

Privy Council Appeal No. 116 of 1927.

Allahabad Appeal No. 21 of 1926.

Messrs. Juggi Lal-Kamalapat of Cawnpore and others - - *Appellants*

v.

The Swadeshi Mills Company. Limited, of Bombay - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 2ND NOVEMBER, 1928.

Present at the Hearing :

VISCOUNT DUNEDIN.

LORD SHAW.

LORD BLANESBURGH.

SIR JOHN WALLIS.

[*Delivered by* VISCOUNT DUNEDIN.]

This is a case of the class which is generally known as a passing off action.

The plaintiffs, who are the respondents before this Board, are a milling company who deal largely in Indian cloths, and who, in connection with the sale of that Indian cloth use certain trademarks. In several of those trademarks, either in conjunction or alone, the lotus flower is the leading feature. Now their complaint is that the defendants, who are appellants before this Board, suddenly began to use trademarks which, though if critically looked at by a person of such literacy as to have critical powers of observation would not be confused, yet would be apt to be confused by the illiterate and unobservant ; and in particular did despite to them for this reason that their trademark had really got to be associated with the name of "Lotus," so that their cloth was known as "Lotus cloth," and that a person coming and asking for "Lotus cloth" might be satisfied by having

cloth delivered with the trademark of the defendants. That there may be deception, as one might phrase it, by sound as well as by sight was nowhere more forcibly insisted on than in the well-known case of *R. Johnston & Co. v. Archibald Orr Ewing & Co.* (7 App. Cas. 219).

The plaintiffs also claimed for an account of profits, but at the trial they gave up their claim for an account of profits and said that they wished instead to claim for damages.

The trial took place before the High Court at Allahabad in its Extraordinary Original Jurisdiction. That court granted an injunction in respect of the trademarks and also it gave a large sum of damages, namely, Rs. 172,800.

Their Lordships have no doubt whatsoever that the judgment of the court was perfectly right as regards the injunction; they think the evidence was quite satisfactory to show that the plaintiffs' cloth was associated with the name of "Lotus" and that any lotus device would lead to cloth being able to be palmed off as their cloth which was the cloth of another manufacturer. There was perhaps a little difficulty as to one of the emblems, where the emblem on the defendants' trademark, if looked at properly was not a lotus but a rose; but it was not only the question of the flower there; there was a garter-like enclosure with a straight line beneath and the whole get-up of the one was so like the whole get-up of the other that their Lordships have no doubt that the court below was right in making their injunction extend as it did.

When, however, their Lordships turn to the question of damages there is more difficulty. The plaintiffs came into court with a demand only for Rs. 25,000 damages, or such other sum as the court might think fit. It seems, according to Indian practice, that they would not be bound down to the figure of Rs. 25,000. When it came to the proof various figures were given and the figure on which the learned judges below have proceeded was a figure which gave the sale account of the defendants' goods which had this, what may be called pirated mark upon them. The figure there brought out was, in round figures, Rs. 3,200,000. What the learned judges then did was this: They said: "We will assume that of that Rs. 3,200,000 worth of goods the defendants would have sold 40 per cent. if they had merely trusted to their own cloth without the addition of a misleading mark but 60 per cent. of it must be held to be due to the misleading mark"; and then, taking 60 per cent. of that Rs. 3,200,000, they calculated the figure of 9 per cent. of profit on that and by that calculation they brought out the sum for which they gave judgment.

Their Lordships think that it is far too speculative an assumption to say that you could divide this figure up into the 60 per cent. and 40 per cent., and they cannot think that there is a justification for a decree founded upon that calculation.

When it comes to the question of what figure is to be substituted the question is not so easy because the matter is very much in the dark. If it had been before a jury it would have been disposed of in the rough and ready way in which juries do dispose of such questions by giving a figure which, if not absolutely out of all question, would have stood the test of any review by a court of appeal.

Their Lordships cannot say that there is any cut and dried rule which can be laid down by a court of law for the estimation of damages in a case like this, but think that on the figures given the safer figures on which to work are the figures which are given which show the falling-off in the respondents' trade which came in after this pirated mark was introduced on the market. If it is assumed that the whole of the falling-off was due to the use of the pirated mark that would bring out a figure of about Rs. 1,000,000 loss of trade, and taking 9 per cent. profit on that amount it gives a figure which, put into pounds sterling, would come out at a sum of £4,500. That, however, does not give anything for a possible increase of trade and their Lordships think that on a rough calculation £500 may be added for that, making £5,000, but as the decree must be in rupees it is equivalent to Rs. 67,000. Their Lordships therefore think that that is in this case the proper figure of damages.

As to costs their Lordships are of opinion that the decree as to costs in the court below should stand and that there ought to be no costs before this Board.

Their Lordships will therefore humbly advise His Majesty that the decree of the High Court in appeal should be varied by substituting Rs. 67,000 for the amount of the damages, and that otherwise it should be affirmed and this appeal dismissed, but without costs.

In the Privy Council.

MESSRS. JUGGI LAL-KAMALAPAT OF CAWNPORE
AND OTHERS

v.

THE SWADESHI MILLS COMPANY, LIMITED, OF
BOMBAY.

DELIVERED BY VISCOUNT DUNEDIN.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.
1928.