

(1953) 05 CAL CK 0030
In the Calcutta High Court
Case No : Govt. Appeal No. 8 of 1952

Superintendent and Remembrancer of Legal Affairs	APPELLANT
Vs	
Prafulla Kumar	RESPONDENT

Date of Decision : 12-05-1953

Acts Referred:

Penal Code, 1860 (IPC) — Section 28, 485

Citation : AIR 1954 Cal 277 : 58 CWN 96

Hon'ble Judges : Sen, J; Mitter, J

Bench : Division Bench

Advocate : S.M. Bose, General and Nalin Chandra Banerjee and Provanshu Kumar Ghosal, for the Appellant; Ajit Kumar Dutt, for the Respondent

Final Decision : Allowed

Judgement

Mitter, J.—This is an appeal by the State against the respondent's acquittal of an offence u/s 485, Penal Code.

2. The prosecution case against the respondent is as follows: Messrs. Gabail Ltd. of London are manufacturers of a drug called Elixir Bromo Valerianate Gabail. The Anglo French Drug Co. (Eastern) Ltd. of Bombay are their agents in India. The trade mark in relation to the said drug consists of the name "Elixir Bromo Valerianate Gabail" printed on a label which is affixed to the bottle containing the drug and also printed on the paper carton in which the bottle is packed and sold. Both the label and the carton contain, in addition, the formula of the drug. The get-up and the design of the label are distinctive and have become associated with the drug of the manufacture of the said Gabail Ltd. The word "Gabail" is also registered to denote that the drug is the manufacture of Gabail Ltd. The trade mark concerned was registered in India in 1942 and is said to be effective for a period of 15 years.

3. The said Anglo-French Drug Co. (Eastern) Ltd. of Bombay having received information that a spurious drug was being sold with a counterfeit of the said

trade mark, moved the learned Chief Presidency Magistrate, Calcutta, for an investigation into their complaint by the Detective Department of the Calcutta Police. The learned Chief Presidency Magistrate ordered such an investigation, and pursuant to search warrants issued by him certain blocks for manufacturing the counterfeit of the said trade mark as well as thick paper cartons with the said counterfeit trade mark printed upon them were recovered from some two printing presses and from the respondent. The respondent was found in possession of 375 such cartons with counterfeit trade marks upon them, marked" Exhibits III and III/1, a block which was marked Ex. II, as also two other blocks marked respectively Exs. IX and X. The last mentioned blocks, namely, Exs. IX and X were in fact made over by the respondent to the police at some stage of the investigation.

4. Originally, a"man by name Chittaranjan De was put upon his trial in connection with the recovery of the said articles. In that trial the respondent was a witness for the prosecution. Chittaranjan De was, however, acquitted. Thereafter, the respondent was sent up to answer a charge u/s 485, Penal Code on three counts. The charge was as follows:

"I, S. M. A. Meerza, Magistrate, 1st class, hereby charge you Profulla Kumar Ray as follows:

First -- That you, on or about 16-9-1950 at 39 Tollygunge Road, p.s. Tollygunge, were in possession of counterfeit trade marks to wit carton sheets Ex. III and Ex. III/I for the purpose of denoting that any goods are the manufacture or merchandise of a person whose manufacture or merchandise they were not or they belonged to a person to whom they did not belong and thereby committed an offence punishable u/s 485, Penal Code and within my cognisance. Secondly -- That you, on or about the same day and place and p.s. were in possession of an instrument for counterfeiting the trade mark of the complainant's company viz. the block Ex. II and thereby committed an offence punishable u/s 485, Penal Code and within my cognisance.

Thirdly -- That you, on or about, the same day and place and p.s. had in your possession an instrument for counterfeiting the trade mark of the complainant's company to wit blocks nos. IX and X and thereby committed an offence punishable u/s 485, Penal Code and within my cognizance.

And I hereby direct that you be tried by the said Court on the said charge."

5. The respondent's defence is that the said Chittaranjan De, who is a chemist, required the goods for his own purpose and that he was merely instrumental, as a bona fide broker, in getting De to place the orders with the printing presses. As to the recovery from his jewellery shop of a large quantity of counterfeit cartons, the respondent's case is that he took delivery of these cartons with a view to their being despatched to De.

6. Upon a consideration of the evidence, oral as well as documentary, the learned

Magistrate came to the conclusion that the prosecution had failed to prove that the respondent's possession of the offending articles was for either of the purposes mentioned in the charge. The learned Magistrate held that the onus of establishing the charge u/s 485, Penal Code was wholly upon the prosecution and that the evidence called on its behalf was insufficient to discharge that onus.

