

(1904) 04 MAD CK 0001
In the Madras High Court

T. Nooroodeen Sahib

APPELLANT

Vs

Charles Sowden and Others

RESPONDENT

Date of Decision : 22-04-1904

Acts Referred:

Merchandise Marks Act, 1889 — Section 2, 4

Citation : (1905) 15 MLJ 45

Hon'ble Judges : Moore, J;Davies, J;Benson, J

Bench : Full Bench

Judgement

Davies, J.—The first three plaintiffs are importers of "" Grey shirtings"" from Manchester of which the, last three plaintiffs are the shippers. On

these goods they have since 1889 stamped a "" facing"" which, to take a typical example, consists of letters, designs and numerals in the following

order:

T.A. Taylor & Co. (in. Roman capitals).

A coat of arms.

T.A.T. (in manuscript form).

Scimitars placed horizontally varying in number for quality.

Figures showing weight in lbs.

A number.

A circle within a circle with, inscriptions denoting Firm.

Figures showing length in yards.

A letter (Roman capital)

A number.

2. The plaintiffs claim the whole of this combination in the sequence in which its details stand as their "" trademark"" and charge the defendant

another importer of similar goods with the infringement of it by stamping his merchandize with a facing so closely resembling theirs in the character

and order of his marks as to mislead the public into believing that in purchasing his shirtings they are purchasing the plaintiffs"

3. The action is not upon a "" trademark"" properly so called as there is no registration of trademark in this country, but it is brought upon the right of

an exclusive user of what may be more appropriately styled a "" trade description"" which is recognized and protected under Sections 2, 4 and 6 of

the Indian Merchandize Marks Act IV of 1889. So that there can be no doubt that the plaintiffs are entitled to the injunction the learned Chief

Justice has given them if they have established (1) their exclusive user of the abovementioned marking and (2) that the defendant has imitated it so

that the imitation is in the words of Section 4 of the said Act "" reasonably calculated to lead persons to believe"" that his goods are their goods. My

conclusions on these questions--which are really questions of fact--differ from those of my learned brothers and so I may as well state what they

are and adduce my reasons afterwards. On the first point I find that the plaintiffs" right of exclusive user is limited to the first four items of their

marking that is to say the name of their firm, their coat of arms, the facsimile initials of the late Mr. Taylor, and the scimitars. On the second point I

find that the defendant has not imitated any of those marks and further that what he has copied he was at liberty to copy and no one is likely to be

deceived thereby into taking his goods for Taylor"s.

4. Now to establish the "" user,"" as the term is understood in Commercial Law, of a trademark it is necessary for the claimant to shew that it is by

that particular marking his goods are known or recognized in the market or by the public. In this case the plaintiffs have set themselves to prove

that it is by the whole series of marks arranged in the particular way indicated that their importations are distinguished from the importations of

others. It must therefore be shewn that the general appearance or "" get up"" of the facing printed on their cloths is so associated in the mind of the

public with the plaintiffs" goods that when a person sees the former, he is satisfied it implies the latter. And this must be proved as a fact before any

question of deception by imitation can arise. Here so far from there being proof there is not even evidence that the plaintiffs' goods are known by

the combination of marks which they want to monopolize. Mr. Sowden (the 1st plaintiff) himself says that his shirtings, are known both in Madras

and up-country as ""Talwar"" (Hindustani for sword) or ""cutty"" (Tamil and Telugu for knife) or ""Taylor house"" shirtings the two former obviously

referring to the scimitars, and the latter to the name and initials of the Firm stamped so clearly upon the cloth. Mr. Sowden does not state that

Taylor House"" is known to the outside public by any thing more than the scimitars and the name. He does not state that it is known to the

community by the combination and arrangement of which he is claiming the ""user"" and so he does not support his own case. The evidence of all his

witnesses and of the witnesses for the defendant is to the same effect that the plaintiffs' grey shirtings are generally known only as ""Talwar or cutty

goods.

