

Role of Superior courts of Pakistan in Protecting Intellectual Property: An Analysis

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Abstract: *The present age is the age of knowledge, and in this age, only those nations have gained honor and dignity that have turned this knowledge into wealth through inventions. Therefore, it is very important to give legal protection to these inventions so that the benefits of these inventions are limited to the person who owns them. Doing so raises not only social and economic development and living standard in society but also encourages other people to turn their knowledge into inventions. The real role in the protection of the intellectual property is played by the judiciary in any society. This study examines the role of superior courts in protecting intellectual property in Pakistan and concludes that Pakistan's superior courts have always played an important role in protecting intellectual property rights. All that is needed is to ensure speedy delivery of justice in such cases.*

Key Words: Intellectual Property, Superior Courts, Protection, Role

Introduction

Like many other countries in the world, Pakistan has a system of separation of powers. Powers have been divided into three organs of the state: the judiciary, the legislature and the executive. In Pakistan, the legislature has enacted laws on intellectual property. On the executive side, we have an intellectual property organization of Pakistan (IPO-Pakistan) which is playing its role to some extent.

Under this organization, Enforcement Coordination Committee comprising Police, FBR, FIA, PEMRA and Pakistan Customs is working to prevent piracy and counterfeiting in Pakistan. But the most important role in the preservation of intellectual property rights is played by the superior courts. Whether the superior courts are playing this role well or not? This study will analyze the decisions of the superior courts on intellectual property and see how successful the superior courts have been in protecting intellectual property. So let's take a look at the decisions of the superior courts on intellectual property.

In Case [Messrs Alpha Sewing Machine Company v. Registrar of Trade Marks and Another \[1990\]](#), Messrs Alpha Sewing Machine Company, Lahore, the appellant, filed an application with the Trade Marks Registry for registration of its trademark PHILIP for sewing machines.

The appellant claimed user of the mark since 1974. Messrs Philips Export BV, which owns and controls an international group of companies, opposed the registration of the appellant's trademark. It stated that it was the proprietor of the Trade Mark PHILIPS, which had been registered in Pakistan on the 21st March 1951, in respect of machines, machine tools and motors (except for vehicle), including magneto electric welding machines, goods belonging to class 7. It maintained that the products bearing the Trade Mark PHILIPS were being continuously sold in the local market and by virtue of continued and extensive use, its products had become very popular and that the Trade Mark PHILIPS was associated with none else than itself. It pointed out that its Trade Mark PHILIPS was nearly identical with the appellant's PHILIP and the goods of the parties being of the same description it could be inconvenienced and embarrassed if the appellant's mark was registered as in that event the appellant's goods would be mistaken and sold and passed off as those of its manufacture. It averred that by reason of prior registration and use of its Mark PHILIPS, the appellant's Mark PHILIP was not adopted to distinguish the appellant's goods within the meaning of section 8(a) of the Trade Marks Act, 1940. It stressed the danger of confusion and deception cropping up from the registration of the appellant's mark and its

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consequent use. The court, in this case, observes that it is not uncommon nowadays to find sewing machines being sold at the same shop where household appliances manufactured by respondent 2 bearing Trademark PHILIPS are offered for sale. The contention of the learned counsel for the appellant that the goods of the appellant and respondent 2 are not purchased by the same category of customers as the sewing machines manufactured by the appellant are to be bought by tailors and some of the housewives can be accepted only with a grain of salt. The purchase of sewing machines is not restricted to tailors and housewives; other members of the public do make purchases of sewing machines for various purposes. Also, like anybody else, tailors and housewives indulge in the purchase of domestic appliances manufactured and marketed by respondent 2. If any purchaser of sewing machine were to be offered for sale a machine manufactured by the appellant bearing the mark PHILIP, he would naturally take it to be a product of respondent 2 and with the image of quality which he has in his mind regarding respondent 2's products he might readily buy it only to find soon afterwards that he had been duped and cheated. There is very likelihood of causing deception and confusion with the use of the mark PHILIP by the appellant, and in such a case, different nature of goods loses relevance.

