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judgedate

1961.06.23
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caseid

1959(O)856
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reporter

Minshu Vol. 15, No. 6
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casetitle

Judgment regarding whether or not the court can find the fact that one trademark generates two terms of address
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casename

Case to seek revocation of a trial decision
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caseresult

Judgment of the Second Petty Bench, dismissed
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court_second

Tokyo High Court, Judgment of June 23, 1959
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summary_judge

There is no problem, even if the court confirms the fact that one trademark generates two terms of address.
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references

Article 2, paragraph (1), item (ix) of the former Trademark Act (Act No. 99 of 1921)

Article 2 (1) Trademarks set forth in the following items cannot be registered.
(ix) Trademark that is identical with, or similar to, another person's registered trademark and that is used for identical or similar goods;
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maintext

The final appeal is dismissed.
The cost of the final appeal shall be borne by the appellant of the final appeal.
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reason

Item I in the reasons for final appeal filed by the counsel for the final appeal, KANEKO Hajime
The argument of the counsel for the final appeal condemns the judgment in prior instance, which held that the applied trademark in this case and the cited trademark generates a term of address, or concept of "D." However, even if the public today has less knowledge about emblems, etc. than they used to have as alleged in the argument, there are still a considerable number of persons who recognize that the figures in the above trademarks represent "D," and it cannot be said that the above holding of the judgment in prior instance violates a rule of thumb as alleged in the argument. The argument is not well-grounded.
Item II in the same reasons for final appeal
Apart from a case where only a part of a trademark is extremely important while other parts are simply add-ons, with regard to a figure like the applied trademark in this case, there may be a case where two terms of address are generated. There are no reasons to hold that the judgment in prior instance, which found the fact that the above trademark generates a term of address, or concept of "E," and also a term of address, or concept of "D," is illegal.
Item III in the same reasons for final appeal
As alleged in the argument of the counsel for the final appeal, two trademarks that generate the same term of address or concept are determined as similar trademarks when they are likely to create misconception and confusion concerning the place of origin of a product. The argument alleges that the risk of such misconception and confusion

cannot be predicted at all in this case. However, with regard to this point, the judgment in prior instance held that it can be said that misconception and confusion are not created only among persons who are familiar with the competing relationship between the two families and only in the case of spot trading, and this holding can be affirmed. The argument is not well-grounded.

Item IV in the same reasons for final appeal

The judgment in prior instance did not determine the main part of the applied trademark based only on its size and area as alleged in the argument of the counsel for the final appeal, but held that figures of a cube showing the emblem D cannot be overlooked even when the trademark is observed as a whole, and that a term of address, or concept of "D," is also generated consequently. This holding can be affirmed also by this Court. The argument is not well-grounded.

Item I in the reasons for final appeal filed by the counsels for the final appeal

As alleged in the argument of the counsels for the final appeal, in determining similarity of trademarks, respective trademarks must be observed as a whole. The figure of the applied trademark in this case and the figure of the cited trademark are not the same, and in particular, there is an E figure in the center of the applied trademark in this case, and D figures are partially covered by E, not revealing their entire shape. However, it is difficult to conclude from these facts that the applied trademark does not generate a term of address or concept of D. The judgment in prior instance, which held that a term of address or concept of the applied trademark is the same as that of the cited trademark, is legitimate, and therefore the argument is not well-grounded.

Item II in the same reasons for final appeal

The argument of the counsels for the final appeal alleges that the judgment in prior instance contains illegality of wrongly setting a standard time for the determination of whether or not the applied trademark falls under Article 2, paragraph (1), item (ix) of the Trademark Act (Act No. 99 of 1921). From the text of the judgment in prior instance, it is apparent that the judgment in prior instance set such standard time at the time of the application. Even if, as alleged in the argument, circumstances that were predictable at that time should be treated as part of basis for the above determination, facts that occurred after the time of application and by the time of the trial decision should not be treated without consideration as facts that were predictable when discussing whether the applied trademark falls under Article 2, paragraph (1), item (ix) of the same Act. In addition to this, with regard to whether or not the terms of address or concepts are the same, it is generally difficult to imagine a case where the determination differs at the time of the application and at the time of the trial decision. In addition, according to the

judgment in prior instance, it can be said that misconception and confusion are not created only among persons who are familiar with the competing relationship between the two families and only in the case of spot trading. It is also difficult to imagine a case where such a fact differs according to the standard times. The argument is not well-grounded.

Item III in the same reasons for final appeal

By citing many precedents, the argument of the counsels for the final appeal alleges that the judgment in prior instance misunderstands the standard for the determination of similarity of terms of address or concepts of trademarks. However, the determination of similarity of trademarks is an issue that should be determined according to each specific case. Therefore, simply because the judgment in prior instance determined that the applied trademark in this case and the cited trademark are similar, it cannot be said that the judgment in prior instance contravenes the precedents cited in the arguments, or that the judgment in prior instance misunderstands the standard for the above determination. The argument is not well-grounded.

Item IV in the same reasons for final appeal

The argument of the counsels for the final appeal alleges that the judgment in prior instance contains illegality of not stating reasons for important matters, stating conflicting reasons, and an insufficient trial. Therefore, this Court will consider the points alleged in the argument.

1. The judgment in prior instance did not ignore the E shape figure in the center of the applied trademark, but rather observed such figure fully, and nonetheless held that a term of address, or concept of "D," was to be generated. The judgment in prior instance did not make the determination by extracting and analyzing only part of the figure of the applied trademark as alleged in the argument.

2. The judgment in prior instance held that whether or not a trademark is particularly remarkable is a problem pertaining to Article 1 of the same Act and has no connection with whether or not a trademark falls under Article 2, paragraph (1), item (ix). As long as the applied trademark falls under Article 2, paragraph (1), item (ix), there is no need to determine whether or not the trademark is particularly remarkable.

3. The judgment in prior instance did not determine the similarity of trademarks in consideration of the appellant's subjective intention. There are no conflicting reasons in the judgment in prior instance as alleged in the argument.

4. With regard to the applied trademark, the judgment in prior instance acknowledged that a term of address or concept of "E-gata Ganso" is generated, and that a term of address or concept of "D" is also generated. Since it cannot be said that one trademark

never generates two terms of address or concepts, there is no contradiction as alleged in the argument.
5. As explained in the above item 2, the argument is not well-grounded.
6. Whether or not there is a covering paper is a different issue from whether or not trademarks are similar, and there is no need to mention the identification of goods by a covering paper in the holding.
As seen from the above, in short, the judgment in prior instance does not contain illegality of inadequate reasons, conflicting reasons, insufficient trial, determination with an omission, etc., and therefore the argument is not well-grounded.
Item V in the same reasons for final appeal
Even if the relationship between the appellant and the registration holder of the cited trademark is as alleged in the argument of the counsels for the final appeal, as long as the cited trademark has already been registered and the appellant's applied trademark is determined to be similar to the above cited trademark, it is inevitable for the appellant's application to be refused registration. The argument cannot be accepted.
Accordingly, pursuant to Article 401, Article 95, and Article 89 of the Code of Civil Procedure, the judgment has been rendered as set forth in the main text by the unanimous consent of the justices.
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presiding

Justice FUJITA Hachiro
Justice IKEDA Katsu
Justice KAWAMURA Daisuke
Justice OKUNO Kenichi
Justice YAMADA Sakunosuke
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note_other

(This translation is provisional and subject to revision.)