5. It is true that two of the Mahomedans, witnesses for the plaintiffs, add that Taylor's goods are also known by the other marks in the facing but

there is nothing to support their statements, while the rest of the oral evidence on both sides is to the contrary, and all the documentary evidence on

the record and the ""fashion of the market"" contradicts and disproves them. Thus in the various price lists, orders, invoices, and letters that have

been filed the plaintiffs' shirting are invariably referred to as Scimitars, Talwars or Cutties, just as the shirtings of the other numerous importers,

Europeans and natives, are quoted as Doves, Serpents, Revolvers, Rose water sprinklers, Elephants' Heads and so on, according to their

distinctive object designs by which alone they are commonly or popularly known in the market. There is no instance of any of this class of goods

being identified by combination or particular designs with figures, letters, circles and other such marks, which merchants are using in common to

denote quality or quantity. The plaintiffs' claim that they alone can appropriate to themselves in combination the use of marks which are ordinarily

publici juris"" is from its extraordinary character one that must be strictly proved. They must show that these marks as arranged by them indicate

origin or property as well as quality, and in this they have entirely failed. Several facings in vogue among importers in Madras have been exhibited,

and their general appearance is thus summarized by the learned Chief Justice. "They have a good many features in common. They are all or nearly all of the same colour. They all have somewhat similar "headings" or borders. They all or nearly all have at the top of the facing something in the nature of a heraldic device. They all have a special symbol or fancy marks. They all bear a series of figures and letters arranged vertically". Mr. Sowden asserts that this was a system originated by his Firm in 1876 and so it may have been. But his right to it by allowing other firms to copy it without protest for the past quarter of a century is now dead and gone. It seems to me that is an attempt to revive it upon the strength of what was in 1889 merely a re-arrangement and alteration of the component parts of the old system of 1876 but nevertheless it is the same system still. In 1889 Taylor's goods were known as they are known now by the scimitar mark which has been their distinctive mark all along, and Mr. Sowden has not shown that by the changes in his facing made in 1889 his goods acquired any fresh reputation--in other words that by reason of the alterations then made his shirtings have become more distinctly or widely known to the public. The result is that having failed to prove that his shirtings are distinguished and known by the general get up of his marking the foundation of his case goes and there is an end of it. Besides the name and initials of their firm, and the scimitar and the coat of arms (the two latter having been registered as "trademark" in England) the plaintiffs would claim as one of their distinctive marks as apart from their general facing the double circular name stamp. Now this design the circle within a circle with inscriptions of the name of house inside was originally the defendant's design. He was using it on these shirtings in 1880 when the plaintiffs had only a single circle and he has never abandoned the use of it. It is manifest therefore that the plaintiffs' exclusive claim to it is bad--for even if they have enlarged the size, the design itself is exactly the same as the defendant's. In my judgment then the only right of "user" in its legal sense to which the plaintiffs have proved themselves entitled is to their name, their coat of arms, their initials and their scimitars the first four items in their trade description and in respect to these there has been no imitation by the defendant.

The following is a type of the defendant's facing:

T. Nooroodeen Saib & Co., (in Roman capitals).

A coat of arms.

Words in Tamil and Telagu signifying ""scent bottle"".

Cut glass scent bottles placed horizontally.

Figures showing weight in lbs.

A number.

A circle within a circle with inscriptions denoting Firm.

Figures showing length in yards.

A number.

6. A letter (Roman capital) which in the sequence of its marks closely follows the plaintiffs" more so in fact than any of the other samples we have

seen. In regard to the first four items however the differences are most marked. Thus in large and clearly printed letters the defendant shows that he

is Nooroodeen, the Mahomedan--not Taylor, the Englishman The defendant"s coat of arms coming next in arrangement is very dissimilar to the

plaintiffs". His crest is a crown which he has used since 1880--on his shield is a lion ram print--motto he has none. The plaintiffs" crest is a

crescent--on the shield are two scimitars crossed and for motto ""Semper Resurgam."" The third mark of the defendant"s which are the vernacular

words for scent bottle are no copy of the initials T.A.T. and the fourth mark in the facing the defendant"s scent bottle is as different in shape from

the plaintiffs" symbol--the scimitar--as two things can be. To any one possessing the slightest idea of form the one could never be mistaken for the

other. So that the defendant has not imitated in any way the four distinctive marks to the use of which alone the plaintiffs have the exclusive right,

and hence it is no doubt that the plaintiffs do not make that the basis of their action. Now what has the defendant done? It will be seen that all the

other marks at the bottom of the facing refer to quality or quantity unless we except the double circle, and as for that it belongs to the defendant

rather than to the plaintiff. One mark at least--that denoting length--is required by law and the others by the usages of the trade. The defendant is

therefore imitating nobody in particular by putting on these descriptive marks, and in the marks indicating property he has not imitated the plaintiffs.

