

BOMBAY HIGH COURT

Emperor

Vs.

Chhotalal Amarchand

Criminal Appeal No. 491 of 1935

(John Beaumont, Kt., C.J., Rangnekar and N.J. Wadia, JJ.)

01.09.1936

JUDGMENT

John Beaumont Kt, C.J.

1. In this case a question is referred to this Court in the following terms :-

What is the starting point of limitation under Section 15 of the Indian Merchandise Marks Act in a case where it is proved that the offence of infringement of a trade mark, etc., has been a continuing one? Does time run (a) from the particular instance of infringement specified in the charge, or (b) from the date of the first infringement or first discovery of infringement, whichever expiration first happens? The question assumes that you can have a continuing offence in the sense in which you can have a continuing tort, or a continuing breach of contract, and I doubt myself whether the assumption is well founded, having regard to the provisions of the Criminal Procedure Code as to the framing of charges and as to the charges which can be tried at one and the same trial. It is quite clear that you could not charge a man with committing an offence *De die in diem* over a substantial period.

2. The accused was charged with offences under Sections 482, 485, and 486 of the Indian Penal Code in respect of offences which I will refer to by a compendious term as infringements of the complainant's trade mark. The defense which prevailed before the learned Magistrate who tried the case was that the accused had continuously infringed the complainant's trade mark since 1931, and the prosecution was therefore out of time under Section 15. With deference to the referring Court, I do not think that fact was properly proved before the Magistrate, but for the purposes of my judgment I will assume that it was so proved. The matter has been referred to us because there has been a difference of judicial opinion as to the construction of Section 15 of the Merchandise Marks Act, and there is one decision of this Court, *Abdulsatarkhan v. Ratanlal*¹ the

correctness of which requires to be considered. Section 15 of the Merchandise Marks Act is in these terms :-

No such prosecution as is mentioned in the last foregoing section shall be commenced after the expiration of three years next after the commission of the

¹ I.L.R. (1935) Bom. 551 : 37 Bom. L.R. 580

offence, or one year after the first discovery thereof by the prosecutor, whichever expiration first happens.

Referring back to the previous section, which again refers back to Section 13, there are three classes of prosecution to which Section 15 applies; first, prosecutions for offences under the Act, secondly, prosecutions for offences under Section 18 of the Sea Customs Act, and thirdly, prosecutions under the relevant sections of the Indian Penal Code, the present prosecution coming within the latter category. Reading Section 15 in the first place without reference to authority, it appears to me to be perfectly plain that the words 'commission of the offence' mean commission of the offence in respect of which a prosecution is launched, that is to say, commission of the offence charged. On that view of the matter the procedure is perfectly simple. One looks at the charge, which has to specify the date of the offence, and if one finds that that date is more than three years before the commencement of the prosecution, then the prosecution is barred under Section 15, whether or not the complainant had knowledge of the offence. If the offence charged is less than three years, but more than one year, before the date of the prosecution, then the prosecution is barred if the complainant had knowledge of the commission of the offence charged for more than a year before the date of the prosecution. But, if, as in the present case, the offence is less than one year from the date of the prosecution, then there is no bar under Section 15. That seems to me to be the literal effect of Section 15, and that is the view of the section which has been taken by the Calcutta High Court in *Nagendranath Shaha v. Emperor*² On the other hand, the Madras High Court in *Ruppell v. Ponnusami Tevan*³ the Rangoon High Court in *Mahomed Jewa v. Wilson*⁴ and this High Court in *Abdulsatarkhan v. Ratanlal*⁵ have taken the view that the offence referred to in Section 15 is not the offence charged where the infringement has continued for a long period, but in such a case the offence under Section 15 is the first offence of infringement committed by the accused. In order to extract that meaning from Section 15 it seems to me that the section would have to be considerably altered, and in addition to a reference to 'the offence' which, as I have said, must mean the offence charged, there would have to be some such words as "or an offence similar to the offence charged which has continued uninterruptedly down to the date of the prosecution." It is a strong thing to alter the words of the section to that extent. Mr. Justice Twomey, in the Rangoon case, observes that in construing an Act of Parliament it is always open to the Court to consider what is the object of the legislature, and if it finds that that object can only be effected by giving some particular section, or expression, a meaning other than that which the words literally bear, the Court is justified in doing that amount of violence

to the language in order to carry out the object of the legislature. That, no doubt, is a perfectly sound principle, but I think the learned Judge omitted to notice that the object of the legislature must be ascertained from within the four corners of the Act. It is not open to the Court to speculate as to what the legislature probably meant, and then do violence to the language of the enactment in order! to give effect to the presumed intention. There is, as far as I can see, nothing whatever in the context of this Act to show that the legislature did not mean precisely what it said in Section 15. Therefore, in my view, it is not really open to

