

(1897) 02 CAL CK 0014
In the Calcutta High Court

T. Barlow and Others

APPELLANT

Vs

Gobindram and Another

RESPONDENT

Date of Decision : 16-02-1897

Acts Referred:

Citation : (1897) ILR (Cal) 364

Hon'ble Judges : Sale, J

Bench : Single Bench

Judgement

Sale, J.—The plaintiffs in this suit claim to be entitled to the exclusive use of the number 9000 as a mark for distinguishing certain cloth known in the Calcutta market as black-beetled cloth which is imported by them into Calcutta, and they seek to restrain the defendants by the injunction of his Court from selling or dealing with any black-beetled cloth other than that imported by the plaintiffs, which is stamped or impressed or marked with the number 9000, or any colourable imitation of such number. The defendants admit that they purchased and obtained delivery of, from Messrs. Hoare, Miller & Co., a consignment of five cases of black-beetled cloth marked with a certain design, a part of which design was the number 9000, and that they have since sold and disposed of the said goods in the Calcutta market. They, however, deny that the plaintiffs have a right to the If exclusive use of the number 9000 as a distinguishing mark for the goods imported by them, and they also deny that in selling and disposing of the goods marked in the manner aforesaid they infringed any right to which the plaintiffs are entitled. The plaintiffs are merchants and importers carrying on business in Calcutta, and the defendants are cloth dealers who have been in the habit for some years of purchasing black-beetled cloth which is known in the Indian market as kala kapra from various firms in Calcutta (and among them from Messrs. Hoare, Miller & Co.), and of selling the cloth so obtained by them by retail in the Calcutta Market.

2. The plaintiffs have for many years imported black-beetled cloth into the country, and are by far the largest importers in Calcutta of this particular variety

of cloth which is principally used to cover umbrellas. Formerly umbrellas were commonly imported into this country in the finished state. It is now very generally the practice to manufacture them locally, with the result that the demand for the cloth required in the manufacture has largely increased.

3. The plaintiffs adopted the practice generally followed in the piece-goods trade of distinguishing black-beetled cloth imported, by them by various marks and designs, sometimes used in combination with numbers and sometimes without numbers. It does not appear that the plaintiffs have for the purpose of distinguishing black-beetled cloth imported by them ever used numbers alone and independently of some object design. Mr. Sutcliffe, who is an assistant in the plaintiffs' firm, and who since he arrived in this country in December 1891 has been in charge of the piece-goods department, states in his evidence that the plaintiffs use some sixty different numbers for distinguishing black-beetled cloth imported by them; that all these numbers are used in combination with some with distinctive object design, and that besides these numbers sometimes object designs are used to distinguish this cloth with out any numbers at all. A considerable portion of the business in black-beetled cloth done by the plaintiffs consists in importing cloth upon the orders or indents of native dealers or shopkeepers, who again sell the articles to purchasers in the market who frequently are the ultimate consumers, that is to say people who manufacture umbrellas, or are in some way engaged in that trade; sometimes the purchasers are up-country dealers or their agents. It is not, I gather from the evidence, the plaintiffs' practice in their business to distinguish a particular quality or description of cloth always by the same object design or combination of object design and number. Different numbers and different object designs are frequently used to distinguish importations of cloth which are identically the same in quality, kind and measurement. For example, when the plaintiffs are importing the same quality of cloth for different dealers, although the cloth so imported may be the same in every respect, it is the plaintiffs' rule to stamp or impress the different consignments with different numbers, and sometimes with different object designs. In this way the use of a particular number is confined to the importation made for a particular dealer. It is explained that this practice is adopted to prevent dealers who import cloth through the plaintiffs from competing with and underselling each other in the market.

