1955 *Present :* Basnayake, A.C.J., and Pulle, J.

S. H. M. MOHIDEEN *et al.*, Petitioners, *and* REGISTRAR OF TRADE MARKS, Respondent

S. C. 196—D. C. (Inty.) Colombo, 481/Spl.

Trade Marks Ordinance—Section 17—" Calculated to deceive "

When considering whether a trade mark, which is proposed to be registered, so nearly resembles an already registered trade mark as to be " calculated to deceive " within the meaning of section 17 of the Trade Marks Ordinance, a test to apply is not whether if a person is looking at the two trade marks side by side there would be a possibility of confusion, but whether the average person who sees the proposed trade mark in the absence of the registered trade mark would mistake the proposed trade mark for the registered trade mark.

APPEAL from an order of the District Court, Colombo.

H. V. Perera, Q.C., with *N. K. Choksy, Q.C.*, and *S. H. Mohamed*, for the Petitioner-Appellants.

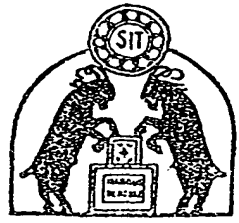
Mervyn Fernando, Crown Counsel, for the Respondent.

July 13, 1955. BASNAYAKE, A.C.J.—

Shahul Hamid Mohamed Mohideen and Mohamed Assan Kizar, exporters of tea and Ceylon produce, both carrying on business in Colombo under the business name of "Kizar & Co." (hereinafter referred to as the appellants) applied to the Registrar of Trade Marks for the registration of a trade mark in respect of tea in class 42. The trade mark is depicted in the application and has the words "TWO RAMS" above what appear to be two hornless rams in a gambolling attitude as in the illustration given below :

The Registrar refused the application on the ground that he was precluded by the terms of section 17 of the Trade Marks Ordinance from registering the appellants' trade mark as it so nearly resembled a registered trade mark in respect of the same class of goods (hereinafter referred to as the registered trade mark) belonging to a firm trading under the name of T. V. K. Cader Meera Saibo & Co. as to be calculated to deceive.

The registered trade mark as shown in the illustration given below depicts two bearded goats with curved horns standing almost erect on a box or stand with the legend "Marque Deposse". On the heads of the goats rests a circle with a lotus device with the capital letters "S I T" in the centre.



The appellants appealed under section 10 (3) of the Trade Marks Ordinance from the Registrar's decision to the District Judge. The learned

District Judge upheld the Registrar's decision that the appellants ' trade mark so nearly resembled the registered trade mark as to be calculated to deceive.

Before deciding the question whether the appellants' trade mark so nearly resembles the registered trade mark, it is necessary to decide the meaning of the words " calculated to deceive " in section 17 of the Trade Marks Ordinance. These words are identical with the words in the corresponding provision of the English Trade Marks Act of 1905 and the decisions on that Act afford some guidance in the interpretation of those words in our Act. It has been held in England that the word " calculated " in the context " calculated to deceive " does not imply any intention to deceive and means no more than " likely ". The question then is whether the appellants' trade mark is likely to deceive.

Apart from the two gambolling rams and the words " TWO RAMS " there are no other features in the appellants' trade mark while the registered trade mark has many features which are not to be found in the appellants' trade mark. The registered trade mark has a bold outline within which the two goats are placed. The features of the two goats are entirely different from those of the animals in the appellants' trade mark. The lotus design with the letters " S I T " on the registered trade mark is not to be found in the appellants' trade mark and is a distinctive feature of it. The stand or box on which the goats are standing is peculiar to the registered trade mark and even the attitude of the goats in it is different.

No standard test of what is likely to deceive the purchaser can be laid down. The tests laid down in the decided cases are rarely capable of extension to other cases. In the circumstances of this case we think the test to apply is not whether if a person is looking at the two trade marks side by side there would be a possibility of confusion ; but whether the average person who sees the appellants' trade mark in the absence of the registered trade mark and in view only of his general recollection of the registered trade mark would mistake the appellants' trade mark for the registered trade mark. With all these marked differences no customer is likely to mistake the appellants' trade mark for the registered trade mark. The appellants have not taken into their trade mark any distinctive feature of the registered trade mark.

For the above reasons we are unable to agree with the learned District Judge that taken as a whole the appellants' trade mark so nearly resembles the trade mark already registered as to be likely to deceive the purchaser.

We therefore set aside the order of the learned District Judge and of the Registrar. There will be no costs of this appeal.

PULLE, J.—I agree.

Order set aside.

1954 *Present :* de Silva, J.

A. D. P. RANASINGHE, Appellant, *and* H. A. R. PIERIS, Respondent

S. C. 33—C. R. Gampaha, 5,438

Appeal—Security for costs of appeal—Procedure for furnishing it—Civil Procedure Code, ss. 756 (1) and (3), 757.

A notice of security for costs of appeal given in terms of section 756 of the Civil Procedure Code is not invalid if the amount of security is not specified in it.

Where the security bond was perfected upon its acceptance by an officer of the court and before the security was accepted by the Judge—

Held, that the provisions of sub-section 3 of section 756 of the Civil Procedure Code could not be invoked to cure the defect.

APPEAL from a judgment of the Court of Requests, Gampaha.