7. A point of some importance as to the nature and extent of the onus which lies on the prosecution in a case u/s 485, Penal Code was raised by the learned Advocate-General appearing on behalf of the State. On the evidence, argued the learned Advocate-General, such onus as lay upon the prosecution had been amply discharged. Section 485 is in these terms:

"Whoever makes or has in his possession any dye, plate or other instrument for the purpose of counterfeiting a trade mark or property mark, or has in his possession a trade mark or property mark for the purpose of denoting that any goods are the manufacture or merchandise of a person whose manufacture or merchandise they are not, or that they belong to a person to whom they do not belong, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

It is seen that the first part of Section 485 is concerned with making or possessing any instrument for the purpose of counterfeiting a trade mark or property mark, whereas, the second part is concerned with possession of a trade mark or property mark for the purpose of passing off. The respondent was charged with both, namely, possession of an instrument for counterfeiting, and possession of a trade mark for the purpose of passing off. Mr. Advocate-General has argued that the general onus of making out the ingredients of the offence must rest upon the prosecution. This onus, according to him, could however be discharged by praying in aid the presumption which arises under Explanation 2 to Section 28, Penal Code. Section 28 is as follows:

"A person is said to "counterfeit" who causes one thing to resemble another thing, intending by means of that resemblance to practise deception, or knowing it to be likely that deception will thereby be practised.

Explanation 1 -- It is not essential to counterfeiting that the imitation should be exact.

Explanation 2 -- When a person causes one thing to resemble another thing, and the resemblance is such that a person might be deceived thereby, it shall be presumed, until the contrary is proved, that the person so causing the one thing to resemble the other thing intended by means of that resemblance to practise deception or knew it to be likely that deception would thereby be practised."

8. Having regard to Explanation 2, and in the facts of this case, the question is whether the possession of the offending articles was for the purpose of counterfeiting the trade mark concerned. On the facts, there is no doubt that the respondent caused the labels and the cartons with the printing "Elixir Bromo

Valerianate Gabail" upon them to resemble the genuine cartons and labels with the trade mark "Elixir Bromo Valerianate Gabail" and that the resemblance was such that a person might be deceived thereby. That being so, the respondent must be presumed to have intended by means of that resemblance to practise deception or to have known that it was likely that deception would thereby be practised. If in the facts of this case Explanation 2 was applicable, it would follow that the respondent was guilty of counterfeiting. In other words, his possession of the offending articles was for the purpose of counterfeiting the complainant's trade mark. It would also follow that his possession of the counterfeit trade mark was for the purpose of passing off.

Mr. Advocate-General argued that but for explanation 2 to Section 28, Penal Code, it would have been necessary for the prosecution to prove affirmatively that the respondent's possession was for the purpose of counterfeiting a trade mark. Unlike Sections 482, 486 and 487, Section 485 casts no onus upon the accused. Therefore, the onus of establishing the elements of an offence u/s 485 must rest upon the prosecution. The question before me is not upon whom the onus is, but as to how that onus is to be discharged. Mr. Advocate-General's argument is that the onus of proving either of the purpose mentioned in Section 485 is discharged by the prosecution establishing possession of the instrument for counterfeiting and the close resemblance between the counterfeit trade mark and the genuine trade mark, whereby deception becomes inevitable. In my view, the learned Advocate-General is right. I hold, therefore, that the onus, of establishing the elements of the offence u/s 485 rests entirely upon the prosecution, but that" it can, in the circumstances disclosed in the case, successfully discharge that onus by praying in aid Explanation 2 to Section 28, Penal Code.

9. In the facts of this case, the point of law canvassed appears to be more academic than real, for, the possession of the blocks as well as of a huge quantity of counterfeit cartons, in all the circumstances of this case, must give rise to the inference that such possession was either for the purpose of counterfeiting a trade mark or for the purpose of passing off, as the case may be. It is to be observed, however, that the prosecution must call relevant evidence to lay the foundation for a presumption under Explanation 2. That presumption, whereby an intention to practise deception can be established, is rebuttable. The learned Magistrate, I am afraid, misread Explanation 2 to Section 28. Had he not done so, he would have seen that there were facts in this case which raised a presumption, until the contrary was proved, that the respondent intended to practise deception. On that basis, and in the facts of this case, the learned Magistrate was bound to find that the respondent's possession of the block was for the purpose of counterfeiting a trade mark and that his possession of the cartons with the counterfeit trade mark upon them was for the purpose of passing off.

