

fact as the utilisation of a portion of the reserve as working capital has to be proved by the employer by evidence given on affidavit or otherwise and after giving an opportunity to the workmen to contest the correctness of such evidence by cross-examination.

We must therefore reject the contention urged on behalf of the employer-appellant that the balance-sheet that has been filed is sufficient to prove that Rs. 2,27,000 of the depreciation fund was actually used as working capital. There is, as we have already stated, no material on the record from which any conclusion can be reached as regards the utilisation of the whole or any portion of this sum lying in depreciation fund as working capital.

The appellant's counsel finally asked that the matter may be sent back to the Industrial Tribunal and an opportunity given to him to adduce proper evidence on this point. We do not see any circumstance that will justify us in making an order of remand in a case of this nature.

The appeal is accordingly dismissed with costs.

*Appeal dismissed.*

## THE STATE OF UTTAR PRADESH

v.

HAFIZ MOHAMMAD ISMAIL AND  
HAFIZ JAWED ALI

(JAFER IMAM, K. N. WANCHOO AND J. C. SHAH, JJ.)

*Criminal Trial—Counterfeit trade mark—Wrappers and labels of soap made to resemble those of another soap—If Counterfeit—Indian Penal Code, 1860 (XLV of 1860). ss. 28 and 486.*

The respondents were found selling counterfeit Sunlight and Lifebuoy soaps and were prosecuted under s. 486 of the Indian Penal Code. The Magistrate found that the resemblance between the wrappers and labels in which the soaps were being sold and those of the genuine soaps was such that a person may be deceived by it and convicted the respondents. An appeal to the Sessions Judge was dismissed. On revision the High Court held that the wrappers and labels were mere colourable imitations of the genuine trade mark, but were not counterfeit and acquitted the respondents.

1960

*P. T. Red Dye  
Works Ltd.*

v.

*Dyes & Chemical  
Workers' Union*

*Das Gupta J.*

1960

February, 9

1960

State of U. P.

v.

Hafiz Mohammed  
Ismail & Hafiz  
Jawed Ali

*Held*, that the wrappers and labels were counterfeit of the genuine wrappers and labels of Sunlight and Lifebuoy soaps. In order to prove that the wrappers and labels were counterfeit within the meaning of s. 28 of the Indian Penal Code read with Explanation 2 thereof the Court had to decide (i) whether the wrappers and labels on the soaps sold by the respondents were made to resemble the wrappers and labels of the genuine Sunlight and Lifebuoy soaps, and (ii) if they were so made to resemble, whether the resemblance was such as might deceive a person. It was not necessary to import words like "colourable imitation" in s. 28. Explanation 1 of s. 28 provided that it was not essential to counterfeiting that the imitation should be exact and the High Court had erred in not considering whether the resemblance was such as might deceive a person, inspite of the difference in detail between the two sets of wrappers and labels.

*Criminal Appellate Jurisdiction*: Criminal Appeals Nos. 129-130 of 57.

Appeals by special leave from the judgment and order dated July 13, 1956 of the Allahabad High Court (Lucknow Bench) at Lucknow in Criminal Revisions Nos. 118 and 119 of 1955, arising out of the judgment and order dated March 31, 1959 of the Second Civil and Sessions Judge, Lucknow in Criminal Appeals Nos. 511 and 512 of 1954.

*H. N. Sanyal*, Additional Solicitor-General of India, *G. C. Mathur*, and *C. P. Lal*, for the appellant.

*Nuruddin Ahmad* and *Naunit Lal*, for the respondents.

1960 February, 9. The Judgment of the Court was delivered by

Wanchoo J.

WANCHOO, J.—These are two connected appeals by special leave against the judgment of the Allahabad High Court. The brief facts necessary for their disposal are these. One Bhagwan Swarup Saxena, the Trade Marks Investigator, Lever Brothers Limited India (hereinafter called the company) was working in Lucknow on behalf of the company. He came to know that counterfeit Sunlight and Lifebuoy soaps were being manufactured and sold on a large scale in Yahiaganj and other places in Lucknow. This was investigated on behalf of the company which manufactured genuine Sunlight and Lifebuoy soaps. It was found that two soap factories in Lucknow were manufacturing counterfeit Sunlight and Lifebuoy soaps. It was also found that Hafiz Mohammad

Ismail and Hafiz Jawed Ali who are the respondents in the two appeals before us were selling these counterfeit soaps in Yahiganj where they have shops. Consequently a raid was made on the two shops with the help of the police on May 19, 1953. A large number of soaps were recovered from the two shops which were wrapped in labels said to be counterfeits of those in which the genuine Sunlight and Lifebuoy soaps of the company are sold. Consequently the two respondents were prosecuted under ss. 482 and 486 of the Indian Penal Code.

