

(1930) 11 MAD CK 0004
In the Madras High Court

Hussain Meah Sahib (died) and Others	APPELLANT
Vs	
A.G. Abdul Rahim Sahib	RESPONDENT

Date of Decision : 05-11-1930

Acts Referred:

Citation : AIR 1931 Mad 326 : (1931) 33 LW 554

Hon'ble Judges : Bhashyam Ayyangar, J

Bench : Division Bench

Judgement

Bhashyam Ayyangar, J.—Those appeals arise out of two ""passing off"" actions: a suit and a cross suit, between the same parties. It will be

convenient to refer to Abdul Rahim Sahib, the plaintiff in the one and the defendant in the other, as the plaintiff, and Hussain Mean Sahib, the

defendant in the former and the plaintiff in the latter, as the defendant.

2. Both plaintiff and defendant are beedi manufacturers and traders of Madras. Each of them appears to have alleged that the other came into that

trade shortly before the dispute arose between them, but it was conceded at the hearing that they had both been in it for some considerable time.

As between them the defendant was certainly the earlier in the field. In fact, the evidence is that it was he who introduced beedies in Madras about

40 years ago when he removed to it from somewhere near Bombay. He made and sold them loose at first and then in packets. His business, which

must originally have been small, gradually grew and appears to have assumed quite a respectable magnitude in or even some time before 1920,

and there is evidence to show that his income from it was assessed for taxation at Rs. 3,000 or Rs 4,000 in the years 1921 to 1924. The plaintiff,

according to his own statement, began this business only about 25 years ago. He

too was first selling his beedies. loose and it was only later on he began to sell them in packets with wrappers on. When he commenced to use wrappers, he first described his beedies as, ""Siva Nesan beedies"" and after some time he adopted another designation also, namely ""Rahim beedies"" (Rahim being his own name).

3. Then, about the end of 1922, he registered a trade-mark with the Madras Chamber of Commerce with the designation of ""Sait Beedies"" and subsequently began to sell some of his beedies under that label. He alleges in the plaint that he has been doing a large business in, them and earned a ""wide popularity and reputation,"" and the said designation of ""Sait Beedies"" has become identified with and come to denote his manufacture in the minds of the beedi-purchasing public. His case is that shortly before the suit, the defendant started selling the beedies, manufactured by him with the description of ""Sait Beedies "" or ""Sait Jadi Beedies"" (the word ""Jadi"" simply denoting that the ends are folded) on their wrappers and this is a bare-faced attempt on his part to cut into the trade of the plaintiff and fraudulently pass off beedies manufactured by him as plaintiff's beedies.

4. He therefore filed his, suit for an injunction to restrain the defendant from selling any beedies as ""Sait Beedies"" or ""Sait Jadi Beedies"" or from impressing upon any wrappers of packets of beedies or individual beedies the trade name ""Sait Beedies"" or ""Sait Jadi Beedis"" in any colour or in any shape-whatsoever and for damages.

5. The defendant's contention is this. He says that he came to Madras- from Bombay over 40 years ago, and commenced the manufacture of beedies which he called Hussain Mean Sait Beedies (Hussain Mean Sait being his own name) and in a short time the abbreviated name of ""Sait, Beedies"" acquired a name and fame and became associated with the beedies of his manufacture and that in or about 1910 he

folded the ends of his beedies and made them thicker and longer and called them Hussain Sait Jadi Beedies or ""Sait Jadi Beedies"" for brevity's

sake; that those ""Sait beedies"" and ""Sait Jadi Beedies"" have denoted his manufacture for a long time and it was the plaintiff who began to make

beedies long after him; that he pirated the designation of ""Sait Beedies"" and

fraudulently and dishonestly passed off his inferior goods as those of his own; that he was not aware of the registration by the plaintiff of the said designation with the Chamber of Commerce or of its use by the plaintiff, until the latter sent his notice shortly before his suit, that the registration by the plaintiff does not confer any right on him in law and that the plaintiff should be restrained by injunction from using the said name and directed to pay him damages.

6. The City Civil Judge who tried both the suits together granted an injunction in favour of the plaintiff and dismissed the suit of the defendant, who has therefore appealed in both.

7. Now, the first point which we propose to deal with is whether the defendant's beedies were called or known as Sait Beedies"" before the

plaintiff registered that expression as a part of his trademark in the end of 1922 and began to use the same for the beedies manufactured by him.

On this point it is an important circumstance, that the defendant, whether he strictly was or was not a Sait, was undoubtedly known as a Sait. The

plaintiff denied this and even took an issue; but his own second witness speaks of the defendant as Hussain Mean Sait and Exs. 2 and 3, which are

a memorandum of the Board of Revenue and a letter from the Collector of Madras addressed to the defendant in 1917 and 1918, that is, long

before the plaintiff wanted to assume the designation of the Sait, conclusively show that the document went by that appellation. This makes it very

probable that beedies manufactured by him were known as Hussain Mean Sait Beedies or shortly as ""Sait Beedies"" as alleged by him. It is also

made out by the oral evidence on his side. The learned Judge has dealt with the evidence at length and mentioned some grounds of detraction with

regard to the testimony of some of the witnesses but he concedes that at least two of them namely D.Ws. 4 and 7 are quite respectable. He

however suggests that these two witnesses have spoken falsehood because ""the plaintiff is bidding fair to rival them in competition"", but we think

that the suggestion is unjustified and gratuitous. The plaintiff's witnesses are of much lower status and the learned Judge himself has observed about

them that they

are not respectable merchants of high status and some of them like P.Ws. 6, 7 and 8 seem to be intimate friends of the plaintiff, living very near the

place of his residence.

