

**SY CHNG, PETITIONER-APPELLEE, VS. GAW LIU,
RESPONDENT-REGISTRANT-APPELLANT.***G.R. No. L-29123. March 29, 1972*

Ponente: FERNANDO, J.

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Respondent Gaw Liu would have this Court set aside an order of the Director of Patents at the instance of petitioner Sy Chng, revoking a registration for a trademark used on his product consisting of dyestuff. What respondent seeks from us is not easy to grant. Director Tiburcio Evalle in his well-written decision took particular pains to demonstrate the weak and inconclusive character of the claim of respondent as against the rather convincing proof offered by petitioner in support of his stand. The questions he raised are essentially factual. On that point, it is well-settled that in the absence of arbitrariness, the conclusion reached by the Director of Patents is to be accorded respect and must be upheld. Respondent did likewise essay a colorable attempt at assigning as one of the alleged errors what could pass for a legal issue, but it cannot be said that he was any more successful. Accordingly, we affirm.

The case arose from a petition filed by Sy Chng to cancel a certificate of registration No. 10637, of a trademark, LION and TIGER issued by the Philippines Patent Office on December 12, 1963 in favor of respondent Gaw Liu. The application was filed on February 20 of that year, the use of such trademark on his product consisting of dyestuffs allegedly dating back to 1956. Petitioner Sy Chng did seek such a cancellation on the allegation that he had previously used such a trademark since 1952 on aniline basic colors or goods similar to those manufactured or sold by respondent whom he accused of fraudulently appropriating and registering the same with full knowledge that he was not the owner. There was a denial by respondent.

After noting that both parties adduced evidence both oral and documentary, Director Evalle in his decision of January 29, 1968 set forth the evidence for petitioner as follows: "Petitioner's principal witness is Sy Chang, his assistant manager, who testified that he has been connected with Venus Commercial since 1949 up to the present. His firm allegedly is engaged in the manufacture of dyestuff, crayone, stationery, and school supplies, and in the sale of dyestuff the trademark LION and TIGER label has been adopted since 1952. The witness identified a LION-TIGER label being used by Petitioner. It was designed for Venus Commercial in 1952 by Mr. Gaudencio Eugenio, a free lance artist who confirmed this fact by testifying that around June, 1952, upon request of Sy Chang, he designed a label for dyestuff, the LION & TIGER label, for which he was duly compensated. The design was in turn first printed by Majestic Press owned by the other witness, Antonio T. Cheng, who affirmed that he knew Venus Commercial because of a printing job in 1952 pertaining to the 10,000 pieces of LION-TIGER label. He allegedly had been printing lots of jobs for the firm, and for the printing of LION-TIGER labels, he confirmed having been paid P150.00 for said job on October 14, 1952. Continuing, witness Sy Chang presented an itemized list of customers who purchase LION-TIGER dyestuff from Venus Commercial. The earliest sale of merchandise bearing the said trademark, as shown by the list, the copy of the corresponding invoice issued by the firm, and the corresponding entry on Petitioner's mercantile books was made on October 28,

1952. A total of one hundred one (101) invoices issued since then was also presented and duly identified by the witness, the latest one bearing the date April 27, 1965. To prove promotional activities, calendars for the years 1958, 1961, 1964, 1965 and 1966, were presented to and identified by the witness, they having been issued by Venus Commercial, clearly depicting the goods it deals in, including the LION-TIGER aniline basic colors." [1]

Then came this portion of the decision: "The witness asserted that the Respondent knew Petitioner's use of the label trademark because Respondent was also engaged in chemicals and dyestuffs, and who sometimes bought from Venus Commercial raw materials, as shown by a purchase made by Respondent from Petitioner of dyestuff on November 26, 1954. Witness Sy Chang further asserted that he first came to know Gaw Liu when the Petitioner received a letter dated April 24, 1964 from Respondent who demanded that Venus Commercial refrain from using the trademark LION-TIGER, otherwise he would bring criminal and civil actions in court. This letter was sent to Petitioner's legal counsel who arranged a meeting between Petitioner and Respondent at Botica Boie, Escolta, Manila, for possible amicable settlement which, however, did not materialize because the Respondent, after having been offered payment of his registration expenses and other settlement payment provided he refrained from further using the trademark, demanded the sum of P80,000.00. The amount is allegedly the value of the trademark. This fact was confirmed by said legal counsel who also testified and alleged that at that time Respondent recognized Petitioner as owner of LION-TIGER, and the respondent felt that because the registration is in his favor, he had the right to demand P80,000.00. As a result and probably because they were not agreeable, the Petitioner and witness Sy Chang were disgusted because they knew they owned and used the trademark for a long time. Since no amicable settlement was reached, the Petitioner instituted this cancellation proceeding." [2]

