

ORIGINAL CIVIL.

Before Mr. Justice Fletcher.

MUNNA LAL SEROWJEE

v.

JAWALA PRASAD.*

1908

Jan 8.

Trade-mark—Mark indicating manufacturer—Infringement, calculated to deceive—Passing-off goods—Injunction—Admissibility of evidence of intent to deceive.

The general principle applicable to “passing-off” is that nobody has the right to represent his goods as the goods of somebody else.

Reddaway v. Bankam(1) followed.

In an action for an injunction to restrain the use of a trade-mark, if the defendant's goods on the face of them and having regard to the surrounding circumstances are calculated to deceive, evidence to prove the intention to deceive is inadmissible as being unnecessary, the rule being that a man must be taken to have intended the reasonable and natural consequences of his own acts.

Saxlehner v. Apollinaris Co.(2) followed.

Where a trade-mark has come to be recognised in the market as denoting goods prepared by the plaintiff, and where the defendants have deliberately adopted a trade-mark identical with that of the plaintiff:—

Held, that such adoption is calculated to deceive, and that an injunction should be granted.

London General Omnibus Co. v. Lavell (3) and *Bourne v. Swan and Edgar, Ltd.* (4) referred to.

THIS was a suit brought by the plaintiff, Munna Lal Serowjee, for an injunction to restrain the defendants, Jawala Prasad and others, from infringing his trade-mark. The plaintiff was a dealer in *ghee* in Calcutta, and for a period of over twelve years he had sold his *ghee* tinned in canisters having embossed thereon his trade-mark which consisted of a flower on a stem with leaves, the flower being of the shape of an ellipse with an indented circumference having within its surface the initials of the plaintiff's

* Original Civil Suit No. 843 of 1903.

(1) [1896] A. C. 199.

(3) [1901] 1 Ch. 185.

(2) [1897] 1 Ch. 893.

(4) [1903] 1 Ch. 211.

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firm, M. D. S. This trade-mark was registered by the plaintiff on the 19th December 1894, and he claimed that his *ghee* was extensively known in India, Burma, and the Straits Settlements as "phulmarka" *ghee*.

The defendants were also dealers in *ghee* and for some time from October 1902 till February 1903 the plaintiff acted as a commission agent in Calcutta for the sale of the defendants' *ghee*. It came to the knowledge of the plaintiff that the defendants were selling their *ghee* in canisters with an embossed trade-mark exactly similar to his own except that the letters embossed in the middle of the flower were "J. P. M.," and he called on the defendants to desist from the use of such trade-mark, but they refused to do so.

Thereupon, this suit was instituted for an injunction, on the ground that the defendants' trade-mark was calculated to deceive, and that it had in fact deceived, purchasers by inducing them to purchase the defendants' goods in the belief that they were buying those of the plaintiff.

It was contended by the defendants that the flower-mark or "phul" mark was one which was common to a large number of traders in *ghee*, and that each trader put his name and initials on and under the flower as a distinguishing mark, and that purchasers of *ghee* invariably asked for the "phul" mark of the particular trader whose goods they desired to purchase.

Mr. C. R. Das (*Mr. A. N. Chaudhuri* with him), for the plaintiff.

Mr. Zorah (*Mr. B. C. Miller* with him), for the defendants.

Cur. adv. vult.

FLETCHER J. This is a suit brought by the plaintiff to restrain the defendants from infringing his trade-mark. The plaintiff is a dealer in *ghee* in Calcutta, and for a period of twelve years and upwards he has sold his *ghee* in canisters, having embossed thereon his trade-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 surface the initials of the plaintiff firm, M. D. S.

The defendants are also dealers in *ghee*, and for some time the plaintiff acted as commission agent in Calcutta for the sale of the defendant's *ghee*. The defendants now sell their *ghee* in canisters with an embossed trade-mark exactly similar to that used by the plaintiff, except that the letters embossed in the middle of the flower are J. P. M., instead of M. D. S.

The defendants allege that they used this trade-mark during the time that the plaintiff acted as their commission agent, and that the plaintiff was well aware of this fact. Having heard the evidence, I have come to the conclusion that the defendants deliberately adopted the plaintiff's trade-mark, after the plaintiff ceased to be their commission agent. I have also come to the conclusion on 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.

In these circumstances, is the plaintiff entitled to any relief?

It is urged by the defendants, that in the present case there is no evidence that the defendant's mark is calculated to deceive, and reliance is placed on the judgment of the Court of Appeal in England in the case of *The London General Omnibus Co., Ltd., v. Lavell*(1) where it was decided that in an action for deceit brought on the ground that a particular article used by the defendant is a colourable imitation of the plaintiff's, the conclusion of the Judge on a view by him of the two articles is not sufficient by itself to support an injunction. It will be noticed that the case of *The London General Omnibus Co. v. Lavell*(1) was an action for deceit, and Lord Justice (then Mr. Justice) Farwell in the case of *Bourne v. Swan and Edgar, Ltd.*(2), has discussed this case and has pointed out the distinction between a passing-off action and a common law action for deceit.

In the present case, however, in my opinion there is evidence that the defendant's mark is calculated to deceive. Now, the general principle applicable to passing-off cases is that "nobody has the right to represent his goods as the goods of somebody else:" *Reddaway v. Banham*(3). Further, in an action for an injunction to restrain the use of a trade-mark, or mark if the

(1) [1901] 1 Ch. 135.

(2) [1903] 1 Ch. 211.

(3) [1896] 1 A. C. 199.

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defendant's goods on the face of them and having regard to the surrounding circumstances are calculated to deceive, evidence to prove the intention to deceive is inadmissible as being unnecessary, the rule being that a man must be taken to have intended the reasonable and natural consequences of his own acts: *Saxlehner v. Apollinaris Co.* (1).

Now, applying these rules in the present case, it appears to me that the adoption by the defendants of a trade-mark identical with that of the plaintiff, on the termination by the plaintiff of his agency for the defendants is calculated to deceive, and, moreover, there is some evidence in the present case of a person being actually deceived. I accordingly think the plaintiff is entitled to succeed, and I grant an injunction restraining the defendants 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*. I also direct an enquiry to be made by the Official Referee as to what damages, if any, have been suffered by the plaintiff by reason of the improper use by the defendants of his trade-mark. The defendants must pay to the plaintiff his costs of this suit on scale No. 2.

Judgment for the plaintiff.

Attorneys for the plaintiff: *Manuel & Agarwalla.*

Attorney for the defendants: *N. C. Bose.*

J. C.

(1) [1897] 1 Ch. 893.