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judgment of the Bench, clearly observed that the order "does not direct any payment of money at a certain date or at recurring periods although it does take notice of and refers to the compromise between the parties arrived at on that date". In fact, reference was made to an earlier Division Bench decision, to which Shadi Lal, C. J. was a party, reported as *Banarsi Das* v. *Ramzan* (8), and that case was distinguished on facts. In *Banarsi Das's case* it was specifically held that an order passed by the executing Court to pay the decretal amount by instalments on compromise has the result of extending time under section 48(1)(b). Head-note (a) runs as follows:—

> "The parties to an execution agreed that the decretal amount should be paid by instalments and the Court accepted the compromise and consequently passed an order striking off the execution proceedings. Held that the Court, when accepting the request of the parties, intended that the decretal amount should be payable by instalments, that section 48(b) of the new Code applied and the order which it passed was in essence and substance one made under section 210 of the Civil Procedure Code (now Order 20, rule 11) which extended the period of limitation."

In fact, *Banarsi Das's case* was followed by Jai Lal, J. in *Bhagwant Singh* v. *Santa Singh and another* (9). The High Court of Travancore Cochin in *Kuriakko* v. *Kurian Pylee* (10), also took a view similar to the one taken by the Full Bench of the Allahabad High Court, referred to above. In its

(8) A.I.R. 1923 Lah. 381.
(9) A.I.R. 1933 Lah. 758.
(10) A.I.R. 1953 Tra. Cochin 394 at P. 397.

subsequent decision reported as *E. Valia Raja* v. *Chacko* (11), this earlier decision was overruled. Head-note (a) runs as follows:—

> "An executing Court's order accepting a compromise arrangement entered into between the parties for paying up the decree-debt by instalments or on a specified date, would constitute a subsequent order within the meaning of section 48(1) (b)."

Similarly the earlier view taken by the Patna High Court in *Bishwa Nath Prasad* v. *Lachhmi Narain* (12), to the effect that an order passed in a subsequent compromise is not an order contemplated by section 48(1)(b), has been reversed recently in *Omprakash v. Jagarnath Prasad* (13). Bombay High Court has always taken the view that the subsequent order contemplated by section 48(1)(b) of the Civil Procedure Code can be an order passed by the executing Court. *D. S. Apte's case* is a direct authority on the point. Calcutta High Court (See *Monmohan* v. *Khalishkhali Co-operative Bank* (14), and *Jatindra Nath* v. *Heramba Chandra* (15), recently Madhya Pradesh High Court in *Gulab Chand* v. *Sewa Chand* (16), and Rajasthan High Court in *Laxmilal* v. *Onkarlal* (17), have also taken the same view.

We, therefore, find that almost all the High Courts have now taken the view that an order passed by the executing Court directing the payment of decretal amount by instalments or at a future

(11) A.I.R. 1959 Kerala 83.
(12) A.I.R. 1935 Pat. 380.
(13) A.I.R. 1959 Pat. 158.
(14) A.I.R. 1937 Cal. 236.
(15) A.I.R. 1945 Cal. 154.
(16) A.I.R. 1960 Madh. Pra. 70.
(17) A.I.R. 1955 Raj. 33.

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date does amount to a "subsequentt order" within the meaning of section 48(1)(b) and, in fact, there is hardly any authority to the contrary. The opposite view was really based on the observations of the Full Bench in *Gobardhan's case* which view has not even been adhered to by the Allahabad High Court itself in subsequent decisions, and *Banarsi Das's case* is distinguishable and is hardly any authority on the point. Reference was also made to a Privy Council decision in *Kirtyanand* v. *Pirthi Chand* (18), but that was a case in which an order for payment by instalments was not made in the course of the execution proceedings but in another suit and, consequently, this case has no bearing.

In view of the above, the decision of the learned Single Judge and the lower appellate Court that the order passed by the executing Court in 1951 gave fresh period of limitation is well-based and must be upheld. This appeal is, consequently, dismissed. In the peculiar circumstances of the case, however, there will be no order as to costs.

Falshaw, C.J.

D. Falshaw, C.J.—I agree.

APPELLATE CIVIL

*Before Inder Dev Dua, J.*

VIR VIKRAM PARKASH,—*Appellant.*

*versus*

CHITRU AND OTHERS,—*Respondents.*

**Regular Second Appeal No. 1047 of 1961.**

1962

December, 20th.

