

father as I saw him in court looking well and happy. In my view it would not be good for Godfrey to be brought up by a stepfather whilst the father is alive, competent and able to bring up his child. Both the applicant and the respondent go out to work and both rely on somebody to take care of the children. This is not unusual these days. What is important, would the father bring up Godfrey in the child's interest? I am of the opinion that he would. See *Willoughby v. Willoughby* (2). 5

I would, however, request that the mother be allowed access to the children when possible and that the parents should not allow the friction existing to deprive the children of this access. The respondent should allow this access at reasonable times and the applicant should not take this opportunity to unsettle the child. 10

I refuse the application, and make no order as to costs. *Application refused.* 15

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T. CHOITHRAM AND SONS LIMITED v. P. CHOITHRAM AND SONS AND REGISTRAR GENERAL 20

SUPREME COURT (Beoku-Betts, J.): July 30th, 1965  
(Civil Case No. 364/64)

- [1] **Personal Property—goodwill—trade marks and names—injury to goodwill essential in action for infringement:** It is not necessary for a plaintiff, in an action for infringement of a particular trade mark or name, to show that the defendant had a fraudulent motive as long as he shows actual or probable injury to his goodwill (page 258, lines 15–20). 25
- [2] **Trade Marks, Trade Names and Designs—infringement—fraudulent motive not essential if injury to goodwill:** See [1] above. 30
- [3] **Trade Marks, Trade Names and Designs—infringement—knowledge of existing mark or name—infringement after knowledge may raise presumption of intention to deceive:** Where a person has knowledge of an existing trade mark or name or, having adopted an identical or similar mark or name as his own, subsequently obtains such knowledge and nevertheless infringes, or continues to infringe the existing mark or name, he is presumed to intend the natural consequence of his acts and, if such natural consequence be to deceive the public, he will be restrained from continuing to use his mark or name (page 258, lines 20–28). 35
- [4] **Trade Marks, Trade Names and Designs—trade names—infringement—plaintiff need not show fraud but likelihood of deception of public:** In an action to restrain a person from using a particular trade name 40

because of the risk of confusion with the plaintiff's name, the plaintiff need not prove any fraudulent act or intention on the part of the infringer; the use of a name likely to deceive the public is sufficient (page 258, lines 34-38).

- 5 [5] Trade Marks, Trade Names and Designs—trade names—name acquired by reputation—likelihood of confusion irrelevant if name bona fide and honestly adopted: A person who has *bona fide* and without intention to deceive adopted a name for business purposes and acquired it by reputation over a considerable period is entitled to trade under it and cannot be restrained from doing so even if its similarity to another firm engaged in the same trade may occasionally lead to confusion (page 257, lines 29-35).
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- 15 [6] Trade Marks, Trade Names and Designs—trade names—right to use own name—likelihood of confusion irrelevant if no fraud: The right of a person to use his own name in trade cannot be interfered with merely because it may lead to confusion by reason of its similarity to, or identity with, the name of another trader engaged in the same business but he is not entitled to use his own name with intent to deceive the public and infringe the other name (page 258, lines 5-12).

20 The plaintiff company brought an action against the first defendant seeking an injunction to restrain him from using a business name so closely resembling that of the plaintiff company as to cause confusion to the public; an order for the removal of the defendant's business name from the register; and damages.

25 The plaintiffs had carried on business in the country for over 20 years as merchants of provisions, medicine, hardware, fancy goods and garments. They were known first as "T. Choithram & Sons" and later as "T. Choithram & Sons Ltd." In 1963, the defendant firm commenced business in the same merchandise field, following the creation of a partnership between Choithram Pasaram Gacheri and Metranan Issardas Bathuramani. They adopted the business name of "P. Choithram & Sons."

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The plaintiffs alleged that the use of this name confused members of the public to the detriment of the plaintiffs' business and sought the orders detailed above. The defendant firm contended that its business name represented the actual names of the principal partner in the firm and that there was sufficient distinction between the two names to prevent mistakes being made.

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40 Cases referred to:

- (1) *Baume & Co., Ltd. v. A. H. Moore, Ltd.*, [1958] Ch. 137; [1957] 3 All E.R. 416; on appeal, [1958] Ch. 907; [1958] 2 All E.R. 113.

(2) *Jay's, Ltd. v. Jacobi*, [1933] Ch. 411; [1933] All E.R. Rep. 690, distinguished.

(3) *Turton v. Turton* (1889), 42 Ch. D. 128; 61 L.T. 571, distinguished.

*Smythe* for the plaintiffs;  
*Davies* and *McCormack* for the defendant.

