APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

H.C. 1948

Feb. 6.

SAYA U NYO ZEINT (APPELLANT)

v.

SAYA SHEIN (RESPONDENT).*

Temporary injunction—Order 39, Rules 1 and 2, of the Code of Civil Procedure — Principle on which temporary injunction is granted—Proof of title if necessary.

Held: That if a party makes out a *prima facie* case, *i.e.* a case of a clear colour of title as distinguished from proof of real title, he is entitled to a temporary injunction if other conditions are satisfied.

Universities of Oxford and Cambridge v. *Richardson*, 31 E.R., Chancery, 1260, followed.

Spottiswoode v. *Clarke*, 41 E.R., Chancery, 901, referred to.

Held: That in order to obtain temporary injunction restraining the use of a trade mark or label, the plaintiff must show that the case is of some urgency, that he has a clear colour of title and the granting of injunction will not cause irreparable damage to the defendant if it be later proved that the defendant has a right.

Copinger on Copyright, 7th Edn., p. 156, followed.

G. N. Banerji for the appellant.

The following judgment of the Bench was delivered by

U THEIN MAUNG, C.J.—This is an appeal from an order under Order XXXIX, Rule 2 (2), of the Code of Civil Procedure granting a temporary injunction to restrain the appellant and his servants and agents from manufacturing, selling or offering for sale any bottle of tonic with a certain label attached thereto. The said order has been passed in a suit filed by the plaintiff-respondent against the defendant-appellant for a perpetual injunction to prevent the defendant-appellant

* Civil Misc. Appeal No. 51 of 1947 against the order of the Original Side of High Court in Civil Regular No. 259 of 1947.

and his servants and agents from using the particular label and also for damages and accounts, wherein the defendant-appellant has also claimed that the label is his registered trade mark.

The temporary injunction has been granted as the learned Judge is satisfied from the evidence that has so far been adduced before him that the plaintiff-respondent has made out a *prima facie* case of his having been using the label or rather the label, with which the defendant-appellant's label is almost identical, since the time prior to 1941, *i.e.* before the defendant-appellant began to use his label.

The learned advocate for the appellant has strenuously argued that the temporary injunction should not have been granted as the plaintiff-respondent has not yet proved his title to the trade mark and that the learned Judge's order granting the temporary injunction amounts to prejudgment of the question relating to the parties' rights to the trade mark.

In order to obtain an interlocutory injunction the plaintiff must show that the case is of some urgency, that he has a clear colour of title, and that the granting of the injunction will not cause irreparable damage to the defendant if it should turn out at the trial that he was in the right. (*See* Copinger on the Law of Copyright, 7th Edition, page 156.)

There can be no doubt that the case is of some urgency inasmuch as the defendant-appellant has admittedly been selling his medicine with the labels which are claimed by the plaintiff-respondent to have been colourable imitation of his trade mark.

With reference to the question of title, Cottenham L.C. has observed in *Spottiswoode* v. *Clarke* (1): "It is much better, if the legal right is to be litigated, that

(1) 41 E.R., Chancery, 901.

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this Court should abstain from expressing any opinion upon it in the meantime." However, without expressing any definite opinion on the question of title at this stage and on the materials before us, we must say that we agree with the learned Judge on the Original Side that the plaintiff-respondent has made out a *prima facie* case. He has established a clear colour of title and it is all that is necessary for him to establish for the purpose of a temporary injunction. The following extract from the judgment of Eldon L.C. in *The Universities of Oxford and Cambridge* v. *Richardson* (1), contains the reply to the contention of the learned advocate for the defendant-appellant that a temporary injunction cannot be granted unless and until the plaintiff-respondent has proved that he has got a title which is clear at law:

> "It is then said, in cases of this sort, the universal rule is that, if the title is not clear at law, the Court will not grant or sustain an injunction, until it is made clear at law. With all deference to Lord Mansfield, I cannot accede to that proposition so unqualified. There are many instances in my own memory, in which this Court has granted or continued an injunction to the hearing under such circumstances. * * * * * This Court has lately said possession under a colour of title is ground enough to enjoin and to continue the injunction, till it shall be proved at law, that it is only colour and not real title. There have been several instances of late."

We are also satisfied that no irreparable injury will be caused to the defendant-appellant and that such damage as may be caused to him can, in the case of his being ultimately found to have a better right to the trade mark, be fully compensated inasmuch as the learned Judge has granted the temporary injunction "on condition that the plaintiff furnishes security in the sum of Rs. 5,000 entering into a bond to pay a sum to be awarded by this Court against him not exceeding

(1) 31 E.R., Chancery, 1260.

Rs. 5,000 by way of damages to the defendant if subsequently the suit should fail."

Under these circumstances there is no reason for us to interfere with the order granting the temporary injunction. The appeal is dismissed. However, the hearing of Civil Regular Suit No. 259 of 1947 in this Court, which according to Mr. Banerji is to be transferred to the Rangoon City Civil Court, and Civil Regular Suit No. 2311 of 1947 in the Rangoon City Civil Court might be expedited in the interests of both parties.