

Sumat Prasad Jain

Vs.

Sheojanam Prasad (Dead) and Others and State of Bihar

Criminal Appeal No. 181 of 1969

(CJI J. M. Shelat, D. G. Palekar, S. N. Dwivedi JJ)

29.08.1972

JUDGMENT

SHELAT, ACTING C.J. -

1. This appeal, by special leave, is directed against the judgment and order of the High Court of Patna whereby the High Court set aside the order of acquittal passed by the Additional Sessions Judge and restored the order of conviction and sentence passed by the Trial Magistrate under Sections 482 and 486 of the Penal Code.
2. One Sheojanam Prasad (who died during the pendency of his appeal before the High Court) was at all material times the proprietor of a provisions store in Arrah. He claimed to have evolved a formula for manufacturing a scent to which he gave the name of 'Basant Bahar'. The scent, when put into market, soon became popular and in the course of time gathered custom. The scent used to be packed in cartoons and other receptacles which carried on them the picture of a Pari (an angel) holding a bunch of flowers in her hands and an inscription "Basant Bahar Scent Khushbuon Ka Badshah". The cartoons and receptacles were of green colour and had on them in print the name of the manufacturer, namely, 'Basant Bahar Perfumary Co., Shahabad'. In 1951 Sheojanam Prasad thereafter applied before the Registrar of Trade Marks for registration of the trade mark. The application was, however, not granted as it contained certain technical defects. His case was that nonetheless the said scent with the aforesaid marks became popular in the market as the scent manufactured and sold by him.
3. The case of Sheojanam Prasad was that the appellant was also conducting a provisions store in Arrah. Finding that his Basant Bahar scent had become popular, the appellant put out for sale a scent prepared by him and gave it the name of Pushp Raj. The Pushp Raj scent, however, did not become popular with customers. The appellant, therefore, started putting out for sale his said scent under the name of Basant Bahar in cartoons and receptacles, similar to those of his (Sheojanam Prasad), in the same colour, shape and size, except for one particular only, namely, the name of the manufacturer, such name being Basant Bahar Chemical Co. Ltd., Shahabad. In Paras 14 and 15 of his complaint against the appellant, Sheojanam Prasad averred as follow :

"14. That the failure of the "Pushp Raj" led the accused to devise ways and means of destroying the business credit of "Basant Bahar" by surreptitiously and fraudulently and deliberately printing Trade Mark Label of Basant Bahar and packing scents in receptacles of the various varieties with inferior quality of scent which are easily being palmed off as the genuine "Basant Bahar" of the complainant with the result that accused uses false trade mark and sells inferior quality Basant Bahar to defame and destroy the good name of the

complaint and his scent (Basant Bahar) and make illegal gain for himself.

15. That the accused is manufacturing spurious scent and defrauding the public as genuine Basant Bahar with counterfeit imitation of trade mark with the sole object of making illegal gain and damaging the business reputation of Basant Bahar in the hope of boosting up the sale of Pushp Raj by damaging Basant Bahar".

4. Before the Trial Magistrate the defence taken up by the appellant was that the Basant Bahar scent was his original product, that he had put that scent first in the market and that it was Sheoanam Prasad who imitated the genuine scent evolved by him, and that therefore, there was no question of his having committed any offence either under Section 482 or Section 486 of the Penal Code. Both the parties examined witnesses. The Trial Magistrate, on such evidence, found : (1) that it was the complainant who placed the scent under the name of Basant Bahar first in the market, (2) that that scent enjoyed a better market, (3) that finding that that scent had become popular, the appellant put out his own scent which was of inferior quality under the name of Basant Bahar, and thus passed off his scent as if it was the one manufactured and marketed by the complainant. On these findings, the Trial Magistrate convicted the appellant both under Section 482 and Section 486 and imposed fine of Rs. 250/- on each of the two counts.

5. On appeal by the appellant before the Additional Sessions Judge, Arrah, the said order of conviction and sentence was set aside. The additional Sessions Judge did not disagree, however, with the findings of fact arrived at by the Trial Magistrate, but held that on the allegations contained in the complaint a conviction under Section 482 or under Section 486 could not be sustained. This conclusion was arrived at on the reading of the complaint to mean allegations of counterfeiting the complainant's trade mark by the appellant and not the property mark. He also held that after the passing of the Trade and Merchandise Marks Act, 1958 such counterfeiting of trade mark was no longer an offence under the Penal Code.