So there is no imitation in all or any of: the marks themselves. The head and

front of the defendant's offending is then reduced to this--his imitating the order or arrangement in which those marks stand so as to make them correspond with the plaintiffs". The defendant has undoubtedly done this but with what object ? To show that the shirtings though his are as good as Taylor's. His correspondence with Gunnis and Co., seems to me conclusive when it is read right through, that his sole object was to get his goods of a quality equal to or better than Taylor's and to have them so marked in that respect as to successfully compete with Taylor in the market. It must be borne in mind that the defendant is not an adventurer seeking a bubble reputation, but a large importer of long standing. The correspondence shows that he was trying to build up his own old reputation in grey shirtings and I can find nothing in it to justify the notion that he wanted to pass off merchandize of his own as Taylor's. I think his marking of itself proves the reverse. He has studiously avoided imitating the plaintiffs' distinctive marks and has in unmistakable characters declared his own. His adoption of the plaintiffs' general arrangement in the placing of his marks must therefore be attributed to some motive other than to induce people to believe that his goods are the plaintiffs' goods for he has done his best to show that they are not. By the light of the letters between himself and his Manchester friends it is made clear that his reason for copying the plaintiffs' arrangement was to announce to the public that his own wares were equal to the plaintiffs' in quality and he has a perfect right to make that announcement in the way he has done. It is not suggested that the public have a preference for Taylor's goods on any score but their good quality. It is not on account of the beauty of their facing or that it has lucky numbers or any other adventitious circumstance that makes their goods sought for. If it were so, the defendant's resemblance thereof would of course be prohibited. But true representations as to quality however published have a fair field and no favour in the mercantile world. If the defendant's is a false representation he has made it at his peril subjecting himself to the criminal law but that is another matter.

7. Lastly coming to the question of deception no instances of actual deception having been cited, we have to consider only the probabilities of deception and for that purpose to bear in mind who the purchasers are. There are two main classes. The dealers wholesale and retail and the

consumers, who may be subdivided into literate and illiterate. Would any of these buy shirtings by the general appearance of the marking stamped on them. It is certain that no shirtings are known in the market by their general appearance, but only by their distinctive marks or by the Firm's name. Hence it may be concluded that shirtings are not purchased by looking to their general appearance. We have Mr. Leighton's word for it that dealers "" are suspicious, about marks"" and as to consumers generally I doubt if they can by the general appearance distinguish one from the other the dozens of facings in the market which all bear so strong a family likeness to one another. It seems to me that no buyer is guided by general appearance--the dealer because he is too cautious and the consumer because it would only puzzle and confuse him. It might be different if the conglomeration of the various marks went to form a definite picture of its own, but its chief characteristic is that it is non-descript. The facing viewed as a whole is meaningless to trader and customer alike. It must therefore be examined in detail to get a clear idea of what it denotes. Let us see which marks are meant to appeal to the dealer and which to the ordinary purchaser. My impression is that the lower portion of the marking with its numerals and letters indicating quality, quantity and weight is intended for the trader only, because in the first place being in English the ordinary purchaser would not be able to make them out and in the second place we are told they convey a hidden meaning which only the trader under-stands. Consequently the trader would not be misled in this matter. The top of the facing is what is left to designate whose merchandise it is to purchasers who can read names or appreciate pictorial designs. As already pointed out by me such persons could not possibly be deceived into taking the defendant's goods for the plaintiff's for if they looked for name they would find Nooroodeen's not Taylor's and, if they looked for emblem they would find Nooroodeen's bottles and not Taylor's knives. Whatever else the bottle might be mistaken for, it could never be mistaken, for a knife or cutting instrument of any sort. So that with regard to all people who buy these goods by looking to the name and marking, that is the dealers and the intelligent section of the public, there can be no probability of deception. It is said the unwary may be deceived. If the trader is unwary he has only himself to blame. If the customer is the unwary person the defendant cannot be blamed if he takes the defendant's