² I.L.R. (1929) Cal. 1153

⁴(1911) 12 Cri. L.J. 246

³I.L.R. (1899) Mad. 488

⁵ I.L.R. (1935) Bom. 551 : 37 Bom. L.R. 580

the Court to do anything more than give effect to the plain meaning of the section. We cannot speculate as to whether that meaning correctly carries out what was actually in the mind of the legislature. However, in deference to the referring judgment, I would say that it seems to me that far more difficulties arise from the construction placed upon the section by the Madras High Court, the Rangoon High Court, and this Court, than arise under the construction placed upon it by the Calcutta High Court. The only serious objection to the literal construction of the section is this, that if ' the offence' means the actual offence charged, it is unlikely that a prosecution will be launched in respect of an offence which took place more than three years ago, and the section is likely therefore to have only a limited application. That may be so, but that is not a sufficient reason for not giving the section its proper meaning. On the other hand, there would be very serious difficulties in the way of the other construction contended for. I have noticed the initial difficulty that the section would have to be largely redrafted. Apart from that, I think there would be great practical difficulty in determining whether there had been a prior infringement. For example, where a prosecution is launched in respect of an infringement taking place in 1935, and the defense is that a similar infringement took place in 1931, and has continued ever since, the Court would have to try whether the act of 1931 amounted to an infringement or not. All that the Magistrate held in this case was that the accused had sold his goods under the name of 'gripe water' in 1931, but it has not been established that the complainant has a monopoly in the use of those words, and the Magistrate should have gone further, and inquired whether the sale in 1931 was in such circumstances as to lead to deception, that is, as to pass off the accused's goods as the complainant's goods. Now dishonest traders who are minded to take for themselves the reputation of a rival trader very often proceed to their object by progressive stages. They start with a makeup which has points of dissimilarity from the rival make-up, and, if they are not attacked, they gradually approach nearer to the make-up of their rival; and a Magistrate might well find himself compelled to try, first of all, whether the infringement alleged by the accused in (say) 1931 amounted to an infringement, and if not, whether, on rather different evidence, there was an infringement in 1932 or in 1933, and so on. The Court might have to try a succession, in effect, of passing off claims each one based on different evidence. Furthermore, I feel great difficulty in supposing that the legislature intended to confer upon a person a prescriptive right to commit an offence made criminal

under the Indian Penal Code. It might very well happen that an infringer carried on his infringing business for more than three years in a place far removed from the place where the complainant carried on his business. The complainant might never hear of the infringement, or if he did hear of it, might think it not worth while to interfere. But it can hardly be suggested that after carrying on his infringing business for three years without doing the complainant any particular harm, the infringer could then come and set up his business next door to the complainant with complete immunity so far as any action under the criminal law is concerned. Those are reasons which suggest that in all probability the legislature really meant what it said when it enacted Section 15, but for the reasons I have already given, I think speculations of that kind are: really not permissible, because, in my view, the language of Section 15 is perfectly plain, and there is nothing in the rest of the Act to control the natural meaning of the words, and all we can do, therefore, is to give effect to them. In my opinion, we should answer the question propounded by saying that in all cases the starting point of limitation under Section 15 is the date of the offence charged. It follows that the case of *Abdulsatarkhan v. Ratanlal* was wrongly decided, and must be treated as overruled.

Rangnekar, J.

3. The section is by no means easy of construction and there are obvious difficulties in adopting either of the two constructions pressed upon us. The difficulties have been fairly set forth in the referring judgment as also in the reported decision in *Abdulsatarkhan v. Ratanlal*⁶ and it is not necessary now to refer to them again. The position shortly seems to me to be this.