6. The complainant thereupon filed an appeal in the High Court Pending the appeal the complainant, as aforesaid, died on July 22, 1967. Two questions in the main were canvassed before the High Court : (1) whether on the death of the complainant the appeal filed by him abated, and whether his son Ashok Kumar could be brought on record as the legal representative of the deceased complainant, and (2) whether on the averments in the complaint and the evidence on record a case of counterfeiting the property mark of the complainant could be maintained. The High Court was of the view that there was no provision in the Code of Criminal Procedure under which a legal representative of deceased complainant could apply for being brought on record for the purpose of continuing an appeal filed by such a complainant. On that view, the High Court dismissed the application by the complainant's son for being brought on record. The High Court, however, was of the view that the complainant's death did not bring about abatement of the appeal since once a criminal appeal was admitted the High Court had to go on with it and decide it, the real interested party being not the complainant, but the State. That question has not been agitated before us, and therefore, we are not called upon to decide it or to express our opinion one way or the other.

7. On the second question, the High Court examined the averments contained in the complaint, particularly in Paras 14 and 15 thereof, and also the evidence on record and conclude that though in the complaint the complainant had used expressions, such as, "trade mark", "counterfeiting his trade mark", etc. those expressions had been loosely used, and that in substance the complaint averred counterfeiting of property mark. Disagreeing with the construction placed by the Additional Sessions Judge on the complaint, the High Court allowed the appeal, set aside the order of acquittal

passed by him and restored the order of conviction and sentence passed by the Trial Magistrate. Counsel for the appellant challenged the correctness of the view taken by the High Court.

8. Counsel for the appellant maintained that the view taken of the complaint by the Additional Sessions Judge was correct as against that taken by the High Court, that on a fair perusal of the complaint the case there set out was one of breach of and counterfeiting the trade mark 'Basant Bahar'; and that therefore, after the passing of the Trade and Merchandise Marks Act, 1958 such counterfeiting was no longer an offence punishable under the Penal Code. The contention further was that since the complainant's said trade mark was unregistered, he had not even a remedy by way of a civil suit under that Act. The High Court, so that argument ran, wrongly, construed the complaint as one for a breach of and counterfeiting the property mark, and therefore, the High Court's order cannot be sustained.

9. The concept of a trade mark is distinct from that of a property mark. A mark as defined by Section 2(1)(j) of the Trade and Merchandise Marks Act, 1958, includes a device, brand, heading, label, ticket, name, signature, word, letter or numerical or any combination thereof. A trade mark means a mark used in relation to goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods and some person having the right as proprietor to use that mark. The function of a trade mark is to give an indication to the purchaser or a possible purchaser as to the manufacture or quality of the goods, to give an indication to his eye of the trade source from which the goods come, or the trade hands through which they pass on their way to the market. Per Bowen, L.J., in *In re Powell's Trade Mark*, ((1893) 10 RPC 200) on the other hand, a property mark, as defined by Section 479 of the Penal Code means a mark used for denoting that a movable property belongs to a particular person. Thus, the distinction between a trade mark and a property mark is that whereas the former denotes the manufacture or quality of the goods to which it is attached, the latter denotes the ownership in them. In other words, a trade mark concerns the goods themselves, while a property mark concerns the proprietor. A property mark attached to the movable property of a person remains even if part of such property goes out of his hands and ceases to be his. In *Emperor v. Dahyabhai Chakasha*, ((1904) 6 Bom LR 513) the National Bank of India used to import bars of gold for sale in India. Each bar was of a uniform size weight and purity and had the words "National Bank of India" inscribed on it as its property mark. The gold so imported was known in the market as 'Nasrana Bak'; and acquired a special value in the market. The accused placed in the market gold of their own mark with words 'Nasrana Bak' inscribed on their bars. The High Court of Bombay, held that the National Bank of India owned a property mark in the bars imported by it, and that the accused were guilty of counterfeiting that property mark. It further held that though some of those bars had been sold by the Bank and had thus passed out of its hands, that fact did not mean that its property mark did not remain, for the function of a property mark to denote ownership is not destroyed because any part of it on which it was impressed has ceased to be of that ownership. (see also *S. K. Pothilingam Pillai v. N. M. Rowther*. (AIR 1969 Mad 94))

10. The question then is whether the complaint in substance, if not in form, contained the necessary averments for bringing the cases under the offence of using a false property mark by the appellant and selling goods with a counterfeit property mark. To succeed on the charges under Section 482 and Section 486 the complainant had to establish that the appellant marked the scent manufactured and sold by him, or the packets and receptacles containing such scent or used packets or receptacles bearing that mark, and that he did so in a manner reasonably calculated to cause it to be believed that the goods so marked or the scent contained in the packets and receptacles belonged to the complainant. For the purpose of Section 486 he had further to establish that the appellant had sold,

or exposed for sale, or had in his possession for sale goods having a mark calculated to cause it to be believed that the scent was the scent manufactured by and belonging to the complainant.

