cent. per annum from the date of suit up till the date of realisation, will be a charge on the property specified at the foot of the plaint.

REVISIONAL CRIMINAL

Before Mr. Justice Ismail

EMPEROR *v.* ROSHAN SINGH*

1939 October, 4

Indian Penal Code, sections 482, 486—*Using a false trade mark —Selling goods with a counterfeit trade mark—Distinction between "false" trade mark and "counterfeit" trade mark—Principles governing trade mark cases—Conviction under both sections, legality of—Merchandise Marks Act (IV of* 1889), *sections* 9, 14—*Order for forfeiture of goods and for costs of prosecution—Refused to be made in criminal revision—Criminal Procedure Code, section* 439—*Findings of fact, in revision.*

In a prosecution under sections 482 and 486 of the Indian Penal Code it was found that the trade mark exhibited on the soap of the accused bore a strong resemblance to that on the complainant's soap but the trade marks were not identical; that a distinguishing feature was that on the complainant's soap appeared the figure "501" and the word "TOMCO" whereas on the accused's soap appeared the figure "301" and the word "INDIA"; that the general colour scheme of the accused's wrapper was the same as that of the complainant but that some of the writings thereon were dissimilar; that if the two soaps were put side by side a literate man would not find any difficulty in noticing the difference in the trade marks, but a purchaser who was acquainted with the complainant's get up but who trusted to his memory might well be led to believe that the accused's soap was manufactured by the complainant:

Held that the trade marks on the two soaps, although not identical, were so similar that the accused's marks were reasonably calculated to lead a purchaser, who was acquainted with the complainant's get up but who trusted to his memory, to purchase the accused's soap in the belief that he was purchasing the complainant's soap; the accused was therefore rightly convicted under section 482 of the Indian Penal Code. The resemblance between the two trade marks, however, did not

*Criminal Revision No. 556 of 1939, from an order of K. K. K. Nayar, Sessions Judge of Agra, dated the 15th of June, 1939.

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amount to "counterfeiting", and the conviction under section 486 could not stand.

The distinction between a "false" trade mark and a "counterfeit" trade mark is somewhat subtle; it depends on the degree of resemblance between the false and the genuine trade marks. As laid down in explanation I to section 28 of the Indian Penal Code, it is not essential to counterfeiting that the imitation should be exact; but a thing is not ordinarily said to be counterfeit unless it bears on the face of it the semblance of validity and is such as to deceive the average person on ordinary observation with, presumably, some care. In the present case it was impossible to say that "301" and "INDIA" were counterfeits of "501" and "TOMCO".

An accused person can be legally convicted under both the sections 482 and 486 of the Indian Penal Code simultaneously. If a false trade mark has been used, and it amounts to a counterfeit trade mark and goods having such mark are sold or exposed for sale, it is perfectly legal to sustain a conviction under both the sections.

It would not be proper for the High Court in revision to pass any order for confiscation of goods or for costs of prosecution in a trade mark case, where no such order was passed by the lower courts and there were no materials on the record to assess the costs, and the rights of third parties might be affected by an order of confiscation.

Ordinarily it is not the practice of the High Court to disturb findings of fact in criminal revision, but where the finding of fact depends on a correct interpretation of the law it is necessary to examine the case on the merits in some detail.

Mr. *K. D. Malaviya*, for the applicant.

Messrs. *B. B. Chandra* and *Ram Narain Verma*, for the opposite party.

The Deputy Government Advocate (Mr. *Sankar Saran*), for the Crown.

ISMAIL, J.:—This is an application in revision against an order of the court below. The complainant, Messrs. Tata Oil Mills Company of Bombay, made this complaint through Mr. Tandon, who is the manager, Tomco Sales department, Delhi, against the applicant Roshan Singh, who is the proprietor of Agra Soap and Chemical Works, under sections 482, 483 and 486 of the Indian Penal Code. The complaint states that the complainant firm

