

1893 claim of the defendant to refuse production. Consequently this summons  
MARCH 28. must be dismissed with costs.

ORIGINAL  
CIVIL.

17 B. 581.

Attorneys for the plaintiff:—Messrs. *Roughton and Byrne*.  
Attorneys for the defendant:—Messrs. *Payne, Gilbert and Sayani*.

17 B. 584.

ORIGINAL CIVIL.

*Before Sir Charles Sargent Kt., Chief Justice, and Mr. Justice Starling.*

BADISCHE ANILINE AND SODA FABRIK (*Original Plaintiffs*), *Appellants*  
v. MANECKJI SHAPURJI KATRAK (*Original Defendants*), *Respondent*.  
[24th March, 1893.]

*Trade mark—Infringement—Label—Details different, but general similarity likely to deceive—Injunction.*

The plaintiffs sued the defendant for an infringement of their label used on tins of aniline dye which they imported into Bombay. The label covered the top of the tin, and bore upon it the picture of an elephant in the centre of a curved band: the rest of the label being a combination in green, red and gold; representations, for the most part, of coins, medals and tracing. The defendant was the agent in Bombay of Cassella & Co., of Frankfort. Prior to 1892, Cassella & Co. had imported aniline dye into Bombay in tins bearing a label, the chief feature of which was an elephant. Of that label, however, the plaintiffs did not complain. But in January 1892 Cassella & Co. adopted a new label, also bearing the picture of an elephant, different in some respects from the picture on the plaintiffs' label and with new surroundings, to none of which, taken separately, did the plaintiffs [585] object, but they complained that in its general effect this new label was so similar to their trade mark as to amount to a colourable imitation thereof, and to be likely to deceive purchasers.

*Held*, that the plaintiffs were entitled to an injunction against the defendant.

*Per* SARGENT, C.J.—The question in a case of this description is not what would be the effect on brokers or even dealers in Bombay, but how the label would be likely to strike incautious or unwary purchasers, such as are to be found more particularly in the Mofussil. After a careful examination I cannot feel any doubt that the attention of such purchasers would be arrested by the general effect of the label, and that, notwithstanding such differences as undoubtedly exist in respect to the colour and size of the elephant and in some other respects, would regard the labels as symbolical of the plaintiffs' goods.

The remarks of Lord Selborne in *Johnston v. Orr Ewing* (1) relied on.

*Per* STARLING, J.—It is quite possible for a label no part of which is a copy of another label to be a colourable imitation of that other label, and to be so like it in general appearance as to be likely to deceive purchasers.

[F., 1 Bom. L.R. 291 (294); 15 Ind. Cas. 116 (118) = 1912, P.L.R. Supp. No. 5 = 166 P.W.R. 1912; 15 M.L.J. 45; R., 25 B. 433 (468) = 3 Bom. L.R. 1; 55 P. R. 1902 = 98 P. L.R. 1902.]

SUIT for the infringement of a trade mark.

The plaint stated that the plaintiffs were manufacturers of aniline dye and had for some years imported large quantities of their dyes into Bombay in tins bearing a label (marked Ex. A) which had been in the exclusive use of the plaintiffs, and which they claimed to be their trade mark. The label covered the top of the tin and had upon it the picture of an elephant as the central figure surrounded by certain printed words: the rest of the label being a combination in green, red and gold; representations, for the most part, of coins, medals and tracing. The

\* Suit No. 342 of 1892; Appeal No. 779.

(1) 7 Ap. Ca. 219.

said trade mark had been registered by the plaintiffs in Germany and in England. The dyes of the plaintiffs had acquired a high reputation in the eastern market, and the plaintiffs' label as the distinguishing mark of their goods had become well known.

The plaintiffs complained that the defendant had recently been importing into, and selling in, Bombay aniline dyes in tins bearing labels which were a colourable imitation and infringement of the said trade mark. The defendant's tins contained dyes inferior to the plaintiffs' and were sold at a lower price. The plaintiffs prayed for a declaration that the defendant's label, marked Ex. B, was a colourable imitation, and for an injunction, &c.

