

the right of revision before the Financial Commissioner against such orders of the Commissioner. Therefore, it has to be held that this particular provision of the Rule 6(8) (b) of the Panjab Security of Land Tenures Rules, 1956, as amended upto the 31st July, 1959, is inconsistent with the provisions of the parent Act and hence *ultra vires*. The right of revision to the Financial Commissioner passed under Rule 6(8) (b) of the Panjab Security of Land Tenures Rules, must therefore lie."

(7) As I have already held above, that if once we come to the conclusion that the provisions of section 84 of the Panjab Tenancy Act will be applicable to the proceedings under the Panjab Security of Land Tenures Act, then there is no manner of doubt that the orders passed by the Commissioner and thereafter by the learned Financial Commissioner are unexceptionable. Even though Karnail Singh's appeal was barred by limitation, yet since this matter had come to the notice of the Commissioner and he was of the view that an illegality had been committed by the Collector in assessing the surplus area, he could validly recommend the case to the learned Financial Commissioner for setting aside all the proceedings up-to-date and remanding the case to the Collector for a fresh decision in accordance with law.

(8) In view of what I have said above, this appeal fails and is dismissed. There will, however, be no order as to costs.

Gopal Singh, J.—I agree.

K.S.K.

APPELLATE CIVIL

Before D. K. Mahajan and H. R. Sodhi, JJ.

DELCO ENGINEERING WORKS,—Appellants.

versus

GENERAL MOTORS CORPORATION.—Respondents.

Regular First Appeal No. 142 of 1967

October 13, 1971.

Trade and Merchandise Marks Act (XLIII of 1958)—Section 27—Passing off action—Determination of—Principles as to—Stated.

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Held, that an action for passing off is founded on the desirability of preventing commercial immorality or dishonesty on the part of a trader who by using a particular mark, whether registered or unregistered, wants to falsely represent that his goods are the goods of some one else so that he can take unfair advantage of the reputation of that other person in the market. The likelihood or probability of deception depends on a number of factors and is a question of fact in the circumstances of each case. Phonetic or visual similarities, get up, packing or other writings and marks on the goods or on the parcels in which they are offered for sale and other resemblances may help in determining the probability of deception, but each case depends on its own facts. If there is no link between two trades, or in other words, the two trades are not closely co-related and the goods are not analogous, a conclusion may be reached in a particular case that the chances of deception are too remote to be taken notice of so as to restrain the defendant from selling his goods under the same or similar trade mark. The whole thing has to be approached from the point of view of a man of average intelligence and of imperfect recollection. It is true that no proprietor of a trade mark acquires monopoly for the use of that mark but at the same time a trader cannot be allowed in justice and equity to let his goods pass off as those of another. (Paras 7, 8 and 14)

Regular First Appeal from the decree of Shri Gurbachan Singh, District Judge, Ludhiana, dated the 8th day of May, 1967, granting the plaintiffs a decree for permanent injunction restraining the defendants by themselves, their servants and agents, from using the word "Delco" on pedal axles for push bicycles or any other goods of their manufacture so as to pass off and/or enable others to pass off their goods as the goods of the plaintiffs and also restraining the defendants by a perpetual injunction from using the word "Delco" as part of their business name so as to pass off their business as of the plaintiffs or as in any way connected with the business of the plaintiffs and further ordering the defendants to pay a sum of Rs. 500 as nominal damages to the plaintiffs and also further ordering the defendants to deliver to the plaintiffs for destruction all pedal axles for push bicycles, dyes, stamps, literature and all other things bearing the offending trade mark "Delco" thereon and further ordering that the defendants would also pay the costs of the plaintiffs.

J. N. Kaushal, Senior Advocate, M. R. Agnihotri and Ashok Bhan, Advocates with him, for the appellants.

Kuldip Singh, R. S. Mongia, and J. S. Narang, Advocates, for the respondents.

JUDGMENT

Judgment of this Court was delivered by:—

SODHI, J.—(1) This appeal arises out of an action for passing off instituted by the plaintiff-respondents against the appellants to restrain the latter from using the trade mark "Delco". The suit was

decreed by the District Judge, Ludhiana, and a perpetual injunction issued against the appellants restraining them from using the word "Delco" on pedal axles for push cycles or any other goods of their manufacture. A sum of Rs. 500 was awarded to the respondents as nominal damages for the alleged user of their trade mark by the appellants.

(2) The respondents are General Motors Corporation incorporated in the United States of America with their registered head office at West Grand Boulevard and Cass Avenue Detroit. It is claimed by them that they have been carrying on business on a large scale throughout the World, including India, in the manufacture and sale of automobile goods *inter alia* motor cars, locomotives, diesel engines, electric motors, airplane engines, refrigerating and heating equipment, household appliances and accessories thereof, and that till the year 1957, they also carried on business in coaster brakes and hubs for bicycles. It is alleged that they acquired world-wide reputation for superior quality of their goods under the trade mark "Delco". Trade mark "Delco" was got registered by them in India as well in the year 1962, under trade marks Nos. 129625, 129627, 129628, 129626 and 121848 for various classes of goods as specified in the registration certificates Exhibits P. 3, P. 4, P. 5, P. 6 and P. 7. The registration certificate, Exhibit P. 6, covers pedals for land vehicles and springs. Admittedly, the respondents do not hold any trade mark for pedal axles for push bicycles.

(3) The defendant-appellants started in Ludhiana, Punjab, the Manufacture of bicycle axles and in the year 1956, they applied for registration of the trade mark "Delco" in respect of bicycle accessories and parts thereof, including pedal axles. The business name under which the appellants are working is "Delco Engineering Works" and Shri Kehar Singh is stated to be the sole proprietor of this concern. The averments of the appellants are that they commenced the use of the trade mark "Delco" for their bicycle axles actually in the year 1952 and to the same effect was their statement before the Registrar of Trade Marks. The Registrar pointed out to them that the word "Delco" as proposed to be used by them came in conflict with certain other trade marks including that owned by the General Motors Corporation, respondents. The appellants explained to him that "Delco" registered mark 129626 (Exhibit P. 6) is registered for vehicle brakes, vehicle springs, pedals for land vehicles, etc., but they wanted to use such trade mark only for the parts and fittings for cycles which

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was a separate class and not covered by the registration certificates of the respondents. The respondents raised objections before the Registrar about the registration of their trade mark in the name of the appellants but the same were not disposed of on merits as they were held to have not been filed within the prescribed time. The Registrar refused to invoke his discretion in their favour in the matter of extension of time and rejected the application in reply to notice of opposition on 30th January, 1959. The registration was ultimately allowed in favour of the appellants and they thus became proprietors of the trade mark "Delco" intended to be used for pedal axles for push bicycles. A notice, dated 20th September, 1958, Exhibit P. 1, was sent by the respondents to the appellants per registered post acknowledgement due that the products manufactured by them (Appellants) under their trade name "Delco" resembled the goods produced by the respondents and were likely to deceive or cause confusion in the course of trade and that the appellants were doing so solely with a view to pass off their goods as those of the respondents. The appellants were asked to withdraw their application for registration and stop the manufacture of any goods under the trade name "Delco". The appellants were further warned that if they did not desist from pursuing their illegal activities in the matter of use of "Delco" trade mark, suitable legal proceedings to protect the rights and interests of the respondents would be taken against them. It appears that after the aforesaid notice negotiations started between the parties and it is a common ground that Shri Kehar Singh, proprietor of the appellant firm, went to Bombay on 15th June, 1961, to discuss the terms of the settlement. No amicable settlement was arrived at and the appellants continued the manufacture of bicycles axles under the trade mark "Delco".

