

APPELLATE CRIMINAL.

Before Mr. Justice Broomfield and Mr. Justice Divatia.

ABDULSATARKHAN KAMRUDDINKHAN (ORIGINAL COMPLAINANT),
 APPLICANT v. RATANLAL KISHENLAL (ORIGINAL ACCUSED No. 2),
 OPPONENT.*

1935
 April 18

Indian Penal Code (Act XLV of 1860), section 482—Indian Merchandise Marks Act (IV of 1889), section 15—Offence of infringement of property mark—No discontinuance proved—Time runs from first instance of infringement—Limitation.

Under section 15 of the Indian Merchandise Marks Act, 1889, if the offence of infringement of a trade or property mark is a continuing one and no discontinuance is proved, time runs from the first instance of infringement or from the first discovery of the infringement :

Ruppell v. Ponnusami Tevan,⁽¹⁾ followed.

Akshoy Kumar Dey v. The King-Emperor⁽²⁾ and *Nagendranath Shaha v. Emperor*,⁽³⁾ distinguished.

Mahomed Jewa v. Wilson⁽⁴⁾ and *Abdul Majid v. Emperor*,⁽⁵⁾ referred to.

The accused was charged with the offence of using a false property mark. The allegation of the complainant was that the accused had used a property mark, which had been in use by the complainant for a considerable number of years and that on July 25, 1933, a certain person was induced by the accused to purchase a packet of *bidis* bearing the alleged false property mark. A complaint was filed on December 28, 1933. In the course of the trial, however, it was admitted by the complainant that he had come to know of the infringement of the property mark by the accused more than a year before this particular offence.

Held, that the prosecution was barred under section 15 of the Indian Merchandise Marks Act, 1889, especially as no discontinuance was proved and therefore the accused was entitled to an acquittal.

CRIMINAL REVISION APPLICATION against the order passed by H. K. Chainani, Sessions Judge at Poona, setting aside the conviction and sentence passed by A. A. Basit, First Class Magistrate, Sholapur.

Offence under section 482 of the Indian Penal Code.

The complainant who was a manufacturer of *bidis* (Indian cigarettes) at Poona alleged that accused No. 2 started a *bidi* shop at Sholapur and tried to push his business by

* Criminal Revision Application No. 60 of 1935.

⁽¹⁾ (1899) 22 Mad. 438.

⁽²⁾ (1929) 57 Cal. 1153.

⁽³⁾ (1928) 32 Cal. W. N. 699. ^m

⁽⁴⁾ (1911) 12 Cr. L. J. 246.

⁽⁵⁾ (1916) 17 Cr. L. J. 488.

1935

ABDULSATAR-
KHAN
v.
RATANLAL

selling packets bearing labels of the same design and mark as those of the complainant and thereby induced customers to believe that the *bidis* manufactured and sold by him were *bidis* manufactured by the complainant.

On December 28, 1933, a complaint was filed stating that on two occasions, on July 24, 1933 and December 7, 1933, the complainant's trade-mark was infringed by the accused.

The trying Magistrate held that the accused used a colourable imitation of the labels of the complainant on the *bidis* bundles manufactured by him and he did so in a manner reasonably calculated to cause it to be believed that the *bidis* were manufactured by the complainant. He, therefore, convicted the accused No. 2 of the offence under section 482 of the Indian Penal Code and sentenced him to pay a fine of Rs. 150 or in default to undergo rigorous imprisonment for three months.

On appeal the Sessions Judge acquitted the accused on the ground that the prosecution was barred by limitation under section 15 of the Indian Merchandise Marks Act, observing as follows :—

“ In paragraph 6 of his complaint, exhibit 1/E, the complainant has stated that he learnt on or before 1st of October 1932, that his trade-mark was being infringed by the accused. In his own examination-in-chief, he has stated as follows :—

‘ In the year 1932, I received information from my agent in Sholapur that a colourable imitation of the label I used on my property was being made by the accused.’