[586] The defendant denied all the above allegations of the plaintiffs, and further stated that he did not himself deal in aniline dyes, but was merely a commission agent for his indentors.

From the evidence, it appeared that the plaintiffs had been importing the aniline dye into Bombay since 1883, and that it was not until January 1892 that the defendant began to sell this dye with the labels complained of as the agent of Messrs. Leopold Cassella & Co. of Frankfort. This firm had, in a few instances prior to that time, imported aniline dye bearing a label (Ex. No. 6), the chief feature of which was an elephant. Of that label, however, the plaintiffs did not complain. In his evidence the defendant stated that he visited Messrs. Cassella & Co. at Frankfort at the end of 1891 with a view to doing dye business for them in Bombay. He said:—

“They showed me tins of scarlet dye, and asked me to push the business of it in Bombay. This was the first time I saw the label B. It was on the tins they showed me at that time. I had never heard of or seen the label A. I had left Frankfort and was at Basle when the letter of 22nd January 1892 arrived. My assistant in Bombay received the letter and samples mentioned therein. I saw them when I arrived here at the end of March. They were like the Ex. B with tickets at the ends, with  $\frac{1}{2}$  lb. on them and labels like B. All the tins subsequently imported by me had tickets and labels like B.”

A correspondence between the defendant and Cassella & Co. relating (*inter alia*) to the label in question was put in evidence. After some preliminary negotiations the defendant had, on the 20th February 1892, given to Leopold Cassella & Co. a small trial order for 30 cases of the aniline dye. On March 11th, 1892, Cassella & Co., wrote as follows to the defendant:—

“We have your favours of February 13th and 20th, and in reply we are glad to receive your trial order for 30 cases scarlet as per indent No. 1, which will have our prompt attention, and we hope to be able to forward the first shipment shortly.

“With regard to the elephant ticket, we beg to inform you that Messrs. Ernthausen of Calcutta, in a letter addressed to our friends Messrs. Dial & Co., there, pretend to have a right to forbid its future use by us. We do not know on what this pretension is based, and have written to India accordingly, but would say that, if Messrs. Ernthausen are justified in their claim, we cannot of course undertake to deliver this ticket any more. As soon as this matter is cleared up, we shall not fail to inform you thereof.

“In any case, it might be as well for you to select another ticket which we would substitute in case of need.”

1893  
MARCH 24.  
—  
ORIGINAL  
CIVIL.  
—  
17 B. 584.

1893  
MARCH 24.  
—  
ORIGINAL  
CIVIL.  
—  
17 B. 584.

[587] In reply to this the defendant wrote on the 2nd April, 1892 :—

" We carefully read all you write about the elephant ticket by Messrs. Ernthausen & Co. of Calcutta and Messrs. Ostermeyer & Co. of this place, who are the agents of Messrs. B.A. and Soda Fabrik.

" So far as our information goes, we believe you have a prior right to the use of the ticket, as some such ticket was used by you before the Soda Fabrik made use of same, or at least you have an equal right for its use. We are quite sanguine that, if you have a free use of this ticket, it will help us to drive out of the market Soda Fabrik's scarlet, and fearing same they have taken the step to stop same being used by you. You will of course not easily give way to their pretensions, but will thoroughly sift the question of right. We are anxious to hear the result of your correspondence on this subject.

" As to your suggestion to select another ticket in place of the elephant one, it will of course take a long time to introduce same in the market, and thus throw unnecessary hindrance in the way."

