

APPELLATE CRIMINAL

Before Muni Lal Verma and Gurnam Singh, JJ.

AJIT SINGH,—Appellant

versus

CHARAN SINGH PARDESHI, ETC.,—Respondents.

Criminal Appeal No. 439 of 1972.

February 27, 1973.

Trade and Merchandise Marks Act (XLIII of 1958)—Sections 2(1) (d), 77(4), 78 and 92—“Deceptively similar” trade marks—Test for the determination of—Stated—Time limits of three years prescribed in section 92—Whether starts from the date of the first infringement of the trade marks—Offence of use of complainant’s trade mark—Accused’s plea of its user with absent and no intention to defraud—Whether to be proved beyond reasonable doubt—Mere preponderance of probabilities—Whether sufficient—Inference of intention.

Held, that it is plain from the definition of the expression “deceptively similar” as given in clause (d) of sub-section (1) of section 2 of the Trade and Merchandise Marks Act, 1958 that for a trade mark to be deceptively similar to another, it is not essential that both the trade marks should be exactly similar. It is not necessary to examine the two trade marks by placing one by the side of the other to find out if there are any differences in the design. The test of such comparison is not sound because a purchaser of the goods would seldom have the two trade marks before him when he makes the purchase. It is not the close resemblance which is required for declaring a trade mark to be deceptively similar. On the other hand, it is the near resemblance or likeness of the general appearance of the two trade marks that warrants that finding. If the get-up or general appearance of the two trade marks is such that it is likely to mislead an ordinary purchaser in buying the goods of one trade mark in place of the goods of another trade mark then the one can be said to be deceptively similar to the other.

(Para 5)

Held, that the expression “of the offence charged” in section 92 of the Act means the offence for which complaint has been made and it does not mean the first offence. Infringement of trade mark may be committed several times and on several dates. Hence the time of three years prescribed by the section for prosecution of an offence under the Act runs from the date of infringement of the

trade mark constituting the offence for which the complaint is made and not from the date of first infringement of the trade mark.

(Para 7)

Held, that a combined reading of the provisions of sub-section (4) of section 77 and section 78 of the Act makes it clear that it is for the accused to show that he had been applying complainant's trade mark to the goods manufactured by him with the assent of the complainant or that he had applied the same to his goods without intention to defraud the public including the complainant. It is, however, not necessary for the accused to produce evidence *aliunde* in defence to prove that he had been applying the trade mark to his goods with the assent of the complainant or without intention to defraud. He can prove these matters from the prosecution evidence, from the material elicited by him in cross-examination of witnesses for the prosecution or from the circumstances of the case. The quantum of proof required for him is not proof beyond reasonable doubt. It is sufficient if he can show that preponderance of probabilities warrants a decision of these matters in his favour.

(Para 8)

Held, that intention can be inferred from the conduct and act of the parties and the surrounding circumstances of the case.

(Para 8)

Appeal from the order of Shri Harbans Singh, Additional Sessions Judge, Jullundur, dated 11th April, 1972, reversing that of Shri D. S. Chinna, Judicial Magistrate, 1st Class, Phillaur, dated 6th January, 1972, and acquitting respondent No. 1.

R. L. Aggarwal, Shauket Ali and Amar Dutt, Advocates, for the appellant.

K. S. Thapar, Miss Surjit Kaur Tounq and Deepak Thapar, Advocates, for the respondents.

M. P. Singh Gill, Assistant Advocate-General, Punjab, for the State.

JUDGMENT.

Judgment of the Court was delivered by:—

VERMA, J.—This appeal has been directed by Ajit Singh (hereinafter called the complainant) against the acquittal of Charan Singh

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(hereinafter called the accused) recorded by the learned Additional Sessions Judge, Jullundur, in a complaint under sections 78 and 79 of the Trade and Merchandise Marks Act, 1958 (hereinafter called the Act).

