

VICTORIA MILLING COMPANY, INC., PETITIONER, VS. ONG SU AND THE HONORABLE TIBURCIO S. EVALLE, IN HIS CAPACITY AS DIRECTOR OF PATENTS, RESPONDENTS.

G.R. No. L-28499. September 30, 1977

Ponente: FERNANDEZ, J.

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FERNANDEZ, J.:

This is a petition to review the decision of the Director of Patents in Inter Partes Case No. 304 entitled "Victorias Milling Company, Inc., petitioner, versus, ONG Su" dated August 15, 1967 denying the petition to cancel the certificate of registration issued by the Philippines Patent Office on June 20, 1961 in favor of ONG Su covering the trademark "VALENTINE" and design and used on refined sugar.[1]

The petitioner, Victorias Milling Company, Inc., a domestic corporation and engaged in the manufacture and sale of refined granulated sugar, is the owner of the trademark "VICTORIAS" and diamond design registered in the Philippines Patent Office on November 9, 1961.

The respondent ONG Su is engaged in the repacking and sale of refined sugar and is the owner of the trademark "VALENTINE" and design registered in the Philippines Patent Office on June 20, 1961.

On October 4, 1963, Victorias Milling Company, Inc. filed with the Philippines Patent Office a petition to cancel the registration of the ONG Su trademark "Valentine."

The petitioner alleged that its trademark "Victorias" and diamond design has become distinctive of its sugar long before the respondent used its trademark; that the registration of "Valentine" and design has caused and will cause great damage to petitioner by reason of mistake, confusion, or deception among the purchasers because it is similar to its "Victorias" trademark; that registration was fraudulently obtained by respondent Ong Su; and that "Valentine" falsely suggests a connection with Saint Valentine or with an institution or belief connected therewith.[2]

In his answer to the petition the respondent averred that he is doing business under the name and style "Valentine Packaging" and has registered the trademark "Valentine" with a design for sugar and was issued Certificate of Registration No. 8891 dated June 20, 1961; that the trademark "Victorias" with diamond design and the trademark "Valentine" with a design are two different marks; and that there is absolutely no likelihood of confusion, mistake or deception to purchasers through the concurrent use of the petitioner's mark "Victorias" with a diamond design and the respondents' mark "Valentine" with a design in connection with sugar.[3]

The petitioner's only witness, Pacifico V. Vijandre, its vice-president and stockholder, testified that Victorias Milling Company, inc. has used since 1947 the trademark "Victorias" and diamond design wkh colors of red and black on sacks of sugar having variable weight and size of 5 lbs., 10 lbs., 25 lbs., 50 lbs., and 100 lbs.; that the company had transactions on or sales of sugar with local dealers such as Kim Kee, Chu Yu & Co., Lumouan & Co., Luzon Merchandising Corp. and ARCA; that the average sale from 1958 to 1962 was P30,000,000 and for

the whole year of 1962 the sale was P46,000,000; that he came to know that the trademark "Valentine" appeared in the market in 1962 through the report of his company's field agents; and that except for the words "Valentine" and "Victorias," the design and wordings of the bags are practically the same.[4]

The respondent, Ong Su, declared that he adopted and began using his trademark "Valentine" and design before and continuously after World War II in the Philippines, particularly on paper bags used as containers for starch, coffee and sugar; and that since January 1955 he continued using said trademark on repacked sugar.

Arturo Chicano, a witness for the respondent, testified that he was a distribution agent of Ong Su; that he travelled a lot but he never came across an instance when the respondent Ong Su's product was mistaken for the petitioner's product; that he found the diamond design to be quite common in combination with other words used as trademarks as a background or to enhance their appearance, such as "DIAMOND" and design (Exhibit "54-A"), "EAGLE" and design (Exhibit "53"), and "SUNRISE" and design (Exhibit "55"), not belonging to the petitioner, which are also used on repacked sugar by various sugar dealers; and that said designs and the color of the lines on which drawn had not been regarded as trademarks but mere ornamentation.[5]

The Director of Patents denied the petition to cancel the certificate of registration of the respondent Ong Su covering the trademark "Valentine" and design because;

"From the facts of record, I find nothing to sustain the petition.