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BEOKU-BETTS, J.:

The plaintiffs' claim is (a) for an injunction to restrain the first defendants, their servants and agents from using the business name of "P. Choithram & Sons" or any other style so closely resembling the name of the plaintiffs as to be calculated to lead to the defendants' business being confused with the plaintiffs' business and to lead to members of the public utilising the services of the defendants' business in the belief that they are utilising the services of the plaintiffs' business and generally from passing off or attempting to pass off the said defendants' business as and for the plaintiffs' business; (b) an order that the entry of the business name "P. Choithram & Sons" registered under the Business Names Registration Act (*cap.* 257) in the register of business names in the offices of the Registrar General, Freetown, be removed; and (c) damages. The plaintiffs at the end of the case stated that they do not press the claim for damages.

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The defence is that the first defendants are honestly using their own name as a business name. The first defendants say that there is sufficient distinction between the name of the plaintiff company and that of the first defendants' firm to prevent mistakes being made.

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The facts disclose that the plaintiffs are a limited liability company doing business in the name of T. Choithram & Sons Ltd., at 5, Rawdon Street, Freetown and at 12 other branches in Sierra Leone, dealing in provisions, medicines, hardware, fancy goods and garments. The business started in 1944 and in 1958 was converted into a limited liability company. The company has nine shops in Freetown. The plaintiffs state that their business was first known as T. Choithram & Sons and later as T. Choithram & Sons Ltd.

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The defendant gives his name as Choithram Pasaram Gacheri and states that he is the proprietor of "P. Choithram & Sons." He states that his business is a partnership registered under the Act as "P. Choithram & Sons." He states that "P" is for "Pasaram" which is his father's name and "Choithram" his personal name, and that "Gacheri" is his caste in India. He said he was never called Gacheri. He states that he has a different telegraphic address and a different

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post office box number and that there could be no confusion of his business with that of the plaintiffs. The defendant commenced business in 1963 dealing in similar goods to the plaintiffs. The latter fact is not disputed by the defendant. The defendant's strong point is that he was trading in his own name in all honesty having no intention to deceive.

In the case of *Turton v. Turton* (3), it was held that although there was a probability that the public would be occasionally misled by the similarity of the names, the plaintiffs were not entitled to an injunction restraining the defendants from the use of the name of John Turton & Sons. The facts in the case are these: the plaintiffs, —Thomas Turton & Sons Ltd., were a limited liability company who carried on the trade of merchants and manufacturers of steel and plates at Sheffield. The business had been carried on by them and their predecessors for a number of years. The defendants were John Turton and his two sons, who were carrying on in partnership in Sheffield a business similar to that of the plaintiffs under the style of John Turton & Sons. The firm was at an earlier date carried on as John Turton & Co. John Turton then took his two sons into partnership and the name of the firm was changed to John Turton & Sons. The plaintiffs brought an action for an injunction. It was held that the defendants did no more than use their own names, John Turton bringing his two sons into business and properly representing to the world that he was using his two sons as partners of his business. There was no evidence that the defendants had any intention to deceive or to represent the business as that of Thomas Turton & Sons Ltd.

Now let us apply the principle of *Turton v. Turton* to the facts in this case. The plaintiffs commenced business in 1944 in the name of T. Choithram & Sons and in 1959 converted their business to T. Choithram & Sons Ltd. They have nine branches in Freetown dealing in provisions, etc. The defendants first commenced business in 1963 in Freetown selling the same or similar goods as the plaintiffs. They chose the name P. Choithram & Sons as their business name and claim that they are trading in their names honestly. An officer of the Registrar General's office gave evidence and tendered Exhibit J, the partnership agreement of the defendant firm. The deed commences as follows:

"This indenture made on October 23rd, 1963 between Choithram Pasaram Gacheri of 33, Kissy Street, Freetown in the Western Area of Sierra Leone now trading as P. Choithram

& Sons, and Metranan Issardas Bathuramani of Bombay, India now of 33, Kissy Street, Freetown.”

From the names Choithram Pasaram Gacheri one could see that P. Choithram represents two of the names of the defendant. Why Gacheri was not added could perhaps be explained, but what I cannot understand is why the words “& Sons” are added to P. Choithram, when it is not claimed that the other partners to this deed are the sons of Choithram Pasaram Gacheri. The defence pleadings must be taken seriously. If they aver that they are using their own names in all honesty the facts supporting this must be true. It is not true in this case. In the case of *Turton v. Turton* (3), John Turton had two sons whom he took into his business and therefore when he added “& Sons” to his name he was using it truthfully. The addition of “& Sons” to “P. Choithram” makes a considerable difference in this case.