(4) The plaintiff-respondents then instituted the present suit in December, 1962. The defendants got their trade mark renewed for a further period of seven years from 16th January, 1963, on payment of necessary fees. The suit was resisted on various grounds and some preliminary objections were taken. It was pleaded in defence that the plaintiffs were estopped from filing the suit because of their acquiescence in the user of "Delco" trade mark by the defendants and that the suit was barred by limitation. It was claimed that the goods of the defendants were entirely of different description and the trade, counter and class of purchasers were also different, that the defendants were proprietors of the trade mark "Delco" so far as it related to the manufacture and sale of pedal axles for push bicycles

and that the plaintiffs had no cause of action. It was further averred that the defendants had been doing business under the trade name of "Delco Engineering Works" and using the trade mark "Delco" almost since the year 1952 and that the user of the trade mark was quite honest and in the usual course of their business. The explanation in the written statement which was reiterated by Kehar Singh appearing as D.W. 10, is that in the word "Delco" as used by his firm. 'D' stood for durability, 'E' for efficiency, 'L' for long life, 'C' for competitive rate, and 'O' for observable. The public, according to the defendants, knew, who were the manufacturers of cycle axles and the allegations of fraud and possibility of deception were described as baseless. The parties went to trial on the following issues arising out of their pleadings:—

- (1) Is the defendant selling goods so marked as to be designed or calculated to lead purchasers to believe that they are the plaintiffs' goods?
- (2) Is the plaintiff entitled to the injunction prayed for ?
- (3) To what amount the damages, if any, is the plaintiff entitled ?
- (4) Is the suit not within time ?
- (5) Whether the plaintiff has not a title and *locus standi* to sue?
- (6) What is the effect, if any, of the registration under section 12(3) of the Trade Marks Act of 1958 of the mark DELCO of the defendant ?
- (7) Relief."

Issue No. 5, as stated above, was subsequently recast at the instance of the parties and the amended issue stood as under:—

"Whether the plaintiff Company is estopped from bringing this suit or have they acquiesced in the use of the word "Delco" by the defendants, and if so, what is its effect?"

(5) The trial Court found issues Nos. 1 and 2 in favour of the plaintiffs it being held that the use of the trade mark "Delco" by the appellants was not honest and that they had deliberately adopted it in order to take advantage of the reputation of the plaintiffs and to lead the public to believe that they were connected with the latter. In the opinion of the trial Court it was a fit case in which the defendants should be restrained from using the disputed trade mark with

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a view to prevent them from passing off their goods as those of the plaintiffs. Under issue No. 3, nominal damages were assessed at Rs. 500. Issue No. 4 was decided in favour of the plaintiffs it being held that the suit was not barred by time. Decision on issue No. 5 also went in favour of the plaintiffs with an observation that there was no evidence to show that the plaintiffs ever acquiesced in the user of the trade mark "Delco" by the defendant-appellants or that they were estopped from instituting the present suit. In the result, the plaintiffs were granted a decree as stated above. Hence the present appeal by the defendants.

(6) Before dealing with the evidence in the case it is necessary to state what the law on the subject is and the evidence will then have to be appreciated from that stand point. The learned counsel for the parties have cited before us a number of authorities laying down tests that should guide a Court in considering the question of passing off or what may be described as unfair competition by use of a same or similar mark which is likely to lead the public to believe that the goods manufactured by the defendants are those of the plaintiffs.

(7) It is futile to give details of every case cited at the Bar or to refer to the history of legislation relating to trade marks in this country. The law in India in regard to passing off action is the same as in England. Section 27(2) of the Trade and Merchandise Marks Act, 1958 (Act No. 43 of 1958) lays down that the statute shall not be deemed to affect rights of action against any person for passing off goods as the goods of another person or the remedies in respect thereof. An action for passing off is founded on the desirability of preventing commercial immorality or dishonesty on the part of a trader, who by using a particular mark, whether registered or unregistered, wants to falsely represent that his goods are the goods of some one else so that he can take unfair advantage of the reputation of that other person in the market. It is not essential that some one must have actually been deceived but likelihood of deception is quite enough. The likelihood or probability of deception depends on a number of factors and is a question of fact in the circumstances of each case. As observed by their Lordships of the Supreme Court in *Corn Products Refining Co. v. Shangrila Food Products Ltd.* (1), "the question whether the two marks are likely to give rise to confusion

(1) A.I.R., 1960 S:C: 142,

or not is a question of first impression. It is for the Court to decide that question."

Evidence of actual deception, as observed by their Lordships of the Privy Council in *Thomas Bear and Sons (India) Ltd. v. Prayag Narain and another* (2), if available may be very valuable, but it is not indispensable. There is at the same time no monopoly in the use of a trade mark, proprietorship of which has been obtained by a particular person and use of the same or identical mark on another class of goods for which no mark has been registered or used in the market is not prohibited. To prevent unfair competition, a safeguard has, however, been provided on the grounds of equity and good conscience inasmuch as no trader will be permitted to use the same or similar trade mark which might create confusion and thereby deceive persons exercising ordinary caution and lead them to assume that the goods put upon the market by a person other than the holder or user of a particular trade mark belong to the latter. The protection will extend ordinarily to analogous goods and there must be some trade connection between the goods for which a trade mark is held and those which are supposed to pass off as the goods of the holder of the trade mark. The inevitable inference drawn in a case must be that there is probability of deception. As observed by the Privy Council in *Thomas Bear and Sons' case*, the question is "one which does not depend on a matter of resemblance". In an action for infringement, the only question to be determined is whether the defendant's mark is identical with or bears a deceptive resemblance to the plaintiff's registered trade mark. There is no matter of false representation involved therein, whereas in a passing off action the element of false representation is germane to the whole issue. There are decisions which lend some support to the proposition that the principle of trading on another's reputation should be restricted to cases of same or similar classes of goods suggesting thereby that when the goods are of a completely different class, the chances of deception are too meagre to be taken notice of. As stated in *Corpus Juris Secundum* (87 C.J.S. Trade-Marks, etc., 88), "the tendency of the Courts, however, has been to widen the scope of protection in the field of unfair competition". It is further stated that—

"Accordingly it is now held that the doctrine of unfair competition is not confined to cases of actual market competition between similar products of the parties, but that it

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

extends to all cases in which one party fraudulently seeks to sell his goods as those of another and includes any act causing damage to the credit, or reputation for integrity and fair dealing, of another So, without regard as to whether there is actual market competition between parties for the same trade, it is sufficient if the unfair practices of the one will injure the other."