For maintaining the modesty of the trademarks register and for protection of the interests of the public, it is the duty of the tribunal administering the law of registration to disallow misuse of another's trademark by a person like the appellant who is not entitled to use it". Therefore, if respondent No. 2 is not manufacturing Sewing Machines or goods like Sewing Machines, the petitioner could legitimately claim and obtain the registration in question. The proposition is not that simple. Even then, the question of deception and confusion could not be ignored as that remains the pivotal point in our law on the issue involved in this case. In this case, the findings by the High Court, with regard to "confusion and deception", are clear and reasoned enough and are covered by the case of "Pan Masala" and "7-Up". Accordingly, we find no merit in this petition. Leave to appeal, therefore, is refused.

In case [Messrs K.S. Sulemanji Esmailji & Sons \(Pvt.\) Ltd. v. Messrs M. Sulemanji & Company \(Pvt.\) Ltd. \[1988\]](#), the plaintiffs allege infringement of their registered trademark by the defendants. The court observes that admittedly the wrappers of the defendants are printed in Pakistan and, after the goods of the defendants are packed in such wrappers, such goods are exported for sale in foreign countries. Prima facie the action of the defendants in getting the wrappers printed with the challenged mark in Pakistan, which mark prima facie, resembles the mark of the plaintiffs, and the goods of the defendants being wrapped in Pakistan in such wrappers, the defendants are apparently using the goods with the challenged mark in the course of trade in Pakistan. The action for an injunction restraining the defendants from using the said mark is, therefore, apparently maintainable in this court. Perhaps the position might have been different if the printing of the defendants' wrappers with the challenged mark and packing of defendants' product therein was done outside Pakistan. However, it is not necessary to consider this point as, admittedly, the printing of packing/wrappers and packing of defendants' products is done in Pakistan.

This is the first appeal against the order passed by the learned District Judge, Sialkot. The brief facts are that the appellant company, the owner of the registered design of footballs, filed suit for permanent injunction under the Patents and Design Act against the defendant/respondent. Along with the plaint, an application for temporary injunction was also filed. This application for temporary injunction was dismissed by the learned District Judge observing that the representation of the pattern on football which was registered in the name of the plaintiff was in dark color whereas the pattern of defendant/respondent was in the light orange color; therefore, the ornamental pattern of the design of the defendant's football was different from the one registered in the name of the plaintiff/appellant, and thus the plaintiff had failed to make out a prima facie case for grant of temporary injunction. It was also observed that the plaintiff was not manufacturing footballs in Pakistan, whereas the defendant has been manufacturing them and also receiving orders for the sale of footballs. The court observes that the appellant is the registered owner of the design in question; therefore, it is not lawful for any other person to apply or cause to be applied to any article, this registered design, as provided under section 53 of the act. This by itself is sufficient to establish a prima facie case in favor of the appellant. There is also the likelihood of causing irreparable loss to the appellant company by using their registered design. The court accepts this appeal, set aside the order of the learned District Judge and issues a temporary injunction against the respondent/defendant as prayed for. However, in view of the urgency of the situation, the learned trial Court is directed to conclude the trial of this case within one month after this order is received by him, even if the proceedings are required to be held on day to day basis ([Messrs Select Sports AS Company v. Messrs Tempo Enterprises, 1998](#)).