10. Mr. Dutt referred us to Section 8 of the Indian Merchandise Marks Act, 1889,

and argued that the presumption, if any, had been rebutted by the respondent. It is to be observed that Section 8 refers to a case u/s 485, Penal Code of "making" any dye etc. In this case, we are only concerned with "possession" of such an instrument. Section 8, Indian Merchandise Marks Act has, therefore, no application to this case. Mr. Dutt, of course, indicated, and rightly, that the only use he wanted to make of Section 8, Indian Merchandise Marks Act was to emphasise that upon the analogy of the provisions of that section the respondent could be said to have shown by such evidence as there was upon the record that he had committed no offence. "We shall presently deal with the evidence to ascertain to what extent, if any, the respondent was able to show that he was a bona fide broker in the transactions concerned.

11. An examination of the actual objects recovered from the possession of the respondent shows that an ingenious as well as a daring fraud was being practiced upon the public by producing the counterfeit of the Company's trade mark, which would deceive even a careful person. The difference between the counterfeit and the genuine carton, which, as I have said before is affixed to the bottle which contains the drug, is so little in get-up, design, printing and colour that it is very difficult to tell one from the other, unless one makes a very close study of the counterfeit ones in relation to the genuine ones. Some 375 such cartons "were recovered from the accused's jewellery shop.

It is also in evidence that from his possession was recovered a quotation which he had received from the Mahajati Art Press. This quotation, which was marked Ex. VI, shows that the respondent wanted the block concerned to be used for the purpose of manufacturing cartons according to a given sample. The actual sample, however, was not produced. But by reference to the genuine carton, which is Ex. IV and by reason of its close resemblance to any one of the counterfeit cartons, there can be no doubt that the sample conferred was a sample of Ex. IV. It appears to us that by placing the order and by providing the Press with a block (Ex. IX), the respondent was guilty of counterfeiting within the meaning of Section 28, Penal Code.

We have already spoken about the resemblance between the genuine carton, with a genuine trade mark upon it, and the counterfeit carton, with a counterfeit trade mark upon it, being so striking that anyone who was responsible for causing it to be done could not but have intended to practice deception. If that be so, then the possession of the block, the order which the respondent placed with the Mahajati Art Press, the fact that he had supplied them with a sample, as also his possession of the huge quantity of counterfeit cartons, would all go to show that the respondent was guilty of the offence of having in his possession instruments for counterfeiting the trade mark of the company. This is on the assumption that the defence is disbelieved. If it is proved that the respondent was in possession of any instrument for counterfeiting as well as of actual counterfeit trade marks, namely, the carton sheets in this case, it would follow that he was in possession of the said counterfeit trade marks for the purpose of

denoting that the goods which were ultimately to be put inside the receptacles bearing the said mark were the goods of Messrs. Gabail & Co. although in fact they were not.

It is true that the respondent might not personally be responsible for putting any spurious drug into any phial or receptacle with the counterfeit trade mark upon it, but his possession of the counterfeit trade mark in quantities I have already mentioned could only have been for the purpose of passing off spurious goods for genuine goods of someone else's manufacture. In our view, the evidence in the case was sufficient to establish the charge against the respondent in respect of all the counts.

12. Reverting to the defence, it appears to us that although the people from the Press described the respondent as a middle man, such evidence as the respondent relies upon does not negative the prosecution case as to his having had possession of the offending articles With the" respective intents alleged. We have already held that Section 8, Indian Merchandise Marks Act has no application to this case. The respondent's case that he placed orders for cartons at the instance of the said Chittaranjan De does not, even if believed, negative the respondent's possession of the said blocks for the purpose of counterfeiting the trade mark of the said Company, and, as we have found, once it is established that he was guilty of possession of any instrument for the purpose of counterfeiting a trade mark, his possession of the cartons in large quantities would also show that he had possession of them for the purpose of passing off.

Chittaranjan De was not called as a witness in this case. The respondent tried to explain away the presence of the cartons by suggesting that they were to be delivered to Chittaranjan De. It is not necessary for us to deal with the complicity of Chittaranjan De or of the Press people in the fraud which was sought to be practised. We have, however, no doubt in our minds that the respondent who owned a jewellery shop was not a bona-fide broker for the purpose alleged by him. Any one in his position by looking at any of the cartons would be put upon enquiry as to why cartons for use in connection with a drug of the manufacture of a foreign firm should be printed locally through intermediaries. It would be obvious to any prudent man that such cartons when pre-pared would be used for packing phials of drugs purporting to be Elixir Bromo Valerianate Gabail.