goods for Taylor's as the defendant has plainly stated, so far as name and mark can do it, that they are his own and not Taylor's. But I doubt if the unwary purchaser exists in the case of an article of clothing like this which has become a necessary of civilized life. The consumer would always be careful in selecting what he wanted in anything of that sort. It remains to deal with the other section of the purchasing public, namely the illiterate or uneducated portion which is by far the larger as it includes womankind. It is obvious that these people would not look to written names or letter for they could not read them, and as to marks presented in the form of drawings I make sure they could not distinguish, one from form another. They would know a real bottle from a real knife or life size models thereof, but the plain outlines of any object on a fiat surface, where solidity, size, and colour are all left to the imagination, is beyond their comprehension. Even our own children require teaching in this respect. Then how would the ordinary uneducated country man or woman be guided in buying a cloth. They are by no means ignorant in matters relating to their bodily wants--the food they eat and the clothing they wear--and what they do as the witnesses for the defendant prove is to look to the cloth itself. They touch and feel the stuff and put it in the light, and by such tests alone decide whether they will take this piece or that. They are regardless of the making which is not put on any shirtings for beauty's sake or for luck and which disappears at the first washing. Taking the article he wants by actual trial and not on trust no buyer can be befooled by marks which he does not pretend or try to understand.

8. So that assuming that plaintiffs had proved the "" user"" of their facing which in my opinion they have not proved I further find that so much of their making as the defendant has imitated is not calculated by that imitation to induce any purchaser whether he or she be dealer or consumer--learned or unlearned--into the belief that the defendant's goods are Taylor's goods--or the select because they could discern the difference between the two facings at a glance and the mass because to them all markings are unintelligible.

9. I would therefore allow the appeal and dismiss the plaintiff's suit with costs throughout for there is nothing to show that the defendant was unreasonable in refusing a compromise which was attempted or any other reason why the costs should not follow the event.

Benson, J.

10. I am of opinion that the view taken by the view taken by the learned Chief Justice and by Mr. Justice Boddam is correct, and that the

defendant's appeal should be dismissed with costs. The plaintiffs claim an exclusive right to use the combination of designs, letters and numbers

which is imprinted on their grey shirtings, and which is known in the trade as their "" facing"", and they ask for an injunction to restrain the defendants

from using a facing on his grey shirtings which the plaintiffs allege is a colorable imitation of their facings, and which is calculated to deceive ignorant

and unwary purchasers into believing that the goods sold by the defendant are those of the plaintiffs' firm.

11. The law on the subject is clear enough.. The difficulty is in the application.

12. There is no system of registering trademarks in India. Every one may use any mark or combination of marks or symbols that he likes unless

some other person has by user acquired a reputation which couples his name with the mark or combination of marks or symbols. In that case the

user acquires a property in the mark or combination which the law will protect just as much as if it were a registered trademark. As observed by

the Privy Council in *Somerville v. Schembri* L.R. 12 A.C. 453. ""As soon, therefore, as a trademark 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 that firm, and no one else has a right to copy it, or even to appropriate any 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 trademark belongs."" ""It is not necessary to prove that

any one has, in fact, been deceived. It is enough if "" the defendant's trade mark bears such a resemblance to that of the plaintiffs as to be

calculated to mislead incautious purchasers,"" per Lord Kingsdown in *Leather Cloth Company v. American Leather Cloth Company* 11 H.L.C.528.

13. Now in the present case there is abundant evidence to prove, that the elaborate "" facing"" shown on the cloth, Exhibit EEE has been used

without alteration and continuously by the plaintiffs on their grey shirtings ever since 1880; and that their goods, so marked, have obtained a great

reputation in the markets of this Presidency, so much so that the defendant

writes to his agent in 1901 (Exhibit R) that the plaintiffs' "cloth is sold more by name and stamp than anything else" and again (Exhibit GG) "it is current just like sovereigns or Government paper." There cannot, I think, be the slightest doubt that plaintiffs had in 1901, and for several years previously, acquired by user a property in the facing shown on their cloth Exhibit EEE.

14. The facing is very elaborate. At the top comes the name of the plaintiff's firm T.A. Taylor and Co., in block letters; next comes the coat of arms consisting of a shield in the middle with a lion and a unicorn on each side; below this the initials (T.A.T.) of the firm; below this come one or more swords placed horizontally (the swords depicted being in fact a Mahratta sword); below this is the weight; then the number; then a double circle containing the words "Sold at the house of" in Telugu in the outer circle and Tamil in the inner circle and "T.A. Taylor and Co." in English at the bottom and in the centre a Hebrew letter. Below the double circle comes the length 38/38 1/2 and below that again a block letter and number and along side of the whole of these is a border. The whole is printed in red colour.