4. The plaintiffs commenced to use the number 9000, which is the subject matter of the present suit, as a distinguishing mark for cloth imported by them in November 1894, and the circumstances under which this number came to; be so used are as follows: Amongst the native dealers for whom the plaintiffs have imported black-beetled cloth is a man named Gunput Dass, who carries on business as a cloth seller at Monohur Dass's Kutra in Burra Bazaar under the name of Sookdeb Seetaram. In July 1894 Gunput Dass in his fifth of Sookdeb Seetaram required the plaintiffs to supply him with fifteen(tm) cases of black-beetled cloth of the same quality and description as the I cloth imported by them bearing the number 9015. As a matter-of-fact, the cloth bearing this number was

imported at the instance of another dealer, and accordingly Sookdeb Seetaram was informed that the cloth could not be supplied to him bearing the number 9015, but that he might have the same cloth marked with the number 9000. To this Sookdeb Seetaram agreed, and the usual contract was entered into, and in due course the cloth impressed with the number 9000, and bearing what is known as the balloon ticket, arrived and was delivered by the plaintiffs to Sookdeb Seetaram.

5. It appears that cloth of the same quality and description is also imported by the plaintiffs distinguished by the balloon ticket only and without any number, and that it is also imported and delivered to different dealers under the numbers 9510, 9010 and 9025 in combination with certain tickets bearing object designs. Mr. Sutcliffe is unable to say whether the balloon ticket is one of these. But it is certain that the balloon ticket is used by the plaintiffs in combination with three different numbers 9000, 9300 and 815 to distinguish different varieties of black-beetled cloth.

6. In the month of September 1895 the plaintiffs received information from the broker employed by them that the defendants were selling black-beetled cloth in the market, bearing the number 9000 imported by the firm of Hoare, Miller & Co., and subsequently a piece of cloth was produced to the plaintiffs, which it was represented had been purchased at the defendants' shop by one Rambux who was employed for the purpose by Gunput Dass. The piece of cloth so produced to the plaintiffs bore not only the number 9000, though differing in colour and appearance from the number as stamped on the plaintiffs' cloth, but it also bore the plaintiffs' balloon ticket. Now, if the evidence in this case sufficiently established the fact that the defendants were selling black-beetled cloth stamped with the plaintiffs' balloon ticket which bears on the face of it the design of a balloon and also the plaintiffs' name inscribed thereon, it would be strong to show that the defendants were endeavouring to pass off goods imported by Hoare, Miller & Co., as goods imported by the plaintiff. What the evidence is on this point, and what it proves, I shall have to consider presently. Meanwhile, inasmuch as the cloth which was being sold by the defendants undoubtedly bore the number 9000, and was undoubtedly imported by Messrs. Hoare, Miller & Co., correspondence ensued on the subject of the use of the number 9000 by the latter firm, which resulted in Messrs. Hoare, Miller & Co., on being satisfied that the plaintiffs' user of the number 9000 was prior in time, giving an assurance to the plaintiffs that they would discontinue the use of the number without however admitting the plaintiffs' claim to the exclusive right of using that number.

7. On the 31st October 1895 the plaintiffs through their solicitors wrote to the defendants requiring them to desist from selling or otherwise dealing with black-beetled cloth bearing the number 9000, imported through firms other than themselves. No reply to this letter was received, and on the 29th of May 1896 the present suit was instituted.

8. It is to be observed that the only infringement complained of in this suit is the unauthorised use of the number 9000 in respect of cloth not imported, by the plaintiffs. No reference is made in the plaint to any other mark or design used by them in combination with the number 9000, and no suggestion is made in the plaint that there has been any imitation by the defendants of the general combination of marks used by the plaintiffs to distinguish their goods.

9. It is necessary at the outset to see what the allegations in the plaint are in which the plaintiffs base their claim to the exclusive use of the number 9000 on black-beetled cloth imported by them.

10. These allegations are in substance two in number. The first is that the plaintiffs used the number to denote that the cloth which bore the number was of a certain quality, and that it was imported by them. This allegation shows the purpose and object the plaintiffs had in view in using this number.

11. The second proposition is that at the time of the infringement complained of, the number was recognized in the Calcutta market and by the dealers in different parts of India as representing that the cloth on which it was impressed had a particular reputation as to quality, and was imported by the plaintiffs.

12. In other words, what the plaintiffs say in the plaint is that the number was used by them to denote both the quality and the origin or importation of the cloth, and they go on to say that the number is recognized in the market as representing the quality and importation of the cloth.

13. It is clear from the cases which have been referred to that both these propositions must be established as the foundation of the right of exclusive user.

