

(1958) 02 CAL CK 0027

In the Calcutta High Court

Case No : Criminal Revision No's. 533, 535, 637 and 638 of 1955

Md. Mahboob and Another

APPELLANT

Vs

Bibhuti Bhusan Gupta
 Bibhuti Bhusan Gupta Vs Md.
Mahboob and Another

RESPONDENT

Date of Decision : 06-02-1958

Acts Referred:

Penal Code, 1860 (IPC) — Section 480

Citation : AIR 1960 Cal 63

Hon'ble Judges : S.N. Guha Ray, J;B.K. Bhattacharya, J

Bench : Division Bench

Advocate : Amaresh Chandra Roy and Sudhindra Kumar Palit, Bimal Chandra Chatterjee, for No. 533, Ajit Kumar Dutt and Bimal Chandra Chatterjee, for No. 535/55, N.K. Basu and Surathi Mohan Sanyal, for Nos. 637 and 638 of 1955, for the Appellant; Bimal Chandra Chatterjee, for Nos. 637 and 638 of 1955, N.K. Basu and Surathi Mohan Sanyal for Nos. 533 and 535 of 1955, for the Respondent

Judgement

Bhattacharya, J.—These four petitions in revision are heard together for the sake of convenience. In two cases, Rules were obtained by the accused and in the other two Rules were granted to the complainant regarding enhancement of sentence. They relate to two cases for infringement of trade mark held by Messrs. Lever Brothers (India) Ltd. in respect of a soap known as "Sunlight" manufactured by them. The accused petitioners, it was alleged inter alia, were making the soap "Sunright" with a false trade mark and using wrappers also with false trade mark thereon in a manner reasonably calculated to cause it to be believed that the soaps had connection with the firm Lever Brothers (India) Ltd. although they did not have any such connection at all.

2. The case against the accused and the objections raised will be discussed hereafter.

3. The right of Lever Brothers to the trade mark (Sunlight) and the wrappers of

Sunlight is unquestionable.

4. It was contended by the learned Advocates appearing for accused petitioners in Crl. Revision Cases Nos. 535 and 533 that for proving actual deception no witnesses were examined in the court of the learned Presidency Magistrate who convicted the accused persons. But the law is clear on this point. Section 480 of the Indian Penal Code does not necessarily require that any intending purchaser should actually be deceived. It is sufficient if the deception in question is reasonably calculated to cause it to be believed that the goods so marked have a connection with the course of trade of a person with whom they have not any such connection.

5. The Court was quite competent in the absence of any evidence to come to its own conclusion after looking at the two wrappers etc. It was within its competence to place itself in the position of an unwary purchaser and it is exactly what the learned Magistrate seems to have done. The case relied on by the learned Advocate for the accused petitioners in Case No. 535 of 1955; AIR 1940 86 (Privy Council) , is not applicable to the facts of the present case, for there the question was whether a trade mark which the plaintiff had with reference to cigarettes entitled him to restrain the defendant from putting a similar mark on chewing tobacco. In that Privy Council case it was laid down that it cannot be doubted that the Judge can himself decide on the degree of resemblance or on the materiality of the alleged differences of the marks or words.

6. We have seen the soaps in question as also the wrappers. It is clear from a simple look at the wrappers of Sunright that there the get-up is closely similar to the get-up of Sunlight, as has been found by the learned Magistrate. In general appearance, colour selection and other essential details the wrappers of Sunright so closely resemble those of Sunlight that they are likely to deceive an unwary purchaser who is acquainted with the trade mark and who trusts his memory. It is true that the price of Sunright is only 5 piece whereas that of Sunlight is about 6 annas. The cake of Sunright soap is slightly smaller than Sunlight. But not only the top portion of the wrappers but the designs on the sides also are almost similar. It is clear that the accused persons were out to go very far near the line in trading on the reputation of another manufacturer. The test, it is well known, is not whether a purchaser would be deceived if he had the two articles side by side. The matter must be considered on the point of view of the ordinary unwary purchaser and the totality of the impressions gained on seeing the wrappers in question when offered for sale. There is no manner of doubt that any average purchaser would be deceived into believing that he was purchasing Sunlight soap when he would be offered Sunright. It is needless to point out that phonetically also the two words "Sunlight" and "Sunright" closely resemble each other. There are certain dissimilarities no doubt but they are of very minor character. The learned Magistrate's decision on this point therefore cannot be interfered with,

REVISION NO. 535 of 1955.

7. In this case the accused petitioners are 3 in number, Md. Hanif, Abdul Gani and Abdul Rahaman. Hanif and Abdul Gani were convicted under Sections 482, 483 and 486, I. P. C. and under Sections 6 and 7 of the Indian Merchandise Marks Act and they were sentenced to pay a fine of Rs. 200/-each and in default to suffer rigorous imprisonment for two months. The accused Abdul Rahaman was convicted under Sections 482/109, 483 and 485, I. P. C. and sentenced to pay a fine of Rs. 100/- and in default to suffer rigorous imprisonment for one month.

8. At the outset it may be stated that through inadvertence the learned Magistrate did not indicate the section for conviction under which the fine was being imposed. We take it that the sentence would relate in the case of Md. Hanif and Abdul Gani to the first section mentioned, that is, Section 482 only of the Indian Penal Code and the sentence of Abdul Rahaman would be in relation to the conviction Under Sections 482/109, I. P. C. The learned Magistrate indicated that he was not imposing any separate sentence under any other section. In this view of things no material irregularity seems to have been committed by the learned Magistrate.