As for the defense of respondent, this is how the decision summarized matters: "The Respondent also presented himself and one witness, Pua Chong Beng. The latter's testimony, however, was stricken from the record, upon motion of the Petitioner's counsel because said witness failed to submit himself to further cross-examination, and it was ruled during the hearing that his failure to further appear would result in the striking off of his testimony. Gaw Liu himself next took the witness stand and testified that he was engaged in chemical manufacturing since the Japanese occupation, with offices at Magdalena St., Manila. Thereafter, in 1947, he used and adopted the brand TIGER for his dyestuff and later, he allegedly adopted LION & TIGER, made some sales, as shown by an invoice dated December 10, 1951 issued to Pua Chong Beng of Zamboanga. There was also another customer named Mr. Ong of Chin Cheng Trading, Jolo, Sulu, but he could not produce an invoice because he did not send for it. Two more invoices, one dated September 9, 1952 and the other October 31, 1952, were also exhibited to show sale by him of LION-TIGER colors to Pua Chong Beng. He confirmed having known Venus Commercial in 1951 or 1952 through the owner he knew only as 'Mr. Cao' who used to offer him discarded materials such as dyestuff and empty cans. He also admitted knowing witness Sy Chng who worked for Venus Commercial, but only after 1952, but he had never been inside the firm's establishment; neither had he received any calendar from said firm. According to him, Venus Commercial sold dyestuff in 1950, or 1951, or 1952, using another brand he described as a lady carrying on her back two children holding two rotating small drums. After it stopped selling dyestuff of the 'Lady' brand, they started using the LION brand in 1952 or 1953." [3]

The weakness of the testimony for respondent, now appellant, Gaw Liu was noted in such decision: "Respondent affirmed the meeting which took place at Botica Boie but they merely talked over cups of coffee. Afterwards a meeting between him and a 'Mr. Ang' took place at the Far East Restaurant where he told Mr. Ang that his trademark would cost P80,000.00 because he had been advertising it for twenty years and he used it to support his family and to educate his children. Mr. Ang told him that it was too high a price which the Petitioner could not afford to pay. While being cross-examined, he said he could not produce his books and sales records because they were all burned in the Binondo fire that occurred in 1960. (The parties, however, agreed that a fire took place in Binondo, Manila, on February 21, 1964.) After the fire, he transferred his dyestuff business to San Juan, Rizal,

where he already had a 'screen process' business. Thus, he could not relate his total annual net sales and profit for the sale of LION-TIGER dyestuff. Asked how he advertised his trademark LION-TIGER, the Respondent said that it was a small business so he did not advertise it either by newspaper, radio, or handbills, but he sold it cheaper to convince people to use it. * * *. In the early phase of his testimony, Gaw Liu was asked to explain why he claimed to have used the trademark in 1947 when, according to his application he first used it in commerce on June 10, 1956. He explained that it was because the Patent Office required two months use at the time the application was filed. He also traced the history underlying his adoption of the trademark LION-TIGER which he caused to be designed by one 'Roming from Guadalupe' and caused the printing of labels in 1950 by Luzon Press and then by General Offset, although the invoices for the job were also burned but after his transfer to San Juan, Rizal, he again caused the printing of the labels, and his sale was once a month only. Thus, he asserted that 'LION TIGER was very valuable to him before, but not now.'"[4]

The decision then referred to the rebuttable character of the validity of registration of the trademark registered in the name of respondent, the evidentiary burden of proving invalidity resting upon the petitioner. From the facts as presented though, the conclusion reached is that the presumption had been rebutted, petitioner having shown "that at the time the respondent filed his application for registration and for years prior thereto, he was not the exclusive user of the trademark LION-TIGER. The burden of going forward is thus shifted to the respondent who must show that the subject matter of registration is, in fact, distinctive of his goods." [5] Why it should be thus is explained in this manner: "It is very clear that the record is wanting in proof sufficient to show that Respondent-Registrant has actually and substantially adopted and used the trademark so as to show that his firm was the source or origin of his dyestuff. He never presented proof required by law to invest him with exclusive, continuous adoption and use of the trademark which should consist in, inter alia, considerable sale since his adoption thereof combined with promotional work suitable to popularize the trademark." [6]

There are additional considerations vitiating the claim of respondent. Thus: "In this case, it has been admitted by him that he never advertised the trademark, either by newspaper, radio or handbills. He was not able to show extensive sales, except those made by him to Pua Chong Beng, which, however, may be considered as negligible and sporadic. His sale, if it is really a sale at all; was made in a limited area to a single individual and wanting in corroboration. No further sales were made as the record eloquently shows. These matters are necessary especially when Respondent alleges use on a date earlier than that alleged in his application, in which case his evidence, testimonial or documentary, must be definite, clear, and free from doubt or inconsistencies. In this case, he was not even able to prove use in commerce prior to filing of his application. Thus, under the Rules of Practice in Trademark Cases (Rule 173), in all inter partes proceedings, the allegation of date of use in the application for registration of the applicant or of the registrant cannot be used as evidence in behalf of the party making the same. In case no testimony is taken as to the date of use, the party will be limited to the filing of the application as the date of his first use. Therefore, because the Respondent was not able to prove his date of first use in commerce of the trademark LION-TIGER he is deemed to have used it on the filing date of his application which is February 20, 1963." [7]

Necessarily therefore, the inevitable conclusion is the superior right of petitioner in view of what the decision called "the chain of circumstances" favorable to him namely his "use thereof in commerce, and a systematic preservation of the records to support his claim of continuous use, such as the making of the design, the printing of the design on labels, the actual use on the goods, advertising in calendars, and other acts of dominion, such as the filing of this petition for cancellation." [8]

The dispositive portion of the decision appealed is for granting the petition. The Certificate of Registration No. 10637 issued to Gaw Liu for the trademark LION & TIGER is "ordered cancelled." [9] Then came this petition for

review filed on January 14, 1968. A careful study of the respective briefs of petitioner and respondent failed to disclose any justification for a reversal of the decision reached by the Director of Patents. It must be, as set forth in the opening of this petition, be affirmed.

