

IN THE COURT OF APPEAL OF THE DEMOCRATIC

SOCIALIST REPUBLIC OF SRI LANKA

Daintee Limited

No. 72C, Kandawala Road

Ratmalana

PLAINTIFF

CA Appeal No. 545/97F

D.C. Colombo Case No. 3822/Spl.

Vs

Uswatte Confectionery Works Ltd

No. 437, Galle Road

Ratmalana.

DEFENDANT

AND NOW

Uswatte Confectionery Works Ltd

No. 437, Galle Road

Ratmalana.

DEFENDANT-APPELLANT

Vs

Daintee Limited

No. 72C, Kandawala Road

Ratmalana

PLAINTIFF-RESPONDENTS

BEFORE : Deepali Wijesundera J.
M.M.A. Gaffoor J.

COUNSEL Indra Ladduwahetty for the
Defendant – Appellant.
K.M. Basheer Ahamed with
M.R. Rahumathullah for the
Plaintiff – Respondent.

ARGUED ON : 29th October, 2015

DECIDED ON : 28th April, 2016

Deepali Wijesundera J.

The plaintiff respondent instituted action against the defendant appellant in the District Court of Colombo seeking relief in respect of defendant's alleged acts of unfair competition based on Sec. 142 (1) and (2) (a) of the Intellectual Property Act.

Both the plaintiff and the defendant are companies manufacturing and selling sweets. The plaintiff respondent (hereafter referred as the respondent) designed new wrappers and marketed its sweets under the brand names CHIX and DAINTEE and put out different flavours. The respondent took up the position that seeing the success of their sweets in the new wrappers the appellant who claimed to be a confectioner started marketing their sweets in wrappers resembling the wrappers used by the respondent company. The appellant company claimed that their wrappers did not resemble the respondent's wrappers, and that their trade mark name USWATTE is a striking feature of their wrappers. At the trial before the District Court several witnesses have given evidence and marked documents. The learned District Judge after hearing their evidence has given his judgment in favor of the plaintiff respondent. The learned District Judge on arriving at his ruling has stated that the art work of the wrappers sent to Singapore for printing compared with each other (P16 and P30) exposed a similarity clearly. He also decided that the damages claimed by the respondent remained unchallenged and uncontradicted and the damages claimed were awarded.

The argument of the appellant was that their name is displayed on the wrapper which indicated it was their product and that it is an act

of competition not contrary to honest practices in industrial or commercial matters.

The appellant argued that the marketing of their products did not cause any confusion since the word 'Uswatte' is a striking feature in the wrapper while the respondent's toffees had the word Daintee on their wrappers, therefore the wrapped toffees can not cause confusion. The appellant stated that the learned District Judge erred in holding that the design of the wrappers used by the appellant is an imitation of the design used by the respondent. The appellant submitted that there was no evidence of any similarity between the two and that the evidence did not disclose any confusion.

The appellant stated that the learned District Judge erred in holding that the appellant had committed an Act of unfair competition in terms of *Sec. 142 of the code of Intellectual Property Act*. He further stated that learned District Judge erred in holding that the respondent suffered damages to its business and goodwill by answering issue no. 10 in the respondent's favour.

The learned counsel for the respondent submitted that the questions of law or matters in issue suggested by the appellant do not arise since the evidence in the District Court proved that the appellant put out inferior quality sweets copying the newly designed wrappers of the respondent and that as a result the respondent suffered a bad name and their sales dropped. The respondent also stated that the respondent's sales went up with the newly designed wrappers which fact was not challenged or disputed in the District Court. The respondent further stated the fact that the appellant copied the respondent's new wrapper because of its good sales, has also not been challenged in the District Court.

Sec. 142 (1) and (2) (a) reads thus;

142 (1). Any act of competition contrary to honest practices in Industrial or Commercial matters shall constitute an act of unfair competition.

(2) Acts of unfair competition shall include the following,

(a) All acts of such nature as to create confusion by any means whatsoever with the establishment, the goods, services or the Industrial or Commercial activities of a competitor.

The relief sought was based on section 179.

The possibility of confusion could be seen when the wrappers are compared as stated by the District Judge since these sweets are bought mostly by children. The art work for the design of both wrappers are similar the only difference being the brand names.

The volume of sales of the respondent was not challenged by the appellant therefore it is not necessary for the respondent to prove the volume of sales. The damages claimed was decided on the volume of sales. The District Judge has analyzed the evidence correctly when arriving at the quantum of damages.

On perusal of the judgment it could be said that the evidence placed before the learned District Judge had been carefully analyzed. The District Judge has said the damages claimed went undisputed and unchallenged after hearing and observing the witnesses and perusing the documents marked before him.

The appellant has failed to state any legal or factual basis on which the learned District Judge's judgment should be set aside. On

perusal of the said judgment it could be seen that he has carefully analyzed the law and the evidence placed before him. He had seen and heard the witnesses who placed evidence before him.

For the afore stated reasons the judgment of the learned District Judge is affirmed and the appeal is dismissed with costs fixed at Rs. 50,000/=.

JUDGE OF THE COURT OF APPEAL

M.M.A. Gaffoor J.

I agree

JUDGE OF THE COURT OF APPEAL