

**Nath Nath Dey Vs. Emperor**

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**SooperKanoon Citation :** [sooperkanoon.com/870327](http://sooperkanoon.com/870327)

**Court :** Kolkata

**Decided On :** Nov-04-1912

**Reported in :** 18Ind.Cas.404

**Judge :** Chitty and ;Richardson, JJ.

**Appellant :** Nath Nath Dey

**Respondent :** Emperor

**Judgement :**

1. The appellant, Anath Nath Dey, has been convicted by the fourth Presidency Magistrate of offences under Sections 482, 485 and 486 of the Indian Penal Code and sentenced to pay a fine of Rs. 210 or in default to undergo three months' simple imprisonment, the fine, if realised, to be paid to the complainant as compensation. The appellant was also charged in the alternative with offences under Sections 6 and 7 of the Merchandise Marks Act, 1889, but beyond stating the fact at the commencement of his judgment, the learned Magistrate has taken no further notice of it. He has not at all discussed those charges or come to any finding upon them. The case of the complainant, Ashutosh Pal, as put forward in his petition of complaint, is that he manufactures and carries on business in umbrellas; that his business is of long standing and his umbrellas known in the market as 'Butto Kristo Pal' umbrellas, Butto Kristo Pal being the name of his son; that his trade mark is the device annexed to the petition and marked A. (In Court it has been marked as Exhibit 1). He farther complained that the appellant, who had

recently started business in umbrellas, had counterfeited the said trade mark, using one very similar to it, Exhibit B. (In Court, that has been marked as Exhibit 2.) He accordingly charged the appellant under Sections 482, 485 and 486, Indian Penal Code, and Sections 6 and 7 of the Merchandise Marks Act, 1839. The appellant filed a written statement denying the complainant's trade-mark. He alleged that Butto Kristo Pal was the son of Tulsi Das Pal, whose umbrella business he (the appellant) had purchased. He further complained that the parties being rival traders, this case had been brought against him falsely and maliciously in order to ruin his business.

2. When the case came on for hearing, the complainant gave evidence. He swore that the umbrellas manufactured by him in the name of his son were known as Butto Kristo Pal' umbrellas. He further swore to the design (Exhibit 1) and to the appellant's alleged counterfeit of it (Exhibit 2). In cross-examination, he alleged his trade mark in umbrellas to be Butto Kristo Pal' or Sri Butto Kristo Pal.' One of the complainant's partners, Nagendra Nath Day, stated: 'The trade-mark of the umbrellas is Butto Kristo Pal.'" The other partner, Lal Behari Ghosh, in cross-examination went further. He said: 'Our trade mark is Butto Kristo Pal.' This configuration (meaning Exhibit 1) is not our trade mark. Butto Kristo Pal' only is our trade mark.' He admitted that it had not been advertised, still less registered. Butto Kristo Pal, the son of complainant, has no business connection with his father, except that Nagendra Nath Day, one of the complainant's partners, is also his partner. They carry on a separate business at 120, Old China Bazar, the complainant's shop being at. 121. Butto Kristo Pal, in cross-examination, said;-- 'Butto Kristo Pal is my trade mark at No. 120. The shop at No. 120 was opened three or four years ago.' The complainant called a number of other witnesses, merchants who had bought umbrellas of his firm and others. Not one of them speaks to any device or trade mark of the complainant, but their evidence goes to show that there is a brand of umbrellas in the market known Butto Kristo Pal umbrellas, and when they are asked for such umbrellas, they write to the complainant's firm for them. It is said that the complainant has been doing this business for 10 or 12 years.

3. The charge against the appellant is that he has also been selling umbrellas as 'Butto Kristo Pal' umbrellas, a number of which were found at his place of business, Nos. 125-6, Old China Bazar. A wooden block, the die of Exhibit 2, was also found and has been put in to support the charge under Section 485.

4. The appellant called evidence to show that Tulsidas Pal, who admittedly had dealt in umbrellas for 20 or 25 years previous of his insolvency in 1908, had used the name of 'Butto Kristo Pal' to denote one class of his umbrellas for three or four years prior to 1908, he also having a son Butto Kristo Pal. Tulsi Das Pal is a cousin of the complainant, who learnt his business in Tulsi Das's shop. It was further alleged that Tulsi Das Pal, on the eve of his insolvency, sold his business to the appellant who has since carried it on. There can be no doubt that Tulsi Das Pal before 1908, and the appellant since that date have received orders from the mofussil for 'Butto Kristo Pal' umbrellas.

5. On this evidence, the learned Magistrate has convicted the appellant under Sections 482, 485 and 486, Indian Penal Code. In our opinion, that conviction cannot possibly stand.

6. A trade mark must be some visible concrete device or design affixed to goods to indicate that they are the manufacture by the person whose property the trade-mark is. It might, no doubt; consist of a name impressed in some distinctive way. In this, case the complainant has no exclusive right to manufacture umbrellas or even umbrellas of a particular kind. All that he could claim would be, that, no other manufacturer should so mark umbrellas as to pass them off as the complainant's manufacture when they were not. This, the complainant alleged, the appellant had done by affixing a mark or design closely resembling his own and containing the name 'Butto Kristo Pal.' The complainant, however, has completely failed to show that he has any such trade mark. In his complaint, he put forward Exhibit 1 as his trade mark, but in his examination he went back on this and claimed simply the use of the name 'Butto Kristo Pal.' His partner, Lal Behari Ghosh, went further and denied that Exhibit 1 was their trade-mark, while the son, Butto Kristo Pal, claimed the name as his trade mark in a business independent of his father's. Not one of the complainant's witnesses speaks to the complainant having any trade mark,

meaning any design or device, nor do they suggest that his umbrellas are known by any such trade mark, It appears that the case was allowed to change its character as it went on. From a case relating to the making and use of a false trade mark, it drifted into a case of using a false trade name. The distinction between a trade mark and a trade-name is clear, see the remarks of Lord Blackburn in *Singer Manufacturing Co. v. Loog* (1882) 8 A.C. 15 at p. 32; 52 L.J. Ch. 181; 48 L.T. 3; 31 W.R. 325. The improper use of a trade name might fall within the purview of Section 5 of the Merchandise Marks Act, and be punishable under Section 6 or 7 as a false trade description. That, however, is not the case here. There is no proved trade mark of the complainant for infringing which the appellant can be convicted under Sections 482, 485 or 486, Indian Penal Code. We are not prepared to say what might have been the result had the case been confined to the charges under Sections 6 and 7 of the Merchandise Marks Act. It has not been dealt with on that footing, and the appellant could not, as the evidence at present stands, be convicted under either of those sections.

7. We allow the appeal, set aside the conviction under Sections 482, 485 and 486 of the Indian Penal Code, and direct that the fine, if paid, be refunded. The property confiscated must be returned to the appellant. We may add that we agree with the contention of the appellant that this case ought never to have been brought in the Criminal Court. The dispute between the parties is one of a civil nature, and could have been much more satisfactorily dealt with by a Civil Court.