is well known at Bombay and carries on business on a large scale in various kinds of soap; that it has got its trade marks which have been duly registered and one of them is "501" which it has been using on a soap in the market known by the name of "501"; that the applicant (Roshan Singh) dishonestly with a view to defraud the public has manufactured a soap similar in shape, size, colour etc., and is selling it under the name "301"; that the general get up of the soap is designed to deceive the public and to cause loss to the complainant; that the complainant was informed of this fact in the month of July, 1938, and thereupon the applicant was served with a notice on behalf of the firm to desist from copying the trade mark of the complainant firm but the applicant paid no heed to it. On these allegations it was prayed that action may be taken against the applicant under the sections mentioned above and that the goods, moulds etc., found in possession of the accused may be taken possession of. The applicant pleaded not guilty and stated that his soap had been in the market for several years past; that there was no resemblance between the soap manufactured by the applicant and soap "501" manufactured by the complainant; that no offence in law was committed by the applicant and that the complaint was barred by limitation.

The case was tried by a Magistrate of the second class who found the applicant guilty under sections 482 and 486 of the Indian Penal Code and convicted and sentenced him to a fine under each count. On appeal the appellate court affirmed the conviction but reduced the sentence to a fine of Rs.200 under section 482 or three months' rigorous imprisonment in default and Rs.25 under section 486 or three months' rigorous imprisonment in default. The applicant went in revision to the Sessions Judge who summarily rejected the application. The applicant has now come up in revision to this Court.

It is not disputed that the complainant's soap bears a registered trade mark. The applicant, on the other

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hand, has no registered trade mark. The courts below have come to the conclusion that the applicant's soap is a colourable imitation of the complainant's soap and the similarity is reasonably calculated to deceive the intending purchasers.

Ordinarily it is not the practice of this Court to disturb findings of fact in revision, but in the present case the finding of fact depends on a correct interpretation of the law. It is therefore necessary to examine the case on merits in some detail.

In the declaration form registered by the complainant company in Bombay the description of the trade mark is given as follows. "The cube soap has six sides. On the first corresponding and reverse sides of the soap there is imprinted an aureole within which there is a rhombus and T, O, M, C, O, being the first letters of the words which form the name of the company. Over the second corresponding and reverse sides of the cube soap there appears an aureole imprinted therein and this forms and constitutes the number or otherwise the brand of soap referred to above manufactured by the company. Upon the third corresponding and reverse sides of the soap there are words "Free from animal fat" imprinted in three lines one beneath the other. The trade mark, number and stamp herein described are particularly used in respect of this brand of soap."

The applicant's soap has got on the first corresponding and reverse sides within the rhombus figure 301 and under the figure the word "special". Upon the third corresponding and reverse sides of soap there are the words "Free from animal fat" imprinted in three lines one beneath the other. In place of "TOMCO" the applicant's soap has "INDIA". The only distinguishing feature is that in place of digit 5 in the complainant's soap the applicant has got digit 3. The applicant's soap is also a cube and has six sides. The sizes of the two soaps are about the same but the colour of the applicant's soap is lighter. The soaps are supplied in wrappers. Each wrapper contains three bars. The

complainant's wrapper is of cardboard. The top portion is white and the lower portion has red band all round. The colouring of the applicant's wrapper is similar but the applicant's wrapper is of thin paper. On one side of the complainant's wrapper there is No. 501 in bold type and underneath are the following words "Special household soap, especially made for washing delicate materials". In the left corner are the letters T O M C O. The applicant's wrapper has the number 301 and underneath are the words "Special household soap, especially made for washing delicate clothes". In the left corner in place of "T O M C O" "INDIA" is printed. On other sides of the wrapper there is not much similarity, but as stated above the colour scheme is similar. There cannot be the least doubt that at first sight there is great resemblance between the soaps. There is also some resemblance between the wrappers. The question is whether the resemblance amounts to an infringement of the complainant's trade mark and whether the action of the applicant is punishable under sections 482 and 486 of the Indian Penal Code.