With reference to this last letter the defendant in his evidence said :—

" I was in Bombay on 2nd April (letter read). I was anxious to secure monopoly of the scarlet dye bearing the label B. It was not one of my special objects to drive the Soda Fabrik scarlet out of the market by the use of this label. I meant what I wrote when I wrote the paragraph 'If you have a free use in market, &c.' I had been told by Jiwa Chuttoo that the Soda Fabrik was in the market, selling scarlet Rs. under Ex. A. I had not seen A. Jiwa did not tell me what quality they were selling. He said they were selling under similar tickets only; similar, that is, to Ex. B. I mentioned Soda Fabrik only because I was told by the dealer that they had a similar ticket. It was my own opinion that, if we could use the label B, we could drive the Soda Fabrik out of the market. I can't swear he (Jiwa Chuttoo) did not tell me that the Soda Fabrik were the largest sellers and had the highest reputation. I did attach some importance to the label B when I wrote this letter. I did so because it was like A as described to me by Jiwa Chuttoo. I think Jiwa attached importance for the same reason. I meant what I wrote as to its taking a long time to introduce a new ticket, &c. B was a new ticket and had not been introduced into the market.....I know B to be similar to A and that plaintiffs had used A since 1882. It did not occur to me that it would be right to advise Cassella to discontinue the use of B; on the contrary I went on pressing Cassella to give me monopoly of sale of B.....The monopoly was for Jiwa Chuttoo. I was to give him all I imported. He told me Cassella's dye was a little cheaper than plaintiffs'. That was one reason why we hoped to oust plaintiffs from the market. The label B was another reason."

In a letter written to the defendant by Messrs. Leopold Cassella & Co. on the 1st December 1892, they stated :—

" We had seen the plaintiffs' label before we got up ours registered in Germany in 1892, and as our lithographer had also seen the same label before, we at the time gave special orders to have the design drawn up in such a manner that no part thereof could be considered an imitation of the plaintiffs' label."

[588] At the hearing, the material issue raised was whether the defendant's label (marked Ex. B) was a colourable imitation or infringement of the plaintiffs' trade mark.

*Macperson and Melsheimer*, for the plaintiffs.

*Lang* (Acting Advocate-General) and *Inverarity*, for the defendant.

1893

MARCH 24.

ORIGINAL  
CIVIL.

17 B. 584.

29th January 1893. PARSONS, J.—The law of the case is clear, and the point to be decided, in order to determine the second issue, is one of fact only, *viz.*, whether label B is so close an imitation of the label A as to be calculated to mislead ordinary purchasers and to lead them to mistake the defendant's dye for the dye of the plaintiffs. Now there can be no doubt that there is a certain resemblance or similarity between the tin B and the tin A. They are of the same size and shape. Both are done up in red glazed paper stamped with a large R in gold at the back and closed with round tickets at the ends. Both have large glazed labels and are resplendent with red and green medallions, while both bear the word and letter "Scarlet R" prominent in large letters on a white ground and the figure of an elephant in the centre. If, however, we eliminate from them such of the above things as are the common property of the trade, namely the red glazed paper covering with the R on it, the closing tickets, the scarlet R on a white ground, and the elephant, I think that very little similarity remains. The elephants decidedly bear no resemblance to each other. They are different in size, colour, position and shape, and while one is barebacked, the other has a bright red *j'hood* or saddle cloth. There is no question but that the elephants belong to the respective parties, and that each has a right to the use of the elephant he has used. The defendant, therefore, has a right to surround his elephant with any framework or setting that he chooses, provided only that the framework or setting chosen by him does not infringe upon or copy the framework or setting that had previously been chosen and used by the plaintiffs. He has no right to combine his elephant with his medals and trade marks so as to imitate the plaintiffs' combination, and thus cause his label to present an appearance similar to the plaintiffs' label.

[589] The question is whether he has done this. Upon this point the evidence of the plaintiffs' agent, Ostermeyer, appears to me very important. He admits that, though he would consider the framework of the defendant's label an infringement so long as it is round an elephant or any animal like an elephant, he would not object to it if it were made to surround some other animal; but surely if the framework is such that the defendant could lawfully place it round any animal except an elephant, he could place it round the elephant, for he has a right to the use of that animal. It seems to me that either the framework must be an unlawful imitation in every case and whatever animal be in its midst, or it can be no unlawful imitation at all, for I can hardly conceive of one and the same framework being lawful with one lawful centre, but unlawful with another lawful centre.