15. No doubt the most distinctive single feature in his combination is the scimitar, or series of scimitars, lying horizontal, and varying in number with the quality of the cloth and from this feature the cloth was generally known in the market as "tulwar," "sword," or "kattee" (knife), cloth, but it was sometimes also, known simply as "Taylor house cloth." This system was invented by Mr. Taylor apparently in 1876, and it has been followed without objection on the plaintiffs' part by all the leading firms of Madras, Some use elephant's trunks, others revolvers, others sprinklers and so forth. But though each has in this way a special distinctive mark, this mark forms only a part of each firm's facing--some facing are more, some less elaborate. The plaintiffs' is more elaborate than any of the others, and none, of them imitate the plaintiffs' in anything like the close detailed manner that the defendants' facing does. The fact that the plaintiffs do not complain of the other firm's partial adoption of their system is not, I think, any valid reason for saying that the plaintiffs have no right to complain of the defendant's much closer imitation. The defendant was formerly in business with his brother, Rahiman, and they then used mermaids as their distinctive

mark--Rahiman died in 1895; and since 1896 the defendant has carried on business in his own name.

16. Now there is abundant evidence, which has been set out in the judgments that have been already delivered in this case, and which I need not

repeat, to show that from 1897 the defendant set himself deliberately and keenly to compete with the plaintiffs in the market for grey shirtings. No

objection could be raised to this provided he did it in a legitimate way. He constantly wrote to his English Agents urging them to improve the quality

and to lessen the cost, so as to enable him to compete successfully with the plaintiffs whose goods held the market, and he sent samples of the

plaintiffs' goods so that the agents might get the same goods or goods of equal quality for him. All that was perfectly fair and legitimate. The English

Agent complied with his requests, and still the defendant could not secure a good market. On the 30th March 1898 Messrs. Gunnis and Co., the

English Agents, write (Exhibit HH) to the defendant "' T.A.T. and Co.'s 44 and 48 grey shirtings which you praise so highly. Well, we have sent

you these same cloths over and over again. Indeed there is hardly a first class make which you have not had either in patterns or in goods, but your

buyers never seem to like them when they bear your stamps, or else they will not pay the prices as others do.'" Now whether this was intended

merely as a little chaff at the defendant's expense, or was intended as a hint that he should imitate the plaintiffs' stamps, it is certain that

immediately after the receipt of that letter, the defendant set to work, deliberately and systematically, though cautiously, to alter his "'facing"' little by

little, so as to come nearer and nearer by degrees to that of the plaintiffs. The details of these alterations have been accurately set out in the

judgment of Mr. Justice Boddam. These alterations were begun in the letter (Exhibit M), dated 21st April 1898, and ended with the letter (Exhibit

AA), dated the 13th June 1901, and in the interval the defendant made a dozen or more alterations in his facing and every one of them brought his

nearer to the plaintiffs' facing; in the size, number, arrangement and general effect of the various signs, letters and numbers. The defendant even

sent specimens of the plaintiffs' facings to England to his Agents there when giving them instructions as to the facings required by him, and thus

enabled them not only to closely imitate the letters and other particulars, but

also to get the exact tint of color, so as to make the general effect to correspond more closely. The scimitars alone were not imitated except by putting in their place scent bottles lying horizontal. Now it is contended for the defendant that the scimitars of the plaintiffs and the scent bottles of the defendant are the only material parts of their respective trademarks, and that the other marks and numbers are *publici juris*, and that their imitation is immaterial so long as the distinctive marks of the scent-bottles remain. No doubt the plaintiffs cannot claim an exclusive right to the use of numbers denoting the length, or the weight or the quality of the cloth, nor do they do so. With the exception of the scimitars, the double circle and its inscriptions, and of course, the name and initials of the firm, the plaintiffs do not claim any exclusive right in the letters or figures which appear in their facing taken separately, but, they do claim an exclusive right to the combination of the letters and figures as arranged by them with the scimitars, and the double circle and its inscriptions and to this I think they are entitled. The question is not, I take it, whether the defendant has imitated this or that part alone of the plaintiffs' design, but whether, as a result of his using the design complained of, he is doing what is calculated to lead an ignorant and unwary purchaser into thinking that in buying his goods he is really buying the plaintiffs' goods.