There is no question that as to their respective literal designation the trademarks are different. One is VALENTINE while the other is VICTORIAS. Thus, as to sound and connotation there is no dispute as to their dissimilarity.

However, from the evidence and pleadings, it appears that petitioner is relying heavily on its diamond design, the color scheme, and the printing sequence or arrangement of such legends as weight, contents and manufacturer or packer.

I am of the firm belief that the diamond portion of petitioner's trademark has not bolstered its cause. Common geometric shapes such as circles, ovals, squares, triangles, diamonds, and the like, when used as vehicles for display of word marks, ordinarily are not regarded as indicia of origin for goods to which the marks are applied, unless of course they have acquired secondary meaning. I have scoured the records completely to ascertain if the petitioner has submitted satisfactory evidence in this regard, but I find absolutely nothing to base a ruling that the triangle (sic) design has acquired a secondary meaning with respect to its sugar business.

It is the common practice for trademark owners to register designs forming outline of their distinguishing mark, but when the registrant of such design relies upon registration in proceeding based upon likelihood of confusion of purchasers, he assumes the burden of showing that the design portion of the mark has been so used that purchasers recognize the design, standing alone, as indicating goods emanating from the registrant. — *Bausch & Lomb Optical Co., v. Overseas Finance & Trading Co., Inc.* (ComrPats) 112 USPQ 6.

Considering herein that the petitioner failed to establish that diamond design component of its mark has acquired a secondary meaning and that the literal portion of the marks have no similarity, there is no reasonable likelihood of purchaser confusion resulting from registrant's use of VALENTINE within a diamond and petitioner's use of VICTORIAS within a diamond.

As regards the colors black and red used, it is fundamental in trademark jurisprudence that color alone, unless displayed in a distinct or arbitrary design, does not function as a trademark, inasmuch as here, or elsewhere, the colors black and red are not so displayed by the petitioner, and are primary colors commonly and freely used in the printing business.

Finally, as regards the printing sequences or arrangement of such legends as weight, contents, and

manufacturer or packer, I regard it as merely a matter pertaining to the 'dress of the goods' — a matter involving unfair competition over which the Patent Office has no jurisdiction, (See: Menzi & Co., Inc. vs. Andres Co, Rec. No. 59 dated Oct. 31, 1952, Dir. of Patents.) And in the case of A, E. Staley Manufacturing Co., Inc. vs. Andres Co. v. Tan Tong, citing; Gillette Safety Razor Co. v. Triangle Mechanical Laboratories, 31 USPQ 24; Aladdin Mfg. Co. v. Mantle Lamp Co., 21 USPQ 58; and J. C. Eno (U.S.) Limited v. Deshayas, 29 USPQ 179), it was held that the tribunals of the Philippines Patent Office have no jurisdiction over questions of unfair competition. At most, the petitioner's recourse is for it to seek relief in civil courts.

The allegations that the registration of VALENTINE was obtained fraudulently; that it falsely suggests a connection with St. Valentine; and that it is merely descriptive or deceptively misdescriptive of sugar have no basis in law and fact."^[6]

The petitioner submits that the Director of Patents committed the following errors:

"I

THE RESPONDENT DIRECTOR OF PATENTS ERRED IN HOLDING THAT PETITIONER'S REGISTERED DIAMOND DESIGN IS NOT AN INDEX OF ORIGIN.

II

THE RESPONDENT DIRECTOR OF PATENTS ERRED IN HOLDING THAT PETITIONER IS REQUIRED TO ESTABLISH THAT ITS DIAMOND DESIGN HAS ACQUIRED A SECONDARY MEANING.

III

THE RESPONDENT DIRECTOR OF PATENTS ERRED IN HOLDING PETITIONER'S DIAMOND DESIGN HAS NOT ACQUIRED A SECONDARY MEANING.

IV

THE RESPONDENT DIRECTOR OF PATENTS ERRED IN HOLDING THAT THE DETAILS OF PETITIONER'S DESIGN THAT HAVE BEEN IMITATED BY RESPONDENT ONG SU MERELY PERTAIN TO THE 'DRESS OF THE GOODS.'