In case [Bolan Beverages \(Pvt.\) Limited v. Pepsi co Inc. and 4 others \(2004\)](#), Pepsi Cola Company entered into an agreement with Bolan Bottlers. Through such agreement Pepsi Cola Company appointed

Bolan Bottlers to bottle, sell and distribute their product is known as and sold under the trademarks PEPSI COLA and PEPSI, solely within the limits of the Province of Balochistan described as "Territory". The term of such appointment initially was for a period of five years commencing from the date of appointment. After the expiry of initial terms, this appointment was to be automatically extended for additional terms of 5 years each unless either the Bolan Bottlers or the Pepsi Cola Company should give notice in writing to the other party of its intention not to renew the agreement or of the terms under which such appointment shall be renewed. Such notice was to be given at least one year in advance of the expiration of the original term of five years or of any additional term. Bolan Bottlers accepted the appointment upon the terms contained in the agreement to bottle, sell and distribute the beverage only for ultimate resale to consumers within the "territory" and not without either directly or indirectly. Clause 2 of the agreement was incorporated to provide that Pepsi Cola Company will sell either directly or through its subsidiaries to Bolan Bottlers, and the latter will purchase all units of Pepsi-Cola concentrate required for the manufacture of the beverage known as Pepsi Cola the world over. A Unit of Pepsi Cola concentrate was of fixed quantity while the price thereof was the US \$ 1 150. Such a bottling appointment was intact when the Pepsi Cola Company cancelled the exclusive bottling appointment. Bolan Bottlers filed a civil suit against Pepsi Cola Company and its various divisions for a declaration to the effect that the cancellation was void and unlawful and further that interest of Bolan Bottlers had been created in the franchise and hence it could not be revoked unilaterally by Pepsi Cola Company. An injunction was also sought against Pepsi Cola Company to the effect, inter alia, that Bolan Bottlers be allowed to continue the business and Pepsi Cola Company be restrained from taking any action against the bottlers and under the Trade Marks Act, till the final decision of the suit. In the instant case, the court remarks that the product known as Pepsi Cola is sold to the third party as the property of Bolan Bottlers without any control of Pepsi Cola Company, and hence it prima facie lacks the necessary ingredients of an agency. The Bolan Bottlers also do not receive any commission for the sale; rather, they receive the entire amount of sale consideration as well as the profits. They are also likely to sustain losses as well. In the instant case, the subject-matter of the agreement is the sale of concentrate by Pepsi Cola Company to the Bolan Bottlers. The interest of the parties is only to the extent of sale by one and purchase by the other. Everything comes to an end the moment the sale is completed. The case of the appellant is that after such agreement, the Bolan Bottlers constructed offices, built a vast infrastructure, employed numerous persons and hence a clear interest was created. This would not be a proper definition of interest because such interest is created independent of the agreement, which is only for the sale of concentrate. All the infrastructure which has been constructed and prepared by the appellant is for the expansion and promotion of his own business, which he commenced in order only to earn his own profits, which are never to be shared by the respondent, i.e. The Pepsi Cola Company. In the circumstances of the present case and in the light of section 21(a) read with section 56(f) of the Specific Relief Act, the instant one is not a fit case for the grant of temporary injunction.

The present appeal has been brought against the order passed by the learned Civil Judge, Lahore, whereby an application for the grant of a temporary injunction filed by the respondent has been allowed. Brief necessary facts of the case for the disposal of this appeal are that the respondent/plaintiff filed a suit for declaration etc. stating in the plaint that under the agreement (the bottling agreement) between the parties, the respondent has exclusive, perpetual rights to manufacture and sell the soft drink of the brand Seven-Up, for the territory covered thereunder. It may be pertinent to state here that though in the plaint, the bottling agreement has been briefly ascribed as a franchise/license agreement as well. But in paragraph No. 23, it is unequivocally averred "that the threatened suspension of the franchise agreement is violative of section 202 of the Contract Act. The franchise agreement is obviously an agency with the interest of the agent, i.e., the plaintiff, who has made investments running into crores of rupees in the project, glass bottles in trade, advertisement and publicity, credit sales to the trade and institution will be struck-up". Apart from the paragraph reproduced above, and by taking into account the plaint as a whole, still, it is mainly the case of the respondent that on the basis of the bottling agreement, a relationship in the nature of an agency has been created between the parties. Due to the huge investments made by the respondent; the use of its experience; the dint of hard efforts made by the respondent in introducing the product in Pakistan, as pioneer/sponsors, the respondent has earned a name and goodwill in the market, which is synonymous to the word 'Seven-up' in the social and financial set-up of the country. Thus, the respondent has acquired an interest in the property, forming the subject-matter of the agency. On account of the above, it is the case of the respondent that such an agency cannot be terminated /suspended in view of section 202 of the Contract Act. In this case, the court observes that the respondent has not been able to make out a prima facie case, and the principles of irreparable loss and balance of convenience are in its favor. Therefore, by allowing this appeal, the impugned order of the Trial Court was set aside, and the application for the grant of a temporary