(2) Shortly put, the prosecution case is that the firm known and styled as M/s Wattan Singh and Sons and the firm known and styled as M/s Bakhtawar Engineering Works manufacture agricultural machinery including chaff cutting machines, component parts and blades thereof at Goraya, district Jullundur. There are other firms which also manufacture such goods at Goraya. The complainant is the managing partner of the firm M/s Wattan Singh and Sons and the said firm had been manufacturing the aforesaid goods under the registered trade mark of 'Do Chiri' since 1949. The said firm had also manufactured the said goods even earlier but without registration of the aforesaid trade mark. The said trade mark is embossed on the chaff cutting machine at the time of moulding and a plate carrying the said mark is also affixed on it. The goods of the aforesaid firm had gained popularity and had been on extensive sale in different parts of India, including Saharanpur and it had built up valuable goodwill for the aforesaid trade mark.

(3) Towards the close of the year 1967, the firm M/s Bakhtawar Engineering Works began to manufacture goods with the trade mark of 'Do Kabutar'. The plate carrying the said trade mark was being affixed on the chaff cutting machines. The goods of the said firm were also marketed at Saharanpur through M/s. P. S. Batra and Company, Toka and Pipe Merchants as well as at other places. The accused is the proprietor of M/s Bakhtawar Engineering Works and P. S. Batra is the proprietor of M/s. P. S. Batra and Company, Toka and Pipe Merchants. The trade mark of 'Do Kabutar' which is not registered, is identical or nearly resembling and deceptively similar to the registered trade mark of 'Do Chiri'. Therefore, the complainant made complaint under sections 78 and 79 of the Act alleging that the accused and his firm M/s Bakhtawar Engineering Works had been falsely applying trade mark of 'Do Kabutar' to their goods without his (the complainant's) assent, and thereby infringed the trade mark of 'Do Chiri', held by him, and had been passing off their goods as and for those of his (the complainant's) firm and it resulted into tremendous fall in the sale of his goods and had caused heavy loss to him; and that P. S. Batra and his firm had been selling the said goods of the firm of the accused

knowing fully well that the trade mark of 'Do Kabutar' had been falsely applied to the same. The learned Magistrate doubted the case against N. S. Batra (who seems to have been summoned as accused for P. S. Batra) and acquitted him. He, however, held the accused guilty and convicted him under section 78 of the Act and sentenced him to a fine of Rs. 2,000; in default, to suffer rigorous imprisonment for six months and directed that half of the said fine, if realised, would be paid to the complainant by way of compensation. The accused preferred appeal against his aforesaid conviction and sentence and he succeeded therein; and the learned Additional Sessions Judge, setting aside his conviction and sentence, acquitted him. Dissatisfied with the said result, the complainant has come to this Court in appeal. The evidence was read out to us and we heard the arguments and examined the record.

(4) The facts, that the complainant's firm had been manufacturing and selling the goods under the registered trade mark of 'Do Chiri', that the firm of the accused had been manufacturing goods with the trade mark of 'Do Kabutar' and that the nature of the goods manufactured by them are the same and both these firms are working at Goraya and the field of their activity is the same, are amply borne out by the evidence present on record and are not disputed. The learned Additional Sessions Judge acquitted the accused for three reasons :

- (i) that the trade mark of 'Do Kabutar' was not deceptively similar;
- (ii) that the prosecution was barred by time under section 92 of the Act; and
- (iii) that there had been honest concurrent user of the trade mark 'Do Kabutar' by the accused.

(5) The powers of this Court in hearing appeal against an order of acquittal are no doubt as extensive as the powers in hearing appeal against the order of conviction. However, due regard has to be given to the reasons recorded by the Court in acquitting the accused and the same have to be dispelled before a contrary view is taken. The case of the complainant is that the accused applies trade mark of 'Do Kabutar' which is deceptively similar to his (the complainant's) registered trade mark of 'Do Chiri' and the said act of the accused falls within the mischief of the offence described in clause (a) of sub-section (2) of section 77

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of the Act. The expression "deceptively similar" is defined in clause (d) of sub-section (1) of section 2 of the Act as under :

"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."