In his cross-examination he, further, states: ‘ For two years I sat quiet because on warnings from my agent, the accused promised to stop using imitation labels.’

The complaint was filed on 28th December 1933. The above statements made by the complainant, in his deposition, however, show that he knew more than 12 months before the date of this complaint, that the accused was infringing his trade-mark. Mr. Pardeshi for the appellant has, therefore, argued that the case is time-barred under Section 15 of the Indian Merchandise Marks Act. He relies on two cases, 10 Indian Cases, page 787, and 22 Mad., page 488. Mr. Deshmukh, who appears on behalf of the complainant, on the other hand, has cited another case, A. L. R. 1928, Calcutta, page 495, in which a different view has been taken. In that case it has been held that the words, ‘ first discovery ’, in Section 15 of the Indian Merchandise Marks Act, mean when the complainant first discovered the particular offence with which the

accused is charged. After going through these cases, I am, however, inclined to agree with the view taken in the two cases cited by Mr. Pardeshi."

1935

ABDULSATAR
KHAN
v.
RATANLAL

The complainant applied in revision.

Carden Noad, with *D. A. Tuljapurkar*, for the applicant.

A. A. Adarkar, for the opponent.

No appearance for the Crown.

BROOMFIELD J. This is an application for revision of an order of acquittal made by the Sessions Judge of Sholapur in a case in which one Ratanlal Kishenlal was convicted by the First Class Magistrate of Sholapur of an offence under section 482 of the Indian Penal Code, i.e., the offence of using a false trade-mark or a false property mark. The allegation of the complainant was that the accused had used a property mark which had been in use by the complainant for a considerable number of years and to which he had established a right and that he had thereby induced his customers to suppose that the *bidis* sold by him were the complainant's *bidis*. The Sessions Judge on appeal from the conviction did not go into the merits of the case at all. He acquitted the accused on a preliminary ground that the prosecution was barred by limitation under section 15 of the Indian Merchandise Marks Act, which provides that no such prosecution as is mentioned in section 14 (and that includes a prosecution under section 482 of the Indian Penal Code) shall be commenced after the expiration of three years next after the commission of the offence or one year after the first discovery by the prosecutor, whichever expiration first happens.

Now, the charge in this case alleged the use of a false property mark on July 24, 1933, that being the date apparently on which it is alleged that a certain person was induced to purchase a packet of *bidis* bearing the alleged false property mark. But in the course of the trial it was admitted by the complainant that he had come to know of the infringement of his property mark by the accused more

1935

ABDULSATAR-

KHAN

v.

RATANLAL

Broomfield J.

than a year before this particular offence, and on that ground the learned Sessions Judge, following a decision of the Madras High Court, *Ruppell v. Ponnusami Tevan*,⁽¹⁾ has held that the prosecution was barred.

The question raised in this revision application depends upon the construction of section 15 of the Indian Merchandise Marks Act, the particular point being whether the word "offence" as used in that section means the specific offence alleged in the charge or the first of a series of offences when the offence as here is a continuous one. There is no authority of this High Court upon the point, but the matter has been considered by several of the other High Courts and there is apparently a conflict of authority. *Ruppell v. Ponnusami Tevan*,⁽¹⁾ the case on which the learned Sessions Judge has relied, is very much on all fours with the present case. The facts there were that a complainant had discovered in 1893 that goods were being sold marked with what was alleged to be a counterfeit trade-mark, and he called upon the person so selling to discontinue the use of the said mark and to render an account of the sales. The right to proceed further was reserved, but no action was then taken. In 1898, upon its being ascertained that the said trade-mark was being used, the prosecution was commenced. The Court held that, inasmuch as the complainant had not shown that he believed the use of the alleged counterfeit trade-mark had been discontinued after his first discovery and complaint in 1893, the prosecution was time-barred under section 15. So that the view taken by the Court was that "offence" in this section means the first of a series of offences, and there are certain observations in the judgment on which the learned Sessions Judge here has relied. Their Lordships said (p. 490) :—

"Ordinarily the infringement of a trade-mark is rather a civil than a criminal wrong, but as civil proceedings may require much time and expenditure to bring them to a conclusion, the Legislature, in its anxiety to protect traders, has allowed of resort

⁽¹⁾ (1899) 22 Mad. 488.

to the criminal Courts to provide a speedy remedy in cases where the aggrieved party is diligent and does not by his conduct show that the case is not one of urgency. If, therefore, the person aggrieved fails to resort to the criminal Courts within a year of the offence coming to his knowledge, the law assumes that the case is not one of urgency, and it leaves him to his civil remedy by an action for injunction."