14. In the *Singer Manufacturing Company v. Loog* L. E. 8 Ap. Cal. 15 Lord Watson at page 38 of the report says: "I think it is established by the evidence that the name "Singer" as used by the appellant-company and their predecessor in business Isaac Merritt Singer has long been and still is generally understood to denote sewing machines of their manufacture," and again: "It is clearly proved that a customer desiring to purchase a Singer Sewing Machine invariably understood that he was buying and expected to get, not merely a machine made by Mr. Singer or the company, but a machine of the same shape and character with one or other of the classes which he or they were known to be making at the time,"

15. The learned Judge then proceeds: "The legal consequence of these facts is that the appellant company have a right, an exclusive right, to use the name "Singer" as denoting sewing machines of their manufacture." In the sentences which follow the learned Judge points out what is necessary to constitute an infringement of this right of exclusive user. He says: "No one has a right to use the word for the purpose of passing off his goods as theirs, or even when be is innocent of that purpose to use it in any way calculated to deceive or aid in deceiving the public. None of the numerous authorities cited at the bar by the

appellants" Counsel carry the exclusive right of a trader to a particular name beyond that limit. There is no authority, and in my opinion no principle for giving the trader any higher right. If he cannot allege and prove that the public are deceived or that there is reasonable probability of deception he has no right to interfere with the use of the name by others."

16. And so again in *Somerville v. Schembri* L. R. 12 Ap. CaL. 453 the same learned Judge in delivering the judgment of the Privy Council made use of the following observations at page 457 of the report:

In the first of these cases the interest which a merchant or manufacturer has in the trade-mark which he uses was thus defined by Lord Cranworth: "The right which a manufacturer has in his trade-mark is the exclusive right to use it for the purpose of indicating where, or by whom or at what manufactory the article to which it is affixed was manufactured." As soon, therefore, as a trade-mark has been so employed in the market as to indicate to purchasers that the goods to which it is attached are the manufacture of a particular firm, it becomes, to that extent, the exclusive property of the firm; and no one else has a right to copy it, or even to appropriate an part of it, if by such appropriation unwary purchasers may be induced to believe that they are getting goods which were made by the firm to whom the trademarks belong."

17. And, again, in *Johnston v. Orr Ewing* L.R. 7 Ap. Ca. 219 Lord Selborne in dealing with the question of the right of the respondent to the exclusive user of the Two Elephant mark, after stating the effect of the evidence says at page 221 of the report: "Hence it happened that many of the customers who desired to purchase the plaintiffs' yarn in Bombay and the markets supplied from thence, were in the habit of knowing it as, and calling it, "bhe hathi," which in the Guzerati language means "two elephants"; sometimes prefixing the word "Graham's " and sometimes "Sooneri," which means "golden." It is in my opinion clear upon the evidence that these words " bhe hathi" so used (whether alone or not) had reference to the device upon the plaintiffs' ticket, that they were used to describe the plaintiffs' goods, and those only, and that any customer or native dealer in Bombay or the districts thence supplied, when ho asked for "bhe hathi" yarn, would be asking for the yarn exported by the plaintiffs and bearing their trade-mark."

18. The learned Judge then adds: "The plaintiffs' title to their own trademark being clearly made out, the only question is whether the defendants have infringed it." The question then of the right to the exclusive user of a trade name, or trade number is largely, if not entirely, a question, of fact, and the question whether it exists in any given case must depend upon whether the evidence in that case is sufficient to show such a connection or association between the name or the number and the firm which uses it as to indicate to the ordinary purchasers in the market into whoso hands the goods marked with the name or number may come that the goods are the goods of that particular firm.

19. It is necessary, therefore, to turn to the evidence in this case to see whether such an association of the number 9C JO with black-beetled cloth imported by the plaintiffs' firm has been made out so as to show that this number appearing on that cloth is in effect a representation to the ordinary purchaser that the cloth bearing that number belongs to or has been imported by the plaintiffs.