The statement of law as given in Kerly on Trade Marks (Eighth Edition) at page 333 is almost to the same effect. The relevant passage is in the following words:—

"A plaintiff may fail to make out a case of infringement of a trade mark because he cannot prove its registration or that its registration extends to the goods, or to all of the goods, in question, or because the registration is invalid, and may yet show that by imitating the mark claimed as a trade mark, or otherwise, the defendant has done what is calculated to pass off his goods as those of the plaintiff".

Again at page 332, there appears an equally significant statement to the effect that,—

"In such cases the point to be decided is whether, having regard to all the circumstances of the case, the use by the defendant in connection with the goods of the mark, name or get-up in question impliedly represents such goods to be the goods of the plaintiff."

(8) The distinction between a passing off action and one for infringement was brought out by their Lordships of the Supreme Court in *Ruston and Hornsby Ltd. v. The Zamindara Engineering Co.*, (3), and the same test, as referred to above, namely, whether the goods sold by the defendant are designed or calculated to lead the purchasers to believe that they are plaintiff's goods, was adopted for the purposes of a passing off action. The appellant company in that case had its registered office in England with a subsidiary company under the same name registered in India

It carried on business in the manufacture and sale of diesel internal combustion engines and their parts and accessories under the trade mark "RUSTON". The respondent then was a company registered in India and it started the manufacture and sale of similar engines under the similar trade mark "RUSTOM", and the actual words used were "RUSTAM INDIA". A suit instituted by the appellant for a permanent injunction restraining the respondent from the use of the trade mark "RUSTAM" on the ground that it violated its trade mark because of the similarity between the two trade marks was dismissed. The decree of the trial Court was upheld in appeal and in an appeal before the Supreme Court by special leave, the decree of the High Court was set aside and the appellant held entitled to an injunction restraining the respondent and its agents from selling or advertising for sale engines, machinery or accessories under the name of "RUSTAM" or "RUSTAM INDIA". It was observed by their Lordships that "no case of actual deception nor any actual damage need be proved "nor was it necessary to prove that the alleged imitator used the trade mark of another knowingly or with an intent to deceive. The test of the likelihood of confusion or deception arising from similarity of marks was held good both in cases of infringement and passing-off actions. The two trade marks "RUSTON" and "RUSTAM" were, therefore, held likely to create confusion and deceive the purchasers. It was no doubt an infringement action, but in the ultimate analysis in the matter of determining whether the use of a particular trade mark is likely to cause confusion or deceive the purchasers, the line of distinction is almost imperceptible and the question to be answered in each case is "whether the mark used by the defendant as a whole is deceptively similar to that of the registered mark of the plaintiff". Phonetic or visual similarities get up, packing or other writings and marks on the goods or on the parcels in which they are offered for sale and other resemblances may help in determining the probability of deception, but, as already observed, each case depends on its own facts. If there is no link between two trades, or in other words, the two trades are not closely co-related and the goods are not analogous, a conclusion may be reached in a particular case that the chances of deception are too remote to be taken notice of so as to restrain the defendant from selling his goods under the same or similar trade mark. The whole thing has to be approached from the point of view of a man of average intelligence and of imperfect recollection. Reputation of a trade mark must be ascertained in

each case and their Lordships observed in '*Corn Products Refining Co.,*' case (supra)—

"It seems clear to us that what is necessary is that the reputation should attach to the trade mark; it should appear that the public associated that trade mark with certain goods. The reputation with which we are concerned in the present case is the reputation of the trade mark and not that of the maker of the goods bearing that trade mark. A trade mark may acquire a reputation in connection with the goods in respect of which it is used though a buyer may not know who the manufacture of the goods is."

(9) A Division Bench of the Bombay High Court in *Sunder Parmanand Lalwani v. Caltex (India) Ltd.*, (4), had an occasion to consider the case where registered trade mark "Caltex" usually associated with petroleum, kerosene and lubricants was started being used for watches for which it was wholly new in India. A question arose whether the use of the trade mark "Caltex" on watches was likely to deceive or cause confusion so as to render it probable for a purchaser to believe that the watches were manufactured by the Caltex Company. It is necessary to make a brief reference to the facts of this case. The defendants Sunder Parmanand Lalwani of Bombay applied for registration of the trade mark "Caltex" in respect of watches which were stated to be imported from Switzerland in their own right under a contract with a manufacturing company known as Degoumois and Co. It was urged before the Deputy Registrar, Trade Marks, on behalf of the applicant company that as the competing goods were entirely different in character, there being no connection in the course of trade between them inasmuch as they were never sold at the same shop much less at the counter and the trade channels through which respective goods passed were entirely different, there was no tangible danger of any deception or confusion arising so as to withhold the registration of the trade mark in favour of the applicant. The Caltex India Limited opposed the application. Their contention was that their publicity was wide spread and that they had large resources so as to be capable of starting any new industry or trade. It was, therefore, urged that use of the trade mark 'Caltex' by the applicant was likely to deceive the customers, who would believe that the

watches were manufactured or were in some way connected with the Caltex Company or at least they would wonder whether they were in any way so connected which was bound to create confusion leading to sufficient chances of deception. The Deputy Registrar dismissed the opposition but on appeal being filed in the High Court, S. M. Shah J., allowed the appeal and set aside the order of the Deputy Registrar thereby refusing registration. A further appeal to a Division Bench of the same Court by Sunder Parmanand Lalwani, applicant, was dismissed. In analysing the approach required in such cases, the learned Judges discussed certain leading cases on the point, such as, *In the Matter of Dunn's Trade Mark*, (5), *In the Matter of an Application by Edward Hack for the Registration of a Trade Mark* (6), and *The Eastman Photographic Materials Company Ltd. and another v. The John Griffiths Cycle Corporation, Ltd. etc.* (7). In the first case, "D" applied to register a label for baking powder under the trade name "Fruit-Salt Baking Powder". "E" opposed registration on the ground that he had registered the words "Fruit-Salt" as a trade mark for a medical preparation known as "Eno's Fruit Salt". The opposition was accepted and registration refused. The evidence showed that Eno's preparation was well-known and very popular. The House of Lords by majority reached the conclusion that the proposed use of the words "Fruit Salt" would be calculated to deceive so as to induce people to buy baking powder under an impression that the same was in some way or other connected with "E's" preparation. The question in trade mark cases is not only between two rival traders, but the public is also interested in it. What has to be avoided is probability of deception to them. The second case too related to registration, but the expression "deceive or cause confusion" required to be considered. The trade mark "Black Magic" was registered for "Chocolate and chocolates" which mark had been extensively advertised. An application was made for registration of the same trade mark in respect of medicated preparations such as laxatives. The holders of the trade mark for chocolates opposed the registration it being urged by them that such registration would or might convey the impression that their chocolate was used in the preparation of the laxatives. The Assistant Comptroller allowed the registration for laxatives. The opponents' appeal was allowed by the

(5) 7 R.P.C. 311

(6) 58 R.P.C. 91.

