

**Teju Singh Vs. Shanta Devi**

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**Court :** Andhra Pradesh

**Decided On :** Jul-23-1973

**Reported in :** AIR1974AP274

**Judge :** Krishna Rao and ;Lakshmaiah, JJ.

**Acts :** [Trade and Merchandise Marks Act, 1958](#) - Sections 27(2)

**Appeal No. :** Letter Patent Appeal No. 141 of 1972

**Appellant :** Teju Singh

**Respondent :** Shanta Devi

**Advocate for Def. :** B. Subbarayudu and ;A.V. Radhakrishnan, Advs.

**Advocate for Pet/Ap. :** N. Bapi Raju and ;N.V. Suryanarayanamurty, Advs.

**Judgement :**

**Krishna Rao, J.**

1. This appeal is filed by the defendant under clause 15 of the Letters Patent against the judgment of our learned brother Sambasiva Rao, J. dismissing C.C.C.A.No. 124 of 1970 (reported in : AIR 1973 AP51 , Teju Singh v. Shanta Devi).

2. The plaintiff filed the suit O.S. No. 18 of 1970 in the Court of the Chief Judge, City Civil Court, Hyderabad, for an injunction restraining the defendant from using her trade name of business for recovery of Rs. 400/- by way of damages and together with other incidental reliefs. The trial Court decreed the suit only so far as injunction is concerned, but rejected the relief for damages. Aggrieved by this, the defendant filed C.C.C.A. No. 124 of 1970. The appeal was dismissed by our learned brother holding that the plaintiff's trade name is a distinctive name and that irrespective of the question whether he acquired any reputation or not, he is entitled to an injunction as the defendant has started his business very near the plaintiff subsequently and that there is also a likelihood of deception or confusion among customers with respect to the name adopted by the defendant . Against the said judgment, the defendant filed the above appeal.

3. Before proceeding to consider the points raised in this appeal, it is necessary to give particulars about the trade names adopted by the rival parties. The plaintiff started her business of electric dry cleaning of clothes in the year 1965 locating the shop on the Kachiguda main road, Hyderabad. The covers which the plaintiff delivers the goods depict the design of two concentric circles. The inner circle contained the figure of a man carrying a coat with the words '8 Hours' shown over his shoulder. In the interspace between the two circles the words 'ONE DAY SERVICE' are printed DOWN below the circle there are the words 'One day' and down below 'Electric Dry-Cleaners'. In between the Words 'One day' the same figure of the man with coat in one hand and the words '8 hours' on the shoulder are inscribed. The design is printed in black over a brown paper cover. The sign board of the plaintiff in front of the shop contains the following words 'One day Electric Dry-Cleaners.' In between the words 'One day' there is a design of a man carrying a coat in one hand and the words '8 Hours' on the other ( vide Exs. A-1 and A-4 ). On the other hand the defendants paper bag contains the following design and description in green colour. There is a bird carrying a coat on her beak. On either side of the said design there are the words 'Give Morning' and 'Take Evening.' Down below the design we find the following words:----

'Only 1-day Electric Dry-Cleaners.'

Below these words the figure of a lady is printed. The sign-board also contains the figure of the bird carrying the coat and to the left of the bird the figure '1' is put and to the right the word 'Day' is put in broad letters and down below we find the words 'Electric Dry-Cleaners'. (Vide Exs. A4 and A-7). The defendant's shop is located a few yards away the plaintiff's shop.

4. On the date of the suit the plaintiff did not register her name or design under the Trade-marks Act. But during the pendency of this appeal it is stated before us that it was registered as trade-mark. But in the present case we are not concerned with the said marks or as to any cause of action based on the said trade-mark. When the plaintiff brought the suit it was on a common law action for 'passing off' the plaintiff's business name. The scope of an action for passing off goods is now too well settled to require elaborate citation of authorities. It is a remedy against a false representation tending to deceive customers into believing that the goods which the defendant is selling are really the plaintiff's. The false representation may be by statements or by conduct. i.e., by adopting the distinctive mark, name number, design, get-up or appearance of another's goods. The plaintiff may prove either an intent to deceive or an actual damage and it is enough if he shows that the conduct of the defendant was calculated or likely to deceive or mislead public. On proof of these facts the plaintiff could be entitled to an injunction or damages. The onus is on the plaintiff to show that his goods acquired a reputation among the public by some distinctive mark, name, etc. the same principles which are applied in the case of an action for 'passing off' the goods are applied where the name of a person's business is limited and passed off by another person as his own. It has now been uniformly laid down as settled rule that either in the case of goods or business the plaintiff has to show that his mark has become so distinctive that the public regard the same as belonging to a particular source. The plaintiff has to further prove that the offending mark or name is likely or calculated to deceive and cause confusion among the public thereby injuring the plaintiff's business. It has also been held that where a trader adopts a trading including mere descriptive words of common use of the Court will not readily assume that the use of the said word or name by another is likely to cause confusion. In such cases it is incumbent upon the plaintiff to show that the name has acquired a secondary meaning in connection with the goods or business so that the use of this name by another is

