

Privy Council Appeal No. 46 of 1929.

The Chesebrough Manufacturing Company, Consolidated - - *Appellants*

v.

Ibrahim Lebbe Abdul Kudhoos - - - - *Respondent*

FROM

THE SUPREME COURT OF CEYLON.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 22ND NOVEMBER, 1929.

Present at the Hearing :

LORD BLANESBURGH.

LORD WARRINGTON OF CLYFFE.

SIR CHARLES SARGANT.

[*Delivered by* LORD WARRINGTON OF CLYFFE.]

This is an appeal from an order dated the 17th October, 1928, of the Supreme Court of the Island of Ceylon, reversing an order of the District Court of Colombo dated the 19th March, 1928. The appeal has not been heard on the merits owing to the fact that before opening his case Counsel for the appellants very properly called the attention of the Board to a serious irregularity in the proceedings in the Colony.

The proceedings were instituted on the 26th February, 1927, by a petition presented by the present appellants and intituled "In the matter of the application for registration of a trade mark under Ordinance No. 14 of 1888 and in the matter of an application under Section 28 of the said Ordinance." This section provided that "The Court may on the application of any person aggrieved by any entry made without sufficient cause in any such register" (*i.e.*, the register to be kept under the Ordinance) "make such order for expunging or varying the entry as it may think fit." The petition asked for an order expunging from the register a certain trade mark of the respondent on the grounds in the petition stated.

The order of the District Judge was headed as in the title of the petition and ordered "in terms of Section 28 of the said Ordinance No. 14 of 1888," that the respondent's trade mark be expunged from the register.

By the order of the Supreme Court the order of the District Judge was set aside with costs.

Unfortunately, at the date of the institution of the proceedings, the Ordinance No. 14 of 1888 was no longer in force, having been repealed by the Trade Marks Ordinance No. 15 of 1925, which prior to that date had come into operation by virtue of a proclamation of the Governor duly published in the Government Gazette. Still more unfortunately, neither the Judges nor the Counsel in the Colony called attention to the repeal, and no steps were taken in either of the Courts to have the mistake corrected, but the application was dealt with on the merits as if the Ordinance of 1888 were still in force.

The hearing of the appeal was adjourned for a few days to enable Counsel on both sides to consider the position. It was then argued for the appellants that the matter was a mere technicality and that the proceedings would be put right by amendment. Their Lordships, however, were of opinion that this was a matter which ought to have been dealt with in the Colony, and that they could not properly advise His Majesty now to interfere.

The result is that, in their opinion, the order of the District Judge, purporting as it does to be made under the Ordinance of 1888, was in fact made without statutory authority and was, apart from any question of merits or their absence, rightly set aside by the order of the Supreme Court, and this appeal must therefore be dismissed. Inasmuch, however, as the merits of the case have not been discussed, the dismissal of this appeal, which necessarily leaves the order of the Supreme Court standing, should be without prejudice to such proceedings under the Ordinance of 1925 as the appellants may be advised to institute, and their Lordships asked for and obtained from the respondent's Counsel an undertaking, the terms of which are set out below. As to the costs of the appeal, their Lordships are of opinion that the usual result of a dismissal, viz., that it be with costs, cannot properly be avoided. The initial fault was that of the appellants, and they must take the consequences.

For these reasons their Lordships are of opinion that the proper order to make would be as follows :—

Without prejudice to any proceedings for rectification of the register which the appellants may institute under the Trade Marks Ordinance No. 15 of 1925 and the respondent by his Counsel undertaking not to meet such proceedings by a plea of *res judicata* based upon the order dated the 17th October, 1928, of the Supreme Court of Ceylon, or otherwise to rely on such order or on the judgment of the Supreme Court, this appeal is dismissed with costs.

They will humbly advise His Majesty accordingly.



In the Privy Council.

THE CHESEBROUGH MANUFACTURING
COMPANY, CONSOLIDATED

2.

IBRAHIM LEBBE ABDUL KUDH00S.

DELIVERED BY LORD WARRINGTON OF
CLYFFE.

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