1. Four errors were assigned by respondent, now appellant, Gaw Liu. Three of them, except for the second assignment of error, are factual in character. Appellant would impress on this Court that he did present the proof required by law to invest him with exclusive, continuous adoption and use of the trademark contrary to the finding of the Director of Patents, who moreover should have not relied on the weak and inconsistent testimony of the witnesses for petitioner and should not have admitted certain proofs regarding the actual and positive use of the trademark in question by the appellee. Appellant is oblivious of the controlling principle of law set forth in *Chua Che vs. Philippines Patent Office*.^[10] As worded in the opinion of Justice Paredes: "At the very outset, we would like to state that in cases of the nature of the one at bar, only questions of law should be raised, and the only exception to this rule, meaning that findings of facts may be reviewed, is when such findings are not supported by substantial evidence (Sec. 2, Rule 44, Revised Rules). The finding of the Director of Patents Office to the effect that opposer-appellee Sy Tuo had priority of use and adoption of the trademark 'X-7', is for all intents and purposes, one of fact. This being the case, such finding becomes conclusive to this Court. Even on this sole issue alone, the petition for review must fall."^[11] To the same effect is this excerpt from the later case of *Lim Kiah vs. Kaynee Company*:^[12] "It is well-settled that we are precluded from making such an inquiry as the finding of facts of the Director of Patents in the absence of any showing that there was a grave abuse of discretion is binding on us. As set forth by Justice Makalintal in *Chung Te vs. Ng Kian Giab*: 'The rule is that the findings of fact by the Director of Patents are conclusive on the Supreme Court provided they are supported by substantial evidence.'"^[13]

2. The second assigned error would accuse the Director of Patents of failing to pass upon two important documents^[14] which in his opinion would reveal that appellee did alter two important documents in order to fortify his side of the case. This allegation did not pass unnoticed in the brief of appellee. It was refuted in this manner: "The Director of Patents did not err in not dwelling lengthily on Exhibits '3' and 'D-12', as he was satisfied that the goods appearing thereon are Tiger and Lion Dyestuff of Appellee, Sy Chng. The Honorable Director of Patents did not see anything suspicious or spurious in the entry made as to the trademark carried by the goods appearing in the invoice because, it was issued regularly and properly in the ordinary course of Appellee's business. Appellant's claim that the letters 'T' and 'L' meaning Tiger and Lion were just added and superimposed very much later, is misleading and defamatory. Besides, this is a mere conclusion of the Appellant who merely indulged in speculation, as there was nothing of record to show that Appellee changed the entry on his invoice. On the contrary, it is surprising why Exhibit '3' came into the possession of Appellant, Gaw Liu, who testified on the same when the purchaser appearing therein is China Commercial owned by Pua Chong Beng, the witness who refused to be further cross-examined. Pua Chong Beng, the witness of Appellant from Zamboanga, should have testified on Exhibit '3', because he is the only competent witness on said invoice and the goods covered by it, and not appellant, Gaw Liu who is not privy to the transaction."^[15] Appellant could have disputed the truth of the above assertion in a reply brief, but he did not submit any. It could have been due to a realization on his part that the version offered by appellee is closer to the truth. The lack of merit of such an assignment of error is thus apparent.

WHEREFORE , the decision of the Director of Patents of January 29, 1968 is hereby affirmed. Without pronounce-ment as to costs.

Concepcion, C.J., Reyes, J.B.L., Makalintal, Zaldivar, Castro, Teehankee, Barredo, Villamor, and Makasiar, JJ., concur.

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- [1] Decision, Appendix A, Brief for the Appellant, pp. iii-iv.
- [2] Ibid, pp. iv-v.
- [3] Ibid, pp. v-vi.
- [4] Ibid, pp. vi-vii.
- [5] Ibid, p. viii.
- [6] Ibid.
- [7] Ibid, pp. viii-ix.
- [8] Ibid, p. x.
- [9] Ibid, p. xi.
- [10] L-18337, Jan. 30, 1965, 13 SCRA 67.
- [11] Ibid p. 72.
- [12] L-24802, Oct. 14, 1968, 25 SCRA 485.
- [13] Ibid, p. 489. The Chung Te decision is reported in L-23791, Nov. 23, 1966, 18 SCRA 747.
- [14] Exhibit D-12 and Exhibit 3.
- [15] Brief for the Appellee, pp. 25-26.

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