*Punjab Pre-emption Act (I of 1913)—S. 3—Village immovable property—Whether includes factory area—Land recorded as Banjar Qadim—Whether agricultural land for*

(18) A.I.R. 1933 P.C. 52.

*purposes of pre-emption—Interpretation of statutes—Principle as to, in cases where language not clear and capable of more than one meaning.*

*Held,* that a factory area is not intended to fall within the expression "village immovable property" for the purpose of the operation of the law of pre-emption.

*Held,* that a small bit of land describe in revenue papers as *banjar qadim,* situate in a factory area and sold for the purpose of constructing factory thereon cannot fall in the category of agricultural land so as to attract the law of pre-emption on the sole ground that on an occasion or two *bajra kharaba* was stated to have been grown on it. Agricultural land, the sale of which can be considered to have been intended to be outside the constitutional guarantees and within the purview of the definition for the purpose of pre-emption, must be occupied and let for agricultural purposes etc., from the long range and broad point of view, and a small bit like the one in question can hardly be considered to have been intended to fall within this category. That to bring it within this category would obstruct industrial progress of the nation is also not wholly irrelevant in interpreting the meaning of the expression 'agricultural land.'

*Held,* that the right of pre-emption relating to sale of agricultural land and village immovable property is based on considerations which are obviously inapplicable to sales of land for industrial purposes like the construction of factory. Of course, if the law is obsolutely clear and is attracted on a plain reading of its language in a given case, then whatever its effect or impact on the industrial progress of the country, it must be given effect, but when the law is couched in language which is unprecise and capable of both wide and narrow meaning requiring interpretation. then the Court has to construe it in the background of the underlying object of the statutory provision and its impacts and consequences of the nation's progress and the economy of the country as a whole.

*Second Appeal from the decree of the Court of Shri S. C. Jain, Senior Sub-Judge, with Enhanced Appellate Powers, Gurgaon, dated 6th March, 1961, modifying that of Shri Raghubir Singh Gupta, Sub-Judge, Ist Class, Palwal,*

*dated the 22nd November, 1960 (granting the plaintiff a decree against the vendee defendant No. 1, for possession by pre-emption subject to his paying Rs. 6,000, inclusive of the security money to the vendee on or before 31st December, 1960, failing which his suit would stand dismissed and leaving the parties to bear their own costs) to the extent that the plaintiff pre-emptor would pay Rs. 153-4-0 in addition to Rs. 6,000, as found by the trial Court and the amount would be deposited by him on or before 15th April, 1961, failing which the plaintiff's suit would stand dismissed ipso facto with costs and leaving the parties to bear their own costs.*

Shamair Chand, P. C. Jain, and Harish Chandra Mittal, Advocates.—for the Appellants.

H. L. Sarin, Sat Dev and K. K. Cuccria, Advocates,—for the Respondents.

JUDGMENT

Dua, J.

DUA, J.—These two appeals (Regular Second Appeals Nos. 1047 and 1048 of 1961) have been bracketed together and deserve to be disposed of together because they involve identical question of law and fact.

The controversy centres round the question whether the two sales of the properties in question are pre-emptible. On 4th July, 1958, ten *biswas* of land in all were sold by virtue of two sale-deeds, one of them relating to two biswas and the other to eight. The price of ten biswas was Rs. 3,000. In the sale-deeds the property sold was described as agricultural land and it was expressly recited therein that the vendee was entitled to use the land in any manner he liked including the construction of factories. Chatru, the plaintiff, in both the suits, claiming to be a co-sharer instituted the two suits in January, 1960, basing his claim on his status as a co-sharer in the land and describing the subject-matter of the sale