(7) 15 R.P.C. 105.

Chancery Division of the High Court Judges on the ground that "there was a risk of confusion in that some persons would be likely to think that the two "Black Magic" preparations were made by the same manufacturers, and others to wonder if this might be the case". The third case also related to the consideration of the question as to whether description of the goods was such as to be calculated to deceive. The E. Company were the manufacturers of Kodak cameras and had also manufactured cameras specially adopted for being used on bicycles known as "Bicycle Kodaks". Another company (J.G. Company) applied for registration of the word "Kodak" on cycles and obtained the same trade mark. The E. Company then commenced an action against J. G. Company to restrain the latter from carrying on business under the name "Kodak Cycle Company, Ltd." and from passing off their goods as the goods of the plaintiff. It was held that "the word "Kodak" had become identified with the E. Company and with their goods, that the evidence showed a close connection between the bicycle and photographic trades, that registration had been obtained by an untrue statement to the Registrar, and that the Defendants were trying to get the benefit of the reputation of the E. Company." An injunction was accordingly issued restraining the defendants from trading under the name "Kodak Cycle Company, Ltd.", and from selling their goods as "Kodak". The trade connection between Kodak cameras and Kodak cycles was only this much that E. Company had manufactured cameras to be more suitably fitted on bicycles though there was no other connection between the cameras and the bicycles.

(10) There are some interesting cases to be noticed in Federal Supplements and one of them is reported as *Alfred Dunhill of London, Inc. v. Dunhill Shirt Shop. Inc.* (8). An injunction was granted against the use of the trade name "Dunhill" by the defendant corporation selling shirts though this mark was being used by another corporation for selling smokers' supplies. It was held that it was no answer that the defendant sells shirts, and the plaintiff, smokers' requisites. Another case is *Wall v. Rolls-Royce of America* (9). Howard Wall was doing business under the name Rolls-Royce Tube Company. There was a corporation Rolls-Royce of America, well-known manufacturers of automobiles and aeroplanes. Howard Wall was using the name Rolls-Royce for his business

(8) 3 F. Supp. 487.

(9) 4 F. (2d) 333.

enterprise and was using this name for radio tubes. It was established from evidence that by reason of the high standard of its product and the volume and spread of its trade the name Rolls-Royce had become associated all over the world with the excellence of its product, and was associated in the public mind with high-grade work, and gave its owners an established, distinctive, and valuable business asset. The defendant Howard Wall was individually engaged in the business of selling radio tubes and he had no connection with the corporation. On an action for injunction it was observed by the Circuit Court of Appeals, constituted by a Bench of three Judges, that there was no legitimate purpose to be served by the adoption of the name "Rolls-Royce" by the defendant except that it enhanced his standing and endangered that of the plaintiff. A few of the observations in this regard may usefully be reproduced:—

"... Indeed, from the standpoint of commercial integrity, fair business and trade equity, we feel the court below, sitting in equity, was justified in preventing the defendant from veiling his business under the name of "Rolls-Royce", for he had, and could have had, but one object in view, namely, to commercially use as his own a commercial asset that belonged to others ..."

(11) There is yet another case which must not go unnoticed and it is reported as *Bulova Watch Co. v. Stolzberg*, (10). The plaintiff-company, Bulova Watch Co. of New York, was concentrating on watch business except that for a short period it manufactured radios as well. It registered the trade mark "Bulova" under the Trade Mark Act, 1905, for watches, watch movements and watch cases. The plaintiff used the name "Bulova" in connection with its products and this mark had been extensively advertised since the year 1927. In 1941, defendant registered his trade mark "Bulova" on shoes. He was conducting shoe business under the name of "Eddy's Shoes" but shoes were stamped as "Bulova Fine Shoes" and the word "Bulova" featured in the advertisements. The defendant could assign no reason for his choice of the word "Bulova" and he seemed to have done so as the trade mark was widely advertised and well-known name in the field of trade. The plaintiff instituted an action for injunction and destruction of all material containing the name "Bulova" and also for damages. The

(10) 69 F. Supp. 543.

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relief for infringement was refused but the defendant was enjoined from the use of the plaintiff's trade mark "Bulova" in connection with the sale of shoes it being held that the case squarely fell within the ambit of unfair competition. The approach to be made in such cases was analysed and it was observed that,—

"... it is the 'unfairness' of the defendant's conduct rather than the existence of 'competition' between plaintiff and defendant which forms the basis for the intervention of a court of equity. The trade-mark not only serves to designate the source of the owner's products, but also stands as a symbol of his good will and hence is an instrument for the creation and retention of custom ..."

In the same decision, the following words of Judge Learned Hand in *Yale Electric Corporation v. Robertson* (11), have been borrowed:—

"However, it has of recent years been recognized that a merchant may have a sufficient economic interest in the use of his mark outside the field of his own exploitation to justify interposition by a Court. His mark is his authentic seal; by it he vouches for the goods which bear it; it carries his name for good or ill. If another uses it, he borrows the owner's reputation, whose quality no longer lies within his own control. This is an injury, even though the borrower does not tarnish it, or divert any sales by its use; for a reputation, like a face, is the symbol of its possessor and creator, and another can use it only as a mask. And so it has come to be recognised that, unless the borrower's use is so foreign to the owner's as to insure against any identification of the two, it is unlawful."

(12) Mr. Kuldip Singh, learned counsel for the respondents, cited several other authorities as well, but it is wholly futile to go on multiplying them and burdening the judgment with the facts thereof when the principles that emerge from the plethora of case law, Indian, English and American, have been stated above.

(11) 2 Cir. 26 F. 2d. 972, 974.

(13) Mr. J. N. Kaushal, learned counsel for the appellants, invites our attention to cases reported as, *Thomas Bear and Sons (India) Ltd. v. Prayag Narain and another* (2) *National Electric Stores and others v. General Electric Co. Ltd.* (12) *Messrs Modi Sugar Mills Limited v. Tata Oil Mills Co. Ltd. Bombay*, (13) *R. J. Wood and Co. v. Firm Kanshi Ram-Hans Raj*, (14) *The Bridgestone Company (P) Ltd. v. The Bridgestone Tyre Company Ltd. Tokyo, Japan*, (15) *Anglo-Indian Drug and Chemical Co. v. Swastik Oil Mills Co. Ltd.* (16) *M/s. Parry and Co. Ltd., Madras v. M/s. Perry and Co., Usilampatti Madurai*, (17) *Neostyle Manufacturing Company Ltd., v. Ellam's Duplicator Company*, (18) and *Rustom Ali Molla and others v. Bata Shoe Co. Ltd.*, (19).

