
(1916) 01 BOM CK 0014
In the Bombay High Court

The Madhavji Dharamsey Manufacturing, Co., Ltd. APPELLANT
Vs

The Central India Spinning, Weaving and Manufacturing Co. RESPONDENT
Ltd.

Date of Decision : 18-01-1916

Acts Referred:

Citation : 34 Ind. Cas. 529

Hon'ble Judges : Basil Scott, C.J.;Heaton, J

Bench : Division Bench

Judgement

Basil Scott, C.J.—As to the main facts there is no dispute. They are concisely stated in the first paragraph of the judgment of the lower Court as follows:

The plaintiffs are manufacturers of cloth which they manufacture in their Mill, in Nagpur, in the Central Provinces. In 1904 they commenced to manufacture a certain quality of black twill and for the purposes of reference they distinguished it from other kinds of cloth manufactured in the Mill by assigning to this twill No. 2051. The shade colour of the twill was distinguished by a series of numbers commencing from 1. The black twill was distinguished by No. 10. The number 2051 was in no way descriptive of the twill cloth. On each piece of cloth was also woven the device of a serpent surrounded by a scroll containing the name of the Empress Mill. This twill was put on the market in the North-West Frontier Provinces, Sindh and the Punjab where the plaintiffs have got their selling agents at Amritsar, Peshawar and Karachi. The dealers in these towns and other smaller towns would apply to the selling agents for the plaintiffs' cloth and the cloth would be distributed by these dealers to smaller dealers in smaller towns and villages and so on until it ultimately found its way to the consumer. In or about July 1913, the defendants, who were a company carrying on the manufacture of cloth in Bombay, put on the market a black twill cloth which was also marked "2051" with the number 10 below. In addition there was a printed ticket affixed to each piece, a sample of which was affixed to the piece of cloth manufactured by the defendants, put in as an exhibit in this case, and there was also a white

ticket bearing the defendants" name and other particulars.

"The plaintiffs allege that by 1913 their black twill had become known amongst purchasers in Sindh, the Punjab and the Frontier Provinces by its number alone, so that anybody who wanted to buy the plaintiffs" black twill would not write an order a bale of black twill from Nagpur Mill bearing the mark of the serpent and the number 2051", but would simply order "a bale of black twill No. 2051.

"The plaintiffs contend that they have established this by their evidence and that they are, therefore, entitled solely to the use of that number on their black twill and that the use of that number by the defendants on a similar twill constitutes an infringement of their rights.

2. The learned Judge held that the No. 2051 was the dominant characteristic of the plaintiffs" goods among purchasers in the Indian markets in which it had an extensive sale, and that it was under this designation that the constituents of up-country middlemen were in the habit of ordering the plaintiffs" twill of that description; and, being of opinion that the defendants had copied the plaintiffs" number in order to induce purchasers to buy the defendants" cloth, which was rather heavier and cheaper than the plaintiffs," instead of the plaintiffs" cloth, passed the decree for an injunction and damages which is now under appeal.

3. The main contention of the appellants is that the learned Judge erred in assuming that purchasers ordering twill No. 2051 or 2051/10 expected to get the plaintiffs" particular manufacture bearing that mark and that on the evidence the plaintiffs had failed to prove that purchases of black twill No. 2051 or 2051/10 were made on account of special preference for the plaintiffs" particular cloth and that the number or combination of figures was merely a manufacturer"s number or quality number, to which the defendants had as much right as the plaintiffs.

4. It will be convenient to deal with the question of quality numbers first. The argument that numbers on goods are merely manufacturers" quality numbers may be perfectly correct in a state of facts such as was proved to exist in *Barlow v. Gobindarm* 24 C. 364 : 10. W.N. 281, relied upon by the appellants" Counsel, where the Court found that the same importers imported into India cloth of identically the same quality, kind and measurement, under different numbers as well as different object designs. But that contention is inappropriate where the cloth of a particular factory when of a particular kind invariably bears not only a trade device but also a fancy combination of figures designed for that particular cloth. The number not only represents no other cloth but that particular cloth never bears any other number-so that as far as quality is concerned (i. e., the ultimate result of the material and processes employed in that factory for the production of that cloth) there is no standard of comparison but another piece of the same cloth of the same manufacture, The simple question, then, in such circumstances is, whether the defendant in the passing-off case is doing something calculated to deceive purchasers into the belief that they are buying

