
(1952) 06 BOM CK 0002
In the Bombay High Court
Case No : Criminal Appeal No. 179 of 1952

Pranjivandas Sunderji	Vs	APPELLANT
State of Bombay		RESPONDENT

Date of Decision : 20-06-1952

Acts Referred:

Penal Code, 1860 (IPC) — Section 486

Citation : AIR 1953 Bom 85 : (1952) 54 BOMLR 795

Hon'ble Judges : Vyas, J;Bavdekar, J

Bench : Division Bench

Advocate : Purshottam Tricumdas, C.K. Shah and C.C. Vaidya, for the Appellant; E.B. Ghaswala, Craigie, Blunt and Caroe, K.S. Daundkar, Asst. Govt. Pleader, for the Respondent

Judgement

Bavdekar, J.

(1) The appellant has been convicted by the learned Chief Presidency Magistrate, Bombay, of an offence u/s 486 of the Indian Penal Code and has been sentenced to undergo simple imprisonment for three months and to pay a fine of Rs. 1,000, in default simple imprisonment for three months.

(2) Most of the facts in this case are not in dispute. It appears from the evidence that Messrs. Tootal Broadhurst Lee & Co. are the holders of a registered trade mark "Tootal" and they have been manufacturing and selling with this trade mark among others woven undervests in the Indian market up to 1944. They seem to have stopped sending out these goods to India afterwards; out there was some evidence that in the year 1948 some English company in Bombay had imported a few undervests of Messrs. Tootal Broadhurst Lee & Co. It is not in dispute that the appellant in the present case purchased from one Popatlal Ghelabhai & Co. respectable wholesale merchants of Bombay, undervests in boxes of six and these undervests were not manufactured by Tootal Broadhurst Lee & Co., and yet they bore either the trade mark "Tootal" itself, or sometimes the mark "Tootal". The boxes in which the appellant purchased these undervests

from Popatlal Ghelabhai & Co. bore the mark "Tootal".

When Rallis, who are the agents in India of Messrs. Tootal Broadhurst Lee & Co., came to know that such undervests were being sold in the market, they sent one Billimoria to purchase from the appellant's shop undervests, and he purchased 18 undervests in three boxes for a sum of Rs. 40-3-3, the approximate sale price of the undervests being Rs. 28 per dozen. A warrant was then Obtained, and on August 18, 1950, Sub-Inspector Mehta raided the shop of the appellant in the company of Billimoria and one D'Sa and secured 13 boxes of different sizes containing undervests which had got a label upon them "Tootal" or "Tootel". The appellant and the other partners of the firm were then prosecuted for offences under Sections 483 and 486 of the Indian Penal Code. The appellant is a person who manages actually the business of the shop and was convicted of an offence u/s 486; but the other partners were acquitted, and we will not be concerned with them in the present appeal.

(3) The principal defence of the appellant was that he had purchased the goods from a reputable firm like Popatlal Ghelabhai & Co., who are importers of all kinds of hosiery; that he had sold these articles at only a small profit; that he paid Popatlal Ghelabhai & Co. cash for what he had purchased; that after the raid he straightaway disclosed his purchase from Messrs. Popatlal Ghelabhai & Co. and that in the circumstances his case falls either under Clauses (a) and (b) of Section 486, or if it does not fall under them, under Clause (c), Now, it does not appear in this case that there was, as a matter of fact, any demand in writing made upon the appellant by Tootal Broadhurst Lee & Co. to give all the information in his power with respect to the persons from whom he obtained the undervests; but the appellant from the first seems to have disclosed that he had obtained these goods from Messrs. Popatlal Ghelabhai & Co., and that he had obtained them from them has now been proved beyond a shadow of doubt. In our view, therefore, in case the appellant can show that he had taken all reasonable precautions against, committing an offence against the section, and that he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the mark upon the vests, his case will come within the exception referred to in Clauses (a) and (b).

We are not prepared to accept, however, in the first, instance, the contention that the appellant in this case had no reason to suspect the genuineness of the mark at the time when he sold the goods to Mr. Billimoria and when he was found in possession thereof for the purpose of trade. It is not in dispute that the appellant has been for a number of years in the hosiery trade. The appellant, as a matter of fact, was for a number of years a servant in Messrs. Popatlal Ghelabhai & Co., from whom in this case he has purchased the undervests in question. He has left them now and has got an independent business of his own; but experience in service with a firm like Messrs. Popatlal Ghelabhai & Co. would naturally make the appellant conversant with the fact that there was a trade mark like "Tootal" & goods of good quality were sold by someone under that

trade mark. It is no doubt true that it appears from the evidence that even though ties and other things made by Messrs. Tootal Broadhurst Lee & Co., and bearing the trade mark "Tootal" are being sold in India at the moment, since 1944 speaking generally, undervests manufactured by them and bearing trade mark "Tootal" have not been imported in India.