17. Then it is contended for the defendant that as a matter of fact the design complained of is so unlike the plaintiffs that no one but a fool or an idiot would be misled by it and that trade marks are not intended for such persons. On this question a great deal of "opinion evidence" has been adduced on both sides, and although such evidence appears to have been treated by the House of Lords as admissible in the case of *Johnston v. Orr Ewing* L.R. 7 A.C. 219 it is difficult to see under what provision of the Indian Evidence Act, it can be regarded as admissible in this country. I agree with my learned brothers that we must exclude it from consideration. There is, however, evidence that the ultimate purchaser is in very many cases an ignorant and uneducated person. It may well be that a person able to read would not mistake the two facings. The plaintiffs' and defendant's names are printed in English and in the vernacular on their respective cloth, and this would be enough to save any one who could read from being deceived., but the writing would be no safe-guard to one who could

not read. The writing in English letters at the top and in three vernaculars in the double circle would appear to a man unable to read to be exactly similar in both the plaintiffs' and the defendant's facings. There is some evidence that the defendant's former firm of Rahiman Sahib did use a kind of double circle in 1881, but it was in combination with an oval mark, and it was not originally similar to the plaintiff's double circle. In 1900, however, he made it exactly the same as the plaintiffs' in size, position and arrangement of the tri-lingual writing in it and he dropped the oval which had previously always been used in combination with it. What was the object of this, except to imitate, the plaintiffs' facing more closely ? Even the place of the plaintiffs' scriptoria initials in their facing is occupied in the defendant's facing by the name of the scent bottles in the vernacular. To a man who could not read, the two sets of letters would seem much the same--viz. some writing which he could not read. Some uneducated men are shrewd enough, and if such an one had noticed the scimitar device and wished to see it on the cloth, he probably might be saved from deception by the difference between the plaintiffs' scimitars and the defendant's scent bottles, but after more than 30 years' experience of the people of this part of India I can well believe that in the case of ignorant and incautious buyers who had only a general impression of Taylor's facing and who might not pay special attention to the scimitars or scent bottles, the general resemblance of the defendant's facing to the plaintiffs' would be likely to mislead. In my early days, when I was engaged in revenue settlement work, I had a great deal to do with the uneducated cultivators--the class to which so many of the ultimate buyers of the grey shirtings belong--and I was often struck with the difficulty of getting them to understand a plan or drawing of any kind. It was unfamiliar to them, and conveyed no idea or only a "vague idea to their minds.

18. No doubt the figure of an ox or a God bill-hook or other object familiar to them, might easily be recognized; but the plaintiffs' scimitar is quite unlike any knife or sword known to the ordinary cultivator. The defendant's scent bottle is equally unlike anything he knows in daily life. I can well suppose that an ignorant man, who had only heard of the famous " sword " or " knife " cloth, might be misled into supposing that the scent bottle on the cloth was intended to represent the knife or sword of which he had heard. It

must be observed that notwithstanding the defendant's evidence in the box, he really had not established any reputation for his scent bottle cloths. They were not familiar to any large class of buyers, for as late as November 1901 (Exhibit GG) we find him writing to his agents "we are doing our very best to introduce the scent-bottles. Although we are in infancy of them orders are just coming in". Moreover, the plaintiffs' cloth was not always known by the name of "sword" or "knife" cloth. It was also known as "Taylor's house cloth." To one who knew it by that name, or who knew it not by any particular name, but by his general recollection of the facing on it, the scimitar would probably seem of little importance. Indeed, where the scimitars are few in number, say, only 2 or 3, they would be a comparatively small feature in so large a design and might well be overlooked in the mass of other marks, letters and figures which make up the whole facing. Then we have the defendant's conduct. As observed more than once by their Lordships in the case of *Johnston v. Orr* Swing L.R. 7 A.C. 219 such conduct is cogent evidence against the defendant on the question whether the colorable imitation was calculated to mislead. The defendant is a man of great shrewdness, and he has over 20 years' acquaintance with the particular market for those goods. He understands the habits and ways of thought and methods of the Indian buyer probably as well as any man in the trade. What he does not know in regard to it is probably not worth knowing. He is not a man likely to spend money in making changes from mere caprice. Indeed he would be likely to avoid change, unless he had something to gain by the change, for, as one of his own witnesses says, the Indian buyer is suspicious of novelty. The defendant is absolutely unable to give any reasonable explanation for the changes made by him. The fact that he thought it advisable to make so many changes, and always in the direction of getting his facing nearer and nearer to that of the plaintiffs leads me irresistibly as it led the learned Chief Justice to the conclusion that he thought the change was likely to result in commercial advantage, to be obtained either by the goods being occasionally mistaken for those of Taylor & Co., or by purchasers associating his goods with those of Taylor & Co., and thinking they were of the same kind and quality on the strength of the resemblance of the two facings.