(14) The main emphasis of the learned counsel is on the observations of the Privy Council in *Thomas Bear and Sons' case*, (2) where it is stated that "there can obviously be no monopoly in the use of the trade mark". It is urged that no trade connection exists in the instant case between bicycle pedal axles manufactured by the appellant and automobile goods of the respondents, more so when the respondents never produced and put in the market after the year 1957 even coaster brakes and hubs for bicycles for which they held registration certificates. The classes of goods, namely, bicycle pedal axles and automobile spares are stated to be different, and the argument is that there is no evidence to show that there existed or exists a common market for these two types of goods or the class of purchasers is the same or that they were ever sold at the same counter. The learned counsel submits that cycle purchasers are a class by themselves and there is no likelihood of any deception being practised on a customer of average intelligence so as to create a belief in his mind that the goods sold by the appellant are the goods of the respondents. Mr. Kaushal further urges that the respondents have not examined any witness who deposed that

(12) A.I.R. 1944 Lah. 386.

(13) A.I.R. 1943 Lah. 196.

(14) A.I.R. 1937 Lah. 186.

(15) 1966 P.L.R. (Delhi Section) 97.

(16) A.I.R. 1935 Bom. 101.

(17) A.I.R. 1963 Mad. 460.

(18) 21 R.P.C. 569.

(19) A.I.R. 1957 Cal. 120.

he was deceived inasmuch as he took the goods of the appellants to be those of the respondents. According to the learned counsel, the evidence of the dealers that it is likely that purchasers of the appellants goods will be deceived is inadmissible and that the only right type of evidence would have been of witnesses who are accustomed to buy the articles in question as they alone could say whether they would be deceived. Decision in *Thomas Bear and Sons' case*, (2) has to be confined to its own facts and, as a matter of fact, it is observed by their Lordships that in an action for infringement of a trade mark or passing-off action, determination of the questions involved depends on the evidence adduced. The appellants there were manufacturers and sellers of cigarettes and of tobacco described as "Virginia Bird's Eye" smoked in pipes. These goods were marketed in a European style and sold in packets and in tins bearing a mark the distinguishing feature of which was the representation of an elephant and the packets and tins of cigarettes have also borne the designation "Elephant Cigarettes". Upon the tobacco the representation of the elephant appeared in the red and upon the cigarettes the representation of the elephant appeared on a red back-ground. These goods were well known in the Indian market as "Elephant Mark", "Hathi Markha", "Lal Hathi" and the like, since the year 1922. In 1926, the respondents firm "Rama and Company" started the manufacture and sale of chewing tobacco. This stuff was also sold in packets and tins and is often intended for use as an addition to betels (pans). This tobacco was of indigenous growth. The packets and tins had the picture of an elephant on them, not unlike the elephant used by the appellants though there were differences in colour. The packets and tins in which chewing tobacco was sold were different in appearances and the labels clearly bore the name of the manufacturers, that is, "Rama and Company", while the appellants' goods bore their own name. It was in these circumstances that their Lordships observed that,—

".....A manufacturer of cigarettes under an undoubted trade mark such as an animal, or any other device cannot legally object to the use of the identical mark on, say, hats, or soap, for the simple reason that purchasers of any of the latter kinds of goods could not reasonably suppose, even if they were well acquainted with the mark as used on cigarettes, that its use on hats or soap denoted that these goods were manufactured or marked

by the cigarette manufacturer: see *somerville v. Schembri* (20). Those would be simple cases, but some much more difficult ones can be suggested. If a manufacturer of a special kind of smoking tobacco under a trade mark seeks to restrain the use of it on cigars, or on a very different kind of smoking tobacco, or on cigarettes, or on snuff, or on chewing tobacco, or on tobacco in some form sold for use as a weed killer — all these things being made of tobacco — questions, sometimes of great difficulty, may arise. It is, however, very important to observe that each of these questions will be a question of fact to be decided on the evidence adduced. The vital element in such a case is the probability of deception. This may depend on a number of matters as well as the question of similarity of the marks or of the get-up. Witnesses can be called to prove the circumstances and the places in which the articles are sold, the classes of persons who buy them, and whether they include persons who are illiterate or ignorant or the reverse, the manner in which the public are accustomed to ask for the articles, and any other matters which will assist the Court to decide whether deception is probable. Evidence of actual deception may be available and if available may be very valuable. There is no such person as an expert in human nature, and it is now well settled that a witness cannot be called to say that it is likely that purchasers of the goods will be deceived. This can only be a matter of opinion formed after the dispute has arisen and too often without any judicial consideration of the opposing contentions.....”

It is true that no proprietor of a trade mark acquires monopoly for the use of that mark but at the same time the other proposition is equally well-settled that a trader cannot be allowed in justice and equity to let his goods pass off as those of another. *Thomas Bear and Sons' case*, in our opinion, does not help the appellants and is distinguishable on facts. The card-board packing in which the cycle axles manufactured by the appellants contained has the word “DELCO” written in scripts of different languages and the place

where the contents have been manufactured is not indicated, though the name "DELCO ENGINEERING WORKS (REGD)" is printed in thin letters. In one corner the words "Punjab India" are printed. The axle itself has nothing else engraved on it except the word "DELCO".

(15) *National Electric Stores' case* is not even remotely of any assistance to the appellants. Electric bulbs and dry cell batteries used in electric torches, were held to be goods of the same class as dry electric flashlight batteries. The plaintiffs were the General Electric Company Ltd., carrying on extensive business as manufacturers and sellers throughout the world of electric equipment for over several decades. They manufactured electric bulbs, wireless valves, photo electric cells, dry cell batteries and a large variety of other electric goods under the trade mark "Osram". The defendants started a business as sellers of dry electric flashlight batteries and used the name "Osram" for such batteries. A passing-off action instituted by the General Electric Company was dismissed by the trial Court but decreed on appeal by the District Judge who held that flashlight batteries had a close affinity to and were connected by the trade and the public with electric bulbs; that the trade mark "Osram" was the property of the plaintiffs; and that the use of such mark by the defendants was intended to increase their sale by deceiving the public that they were buying the goods manufactured by the plaintiff company. These findings were affirmed by the High Court and the injunction against the respondent maintained. Divergence of judicial opinion as to the meaning of the expressions 'goods of a similar class and character and goods of a totally different character' was noticed by the learned Judges and it was observed that "every case has to be judged with due regard to the evidence, direct and circumstantial, brought on the record".

(16) *Messrs Modi, Sugar Mills' case* relates to the likelihood of deception by using the trade marks "Cocogem" and "Kotogem". Tata Oil Mills Co., Ltd., plaintiffs, produced vanaspati products under the name "Cocogem". This mark had acquired great popularity and reputation throughout India and even in some foreign countries. It was sold in cylindrical tin containers and the label used thereon gave a clear description of the manufacturing company. The defendants, the Modi Sugar Mills' Ltd., also produced various kinds of vanaspati one of which was from cotton-seed and they

called it "Kotogem". The plaintiffs brought a suit to restrain infringement of the trade mark and passing off, it being pleaded that "Kotogem" was a colourable imitation of their trade-mark "Cocogem". It was found as a fact that the containers of the two vegetable products were quite dissimilar both in shape and in the matter of use of labels. The defendant's container had a pictorial representation of a stalwart Rajput soldier, riding a horse and carrying a flag, on which were printed the words "Kotogem", whereas there was no pictorial representation on the packing of the plaintiffs. The word "Cocogem" was printed in bold letters in red colour and the name of the manufacturers also stated therein. In such a situation it was held that there was no likelihood of any person mistaking one for the other.