the particular article which they know as bearing the particular number. It is not a case of a known quality of one manufacturer indicated, for reasons of convenience, by various numbers, as in *Barlow v. Gobindram* 24 C. 364 : 10. W.N. 281 but of the particular mark in dispute being an invariable indication of the cloth of the plaintiffs' manufacture. It is, however, contended that the plaintiffs cannot claim an exclusive right to the user of the particular combination of figures, unless it is shown that the purchasers consciously associate the figures with the plaintiff company. But where goods have acquired, by a particular fancy description, combination or device, a reputation in the market, it is immaterial that the customers do not know who the maker is. In *Wotherspoon v. Currie* (1872) 5 H.L. 508 : 42 L.J.Ch. 130 : 27 L.T. 393 Lord Hatherley said:

...The name of the article again, if it has acquired a name, should not, by any honest manufacturer, be put upon his goods if a previous manufacturer has, by applying it to his goods, acquired the sole use of the name. I mean the use in this sense, that his goods have acquired by that description a name in the market, so that whenever that designation is used he is understood to be the maker, where people know who the maker is at all -or if people have been pleased with an article, it should be recognized at once by the designation of the article, although the customers may not know the name of the manufacturer.

5. So also Lord Halsbury in *Birmingham Vinegar Brewery Company v. Powell* (1897) A.C. 710 : 66 L.J.Ch. 763 : 76 L.T. 792 said:

It may be true that the customer does not know or care who the manufacturer is, but it is a particular manufacture that he desires. He wants Yorkshire Relish to which he has been accustomed, and which it is not denied has been made exclusively by the plaintiff for a great number of years. This thing which is put into the hands of the intended customer is not Yorkshire Relish in that sense. It is not the original manufacture. It is not made by the person who invented it. Under these circumstances it is a fraud upon the person who purchases to give him the one thing in place of the other.

6. The evidence appears to us to be convincing that the plaintiffs' twill cloth had by or before 1911 (the year in which the defendants claim to have introduced the marks complained of) acquired in the Northern India markets a reputation under the designation of 2051 and, when black, of 2051/10, and that purchasers desiring that cloth ordered it rather by those figures than by any other designation and that the figures had become by use the dominant designation. It is said that the witnesses for the plaintiffs were middlemen or commission agents and not the ultimate buyers and that the witnesses would not be deceived. To this the answer is that their testimony as to the form in which order for the plaintiffs' cloth is usually given is good proof of the association formed in the minds of ultimate buyers between the figures and the article produced by the plaintiffs.

7. It is also contended that no case of actual deception has been proved, but this

is not necessary. It is sufficient to justify relief if the Court is satisfied, as we are here, that the defendant is putting into the hands of middlemen a means whereby ultimate purchasers are likely to be defrauded: see *Singer Manufacturing Company v. Loog* (1880) 18 Ch.D. 395 and *Lever v. Goodwin* (1887) 36 Ch.D. 1 : 67 L.T. 583 : 36 W.R. 177. It has been contended that as the plaintiffs and defendants affix to their cloth distinctive trade marks no importance should be attached to the figures; but it is a matter of common experience that the attention of buyers is often not attracted by the most prominent design. Experience alone shows which device has caught the attention of buyers. Here there can be no doubt that far more importance is attached to the figures than to the pictorial representations and the conclusion is almost irresistible that the defendants, knowing the importance attached by buyers to the plaintiffs' combination of figures, adopted that combination in the hope of securing for their cloth some of the plaintiffs' customers. In our opinion the judgment of the lower Court is right and should be affirmed.

8. As regards the form of injunction objection has been raised as to its local extent, and as regards the form of the inquiry as to damages that it is sweeping.

9. In our opinion the injunction must be wide enough to cover all possible Indian channels of approach to the ultimate buyers and should not be limited as contended by appellants, and as regards the form of inquiry as to damages it appears to us that it would be neither reasonable nor practicable to restrict the inquiry as suggested. The wide form of inquiry was adopted after argument in *Lever v. Goodwin* (1887) 36 Ch.D. 1 : 67 L.T. 583 : 36 W.R. 177 and has been rightly applied in the present case.

10. The appeal must be dismissed with costs.