It further appears doubtful whether, as a matter of fact, Messrs. Tootal Broadhurst Lee & Co. have ever manufactured or sold under the trade mark "Tootal" any knitted undervests at all. One of the witnesses who was examined in the case on behalf of the prosecution itself said that so far as his knowledge went Messrs, Tootal & Co. were selling cotton vests bearing the trade mark "Tootal", but they were woven vests and not knitted vests. But that does not alter the fact that considering the status of the appellant who himself is a small wholesaler and had served in the shop of a big wholesaler, it would not be reasonable to expect that he would not know that goods of good quality were being sold by someone under the trade mark "Tootal". It is true that in this case the appellant has purchased from Messrs. Popatlal Ghelabhai & Co. the undervests found with him and sold by him. It does not appear that he paid for them anything but the market price; nor does it appear that he has made any very great profit. But these things are not very material for the purpose of the offence under the section.

It is obvious that if this Court were to hold it innocent for anybody to sell under the trade mark "Tootal" goods not manufactured by or sold by Tootal Broadhurst & Co., provided only he sold them at a proper price and at a reasonable profit, huge profits could be made by persons who would be thus enabled to sell articles bearing a well-known trade mark. It would appear besides that when it is pointed out that the appellant has purchased the goods from a big importing firm, whose repute we have no reason to doubt, everything which could be said in favour of the appellant has been said. As I have already mentioned, the boxes in which the goods secured from the shop of the appellant were kept bore on the outside the mark "Tootel". Some of the goods inside also bore the same mark. Mr. Purshottam, who appears on behalf of the appellant, says that the appellant is a Gujarati trader; that he has signed his written statement in Gujarati, and that he may not even be knowing English. But in our view the prosecution had led evidence of the description of the mark upon the articles obviously with a view to making out that anyone who can read English would notice the attempt to imitate the correct trade mark.

It seems to us clear that the goods did not bear the same trade mark always; sometimes they bore the trade mark "Tootal"; sometimes they bore the mark "Tootel". The goods bear also other marks which were not genuine, for example, "Made in English" and in case it was the case of the appellant, upon whom the burden was, once the prosecution had brought the case under the opening words of Section 486 that he did not know English, he had to state and to lead evidence to that effect. If he had done so, the prosecution might have been in a position

perhaps to show that notwithstanding what the appellant stated, he knew English well enough in order to make out the difference between "Tootal" and Tootel". Besides, as I have already mentioned, there was a difference between what was upon the labels on the undervests to be found inside the boxes. Mr. Purshottam who appears on behalf of the appellant says that the appellant is a wholesaler and he may perhaps not have any reason to examine closely the inside of the boxes. That may be conceded. But there was a difference in a very large number of cases between what was to be found inside and what was to be found on the outside of the boxes, and It is difficult to understand that even a wholesaler would never have tried to look inside what was in the box. The customer would ordinarily want to Inspect what was inside the boxes and we do not understand that during the time when the appellant was selling the boxes he had never got any opportunity to discover for himself that even though the outside bore the mark "Tootel", the inside was different.

The point is that whenever anyone proposes to counterfeit a trade mark, he does not counterfeit the trade mark wholly. Some difference is kept, and whenever therefore a man in the position of the appellant found that when he wanted to purchase Tootal undervests he was given articles upon the boxes in which they were sold there was a description not "Tootal" but "Tootel" he would be put upon an inquiry as to whether the goods were really speaking vests which were manufactured by the owner of the trade mark "Tootal", much more so when the labels on the undervests were different. He would then be expected to make inquiries from Messrs. Popatlal Ghelabhai & Co., as to whether the goods were as a matter of fact, the goods of the owners of the trade mark Tootal" and, as a matter of fact, in our view he could make inquiries further also from whoever the owner of the trade mark would be, which it should not have been very difficult for the appellant to find in the present case. But the matter does not even rest there. The goods were purchased by the appellant at a price of something like Rs. 25 per dozen. There was evidence led as to what the price of Tootal undervests, which were woven, would be; but there was no evidence led as to what would be the price of any foreign knitted undervests. We would be surprised if even knitted foreign undervests could be purchased at the rate of Rs. 26 per dozen, considering the difference in prices between similar indigenous articles and imported ones.