to be agricultural land. Both the suits were resisted by the vendee on various grounds including the pleas of limitation and that the land sold was comprised in industrial area and, therefore, its sale was not subject to the right of pre-emption. The Courts of first instance decreed the suits and on appeal those decrees were affirmed. In respect of issue No. 6 (and it is this issue which deals with the plea of the land being comprised in industrial area in both the suits) the trial Court came to the conclusion that though the adjacent plots of lands had been acquired by third persons for industrial purposes and that factories had also been set up thereon, the land in question could not be held to be a waste land merely because the land sold was not under cultivation at the time of the sale. On appeal, the learned Senior Subordinate Judge referred to the copy of the last Jamabandi of the year 1945-46 and of the *Khasra Girdawaris* of the years 1958-59 and 1959-60 and then after observing that as the sale took place on 4th July, 1958 and, therefore, the nature of the land to be seen is as on the date of the sale itself, the Court proceeded to observe that even if it were to be admitted that the land was *banjar quadim* it still did not take it out of the category of village immovable property. The Vendee, according to the lower Appellate Court, nowhere asserted to have reclaimed the *banjar qadim* land. Even after referring to Khasra *Girdawari* for 1958-59, the Court observed that the land was uncultivated only for one crop in Kharif 1958 and the entry in Rabi 1958 showed that it had not been cultivated for two crops. From these entries, the Court inferred that the land was not *banjar qadim*. The vendee having not produced copies of *Khasra Girdawaris* prior to 1958, the Court apparently drew an adverse inference against him. The Court then considered the scope of section 15 of the Punjab Pre-emption Act and

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observed that the argument that the land sold was not agricultural was of not much avail because it nevertheless retained the character of village immovable property and as such its sale was also pre-emptible. On this finding the plaintiff's right to claim pre-emption was affirmed but slight modification in payment of sale-price was made.

The arguments in his Court have primarily centred round the point whether the Courts below are justified in decreeing the plaintiff's claim on the basis of the proerty sold being village immovable property and also as to whether the property in question is truly agricultural land. In so far as the first part of the argument is concerned, reference has been made to the sale-deeds and also to the plaint and it has been emphasised that in both the deeds and the plaint the property has been described to be agricultural land. In the written statement an objection was raised that the purpose of the purchase in question was for factory and that the site was also located in factory area. Even in spite of this assertion in the written statement in the replication filed by the plaintiff there was a mere denial of the preliminary objection without making any alternative case on the basis of the land being village immovable property. On the basis of this contention, Shri Shamair Chand has forcefully argued that the Courts below have erred in law making out a new case for the plaintiff.

"Agricultural land" as defined in section 3 of the Punjab Pre-emption Act merely adopts the definition of the term "land" as contained in the Punjab Alienation of Land Act and "village immovable property" has been defined to mean immovable property within the limits of a village other than agricultural land. In respect of both

these categories of property mentioned the right of pre-emption is governed by section 15 of the Pre-emption Act. *Prima facie* it may seem that merely because the plaintiff did not specifically base his claim on the property being village immovable property, the Courts below may not be considered to have committed any such illegality by determining the controversy on that basis as would justify interference by this Court, for, the right to both categories of property is governed by the same provision of law. But in this case it has been argued with a certain amount of plausibility that the area or locality in which the site in question is situated is a factory area and, therefore, it can by no reasonable stretch be described to be village immovable property, and that if this precise plea had been taken it could have been shown that the locality in question could not reasonably be considered to be a part of any village and, therefore, the property sold could not constitute village immovable property for the purpose of the right of pre-emption. In this context it has been argued that the right of pre-emption being a piratical and aggressive right it should not be extended by liberal construction of law but should be strictly confined within clearly specified statutory limit. The contention is not wholly without substance and requires to be kept in view when considering the merits of the controversy.

On behalf of the appellant, it is contended that the land in question can by no means be described to be agricultural land at the time of the sale. As already noticed, the definition of the term "land" as contained in the Punjab Alienation of Land Act has been adopted by the Punjab Pre-emption Act. In the Land Alienation Act, the term "land" has been defined to mean land which is not occupied as the site of any building in a town or village and is

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occupied or let for agricultural purposes or for purposes subservient to agriculture or for pasture and includes:—

(i) the sites of buildings and other structures on such land;

(ii) a share in the profits of an estate or holding ;

(iii) any dues or any fixed percentage of the land revenue payable by an inferior to a superior landowner;

(iv) a right to receive rent;

(v) any right to water enjoyed by the owner or occupier of land as such;

(vi) any right of occupancy.