V

THE RESPONDENT DIRECTOR OF PATENTS ERRED IN CONFINING HIS COMPARISON OF PETITIONER'S AND RESPONDENT'S RESPECTIVE TRADEMARKS TO ONE SOLE ITEM OF THEIR DESIGN, IGNORING THE COMPLETE LABELS AS ACTUALLY USED IN TRADE AND SEEN BY CONSUMERS.

VI

THE RESPONDENT DIRECTOR OF PATENTS ERRED IN TAKING THE POSITION THAT IN CASES OF TRADEMARK CANCELLATION INVOLVING, AMONG OTHERS, OBVIOUS ACTS OF UNFAIR COMPETITION, HE NEED NOT TAKE ANY ACTION WHATSOEVER, SINCE HE SUPPOSEDLY HAS NO JURISDICTION IN THE PREMISES.

VII

THE RESPONDENT DIRECTOR OF PATENTS ERRED IN HOLDING THAT PETITIONER'S REGISTERED COLOR DESIGN DOES NOT FUNCTION AS A TRADEMARK.

VIII

THE RESPONDENT DIRECTOR OF PATENTS ERRED IN HOLDING THAT BECAUSE THE LITERAL PORTIONS OF THE RESPECTIVE TRADEMARKS IN QUESTION, NAMELY, THE RESPECTIVE NAMES 'VICTORIAS' AND 'VALENTINE', HAVE NO SIMILARITY, THERE IS NO REASONABLE LIKELIHOOD OF PURCHASER CONFUSION.

IX

THE RESPONDENT DIRECTOR OF PATENTS ERRED IN ASSUMING THAT PETITIONER, OR THE OWNER OF ANY IMITATED OR INFRINGED TRADEMARK FOR THAT MATTER, MUST ESTABLISH ACTUAL PURCHASER CONFUSION.

X

THE RESPONDENT DIRECTOR OF PATENTS ERRED IN PREVENTING THE TESTIMONIES OF RESPONDENT ONG SU AND WITNESS ERNESTO DURAN AS REBUTTAL WITNESSES FOR PETITIONER, SAID RULINGS OF RESPONDENT DIRECTOR CONSTITUTING REVERSIBLE ERROR AND THE DENIAL OF PROCEDURAL DUE PROCESS.

XI

THE RESPONDENT DIRECTOR OF PATENTS ERRED IN HOLDING THAT THE REGISTRATION OF THE VALENTINE TRADEMARK BY RESPONDENT ONG SU WAS NOT FRAUDULENTLY OBTAINED.

XII

THE RESPONDENT DIRECTOR OF PATENTS, ACTING THROUGH HEARING OFFICER AMANDO MARQUEZ, ERRED IN ADMITTING RESPONDENT ONG SU'S EXHIBITS PERTAINING TO ONE 'MARIANO ANG,' SAID NAME NOT HAVING BEEN CLEARLY ESTABLISHED AS AN ALIAS, ALTHOUGH ADMITTEDLY UNAUTHORIZED, OF RESPONDENT ONG SU."[7]

The contention of petitioner that the diamond design in its trademark is an index of origin has no merit. The petitioner has not shown that the design portion of the mark has been so used that purchasers recognize the design, standing alone, as indicating goods coming from the registrant. As correctly stated by the Director of Patents, common geometric shapes such as diamonds ordinarily are not regarded as indicia of origin for goods to which the marks are applied unless they have acquired a secondary meaning. And there is no evidence that the diamond design in the trademark of the petitioner has acquired a secondary meaning with respect to its sugar business. The word "Victorias" is what identifies the sugar contained in the bag as the product of the petitioner. Indeed, the petitioner has advertised its sugar in bags marked "Victorias" with oval, hexagon and other designs.[8]

The evidence is that ONG Su has been using his trademark since prior to the last World War and he obtained the registration thereof on June 20, 1961. Vijandre declared that the petitioner started to use its trademark only in 1947. Said trademark was registered on November 9, 1961. It cannot be said, therefore, that the respondent Ong Su imitated the trademark of the petitioner.

