

Empreor Vs. Bakaulah Mallik

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Court : Kolkata

Decided On : Jan-19-1904

Reported in : (1904)ILR31Cal411

Judge : Ghose and; Stephen, JJ.

Appellant : Empreor

Respondent : Bakaulah Mallik

Judgement :

Ghose and Stephen, JJ.

1. The appellants in the present case have been convicted on charges under Section 482 and Section 486 of the Indian Penal Code, as amended by the Indian Merchandise Marks Act, 1889, of using a false trade-mark, and selling goods marked with a counterfeit trade-mark, and under Section 6 of the Merchandise Marks Act of applying a false trade description to goods, and they are now appealing against These convictions. The main facts in the case are simple and are undisputed.

2. Since December, 1900 the opposite party have been selling fish-hooks, which they have imported from Europe, in packets bearing labels on which appears a design of two fish crossed, with their heads and tails bent up. These fish-hooks have been generally known in Calcutta as 'mash marka' (fish mark) and have

commanded a large sale. The boxes, labels and designs have been made exhibits, but we need only notice the design of two fishes which for present purposes may be conveniently referred to as mark A. During the season of 1903 the appellants sold fish-hooks in similar boxes, bearing similar labels, and a design of one fish with his head and tail turned up. These boxes, labels and designs have also been made exhibits but again we need only notice the design of one fish, which we will refer to as mark E.

3. No point has been raised before us on the similarity of the boxes and labels, as it is admitted that their shape and appearance are what are usual in the trade, and the inscription on the label bearing mark B is different from that on the label bearing mark A; the name of the maker in particular being truly given, But it is alleged that mark E is a fraudulent imitation of mark A, and that it is devised to enable the appellants to sell their fish-hooks as 'mash marka.'

4. Under these circumstances the opposite party's contention is that mark E is a false trade-mark, which, for present purposes, we may take to be the same as a counterfeit trade-mark, and that they have applied the name 'mash marka' to these goods as a false trade description.

5. It has not been urged before us that mark E is in itself a false trade-mark, as being such a mark as is mentioned in Section 480 of Indian Penal Code; but merely as being a mark to which the term 'mash marka' is likely to be, and indeed is intended to be, applied. It is also to be noticed that a trade description as defined in Section 2 of the Merchandise Marks Act does not include such marks as mark E, but that such marks are brought within the scope of Section 6 of the Act by the operation of Section 4(1), Whether we consider the case of a false trade-mark or of a false trade description we have first to consider what is the real point of the case, namely, whether the mark or description is false. And in this present case the point seems to depend on whether the application of the term 'mash marka' is in the language of Section 480 of the Indian Penal Code or Section 4(1) of the Merchandise Marks Act 'reasonably calculated to cause it to be believed (or to lead persons to believe) 'that the fish-hooks sold under mark E are the merchandise of the opposite party. How far in fact does the law allow a man to

appropriate to his own use a name which is suggested by his trade. That it does so to some extent is plain from various well known cases. In *Seixo v. Provezende* (1865-66) L.R. 1 Ch. 192 quoted in *Kerly on Trade-marks* at p. 240, Lord Cranworth says 'the defendants have adopted a trade-mark which could not fail to lead purchasers to attribute to the wines so marked the same name, as that under which the plaintiff's wines were known and so to believe that in purchasing them they would be purchasing the wines of the plaintiff.' The facts of that case, however, seem to be essentially different from those before us. Without considering how far principle that was followed in an application for an injunction ought to be followed in a criminal case, it must be observed that in that case the public were directly invited to adopt the use of a definite word, though that word was a common one. In the present case as put forward by the respondent, the public had chosen a name for their own use; and, if the difference between the two kinds of fish-hooks is noticeable enough to make the public care to distinguish between them, the difference between one fish and two fish is marked enough to afford a very simple method of distinction. The facts in the *milkmaid brand* case, *Anglo Swiss Condensed Milk Co. v. Metcalf* (1886) L.R. 31 Ch. D. 454 are too different from the present facts for that case to afford us much assistance. In the 'Two Elephants case' *Johnston v. Orr Ewing* (1882) 7 A.C. 219 both marks contained two Elephants, which clearly distinguished it from the present case.

