

Before Sir Francis W. Maclean, K. C. I. E., Chief Justice, Mr. Justice Geidt and Mr. Justice Woodroffe.

NEMI CHAND

v.

SECRETARY OF STATE FOR INDIA*.

1907
Feb. 20.

Detention of goods—Collector of Customs, powers of—Counterfeit Trade-mark—False trade-description—Damages, suit for—Sea Customs Act (VIII of 1878) ss. 18, 19A—Merchandise Marks Act (IV of 1889) ss. 10, 11—Indian Penal Code (Act XLV of 1860) ss. 28, 480.

It is the duty of the Collector of Customs as representing the Government to stop from being brought into British India, goods coming within the specification mentioned in s. 18 of the Sea Customs Act, 1878, as amended by the Merchandise Marks Act, 1889, *inter alia* goods having applied thereto a counterfeit trade-mark within the meaning of the Indian Penal Code, or a false trade-description within the meaning of the Indian Merchandise Marks Act, 1889.

The Collector has power to detain such goods although no regulations have been framed by the Governor-General in Council under s. 19A(2) of the Sea Customs Act, 1878, as amended by the Merchandise Marks Act, 1889.

APPEAL by the plaintiff, Nemi Chand, from the judgment of SALE J.

The claim in this suit arose upon the facts which have been set out in the case of *Nemi Chand v. Wallace*(1). The plaintiff claimed damages against the Secretary of State for the wrongful detention of certain bales of grey shirtings by the Customs authorities. The question was whether the Collector of Customs had the power to detain the goods bearing a mark which was alleged to be counterfeit, and which, on enquiry, he found to be a colourable imitation. Sale J. dismissed the suit on the ground that the goods in question were marked with a counterfeit trade-mark, and that the detention therefore was warranted and justifiable. His Lordship's judgment was as follows:—

SALE J. The claim in this suit arises upon the facts which have been dealt with in the suit by the same plaintiffs against Messrs. Shaw Wallace and Company.

* Appeal from Original Civil No. 48 of 1906, in Suit No. 805 of 1904.

(1) (1907) I. L. R. 34 Calc. 495.

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The plaintiff's claim damages against the defendants for the wrongful detention of 65 bales of grey shirtings.

The defendant denies that the suit is maintainable against him on the facts alleged in the plaint and he further justifies the detention on the grounds that the goods in question are marked with a counterfeit trade-mark and are therefore prohibited from importation under the Sea Customs Act, VIII of 1878, as amended by section 10 of the Indian Merchandise Marks Act, IV of 1889.

As regards the question whether this suit is maintainable against the defendant the Secretary of State for India in Council, I am of opinion it is not governed by the case of *Nobin Chunder Dey v. Secretary of State for India*(1).

I have already given my reasons for the opinion that the orders and proceedings of the Collector of Customs, so far as they go beyond an order (on a sufficient indemnity by the complaint) to detain the goods pending the determination of the question at issue in a competent Civil Court, are illegal and void.

The defendant admits that the goods in question are the goods of the plaintiffs and he admits the goods are detained by officers who are under his orders and therefore by his authority and he justifies the action of his servants the Collector of Customs who made the orders complained of.

The defendant therefore justifies the detention not as an act of state but as a proper exercise of a specific statutory power. In my opinion, it is within the jurisdiction of this Court, under these circumstances, to investigate the legality of the detention, and award the plaintiffs damages if the illegality of the detention be established. On the merits, however, I have for the reasons assigned in the previous case, arrived at the conclusion that the goods in question are marked with a counterfeit trade-mark within the meaning of the Act. The detention is therefore warranted by law and is justifiable.

This suit must therefore be dismissed with cost on scale 2.

From this judgment the plaintiff appealed.

Mr. Garth and *Mr. Knight*, for the appellant.

The Advocate-General (Mr. O'Kinealy) and *the Standing Counsel (Mr. Sinha)*, for the respondent.

Cur. adv. vult.

MACLEAN C.J. This is an appeal from the decision of Mr. Justice Sale dismissing the suit of the plaintiff against the Secretary of State for India in Council, in which he claims Rs. 50,000 as damages against the Secretary of State, for the

NOTE TO BINDER.