The contention raised is that the land sold being in factory area and not being occupied or let for agricultural purposes or for purposes subservient to agriculture or for pasture, it cannot be considered to be agricultural land and, therefore, is not pre-emptible. In this connection great emphasis has been laid on the argument that the land has all along been described to be *banjar qadim* and that in Kharif 1958 and Rabi 1959 it is described as "khali" and that only after the sale in 1959 in one harvest the entry in the revenue records is "*bajra kharaba*". In Rabi 1960, it is again alleged to be vacant. Another part of this argument is that since the area or the locality in which the site in question is situated has become a factory area it cannot be considered even village immovable property for such an area cannot be described to be a part of village Arangpur in which the land is stated to be situated. Whether or not a particular place is a village is, according to Shri Shamair Chand, a question of law or at least a mixed question of fact and law, and, therefore, open to consideration by this Court on second appeal. Reference has in this connection

hold and own property guaranteed, the right of pre-emption and sale of agricultural land has to be considered in the background of the constitutional guarantees. So considered, I am inclined, as at present advised, to take the view that the small bit of land described in revenue papers as *banjar kadim,* situate in a factory area and sold for the purpose of constructing factory thereon cannot fall in the category of agricultural land so as to attract the law of pre-emption on the sole ground that on an occasion or two *bajra kharaba* was stated to have been grown on it. Agricultural land the sale of which can be considered to have been intended to be outside the constitutional guarantees and within the purview of the definition for the purpose of pre-emption must be occupied and let for agricultural purposes, etc., from the long range and broad point of view, and a small bit like the one in question can hardly be considered to have been intended to fall within this category. That to bring it within this category would obstruct industrial progress of the nation is also not wholly irrelevant in interpreting the meaning of the expression 'agricultural land'.

In the view that I have taken I do not think it is necessary to express any considered opinion on Shri Shamair Chand's contention about the plaintiff not being a co-sharer.

In the result both these appeals succeed and allowing the same I set aside the judgments and decrees of the Courts below and dismiss the plaintiff's suits. The parties are, however, directed to bear their own costs throughout.

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Coming to the question whether or not the land sold is agricultural land it may again be stated at the outset, that no precedent has been cited in which a site described as *banjar qadim* situated in an area which is fast developing into an industrial area was held to constitute agricultural land for pre-emption purposes, merely because occasionally some *bajra kharaba* was stated to have grown on it and a sale of such a site held pre-emptible. In considering the question canvassed before me it would be pertinent to take into account the object of the law of pre-emption. After the enforcement of the Constitution with the fundamental right to

hold and own property guaranteed, the right of pre-emption and sale of agricultural land has to be considered in the background of the constitutional guarantees. So considered, I am inclined, as at present advised, to take the view that the small bit of land described in revenue papers as *banjar kadim*, situate in a factory area and sold for the purpose of constructing factory thereon cannot fall in the category of agricultural land so as to attract the law of pre-emption on the sole ground that on an occasion or two *bajra kharaba* was stated to have been grown on it. Agricultural land the sale of which can be considered to have been intended to be outside the constitutional guarantees and within the purview of the definition for the purpose of pre-emption must be occupied and let for agricultural purposes, etc., from the long range and broad point of view, and a small bit like the one in question can hardly be considered to have been intended to fall within this category. That to bring it within this category would obstruct industrial progress of the nation is also not wholly irrelevant in interpreting the meaning of the expression 'agricultural land'.

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time of the registration of the aforesaid marks in favour of the respondents and were, therefore, not distinctive of the goods of the respondents.

(2) The respondents committed fraud upon the Registry in declaring that they were the originators or proprietors of the aforesaid marks and suppressed the real facts in declaring that they were the originators of the trade marks when, in fact, they were not.

(3) That many other traders in the market are using the numeral 50 and the word *per se* 'Fifty' on or in relation to bells for cycles and distinctiveness, if any, which the respondent claims, has been lost.

(4) That the respondents did not get the registration of these marks with the *bona fide* intention of using it as such in relation to their goods and, in fact, there has been no *bona fide* use of the trade marks in question in relation to the respondents' goods before the date of the application.

(5) That the respondents are using different trade marks than the ones registered by them.

All these allegations have been controverted by the respondent and the issue, which arose for trial, was as follows:—

"Whether the Trade Marks Nos. 161543 and 161544 are liable to be cancelled on the grounds mentioned in para No. 4 of the petition?"

So far as grounds Nos. 4 and 5 are concerned, they were not seriously pressed by Mr. Anup Singh,

M/s The National Bell Company
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Capoor, J.