Irrespective, however, of this admission of Ostermeyer's, I must hold, on the whole case, that there has been no imitation which amounts to an infringement. The evidence on the point is very unsatisfactory, almost worthless; indeed, the only witness who seems to be of any use at all is Kalikhan, who is himself a dyer. He says he would not be deceived by the resemblance, and I think he is quite right in this, for I cannot imagine any one being deceived by the apparent resemblance between the tins by reason of the labels alone. In the first place, the difference between the elephants is, as I have said, most marked; no one could fail to notice this, or be induced to mistake the defendant's elephant for the plaintiffs'. Then the broad white line round the plaintiffs' label is eminently distinctive. Green is the predominant colour in the plaintiffs' label, red in the defendant's. The broad straight lines at the foot of the

1893  
MARCH 24.  
ORIGINAL  
CIVIL.  
17 B. 584.

defendant's label, in which occur the words "Scarlet R" and "manufactured in Germany," are in marked opposition to the curved line in which "Scarlet R" is printed in the plaintiffs' label. The broad maroon oval, surrounding the elephant on which the manufacturers' name is printed on plaintiffs' label, is wholly different from the circular band broken at two points, black above and white below, which surrounds the elephant on the defendant's label. The plaintiffs' trade mark and the medal, which break the circle, have no counterpart in the defendant's label. Plaintiffs' label has small medals at its four corners; defendant's has his [590] trade mark in large circles at the top corners of his labels. These, silver on a green ground surrounded by a broad red band, are very distinctive of his label, and there is nothing on the plaintiffs' label which at all corresponds to them. Below these on each side come a wreath of flowers, two medals and a bouquet of flowers, all of which are unlike anything on the plaintiffs' label. Moreover, there are perforated figures on the plaintiffs' labels and embossed letters on his tins which are absent on the defendant's.

For all these reasons it seems to me to be impossible to hold that the defendant's label is a colourable imitation or infringement of the plaintiffs' label.

As to the correspondence between defendant and Cassella, on which so much has been said, it seems to me that the defendant only wanted to have a label with an elephant upon it, so that the dye might keep its place in the market under the name of elephant brand. This he was entitled to do, since Cassella had the right to use an elephant. The case would have been quite different if the plaintiff had the exclusive right to put an elephant on his labels, or to call his dye the elephant brand. He has neither of these rights, and, therefore, has had to fall back upon an allegation of general imitation or copying, and in that I think he fails, for I can see no trace of similarity which would lead me to suppose that the one was copied from the other; I do not think the one is so like the other that even the most ignorant purchaser would be deceived.

While finding, therefore, the first issue in the affirmative, I find the second and third in the negative, and dismiss the suit with costs.

The plaintiffs appealed.

*Macpherson, Melsheimer and Lowndes*, for the appellants:—The defendant on the record here is a commission agent. The real offender and the real defendant is Cassella & Co. of Frankfort. The plaintiffs have imported aniline dye into Bombay under label A since 1882, and these goods have a high reputation in the Bombay market. The defendant first introduced aniline dyes under label B into the Bombay market in March or April 1892. There is a picture of an elephant on both labels [591] of that we do not complain. In a few instances Cassella & Co. had previously imported aniline dye into Bombay with a label (Ex. 6) which had a picture of an elephant in it, but we did not object to that label. The first question, then, that arises is why was the old label (Ex. 6) given up and the new label (Ex. B) adopted? It was adopted in order to oust the plaintiffs from the Bombay market. It is of this label that the plaintiffs complain. It was adopted for the purpose of deceiving the purchaser, and it is calculated to deceive him. The Judge in the lower Court analysed label A and label B and catalogued the differences between them. We submit that is not the way to deal with such a case as this. We do not complain of any particular thing in label B. We complain of it as a whole, and contend that as a whole the likeness is such as to deceive. Parsons, J., had both labels before him when he ascertained their differences. The purchaser

1893  
MARCH 24.  
ORIGINAL  
CIVIL.  
17 B. 584.

in the market has not that advantage. The test is, are they sufficiently alike to enable a fraudulent dealer to give the defendant's dye to a purchaser who intends to buy the plaintiffs' dye? The correspondence shows that the object of introducing label B into Bombay was to obtain the benefit of A's reputation and to drive A out of the market, and that the artist who designed B had A before him. It is clear that the design was to deceive, and that fact is cogent evidence that the label would deceive. It is not necessary that there should be an intention to deceive—*Reddaway & Co. v. Bentham Hemp Spinning Co.* (1); but the case is stronger where that intention is proved—*Taylor v. Taylor* (2); *Taylor v. Virasami* (3); *Ralli v. Fleming* (4); *Wotherspoon v. Currie* (5); *Johnston v. Orr Ewing* (6); *Abbott v. Bakers' and Confectioners' Tea Association* (7); *Hugh Balfour & Co. v. Kilburn & Co.* (8).