This case has been followed in Burma, *Mahomed Jewa v. Wilson*,⁽¹⁾ also in *Abdul Majid v. Emperor*.⁽²⁾

The learned counsel who appears for the applicant has relied in particular on two Calcutta cases: *Akshoy Kumar Dey v. The King-Emperor*⁽³⁾ and *Nagendranath Shaha v. Emperor*.⁽⁴⁾ These cases do appear to support his contention that the word "offence" in section 15 should be interpreted to mean the specific offence alleged in the charge. But possibly they can be distinguished. *Akshoy Kumar Dey v. The King-Emperor*⁽³⁾ was a case under section 486 of the Indian Penal Code, which deals with the offence of selling, exposing or possessing specific goods or things. The section, therefore, differs to some extent from section 482 which deals with the offence of using a false trade or property mark, an offence which is in its nature continuous. In the second place in this case there was a finding of fact that the complainant had no knowledge of the previous user.

Nagendranath Shaha v. Emperor⁽⁴⁾ was a case under section 482, but there it was held proved that the accused had after the first discovery of the offence given an undertaking to discontinue the use of the trade-mark. In the present case the complainant has no doubt alleged that after he discovered the infringement of his property mark he sent a notice to the accused and that the accused promised to discontinue the use of it. But there is no proof of any such discontinuance, and the complainant has admitted in his deposition that he has no documentary evidence such as he might be expected to have to show that there really was any discontinuance by the accused at all.

⁽¹⁾ (1911) 12 Cr. L. J. 246.

⁽²⁾ (1916) 17 Cr. L. J. 488.

MO-II Bk Ja 3—6

⁽³⁾ (1928) 32 Cal. W. N. 699.

⁽⁴⁾ (1929) 57 Cal. 1153.

1935

ABDULSATAR
KHAN

v.
RATANLAL

Broomfield J.

1935

ABDULSATAR-
KHAN

2.

RATANLAL

Broomfield J.

Mr. Carden Noad has advanced the argument that a man may infringe a trade-mark, discontinue doing so on discovery, and then repeat the infringement after a year, in which case, if time runs from the original infringement, there could be no prosecution. This, it is suggested, would be absurd. A similar argument seems to have weighed with Mr. Justice Ghose in *Nagendranath v. Emperor*.⁽¹⁾ But if there is proof of a discontinuance of the infringement, the limitation would not operate, even according to *Ruppell v. Ponnusami*.⁽²⁾ Moreover, on the other view, the section is really reduced to a dead letter. In that connection I may refer to *Mahomed Jewa v. Wilson*,⁽³⁾ where Mr. Justice Twomey says (p. 247) :—

“The intention of the Legislature will be frustrated if it is held that the owner of a trade-mark can stand by for several years while his trade-mark is being infringed continuously and then bring a criminal complaint in respect of some recent instance in which there has been infringement. To interpret the section in that way would reduce its provisions to a nullity, for it would entirely remove the bar of limitation except in cases where the series of infringements has actually ceased.”

In the same case the learned Judge has laid stress upon the words “first discovery” in the section. He says (p. 248) :—

“The words ‘first discovery’ cannot reasonably be applied to the last of a long series of similar offences extending without interruption throughout several years to the knowledge of the prosecutor. In my opinion, they can refer only to the first offence of the series which comes to his knowledge.”