20. The evidence which has been given in respect of the right of exclusive user of the number 9000 claimed by the plaintiffs falls under two heads: First, there is the direct evidence bearing on the user of the number 9000 by the plaintiffs and the reputation it bears in the market as applied to black-beetled cloth, and next there is a very large body of evidence dealing with the practice as to the use of numbers and their signification in the piece-goods trade generally, and to the meaning and use of a variety of numbers used in that trade. All this body of evidence last mentioned seems to me to have but a very remote bearing on the points at issue in the case. Both sides, I regret to say, have insisted upon appealing to the practices and usages prevailing in the piece-goods trade generally, and the result has been that a great many side-issues and remote questions have been discussed and evidence given thereon, which has led to an unnecessarily protracted hearing. Indeed, much of the evidence which has been adduced in this case only serves to show and to emphasize the fact that no general rule as to the right of exclusive use of numbers can be established from particular instances applicable to all the various numbers used in the piece-goods trade. Each case must depend upon its own particular facts, and it is impossible for the Court to form or to express any opinion as to rights of persons who are not parties to this suit, as regards particular numbers, when the facts and circumstances relative to the use of these numbers are not fully before the Court.

21. I propose therefore only dealing with the evidence so far as it bears directly on the use of the number 9000 and its reputation and meaning in the market in connection with the black-beetled cloth. I turn first to the evidence of Mr. Sutcliffe and the broker Proladh Roy. Both these witnesses say that between the months of November 1894 and September 1895 there was in their opinion a rapid sale of the plaintiffs' number 9000 black-beetled cloth in the market, and that an active demand for this particular cloth rose. They say that the purchasers of black-beetled cloth purchase usually by the number affixed to the cloth, and not from an examination of the quality of the cloth, and that the number 9000 quickly acquired a reputation in the market. Mr. Sutcliffe says that by September 1895, which is the date of the alleged infringement by the defendants, the number had acquired in his opinion a good reputation.

22. But to show that a particular number has acquired a reputation in the market, and that purchasers buy the cloth by the number and not from an examination of the nature or quality of the cloth, is not sufficient to establish the right of exclusive user of that number, as Markby, J., has pointed out in his judgment in the case of *Ralli v. Fleming* ILR 3 Cal. 417 see p. 433 of the report. It is consistent with this evidence that the reputation which the number acquired

was a reputation for quality only. It does not necessarily follow that the purchasing public showed a preference for the goods because the plaintiffs imported them, or that the number as understood by the public represented that the goods were in fact imported by the plaintiffs.

23. In cross-examination Mr. Sutcliffe was pressed as to the relative importance of the ticket bearing an object design and the number as used by the plaintiffs on their black-beetled cloth, and Mr. Sutcliffe in answer to a question said: "If the ticket were taken off I think a buyer would know our cloth from the number." I am sure that Mr. Sutcliffe was speaking particularly of the number 9000 when he gave this answer, but even if he did, it does not appear that Mr. Sutcliffe had any grounds for forming this opinion beyond that there seemed to him a demand for his firm's goods bearing that number.

24. So also the witness Proladh Roy says: "The number 9000 is well-known in the Bazar.

Q. What does the number indicate?

"A. It indicates that the cloth is Barlow's.

25. This again is the expression of an opinion only, and its value must depend upon the grounds on which it is based.

26. It does not appear that this witness had any better basis for his opinion than Mr. Sutcliffe. Moreover, the witness goes on to say that the other numbers used by the plaintiffs for precisely the same kind of cloth, i.e., the numbers 9015, 9010, 9025 and 9001, acquired but little or no reputation, yet the cloth was the same in each case and the importers were the same. It seems, therefore, reasonable to infer that any reputation the number 9000 acquired must have been independent of any association between the number and the plaintiffs as the importers in the minds of the purchasers. I do not think that any of the other witnesses who have been called say that purchasers or general dealers in the market understood from the number 9000 that the cloth on which that number appeared was the plaintiffs".

27. The other witnesses are witnesses who are unconnected with the plaintiffs' firm, and an examination of their evidence shows that none of them are prepared to say that purchaser's or general dealers in the market understood, from the number 9000 and from that number alone, that the cloth was the plaintiffs". I shall refer to the evidence of these witnesses shortly. I take the evidence first of Gunput Dass. This is the person to whom the plaintiffs exclusively delivered the cloth bearing the number 9000 up to the time at least of the alleged infringement. Gunput Dass says: "9000 cloth became known in the market. Two or three months after it came out I began selling it. All beparis began asking for this number."