It is plain from the said definition that it is not essential that both the trade marks, i.e., of 'Do Chiri' and 'Do Kabutar', should be exactly similar, and it is not required to examine the same by placing one by the side of the other to find out if there are any differences in the design. The test of such a comparison is not sound because a purchaser of the goods manufactured by the complainant or by the accused would seldom have the two trade marks before him when he makes the purchase. Therefore, it is of no use to discover as to on how many points the aforesaid two trade marks are similar or as to on how many points these are dissimilar. It is the element of similarity in both the trade marks which would cause deception or confusion. Therefore, if by looking on both the trade marks it can be said that the get up or general appearance of the trade mark of 'Do Kabutar' is such as would likely to mislead a purchaser to take the goods bearing the said trade mark for the goods of the trade mark of 'Do Chiri', the trade mark of 'Do Kabutar' would be said to be deceptively similar. We are guided in this view by the judgment of the Supreme Court in *Parle Products (P) Ltd. v. J. P. & Co., Mysore* (1), and the judgment of the Privy Council in *Thomas Bear & Sons (India) Ltd. v. Prayag Narain and another* (2). The plate bearing the trade mark of 'Do Chiri' and the plate bearing the trade mark of 'Do Kabutar' are oval in shape. The colour of the said plates is similar and the colour in which the birds appear on the same is also similar. The customers of the goods of both the firms are mainly unsophisticated illiterate villagers. In these circumstances, we have no doubt in saying that the get-up or general appearance of the two trade marks is likely to cause an ordinary purchaser to buy the goods of the trade mark of 'Do Kabutar', i.e., manufactured by the accused, believing that same had been manufactured by the complainant and were of the trade mark of 'Do Chiri'. To put it differently, the likeness of the two trade marks i.e., of 'Do Kabutar' and 'Do Chiri' is likely to cause confusion and also deception. In that view of the matter, we

(1) A.I.R. 1972 S.C. 1359.

(2) A.I.R. 1940 P.C. 86.

find that the trade mark of 'Do Kabutar' does come within the definition of 'deceptively similar' reproduced above.

(6) True, the learned Additional Sessions Judge has observed that there are some points of dissimilarity in the two trade marks inasmuch as the names of the two birds are different, and in trade mark of 'Do Chiri' the two sparrows are sitting on the ground with a flower vase between them and in the trade marks of 'Do Kabutar' the two pigeons are sitting on a branch of tree and that the postures of the birds in the two trade marks are different. Besides the points of dissimilarity, referred to by the learned Additional Sessions Judge, a close scrutiny of the two trade marks may further reveal some points of dissimilarity. For instance, in the trade mark of the accused, the words 'Do Kabutar' are written in English and Gurmukhi scripts whereas in the trade of the complainant, the words 'Do Chiri' are written in Urdu script. But in view of the discussion above, it is not the close resemblance which is required for declaring a trade mark to be deceptively similar. On the other hand, it is the near resemblance or likeness of the general appearance of the two trade marks that warrants the finding that the trade mark of 'Do Kabutar' is deceptively similar. Therefore, we disagree with the learned Additional Sessions Judge that the trade mark of 'Do Kabutar' was not deceptively similar and find ourselves in agreement with the learned counsel for the complainant that his conclusion on the said point cannot be accepted.

(7) Section 92 of the Act, so far it is relevant for decision of the question of limitation, reads thus—

"No prosecution for an offence under this Act shall be commenced after the expiration of three years next after the commission of the offence charged, or two years after the discovery thereof by the prosecutor, whichever expiration first happens."