The addition is unexplained. Looking at the name, members of the public could easily be confused as the similarity is striking. The fact that the addition of “& Sons” is unexplained leads me to think that this was designed by the defendant to deceive. Even if there is not that intent, there is the likelihood of confusion in the two businesses. The confusion is more emphasised because of the similarity in the type of trade carried on by both businesses. If the business name of the defendant firm was merely “P. Choithram” and there was no evidence of an attempt on the part of the defendant to misrepresent the fact, it might have been a different matter and the plaintiff would have had to bring more evidence relating to the defendants’ *mala fides*. The case of *Baume & Co. Ltd. v. A. H. Moore, Ltd.* (1) is in point.

The case of *Jay’s, Ltd. v. Jacobi* (2) decided that a person who has *bona fide* and without any intention to deceive adopted a name for business purposes and acquired it by reputation over a considerable period is entitled to trade under that name and cannot be restrained from so doing even though the similarity of the name to that of another firm engaged in business in the same trade may occasionally lead to confusion. This case was cited by the defence counsel. I am sure if he had read it properly he would not have referred to it because it tends to support the plaintiffs’ case. The plaintiffs started business in 1944 with the name of T. Choithram & Sons, whilst the defendant started business in 1963. The *bona fides* of the defendant is queried because to me it appears that the words “& Sons” were added to “P. Choithram” with no other purpose than

to deceive. The defendants have built no reputation. How the facts of the *Jay's* case help the defence in view of the facts I do not see. In 2 *Daniell's Chancery Practice*, 8th ed., at 1283 (1914), it is stated, *inter alia*:

5       “The right of a man to use his own name in trade cannot be  
interfered with merely because it may lead to confusion by  
reason of its similarity to, or identity with, the name of another  
trader engaged in the same business; but a man cannot use  
10       his own name fraudulently, and will not be permitted to lend  
his name to a new company for the purposes of carrying on a  
business similar to an old-established business carried on under  
the same name.”

In 32 *Halsbury's Laws of England*, 2nd ed., at 615, para. 922, the  
law is stated as follows:

15       “Although the law only intervenes to prevent such names or  
marks being used so as to deceive, it is not necessary to show  
an actual fraudulent motive for the user; fraudulent motive  
in itself does not constitute a cause of action, since the plain-  
tiff's claim depends on the injury, actual or probable, to his  
20       goodwill, and not on the wickedness of the defendant. If the  
defendant originally knew of the plaintiff's claim to the name  
or mark, or if, having adopted such name or mark without  
knowledge of the plaintiff's use thereof, he has subsequently  
had the plaintiff's claim brought to his notice, and still con-  
25       tinues his former conduct or challenges the plaintiff's rights,  
he is considered as intending the natural consequences of his  
acts, and if such natural consequence be to deceive, then he  
will be restrained from continuing to use such name or mark.”

In this case, the plaintiff brought instances of business letters being  
30       misdirected, advertisements being confused, cablegrams being mis-  
directed, all because of the similarity of the names of the plaintiff  
company and the defendant firm. Although some of the allegations  
were not proved, yet the state of confusion existing arises conse-  
quent on the use of this business name of the defendant. The law  
35       is clear that the plaintiff need not prove fraudulent action by the  
defendant or any action on their part to deceive to succeed. The  
use of a name which is likely to deceive the public is enough under  
the circumstances. In this case, I have found as a fact that the  
defendant did not use his name as such. If he wanted to justify  
40       his pleadings he should have used “P. Choithram Gacheri & Partner”  
as a business name, or just “P. Choithram.” I also find as a fact

that the name "P. Choithram & Sons" resembles so closely "T. Choithram & Sons Ltd." that the public is likely to be deceived, coupled with the fact that the defendant firm deals in similar commodities. I hold that there are no *bona fides*. The defendant firm had the intention of passing off their business as that of the plaintiffs' business. The defence as pleaded is at variance with the partnership agreement of the defendant firm. The name of the defendant business is not the same as the defendants' names.

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I therefore find for the plaintiff and order:

(a) an injunction restraining the first defendants, their servants or agents or any of them or otherwise from using in connection with their business as a trading style the business name of "P. Choithram & Sons," or any other style so closely resembling the name of the plaintiffs.

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(b) delivery up by the first defendant of all business cards, letter-heads, business and other stationery and other matters the use of which would be a breach of the injunction now ordered;

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(c) that the second defendant not having defended this action, I order that the entry of the business name "P. Choithram & Sons" registered under the Business Names Registration Act (*cap. 257*) in the register of business names in the office of the Registrar General be removed;

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(d) I award no damages as the claim was withdrawn;

(e) I hold that the defendant was not engaged in the passing-off of the goods of the plaintiff as such, but of the business;

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(f) I order that the injunction should take effect one calendar month from the date of this judgment.

*Order accordingly.*

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