The petitioner avers that purchasers of sugar are likely to confuse petitioner's "Victorias" trademark and respondent ONG Su's "Valentine" trademark because of the following similarities:

- "1. Both trademarks have the same diamond design with the slight modification that the lines of the 'VALENTINE' diamond design are a little protruding at the ends.
2. The lines forming the diamond design in both trademarks consist of two lines, namely, the outer portion and the inner portion.

3. The outer portion of the diamond design of both trademarks has the color black as shown in the specimens (Exhibits 'A1 and 'B'). The inner line of the diamond design in both trademarks has the color red.
4. In both trademarks, the word 'PURE' in black print appears inside of the upper portion of the diamond design.
5. In both trademarks, the word 'VICTORIAS' and the word 'VALENTINE' placed within the diamond design are conspicuously colored red.
6. The letter 'V in Victorias and the letter 'V in Valentine are identically placed.
7. The word 'VICTORIAS' and the word 'VALENTINE' are identically arranged, the same containing the same number of letters.
8. Immediately below the words 'VICTORIAS' and 'VALENTINE' appears the words 'REFINED SUGAR.'
9. Underneath the diamond design in both trademarks are the words 'FINE GRANULATED' and below said phrase are the words 'CANE SUGAR' with a small diamond design.
10. Both trademarks are used on refines sugar.
11. The words 'PURE,' 'VALENTINE,' 'VICTORIAS,' 'FINE GRANULATED' and 'CANE SUGAR' in both trade marks are similarly arranged and printed." [9]

The respondent Ong Su, maintains that the alleged similarities are minor for the following reason:

"Appellant attempts to show the possibility or likelihood of purchaser confusion by pointing out alleged similarities in the packages in question, e.g. 'Pure 'Refined Sugar' appearing in both marks in question. It should be noted, however, that these words are merely descriptive commonly applied to the goods, namely, sugar, and cannot be exclusively appropriated by the petitioner. The other alleged similarities pointed to by appellant — that the lines forming the diamond design in both trade-marks consist of two lines, the outer portion and the inner portion; that the diamond design in both trademarks has the color black and the inner line of both designs has the red color; that the diamond design as used by the petitioner and by respondent are of the same size; that the letter 'V in Victorias and the letter ' V in 'Valentine' are the same size; and that the letter 'V' in VICTORIAS and the letter 'V in the Valentine package are identically placed in the diamond; and that the word 'Victorias' and the word 'VALENTINE' are identically arranged within the diamond

— are, we submit with respect, minor and insignificant for the purpose of this petition even if the observations of appellant are correct." [10]

It seems clear that the words "Valentine" and "Victorias" and the names and places of business of Victorias Milling Company, Inc. and Ong Su are the dominant features of the trademarks in question. The petitioner has not established such a substantial similarity between the two trademarks in question as to warrant the cancellation of the trademark 'Valentine' of the respondent Ong Su.

The Director of Patents correctly ruled that he has no jurisdiction over the issue of unfair competition. Under Section 27 of the Trade Mark Law, Republic Act No. 166, all actions for unfair competition shall be brought before the proper Court of First Instance.

The refusal of the Director of Patents to allow respondent Ong Su and witness Ernesto Duran to testify on rebuttal is not a reversible error.

The only purpose of the petitioner in proposing to call Ong Su as a witness on rebuttal is to ask the latter if he had judicial authority to use the alias 'Mariano Ang.' It appears, however, that the counsel of petitioner had already

extensively cross-examined Ong Su as to his citizenship, alien certificate of registration and the other name Mariano Ang. It seems immaterial whether or not Ong Su has judicial authority to use Mariano Ang as an alias. There is evidence that even before the last World War, the trademark 'Valentine' and design had been used under the name of either Ong Su or Mariano Ang.