The expression "of the offence charged" would, in our opinion, mean the offence for which the complaint had been made and cannot be construed as to mean the first offence. Infringement of trade mark may be committed several times and on several dates. The time of three years, prescribed by section 92 of the Act, would run from the date of infringement of the trade mark constituting the offence for which the complaint is made and not from the date

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of first infringement of the trade mark. We are supported in this view by the judgment of their Lordships of the Supreme Court in *Ram Kishore v. State of Uttar Pradesh* (3). Similarly, the period of two years, prescribed by section 92 of the Act would run from the date when the complainant came to know about the offence for which complaint had been brought. The complaint was made, in the instant case, on 24th January, 1968, for the offence which was alleged to have been committed by the accused two months prior to the institution of the complaint. That means, that the offence for which the complaint was made had been committed in the month of November, 1967, i.e., within two months prior to making of the complaint and that the complainant had also come to know about the commission of that offence within two months prior to the institution of the complaint. As such, the complaint was made within three years from the date of commission of the offence charged and also within two years after the discovery thereof. Therefore, we, in disagreement with the learned Additional Sessions Judge, find that the complaint was instituted within time and that the prosecution of the accused is not barred by section 92 of the Act.

(8) The relevant portion of sub-section (4) of section 77 of the Act, which defines the offence, reads thus—

“In any prosecution for falsely applying a trade mark to goods, the burden of proving the assent of the proprietor shall lie on the accused.”

and the relevant portion of section 78, which provides penalty for the said offence, reads as under :—

“78. Any person who,—

* * * *

(b) falsely applies to goods any trade mark; or

* * * *

(g) shall, unless he proves that he acted without intent to defraud, be punishable with imprisonment.....”

After reading the said provisions, we have no hesitation in agreeing with the learned counsel for the complainant that it was for the accused to show that he had been applying the trade mark of 'Do Kabutar' to the goods manufactured by him with the assent of the complainant or that he had applied the said trade mark to his goods without intent to defraud the public including the complainant. It was, however, not necessary for the accused to produce evidence *aliunde* in defence to prove that he had been applying the trade mark of 'Do Kabutar' to his goods with the assent of the complainant or without intent to defraud. He could prove the said matters from the prosecution evidence, from the material elicited by him in cross-examination of witnesses for the prosecution or from the circumstances of the case. The quantum of proof required from him is not proof beyond reasonable doubt. It is sufficient if he can show that preponderance of probabilities warrants a decision of the said matters in his favour. 'Intention' cannot be proved by direct evidence. It has to be inferred from the conduct and act of the parties and the surrounding circumstances of the case. The defence of the accused was that his firm had been selling the goods manufactured by it with trade mark of 'Do Kabutar' honestly and openly and to the knowledge of the proprietors of the complainant's firm since 1947. In other words, his defence was that he had the implied assent of the proprietors of the complainant's firm in the user of the trade mark of 'Do Kabutar' and that he had been applying the same on his goods without any intention to defraud. In the year 1950, Jawala Singh, who was elder brother of the father of the complainant, and who had been a partner in the firm, had applied to the Registrar of Trade Marks, Bombay, for registration of the trade mark of 'Do Chiri'. Sadhu Singh, one of the partners of Messrs Gujjar Singh, Sadhu Singh and Brothers, who also manufactured chaff cutting machines, etc., had raised objections against the registration of the said trade mark of 'Do Chiri'. Therefore, Jawala Singh had sworn an affidavit on 30th July, 1952, and had filed the same with the aforesaid Registrar of Trade Marks. A certified copy of the said affidavit had been obtained by the respondent and was produced in the complaint. The aforesaid affidavit of Jawala Singh, having been filed by him in the proceeding before the Registrar of Trade Marks, falls within clause (b) of sub-section (1) of section 125 of the Act and according to sub-section (1) of section 115 of the Act, a certified copy of the said affidavit can be admitted in evidence without any further proof. So, in view of the said provisions, certified copy of the affidavit of Jawala Singh, which was marked as Exhibit D.X. by the lower appellate Court,