28. This evidence so far only tends to show that this cloth was asked for and sold by him by the number, but then he adds: "Purchasers look to the quality of the

cloth and also to the number," and that statement goes to show that purchasers rely on their own judgment as to the quality of the cloth, besides looking to the number imposed upon it.

29. The next witness I refer to is Ram Dutt. This witness is a broker. He says he gets orders for kola kapra 9000. "It has a good reputation," and then he adds: "If some one asks me for 9000 cloth I would go to Sook Deb Seetaram and Jeebun Ram who take such cloth from Barlow & Co.

30. Nowhere does he say that the general reputation of the number 9000 in the market informs the purchaser that the cloth is the plaintiffs'.

31. The witness adds that on some cloth the name of the firm is written, and on others there is the ticket showing who the importers are. These facts, it is obvious, are facts which would inform the purchaser who the importer was, apart altogether from the number used on the cloth.

32. The next witness Sabha Chand said he purchased a consignment of 9000 cloth direct from the broker Praladh Roy, and that he went to Praladh Roy in consequence of something said to him by some beparis. He again does not profess to say that purchasers generally understood from the number 9000 alone that the black-beetled cloth belongs to or is imported by the plaintiffs. Moreover, in answer to the Court he said that in purchasing cloth they look to the marks and also use their own judgment in selecting the cloth. That also is evidence which tends rather to show that the purchasers use their own judgment in selecting cloth, and certainly do not necessarily buy cloth marked with 9000 merely on the faith or belief that it is the plaintiffs'. Heralal Chowdhry, another broker, says that a bepari in purchasing cloth looks at the sample and gives his orders according to the opinion he forms of the quality of the cloth from the samples. He says he came to know of the cloth 9000 in September or October 1895, and he adds: "Barlow's 9000 has a good reputation in the market."

33. Towards the close of his examination he says, "the best known kala kapra in the market is Barlow's 9000," and I take him to mean that this particular variety of cloth is most in demand in the market, but he does not say that this is so because it is known as the plaintiffs' cloth, or that the number 9000 gives the purchasers that information or that purchasers buy under that belief. Moreover, in cross-examination, he seems as regards one point to support what the defendant Tikunchand has said. He says he does not consider that when offering a number of marks to a purchaser that the particular mark chosen is of much importance. He says it does not make much difference to him which mark is chosen, and that even if the cloth comes out without any number at all it would not necessarily make any difference.

34. The witness Fakir Chand Dey represents an important class of witnesses, namely, those who are the actual consumers of this cloth. He says he does an umbrella business, and buys kala kapra to cover umbrellas with. He says he knows Barlow's kala kapra 9000, and all he knows is that Barlow's number 9000

is a superior quality of cloth. He adds that he does not know much about its reputation. He says he never bought number 9000, but only number 9015. The evidence of this witness and of others who follow him rather tends to show that there is in fact no reputation in the market as to number 9000 kala kapra being the plaintiff's cloth, because it is difficult to believe that if any such general reputation existed as to the ownership or importation they would not have known of it.

35. Sri (sic) fas Geenka is a broker, and his evidence merely goes to show that when (sic) 1) &" want Barlow's cloth they ask for Barlow's cloth. His evidence (sic)lacSd to show that there is any such reputation in the market, which of) (sic)f supplies the information that the number 9000 belongs to Barlow & Q8,1"6, He was not cross-examined.

36. Ram (sic)TPen"r(sic)isto Dey is a dealer in umbrellas. He says he knows kala kapra 9000 and n(sic)aa he knows it is imported by Barlow. He says he gets it because it was H"Anl(sic)UIS largely in the market, and that it was of good quality.

37. In (sic) s-examination it appears that his knowledge of this number 9000 being Barlow 1(sic)1 v"s was not derived from any reputation in the market but from information (sic)f8, Supplied by the broker direct. Panchanun Dutt, another umbrella dealer speak li(sic)f8 np number 9000 being a well-known number in the market.

