Ram Kishore

Vs

State of U. P.

Criminal Appeal No. 37 of 1964

(K.N. Wanchoo, J. C. Shah, S. M. Sikri JJ)

28.03.1966

JUDGMENT

SHAH, J.-

The appellant was charged before a Magistrate, 1st Class, at Varanasi with being, on November 25, 1960, in possession of counterfeit labels which could be used to pass off his "tobacco tins" as the goods of M/s Nandoo Ram Khedan Lal bearing "Titli" (butterfly) trade-mark, and with being in possession for sale of "tobacco tins" bearing counterfeit trade marks of the genuine "Titli" brand trade-mark of M/s Nandoo Ram Khedan Lal. The Trial Magistrate convicted the appellant and sentenced him to suffer simple imprisonment for three months for offences under s. 78 read with s. 77 and under s. 79 of the Trade and Merchandise Marks Act 43 of 1958, and directed the two sentences to run consecutively. In appeal to the Court of Session, Varanasi, the order passed by the Trial Magistrate was set aside and the appellant was acquitted principally on the ground that the prosecution was barred because it was not instituted within the period prescribed by s. 92 of the Act. The High Court of Judicature at Allahabad however set aside the order of acquittal and restored the conviction, but reduced the sentence on each of the charges to a fine of Rs. 1,000/-. With certificate granted by the High Court under Art. 134 of the Constitution, this appeal has been preferred.

M/s Nandoo Ram Khedan Lal - who will hereinafter be called "the complainants" - carry on in the town of Varanasi, business in "chewing tobacco". They were marketing their product for the last many years under a trade-mark styled "Titli" (butterfly). The label on the containers of "chewing tobacco" shows figures of three butterflies on yellow-green background and the legend "Titli" in Devnagari and English characters. The appellant who carried on business also in "chewing tobacco" commenced market his goods in the name of "Titli" (partridge). The label on the containers had figures of four butterflies on leaf-green background, and the legend "Titli" in Devnagari and English characters. The colour schemes of the butterflies in the complainants' label and of the butterflies in the appellant's label were substantially similar.

The complainants gave information to the police in November 1960 that the appellant had infringed their trade-mark by marketing his goods under a trade-mark calculated to deceive the purchasers into believing that they were purchasing the product of the complainants. The police submitted a charge sheet against the appellant for offences under s. 78 read with s. 77 and s. 79 of the Trade and Merchandise Marks Act, 1958. The Trial Magistrate observed that there was close resemblance between the label used by the complainants and the label used by the appellant, and that a vest majority of users of such tobacco being illiterate were likely to be "carried away by a pictorial device of "Titli" (butterfly)" since they were incapable of reading and understanding the "descriptions on the label in Devanagri and in English". With this view the Sessions Judge and the

High Court agreed. Before us, no substantial argument has been advanced which would justify us in taking a different view on this question.

It was however contended for the appellant that the case against him must still fail because the prosecution was barred by s. 92 of the Trade and Merchandise Marks Act, 1958, and also because there was such acquiescence on the part of the complainants as would justify an inference that they had assented to the appellant using the trade-mark under which his product was marketed. To appreciate these two contentions, it is necessary to refer to certain facts.

Some time before 1955 the appellant had started marketing his goods under the trade-mark "Titli" : there is however no evidence about the general get-up of the label on the containers of "chewing tobacco" marketed by him at that time. On January 6, 1955 the complainants wrote a letter to the appellant claiming that they were the sole proprietors of "Titli" brand, that "Titli" was their registered trade-mark, and the appellant had "with criminal intention started making illegal and unlawful use of that trade-mark" and had copied their trade-mark and was using it on similar but inferior "chewing tobacco" and was passing off his goods in the market as the product of the complainants; and on those allegations the complainants called upon the appellant to desist from selling or disposing of any of the goods with labels resembling to the complainants' trade-mark and thereby deceiving the public into purchasing the appellant's product when the public desires to purchase the complainants' product and making several other incidental requisitions. In reply, the appellant denied that the complainants were the sole proprietors of "Titli" trade-mark and that in any event the appellant had not used the trade-mark "Titli" on any goods manufactured by him. The appellant also claimed that he had been marketing his goods in the name of "Titli" for many years and that the complainants were seeking to pass off their product as that of the appellant. After this correspondence no steps were taken by the complainants against the appellant till November 1960.