The petitioner in Civil Original No. 37-D of 1961 is the National Bell Company and in Civil Oiriginal No. 38-D of 1961 Messrs Gupta Industries Corporation, both of Kapurthala in the Punjab. The former, according to the petition, is carrying on business since the year 1957 as manufacturers of cycle bells and has been using various numerals 33, 50, 51 and 140 from time to time on their bells according to the qualities. The latter claims to be carrying on the same business since 1947 and using various numerals such as 20, 50 and 60. Both these petitions are practically identical and have been consolidated, and both will be disposed of in the course of the following order. Respondent No. 2 has stated that he does not propose to submit a statement under section 112(2) of the Act and accordingly the only contesting respondent is respondent No. 1 which will hereinafter be referred to as the respondent.

Both these petitions arise from infringement actions instituted by the respondent against the respective petitioners in the Court of the District Judge, Lucknow. On 24th April, 1961, that Court, on being approached by the petitioners under section 111 of the Act, stayed the proceedings in their suits, and allowed time to the petitioners for filing these rectification petitions and they were so filed in this Court within the time as extended by the District Judge, Lucknow.

The petitions are under sections 46 and 56 of the Act and the grounds upon which the cancellation of the respondents' trade marks is claimed, are stated in paragraph 4 of the petition and are as follows:—

(1) That the numeral '50' and word *per se* fifty were common to the trade at the

time of the registration of the aforesaid marks in favour of the respondents and were, therefore, not distinctive of the goods of the respondents.

(2) The respondents committed fraud upon the Registry in declaring that they were the originators or proprietors of the aforesaid marks and suppressed the real facts in declaring that they were the originators of the trade marks when, in fact, they were not.

(3) That many other traders in the market are using the numeral 50 and the word *per se* 'Fifty' on or in relation to bells for cycles and distinctiveness, if any, which the respondent claims, has been lost.

(4) That the respondents did not get the registration of these marks with the *bona fide* intention of using it as such in relation to their goods and, in fact, there has been no *bona fide* use of the trade marks in question in relation to the respondents' goods before the date of the application.

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(1) That the numeral '50' and word *per se* fifty were common to the trade at the

1951 'Lucas 50' bells were being quoted and sold in the market and 'Lucas 30' was being quoted in the market in the year 1953. The respondents, in the applications made by them for the registration of the trade marks in dispute, had themselves filed with the Registrar of Trade Marks price lists and cycle market reports according to which there were quotations of the prices of 'Lucas 30' 'Lucas 50' and 'Republic 50' bells. On behalf of the petitioners, several witnesses, who have been dealing in cycles and accessories for a number of years, were produced. These are Inder Jit (P.W. 2) of the Bharat Commercial Company, Jagdish Lal (P.W. 3) of Messrs Janki Dass and Company and Bishan Narain (P.W. 4) of Messrs E.S. Piare Lal. They have testified that they were selling 'Lucas 50', 'Lucas 61' and 'Lucas 30' bells since long before the partition of the country. P.W. 4 put on the record the price list (Exhibit P. 2) issued by his firm on the 20th of December, 1934 which contained quotations for 'Lucas Bell 61', 'Lucas Bell 50' and 'Lucas Bell 30'. Exhibit P. 3 is a price list of the B.S.A. Bicycles Agency, dated the 1st of October, 1934, which contains quatations for 'Lucas 61 King Bell', Lucas 50 challis Bell' 'Lucas 34 Bell' and 'Lucas 30 Bell'. Exhibit P. 4 is a price list issued by Hashabi & Co., Calcutta, which quotes the prices of Bell Springs for 61 Bells Terry and Challis Bell No. 50 Terry. It also appears that there was on the market a Miller 50 Cycle Bell. Exhibit P. 8, a price list issued by Hashabi & Co., on the 12th May, 1942, mentions the price of 'Miller 50 pattern Bell C.P. in addition to 'Lucas 50 and 30 Challis Bell. It is not necessary to refer to the numerous other price lists of the record and there is overwhelming evidence to show that bells with numerals and in particular '50' were being sold much before the respondents put their 'Fifty' bell on the market, and continued to be sold right up to the year 1952 when

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according to Inder Jit (P.W. 2) as well as R.W. 6 himself, the import of bells and other cycle parts was stopped. Despite this, there was still some sale of Lucas bells and Manohar Lal Sethi (P.W. 1) of Messrs Luthra Sethi and Company, Delhi, deposed that his firm bought Lucas bells from a party and sold the same in the market. The vouchers in this connection are Exhibit P.W. 1/A and P.W. 1/B, dated the 12th of February, 1958 and the 24th of February, 1958, respectively, which mention the sale of 'Lucas 50 C.P. Bells'.