The case has been argued at considerable length and several authorities have been cited in support of their respective contentions by learned counsel for the parties. I now proceed to examine the statutory provisions. Under section 478 of the Indian Penal Code a mark used for denoting that goods are the manufacture of a particular person is called a trade mark. Section 480 of the Code provides: "Whoever makes any goods, or any case, package or other receptacle . . . . with any mark thereon, in a manner reasonably calculated to cause it to be believed that the goods so marked, or any goods contained in any such receptacle so marked, are the manufacture or merchandise of a person whose manufacture or merchandise they are not, is said to use a false trade mark." The punishment for using a false trade mark is provided in section 482. It will be observed that to establish the charge under section 482 it is necessary to prove that the applicant's soap is marked in a manner

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reasonably calculated to be believed that they are the marks of the soap manufactured by the complainant. Section 486 of the Act provides the punishment for selling or exposing for sale any goods or things with a counterfeit trade mark. The expression "counterfeit" is defined in section 28 of the Code and runs thus: "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 to the section says that it is not essential to counterfeiting that the imitation should be exact. It has been argued by learned counsel for the applicant that the applicant cannot be legally convicted under both sections, namely 482 and 486. In my opinion the contention is not well founded. An accused would render himself liable to conviction under section 482 if he uses a false trade mark on any goods which may or may not have been manufactured by him. On the other hand, the ingredient of an offence under section 486 is the sale or exposing or possessing for sale goods or things with a counterfeit trade mark. The offence under the first section will be complete as soon as a false trade mark has been used, but under the latter section it will be necessary that goods should be sold or be possessed or exposed for sale. In my opinion, therefore, it is perfectly legal to sustain the conviction under both sections, provided that it is held that the mark on the soap of the applicant is a false trade mark and also that it is a counterfeit trade mark. I am not called upon to consider the scope of section 483 because the applicant was never convicted under that section. The distinction between false trade mark and counterfeit trade mark is somewhat subtle. In my opinion it depends on the degree of resemblance between the false and genuine trade marks. In *Lokumal* v. *Emperor* (1) this question had to be considered. The accused was convicted under sections 482 and 486. The learned Judges observed:

(1) (1914) 16 Cr. L. J. 230(231).

"A 'counterfeit' is, strictly, an exact imitation, but for the purposes of the Penal Code it is not essential that the imitation should be exact. But a thing is not, ordinarily, said to be counterfeit unless it bears on the face of it the semblance of validity, and is such as to deceive the average person on ordinary observation. Having regard to the patent differences between Exhibit 4 and Exhibit 5, differences which would be obvious on ordinary observation even to an unintelligent person who could read either Gujrati or English—and unless he could read one of the languages the inscription would convey nothing at all—the conviction under section 486 cannot, in our opinion, stand. It is a case of using a false trade mark, not a counterfeit one."

I have already pointed out that the trade mark exhibited on the soap of the applicant bears very strong resemblance to that on the complainant's soap but the trade marks are not identical. If the two soaps are put side by side a literate man will not find any difficulty in noticing the difference but a purchaser who trusts to his memory may well be led to believe that the applicant's soap was manufactured by the complainant firm.

Learned counsel for the applicant has referred me to several cases. I now proceed to notice some of them. In *Surja Prasad* v. *Mohabir Prosad Tribedy* (1) the appellant was acquitted under sections 482 and 486. The accused had applied labels to his bottles which were similar to those used by the complainant but on closer examination great differences in the labels were discernable. The acquittal of the appellant was based on the dissimilarity in the labels used by the appellant to those applied to the bottles of the complainant. This ruling does not assist either party. In *Malumiar & Co.* v. *Finlay Fleming & Co.* (2) the applicant was convicted under section 482 of the Indian Penal Code only. It was held: "The proper test for determining whether a trade mark has been infringed is whether the get up of

(1) (1907) 11 C.W.N. 887. (2) (1929) 30 Cr. L.J. 882.

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the defendant's goods is likely to deceive a purchaser who is acquainted with the plaintiff's get up but trusts to his memory. It is to be assumed that the purchaser will look fairly at the goods without distinguishing features being concealed and the court must also have regard to the class of purchaser by whom the goods would normally be bought."