The appellant was on information lodged by the complainants prosecuted for offences under s. 78 read with s. 77 and s. 79 of the Trade and Merchandise Marks Act, 1958. The appellant submitted that whereas the complainants had no their own admission learnt about infringement of their trade-mark in 1955, criminal proceedings started in November 1960 were barred under s. 92 of the Trade and Merchandise Marks Act, 1958. It may be noticed however that the offences charged against the appellant were alleged to have been committed on November 25, 1960, and the charge-sheet was lodged in the Court of the Magistrate, 1st Class, on March 22, 1961. Section 92 of the Trade and Merchandise Marks Act, 1958, insofar as it is material, provides :

> "No prosecution for an offence under this Act.............. shall be commenced after the expiration of three years next after the commission of the offence charged, or two years after the discovery thereof by the prosecutor, whichever expiration first happens."

In substance the appellant in relaying upon the bar of s. 92 seeks to substitute for the words "after the discovery" the words "after the first discovery", and for the words "after the commission of the offence charged" the words "after the commission of the first infringement of trade-mark". The Legislature has deliberately not used those expressions, and there is no warrant for substituting them in the section and thereby substantially modifying the section.

Counsel for the appellant however submitted that in interpreting s. 15 of the Merchandise Marks Act 4 of 1889, which is similar to s. 92 of Act 43 of 1958, the Madras High Court had in Ruppell v. Ponnusami Jevan and Another [I.L.R. 22 Mad. 468] held that a prosecution under s. 15 of the

Merchandise Marks Act 4 of 1889 commenced after the expiration of the period prescribed by the Legislature from the date when the infringement was first discovered, is barred and that this Court had in Dau Dayal v. State of Uttar Pradesh [A.I.R. 1959 S.C. 433] affirmed that view. In Rupell's case [I.L.R. 22 Mad. 468] the accused was charged with committing an offence punishable under s. 15 of the Indian Merchandise Marks Act, 1889, on a complaint that the accused had infringed the complainant's trade-mark. It appeared at the trial that the complainant had discovered in 1893 that goods were sold by the accused marked with a trade-mark which was similar to his trade-mark, and the complainant had called upon the accused to discontinue user of the counterfeit trade-mark and to render an account of sales made by him. In 1898 the complainant prosecuted the accused for infringing his trade-mark. The High Court of Madras held that as the complainant did not show that he believed the use of the alleged counterfeit trade-mark had been discontinued after the first discovery and protest in 1893, prosecution of the accused in 1898 under s. 15 of the Indian Merchandise Marks Act, 1889, was barred. This view was followed by the Bombay High Court in Abdulsatar Khan Kamruddin Khan v. Ratanlal-Kishenlal, [I.L.R. 59 Bom. 551] : The Court observed in that case that under s. 15 of the Indian Merchandise Marks Act, 1889, if the offence of infringement of a trade or property mark is a continuing one, and if no discontinuance is proved, time runs from the first instance of infringement or from the first discovery of the infringement. Abdulsatar Khan's case [I.L.R. 59 Bom. 551] was however overruled by a full bench of the Bombay High Court in Emperor v. Chhotalal Amarchand. [I.L.R. (1937) Bom. 183]. In that case the Court dissenting from the judgment of the Madras High Court in Ruppell's case [I.L.R. 22 Mad. 488] and overruling the decision in Abdulsatar Khan's case [I.L.R. 59 Bom. 551] held that under s. 15 of the Indian Merchandise Marks Act, 1889, starting point of limitation in all cases is the date of the offence charged.