38. This is P(sic)Jorrtile dealer who obtained a direct consignment of twenty-five cases of the number b na"r(sic) throro 9000 cloth from Barlow about or shortly before the institution of this suit. This, witness makes one statement, which at first sight seems to be of more importance than the statements of the witnesses I have referred to. He says: "When I go to purchase cloth I ask for number 9000. I make no mention of the balloon ticket." If what he meant was that on going to a general dealer in the market and on asking for number 9000 he obtained the plaintiffs' goods that would be some evidence to show that there was a general understanding in the market that the number 9000 was the plaintiffs', but, it turns out that he is only referring to a purchase made by him direct from Barlow and Company, and his evidence also shows that when he purchased in the open market he used, not the number only, but the name of the importer. He says he has only purchased in the Bazar once, and that was Messrs. Mitchell; Bardsley & Co.'s cloth, arid on asking for it he asked for Mitchell; Bardsley & Co.'s cloth numbered so and so.

39. These are all the witnesses who speak to the reputation of number 9000 on black-beetled cloth in the market.

40. This evidence in my opinion fails to establish that there was any said association between the number 9000 and the plaintiffs' name as to indi(sic)an in the understanding of the public that black-beetled cloth bearing the number came from their firm, If so, then there is no right of exclusive user on the part of

the plaintiffs as regards the number 9000, and this suit must fail on the ground. But it is desirable perhaps that I should express my opinion on the evidence bearing on the question of infringement, assuming for this purpose that the plaintiffs have the right of exclusive use which they claim, I do not wish to be understood as saying that a number and a name stand necessary in the same position so far as the question of both being properly the subject matter of right of exclusive user is concerned. It has been said that the case of *Ralli v. Fleming* already referred to affords an instance where the right of exclusive user of a number has been recognised. But when this case examined I do not think it can be regarded as an authority for the recognition of any such right.

41. The facts in that case showed that there had been an imitation of general combination of marks used by the plaintiffs, and the learned Chief Justice appears to have based his opinion very largely on this circumstance. *Markby, J.*, on the other hand, thought the only infringement the plaintiffs were entitled to complain of was the use by the defendants of the number 2008, and as regards this number he held that the plaintiffs had failed to establish their claim to the right of exclusive user, and the injunction which was issued in accordance with the opinion of *Garth, G.J.*, was to following effect: "Order, that the defendants be restrained from selling cloth impressed with the combination of marks described in exhibit to the affidavit of *Alexander Westerhout*, or any other combination that used by the plaintiffs, and especially from using the number any such combination."

42. The right of exclusive user of a name, as has been pointed out in the case of *Singer v. Loog*, is not an absolute and unqualified right which entitles the owner to prevent another person from using it under all cases. It is only when the use of the name deceives or is reasonably like what the public that it can be interfered with or prevented. The same must apply to the right of exclusive user of a number.

43. The use therefore of the number 9000 on cloth sold by the defendant only be an infringement of the plaintiffs' right, if it can be shown such use was intended to deceive the ordinary or unwary purchase belief that the goods were imported by the plaintiffs or that should take the cloth stamped with the number 9000 or any other number. The five cases arrived in September 1895 and they were all sold off by the defendants between the end of that month and the early part of November 1895. On comparing a piece of the plaintiffs' number 9000 cloth with a piece of the defendants' cloth bearing that number the observer cannot fail to be at once struck by the total dissimilarity of the general combination of marks appearing on the respective pieces. Each piece bears a very distinctive object ticket. The plaintiffs' is a balloon ticket rectangular in shape. On the defendants' is a butterfly ticket which is triangular in shape. The marks are arranged differently and even the number 9000 on the plaintiffs' cloth is very unlike the colouring and appearance from the 9000 which is impressed on the defendants' cloth. The plaintiffs' number is in very bright colouring and attracts the eye at once, whereas the number on the defendants' cloth is dull and faint colouring and

does not readily attract attention.

44. I am aware that a comparison of different combinations of market by side is not conclusive on the question of infringement. But I take it that the general dissimilarity of the marks is not a matter which can be disregarded.

45. When numbers are used in conjunction with striking object designs it is difficult to believe that goods are dealt with by the number alone without any reference to the object design. The evidence is that the balloon mark is well known in connection with the black-beetled cloth, and taking all the facts together, I cannot bring myself to think that the use of the number 9000 by the defendants under the circumstances and in conjunction with the other marks proved in this case is calculated to deceive purchasers into the belief that the Dy the defendants is cloth imported by the plaintiffs.