19. The words of Lord Chancellor Selborne, in the case of *Johnston v. Orr Ewing* L.R. 7 A.C. 219 already referred to, are *mutatis mutandis*

closely applicable to the present case. He says : "" Nor am I able to conceive any satisfactory explanation, under all the circumstances of the case,

of the adoption by the defendant of that particular device *** knowing as they did the plaintiffs" ticket, knowing also the character and

circumstances of the markets, and entering as they did on this particular branch of trade with the direct object of competing with and underselling

the plaintiffs, unless it was because they had a desire and intention to approach the plaintiffs" trade mark as nearly as they possibly could. For such

desire and intention no motive can be suggested, except that of getting some part of the benefit of the good-will and reputation of the plaintiffs"

trade"".

20. It seems to me clear that the defendant has made and used a facing for his grey shirtings which is in many respects a colorable imitation of the

facing of the plaintiffs to which the plaintiffs had by user and reputation an exclusive right, and that the imitation is likely to mislead ignorant and

unwary purchasers into believing that the defendant's goods are those of the plaintiffs.

21. He, no doubt, was careful to maintain certain differences in part of the facing in the hope that the Courts would regard them as sufficient to

show that the facing could not mislead. He sailed as near the wind as he thought he safely could. In my opinion he has overpassed the line of safety

and has used a facing which is calculated to mislead, and which infringes the plaintiff's trade mark.

22. I would therefore dismiss the appeal with costs--higher scale.

Moore, J.

23. As no less than five learned Judges of this Court have written elaborate Judgments in this case it does not appear to be necessary or advisable

for me to go through the facts of the case in any detail. It is sufficient that I should state the conclusions that I have arrived at. The principle of law

that should be applied in deciding a case such as this is in my opinion simple and has been well summarised as follows:--"" That principle is that no

man may canvass for custom by falsely holding out his goods or business, whether by misleading description or by colorable imitation of known

marks, packages, and so forth, as being the goods or business of another. Its application is not excluded by showing that the style or words

appropriated by the defendant are in themselves not false as he uses them, or that the plaintiff, if he succeeds, will have a virtual monopoly in an

exclusive designation which is not capable of registration as a trademark. The question is whether the defendant's action naturally tends to cause an

ordinary dealer or purchaser (not necessarily the first purchaser, for the effect on the public at large is to be considered) to think he is dealing with

the plaintiff or buying the plaintiffs' goods." (Pollock on Torts fifth Edition, pp. 298, 299). I proceed to apply to the present case this principle

which, in my opinion, briefly but correctly summarises the law as laid down in the several leading cases. In the following remarks it must be

understood that I am dealing with the illiterate purchaser only and mainly with that class of purchaser as he is to be found up-country. The buyer

who knows English would not be taken in for a moment. Glancing even hurriedly at Exhibits EEE and KKK (which I have selected for purpose of

comparison) he would at once be struck by the words T.A. Taylor stamped at the top of Exhibit EEE and T. Nooroodeen Saib and Co., which

occupies a similar position in Exhibit KKK and could not possibly be mistaken as to which goods purported to be those of the plaintiff and which

those of the defendant. Suppose, however, that these two facings are examined by the illiterate up-country purchaser, what will be the impression

that they will make in their several component parts on his mind ? the purchaser I am thinking of will be the petty dealer who keeps a small shop in

a bazaar in some Mofussil Town or village or it may be a ryot. Now, it would, in my opinion, be a grave mistake to suppose that a person such as

I have indicated is, as a rule, dull, stupid or unintelligent. He is, in my opinion, nothing of the sort. He brings a decidedly intelligent mind to bear on

matters that he knows anything about. His range of ideas is, however, very limited and everything outside the range of what he is accustomed to

convey no idea whatever, or, at the most, the vaguest possible idea to his mind. Let us suppose him contemplating intently, quietly and at his leisure

Exhibits EEE and KKK and try and form an estimate of the ideas that the several portions of these facings will convey to his mind. Commencing at

the top we have first T.A. Taylor and Co., and T. Nooroodeen Saib and Co. As our would-be purchasers know no English these letters convey

no idea whatever to him but it probably does strike him that they look to be much the same on one facing as on the other. The two coats of arms

also convey no idea, he has seldom seen such things and can't imagine what they mean; that there are two lions in one and a lion and a unicorn in

the other he does not remark but it perhaps does seem to him that the figures on one facing are very similar to those on the other. As, he cannot

read the initials T.A.T. and the word attar budi (in Tamil and Telugu) are to him void of meaning. I for a moment pass over the scimitars and the

scent bottles and pass on to the remainder of the facings. In Exhibit BEE we find 10 lbs.