Mr. Savaksha, learned cousel for the respondents, faced with this overwhelming evidence, maintained that the numerals and in particular '50' were merely catalogue numbers and not actually inscribed by the Lucas Company Ltd. on the bells. He referred to clause (a) of sub-section (2) of section 2 of the Act, according to which any reference to the use of a mark shall be construed as a reference to the use of a printed or other visual representation of the mark Clause (b), however, provides that any reference to the use of a mark in relation to goods shall be construed as a reference to the use of the mark upon, or in any physical or in any other relation whatsoever, to such goods. Apart from the catalogues and the price lists there is positive oral evidence as to the numeral '50' having been inscribed on the arms of 'Lucas 50' bells. Thus, Inder Jit (P.W. 2), stated that the figure '50' was inscribed on the Lucas bells. Jagdish Lal (P.W. 3) stated that it was incorrect to say that the bells manufactured by Lucas did not have the figures 50, 61 and 30 inscribed on them. While Bishan Narain (P.W. 4) was not definite on this point, Hari Chand (P.W. 5) was positive that the figures '50', '30' and '61' were used along with the word Lucas. Manohar Lal (P.W. 8) produced a package (Exhibit P.D.) of the 'Lucas Bell 50' manufactured by the Lucas Company and

on this No. 50 is quite prominently displayed. Badri Pershad (R.W. 6) also admitted that Lucas Company were putting the numerals on the flaps of their cartons. Exhibit P.E. is a Lucas Cycle bell which was shown to R.W. 3 Arjan Dev and he said that it was genuine and that the lever had the figure '61' inscribed thereon. In *Louise and Co. Ltd.* v. *Gainsborough* (1), it was held that in order to show that a mark was not distinctive of certain goods, it was sufficient to show that for some years before registration of the mark it had been commonly used in that particular trade on trade cards and lebels and in catalogues, etc. In the instant case, apart from the use in the catalogues and price lists, there is, at least with regard to Lucas Company bells, positive evidence that the numeral '50' was being used on and in relation to the cycle bells manufactured by them. In the instant case, the registrations of the disputed trade marks had been actually in force for more than seven years before the institution of the petitions. The statute on the subject is section 32 of the Act which is as follows:—

> "32. Registration to be conclusive as to validity after seven years.—Subject to the provisions of section 35 and section 46, in all legal proceedings relating to a trade mark registered in Part A of the register (including applications under section 56), the original registration of the trade mark shall, after the expiration of seven years from the date of such registration, be taken to be valid in all respects unless it is proved—
>
> (a) that the original registration was obtained by fraud; or

(1) (1903) 20 R.P.C. 61.

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(b) that the trade mark was registered in contravention of the provisions of section 11 or offends against the provisions of that section on the date of commencement of the proceedings; or

(c) that the trade mark was not at the commencement of the proceedings, distinctive of the goods of the registered proprietor."

The validity of the registration of the impugned trade marks is questioned on behalf of the petitioners on each of the three grounds (a), (b) and (c). So far as (a) is concerned, there is hardly any evidence of fraud having been practised by the respondents. All that is pointed out is that the respondents, who are in the bicycle trade, were getting price lists and catalogues of bycle parts including bells in which price of Lucas 50 was also being quoted and they could not, therefore, have *bona fide* believed themselves the originators of this mark. The story given by Badri Pershad Aggarwal (R. W. 6) in this connection is that the proprietorship concern was putting on the market cycle bells with the marks 'Asia 47', 'Asia 48' and 'Asia 49' in the years 1947, 1948 and 1949, respectively, and that as a result of continued research they improved the quality and design of the bells. In 1950, they placed on the market the 'Fifty' bells with improved quality and higher price. I do not, however, consider that the designation on the bell had any connection with the year 1950 because as admitted by the witness in cross-examination, the manufacture of 'Asia 30' and 'Asia 40' was not started in the years 1930 or 1940. The more likely explanation is that bells with the numeral '50' were already in the market and the numeral