*Lang* (Acting Advocate-General) and *Inverarity*, for the respondent (defendant):—We are justified in trying to oust the plaintiffs' goods by introducing a cheaper dye—*Sebastian on Trade Marks*, (3rd Ed.), p. 142. We say an ordinary purchaser buying with ordinary prudence would not be deceived. [592] The elephant is the chief feature of both the labels; but the elephant in the defendant's label is quite different from that in the plaintiffs'. The plaintiffs know they cannot directly claim an exclusive right to the elephant, but they are endeavouring to get that right indirectly. It is really the elephant that attracts the attention of the buyer, and by which he is guided in selecting goods. The intention to imitate a trade mark is not material—*Woolcum v. Ratcliff* (9). But the defendant did not intend to imitate the plaintiffs' mark. All he wanted was a label with an elephant on it, and to that he had a right. The argument is that the accessories make the principal features of the labels like one another, which, taken by themselves, are quite unlike. But if the chief feature is unlike, how can it be contended that the whole is like? We say that not merely is the elephant different, but the surroundings are different. There is no evidence of deception. The evidence is all interested evidence of brokers and others who wish to push the sale of the plaintiffs' goods.

*Macpherson* in reply:—It is not necessary to prove deception. Probability of deception is enough. Why did the defendant substitute label B for his previous label, which also had an elephant on it?—*In re Worthington & Co.'s trade mark* (10); *Civil Service Supply Association v. Dean* (11). We do not object to the elephant or to the surroundings. It is to the ticket as a whole we object. If the defendant gives up the elephant, he may keep the surroundings, or he may give up the surroundings and keep the elephant. We do not care which. It is to the similarity of the general effect that we object.

#### JUDGMENT.

SARGENT, C.J.—The plaintiffs are manufacturers of aniline dyes in Germany, and since 1882 have been importing these dyes into this country in small tin boxes with coloured glazed coverings, on which labels are impressed. Their scarlet dye, by the evidence of all the witnesses, had acquired a high reputation amongst dealers, and continued to command a large sale, when the defendant, early in 1892, began to import scarlet

(1) 8 Times Rep. 734.

(2) 23 L. J. Ch. 225.

(3) 6 M. 108.

(4) 3 C. 417 (424).

(5) L.R. 5 H.L. 508.

(6) 7 Ap. Ca. 219 (223).

(7) Weekly Notes for 1872, p. 31.

(8) 1 Hyde, 270.

(9) 1 H. & M. 259.

(10) 14 Ch. D. 8.

(11) 13 Ch. D. 512.

1893  
MARCH 24.  
ORIGINAL  
CIVIL  
17 B. 584.

dye, manufactured by Cassella & Co. in Germany, in tin boxes of the same size, with coverings and labels which the plaintiffs [593] complain of as being a colourable imitation of their own coverings and label, and likely to injure them in their trade.

The principal object on the plaintiffs' label (Ex. A) is the figure of an elephant, but this is admittedly common—in varying postures as with different accessories—to all the labels used by other importers of these dyes, and indeed it is not in dispute that all the dyes imported were generally known as elephant brands.

It will be convenient to state, at the outset, that the plaintiffs do not,—whatever they may appear to have done in their solicitors' first letter,—lay claim to the exclusive use of the figure of an elephant on their labels, nor do they rely on their goods being known in the market by any name, devise or mark associated with anything to be found on their label so as to bring their cause of complaint within the decisions in the Glenfield starch case (*Wotherspoon v. Currie* (1)) or the well-known Bhei Hathi case of *Johnston v. Orr-Ewing* (2). Their case is that the general aspect or get-up of the label arising from the combination of the elephant with its accessories and surroundings, &c., is an important feature in it, and that the defendant's label is a colourable imitation of their label in this respect, and likely to deceive purchasers of the defendant's scarlet dyes into supposing that they are really purchasing the plaintiffs' goods.

