

Anatomy of the Common Law Remedy of Passing off in India

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Abstract: Passing off happens when someone deliberately or unintentionally passes off their goods or services as those belonging to another party. This action of misrepresentation often damages the goodwill of a person or business, causing financial or reputation. This paper discusses the common law remedy of passing off, and provides for what acts constitute passing off, defining what an action of passing off entails along with the essentials elements that makes the remedy available to the proprietor of a product/service. The paper also talks about the various characteristics of Passing off, concluding with the importance of passing off and its difference from infringement.

Keywords: Common law, Passing off, Trademark, Misrepresentation, Damages, Rules, Guidelines.

INTRODUCTION

Trademark law, as a way of preserving one's supported mark as a source of business identity in the manner set, embodies aspects such as in the origin and quality of the business of the principal to the public. Therefore, a trademark may be said to reflect the goodwill of a specific product or service but this is where the need for its defence arises. When coming up with only a mark that would be a suitable source of designation for the proprietor's source of income, a substantial amount of ingenuity as well as money is expended but that would only be fair to pursue protection for almost the same [1].

Although the Trademarks Act facilitates fair competition in all ways, its goal is to ensure that no one gets rid of and coasts over another person's goodwill by 'infringement' or 'passing off' that would be addressed in depth in this article. Prior to the entry into force of a first Trademark Law in 1940, the Trademark Law remained regulated by the rules of common law, including the Handing Off principle, how we currently know. Later on, the Trademarks Act provided for the registration of a trademark itself and protection since it allows the proprietor of a trademark state laws and can draw an action for infringement upon being put to fraudulent use by another [2]. Non-registered trademarks are not devoid of rights, as purchasers of non-registered trademarks can still use the Passing off solution.

DISCUSSION

Meaning of passing off?

Based on common law, passing more is the manifestation of the principle that "a person might not always sell his specific goods together under delusion that they must be another man's goods." The passing off action relies on the key premise that nobody has any power to declare his items as someone else's goods. While Passing off has not yet been specified in the Trademarks Act, it has been applied to anything in sections 27(2), 134(1)(c) and 135 of the Act, in which section 27(2) notes that the constitution does not impair its right of action against any person to passed off as some kind of person's products or the remedies relating thereto. Section 134(1)(c) applies to the authority of both the courts to prosecute suits arising from the use of any brand for the purpose of selling it off. Section one of 135 sets out the provisions relating in respect of the transfer resulting from using the symbol.

While passing off is often done with a dishonest motive, it not one of the necessities for either an action and but there was no malice in a case, a claimant would also be qualified to actual damages he suffered. While evidence of deceptive intent can substantially assist a claimant in developing a likelihood of evasion. The rule of passing off applies anywhere there is a question of misunderstanding between two brands and even the overall purchasing of a product, such as packaging or the overall look and feel of a service. In order to distinguish a corporation or organisation and also some goods or services, passing off may be used to protect some form of recognisable name, symbol, logo or get-up use [3].

Essentials to prove passing off

The word "classical trinity" is used on the three main components of a Passing off argument mostly in case of *Reckitt & Colman vs. Borden*. The three elements that've been farther addressed below are 'goodwill', 'misrepresentation' or 'damage.'

- *Goodwill*

The plaintiff must show that a goodwill exists without respect to his goods or services, a goodwill that is enough that every person is taking additional profit of it, and a goodwill that could have been the source of unjust benefit to him, for a passing off argument to operate in his advantage. The credibility of the cost of the goods off must be and so the public will recognise the goods or services by associating the product/services with either the brand, get up, box, etc.

Goodwill is indeed the advantage and profit of a company's good reputation, prestige, and relation. It is the enticing power that tradition pulls in. It is the one thing that, at the first launch, separates an old international firm from the new established industry. A company's goodwill must arise from a specific core or source. However, whether its reach is widely spread or diffused, goodwill should be nothing when it has ample power of attraction to lead consumers home to either the source of which it derives. A Passing off activity is the remedy to defend this goodwill of priors who want to drive on that and who dishonestly want to profit from it. The present goodwill must not be known to everybody in society, but a very limited number of people would not classify a product/service as receiving goodwill either. There must be a large number of individuals in whose heads this goodwill has been created. Goodwill should not need to be built in the minds of every passerby involved, but in a large portion of it.

In the case of *Deepam Silk International vs. Deepam Silks*, the Karnataka High Court in 1998 set out the significance of goodwill and the need to safeguard it, stating that "because once plaintiff has always shown that he'd do business with the trade name for more since last decade so that he had already not only registered for the registration of the mark almost a decade ago," The damage that will be caused to the complainant, if either person like the appellant has use of the same active ingredient and sells the same goods, may not be ascertained in terms of revenue, but has also spent lakhs of rupees on acquiring the reputation by advertising on ads in about all available media. It is the credibility of the trade name of the claimant that would be in danger [4]. If the defendant is always to sell inferior items, it will certainly influence the plaintiff's company and will give the defendant's customers a perception that only the goods offered under the trade name do not retain their quality. There is also every chance that the claimant will lose his customers and have his company logo defamed."