9. The accused Hanif early in 1953 executed an undertaking in favour of Messrs. Lever Brothers (India) Ltd. not to counterfeit the Sunlight soap or use counterfeit wrappers but the undertaking was not honoured and in August 1954 search warrants were issued and in execution thereof 40 Sunright soap labels along with other articles were seized from "New Jamal Soap Factory" at 4 Sambhu Chatterjee Street. Hanif was the licensee under the Calcutta Corporation for carrying on trade as soapmaker and seller at the above premises. At the time of the search the accused Abdul Gani was found working in the factory. Abdul Gani and Hanif are the tenants in occupation of premises at 4 Sambhu Chatterjee Street. Rent receipts were produced by Abdul Gani who was present during the search. A test purchase was made and accused Abdul Gani sold these cakes of Sunright soap in the presence of accused Hanif. The learned Magistrate came to the conclusion that the two accused persons were carrying on business as soap-makers and sellers of Sunright soap. It will not do to say that Abdul Gani was merely a labourer engaged in wrapping up the soaps.

10. The accused Abdul Rahaman is the owner of Mohini Art Press at 3 Raja Dinendra Street. In the declaration filed by him (Ext. 30) he described himself not only as the proprietor but also as the printer under the Press Act. In August 1954 this press was searched and 500 wrappers of Sunright soap, 2 blocks for printing Sunright soap wrappers and some other articles were seized from Mohini Art Press. From the evidence on record it appears that accused Abdul Rahaman printed these wrappers and helped the other two accused persons in their nefarious trade activities. As he described himself as printer he cannot escape the liability for printing these wrappers. There is no indication in the evidence to show that the wrappers had been printed in his press behind his back or that he had acted in a bona fide manner.

11. Before parting with the case it is necessary to stress one aspect. It was brought to our notice that colourable imitation may not amount to counterfeiting in all possible cases. This objection however was not taken before us by the learned Advocate appearing for the accused, nor was the point argued. The case of Aswini Kumar Pal Vs. Emperor, decided by a Division Bench of this Court, dealt with a case of similar nature, where the point that came up was whether "Nortons" was a counterfeit of "Mortons". The learned Judges who decided the case upheld the conviction u/s 486 I. P. C. In the circumstances, we do not wish to pursue this point further in this revisional application.

12. In the result, on a careful consideration of the facts and circumstances of the case, we are of the opinion that the decision of the learned Magistrate should not be interfered with.

13. This Rule is therefore discharged, subject to the slight modification in regard to the co-relation of the sentence as pointed out above.

CRL. REV No. 638 OF 1955

14. Hero Messrs. Lever Brothers (India) Ltd. have prayed for enhancement of sentence. We are of the opinion that the learned Magistrate must have considered all the factors, including the previous amicable settlement and the resultant delay, and we are not prepared to interfere with the sentence. In appropriate cases, we are however of the opinion that only condign punishment will meet the ends of justice in order to curb the anti-social activities of dishonest trading people.

15. This Rule is discharged.

CRI. REV. NO. 533 of 1955.

16. Here there are two accused persons viz., Md. Mahboob and Sk. Badruzzaman. They were convicted under Sections 482, 485 and 488 I. P. C. and also under Sections 6 and 7 of the Indian Merchandise Marks Act and sentenced to pay a fine of Rs. 200/- each and in default to suffer rigorous imprisonment for 2 months.

17. The learned Magistrate however did not indicate the section in relation to the sentence. Obviously, he intended to mean the first section mentioned in his judgment namely, section 482, as he has written in the judgment that no separate sentence was being passed on the other charges. In the circumstances, in our opinion, no material irregularity occurred. The sentences should be co-related to convictions u/s 482 I. P. C.

18. On execution of search warrants several cakes of soaps "Sunright" and soap wrappers were seized from 57 Mechuabazar Street. The accused Badruzzaman was found working in the aforesaid premises at the time. A test purchase was made from accused Mahboob. The accused Badruzzaman held a trade Hence for carrying on trade as soap-maker and seller at 57 Mechuabazar Street, As has

been stated above, he was found working in that factory at the time of the search. The accused Mahboob is the tenant in respect of the premises in question. The learned Magistrate has found that the evidence establishes beyond any reasonable doubt that the two accused persons were carrying on business as soap-makers and sellers of Sunright soap. We see no season to differ.

19. We are of the opinion, on a careful consideration of the facts and circumstances in the case, that the accused persons were rightly convicted by the Magistrate.

20. It was brought to our notice that counter-feiting may not in all cases, be the same as colourable imitation. This objection, however, was not taken by the learned Advocate for the accused petitioners nor was this point argued. In *Aswini Kumar Pal Vs. Emperor*, a Division Bench of this Court upheld the conviction u/s 486 I. P. C. in a case where the question turned on the use of the word "Nortons" in place of the registered trade mark "Mortons".

21. In the result, we do not wish to interfere with the order of conviction and sentence as passed by the learned Magistrate.

22. This Rule is therefore discharged subject to the slight modification in regard to the co-relation of the sentence as indicated above.

Crl. Rev. No. 637 of 1955.

23. Here Messrs. Lever Brothers (India) Ltd. have prayed for the enhancement of the sentence. We are of the opinion that the learned Magistrate applied his mind fully to the facts and law governing this case and we do not think it will be proper to interfere with the sentence. It should be borne in mind that the attempt at amicable settlement led to some delay and it might have been one of the factors that influenced the learned Magistrate in imposing a sentence of fine only, although we are certain that in appropriate cases Magistrates would be fully justified in imposing heavy sentences in order to curb the anti-social activities of dishonest traders.

24. This Rule is discharged.

Guha Ray J.

25. I agree.