11. In Paras 3 and 4 of the complaint, the complainant averred that he had evolved a formula after several attempts for manufacturing scent and calling it Basant Bahar had put the scent so manufactured by him in the market sometime in 1952, which soon became popular in Shahabad as also in Patna and Gaya Districts. In Para 6 of the complaint, he pleaded that he had a pari with a bunch of flowers in her hands printed on the packets and receptacles in which the said scent was packed with an inscription "Basant Bahar Scent, Khushbuon Ka Badshah" and at the foot of such packets and receptacles the inscription Basant Bahar Perfumery Co., Shahabad. In Para 12, he averred that when his scent gained market and popularity the appellant brought out in the market scent manufactured by him under the name of Pushp Raj, having a picture of a lady printed on the packets and receptacles, but the scent failed to get customers. In Para 14, he pleaded that the scent 'Pushp Raj' having failed, the accused adopted "ways and means of destroying the business credit of Basant Bahar by surreptitiously and fraudulently and deliberately printing Trade Mark label of Basant Bahar and packing scents in receptacles of various varieties with inferior kind of scent which are easily being palmed off as the genuine 'Basant Bahar' of the complainant with the result that the accused uses false trade mark and sells inferior quality of Basant Bahar to defame and destroy the good name of the complainant and his scent Basant Bahar and make illegal gain for himself". In Para 15, he pleaded that the accused was manufacturing spurious scent and defrauding the public by making them believe that his scent was the genuine Basant Bahar, that is, "Basant Bahar manufactured and belonging to the complainant with the counterfeit imitation of trade mark with the sole object of making illegal gain and damaging the business reputation of Basant Bahar of the complainant". The complainant led evidence of some traders who deposed that they used to purchase scent from both the complainant and the accused, that from outward appearances they looked alike, and that their customers purchased scent placed in the market by the accused believing it to be the one manufactured and belonging to the complainant, but later on returned it finding it to be of inferior quality. On the evidence on record the Trial Magistrate found : (1) that Basant Bahar evolved and manufactured by the complainant appeared in the market earlier than the scent manufactured and sold by the accused, (2) that the accused first called his scent Pushp Raj, but finding that it did not sell well changed its name into Basant Bahar, (3) that his scent was of inferior quality, (4) that the packets and receptacles in which the accused packed his scent were exactly similar in shape and inscriptions on them, except for the name of the manufacture, namely, Basant Bahar Chemical Co. Ltd., and (5) that he presumably did this with a view to make the likely purchasers believe that the scent he sold and placed in the market was the scent with the mark Basant Bahar made and sold by the complainant. These findings were accepted both by the Additional Sessions Judge and the High Court.

12. In our view the name Basant Bahar with the picture of an angel with flowers in her hands and the inscription of Basant Bahar Khushbuon Ka Badshah printed on the packets and receptacles was the property mark denoting that the scent in question was the one manufactured and belonging to the complainant. From the findings arrived at by the Trial Magistrate it must follow that the appellant marked his scent and the packets and receptacles in which it was packed with the same name, the same picture and the same inscriptions with the intention of causing it to be believed that the scent so marked or the scent contained in the said packets and receptacles so marked was the one manufactured by an sold in the market by the complainant. The evidence clearly showed that the scent so marked by him was sold by him in the market with the intention and object aforesaid. The appellant thus committed the offence of both using a false property mark and of selling goods marked with a counterfeit property mark. Though the complainant used the words 'trade mark' at

several places in the complaint, it was loosely used as can be seen from Paras 14 and 15 of the complaint. The complainant's accusation was the use by the appellant of a property mark with the object of "palming off" to likely purchasers his scent of inferior quality as if it was the scent made by and belonging to the complainant and selling it or exposing it for sale as if it was the scent manufactured by and belonging to the complainant.

13. We hold, therefore, that the High Court was right in setting aside the order of acquittal passed by the Additional Sessions Judge and in restoring the order of conviction and sentence passed by the Trial Magistrate.

14. The appeal is dismissed.

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