(17) *R.J. Wood and Co.'s case* has been relied upon by Mr. Kaushal for the observations made therein with regard to the test to be adopted to see whether two goods are of the same species. It was observed that the whole question must be looked at from a business and commercial point of view and the true test is whether the two sets of goods are so commonly dealt in by the same trader that his customers knowing his mark in connection with one set and seeing it upon the other would be likely to suppose that it was used upon them to indicate that they were his goods no matter with the use by the defendant of the trade-mark is improper or dishonest, the plaintiff must be granted an injunction to restrain the defendant from using the trade-mark.

(18) Facts in *Bridgestone Company's case* are wholly different and decision in that case cannot provide any guideline. The defendant company there had acquired reputation with respect to heavy vehicle tyres and tubes under the trade-mark "Bridgestone". An application for registration of the same trade-mark for bicycle parts other than rubber tyres and tubes was made by the appellant company. An opposition was filed by the respondent on the ground that the trade-mark was the same and likely to create confusion and deceive an unwary customer. It was in these circumstances that S. K. Kapur J. held that registration could not be refused as no question of any confusion arose. In the opinion of the learned Judge, there could possibly be some confusion as to trade origin between heavy tyres and tubes and bicycle tyres and tubes, but bicycle parts other than tyres and tubes cannot be said to have a trade link with, or termed as goods of the same description as heavy vehicle tyres and tubes.

(19) Single Bench judgment of the Bombay High Court in *Anglo-Indian Drug and Chemical Co.'s case* only reiterates the undisputed proposition that acquisition of an exclusive right to a trade-mark in connection with a particular article of commerce cannot entitle the owner of the right to prohibit the use by others of such mark in connection with goods of a totally different character. It had its own peculiar facts and no help can be derived therefrom. The plaintiffs there were carrying on the business of manufacturing and selling drugs, patent medicines, hair oils and toilet requisites under the trade-mark "No. 777". The defendant company started the manufacture and sale of bar soap with the name of their company written on it and underneath No. 777 were the words "Vegetable Soap Washes Well". It was sold in the market as Swastik Soap and two Swastik marks appeared on each bar. The complaint of the plaintiffs was that the use of "No. 777" on the bar soap was calculated to deceive purchasers into the belief that the soap was the plaintiffs' product and an action for infringement was instituted in the High Court. In these circumstances, the learned Judge came to the conclusion that no doubt identical mark was being used by the defendant company, there was no probability of any deception being practised on the purchasers so as to affect the reputation of the plaintiffs. The defendants' counsel gave an undertaking to the Court at the outset of the proceedings that the defendant company was not keen to use No. "777" for bar soap and that the suit was being defended only to establish its rights.

(20) *M/s. Parry and Co.'s case* decided by the Madras High Court is hardly of any assistance. Trade-Mark "Parry's" was registered for confectionary products manufactured by the plaintiff. The defendants engaged in the manufacture of biscuits used the word "Perry" written in script form and also in block letters. The plaintiffs objected to the use of the trade-mark by the defendants and an agreement was arrived at between the parties that the trade-mark would be confined to biscuits only and it was registered accordingly for the defendants. The defendants then extended their business activities of manufacturing and putting into the market confectionary as well under the same trade-mark. In an infringement action it was held that the goods manufactured by the parties were of the same class and the marks used by them so resembled each other as to cause real danger of deception or confusion. This case has been referred to only to illustrate and appreciate what the goods of the

same class or description can mean as otherwise it goes against the appellants.

(21) In *Rustom Ali Molla's case*, the use of the trade mark "Bata" in respect of lungis or handkerchiefs was objected to. Bata Shoe Co., are well-known manufacturers of foot wears and other leather and rubber goods. They are alleged to have started manufacture of socks and hosiery as well under their trade mark "Bata". The defendants used the same mark "Bata" in respect of lungis and applied for registration of the same in regard to this class of goods to be put in the market as "Bata Lungis". Bata Shoe Company instituted a suit claiming *inter alia* a temporary injunction restraining the defendants from infringing their trade-mark and from passing off lungis and other articles as goods of the plaintiffs. The District Judge granted temporary injunction on the ground that the plaintiffs had made out a strong *prima facie* case as to passing off. An appeal was taken to the High Court by the defendants as a result whereof temporary injunction was vacated. The view taken by the learned Judges of the Calcutta High Court was that the mark "Bata" not having been associated in the public mind with lungis or handkerchiefs, these goods being of a totally different character from those of the Bata Shoe Co.'s goods, a trader's user of the said mark or name in respect of lungis or handkerchiefs of his manufacture do not constitute any passing off of his goods as those of the respondents. This judgment runs counter to the view taken by the Division Bench of the Bombay High Court in *Sunder Parmanand Lalwani's case* (*supra*). The Calcutta High Court relied on the *Eastman Photographic Materials Company Ltd.'s case* (7). This is one of the few cases where the trade-mark used by the defendants was exactly identical with that of the plaintiff and not that there was similarity between the two.

(22) In *Neostyle Manufacturing Company's case*, the plaintiff-appellants were engaged in the trade of duplicating machines and accessories under the name "Neostyle". The respondent company traded in paper, stationery, ink, etc., by use of the word "Neostyle", and in an action to restrain the defendant-company from passing off ink and other stationery as the goods of the plaintiffs, injunction was refused, but the Court suggested that the defendants' name should always appear on the tins of ink, etc., sold by them. Mr. Kaushal urged that since the classes of goods sold by the plaintiffs and defendants were different, injunction was refused. This

case really speaking is of no help as it does not give any authoritative pronouncement.

(23) In the background of the cases cited by Mr. Kaushal, he has raised the following points:—

- (1) The trade-mark of the plaintiff-respondents is confined only to automobile goods, motor cars and their accessories, diesel engines and other similar goods of that class, and that it does not extend to bicycle axles. The two classes of goods, namely, motor car accessories and cycle parts, according to the counsel, are separate and such goods are described differently.
- (2) There is no trade connection between the two classes of goods referred to above inasmuch as it is not proved that motor parts manufactured by the plaintiffs and cycle parts manufactured by the defendants are sold by the same trader or at the same counter. It is urged that the purchasers of goods of two classes are quite distinct and both these goods are not sold in a common market. It is not disputed that the respondents have not manufactured any cycle parts whatsoever after the year 1957, but the contention is that there is indeed no evidence at all to show that the respondents ever manufactured any cycle accessories.
- (3) No witness has been produced, who could depose that he was actually deceived or that if he had gone to purchase a paddle axle he was likely to be deceived so as to believe that the goods manufactured by the defendants were those of the plaintiffs.
- (4) The opposition of the plaintiff-respondents to the registration of the trade-mark was rejected by the Registrar. This circumstance the learned counsel wants to be taken into consideration for coming to the conclusion whether there were any chances of deception.
- (5) "Delco" trade-mark is not known to the common man and it is only the owners and dealers in motor cars, who might be familiar with it. The argument is that a purchaser asking for "Delco" bicycles parts purchases the same

knowing well that they are manufactured by the defendants and no question of any deception could arise. The plaintiff-respondents have not established that they enjoyed amongst the public reputation of that magnitude which could be reasonably affected by the use of the trade-mark by the defendants so as to induce the purchasers to believe that the bicycle accessories must have been manufactured by the company of the plaintiffs. It is argued that magazines in which the advertisements of the plaintiff-respondents appear are read only by the commercial class and not by the common man and that it is the information of the common man that has to be taken into account in determining the probabilities of deception.