injunction filed by the respondent was dismissed. No order as to costs ([Concentrate Manufacturing Company and 3 others v. Seven up Bottling Company \(Private\) Limited and 3 others, 2002](#)).

The grievance of the plaintiff in the plaint is that the plaintiff has recently come to know that the defendant has adopted the word "Acer" and commenced its business in the field of computers and has also started selling or intends to sell its goods and products, namely, computer related products, all using the name "Acer". The defendants imitate trademark and trade name "Acer" is the same as the plaintiff's corporate name, trade name and trademark "Acer" Inc. and Acer, respectively. The defendant has also registered a domain name as www.Acer.Com.Pk by launching its website on the internet, which, when uploaded, would be accessible all over the world by approaching <http://www.Acer.Com.Pk>. The plaintiff stated that the adoption and use of imitate name Acer either as a trademark on the website or as an internet domain name is deliberate, unauthorized, mala fide and an act of fraud upon the plaintiff and the general public. Summons was issued to the defendant, and since the defendant could not be served through Bailiff, the same was served through publication in newspapers and on 24-2-2003, it was ordered that the matter proceed ex parte against the defendant. In the instant case, the defendant's website addresses the domain with the word "Acer", which is admittedly the corporate name of the plaintiff as well as the registered trademark of the plaintiff. The plaintiff is also using his corporate name and has a website with the said name as global.Acer.Com, through which the plaintiff offered the sale of the computers of different brands. The possibility that one, who is not fully conversant and or cannot recall the complete website address of the plaintiff while searching with the corporate name "Acer" may approach the website created by the defendant cannot be over-looked and likewise the possibility that such person may place an order to a defendant who is dealing in the same goods as that of the plaintiff with the belief that he is purchasing the "Acer" brand goods from the source wherefrom it has originated. The court remarks that since the plaintiff is holding registered Trade Mark "Acer" and acquired right in it by its long use, the website <http://www.Acer.Com.Pk> may create possible confusions in the mind of ordinary purchaser, and he may through said website purchase the goods from the defendant believing the same that it has been originated from the plaintiff. For the foregoing reasons, the plaintiff's suit is decreed against the defendant to the extent of prayer with no order as to costs as the plaintiff did not press other reliefs ([Acer, Inc. v. Acer Computers, 2004](#)).