I agree that the better view seems to be that where the offence of infringement of a trade or property mark is a continuing one, and no discontinuance is proved, time runs under section 15 from the first instance of infringement, or from the first discovery of infringement. Although, therefore, the matter is by no means free from difficulty, I am not satisfied that there are any grounds for differing from the view which the Sessions Judge has taken. That being so, we decline to interfere and the rule is discharged.

⁽¹⁾ (1929) 57 Cal. 1153.⁽²⁾ (1899) 22 Mad. 488.⁽³⁾ (1911) 12 Cr. L. J. 246.

DIVATIA J. It appears from the evidence that from October 1, 1932, when according to the complainant himself he knew that his trade-mark was being infringed by the accused, to July 24, 1933, when according to him he discovered that a customer was misled on account of the use of this trade-mark by the accused, there has been a continuous use of this mark by the accused. Under section 15 of the Indian Merchandise Marks Act, limitation would begin to run from the time when the complainant made the first discovery of the offence. Now the offence in this case is the offence under section 482, Indian Penal Code, of using a false mark. It is true that in the complaint he alleges that he first discovered the deception on July 24, 1933, and according to him, limitation commenced from that time. But with regard to the offence under section 482 it would be the first discovery of the use of the false trade mark and not the first discovery of any deception practised upon a customer on account of the use of such mark that is to be taken as the starting point. And on these facts, therefore, I think this case would be governed by the principle of the ruling in *Ruppell v. Ponnusami Tevan*⁽¹⁾ not only because the facts of the present case are similar to those in the Madras case but also because the reasoning adopted in that case is to be preferred to the view taken in the two Calcutta cases in *Akshoy Kumar Dey v. The King-Emperor*⁽²⁾ and *Nagendranath Shaha v. Emperor*.⁽³⁾ That view would render section 15 of the Indian Merchandise Marks Act almost nugatory if the complainant is at liberty to choose any act out of the continuous series of acts forming, to his knowledge, the breach of the provisions of section 482. The reasoning of the Madras High Court has been adopted by the Burma Court in *Mahomed Jewa v. Wilson*.⁽⁴⁾ Besides, the Calcutta case of *Akshoy Kumar Dey v. The King-Emperor*⁽²⁾ can be distinguished from the Madras case and the present case on the ground that there

1935

ABDUSATAR-
KHAN
2.
RATANLAL

⁽¹⁾ (1899) 22 Mad. 488.

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1935
 ABDULSATAR-
 KHAN
 v.
 RATANLAL
 Divatia J.

it was not proved that the complainant had knowledge of the breach of the provisions of the section before the complaint was filed. Here, however, the complainant has admitted that he became first aware of the use of his mark in October 1932.

The result is that limitation runs from October 1, 1932, and not from July 24, 1933. I therefore agree that the rule should be discharged.

Rule discharged.

J. G. R.

ORIGINAL CIVIL.

Before Mr. Justice Kania.

1934
 April 9

IN RE BRITISH INDIA BANKING AND INDUSTRIAL CORPORATION LTD.
 VITHALDAS DHANJI & CO., APPELLANTS v. SHIVA
 CHEDUMBARIAH, OPPONENT.*

Indian Companies Act (VII of 1913), section 160—Company—Voluntary liquidation—Contributory—Shareholder dying before list of contributories settled—Deceased shareholder's name included in list of contributories—Order of Court for payment of balance—Liability of legal representative of deceased shareholder for such payment—Procedure—Administration of estate of such deceased shareholder.

Where a shareholder of a company, which has gone into voluntary liquidation dies before the list of contributories is settled, and his name is included in the list of contributories in the liquidation proceedings, and an order is made by the Court for payment of the balance of the money due on the shares, such balance can only be recovered from his legal representatives under section 160 of the Indian Companies Act by adopting proceedings for the administration of the estate of the said deceased. In such cases it is not proper to seek an order for payment personally against the legal representatives of the deceased.

PROCEEDINGS for recovering moneys from a contributory of a company in voluntary liquidation.

*Miscellaneous application I. C. No. 21 of 1922.