(24) We are unable to accept the contention of Mr. Kaushal that there is no trade connection between the goods manufactured by the appellants and the respondents. There is an averment in the plaint that the plaintiff-respondents, carried on manufacture and sale of coaster brakes and hubs for bicycles until the year 1957, and this assertion is supported by the affidavit of Mr. Patrick Henry Murphy, legal attorney of the plaintiff company. The deposition is based on the records of the plaintiff company and the defendants have not specifically denied the same. It cannot, therefore, be held to have been disproved that the respondents did deal in manufacture and sale of bicycle accessories till the year 1957. We have it in the evidence of Shri S. Narayanan, Director, Madras Auto Service Private Limited, Madras, who was examined on interrogatories, that the "Delco" goods as manufactured by the General Motors are available not only with the automobile shops, but also in the shops dealing in cycle accessories in up-country towns. Shri S. M. Subramaniam, partner in the Modern Distributory Company and Manager, Modern Automobiles, Madras, who too was examined on interrogatories, stated that push bicycles and motor cars are both included in land vehicles which are covered by the registration certificates of the plaintiffs. It is further deposed by him that "Delco" automobile spare parts are sold in cycle spare parts shops as well. This witness was previously doing business at Madurai in cycle parts as well as automobile spare parts. Shri S. K. Banerjee, Director of the Howrah Motor Co., Calcutta, asserted on solemn affirmation that automobile and cycle parts are all of allied nature and that many concerns which manufacture and sell automobiles and their spare parts also sell cycles and their

spare parts. Shri R. S. Sanghavi is another witness produced by the respondents and he represents Hindustan Automobiles, Bombay. He has stated that his firm were carrying on business in automobiles and accessories thereof, and were previously importing bicycles from United Kingdom before the import was banned. This firm was selling cycles and accessories thereof as well as automobiles and their spare parts from the same counter. The statements of the aforesaid witness are further supported by the evidence of Shri Ratilal Anandji Doshi of the Associated Auto Parts (Private) Limited, Bombay, who from his personal knowledge deposed that he had come across several cycle traders who sell tubes and tyres for truck and motor cars and also for bicycles. The statement of Shri R. P. Shet of Conwest Private Limited, Bombay, is equally important. It is deposed by him that goods manufactured by "Delco Remy Division" of the respondents are available not only in the shops of auto-parts dealers, but also in the shops of cycle dealers. He claims to have come across at many places, including Bombay, Poona, Ahmedabad, Nagpur, etc., where auto-dealers sold cycles and cycle parts.

(25) We have yet another piece of evidence in the form of advertisements as appearing in commercial magazines like, Exhibits A, B, C, E, F, G, H, etc. We find that advertisements of cycle traders for cycles and their accessories appear in the same magazines as those of dealers dealing in motor cars and their spare parts. As an illustration, it is enough to refer to magazine Exhibit 'G' at page 152 whereof appears an article on bicycles and motor-cycles, etc. These magazines have an index of advertisers and some of the companies referred to therein deal both with bicycles and their accessories, and also in motor cars and their spare parts. The volume of evidence as produced by the plaintiff-respondents and referred to above has not been rebutted.

(26) The defendant-appellants produced Balwant Singh D.W. 1, Ishar Singh D.W. 2 and Khushi Ram D.W. 3 to show that the firms of these witnesses purchased cycle pedal axles from the defendants with whom they had dealings for several years since 1951. Sardar Singh D.W. 4 carries on business of manufacture of cycle spare parts under the name and style of "Navyong Bicycle Industries, Ludhiana". He deposed that manufacturing fields for motor-cycles and their parts, and bicycles and their parts are separate and distinct. He had never purchased any goods from the defendants. D. W. 5 is

Shri Hans Raj Sharma, Editor of news paper "Parwaz" printed and published at Ludhiana. He has been publishing the advertisements of the defendants. The evidence of Shri Balwant Rai D. W. 6 is also to the same effect, namely, that the advertisements of the defendant-appellants were being published in the "Daily Partap". It is not understood how this evidence can be of any help to the appellants Shri Harbhajan Singh D. W. 7 is proprietor of the firm known as "S. S. Kapur and Sons" dealing in cycle spare parts at Delhi, and he had been purchasing pedal axles from the appellants. It is stated by him that he always purchased the goods knowing them to be manufactured by the defendants' firm.

(27) In the face of evidence produced by the plaintiff-respondents it must, therefore, be held that there is a trade connection between bicycle pedal axles and the automobile goods, locomotives, diesel engines, etc., manufactured by the plaintiff company. They are quite often sold in a common market and sometime from the same counter.

(28) The argument of Mr. Kaushal, that no witness was produced by the plaintiffs, who could depose that he was actually deceived or that he would have been deceived so as to believe that the goods manufactured by the appellants were really those of the respondents is to be noticed only to be rejected. It is conceded by the learned counsel that no proof of actual deception is necessary and that a passing-off action would lie even if a customer of an average and ordinary intelligence is likely to be deceived into the belief that the goods manufactured by the defendant-appellants are those of the plaintiff-respondents. We have it in the statement of P. W. 1, Shri D. R. Mehta, Sales Representative of Capital Refrigerator Company, New Delhi, that on seeing the pedal axles for cycles bearing the name "Delco", he was bound to get the impression that the goods were those of the plaintiff-company. Shri R. C. Gupta, P.W. 2, Manager of the Spare Parts Section of the Saran Motors, Janpath, New Delhi, Shri K. K. Bakhshi, P. W. 3, Supply Manager, Jullundur Motor Agency, Delhi, and Shri Amar Nath Sharma, P. W. 4, Manager, Premnath Diesels, New Delhi, also depose to the same effect. Sarvshri S. Narayanan, S. M. Subramaniam, S. K. Banerjee, Ratilal Anandji Doshi and R. S. Sanghavi, to whose evidence reference has already been made, equally support the plea of the plaintiffs that the goods of the defendants are likely to be taken as produced by the plaintiffs.

Delco Engineering Works v. General Motors Corporation. (Sodhi, J.)

(29) Whatever be the value to be attached to this evidence, it is for Courts to determine in each case the extent of likelihood of deception. The trade mark "Delco" under which the plaintiff-company carried on its business had undoubtedly gained wide reputation throughout the world including India for motor cars, locomotives, diesel engines, electric motors, household appliances, etc., and accessories for all these goods. The plaintiffs had been manufacturing cycle parts as well till the year 1957. The trade mark was widely published as it appears from the evidence produced in the case, including commercial magazines. The yearly sales effected by the plaintiff-company from 1948 to 1957, as are to be seen from the affidavit of Shri Patrick Henry Murphy ranged from \$ 772395 to \$ 184230. The sale figures were reduced subsequently because of the ban imposed on imports, but it does not mean that the reputation of the trade mark "Delco" has in any way suffered.