In case [Unilever Plc. England v. R. B. Oil Industries \(Pvt.\) Ltd., Karachi \(1999\)](#), plaintiff, a British Company incorporated in London, has filed this suit for infringement, passing off, injunction, accounts and damages against the defendant, a private limited company with its registered office at Karachi. It is the grievance of the plaintiff that on 6th October 1994, upon learning that the defendant had started marketing Banaspati oil under the Mark Lipton, the plaintiffs through their Advocates addressed a legal notice to the defendant for infringement of the registered trademark and also for passing-off its goods and calling upon the defendant to desist from using the Mark Lipton which was identical to the plaintiff's registered trademark. The defendants, through their reply, denied the charges made by the plaintiffs and required them to supply copies of registration certificates in respect of trademark and asserted that they had obtained Copyright Registration for the Mark Lipton Banaspati from the Registrar of Copyrights. Despite the service of the legal notice and calling upon the defendant not to infringe the plaintiff's trademark or to pass off their product, the defendant continues to sell and advertise their product under the Mark Lipton, and in the same packaging as earlier, the get-up whereof is identical with and is a deliberate and fraudulent imitation of the distinctive get-up of the carton or packaging used for the genuine Lipton product of the plaintiff, hence this suit. The court remarks that no precedent or any other proposition of law to the contrary, supporting the view propounded on behalf of the defendant, has been cited at the Bar. It, thus, seems that the defendant-company wants to thrive at the cost of the plaintiff in order to secure unlawful gain by taking undue advantage and wrongful gain of the mere circumstance that the plaintiff-company is not producing Banaspati oil, which in law as well as equity cannot be permitted. At any rate, there is a greater possibility and likelihood of deception and confusion on the part of innocent buyers and consumers to buy the product of the defendant as and for the goods produced by the plaintiff considering those to be the product of the plaintiff-company. The plaintiff has strongly made out three well-settled essential requirements for the grant of a temporary injunction pending the decision of the suit. The interim order passed earlier was confirmed.

This is an order on an application filed by the plaintiffs under Order 39, Rules 1 and 2 read with section 151, CPC. The facts relevant to the decision of this application are that plaintiff No. 1 is the registered proprietor in Pakistan of the Trade Mark 'Vimto'. Plaintiff No; 2 is the registered user of said Trade Mark in Pakistan, which was registered on 29th October 1942 and since then is in full force. It is alleged that for the last 39 years, plaintiff No. 1 has used said Trade Mark in Pakistan in respect of nonalcoholic beverages, and it has acquired great reputation and popularity. Plaintiff No. 1 has acquired

the exclusive right to use it for itself or for any other person. The plaintiffs have claimed that on 2nd April 1991, it was brought to their notice that the defendants, namely Mehran Bottlers (Private) Limited, have started manufacturing, selling, and offering for sale syrups under the Trade Mark. "PAKOLA VIMTO". According to plaintiffs, the defendants' product bears a Mark which is identical to their registered Trade Mark as such, it is an open infringement of their mark, and use of Mark Vimto by the defendants will inevitably lead to deception and confusion amongst unwary purchasers, who are likely to believe that the defendant's product is manufactured by the plaintiffs or has some connection with the plaintiffs in the course of trade. It is also their case that the use of their Trade Mark by defendants is not accidental or inadvertent, but, in fact, it is a deliberate and fraudulent attempt on the latter's part to deceive the public and to earn profit at the cost of goodwill and reputation of the former. Learned counsel for the plaintiffs submitted that since the plaintiffs are the proprietor of said mark, as such, they have exclusive right to use it and are entitled to an interim injunction against the defendants till the suit is finally decided. The court remarks that the plaintiffs' registered trademark is Vimto. The defendants are using the word 'Vimto', prefixing their trademark 'Pakola'. Although the defendants have claimed that they are using Orange, Ice Cream Soda, Rus Berry and Vimto as flavors, but the fact remains that 'Vimto' is a registered trademark and is to be used exclusively by its proprietors ([J.N. Nichols Plc. v. Mehran Bottlers \(Private\) Limited, Karachi, 2000](#)).

This suit has been filed by the plaintiff against the defendant for a permanent injunction against infringement of trademark, passing off, damages and for accounts of profits. Plaintiff is the registered proprietor of Trade Marks in respect of safety matches. Plaintiff alleges that the defendant started manufacturing and selling wax matches of substandard quality. Its boxes are almost identical to the plaintiff's registered trademark, and that the use of a similar and deceptive mark by the defendant in respect of the same description of goods is calculated or likely to cause confusion or deception in the market and in the minds of the dealers, buyers and consumers most of whom are illiterate. Apart from the fact that the mark of the plaintiff was registered, the defendant, in their written statements, denied the various allegations made in the plaint, taking the stand that the mark being used by the defendant had no resemblance with the registered mark of the plaintiff. The defendant further pleaded that they had applied for the registration of their own mark, and they were awaiting its registration. In this case, the court is of the view that there is such resemblance as it would cause deception in the mind of the unwary purchaser that he was buying the plaintiffs' matchbox when in fact, he would be buying the defendant's matchbox. It is also apparent that the defendant has borrowed certain important features from the plaintiff's mark and deliberately used them in their mark to pass off their matchboxes like that of the plaintiff. Decree in favor of the plaintiff and against the defendant is passed ([Messrs Burney's Industrial and Commercial Co. Ltd. v. Messrs Rehman Match Works, 1983](#)).

