

REVISIONAL CRIMINAL.

Before Addison J.

FAQIR CHAND AND ANOTHER (CONVICTS)

Petitioners

versus

THE CROWN—Respondent.

Criminal Revision No. 1696 of 1933.

Indian Penal Code, 1860, Section 486: Selling goods with counterfeit trade-mark—Similarity of get-up—whether can be taken into consideration in deciding the question of deception—General get-up—whether protected—Test of similarity.

The complainant firm had been manufacturing hair dyes since 1924 and introduced a hair dye styled "Horse Brand Shining Black Hair Dye" to the market in 1927. In addition to these words the figure of a horse was also printed on the labels. About the middle of 1932, the accused commenced to turn out a hair dye styling it the "Arabic Horse Shining Black Hair dye." The design on it was also a horse, but there was a rider on the horse and the colours were not the same.

Held, that in this case a person asking for "Ghora Marka" hair dye might easily be given the brand of the petitioners though it is written on it that it is "Arbi Ghora Marka" Hair dye. The similarity of the get-up would also help in this deception, and that can be taken into consideration even though the complainant firm cannot claim protection for the general get-up.

Held further, that in a conviction under section 486 of the Indian Penal Code, the test is not whether a literate purchaser on the alert would be deceived, if he had the two marks side by side, but whether any ordinary unwary purchaser would be deceived by the similarity.

Held also, that it is not a matter for the witnesses to say, but for the Judge to make up his mind as to whether, on the facts before him, he thinks it probable that the purchasers would be deceived by the similarity of marks and the general get-up of the two sets of goods.

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Emperor v. Ganpat Sita Ram (1), Herbert Whitworth Ltd. v. Jamna Das-Nem Chand (2), and Aswini Kumar Pal v. Emperor (3), relied upon.

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Petition for revision of the order of Mr. G. U. Whitehead, Additional Sessions Judge, Lahore, at Ferozepore, dated 8th August, 1933, modifying that of Lala Kishan Chand, Magistrate, 1st Class, Kasur, dated 9th March, 1933, convicting the petitioners.

JAI GOPAL SETHI, for Petitioners.

JHANDA SINGH, for the Government Advocate, for Respondent.

ADDISON J.—The two petitioners, Faqir Chand and Dwarka Das, have been sentenced to pay fines of Rs. 50 each under the provisions of Section 486, Indian Penal Code, for selling goods marked with a counterfeit trade mark.

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The Courts below have dealt with the subject exhaustively and the question is one of fact. The complaint was brought by the firm Nihal Chand-Ram Lal of Kasur. The name of the petitioners' firm is "The Industrial Trading Company of Kasur." One of the petitioners used to be a servant of the complainant firm and the other petitioner used to be a servant of the complainant in the connected criminal revision No. 1695 of 1933. Hair dyes used to come principally from Germany but owing to the War they ceased to do so and Indian firms commenced their manufacture. The get-up of the cartons in which the small bottles are placed is probably more or less the same as the get-up used by the German firms, but the firms which started manufacturing these dyes employed in addition figures in order to distinguish their manufactures.

(1) (1914) 16 Bom. L. R. 78. (2) 1928 A. I. R. (Bom.) 227.

(3) (1930) 128 I. C. 334.

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The complainant firm in this case has been manufacturing hair dyes since 1924 and it introduced a hair dye styled "Horse Brand Shining Black Hair dye" to the market in 1927. In addition to these words there is the figure of a horse. The firm claimed that it had a wide sale for this particular dye and this is supported by evidence. The complaint is that, about the middle of 1932, the petitioners commenced to turn out a hair dye, styling it the "Arabic Horse Shining Black Hair dye." The design on it is also a horse but there is a rider on the horse and the colours are not the same. The complainant-firm's case was that the resemblance was such as to mislead the public, and the two Courts below have come to the conclusion that it would. The complainant has admitted that he cannot claim protection for the general get-up and has stated that he will be content if the design of the horse is changed. For example, it is in evidence that there is a hair dye in the market the get-up of the carton of which is very much the same but in the case of it the figure is a "bear."

The law on the subject has been frequently laid down. In *Emperor v. Ganpat Sita Ram* (1), it was held by a Division Bench that a person who employs a label which in general resembles the label used by another manufacturer is guilty of counterfeiting a trade-mark under section 486 of the Indian Penal Code, irrespective of the circumstance that the registered trade-mark of the one is quite different from the trade-mark of the other. Again, in *Herbert Whitworth, Ltd. v. Jamna Das-Nem Chand* (2), another Division Bench held that no trader has a right to use a trade-mark so nearly resembling that of an-

(1) (1914) 16 Bom. L. R. 78. (2) 1928 A. I. R. (Bom.) 227.

other trader as to be calculated to mislead incautious purchasers. The use of such a trade-mark may be restricted by injunction, although no purchaser has actually been misled, for the very life of a trade-mark depends upon the promptitude with which it is vindicated. The Judge has to make up his mind as to whether on the facts before him he thinks it probable that purchasers would be deceived by the similarity of the marks and general get-up of the two sets of goods and it is not a matter for witnesses to say. The Calcutta High Court has taken the same view in *Aswini Kumar Pal v. Emperor* (1), where it was said that the test is not, whether a literate purchaser would be deceived if he had the two marks side by side, but whether an ordinary unwary purchaser would be deceived. It was observed in that judgment that no one could possibly mistake the two sets, if he were on the alert and knew the original well, but that was not the proper test: it must be considered from the point of view of the ordinary unwary purchaser.

In the present case a person asking for "Ghora marka Hair dye" might easily be given the brand of the petitioners though it is written on it that it is "Arbi Ghora marka Hair dye." The similarity of the get-up would help in this deception and that can be taken into consideration even although the complainant firm cannot claim protection for the general get-up. It is open to the petitioners to change the designation and design from a "horse" to something else and that is all that the complainant firm desires.

In my judgment the case was properly decided and I dismiss this criminal revision.

P. S.

Revision dismissed.