(30) It is equally not possible to agree with Mr. Kaushal that "Delco" trade mark is not known to the common man being confined to dealers of motor cars only or those people, who own or possess cars. We have already considered the evidence, which shows that automobile goods and cycle parts are quite often sold in the same market and at the common counter and that there is a trade link between the two classes of goods. Trade mark "Delco" has beyond doubt acquired in India a reputation for quality and is associated in the minds of the public with goods of the plaintiff company, more so when we find that the latter sells goods worth millions of rupees every year in the market in this country.

(31) The argument of the learned counsel for the appellants that the opposition of the plaintiffs to the registration of the trade mark of the appellants was rejected by the Registrar and that this circumstance should be taken into consideration for reaching the conclusion about chances of deception is without substance. In a passing-off action, it is wholly immaterial whether the opposition to the registration was accepted or not. It is indeed axiomatic that in such an action it is no defence that the defendant's trade mark is registered. Moreover, the Registrar did not dispose of the objects on merits and rejected the same as barred by time. Shri Kehar Singh, proprietor of the defendant-firm appeared as a witness and the explanation he gave for the choice of the trade mark "Delco" in regard to bicycle pedal axles manufactured by his firm is not only amusing, but ingenious. According to this witness, 'D' stood for durability, 'E' for

efficiency, 'L' for long life 'C' for competitive rate, and 'O' for "observable. Durability and long life mean one and the same thing and the word "observable", as opined by the trial Court makes no sense. We are in agreement with the learned District Judge that the false explanation has been coined by the defendant-appellants only to offer some explanation for the dishonest user of the trade mark of the plaintiff-company. On a consideration of the entire evidence, as produced by the parties, the irresistible conclusions are that—

- (1) There is a trade link between the goods manufactured by the plaintiffs and the defendants.
- (2) Get-up and packing of the goods manufactured by the defendants are deceptive.
- (3) Registered trade-mark "Delco" of the plaintiff-company has acquired great reputation for the quality of goods manufactured and put in the market under that trade-mark. The trade mark had also gained wide publicity.
- (4) The explanation of the defendants for choosing the trade-mark of the plaintiff-company is not honest and straightforward; and that it was a mere device to trade on the reputation of the plaintiff-company.

(32) In the instant case, the trade-mark used by the defendant-appellants is not only similar but identical. In view of our findings and the position of law stated hereinbefore, the doctrine of unfair competition cannot be held to be restricted to competition between the same class of products only and must be held to extend to cases like the present as well where a trader intends to sell his goods so as to induce a belief in the prospective purchasers that the goods manufactured and sold by him are those of another. The finding of the trial Court on issue No. 1 is, thus, affirmed.

(33) When issue No. 1 has been held to be proved, there is no cause shown why relief by way of injunction should be refused to the plaintiff-respondents in a passing-off action. The conduct of the defendants has not been honest and they have purposely selected a trade-mark to trade on the reputation of the plaintiff-company to obtain commercial benefits. It is fit case where injunction should have been granted and the trial Court rightly gave this relief.

(34) Under issue No. 3, the finding of the trial Court is that the plaintiffs have not proved any actual damages. A sum of Rs. 500 only

has been awarded as nominal damages since the defendants admittedly used the trade-mark of the plaintiffs for some years. There is no reason why this decree for a sum of Rs. 500 as damages be not upheld.

(35) Mr. Kaushal did not seriously press the issue of limitation and in fact he could not do so. The trial Court took a correct view that the suit was not barred by time. It is a common ground between the parties that the period of limitation would be regulated by Article 120 of the Indian Limitation Act, 1908. *Terminus a quo* for the period of six years to be reckoned is the date when right to sue accrues or, in other words, the cause of action arises. There must be assertion of a right and its actual infringement or a clear and unequivocal threat of its infringement by the defendants before the period can start running. A notice was served on the defendants on 20th September, 1958, calling upon them not to infringe the trade-mark of the plaintiffs. There then started negotiations in the year 1961, but no amicable settlement could be arrived at. It was a continuing wrong within the meaning of section 23 of the Limitation Act and the period of limitation for a suit for injunction would commence running at every moment of time during which the wrong continues. From whatever aspect the matter is looked at, the suit was within time.

(36) We are also in agreement with the trial Court that no question of estoppel or acquiescence arises in the circumstances of this case. The trade-mark of the defendants was registered on 16th July, 1956, and the plaintiffs opposed the registration. The opposition was rejected on the ground that it was not within time. A notice was then served by the plaintiff-company on 20th September, 1958, requiring the defendants not to infringe its trade-mark. The receipt of the notice is admitted. Averment in para 8 of the plaint is that the plaintiffs negotiated with the defendants for an amicable settlement and on 15th June, 1961, Shri Kehar Singh, proprietor of the defendants' firm, went to Bombay and discussed the terms of settlement telling the plaintiffs that he would consult his brothers and then give the final reply. No reply was ever sent and this averment is admitted by the defendants in their written statement. There has been, therefore, no acquiescence on the part of the plaintiffs in the use of trade-mark by the defendants. No question of estoppel is involved inasmuch as it cannot be said that any express or implied representation

was made by the plaintiffs which led to the change in position of the latter. The finding of the trial Court under issue No. 5 must, therefore, be affirmed.

(37) Section 27(2) to which reference has already been made is a clear answer to issue No. 6. Registration of trade-mark can have no effect on a passing-off action as such actions are clearly saved by the said provision of law.

(38) For the foregoing reasons, we find no merit in the appeal which stands dismissed with costs.

K. S. K.

CIVIL MISCELLANEOUS

Before R. S. Narula and A. D. Koshal, JJ.

HARBANS SINGH UBEROI,—Petitioner.

versus

STATE OF PUNJAB ETC.,—Respondents.

Civil Writ No. 3158 of 1971.

October 19, 1971.

Punjab Civil Service (Executive Branch) Rules (1930)—Rules 5, 6(b) and 8—Constitution of India (1950)—Article 320(3) (b)—Applicability of the Article to a particular service—Ways of exclusion there from—Stated—Selection and nomination to Punjab Civil Service (Executive Branch)—Consultation with Public Service Commission—Whether excluded—Person having lien on ministerial post officiating in gazetted capacity on non-ministerial post—Whether ceases to hold ministerial appointment—High Court Establishment (Appointment and Conditions of Service) Rules (1952)—Rule 3—Punjab Civil Services Rules (1952)—Rule 2.40—Post of a High Court Reader—Whether ministerial and continues to be so on attainment of gazetted rank.

Held, that there are only two ways in which the operation of Article 320(3) (b) of the Constitution of India, 1950 can be excluded for any particular service or post. Firstly, the Governor can, in exercise of the powers