indicated a certain standard of quality. But even so, it is difficult to infer that the respondents intention in obtaining the registration of the disputed marks was fraudulent. If such was the case, they would not have filed along with their applications for registration copies of price lists containing quotations for 'Lucas 50' bells. Mr. Anup Singh in this connection, referred to the case cited as *Gynomin Trade Mark* (2). The crucial circumstance from which a fraudulent intention was inferred in the case was that the party which obtained the registration of the trade mark had been the agent of the proprietor of the mark and thus stood in a fiduciary capacity to him. There are no such allegations in the present case and I am, therefore, unable to hold that the original registration was fraudulently obtained by the respondents.

Clause (b) of section 32 of the Act makes a reference to the provisions of section 11 which is as follows:—

"11. Prohibition of registration of certain marks.—

A Mark—

(a) the use of which would be likely to deceive or cause confusion; or

(b) the use of which would be contrary to any law for the time being in force; or

(c) which comprises or contains scandalous or obscene matter; or

(d) which comprises or contains any matter likely to hurt the religious susceptibilities of any class or section of the citizens of India; or

(2) 1961 R.P.C. 408.

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(e) which would otherwise be disentitled to protection in a court;

shall not be registered as a trade mark."

Mr. Anup Singh, on behalf of the petitioners, has relied on clauses (a) (e) of section 11. So far as clause (a) of section 11 is concerned, it is clear that for about a year before the applications for registration were made by the respondents, the imports of Lucas Bells and other foreign makes of cycle bells had been stopped. It is also not asserted anywhere that Messrs Lucas Company had obtained the registration of either the word 'fifty' or the numeral '50' in relation to the cycle bells and, in the circumstances, I do not think that clause (a) would be attracted. The emphasis by Mr. Anup Singh is on clause (e) of section 11 and it is pointed out that under sub-section (1) of section 9 of the Act, a trade mark shall not be registered in Part A of the register unless it contains or consists of at least one of the five specified essential particulars. Neither the word nor the numeral '50' falls within clauses (a) to (d) of sub-section (1) of section 9 and the only clause, which can plausibly be applied, is as follows:—

"(e) any other distinctive mark".

It would not, however, be correct to say that a mark, which is not registerable under section 9(1) (e) on account of not being distinctive is necessarily disentitled to protection in a Court under clause (e) of section 11. The leading case in this respect is *Imperial Tobacco Company (of Great Britain and Ireland) LD.* v. *De Pasquali and Co.* (3) and according to the principle laid down there it was held that where the allegation is that a mark is

(3) 35 R.P.C. 185.

common to the trade and hence not distinctive, it may be unregisterable under section 9 but that would not necessarily mean that it is disentitled to protection under clause (e) of section 11. In the case cited, Swinfen Ealy M. R. observed at page 204 with reference to the word 'otherwise' that it would extend to and include a matter which intrinsically from its nature a Court of Justice would not protect. That may be not only by reason of its being calculated to deceive but by reason of the nature of the matter itself, as if it were blasphemous, obscene, indecent or seditious. Mr. Anup Singh on behalf of the petitioners, maintained that inasmuch as the respondents had intentionally and, therefore, deceitfully copied the '50' mark of the Lucas Company, they were disentitled to protection and in this connection he referred to *Brown Shoe Company* (4). That was an application for rectification of the register by expunging mark 'Naturlizet' in regard to shoes and other articles on the ground that the petitioner's mark 'Nathuralizer' was so well known at the date of application for registration that the respondents were not in truth proprietors of the mark 'Naturlizet'. The appellate Court in that case ordered the register to be rectified. In the present case, as already shown above, the numeral '50' was even before the respondents applications for registration not the exclusive mark of any particular company, and no element of dishonesty can be inferred from the circumstances in which the applications for registration were made. I am not, therefore, satisfied that clause (e) of section 11 can be invoked by the petitioners in this case and *ipso facto* the objection on the basis of clause (b) of section 32 would also not be valid.

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(4) 1959 R.P.C. 29.