In our view, in all the facts and circumstances of this case, the respondent should have had no doubt that the said counterfeit trade mark in the shape of cartons was for the purpose of passing off spurious goods for genuine goods. That being so, this appeal must be allowed. The order of acquittal passed by the learned Magistrate is set aside and the respondent is convicted of the charge framed against him.

13. The offence is a very serious one. The fraud concerned was on a very large scale, and it is very difficult to detect a crime of this sort in time. The police investigation in the case was very perfunctory and the accused would never have

been brought to trial but for the efforts of the company itself. In view of the gravity of the offence, we feel that a deterrent punishment is called for.

14. We would accordingly convict the respondent Prafulla Kumar Roy of the offence u/s 485, Penal Code and sentence him to suffer rigorous imprisonment for six months.

15. The accused respondent Prafulla Kumar Roy will now surrender to his bail and serve out the sentence of six months" rigorous imprisonment imposed upon him by this Court. The offending articles are forfeited and are ordered to be destroyed.

Sen, J.

16. I agree with the order passed by my Lord but would like to add a few words. Two of the charges against the accused Prafulla Kumar Roy relate to the possession of plates or instruments for the purpose of counterfeiting a trade mark and one charge relates to the possession of cartons bearing a trade mark for the purpose of denoting that any goods are the manufacturing of a person whose manufacture they are not.

17. In respect of the two charges relating to the possession of plates or instruments for the purpose of counterfeiting the trade mark it is not disputed that the ground block Ex. II was found on 16-9-1950 on search of the accused's jewellery shop. It is also not disputed that the two blocks Exs. IX and X were made over by the accused Prafulla Kumar Roy to the Investigating Officer on 7-10-1950. Accordingly the possession of these plates or instruments by the accused is not disputed. The only question is whether there was any possession of these plates or instruments for the purpose of counterfeiting a trade mark of the complainant, viz., Anglo French Drug Co. Ltd. who are the agents for Messrs. Gabail Laboratories.

The burden of proving that the accused had possession of the plates or instruments for the purpose of counterfeiting is no doubt on the prosecution. Mr. AJit K. Dutt appearing for the accused has urged that explanation 2 of Section 28, Penal Code does not directly apply to the case, because explanation 2 deals with a case when a person causes one thing to resemble another thing, that is, it deals with the counterfeiter, whereas in this case the accused is charged not with counterfeiting but with the possession of plates or instruments for the purpose of counterfeiting. It appears to be true that explanation 2 of Section 28 does not directly apply. It appears to apply however in an indirect way to be presently explained.

18. The prosecution had adduced the evidence that the accused gave the ground block Ex. II to the Mahajati Art Press with an order for preparing the card-board sheets coloured dark green with a white ground on them for preparing the cartons in which the drug "Elixir Bromo Valerianate Gabail" was intended to be packed. When the printing of the card board sheets in white and dark green was

done these were taken to the Bholananda Press and there the trade mark of Anglo French Drug Co. was printed on the white ground with the block, Ex. IX and the word "poison" was printed on the cartons also; in other words, the further printing with the blocks IX and X was done by the Bholananda Press. Mr. Ajit K. Dutt's contention firstly is that the accused? innocently caused the cartons to be prepared with blocks made over to him for the purpose and secondly that he merely acted as the broker or middleman and put the chemist interested in the manufacture of spurious drugs, namely, Chittaranjan De, in touch with the printing press and he did not himself cause the counterfeit cartons to be prepared by placing orders himself.

19. Taking the second point first, it does not appear from the evidence of p. w. 2 Amiya Ranjan Mukherjee, an officer of the Mahajati Art Press that any body other than the accused Prafulla Kumar Roy placed the order for the printing of the thousand copies of the ground block. In this connection it is relevant that the Ext, 6 which is a quotation by the Mahajati Art Press was also forwarded to the accused and not to the chemist in question, "Chittaranjan De. As regards further printing by Bholananda Press, P. W. 9, Kamakhya Pada Bhattacharya, an officer of the Bholananda Press stated in his examination in chief that it was the accused Prafulla Kumar Roy who placed the order for printing cartons and also made over the blocks Exts. IX and X. In cross examination he stated that though the order was placed by the accused Prafulla Kumar Roy, Chittaranjan De, proprietor of the Chemico Products, also used to come to the press for expediting the printing of the cartons and that the proof sheet was actually approved by Chittaranjan De; but the proof-sheet in question Exts. VIII and VIII/I on which, there appears an endorsement of Chittaranjan De is the proof sheet of the printing of the ground block which was done by the Mahajati Art Press and! not by the Bholananda Press.