On behalf of the opposite party several cases have been cited. In *Swadeshi Mills Co.* v. *Juggi Lal Kamlapat Cotton Mills Co.* (1) the plaintiff manufactured cloth bearing a particular design known as "Kamal Chhap". The defendant set up a rival factory using colourable imitation of the plaintiff's design on his cloth with a different letterpress. The Bench after a consideration of a large number of case law on the subject held: "If the goods of a manufacturer, from the mark or device he has used, have become known in the market by a particular name, the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market may be as much an invasion of right of that rival as the actual copy of his device . . . . No general rule can be laid down as to what is or is not a mere colourable variation. All which can be done is to ascertain in every case as it occurs whether there is such a resemblance as to deceive a purchaser using ordinary caution." This case went up to the Privy Council and their Lordships of the Judicial Committee affirmed the decision of this Court on the main point, although they reduced the amount of damages; see *Juggi Lal Kamalapat* v. *Swadeshi Mills Company, Ltd.* (2). In that case it is noticeable that the plaintiff's cloth was associated with the name of lotus and that any lotus device would lead to cloth being able to be palmed off as his cloth which was the cloth of another manufacturer. An illiterate purchaser would look to the design of lotus in selecting the cloth and any minor difference in details would not be noticeable by him.

(1) (1926) I.L.R. 49 All. 92. (2) (1928) I.L.R. 51 All. 182.

Learned counsel also cited *Nagendra Nath Shaha* v. *Emperor* (1), *Faqir Chand* v. *The Crown* (2) and *Noor Mohammed Sait & Co.* v. *Abdul Kareem & Co.* (3). There is hardly any difference of opinion in the view laid down in the above cases. The *ratio decidendi* deducible from the authorities is that the prosecution must prove that the trade mark on the accused's goods is likely to deceive a purchaser who is acquainted with the plaintiff's "get up" but who trusts to his memory. Mere differences in detail do not prevent the two designs being essentially the same. What degree of resemblance is necessary is a matter incapable of definition *á priori*. It was observed in *Seixo* v. *Provezende* (4): "All that courts of justice can do is to say that no trader can adopt a trade mark so resembling that of a rival, as that ordinary purchasers, purchasing with ordinary caution, are likely to be misled." Applying the principles enunciated above I have to determine whether the applicant has used a false trade mark or has sold goods with a counterfeit trade mark. I have no hesitation in holding that in the present case the applicant cannot be convicted under section 486 of the Indian Penal Code. It is impossible to say that the No. 301 is a counterfeit of No. 501, nor can it be said that "INDIA" is a counterfeit of "TOMCO". It is true that the imitation need not be exact, but there should be close resemblance to constitute an offence under this section.

Agreeing with the principle laid down in *Lokumal* v. *Emperor* (5) I hold that the applicant is not guilty under section 486.

As to the conviction under section 482 of the Indian Penal Code I see no reason to differ from the conclusions of the courts below. The definition of false trade mark has already been referred to. The question for determination is whether the applicant has marked his soap in a manner reasonably calculated to be believed that the soap is manufactured by the complainant firm.

(1) (1929) I.L.R. 57 Cal. 1153. (2) (1934) I.L.R. 16 Lah. 114.
(3) (1933) I.L.R. 57 Mad. 600. (4) (1865) L.R. 1 Ch. 192(196).
(5) (1914) 16 Cr. L.J. 230(231).

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There cannot be the least doubt that every effort has been made by the applicant to make his brand of soap resemble that of the applicant. The general colour scheme of the applicant's wrapper is the same as that of the complainant. It cannot be a mere accident that there are so many points common between the two wrappers. The writing on five sides of the two wrappers is however dissimilar. It would therefore not be justifiable to hold that the applicant's wrapper is a colourable imitation of the complainant's wrapper. The resemblance of the complainant's soap with Tomco brand is very great indeed. The only distinguishing feature is that in place of digit 5 in Tomco brand there is digit 3 in the applicant's brand. The style and formation of letters in "INDIA" resemble those in "TOMCO". This resemblance again cannot be an accident. It must be deliberate and the object is to deceive the public. The question is whether the resemblance is calculated to deceive the intending purchaser. In deciding this question it is to be assumed that the purchaser will examine the goods with some care. In the present case we are not concerned with the illiterate public. The writing on the wrapper or on the soap will mean very little to a purchaser who is unable to read. We have to confine our attention therefore to a literate purchaser who is acquainted with the "get up" of Tomco brand but trusts to his memory. Ordinarily a purchaser does not keep notes of minute details of a soap, nor does he read every word embossed on the article. The trade mark on both the soaps, although not identical, is so similar that there is every likelihood of a person being induced to purchase the applicant's brand under the belief that he is purchasing Tomco brand. The similarity in the marks may not amount to "counterfeit" but I am satisfied that one is a colourable imitation of the other. The applicant, therefore, has rightly been convicted under section 482 of the Indian Penal Code.