- *Misrepresentation:*

On the part of the defendant, there could be some sort of misrepresentation that makes the public assume that the goods or services offered by him are that of the claimant. A false suggestion should have been made by the defendant, the suggestion was and so it is worthy of deceiving the public into thinking that the goods / services he paid for refers to the claimant. If the plaintiff and defendant were not rival traders in the line of business, the defendant's false suggestion that their business was related to that would harm the credibility and so the goodwill of the business including its claimant. It must be demonstrated in each case mostly as fact that misrepresentation was made on the grounds of the passing off action to be a false representation by the claimant. The use of the goods concerned by the defendant in association with the goods, the label, name or get-up in doubt shall constitute the goods of the plaintiff or the goods of the plaintiff of a specific class or quality; and the use of that mark, name and even get by a defendant shall be deceivable.

- *Damage:*

For the a claim of passing off, real harm or just the plausibility of damage caused by the misrepresentation due to the prosecutor's use of its mark of the plaintiff is essential. The plaintiff must show that he suffered even in a quia timet action that he is liable to incur harm due to the mistaken assumption undermined by the misinterpretation of the defendant that its source of the product or service of the defendant is very much like the source among those offered by the complainant. It can also be because if a passing off action fails both of the above three components, there is a stronger chance that only the plaintiff will also not be able to get the judgement in his favour. A triumphant passing off argument would constitute the existence of all the properties above [5].

In V. Patel's Laxmikant vs. The Hon'ble Supreme Court, Chetanbhai Shah, summarized these three elements and ruled that the three elements of the passing-off operation were:

- a. Reputation of the goods;
- b. Possibility of deception;
- c. Likelihood of damages to the Plaintiff

CHARACTERISTICS OF PASSING OFF ACTION

- *Fraudulence Not Necessary:*

For a claim of passing off, the defendant need not actually have the misleading motive. He can do his job honestly, basically selling the goods or services that he is the owner of and popped up with, but if his business being that it parallels someone's business by getting up, the business the other occurs before that of him, He will also be accountable to the original adopter for losses. Where there is the risk of business misunderstanding, and injunction will be issued even though the defendant sweetly took the name.

- *Classes Of Goods Can Be Different:*

For the sake of handing it off, the classes with which the services or goods of the parties belong are immaterial. The defendant can deal with a particular class of goods/services and could still carry on his merchandise as the claimant does. This is most often the case where the complainant has become the owner of a well-known mark, his prestige exceeds the class to which it belongs, there is a possibility that the public will fall into the assumption that the complainant has begun to deal with the goods or services becoming passed off. At Honda Engines Co. Ltd, Ltd. Vs. Charanjit Singh, and while the appellant and defendant were dealing in completely different goods, the sanction was issued in plaintiff.

- *Prior User to Be Established:*

An indication of who transfers the good and services of it that is possible to obtain through seeing which of the companies first began to use the mark or branding or any aspect which is the point of contention, shall be used by the two parties. Anyone arguing that his or her products\ services are being sold off must also assess a certain prior acceptance.

CONCLUSION

In general, and also in order to obtain immunity but under common law remedy, one shouldn't have to register one's mark on the basis of goodwill gained via the object. In passing off, the fly in the ointment is that, as in the case of infringement, the proprietor needs to show that his product or service has gained a reputation by which the public recognises and associates his company. This is where the value of registering one's mark comes into play. If registered, the proprietor can sue in connection with the action of passing off for infringement of his mark. It is not advantageous to have a trademark registered, but the proprietor is not exempt from the scope of his mark's defence purely on the ground that his mark has not been registered. In passing off, the label itself does not play a significant role, but the misunderstanding created by the public and the damage suffered by the claimant does.

REFERENCES

- [1] Commissioners of Inland Revenue v. Muller and Co.'s Margarine Ltd. (1901) A.C 217.
- [2] Chocosuisse Union des Fabricants Suisses de Chocolat vs. Cadbury Ltd., (1999) RPC 826 (1979) AC 731, pp. 741-742.
- [3] Spalding vs. Gamage (1915) 32 RPC 273.
- [4] Law of Trademarks and Geographical Indications, KC Kailasam, Publication: Wadhwa Nagpur; 2nd Edition, 2005, pg. 343.
- [5] Horlicks Ltd. vs. Bimal Khamrai, (2003) 26 PTC 241 (Del.).