe that but for the bold statement of a partner of the appellant, there is nothing to show that the introduction of the carton of the respondent has, in any way, diminished the sales of the appellant.

(46) The result is that we dismiss the appeal with costs. Counsel's fee Rs. 350.00.