By this application, the plaintiffs have sought, pending the hearing and disposal of the suit, to restrain the defendants, acting directly or indirectly or through their employees, agents, distributors, dealers or otherwise, and all persons claiming through them, from manufacturing, importing, selling, stocking for sale or marketing any drug or medicine containing Cimetidine 'A' under the name "CIMET" or any other name. The case of the plaintiffs, as set out in the plaint, is that plaintiff No. 1 is a subsidiary of Smith Kline Beecham PLC and is engaged in the discovery, development, manufacture and marketing of safe and effective medicines of the highest quality. It is alleged that plaintiff No. 1 is the proprietor of a valid and subsisting Pakistani Patent No. 126617 granted to it by the Government of Pakistan under the Patents and Designs Act, 1911, in respect of an invention entitled "Process for preparing Cimetidine 'A'". Plaintiff No. 2 is the authorized user of the patent in Pakistan and is also a subsidiary of Smith Kline Beecham PLC. It is alleged that defendant No. 1 is manufacturing and/or importing and selling a drug containing Cimetidine 'A' under the name "CIMET" and that the drug is sold by Defendant No. 1 has been made in accordance with the invention described in the patent of the plaintiffs and is a pharmaceutical composition made in accordance with the invention described in the patent. It is further alleged that both the packing in which the drug is sold by the defendants as well as the label on the box and the printed literature clearly state and admit that the drug which is being sold contains Cimetidine. Such action, on the part of the defendants, is alleged to be an infringement of the aforesaid patent of the plaintiff. The contention that a temporary injunction against the defendants would operate against public interest was based on the allegation that the price of the plaintiffs' drug is exorbitant as compared to the price at which the defendants are selling their drug. That, however, is not a relevant consideration for the purpose of the present application. For the above reasons, the plaintiff's application for a temporary injunction is granted as prayed ([Smith Kline & French Laboratories Ltd. and Another v. Ferozsons Laboratories Ltd. and Another, 1992](#)).

In the case of [Sandoz Limited and Another v. Pakistan Pharmaceutical Products Limited \(1987\)](#), the Plaintiffs are a Pharmaceutical Swiss Company, and they filed this suit against the defendants complaining infringement of their patent. These Patents cover the production of the drug "KETOTIFEN", which they are selling under the Trade name "ZADITEN". According to them, it is not possible to state whether the method and process of production of the drug by the defendants is similar to that of the plaintiffs. But by reading the description on defendants' packets, an impression is created that the base of the defendants' drug is similar to that of the plaintiffs. In the court's view, it is a sound prima facie case in favor of plaintiffs. In this kind of case where no reasonable clarification is available by the defendants, the mischief should be suppressed as early as possible. Mere certification of the drug with the Ministry of Health under the Drugs Act cannot protect the defendants against the plea of aggrieved parties under the Patent Act.

Conclusion

Businesses around the world operate with the protection of intellectual property. In countries where intellectual property is protected, investors come, and businesses thrive. People get jobs, and their standard of living rises. People have access to good quality food and consumables. Where legal protection of the intellectual property is lacking, people are reluctant to do business. The investor will never come to a country where intellectual property is not protected. Pakistan's superior courts have played an important role in protecting intellectual property. The above-mentioned decisions are a clear example of that. To ensure speedy delivery of justice in intellectual property cases is a need of the hour.

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