The Magistrate found the case proved and held that the labels in which the respondents were selling soaps were counterfeit of the labels of genuine Sunlight and Lifebuoy soaps. He, therefore, convicted the respondents under ss. 482 and 486 of the Code. The respondents went in appeal to the Sessions Judge but their appeals were dismissed. They then went in revision to the High Court. The High Court held that the cases did not fall within s. 482 of the Indian Penal Code and therefore acquitted them of the charge under that section. It further held that the labels or wrappers used on the soaps sold by the respondents could not be regarded as counterfeit of the genuine wrappers and labels of Sunlight and Lifebuoy soaps though they were colourable imitations of the same; it therefore acquitted them under s. 486 also, without going into the other points raised on behalf of the respondents. The applications of the State of Uttar Pradesh for a certificate to appeal to this Court having been rejected, the State applied for leave to appeal to this Court which was granted; and that is how the matter has come up before us.

The learned Additional Solicitor General appearing for the State has not pressed the appeals so far as the acquittal under s. 482 of the Code is concerned. The acquittal therefore under that section will stand. He has, however, strenuously urged that the view of the High Court that the wrappers and labels are not counterfeit but are mere colourable imitations of the genuine trade marks of the company is incorrect inasmuch as the High Court has not given full effect to the

1960

—  
*State of U. P.*  
 v.  
*Hafiz Mohammed*  
*Ismail & Hafiz*  
*Jawed Ali*  
 —  
*Wanchoo J.*

1960

State of U. P.

v.

Hafiz Mohammed

Ismail & Hafiz

Javed Ali

Wanchoo J.

words of s. 486 in that behalf and the definition of 'counterfeit' in s. 28 of the Indian Penal Code.

Section 28 is in these terms—

“A person is said to ‘counterfeit’ who causes one thing to resemble another thing, intending by means of that resemblance to practise deception or knowing it to be likely that deception will thereby be practised.

*Explanation 1.*—It is not essential to counterfeiting that the imitation should be exact.

*Explanation 2.*—When a person causes one thing to resemble another thing, 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.”

The relevant part of s. 486 is in these terms—

“Whoever sells, or exposes, or has in possession for sale or any purpose of trade or manufacture any goods or things with a counterfeit trade mark or property mark affixed to or impressed upon the same or to or upon any case, package or other receptacle in which such goods are contained, shall, unless he proves—

- (a).....
- (b).....
- (c).....

be punished with imprisonment of either description for a term which may extend to one year or with fine or with both.”

The contention on behalf of the appellants is that the High Court in holding that the labels and wrappers in this case were only colourable imitations of the genuine trade mark labels and wrappers of the company and were not counterfeit has not taken into account the words of s. 28 and particularly of the two *Explanations* thereof. It is pointed out that the words “colourable imitation” do not appear in s. 28 which defines the word “counterfeit” and the High Court seems to have misdirected itself by treating the wrappers and labels in this case as colourable

imitations and not counterfeit within the meaning of s. 28.

The main ingredients of counterfeiting as laid down in s. 28 are (i) causing one thing to resemble another thing, and (ii) intending by means of that resemblance to practise deception or (iii) knowing it to be likely that deception will thereby be practised. Thus if one thing is made to resemble another thing and the intention is that by such resemblance deception would be practised or even if there is no intention but it is known to be likely that the resemblance is such that deception will thereby be practised there is counterfeiting. Then comes *Explanation 1* to s. 28 which lays down that it is not essential to counterfeiting that the imitation should be exact. Ordinarily counterfeiting implies the idea of an exact imitation; but for the purpose of the Indian Penal Code there can be counterfeiting even though the imitation is not exact and there are differences in detail between the original and the imitation so long as the resemblance is so close that deception may thereby be practised. Then comes the second *Explanation* which lays down that where the resemblance is such that a person might be deceived thereby it shall be presumed until the contrary is proved that the person causing one thing to resemble another thing was intending by means of that resemblance to practise deception or knew it to be likely that deception would thereby be practised. This *Explanation* lays down a rebuttable presumption where the resemblance is such that a person might be deceived thereby. In such a case the intention or the knowledge is presumed unless the contrary is proved.

