

(1909) 12 CAL CK 0002
In the Calcutta High Court

Jawala Prasad and Others

APPELLANT

Vs

Munna Lal Serowjee

RESPONDENT

Date of Decision : 14-12-1909

Acts Referred:

Citation : (1909) 12 CAL CK 0002

Judgement

Lawrence Jenkins, C.J.—This appeal arises out of a suit brought by the plaintiff to establish his exclusive right to a mark, with consequential relief. The plaintiff is one Munna Lal Serowjee, who carries on business in Calcutta as a ghee merchant in the name, style and firm of Munna Lal Dwarkadas. The defendants are Jawala Prasad, Mawaram and Copal Das, who carry on business as dealers in ghee under the name and style of Jawala Prasad Mawaram and Buktear Mai Mody, who carries on business in Calcutta as a dealer and commission agent in ghee. Since the institution of this appeal one of the defendants has died, and Mr. Mitter, the appeared on his behalf, has dropped the appeal so far as he is concerned.

2. It is alleged in the plaint, and established by the evidence, that for a considerable time, that is to say for twelve years, the plaintiff's ghee has been sold in Calcutta and foreign markets, tinned in canisters bearing his embossed mark, which consists of a flower on a stem with leaves, the flower being of the shape of an ellipse with an indented circumference, having within its circumference the initials of the plaintiff's firm M.D.S. The infringement is said to consist in the fact that the defendants used on their canisters, of ghee, intended for sale and export in the same markets, a colourable imitation of the plaintiff's mark and it is alleged, that the use by the defendants of this mark is calculated to deceive, as it has deceived, by inducing purchasers to buy the defendants' goods in the belief that they are buying those of the plaintiff. Though the plaintiff's mark has been described as a registered trade-mark, there is no system of registration here which gives a plaintiff a statutory title, and, therefore, it is necessary for the plaintiff to establish that the mark, in respect of which he makes this claim, has acquired a reputation in connection with the

goods that he sells. A trade-mark means a mark used to denote that goods are of the manufacture or merchandise of a particular individual. That is the office of a trade-mark, and much of the difficulty in the case has arisen from the fact that evidence has not been directed to establishing that particular point. However, Mr. Justice Fletcher has come to a clear and distinct finding on the evidence before him in these terms: I have come," he says "to the evidence that canisters containing ghee marked with the plaintiff's trade-mark have come to be recognised in the market as ghee prepared by the plaintiff," and so an injunction was granted by him restraining the defendant from selling, or offering for sale, ghee not prepared or manufactured by the plaintiff in canisters having embossed thereon a flower on a stem with leaves, the flower being in the shape of an ellipse with an indented circumference, without clearly distinguishing such ghee from the plaintiff's ghee." In this finding, and in the consequent injunction, there is this error that it assumed that the ghee was prepared by the plaintiff. This, admittedly, is not so. But it is contended on behalf of the plaintiff that though not prepared or manufactured by him, it is in fact selected and sold by him, and that contention is, I think, made good. The first question then that we have to determine is whether there is anything which supports the view that this particular mark used by the plaintiff on the canisters in which his ghee is tinned has come to denote in the market his ghee. We have the significant fact that from 1894 this mark has been claimed by the plaintiff as his own, and he has used that mark for the purposes of his trade in ghee. During the greater part of that time there has been no other mark of that character and that naturally leads to the conclusion that the plaintiff's ghee did become associated with the mark which he throughout used; and though the evidence is, as I have said, not carefully directed to the real point in issue, I think there is sufficient in the evidence to justify the distinct finding of the learned Judge that the trade-mark has come to be recognized in the market as indicating the ghee of the plaintiff. In this connection, too, one cannot but be impressed by the fact that the plaintiff's mark was known to the defendants, and also by the very significant circumstance that with the whole world of flowers to choose from, for some reason or other, the defendants have selected this particular form of conventional flower, and they have not come forward to explain how it was that this came about. In the circumstances, I hold with the learned Judge that not only did this mark denote in the market the ghee of the plaintiff, but that the defendants did deliberately adopt the plaintiff's trade-mark for their own purposes. Having come to that conclusion, it necessarily follows that the plaintiff is entitled to succeed in this suit. The remedy that has been awarded to him by the Court of first instance has been first of all an injunction; and, secondly, an enquiry as to damages. No special ground of appeal has been directed against this enquiry as to damages, and it was not suggested to us, in the opening of the appellants' case before us, that this enquiry was erroneous, except so far as the whole of the plaintiff's claim was misconceived. Mr. Mitter, however, proposed, in reply, to raise then, for the first, time, a question as to the propriety of this enquiry as to damages. But we could not allow that question to, be raised at that stage of this appeal,

bearing in mind the" grounds of appeal formulated for the consideration of the Court.