The petitioner sought to present Ernesto T. Duran as rebuttal witness to prove that there was a confusion among consumers or buyers of sugar caused by the alleged similarity of the "Victorias" and "Valentine" trademarks. The presentation of Ernesto T. Duran as rebuttal witness was objected to by counsel of the respondent on the ground that the evidence sought to be elicited from Duran did not directly contradict the testimony of witness Chicano. The objection was sustained by the hearing officer whose ruling was subsequently confirmed by the Director of Patents. Counsel for the petitioner made the following formal offer of proof:

"ATTY. GONZALEZ:

Your Honor please, in view of the ruling of the Honorable Director your Honor please on the admissibility of certain items of evidence, which resolution dated February 21, 1966 was received by undersigned counsel for the petitioner on February 22, 1966, said resolution was setting the hearing of this case for this morning, I wish to state, I wish to register my exception, my respectful exception to said resolution. In view of the resolution not permitting me to present Mr. Ernesto Duran, my proposed witness whom I attempted to present at the last hearing, I wish to offer as proof the following items of the testimony of witness Duran. Now as he would go shopping with his parents and that sometime in the month of February 1963 he went to the Aranque market, and while he was buying groceries he saw a shelf with five (5) lbs. bag of sugar with the bag and package he thought was VICTORIAS. Witness Duran will further testify that he went to the shelf and pointed to the bag of sugar and he said 'Isang supot ng Victorias nga.' That the sugar was taken by the shopkeeper and when he went home he found out that the sugar was marked VALENTINE. He went on again on another time later and saw that the shelf was still filled with five (5) pounds (lbs.) bag VALENTINE sugar. The shelf also has bags of VICTORIAS sugar side by side with VALENTINE sugar, that the package of VALENTINE looked so much alike with VICTORIAS sugar that he was misled into pointing to VALENTINE and asked for VICTORIAS.

HEARING OFFICER:

What is that, is that supposed to be the testimony of witness Duran?

ATTY. GONZALEZ:

Yes, your Honor, I am offering as proof of what the witness Duran would have testified. Since this office has ruled that I cannot present him an offer of proof is being made for purposes of putting on record what he would have testified to on record in accordance with the Rules of Evidence.[11]

Having made the foregoing formal offer of proof, the petitioner cannot complain that it was denied procedural due process.

The proposed testimony of Ernesto T. Duran that in February 1963 he went to Arangue market and bought one bag of sugar which he thought was "Victorias" and when he went home he found out that the sugar was marked "Valentine" is not sufficient evidence that the two trademarks are so similar that buyers of sugar are confused. The words "Victorias" and "Valentine" are not similar in spelling and do not have a similar sound when pronounced. Even the diamond designs are different. The diamond design of the trademark "Valentine" has protruding lines at the corners. Even an illiterate person can see the difference between the two diamond designs.

There is no evidence that the respondent Ong Su had obtained the registration of his trademark "Valentine" and design by means of fraud. The said trademark was registered in the Philippines Patent Office before the petitioner registered its trademark.

The record and evidence show that Ong Su had also used in his business the name Mariano Ang. Hence the licenses and permits in the name of Ong Su and/or Mariano Ang were correctly admitted as evidence.

WHEREFORE, the decision of the Director of Patents sought to be reviewed is hereby affirmed, without pronouncement as to costs.

SO ORDERED.

Teehankee (Chairman), Makasiar, Muñoz Palma, Martin, and Guerrero, JJ., concur.

[1] Rollo, pp. 179-184.

[2] Rollo, pp. 87-91.

[3] Rollo, pp. 104-107.

[4] Decision of Director of Patents, pp. II-III, Appendix "A" to Brief for Petitioner-Appellant, Rollo. p. 309.

[5] Idem., pp. III-IV, Rollo, p. 309.

[6] Idem., pp. IV-VI. Rollo, p. 309.

[7] Idem. pp. a-d. Rollo. p. 309.

[8] Brief for Respondents-Appellees, pp. 26-27, Rollo, p. 335.

[9] Brief for Petitioner-Appellant, pp. 7-9, Rollo. p. 309.

[10] Brief for Respondents-Appellees, pp. 32-33. Rollo, p. 335.

[11] Brief for Petitioner-Appellant, pp. 1 12-1 13, Rollo, p. 309.

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