The burden in this case was upon the appellant to show, as I have already mentioned, that his case fell within Clauses (a) and (b) or clause (c) of Section 436 A in case it was the appellant's case that he had no reason to suspect that the goods were not of "Tootel", the owners of the trade mark, we would have expected him to lead some evidence if Tootals were not manufacturing knitted undervests, what the price of foreign knitted undervests of the same quality would be. There has got a large import duty to be paid in such cases, and obviously therefore when the appellant failed to lead evidence, the inference must be that he had no hopes whatsoever of being able to show that even if there were manufactured by a company of the position of Messrs. Tootal

Broadhurst Lee & Co., knitted undervests of the quality which have been sold by the appellant, their selling price in India would not be materially different from Rs. 26 per dozen. In these circumstances, we are not prepared to say that at the time when the appellant sold the articles, he had taken all reasonable precautions against committing an offence u/s 486 or that he had no reason to suspect the genuineness of the mark.

(4) There was a further point made on behalf of the prosecution, and that was that the appellant said at the time when the Sub-Inspector searched the place that the goods were manufactured in Calcutta, though they actually bore a tab saying that they were made in England. This evidence is attacked on behalf of the appellant, and we think rightly, because it proceeds upon the word of Messrs. D'Sa and Billimoria, both of whom are admittedly interested in Messrs. Tootal Broadhurst Lee & Co., who are the prosecutors in this case within the meaning of that word as used in Section 486. It has got to be remembered further that these words are supposed to have been used at a time when three persons visited the shop of the appellant, one of whom was independent. That was Sub-Inspector Mehta, and he says nothing whatsoever about this conversation between the appellant on the one hand and Messrs. D'sa and Billimoria on the other.

When the witnesses were asked about this, they said that this conversation took place when Mehta had left in order to bring the "panchas". On the other hand, Sub-Inspector Mehta makes no reference whatsoever to having left the shop at the time when "panchas" were wanted, and he contented himself by saying that he had sent for them. If nothing had turned upon it, it would be an ordinary discrepancy. But when the appellant is supposed to have said something which, according to the prosecution, was so important and it is not mentioned by the Sub-Inspector, the discrepancy cannot be brushed aside; and that is especially so because as I have already said, Messrs. D'Sa and Billimoria are interested in Messrs. Tootal Broadhurst Lee & Co. We are not prepared to accept, therefore, the contention that the appellant used these words. But even apart from that, the appellant had failed to prove that his case is covered by Clauses (a) and (b). We do not think that he is entitled to an acquittal because of the provisions of those sub-clauses of Section 486.

(5) Mr. Purshottam, who appears on behalf of the appellant, says that in that case he would argue that the appellant's case comes within Clause (c), which says "that otherwise he had acted innocently," and according to him this clause applies to those cases in which either there was no demand made, or, in the alternative, a demand might have been made and complied with, but the case otherwise comes under Clause (c) though the provisions of Clause (a) are not satisfied. Whenever similar words have been used in English enactments, the Courts have not felt it necessary to state what exactly their scope is and we do not think that we should make an attempt to define the scope of Sub-clause (c). But one thing which is quite clear is that in the first instance it is not as if the prosecution has got to prove that the appellant non-innocently committed a

breach of Section 486. That would obviously be reading as if the burden of proving the accused's guilt was laid upon the prosecution, though under Clause (c) of Section 486 the burden of proving innocence is laid upon the defence.

But Mr. Purshottam says that even if that is so, there may be a case in which the appellant fails to prove that he has failed to take reasonable precautions against committing an offence against this section, he may fail to prove that he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the mark and yet nevertheless if he was under the mistaken belief that the goods were of Messrs. Tootal Broadhurst Lee & Co., then in that case he will be protected under Clause (c) of Section 486 of the Indian Penal Code. Now, the words "that otherwise he had acted innocently" have been the subject of interpretation in England in a number of cases. They will be found quoted in the judgment of the King's Bench in -- "Slatcher v. George Mence Smith Ltd.", (1951) 2 All E. R. 388 and the view which these cases have taken of these words is that the words have application where the accused "had acted inadvertently or under a misapprehension or mistake of fact." The words have also been the subject of interpretation in two cases in India, one in Allahabad and one in Nagpur; but they do not afford much help upon the interpretation of the section.