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is admissible in evidence. In paragraph 11 of the said affidavit (Exhibit D.X.) Jawala Singh had stated that several firms manufacturing chaff cutting machines had been using trade marks of various flying birds without raising any objection and, to his knowledge, all those trade marks had some resemblance with one another. He had further furnished names of 20 firms who had been applying the said trade marks. In the month of March, 1971, the accused had moved an application under sections 561-A and 479-A, Criminal Procedure Code (copy Exhibit D. 2) in this Court in Criminal Revision No. 1-M of 1970 against the complainant. The complainant gave its reply (certified copy of which is Exhibit D. 1 and it will be hereinafter referred to as such) to the said application of the accused. During cross-examination, the complainant admitted that he had put in reply (Exhibit D. 1) and he also admitted its correctness. As such, it is admissible. He (the complainant) admitted specifically during cross-examination on 19th June, 1971, that the contents of paragraph No. 13 of Exhibit D. 1 were correct. In the said paragraph, he admitted that Messrs Bakhtawar Engineering Works was one of the 20 firms whose names had been supplied by Jawala Singh and that the said firm had been applying the trade mark of 'Do Kabutar' to their goods. It is, therefore, clear from affidavit (Exhibit D.X.) of Jawala Singh and the reply of the complainant (Exhibit D. 1), when read together, that as back as in the year 1952 Jawala Singh admitted that different firms, at least 20 in number, which included Messrs Bakhtawar Engineering Works, had been applying trade marks of birds to their goods to the knowledge of one another and without any objection.

(9) Section 37 of the Act provides that a registered trade mark is assignable and transmissible and section 33 of the Act provides that an application, in the prescribed manner, for assignment or transmission of a registered trade mark has to be made to the Registrar of Trade Marks. Exhibit P. 8 shows that Jawala Singh and Swaran Singh, who were partners of Messrs Wattan Singh and Sons, had transferred the trade mark of 'Do Chiri' to Swaran Singh, Ajit Singh, Satnam Singh and Balbir Singh had, according to paragraph 2 of the complaint, the said four persons are the partners of the firm of the complainant. It, therefore, follows that Jawala Singh has to be considered as predecessor-in-interest of the complainant and his firm and, as such, his statement, made in affidavit Exhibit D.X., can be used by the accused and his firm. So,

his statement, made in affidavit Exhibit D.X., is available to the accused as good piece of evidence by way of admission against the complainant.

(10) Ajit Singh complainant admitted during cross-examination that Messrs Bakhtawar Engineering Works was installed in or about the year 1952 and that Charan Singh and his brother Joginder Singh were its partners and after the death of Joginder Singh, which took place in or about the year 1964, Charan Singh had become its sole proprietor. It, therefore, follows from the discussion above that the evidence present on the record, when read as a whole, supports the statement of the accused, which has to be taken into consideration under section 342, Criminal Procedure Code, that his firm had been applying the trade mark of 'Do Kabutar' on its goods openly and to the knowledge of the complainant and his firm since long. As soon as it is so held, as we do, there can be no escape from the conclusion that there had been honest and concurrent user of the trade mark of 'Do Kabutar' by the accused. In that view of the matter, we are in agreement with the learned counsel for the accused that the material present on record warrants the conclusion that he and his firm had been applying the trade mark 'Do Kabutar' without intent to defraud and with the implied assent of the complainant. In that view of the conclusion, it has to be said that the two important ingredients of the offence, referred to in paragraph 5 above, are lacking and the accused has succeeded in proving his defence. So, his acquittal cannot be set aside although we have not accepted the conclusion of the learned Additional Sessions Judge that the prosecution was barred by time or that the trade mark of 'Do Kabutar' was not deceptively similar. It is well-settled that when two views can be possible on the evidence and the view taken by the Court acquitting the accused cannot be said to be wrong, the acquittal cannot be set aside. In the instant case, the view of the learned Additional Sessions Judge, that there had been honest and concurrent user of trade mark of 'Do Kabutar' by the accused, is not only reasonable but has been found to be correct. Therefore, the appeal fails.

(11) Consequently, we, maintaining the acquittal of the accused, dismiss this appeal.

B. S. G.