The next point stressed is that the prosecution is barred by limitation. A prosecution under these sec-

tions may be made within three years after the commission of the offence or one year after the discovery thereof by the prosecutor, whichever expiration first happens; see section 15 of the Indian Merchandise Marks Act, 1889. The complaint was made on the 22nd November, 1938. It is alleged in the complaint that the prosecutor received information about the pirated trade mark some time in July, 1938. It is not suggested that Mr. Tandon or any of the Directors of the company received direct information of the commission of the offence earlier. It is, however, contended that Dau Dayal, an agent of the complainant firm at Delhi, had such knowledge on the 8th May, 1937. It is not proved that Dau Dayal is a general agent of the company. So far as the evidence shows, Dau Dayal is the agent of the company only for the purpose of the sale of the goods manufactured by the company. Dau Dayal in his statement denies all knowledge of the commission of the offence in May, 1937. The complainant relies upon Exhibit P-11 dated the 8th May, 1937, to prove that Dau Dayal placed an order with the complainant to purchase soap "301". This document is not in Dau Dayal's handwriting. There is another document Exhibit P-8. It is in Dau Dayal's handwriting and this makes no reference to soap "301". It is admitted that according to the terms of the agreement Dau Dayal could not sell soap manufactured by any firm other than the complainant firm. Under the circumstances it is not likely that he would place an order for "301" with the complainant as the terms of the agreement must have been within his knowledge at the time the alleged order was made. Taking all the facts into consideration I am not prepared to hold the complaint as barred by limitation.

Learned counsel for the opposite party prays that all the goods bearing false trade mark in the possession of the applicant may be confiscated and that the opposite party may be awarded costs. I am unable to accede to the request of learned counsel. Any order with regard to confiscation that may be passed at this stage will lead

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to complications as the rights of a third party may be affected thereby. I have no sufficient material on the record before me to assess the costs. Cases of this nature are not free from difficulty and if the complainant has in fact suffered any damage he may seek his remedy in civil court. In revision I do not consider it proper to pass any order with regard to confiscation or costs.

In the result the application is allowed in part. The conviction and sentence under section 486 of the Indian Penal Code are set aside. The fine, if paid, shall be refunded. The conviction and sentence under section 482 are maintained.

FULL BENCH

Before Mr. Justice Iqbal Ahmad, Mr. Justice Allsop and Mr. Justice Bajpai

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September 11

HARENDRA SHANKAR AND ANOTHER (PLAINTIFFS) *v.* KHIALI RAM AND OTHERS (DEFENDANTS)*

U. P. Agriculturists' Relief Act (Local Act XXVII of 1934), section 33—Suit by debtor for account, not a declaratory suit —Court fee on plaints filed prior to amending Act IX of 1937—Ad valorem *fee—Valuation of such suit, filed before rule* 28(3) *of chapter XX of Rules for Civil Courts—Valuation for court fee—Valuation for jurisdiction—Suits Valuation Act (VII of* 1887), *section* 8—*Court fee on memorandum of appeal—Court Fees Act (VII of* 1870) *as amended in U. P., section* 7(iv)(*b*).

A suit under section 33 of the U. P. Agriculturists' Relief Act is, in form and in substance, a suit for accounts, and is not a suit to obtain a declaratory decree where no consequential relief is prayed.

The court fee payable on such suits, filed after the amending Act IX of 1937, is that prescribed by schedule VI to the U. P. Agriculturists' Relief Act. In suits filed before the amending Act the court fee payable is that prescribed by section 7(iv)(*f*) of the Court Fees Act for a suit for accounts, being *ad valorem* on the amount at which the relief sought is valued in the plaint.

The valuation of such suits, filed after the promulgation in January, 1936, of rule 28(3) of chapter XX of the Rules framed by the High Court for the civil courts, is governed by that rule.

*Stamp Reference in First Appeal No. 254 of 1936.