

terms of that treatise seems to have led to some diversities of view in the Bombay High Court, which need not now be considered.

Their Lordships will humbly advise His Majesty that the decree of the Subordinate Judge and that of the Judicial Commissioners ought to be set aside so far as they affect the property of the present appellant, and that instead thereof the suit ought to that extent to be dismissed with costs in both Courts. The respondent Bank will pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellants :—Messrs. *T. L. Wilson & Co.*

Solicitors for the first respondent (The Allahabad Bank) :—*Messrs. Ranken Ford, Ford, & Chester.*

J. V. W.

APPELLATE CIVIL.

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PARTAB
BAHADUR
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THE
ALLAHABAD
BANK.

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April 1.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

BAHAL RAI AND OTHERS (DEPENDANTS) v. SUMER CHAND AND
ANOTHER (PLAINTIFFS).*

*Act No. V of 1888 (Inventions and Designs Act), section 51—"Proprietor"
of a design—Publication of design in British India.*

In 1899 the plaintiffs got a design for a curtain registered under the Inventions and Designs Act, 1888, as being the proprietors thereof. In 1901 they sued the defendants for damages for imitating this design. The defendants proved that they were making the curtains which were alleged to be an imitation of the plaintiffs' registered design for a Bombay firm, and also that the design had been sent to the Bombay firm from a firm in London in 1897, that is, before the plaintiffs' design was registered, in order that curtains of similar design might be manufactured in India and sent back to London for sale. The plaintiffs failed to prove that they had either invented the design, or had purchased it from the inventor.

Held that the sending of the design by the London firm to the firm in Bombay, with which the former were in no specially confidential relations, amounted to a publication of the design in British India; and as the plaintiffs were not the "proprietors" of the design within the meaning of section 51 of the Inventions and Designs Act, they were not entitled to any protection.

THE suit out of which this appeal arose was brought to recover damages for the alleged infringement of the plaintiffs' right in a certain design for curtains. The plaintiffs alleged

* First Appeal No. 173 of 1901 from a decree of H. F. D. Pennington, Esq., District Judge of Fatehgarh, dated the 3rd of May 1901.

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that they had invented the design in question and got it registered according to the rules framed under Act No. V of 1888, and they charged the defendants with having dishonestly imitated that design. The defendants in their written statement alleged that the design in question was an imitation of an old pattern known as the "Italian design", and denied that the plaintiffs were entitled to have that design registered or to sue for an infringement of it. So far as the plaintiffs were concerned, the evidence of one of them, Sumer Chand, showed that the design was received by them from London in the year 1898, from whom was not stated, but it was in no sense invented by the plaintiffs or either of them. The evidence for the defendants on the other hand established the following facts. In the year 1897, a year, that is, before the receipt of the design by the plaintiffs, one Jehangir Framji, a Parsee merchant carrying on business in Bombay, received a design similar to the design in question from his firm in London, with instructions to have curtains made in accordance with the design and sent to London for sale. Owing to press of work, Framji did not at once have the curtains made, but laid the design aside until towards the end of 1899, when he gave instructions to the defendants to print curtains from the design after making certain alterations. The defendants never saw the design which was sent to the plaintiffs. The design on the curtain, which was alleged to be an infringement of the plaintiffs' registered design, was proved to have been copied from the design which had been received by Jehangir Framji from his London firm.

The Court of first instance, notwithstanding the fact that the defendants had never seen the plaintiffs' design, nevertheless found that they had infringed the plaintiffs' rights by producing a curtain bearing a similar design to that of the plaintiffs' and accordingly issued an injunction as prayed for by the plaintiffs.

Against this decree the defendants appealed to the High Court.

Pandit *Sundar Lal*, for the appellants.

Messrs. *B. E. O'Connor* and *S. Sinha*, *Babu Jogindro Nath Chaudhri* and *Munshi Gulzari Lal*, for the respondents.

STANLEY, C. J., and BURKITT, J.—The suit out of which this appeal has arisen was brought by the plaintiffs to prevent the infringement of a registered curtain design representing a jungle scene. In their plaint the plaintiffs allege that after “suffering great trouble and expenses” they invented a particular design of curtain and got it registered, and that the defendants dishonestly imitated that design. The defendants in their written statement allege that the design in question is an imitation of an old pattern known as the “Italian design,” and deny that the plaintiffs were entitled to have that design registered, or to sue for an infringement of it. The evidence shows that the statement made by the plaintiffs in regard to the invention of this design was absolutely false, as they in no sense were the inventors of the design. According to the evidence of one of the plaintiffs, Sumer Chand, the design was received from London in the year 1898. It does not appear from whom, but it was in no sense invented by the plaintiffs or either of them. It also appears from the evidence that in the year 1897, a year before the receipt of the design by the plaintiffs, one Jehangir Framji, a Parsee merchant carrying on business in Bombay, received a design similar to the design in question from his firm in London, with instructions to have curtains made in accordance with the design and sent to London for sale. He says that owing to press of work he did not immediately have curtains made in accordance with these directions, but laid the design in question aside until towards the end of 1899, when he gave instructions to the defendants to print curtains from the design after making certain alterations. It is established by the evidence that the defendants never saw the plaintiffs’ design. The design on the curtain, which is alleged to be an infringement of the plaintiffs’ registered design, is proved to have been copied from the design which was received by Jehangir Framji from his London firm. This the learned District Judge has found. The Court below came to the conclusion that, notwithstanding the fact that the defendants had never seen the plaintiffs’ design, yet they could be found to have infringed the plaintiffs’ rights by producing a curtain bearing a similar design to that of the

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plaintiffs, and accordingly granted a perpetual injunction against them.