This analysis of s. 28 shows that there is no necessity of importing words like 'colourable imitation' therein. In order to apply it, what the Court has to see is whether one thing is made to resemble another thing, and if that is so and if the resemblance is such that a person might be deceived by it there will be a presumption of the necessary intention or knowledge to make the thing counterfeit, unless the contrary is proved. What the court therefore has to see is whether one thing has been made to resemble another

1960

State of U. P.

v.

Hafiz Mohamed

Ismail &amp; Hafiz

Jawed Ali

Wanchoo J.

1960

State of U. P.

v.

Hafiz Mohammed

Ismail &amp; Hafiz

Jawed Ali

Wanchoo J.

thing. If it finds that in fact one thing has been made to resemble another it has further to decide whether the resemblance is such that a person might be deceived. If it comes to the conclusion that the resemblance is such that a person might be deceived by it, it can presume the necessary intention or knowledge (until the contrary is proved) and counterfeiting would then be complete. Therefore the two things that were necessary to decide in this case were (i) whether the labels or wrappers on the soaps sold by the respondents were made to resemble the labels and wrappers of the genuine Sunlight and Lifebuoy soaps, and (ii) if they were so made to resemble, whether resemblance was such as might deceive a person. If both these things were found the labels and wrappers in this case would be counterfeit and the necessary intention or knowledge would be presumed unless the contrary was proved.

Now the Magistrate as well as the Sessions Judge examined the wrappers and labels in this case and compared them with the genuine labels and wrappers of the Sunlight and Lifebuoy soaps of the company and came to the conclusion that there was resemblance between the two sets of wrappers and labels and that that resemblance was so close that a person might be deceived. On that finding, they held that these wrappers and labels were counterfeit because the contrary was not proved before them. The High Court does not say that there is no resemblance between the two sets of wrappers and labels. The very fact that the High Court says that the wrappers and labels found in this case were colourable imitations of the genuine wrappers and labels shows that there was resemblance. The High Court however has stressed the difference in detail between the two sets of wrappers and labels but seems to have overlooked *Explanation 1* of s. 28 which says that it is not essential to counterfeiting that the imitation should be exact, even though the *Explanation* is quoted in the judgment of the High Court. What the High Court had to decide was whether even with these differences in detail which had also been noticed by the Magistrate and the Sessions Judge a person might

be deceived by these wrappers and labels recovered from the respondents' shops. This aspect of the matter has not been considered by the High Court at all and it has contented itself by saying that the wrappers and labels recovered in this case were colourable imitations of the genuine trade marks. That in our opinion does not dispose of the matter so far as s. 28 is concerned. The High Court should have found whether the resemblance in this case was such as might deceive a person. The High Court had before it the opinions of the Magistrate and the Sessions Judge. Their opinion was to the effect that the resemblance was such as might deceive a person and that the differences in detail did not affect that resemblance. It was this aspect of the matter which the High Court failed to consider when it went on to hold that the labels and wrappers recovered along with the soaps from the shops of the respondents were not counterfeit. We have looked at the labels and wrappers on the soaps recovered from the shops of the respondents ourselves and compared them with the labels and wrappers of the genuine Sunlight and Lifebuoy soaps and we agree with the opinions of the Magistrate and the Sessions Judge that the resemblance is such that a person may be deceived by it. In the circumstances, *Explanation 2* to s. 28 will apply and as the contrary was not proved it must be held that the necessary intention or knowledge was there and these wrappers and labels are counterfeit of the genuine wrappers and labels of the Sunlight and Lifebuoy soaps of the company.

The appeals must therefore be allowed; but as the High Court did not consider the points relating to jurisdiction and limitation and whether the respondents were protected under cl. (a) and cl. (b) or (c) of s. 486, they will have to be remanded to the High Court for disposal according to law on these points. We therefore allow the appeals and setting aside the acquittal of the respondents under s. 486 of the Indian Penal Code only send the cases back to the High Court for disposal on the lines indicated above.

*Appeals allowed.*

*Cases remanded.*

1960

State of U. P.

v.

Hafiz Mohamed

Ismail & Hafiz

Jawed Ali

Wanchoo J.