These pages should be substituted for pages 513, 514, 515 in the June number of the Reports.

alleged wrongful detention by the Collector of Customs of Calcutta of certain bales of grey shirtings. The success of this appeal is dependent in a great measure upon the evidence in the case we have just disposed of. In that case we found as a matter of fact that the marks upon the plaintiff's grey shirtings were a colourable imitation of those upon Messrs. Dewhurst's goods. We do not propose to go again into that question and it has been conceded that the findings upon that question in the appeal just disposed of must be taken as conclusive upon the question of fact in the present suit. The question then is whether the Collector of Customs had power to detain the goods. That in effect is all that he has done, for though, as is pointed out in the previous case, the Collector ordered the goods to be reshipped, in point of fact that has not been done.

The powers of the Collector are derived from statute, namely the Sea Customs Act, VIII of 1878, amended by the Merchandise Marks Act IV of 1889. The question is whether the plaintiff's goods are marked with a counterfeit trade mark within the meaning of the Act. Under section 18 of the Sea Customs Act as amended by the Merchandise Marks Act of 1889 "no goods specified in the following clauses [Clauses (a) to (f)] shall be brought, whether by land or sea into British India" and clause (d) refers to "goods having applied thereto a counterfeit trade-mark within the meaning of the Indian Penal Code, or a false trade-description within the meaning of the Indian Merchandise Marks Act 1889." The language of the section is strong, namely, that no goods of the class mentioned in the section shall be brought into British India; and, if that is so, and if the goods in question came within the specification mentioned in the section, it would be the duty of the Collector of Customs as representing the Government to stop the goods from being brought into British India. What we have to consider, therefore, is whether the goods in this case, "have applied thereto a counterfeit trade-mark within the meaning of the Indian Penal Code." That takes us to the Indian Penal Code (section 28) which says, "A person is said to 'counterfeit' who causes one thing to resemble another thing, intending by means of that resemblance to practice deception or knowing it to be likely that

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deception will thereby be practised.” And the explanations to that section, which are important are as follows :—

“EXPLANATION I. It is not essential to counterfeiting that the imitation should be exact.”

“EXPLANATION 2” which is very pertinent to the present enquiry runs as follows :—“When a person causes one thing to resemble another, and the resemblance is such that a person might be deceived thereby, it shall be presumed until the contrary is proved, that the person so causing the one thing to resemble the other thing intended by means of that resemblance to practise deception or knew it to be likely that deception would thereby be practised.”

We entertain little doubt in this case, as a matter of legitimate inference, from the facts proved, that the plaintiff was the person who caused the marks on his cloth to resemble the marks on Dewhurst's & Co.'s cloth, and there is no doubt as we have found in the previous case, that the resemblance is such that a person might be deceived thereby. If so, the presumption arises that the plaintiff intended by means of the resemblance, to practise deception or knew it to be likely that deception would thereby be practised. If that is so, the mark on the plaintiff's goods is clearly a counterfeit trade-mark within the meaning of the Act.

It is contended that the Collector had no power to detain the goods as no regulations had been framed by the Governor-General in Council under sub-section (2) of section 19A. The power of detention is clearly implied by section 19A of the Act—apart from the positive words of section 18 that no goods of the class specified are to be brought into British India. It is contended that the Collector could not act until and unless the Governor-General in Council had framed Regulations under sub-section (2) of section 19A and, that no such Regulations had been framed, as apparently is the case, when the goods were detained. We do not think that the enabling power given to the Governor-General in Council to frame Regulations can over-ride the prohibiting language of section 18 or the implied power of detention under section 19A.

It is suggested that the plaintiff was not the person who caused the marks on his cloth to resemble those on that of Dewhurst & Co. We think as we have already said, that it is a perfectly legitimate inference from the evidence in the case that he was the person who caused the resemblance to be effected. For my own part, I think that the marks on the plaintiff's cloth may properly be regarded as a "false trade-mark" within the meaning of section 480 of the Indian Penal Code,

For these reasons, the appeal fails and must be dismissed with costs.

GEIDT J. I agree.

WOODROFFE J. I also agree.

Appeal dismissed.

Attorneys for appellant: *Leslie & Hinds.*

Attorneys for respondents: *H. C. Eggar.*

J. C.

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