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There remains clause (c) of section 32. The crux of the matter is that the impugned trade marks were not, either at the time of the registration or at any rate at the commencement of the proceedings, disinctive of the goods of the respondents. Sub-section (3) of section 9 definies, for the purpose of the Act, the expression 'distinctive' and it lays down that this expression in relation to the goods in respect of which a trade mark is proposed to be registered, means adapted to distinguish goods with which the proprietor of the trade mark is or may be connected in the course of trade from goods in the case of which no such connection subsists. The words 'distinctive of the goods' in clause (c) of section 32 is to be interpreted in the same sense. Now, it has already been shown that even before the applications for registration by the Respondents, the numeral (50) was so extensively used in relation to the cycle bells that it could not be considered distinctive of the cycle bells manufactured by the respondents. Indeed, so far as numerals are concerned, they have not been treated as being *Prima facie* distinctive of the goods other than textile goods. In this connection, reference may be made to part 3 of the Trade and Merchandise Marks Rules 1959 which makes special provision for registration of numerals for textile goods. There is thus a great deal of force in the contention on behalf of the petitioners that the mark '50' was *publici juris* or common to the trade. There is further more evidence to show that the numeral (50) as well as the word 'fifty are being commonly used on cycle bells subsequent to the registration of the impugned marks. Badri Pershad (R.W. 6) himself admitted that along with their rates in the Cycle Magazines, rates of 'Five 50' were also being quoted. This came to their notice in 1956 and they gave a notice to the manufacturers Messrs K. R.

Berry and Company of Jullundur. A suit was instituted but was ultimately withdrawn by the respondents and no other suit was filed against that company. Ramesh Chander Rastogi (R.W. 2) admitted having seen in the market for the last one or two years a cycle bell with a brand (550). Arjan Dev (R.W. 3) admitted that there are other manufacturers also who manufacture their bells and call them as '550', 'Fine 50' and son on. Moti Lal (R.W. 4) also admitted that there was another bell sold in the market which was known as '550' bell O. P. Madan (P. W. 6) declared that many other firms also inscribed '50' on the bells manufactured by them, such as 'Padam 50' 'Balco 50', 'Five 50' and 'C. O. 50'. The firm of this witness is known as M. M. Industries and manufactures bells called 'Fine 50' a specimen of which is Exhibit P.B., and its packet (Exhibit P.C.) and they have been manufacturing these bells for the last three years. Manohar Lal (P.W. 8), Petitioner in petition No. C.O. 38-D of 1961, asserted that he has been manufacturing these bells under the name of 'Gupta 50' though his explanation, that this name is due to the bells being manufactured out of brass sheets of 50 lbs. is perhaps not correct. The petitioners have placed on record specimens of bells such as 'C.O. 50', 'Padam 50', 'Five 50', Gupta 50' 'National 50' 'T 50' and 'Fine 50'.

From all this evidence, it is clear that the numeral '50' cannot be regarded to have been distinctive of the respondents' goods at the commencement of the proceedings and it is, therefore, hit by clause (c) of section 32 of the Act. So far as the word 'fifty' *per se* is concerned, there is no evidence that it was used by other parties in relation to the cycle bells either prior to or after the registration of this mark at the instance of the respondents. It has to be remembered that more than

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seven years have elapsed since the original registration of this trade mark. It may be that under sub-section (2) of section 31 of the Act this trade mark may have been capable of challenge before the expiry of the period of seven years from the date of the registration on the ground that it was not a 'distinctive mark' under clause (e) of sub-secion (1) of section 9, but for the reasons already given, that is not enough to justify cancellation of the mark under section 32 of the Act.

The result, therefore, is that both the petitions are partly allowed but only to the extent that the registration of the respondents' mark No: 161543 be cancelled and that it be expunged from the register kept by respondent No: 2 and a notice shall be served upon the Registrar in the prescribed manner.

In view of the divided success of the parties, I leave them to bear their own costs in this Court.

*B.R.T.*

APPELLATE CIVIL

*Before Mehar Singh and A. N. Grover, J.J.*

MUNICIPAL COMMITTEE, PANIPAT,—*Appellant.*

*versus*

NIRANJAN LAL,—*Respondent.*

**Regular Second Appeal No. 161 of 1960.**

*Punjab Municipal Act (III of 1911)*—**S. 97(2)**—*Municipality imposing water tax*—*Whether can continue to charge water rate in excess of water tax.*

*Held*, that in a municipality in which water tax has been levied, such tax alone, and no additional charge, is leviable on quantity of water supplied as limited under sub-section