3. Though no specific objection was taken to the form of the injunction, I think it requires modification, because, as I have pointed out, it proceeds upon an assumption which cannot be sustained, that is, upon the assumption that the gheesold by the plaintiff was prepared or manufactured by him. That is not so; and accordingly there must be a variation introduced into the terms of the injunction so as to fit in with the facts as they actually are established, by substituting the words being ghee of" for the words "prepared or manufactured by." Then, again, the words ghee from the plaintiff's ghee" (after the words without clearly distinguishing such") are not correct, and the words canisters from those in which the plaintiff's ghee is contained" should be substituted for them.

4. The result then is that, with this variation, the decree must be confirmed with costs, the costs of the two abandoned applications will be costs in the appeal.

Woodroffe, J.

5. I agree that the appeal should be dismissed with costs. I think the action is maintainable, even though the plaintiff be not the manufacturer or selector of the goods, but is merely a vendor of them. The main point, however, which has been urged before us is this, that the claim is at variance with the evidence: what, it is said, the plaintiff claims is not the right to exclusive user of a flower, but to the exclusive user of the flower of a particular design which he registered in 1894. This, however, I may observe, was the claim that was made in the plaint, and it is in fact the right which has been protected by the decree.

6. It is further urged that the evidence, if believed, shows that the plaintiff's goods were recognised by the design of a flower alone (which was called phnl-marJea), and not by the particular design of a flower which the goods bear embossed on them, indicating the plaintiff's trade-mark, Exhibit A. I agree with the learned Chief Justice in thinking that the evidence has not been on this point very happily directed. But this particular design has been used since the year 1894, and I am satisfied that for the greater part of this period no other design of flower has been used by any one selling ghee. Therefore, if the plaintiff's goods were associated with the mark of a flower, as there was only one flower, the association must have been with the flower of the particular design which the plaintiff has adopted. I think it is sufficient to show, in the circumstances of this case, that an association has been established between the plaintiff's particular design of a flower and the goods sold thereunder.

7. There is further evidence, it has been noted, that the plaintiff's goods are known by this mark--evidence which, in my opinion, is none the less acceptable because reference is made merely to the design of a flower, and not to the particular distinctive marks of the plaintiff's design. It must be remembered in this connection that, when that evidence was given, the witnesses had before

them the particular exhibit, and I think it is reasonable to suppose that that evidence was given with reference to, and must be read in connection with, that exhibit. As to the similarity of the marks, this is transparent to the eye, and the doctrine of chances is all against coincidence and in favour of the conclusion that there has been, as the learned Judge has found, deliberate imitation. I do not consider, in the circumstances, that any direct evidence was necessary to establish that fact. It appears to me to be a legitimate conclusion from the evidence that is before us. Moreover, there is evidence that" unless the names are read, the marks are not distinguishable. It may be, as the learned Counsel for the appellants has pointed out, that some persons can read the Devnagri characters under the mark, which, he claims, distinguish his mark from that of the plaintiff. But it must be remembered that others cannot do so. The case cited, *Blackwell v. Crabb* (1867) 36 L.J. Ch. 504, must be taken in relation to the circumstances of that case and the country in which that judgment was pronounced. There it was an English name; and the mark was current in England, and naturally the name could be read and understood by everybody. But here the name is in Devnagri character, which is not readable by the greater portion of the public.

8. Apart from this, we have this outstanding fact that the actual design of the defendants' flower is almost exactly the same as the plaintiff's mark. Why is this similarity if it serves no purpose? The adoption of an almost exactly similar mark indicates cogently, in my opinion, that the defendants believed that it was the design which sold the goods if they did not, they would not have adopted it.

9. The only other point which I wish to add to what the learned Chief Justice has said is this: I am not satisfied, as regards the evidence of the plaintiff's witness, Nanda Lal, that he did not make any mistake as to the mark which he says he saw in the plaintiff's firm. I think it is very important in this connection to remember that the reply which he gave was in answer to a question put by one of the plaintiff's counsel in examination-in-chief.