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SURAJ NARAIN v. SUKHU AHIR.

On the broad principle of expediency it is urged, "Why should an adult be unable, having reached maturity, to make a binding promise to pay money he had actually received?" To my mind there is every reason. A lender would be able to advance money to an inexperienced boy, knowing that, as soon as the boy became of age, he, the lender, could use as a lever to extract a fresh promise the argument that it was a debt of honour and shame him into making a fresh promise to discharge an obligation which he had incurred at a time when, *ex hypothesi*, he was not capable of judging for himself.

I would dismiss the application.

BY THE COURT :—The order of the Court, in accordance with the opinion of the majority, is that this application be dismissed with costs.

Application dismissed.

PRIVY COUNCIL.

* J. C. 1928 November 2.

JUGGI LAL, KAMALAPAT (DEFENDANTS) *v.* SWADESHI MILLS COMPANY, LTD. (PLAINTIFFS).

[On Appeal from the High Court of Allahabad.]

Trade-mark—Passing off—Colourable imitation—Deception of illiterate persons—Trade name associated with mark —Damages.

The respondents dealt largely in Indian clothes, and in connection with sales thereof used a trade-mark in which the lotus flower was the leading feature, and their cloths had become known as "lotus cloth". The appellants made and sold cloths upon which they used marks which would be apt to be confused with the respondents' mark by illiterate and unobservant people, and to be accepted by purchasers wishing to buy "lotus" cloth. The respondents brought a suit against the appellants for passing off; they claimed damages,

* *Present* :—Viscount DUNEDIN, Lord SHAW, Lord PLANESBURGH and Sir JOHN WALLIS.

giving up a claim to an account of profits. The High Court held the appellants liable. In assessing damages the Court assumed that 60 per cent. of the sales made by the appellants of goods bearing the offending mark were due to the use of that mark, and awarded the respondents 9 per cent. of the sale price of the 60 per cent. as the profit thereon lost to the respondents.

Held that in the circumstances above stated the respondents' cause of action was established; but that the assumption made in assessing the damages was far too speculative. Though no definite rule could be laid down for estimating the damages in such a case it would be safer to award a sum representing the profit (at 9 per cent.) upon the falling off in the respondents' sales after the offending mark was used, together with a sum representing the profit upon an increase which might have taken place in their trade.

Johnston v. *Orr Ewing* (1) applied.

Judgement of the High Court, I. L. R., 49 All., 92, varied as to damages.

APPEAL (No. 116 of 1927) from a judgement of the High Court (June 7, 1916) in a suit transferred to the Extraordinary Original Jurisdiction of that Court from the court of the Subordinate Judge of Cawnpore.

The respondents brought the present suit in the court of the Subordinate Judge against the appellants alleging infringements of trade-marks to which they had the exclusive right by user; they claimed an injunction, an account of profits, and other relief. They subsequently gave up their claim to an account, and claimed damages.

The suit was transferred to the High Court and was heard by MEARS, C. J., and MUKERJI, J.

The facts appear from the judgement of the Judicial Committee, and more fully from a report of

(1) (1882) 7 App. Cas., 219.

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the proceedings in the High Court at I. L. R., 49 All., 92.

Upon the grounds appearing in that report, the High Court held that the appellants were liable in damages, which were assessed in the manner appearing in the present judgement.

1928. October, 30; November, 1, 2. *Sir Duncan Kerly, K. C., Sir George Lowndes, K. C., Wallach* and *F. E. Bray*, for the appellants:—The marks used by the appellants were not colourable imitations of the respondents' mark, nor likely to deceive purchasers. An exaggerated view of the illiteracy of retail buyers was taken. In any case the decree for damages should be set aside. There was no relevant or convincing evidence of any substantial damages. It could not properly be assumed that cloth sold by the appellants bearing the offending mark would have been sold by the respondents but for the use of the mark: *Leather Cloth Co.* v. *Hirschfeld* (1), *Kinnell and Co.* v. *Ballantine & Sons* (2).

W. A. Greene K. C., Archer K. C., and *E. B. Raikes*, for the respondents:—Applying the principles laid down in *Seixo* v. *Provezende* (3) and *Johnston* v. *Orr Ewing* (4) the evidence fully established an actionable passing off. The High Court was entitled on the evidence to draw the inference upon which they based the damages. The acts of the defendants were fraudulent, and *omnia presumuntur contra spoliatorem*. The Court in no way misdirected itself; had the damages been awarded by a jury, the verdict would not have been assailable. The cases relied upon by the appellants are distinguishable upon their facts.

(1) (1865) L.R., 1 Eq., 299.
(2) (1910) 27 R.P.C., 185.
(3) (1866) L.R., 1 Ch., 192.
(4) (1882) 7 App. Cas., 219.

Reference was made also to *Beard & Son* v. *Bagots, Hutton & Co.* (1).

Sir Duncan Kerly, K. C. replied.

The judgement of their Lordships was 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 trade-marks. In several of those trade-marks, 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 trade-marks 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 trade-mark 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 trade-mark 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 *Johnston* v. *Orr Ewing* (2).

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.

(1) (1916) 2 A.C., 382. (2) (1882) 7 App. Cas., 219.

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The trial took place before the High Court at Allahabad in its Extraordinary Original Jurisdiction. That court granted an injunction in respect of the trade-marks and also it gave a large sum of damages, namely, Rs. 1,72,800.

Their Lordships have no doubt whatsoever that the judgement 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' trade-mark, 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 judgement.

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.

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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.

Solicitors for appellants: *Douglas Grant* and *Dold*.

Solicitors for respondents: *Laltey* and *Dawe*.

FULL BENCH.

Before Mr. Justice Sulaiman, Acting Chief Justice, Mr. Justice Mukerji and Mr. Justice Boys.

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July, 10.

BANKEY LAL AND OTHERS (DEFENDANTS) *v.* RAGHUNATH SAHAI AND ANOTHER (PLAINTIFFS) AND NAND GOPAL AND OTHERS (DEFENDANTS).*

Hindu law—Act No. IX of 1908 *(Indian Limitation Act), articles* 141, 144*—Adverse possession—Suit by reversioners to recover property which was held adversely as against a Hindu female heir—Whether adverse possession against a Hindu female heir is adverse possession as against the reversioners.*

A Hindu widow, who had succeeded to the estate of her husband, died in 1894, leaving a daughter as the heir. The

* First Appeal No. 362 of 1925, from a decree of Shendarshan Dayal, Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge of Agra, dated the 25th of July, 1925.