6. A good deal of argument has been addressed to us by Counsel on behalf of the appellants as to the effect of the decisions in. the camel-hair belting case, *Reddaway v. Bonham* 1896, App. Ca. 199, and *Cellular Clothing Co. v. Maxton*, 1899, App. Ca. 327, which is distinguished from that case. As to these cases we have only to say that applying as they do to descriptive names they can have no application to the present case, since a picture of a fish can hardly be held to be a description of a fish-hook. In the present case, applying as far as we can the principles laid down in the cases we have quoted, and the sections to which we have referred, we do not think that the fact that mark A was known as 'mash marka' can be held to prevent other persons from applying a mark to fish-hooks, which may be generally known by the same term. The respondent's right to the exclusive use of a mark which may acquire such a designation, is at least not plain enough for us to consider it proved as against a person charged with an offence.

The essential feature of the design is, in our opinion, too common and too apt for application to fish-hooks, for a name based on it to be reasonably calculated to mislead. We do not consider, therefore, that, apart from the facts of the case, mark E is a false trade mark, merely because it is or may be known as 'mash marka,' when that name is already applied to mark A. And the same remark applies to 'mash marka' considered as a trade description.

7. 'We must, however, examine the facts of the case to see whether or how far any inference to be drawn from them conflicts with this view. If it appears that purchasers were mislead by mark E or the use of the term 'mash marka' into believing that the appellants' goods were the merchandise of the respondents, this will go a long way to prove that the mark was calculated to produce this effect. If we find that the mark was devised to produce this effect, we shall probably be confirmed in this opinion.

9. It is not disputed that the term 'mash marka', has been applied to the respondents' fish-hooks, since they were first put on the market. There is also evidence which, on the whole, we believe, that the appellants supplied mark E fish-hooks when asked for 'mash marka.' There is an a priori likelihood that this would be so, and the attempt made on behalf of the appellants to prove that mark A fish hooks were asked for under the name 'Jori mash marka', while these were called 'ekmash marka,' seems to point in the same direction. The evidence that any one was mislead by the appellants supplying the E mark as 'mash marka' is less satisfactory. We may suppose that the witness Shaik Yacoob, intended to represent himself as mislead, though he did not specifically say so--Mohamed Ali's evidence went to show that he would have been mislead, had he not been buying mark E on behalf of the respondents; but we cannot place much reliance on his evidence. Ismail bought mark E as 'mash marka,' but he does not profess to have been mislead by the mark itself; on the contrary he noticed the difference of the mark from that to which he was accustomed and made enquiries about it. Fanindra Nath, the appellants' gomasta, gave evidence that he did not sell mark E 'to Mohamod Ali as 'mash marka,' but this we do not wholly believe.

10. There is no doubt some evidence of direct fraud by the appellants to pass off mark E to Ismail as the respondents goods; but it is too vague and uncertain for us to rely on. A voucher was given to Mohamed Ali, in which the hooks supplied to him are described as 'mash marka,' and it is alleged that the description was put in and then struck out (exhibit F), But the insertion and erasure have not been explained in the evidence and convey nothing to our minds.

11. Considering all the evidence on the subject, we find nothing in it to cause us to modify the opinion we have already expressed to the effect that mark E is not a false trade mark, or a false description in the sense we have mentioned. We have not to decide, and we do not decide, whether the appellants were justified in using mark E, or in supplying their own fish-hooks, when asked for L 'mash marka.' But we do hold that they have not committed any of the offences with which they have been charged.

12. It only remains to add that we need not determine whether the appellants have proved that they acted without an intent to defraud. Their evidence on this point almost entirely consists of the indent containing the order for the mark E, fish-hooks, in which no mention is made of any mark (exhibit 5A). This goes some way to prove the point, but falls short of satisfactory proof.

13. We much regret that recourse has been had to the criminal law to settle the matter at Issue between the parties. The result is that nothing has in fact been decided and that the present proceedings have had no useful result. The appeal is allowed, the conviction and sentence being set aside. The fine, if realized will be refunded.