The principles on which the Court gives relief in cases of this description have been often stated by learned Judges in the English Courts of Equity, and I cannot do better perhaps than refer to the judgments of Lord Kingsdown in the *Leather Cloth Company v. American Leather Cloth Company* (3) and of Lord Langdale in *Perry v. Truefit* (4), which were accepted by Lord Blackburn as "the true guide" in delivering judgment in *Johnston v. Orr-Ewing*. Lord Kingsdown in the former case says: "The fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader." Lord Langdale says "he cannot be allowed to use names, marks, letters and other indicia, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person;" and [594] further on, proceeding to consider whether the defendant had infringed the plaintiffs' rights, he adds: "That depends upon the question how far the defendant's trade mark bears such a resemblance to that of the plaintiffs' as to be calculated to mislead incautious purchasers."

Proceeding to an examination of the tin boxes in which the parties pack their dyes, we find that they are of the same size and shape, covered with red glazed paper having a large R in gold at the back and round tickets at the ends, and that the plaintiffs' labels have the word "Scarlet" in red colour with one, two, or three 'Rs' according to quality on a white ground forming the lower part of a circular band round the elephant, whilst in the defendant's label the word and letter "Scarlet R" are the same, but on a straight white band, below the figure of the elephant which has a red *jhool* on it, of lighter colour than that of the plaintiffs' elephant. The elephant in both cases is in the centre of a curved band, which in the plaintiffs' label is circular and in the defendant's elliptical; the elephant in its curved band being in both cases surrounded by small medallions placed at the corners of the labels and arranged on either side of the figure of the

(1) L. R. 5 H. L. 508.

(3) 11 H.L.C. 538.

(2) 7 Ap. Ca. 219 (223).

(4) 6 Beav. 66.

elephant. The plaintiffs' box has also a narrow bluish-coloured band running round the four sides which is wanting in the defendant's label, the ground of which is red throughout, outside the figure of the elephant. In both cases there is a square label at each end of the box.

The general effect on looking at either label, without paying attention to detail, is undoubtedly that of an elephant in the centre of a curved band surrounded by small medallions, with a white band below the elephant on which "Scarlet" in red colour is written; and the plaintiffs' case, as stated by their agent, Mr. Ostermeyer, and by their principal witness, Mr. Brandenburg, who has had large experience in the trade, is that the purchaser's eye would be arrested by the similarity of the general effect, *i.e.*, by the similar combination of the elephant and its accessories and surroundings, and would disregard the differences between them in matter of detail. The Judge of the Division Court did not accept this view, being of opinion, having regard to the points [595] of difference, that no one could be deceived by the apparent resemblance between the tins by reason of the labels alone. I can scarcely doubt that this would be so in the case of Bombay brokers, who are described as a sharp set of men and likely to examine the labels in detail, and remark the differences between them; but the question in a case of this description is not what would be the effect on brokers, or even dealers, in Bombay, but how the labels would be likely to strike the incautious, or (as Lord Chelmsford describes them in *Wotherspoon v. Currie*) unwary purchasers, such as are to be found more particularly in the Mofussil. If people of that class, whether small up-country dealers or dyers, would be likely so to be deceived, it is plain that a great opportunity would be afforded to the brokers and large dealers to push the defendant's scarlet dye in the market to the detriment of the sale of the plaintiffs' dye; and it is from this point of view, which the Judge of the Divisional Court has, I think, lost sight of, that the question as to colourable imitation ought to be considered.

As to this, the evidence of the Bombay brokers and dealers is, I think, of little value, except so far as it explains the course of business in Bombay, and, having reference to that, it can leave no doubt that the labels have a distinct importance in the trade, and that the brokers and large dealers must have great facilities in inducing the up-country dealers, and, through them, the smaller customers and dyers up-country, to accept such brands as they may desire to push in the market. This Court has, therefore, to say, on a comparison of the labels, whether it is likely that the class of persons I have referred to would be deceived.