likely to deceive the public.

5. We will not now refer to a few decision to illustrate the above principles. In *Frang Reddaway and Frank Reddaway and Co., Ltd. V. George Banham and George Banham & Cop. Ltd.*, 1896 AC 199 the plaintiff was manufacturing and selling what is known a 'Camel Hair Belting'. The defendant also began to sell belting made of camel's hair in the name of 'Camel Hair Belting.' It was held that though the name was descriptive of the nature of the goods, it had come to be associated with the plaintiff's business and that the defendant should adopt some other device to distinguish his goods. In *Cellular Clothing Company Ltd. v. Maxton & Murray* ( 1899 ) A. C. 316 the plaintiff marked his goods as 'Cellular Cloth' denoting description of the fabric our of which the cloth is made. The defendant also used the same word. It was held that the word 'Cellular' was an ordinary English word which appropriately and conveniently described the cloth of which the goods sold were manufactured and that no relief can be granted as there was no proof that the word acquired a secondary or a special meaning so as to the plaintiff. It was held in the course of the judgment that no one can acquire an exclusive right to the use of a word or term which is in ordinary use descriptive only unless it is further proved that such descriptive word acquired as distinctive and secondary meaning during course of time. In *British Vacuum Cleaner Co. Ltd. v. New Vacuum Cleaner Co. Ltd.*, (1907 ) 2 Ch, 312 there were two rival companies doing business in the name of 'British Vacuum Cleaner Co., Ltd.' on the one hand and New Vacuum Cleaner Co. Ltd. on the other. It was held that the words 'Vacuum Cleaner' are only descriptive words and that unless there is proff of the said words having acquired a secondary or destructive meaning no action lies to stop another person from using the same description. But it was observed that the use of a fancy word stands on a different footing, as such word does not relate to the article but the person who makes the article. Similarly in *Office Cleaning Service Ltd. v. Westminister Office Cleaning Association* ( 1944 ) 2 All ER 269 the plaintiff carried on business of cleaning the interiors of offices and windows in the name of 'Office Cleaning Service Ltd.,' The defendant carried on a similar business in the name of 'Office Cleaning Association'. It was held therein that in the absence of any fraudulent intention the differentiation between the words 'Services' and 'Association' was sufficient to distinguish the defendant's

business from that of the plaintiff and the plaintiff's claim should be dismissed. The above authorities cited by the appellant's learned counsel lay down the principle that if a trader makes use of a mere descriptive word to denote his business, he cannot claim any monopoly right to the use of such a word. He takes the risk of other people using similar words. In such a case in order to sustain his action he should further establish that the said name though descriptive has acquired a secondary or distinctive meaning by which the goods or business has come during a long course of time to be associated with him. The learned counsel for the respondent drew our attention to *Brestain v. Try* ( 1958 ) R. P. C. 161. That was a case where the plaintiff did business as Ladies Hair Dresses under the trade name 'Charles of London' from 1952. The defendant also started in 1955 similar business in the name of 'Charles London.' it was held on a consideration of large volume of evidence that the plaintiff acquired a goodwill in his business run under the said name and that he was therefore entitled to relief against the defendant by way of injunction in a modified form. The decision is clearly distinguishable on the ground that it was based upon the goodwill acquired by a person doing business by adopting a proper noun.

6. The test whether words are descriptive has been laid down in *Corpus Juris Secundum* , Vol. 87 in paras 34 and 35 , at page 271 , as follows :--

'The true test in determining whether a particular name or phrase is descriptive is whether , as it is commonly used , it is reasonably indicative and descriptive of the thing intended. In order to be descriptive, within the condemnation of the rule , it is sufficient if information is afforded as to the general nature or character of the articles , and it is not necessary that the words or marks used shall comprise a clear , complete , and accurate description . The meaning which should be given is the impression and signification which are conveyed to the Public. Whether words or marks claimed as trade-marks are descriptive or whether they are suggestive or arbitrary and fanciful must be decided with respect to the articles to which they are applied and the mark must be considered as a whole.