No. 11.

A figure with two circles one inside the other.

38/384 yards.

B

No. 386.

While in Exhibit KKK are set out

11 lbs.

No. 12.

A figure with two circles one inside the other.

38/384 yards.

No. 506.

M.

24. Now, all these marks, letters, numbers and figures convey no definite idea to our somewhat perplexed purchaser. He does not know what"

lbs. or yards mean and he cannot read the names of Taylor and Co., or of Nooroodeen Sahib and Co., running round inside the circular figures.

Looking, however, at this portion of the facing Exhibit EEE and comparing it with Exhibit KKK I have no hesitation in arriving at the conclusions

that they will appear to the purchaser whom we are considering as virtually identical. The size of the figure &c. is almost the same in the two

facings, their order has only one slight difference, the position of B with reference to the number as compared with that of M, while in general

appearance it must be admitted that the one is an accurate imitation of the

other. I now come back to the scimitars and the scent bottles. It is admitted that since 1876 the plaintiff has had as a portion of his facing on grey shirtings a number of scimitars placed horizontally. The defendant began to use scent bottles similarly placed in his facing in 1896. He was examined and cross-examined at great length when this case was under trial before the Chief Justice but failed to give any explanation as to why he had decided to insert scent bottles lying horizontally in his facings. He first declared that when he selected scent bottles he thought that they were objects with which up-country buyers were familiar but immediately afterwards admitted that he had never seen scent bottles like those on his facing in any house or village. As to this portion of the case there can be no doubt whatever. Scent bottles such as those on the defendant's facings are absolutely unknown to natives of this country and can convey no idea to their minds. They are as foreign to their eyes as representations of pianos would be. When a witness says that illiterate purchasers come into shops and ask for the defendant's goods as scent bottles or attar budis we may safely set aside his evidence as worthless. Why then did the defendant select as the figure to be used in the central portion of his facing something that would convey no idea to the minds of intending purchasers and, as it would remain to them a nameless figure, could merely confer on this description of shirting an appellation that would be freely used and widely known in the bazaar. As the defendant has not answered this question I must do my best to answer it for him. The correspondence between the defendant and his exporters Messrs G. P. Gunnis and Co., Manchester, that has been put in evidence shows with what care the defendant imitated various portions of the plaintiffs' facing. The decision, however, *T.A. Taylor v. Virasami Chetti* ILR 6 M. 108 which was of course well known to the trade showed the defendant the danger of adopting scimitars or anything the least like them. On the other hand if the central position of the facing was to be occupied by anything that would at once "catch on" to use a slang expression and attract the eye of the intelligent but illiterate purchaser all hope of passing off his goods as Taylor's would vanish. If half a dozen elephants, tigers, oxen, Goddesses, &c, were inserted in the position occupied by the scimitars the defendant's goods would be known at once in all the bazaars as Yanis,

Pulies, Madus, &c., and all the trouble expended in making the lower portion of the facing virtually identical with Taylor's facing would be in vain.

It was considerations such as these that I have no doubt led to the choice of scent bottles as being articles that it was scarcely possible that any

Court could hold resembled scimitars while as they by their appearance failed to produce any impression on the minds of illiterate buyers there was

no danger of their becoming in the eyes of such buyers distinctive features. The result of the analysis to which I have subjected exhibits EEE and

KKK shows, I think, that there is no object in either facing that would produce on the mind of the class of persons whom I have treated of

throughout these remarks any clearly defined and distinctive impression but that the general impression conveyed to the eye of such a person

looking at the two facings especially if he had not, both before him at the same time would be that they were one and the same or, in other words,

that the general resemblance would attract his attention while the points of dissimilarity would probably escape observation. Taking this view it

follows that I must hold that the defendant's action in adopting the facing Exhibit KKK is likely to tend to cause an ordinary illiterate purchaser to

think that he is buying the plaintiffs' goods. I accordingly agree with Mr Justice Benson in deciding that this appeal must be dismissed with costs on

the higher scale.