In Dau Dayal's case, [A.I.R. 1959 S.C. 433] Venkatarama Aiyar, J., incorporated substantially the whole of the judgment in Ruppell's case : [I.L.R. 22 Mad. 488] but in Dau Dayal's case [A.I.R. 1959 S.C. 433] the matter in dispute was entirely different. In that case the accused was prosecuted for offences punishable under ss. 420, 482, 483 & 486 I.P. Code on the allegation that he was in possession of Bidis which bore counterfeit trade-marks. A complaint was filed against the accused on March 26, 1954, and after investigation by the police, a charge-sheet was filed in the Court of the Magistrate on September 30, 1954. The accused contended that the offence was discovered on April 26, 1954, and since process was issued by the Magistrate on July 22, 1955, i.e. more than one year after discovery of the offence he could not, because of s. 15 of the Merchandise Marks Act, 1889, be prosecuted. This Court rejected the plea raised by the accused. An excerpt from the judgment in Ruppell's case [I.L.R. 22 Mad. 488] was incorporated only to indicate the general tenor of s. 15, and not with a view to express approval of all that was observed therein.

We are however in this case not called upon to consider whether Ruppell's case [I.L.R. 22 Mad. 488] was correctly decided. That case was decided on the interpretation of s. 15 of the Merchandise Marks Act, 1889. Suffice if to say that the Legislature has in enacting the Trade and Merchandise Marks Act 43 of 1958 made a substantial departure from the language used in s. 15 of Act 4 of 1889. For the sake of convenience the material parts of the two sections may be set out in juxtaposition :

> #Section 15 of Act 4 of 1889 Section 92 of Act 43 of 1958No such prosecution.....shall No prosecution for an offencebe commenced after the under this Act.......shall beexpiration of three years next commenced after the expirationafter the commission of the of three years next after theoffence, or one year after the commission of the offencefirst discovery thereof by charged, or two years afterthe

> prosecutor, whichever the discovery thereof byexpiration first happens. the prosecutor, whichever expiration first happens.##

The Legislature in enacting s. 92 of Act 43 of 1958 has clearly made departure from s. 15 of Act 4 of 1889 in important respects. Whereas under s. 15 prosecution had to be commenced within three years next after the commission of the offence or within one year after the first discovery thereof by the prosecutor, under s. 92 the prosecution must be commenced before the expiration of three years next after the commission of the offence charged, or two years after the discovery by the prosecutor of the offence charged, whichever expiration first happens. Under s. 92 it is plain the period commences to run from the date of the commission of the offence charged or from the date of discovery by the prosecutor of the offence charged. The argument which could be raised under s. 15 and was approved in Ruppell's case [I.L.R. 22 Mad. 488] that the Legislature intended to provide that the period shall commence from the first discovery thereof by the prosecutor is plainly not open to the offender infringing the provisions of the Trade and Merchandise Marks Act under s. 92. The period has to be computed for the purpose of the first part of the section from the date of the commission of the offence charged, and under the second part from the date of discovery of the offence charged, and not from the first discovery of infringement of trade-mark by the prosecutor.

The plea that the complainants had assented to the use of the trade-mark by the appellant, and on that account the latter could not be said to have falsified a trade-mark or to have falsely applied the trade-mark, is without substance. Section 77, it is true, provides that a person shall be deemed to falsify a trade-mark who either -

> (a) without the assent of the proprietor of the trade mark makes that trade mark or a deceptively similar mark; or
>
> (b) falsified any genuine trade mark, whether by alteration, addition, effacement or otherwise.

If there is assent of the proprietor to the use by the accused of a trade mark which is deceptively similar, there would be no falsification of false application of the trade mark : but protest against infringement of the complainants' trade mark cannot be regarded as assent to the use or application of the false trade mark.

The High Court has on a review of the evidence held that there was no acquiescence by the complainants from which assent may be inferred, and we see no reason to differ from that finding.

The appeal therefore fails and is dismissed.

Appeal dismissed.

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