N. K. Choksy, Q.C., with *A. W. Goonewardene* and *John de Saram*, for the defendant appellant.

H. W. Jayewardene, Q.C., with *P. Ranasinghe*, for the plaintiff respondent.

Cur. adv. vult.

October 21, 1954. DE SILVA, J.—

This is an appeal from the judgment of the Commissioner of Requests, Gampaha, declaring the plaintiff respondent entitled to a decree for rent, ejectment, and damages. The judgment was delivered on 22nd October 1952. The defendant filed this appeal 2 days later. Along with the petition of appeal he deposited a sum of Rs. 26 as security for costs of appeal.

A preliminary objection was taken to the hearing of this appeal on the ground that it was not properly constituted inasmuch as the provisions of Section 756 had not been complied with. Firstly it was contended that the notice of appeal was not a valid one as the amount of security was not specified in it. This objection was raised in the court below also, but the learned Commissioner held that it was not essential to specify the amount of security in the notice. The Civil Procedure Code provides a specimen form for the purpose of giving notice of security. That is form 126. It is contended on behalf of the appellant that this form has not been complied with. The relevant part of this form reads ". . . . . move to tender security by (mention how) for any costs which may be incurred by you in appeal in the premises etc. " Mr. Jayawardene argues that the words " mention how " appearing in this form require the insertion of the amount of security proposed to be given. I do not think that that interpretation is the only one which can be assigned to these words. It certainly is desirable and convenient to mention the amount of security to be furnished. Section 757 of the Civil Procedure Code provides that security may be given in 2 ways, that is to say, by way of mortgage of immovable property or by the deposit and hypothecation of money. The word " how " appearing in form 126 may therefore refer to the form of security, namely, property or money. In the instant case it was set out in the notice that security would be

tendered by depositing cash. I am satisfied that is sufficient compliance with the requirements of form No. 126. It is conceded by the respondent's counsel that the sum of Rs. 26 tendered as security is the maximum security required in the Court of Requests, Gampaha, in this class of cases.

The 2nd objection urged by Mr. Jayawardene was raised in appeal for the first time. He maintains that the security bond was perfected even before notice of security was served on his client and before the security was accepted by the court. The date of the bond is 24.10.'52 whereas the notice of security was served on the respondent and his proctor only on the 28th and 29th October respectively. Section 756 of the Civil Procedure Code provides that when a petition of appeal is received by the court the petitioner shall forthwith give notice to the respondent that he will, on the date specified in such notice within a period of 14 days from the date of decree, tender security for the respondent's costs of appeal. On the day specified, the respondent is entitled to show cause if any against the acceptance of such security. The security has to be perfected within 14 days of the date of decree. It is clear that the security can be accepted only after notice of security is served on the respondent. Mr. Choksy who appears for the appellant while conceding that the security bond had been perfected before the notice of security was served, argued that he was entitled to relief under sub-section 3 of Section 756 of the Civil Procedure Code. This sub-section reads " In the case of any mistake, omission or defect on the part of any appellant in complying with the provisions of this section, the Supreme Court, if it should be of opinion that the respondent has not been materially prejudiced may grant relief on such terms as it may deem just". The point which arises in this case came up for consideration in the Divisional Bench Case *de Silva v. Seenathumma* [1]. In that case security was accepted before notice of security had been served on one of the two respondents. In appeal it was contended on behalf of the respondent that the security was bad inasmuch as it had been accepted before the notice of security had been served on one of the respondents. It was urged on behalf of the appellant that he was entitled to relief under sub-section 3 of Section 756 of the Civil Procedure Code. Soertsz J. who wrote the judgment in that case held that two of the requirements of Section 756 namely the giving of notice forthwith, and the furnishing of the copy of appeal were matters immediately in the power of the appellant and that the court had no power to grant relief under sub-section 3 for a breach of either of those two matters. He further held that relief may be given in case of " reasonable " omission, mistake or defect in regard to the tendering of security and the depositing of money to cover the expenses of the service of notice of appeal. In the circumstances of that case relief was in fact granted to the appellant but he proceeded to state " But I think we should state quite clearly that our decision in this case does not mean in future cases we shall, necessarily, give relief in similar circumstances. "

In the instant case a further difficulty arises, namely, that the security bond was perfected before security was accepted by the court. As I

[1] *41 N. L. R. 241.*

observed earlier the petition of appeal was filed on 24.10.'52 and the appellant moved for a deposit note for Rs. 26 and that motion was allowed. On the same day there is a journal entry which shows that the security bond was filed. This shows that the security bond was perfected without the authority of the court. The fact that the application for a deposit note of Rs. 26 was allowed does not mean that the court accepted that amount as security. In the case of the *Demodera Tea Company Ltd. v. Pedrick Appu*[1] De Sampayo J. said, " It is clear that the acceptance of the security is a judicial act and should be evidenced by an order of court. " In this case too, an officer of the court appears to have accepted the security bond without an order from the Commissioner of Requests. That bond therefore would be unenforceable. The provisions of sub-section 3 cannot be invoked to cure that defect. The appeal must therefore be rejected. I make no order for costs in favour of the plaintiff respondent as the objection on which he succeeds was not raised in the court below.

Appeal rejected.