8. Their evidence cannot therefore be implicitly accepted. Taking the oral evidence as a whole we are clear that the beedies manufactured and sold

by the defendant were being called and were known as ""Sait Beedies"" from long before the plaintiff adopted that designation, and the latter's

allegation that the defendant started selling beedies under that name and the name of Sait Jadi Beedies"" only shortly before his suit is untrue.

9. The next point is whether the plaintiff who registered the designation of "" Sait Beedies"" with the Chamber of Commerce in the end of 1922

himself invented it or only caught hold of an expression which was already in the market. The evidence shows, as already pointed out, that the

defendant's beedies were being called and known as Sait Beedies and it is next to impossible to believe that the plaintiff was unaware of it. It has

not been explained by what association of ideas the plaintiff, who was neither a Sait himself nor had so far as we can see, anything to do with that

designation, otherwise happened to pitch upon that particular expression to denote his beedies for which he had two trade names already. It seems

to us much more probable that he took an expression already in vogue in the market than that he coined a new one and it happened to coincide

with a current designation. There was indeed ample motive for him to copy the name by which the defendant's beedies were known, for these

were of superior quality as shown by the admitted fact that they sold at Rs. 2-3-0 or Rs. 2-4-0 per thousand whereas the price of his own beedies

was Re. 1-13-0 or Re. 1-14-0 per thousand, and must consequently have had a high reputation. Under these circumstances we are of opinion that

the plaintiff only took the designation in question from the description already current of the defendant's goods with the object of pushing up his

trade with its aid.

10. The question now arises whether on these findings the plaintiff is entitled to get an injunction restraining the defendant from selling his beedies as

Sait Beedies"" or "" Sait Jadi Beedies."" Now, there is no statute in this country establishing registration of trade-marks and it is a matter of

concession that the registration of a trade-mark or, label with the Chamber of Commerce does not of itself give any exclusive right to it to the

person who so registers it. The principle applicable to this class of cases has been

laid down in several cases and is well settled:

The fundamental rule is", said Lord Kings-down in *Leather Cloth Co, v. American Leather Cloth Co.* [1865] 11 H.L.C. 530 that one man has no

right to put off his goods for sale as the goods of a rival trader, and he cannot therefore in the words of Lord Langdale in the case of *Perry v.*

Truefitt [1842] 6 Beav 66, be allowed to use names, marks, letters or other indicia, by which he may induce purchasers to believe that the goods

he is selling are the manufacture of another person.

11. In the present case the question therefore comes to this : Did the defendant pass off his beedies as the beedies of the plaintiff by describing

them as Sait Beedies on their wrappers? To make this out the plaintiff has alleged and let in evidence to show that since the end of 1922 he has

been selling a brand of his beedies under the designation of Sait Beedies and has established a reputation connecting that designation with his

manufacture. The lower Court has upheld this position but we consider it unnecessary to go into it, for we are of opinion that, even assuming that

the plaintiff has established a reputation as alleged by him, he is not entitled to have an injunction against the defendant be. cause the latter's

beedies were known as Sait Beedies even before the plaintiff adopted that designation and he has also continued to sell them as such even sub

sequently alongside the plaintiff. Several decisions were cited to us by the learned advocate for the plaintiff but out attention has not been called to

any authority which goes the length of holding that a person who takes up a nam associated with the goods of another can by applying it to his own

goods and building up a reputation in his own way seek to restrain the person with whose "goods the name was previously associated and who has

not abandoned it from continuing to use the same. W think that such a proposition is wholl untenable. For, in a case of that sort will be impossible

to say that the defendant passes his goods off as those of the plaintiff. In this particular case there is also the additional circumstance to contradict

such a theory in that the defendant's goods have distinctly and admittedly been higher priced than those of the plaintiff by about 20 per cent.

12. For these reasons we differ from the decision of the learned City Civil Judge and hold that the plaintiff is not entitled to the injunction asked for

by him.

13. It remains to consider whether the defendant is entitled to get an injunction against the plaintiff. As to this we think that, although the defendant's beedies were called and known as ""Sait Beedies"" even before the plaintiff took up that designation, the defendant has not succeeded in establishing that degree of reputation which would entitle him to get an injunction against the plaintiff.. Further, the plaintiff took up that designation so early as the end of 1922 and has subsequently been doing large business with it and the defendant raised no objection until the plaintiff himself took time by the forelock and gave him notice of suit. It has been made to appear that the defendant was not aware of the use of the expression ""Sait Beedies"" by the plaintiff, but it is hardly credible. We hold therefore that the injunction asked for by the defendant in his belated suit cannot also be granted.

14. The result is that C. C. C. A. No. 4 of 1928 should be allowed and the plaintiff's suit should stand dismissed with costs in both Courts, and that C.C.C.A. No. 5 of 1923 should be dismissed with costs. We order accordingly. The memorandum of objections in C. C. C. A. No. 4 of 1928 should also fail and is dismissed.