It also appears from the search list Ext. 8 that the two-coloured proof sheets were seized from the Mahajati Art Press and not from the Bholananda Press. The search list Ext. 8 shows that the proof sheet Ext. VIII bore the endorsement by Chittaranjan De whom it was seized from the Mahajati Art Press. It cannot therefore be true that in the presence of an officer, p. w. 9 of Bholanath Press, Chittaranjan De appeared and approved of the proof of the bi-coloured ground printing. The evidence of P. W. 9 in cross-examination relating to Chittaranjan De cannot therefore be accepted as reliable. Therefore there remained his evidence both in examination-in-chief and in cross-examination that it was the accused who brought thousand cartons to his shop with an order for printing thereon the blocks Exs. IX and X. Accordingly it must be held that the accused Prafulla Kumar Ray did not merely act as a middleman or broker but he was the person who gave orders and caused cartons to be prepared.

20. As regards the first point urged by Mr. Ajit K. Dutt, viz., that the accused merely caused duplicates to be made in accordance with a given sample and did not know that they were counterfeits of a genuine article, there is the fact that

the label on the cartons bears the names of Messrs. Gabail laboratories Ltd. and Anglo French Drug Co. the name of Anglo French Drug Co. being mentioned as packers. The address of the Anglo French Drug Co. Ltd. is given as Church Gate Street, Bombay. There is the evidence of an officer of the Anglo French Drug Co. that from middle of 1950 they were getting somewhat similar cartons made in Bombay by the Times of India Press and apparently they were packing a drug in Bombay in cartons of this kind. Any prudent person on looking at the label would know that these labels were intended for a drug manufactured by Messrs. Gabail Laboratories Ltd. and packed by the Anglo French Drug Co. Ltd. in Bombay. Accordingly, if duplicates were being made and the resemblance was such that a person might be deceived by the resemblance, the accused cannot be heard to say that he was causing duplicates to be made of a given sample in good faith.

This is where explanation 2 of Section 28, Penal Code comes in : if the accused gave the order for manufacture of these cartons in accordance with a given sample and the resemblance of the cartons to the genuine articles is such that every person might be deceived thereby, it is to be presumed until contrary is proved that the accused intended to practise deception or knew it to be likely that deception would be caused in other words, he knew that counterfeiting was being done. Accordingly it must be held that the accused used the blocks or instruments for counterfeiting and therefore he was in possession thereof for the purpose of counterfeiting.

21. In respect of the charge relating to the possession of the cartons bearing the trade marks "Elixir Bro'mo Valerianate Gabail" the possession of 375 cartons bearing that trade mark by the accused is not disputed, for these cartons were found on search of the accused's jewellery shop on 16-9-1950. The question here is whether the accused was in possession of the cartons bearing trade mark for the purpose of denoting that any goods were manufacture of a person whose manufacture they were not; in other words, for the purpose of denoting that a spurious drug was the drug "Elixir Bromo Valerianate Gataail" manufactured by Gabail Laboratories Ltd. If the defence of the accused could be accepted, namely, at the order of chemist Chittaranjan pe he caused these cartons to be manufactured, it might be difficult to hold that the accused himself had the purpose of denoting that a spurious drue was the drug "Elixir Bromo Valerianate Gabail" manufactured by Messrs. Gabail Laboratories.

But in this case the accused did not succeed in establishing that he was merely carrying out the order of another person viz., chemist Chittaranjan De. The only witness who spoke of Chittaranjan De, the proprietor of the Chemico Products, was P. W. 9 in cross-examination. It has already been pointed out that in the course of cross-examination P. W. 9 made some statements which are demonstrably false. Therefore the evidence of P. W. 9 as to the connection of Chittaranjan De with the manufacture of the cartons cannot be accepted as true. No evidence has been adduced in the case to show that the accused got the order from any other person like Chittaranjan De. Therefore the only fact that

remains is that the accused was found in possession of a very large number, viz., 375 cartons bearing trade mark of the drug manufactured by Messrs. Gabail Laboratories Ltd. and bottled by the Anglo French Drug Co. at the Bombay office. The normal inference would be that he had them in his possession only for the purpose of denoting that spurious goods were manufactured by Messrs. Gabail Laboratories bottled by the Anglo French Drug Co. Accordingly, in view of the evidence this charge must also be held to have been established.