In our view, however, there is no reason whatsoever for departing from the Interpretation which has been put upon these words by a long line of rulings, the first of which goes back to 1911, --"Stone v. Burn", (1911) 1 K. B. 927 Mr. Purshottam on behalf of the appellant argues that even if that view is correct, if the appellant can show that he still believed, though erroneously, the goods to be of Messrs. Tootal & Co., in that case his client is entitled to an acquittal, notwithstanding the fact that the Court comes to the conclusion that he had not taken reasonable precautions or that he had, at the time of the commission of the alleged offence, reason to suspect the genuineness of the mark. In effect, the argument is that there may be a negligence which would make the appellant civilly liable; for making him criminally liable, negligence is not sufficient, and what is necessary is either gross negligence or a guilty state of mind, in the sense that there was an intention in the appellant to defraud.

Now, the question of "mens rea" in similar cases was raised in England, and it has been pointed out that in such cases the "mens rea" for the statute is not the same as in cases where the prosecution had to show a particular state of mind. It was sufficient to show in such a case "mens rea" in the sense that there was an intention on the part of the accused to do the act forbidden by the section. But upon the question as to whether even though there may be reason to suspect the genuineness of the mark, an erroneous belief that the goods were of Messrs. Tootal Broadhurst Lee & Co., would afford sufficient defence to the appellant, the case of --"Allard. v. Selfridge & Co. (1925) 1 K. B. 129 may be cited. It was held in that case that where the defendant tried to take up a defence in paras (a) and (b) of a similar enactment, failure to take the

precautions led, in the first instance, to the defence of absence of reason to suspect the genuineness of the trade description being impracticable. But that was not the only result of the failure to take precautions. The other result was that the defence in para, (c) could not be taken. As Lord Hewart, C. J., mentioned in his judgment (P. 134) : "...Here there was a failure to take all reasonable precautions, and therefore the defence, based upon the absence of reason to suspect the genuineness of the trade description, was impracticable. What then was the defence raised? It was that in some way, other than that referred to in para, (a), the respondent had acted innocently. They sought to show that although reasonable precautions had not been taken, there was nevertheless no reason to suspect the genuineness of the trade description. The argument involves reading the words of para, (a) not as they appear in the statute but as if they were, "Having taken or not taken, as the case may be, all reasonable precautions against committing an offence he had at that time no reason to suspect the genuineness of the trade description"; which seems to me to be nonsense."

In another portion of his judgment, he remarked (P. 136) :

"It is unnecessary to inquire how much is involved in the words in para, (c) otherwise he had acted innocently," but it is quite obvious When one looks at the great variety of transactions, acts or states contemplated by Section 2 Sub-section 2, that in different circumstances different facts may afford a defence under that heading. That at least is clear, that where the term he had acted innocently" is qualified by the word "otherwise" the innocence which is spoken of cannot be a fragment of what is already referred to in paras (a) and (b)."

In this case, not only there was a failure to take reasonable precautions, but in our view circumstances of the case were such that the appellant had reason to suspect the genuineness of the mark upon the goods which he sold. It is impossible to accept, therefore, that his act fell within the meaning of the words "that otherwise he had acted innocently" in para, (c) of the section.

(6) It is true that the statute uses the word "innocently", but as has been pointed out again in --- "Allard v. Selfridge & Co., (1925 1 K. B. 129 "innocently" in this section does_ not mean "without any intention to defraud". "Innocently" means "without any intention to do the act which was forbidden by the statute." What the statute forbids is the selling or keeping for sale of an article which has got upon it a counterfeit trade mark without making enquiries and without having any reason to suspect the genuineness of its trade mark. If, therefore, no enquiries which ought to have been made are made and there is reason to suspect the genuineness of the trade mark, it cannot be said that there is absence of any intention to do the act which was forbidden by the statute.

(7) Nor do we see what gross negligence has got to do in this particular case. The statute requires taking of precautions, and if precautions are not taken, that is an infringement of the statute if subsequently it is found that the article which

was sold or kept for sale bore a counterfeit trade mark. That is apart from the fact which has repeatedly been pointed out that really speaking there is no such thing from the legal point of view as gross negligence. Negligence is the breach of duty to take proper care, and once there is a breach of that duty, it does not make any difference from the legal point of view how grosser how small that breach is.

(8) The appellant was, therefore, rightly convicted. Considering that in this case the appellant had purchased the goods from a reputable firm, it does not appear to us that a substantive sentence of imprisonment is necessary. That is especially so, because it does appear that at the commencement the prosecutor himself had made some attempt to come to a settlement of the case; but the attempts fell through for reasons which, it would not be necessary to give in the present judgment. We, therefore, set aside the sentence of substantive imprisonment passed upon the appellant and confirm the sentence of fine. Sentence in default of payment of fine will also remain. The order of compensation will also remain.

(9) Order accordingly.