4. Upon the construction pressed for by the learned Advocate General, the position will be that a man may be infringing the trade-mark of another person for a number of years—more than three years prior to the complaint lodged against him by the latter, although the latter may be ignorant of such infringement, and may have launched his prosecution within one year from the date when he discovered an instance of such infringement in respect of which the complaint is made. On the other construction, the position is that a man may be infringing the trade-mark of another person for more than three years, and even if the complainant is ignorant of such infringement, either by reason of his absence from the market in which the infringement has been going on, or by reason of various other circumstances, the infringer will get a statutory right to go on with such infringement.

5. Upon the first construction, the difficulty, which might arise, is as regards, the language in the latter part of the section; and I think there is force in the contention that in that case the words "first discovery" and the word "first" particularly would be superfluous, as also the words "whichever expiration first happens", because, although theoretically it is possible that a person may charge another with an infringement in respect of an instance of infringement which occurred more than three years ago, from all practical points of view such a prosecution can

never arise. On the other hand, to adopt the other construction, the section clearly would have to be recast and in place of the words " commission of the offence " words to the effect " commission of a similar offence " or " commission of the first infringement of the offence in respect of the particular trade-mark " will have to be inserted. These then are some of the difficulties which arise in construing this section.

6. The learned advocate for the accused has pressed upon us that in accepting, the first construction we shall be defeating the object of the legislature. Now, as I understand the law, the object of the legislature is to be gathered within the four corners of the- Act, and primarily upon the language of the statute. But even supposing that the object of the legislature was to afford a speedy remedy to traders against a wrongdoer, it is difficult to see how that object can be carried out by adopting the second construction, where, for no fault of his, he may be entirely ignorant that his trade-mark has been infringed. It seems to me that " the offence " in Section 15 must necessarily mean the offence charged, or which is the subject matter of the complaint in regard to which the question of limitation is

⁶I.L.R. (1935) Bom. 551 : 37 Bom. L.R. 580

raised, and upon the whole I have reached the conclusion that it would be safer to adopt the first construction and to hold that limitation starts from the offence charged in the complaint.

7. I, therefore, agree that the question propounded should be answered in the manner proposed by my Lord.

N.J. Wadia, J.

8. The language of Section 15 of the Act clearly suggests that " the offence " referred to in it could only mean the offence charged and not the first of a series of offences when the offence is a continuing one. To put the latter construction on the section it is necessary to read into it words which it does not contain. In *Ruppell v. Ponnusami Tevan*⁷ and in *Mahomed Jewa v. Wilson*⁸ the complainants were aware of the commission of the offence more than three years before the complaint was lodged, and the learned Judge thought that if the aggrieved persons had failed to resort to the criminal Courts within a year it could be assumed that the case was not one of urgency and they could be left to their civil remedy by an action for injunction. That argument however could not apply to the case before us in which the complainant has alleged and his allegation has not been challenged that he first discovered the offence on December 1, 1934, and the complaint was lodged within ten days. It would be a straining of the language of the section to hold in such a case that, though the offence which the complainant alleged had been committed in December, 1934, his complaint must be taken to refer to some similar offence committed four years earlier in 1931 which he had not alleged, of which he was not aware, and of which, therefore, he could not possibly have complained. Mr. Justice Broomfield in his referring judgment has said that the view taken in the Madras and Burma cases derives, much of its force from the facts of those particular cases where there had been continuous infringement to

the knowledge of the complainant. There is a further difficulty involved in that view. It would not always be possible to say with certainty that when the false trade-mark or property mark was first used it was of the same kind as the one actually complained of. The fraudulent imitation of the genuine article may, and probably would in most cases, be in the beginning so slight as to escape detection or be difficult of proof. It would only be after lapse of time had given confidence and increased the temptation that the imitation would approach so close to the genuine article as to attract the notice of the complainant, or to cause such loss to him as would make it worth his while to prosecute. To say that in such cases he would be debarred from prosecuting if the accused could show that he had commenced committing the offence more than three years before the complaint was filed would result in depriving the complainant in most cases of the remedy which the Act provides. In my opinion the view taken in *In re Abdulsatorokhan* is not one borne out by the language of the section. I, therefore, agree with the answer proposed to be given.

⁷ I.L.R. (1899) Mad. 488

⁸ (1911) 1. L. J. 246