The section of the Inventions and Designs Act, namely, Act No. V of 1888, which empowers a proprietor of a design to obtain an order for its registration, is section 51. That section provides that "any person, whether a British subject or not, claiming to be the proprietor of any new and original design not previously published in British India, may apply to the Governor General in Council for an order for the registration of the design." 'Proprietor' is defined in the preceding section of the Act as follows:—"The author of any new and original design shall be considered the 'proprietor' thereof, unless he executed the work on behalf of another person for a good or valuable consideration, in which case that person shall be considered the 'proprietor,' and every person acquiring for a good or valuable consideration a new and original design, or the right to apply the same to an article, either exclusively of any other person or otherwise, and also every person on whom the property in the design, or the right to the application thereof, shall devolve, shall be considered the 'proprietor' of the design in the respect in which the same may have been so acquired, and to that extent, but not otherwise." From the words of this section it will be seen that the only person who is entitled to have a design registered under the Act is the proprietor for the time being of the design, and that the design must be a new and original design, and must not have been previously published in British India. It has been contended on behalf of the appellants in this case that none of these requirements are satisfied in the present case. In the first place, it is said that this design had been previously published in British India. This is proved by the evidence of the person to whom we have referred, namely, Jehangir Framji. He says that he received the design for the curtain, which is the subject-matter of the alleged infringement, from London in December 1897. He received it, he says, from his London firm, and it is of Italian manufacture. The object of sending it to India was to have curtains manufactured of a similar design, but with certain alterations in the figures of animals,

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so that it should be made to look like an Indian design. This shows how Indian art may be degraded. This evidence has been accepted by the learned District Judge, and we see no reason to doubt the truthfulness of it. Now if this publication to Jehangir Framji constituted a publication in British India, it is clear that the plaintiffs had no right to have their design registered in this country in the year 1899. If a design is communicated to a person who is not in any confidential relation to the author or proprietor of the design, it would seem that such communication would constitute a publication, and form a bar to the subsequent registration of the design. It is not shown that there was any confidential relationship whatever between Jehangir Framji, to whom the pattern was sent in 1897, and the author or proprietor of the design. On looking at the curtains before us, which are exhibits in the case, it appears to us to be clear that the design in all is similar, and that the alterations in small details are, what we may call, colourable alterations, which do not affect in any way the material part, or ground-work, of the design. It is perfectly clear that all these designs have been derived from some common source, perhaps from a pattern of considerable antiquity. It appears to us, therefore, that, as regards one of the essential matters which it was necessary for the plaintiffs to establish before they could enforce any privilege conferred by Act No. V of 1888 was not proved, namely, the fact that their design had not previously been published in India. In addition to this, however, the plaintiff must also be the "proprietor" of the design. There is absolutely no evidence worth the name to establish this fact in favour of the plaintiffs. The evidence of Sumer Chand is insufficient for that purpose. Their case, we may repeat, was that they themselves invented the design. But when Sumer Chand goes into the witness-box his evidence is, that the pattern which has been registered was received from London with an order to the plaintiffs to prepare curtains of that pattern for the party who gave the order, and not to prepare curtains of the kind for anyone else. He also, no doubt, says:—"I had to pay the price of the design." What he exactly means by payment of the price of the

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design, it is difficult to say. He does not mention from whom he purchased the design, and the plaintiffs' learned counsel admits that it is not known who the author or proprietor of the design is. This being so, the plaintiffs have failed to establish that they were the proprietors of the design within the meaning of the section to which we have referred. A further requirement is, that the design shall be a new and original design. It is perfectly manifest from the evidence that this design is not a new and original design. The fact that it was in the possession of Jehangir Framji in 1897, two years before the registration of the design by the plaintiffs, is conclusive evidence on this point. For these reasons we must allow the appeal, set aside the decree of the learned District Judge, and dismiss the suit with costs in both Courts.

We also discharge the injunction. The objections which have been filed by the plaintiffs under section 561 of the Code of Civil Procedure fall to the ground, and are dismissed with costs, the suit having, on the merits, been decided against the plaintiffs.

Appeal decreed.

1903
April 2.

FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Banerji and Mr. Justice Burkitt.

BALMAKUND (PLAINTIFF) v. DALU (DEFENDANT).*

Practice—Pleadings—Failure of plaintiff to prove the whole case upon which he came into Court—Plaintiff entitled to succeed on case proved if sufficient to support a decree.

The plaintiff came into Court alleging (1) that he was the proprietor of a certain building, and (2) that he had leased a part of the said building to the defendant, who, however, refused to pay the rent agreed upon, and he sought to have the defendant ejected and to recover possession of the portion of the building occupied by him. No specific issue dealing with the plaintiff's title was framed, but evidence as to title was given on both sides.

Held that even though the plaintiff had failed to make out his case as to the letting, he nevertheless should get a decree on his title unless the defendant could show a better one. The fact that no distinct issue as to the plaintiff's title had been framed could not be construed to the prejudice of the plaintiff inasmuch as the issue had in fact been tried, and it could not be said that the defendant had been in any way taken by surprise.

* Appeal No. 48 of 1901 under section 10 of the Letters Patent.