An exclusive trade-mark must consist of some arbitrary or fanciful term, figure, or device , and words or phrases , in order to constitute a trade-mark, must be used

in a purely arbitrary or fanciful way as applied to the goods in question. Words or marks are arbitrary or fanciful when they are applied, but rather come to indicate their purposes by application and association.'

7. Turning to the facts of the instant case, the plaintiff's case, as set out in the plaint is that the name 'One Day' is a fanciful name, that even otherwise it has acquired a reputation as a distinctive name belonging to the plaintiff and that she is entitled to the reliefs claimed. The first question for determination is whether the words 'One Day' are of a descriptive nature or whether the words are fanciful. We do not agree that the words are fanciful. Even in the evidence the plaintiff stated that the object of using the words is only to notify to the public that the clother will be delivered within one day. According to us the words 'One Day' are words of common usage and purely descriptive of the nature of the business. The words merely signify the time of delivering the clothes which were given for washing. In other words it is only one of the essential conditions of the business, that is to say, that the clothes would be delivered back in one of any special skill or special process of cleaning the goods. We, therefore, hold that the words cannot come under the category of a fanciful or distinctive words but they are purely of a descriptive nature.

8. The next question for consideration is whether the words 'One Day' have acquired any secondary or special meaning in connection with the plaintiff's trade name being a distinctive name, it is no longer necessary to prove that the name acquired any reputation. Even in the case of a distinctive mark when the action is one for a passing off under common law, it should be proved that the plaintiff can succeed merely by proof of infringement of a mark and nothing more. The authorities are clear that in the case of a descriptive name the plaintiff has to further prove, that the words acquired a secondary meaning and that the plaintiff is associated with the said name. The plaintiff has not given any particulars as to how the words acquired any such meaning. No other evidence has been adduced to show that the words 'One Day' have acquired any reputation in the locality as to identify the same with the plaintiff's business. P. W. 2 has been examined to show that when he saw the sign boards of the plaintiff and the defendant, he was led to believe that the plaintiff and the defendant are the same. He stated that if a

servant goes to the shop it is difficult for him to distinguish one from the other .

9. So far as the possibility for visual deception is concerned, we have compared the names and the designs of the plaintiff with those of the defendant and we do not see any scope for a customer being misled. It is not suggested that the defendant is doing business by employing loud speakers proclaiming that his business is 'One day dry cleaning'. The plaintiff used the words 'One Day' while the defendant without copying the word 'One' has adopted the numeral '1'. The design also is different. The plaintiff's design is a man carrying a coat while the design of the defendant is a bird carrying a coat. The design on the wrappers are entirely different. The defendant has exhibited the picture on the plaintiff's wrappers . Even the sign boards employed by the two parties are totally different in their design and a common man is not likely to be deceived. When servants are sent, who give the clothes for dry cleaning they are generally illiterate and they can be directed to distinguish the two shops to by the design employed viz., the man for the plaintiff and the bird for the defendant. If a literate person wants to distinguish between the two ships, he can do so without any difficulty. There is no allegation of fraud or deceitful motive against the defendant. Assuming that both plaintiff and defendant wanted to impress upon the customers that they would deliver the goods within one day, the defendant has taken care to insert certain distinguishing marks such as 'only' and the figure '1' instead of the word 'One' , in addition to the difference in the symbol , viz., a bird carrying a coat instead of a man carrying a coat. We, therefore, hold that the names in the present case are only of a descriptive nature and not distinctive as held by the learned Judge.

10. It is not necessary for us to consider whether the definition of the words 'goods' in the Trade Marks Act takes in the word 'Business'. This is not an action for infringement of a trademark. It is a common law action for passing off in relation to the plaintiff's business. We have already pointed out that the rule is well settled in England, viz., that the same principles as are applied to actions relating to passing for goods equally apply to actions for passing off business names. We however wish to clarify that the remedies of the plaintiff for infringement of a trade-mark are left open as that is not the subject-matter of the suit.

11. The appeal is accordingly allowed. But we direct the parties to bear their respective costs throughout.

12. Appeal allowed.

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