After a careful examination of them I cannot feel any doubt that the attention of such purchasers would be arrested by the general effect of the label, and that such differences in detail as the colour or size of elephant and the colour and shape of curve, which they are capable of remarking, (for it is to be remembered that they cannot read what is on the medallions and would not be able to discriminate intelligently between them) would probably be regarded by them as having been made by the plaintiffs themselves from motives of their own as explained [596] by Lord Selborne in *Johnston v. Orr Ewing* (1). In other words, they would, notwithstanding such differences, regard the labels as symbolical of the plaintiffs' goods. In coming to this conclusion, it is impossible not to be influenced by the conduct both of defendant and Cassella & Co., and the correspondence between them in the early part of 1892 with reference to

1893

MARCH 24.

ORIGINAL;

CIVIL.

17 B. 584.

(1) 7 Ap. Ca. 219.

1893  
MARCH 24.  
ORIGINAL  
CIVIL.  
17 B. 584.

the introduction of Cassella & Co.'s scarlet dye into the Bombay market—a description of evidence to which great importance was attached by Lord Blackburn in *Johnston v. Orr Ewing*, as showing that this resemblance was likely to deceive. Cassella & Co. had already registered an elephant label in 1883 in Germany, and had used it in Germany and Japan. Why, then, did they not use it when they determined to place their scarlet dye on the Indian market? The evidence also goes to show that they had at first used Ex. No. 6 as an elephant label. Why then did they not continue to use it, but instead place the plaintiffs' label (Ex. A) with their engraver with the view to preparing Ex. B? They say they instructed him to draw up their label, so that no part would be considered to be an imitation of the plaintiffs' label; but how came it that whilst no part is exactly the same on both labels, the general similarity between the labels is so striking, if their real intention was to avoid a colourable imitation? That both defendant and Cassella & Co. attached the greatest importance to the get-up of the label cannot be doubted. In his letter of 2nd April, the defendant writing to Cassella & Co. is jubilant over it and says: "We are sanguine that if you have a free use of this ticket it will help us to drive out of the market Soda Fabrik scarlet, and fearing the same they have taken the steps to stop the same being used by you." In his deposition the defendant no doubt explains that he had not then seen Ex. A, and only intended to refer to the elephant. It is almost impossible to believe this statement of the defendant, who was taking a keen interest in the approaching rivalry between the two manufacturers; but at any rate he admits that Jiwa had explained to him what plaintiffs' label was, and knowing, as the defendant must have done, that the figure of an elephant was common to the labels of several importers, his exultation over Cassella & Co.'s label can only [597] be reasonably accounted for by his conviction that it would by its general resemblance to the plaintiffs' label afford the most valuable assistance in ousting the plaintiffs' scarlet in favour of the defendant's dye.

For these reasons I have come to the conclusion that the plaintiffs have satisfactorily established that the defendant's label is likely to deceive unwary purchasers to the detriment of their trade, and that they are entitled to the injunction as prayed for. The decree must, therefore, be reversed and a decree made in terms of the plaint. Appellant to have his costs here and in the Court below.

STARLING, J.—The plaintiffs in this case, The Badische Aniline and Soda Fabrik, seek to have it declared that the defendant's label (Ex. B) is a colourable imitation of their label (Ex. A), and to have the defendant restrained by injunction from selling packets of scarlet aniline dye with Ex. B affixed to them.

The defendant is a Parsi inhabitant in Bombay who has been since January, 1892, importing into Bombay scarlet aniline dyes manufactured by Cassella & Co., of Frankfort, on the packets containing which the label B was affixed.

From the evidence it appears that the plaintiffs have been importing into and selling in Bombay scarlet aniline dyes with the label (Ex. A) on the outside of the packet in which it was contained, ever since 1882. The dye so imported is appreciated and the sale has been an increasing one. Since that date there have been three other elephant tickets (Exs. 1, 12, and 6), besides Ex. B, imported into Bombay in connection with scarlet aniline dye, but to a comparatively small extent, and they cannot in any way be said to be colourable imitations of the plaintiff's ticket. Exhibit 6 was

1893  
 MARCH 24.  
 ORIGINAL  
 CIVIL.  
 17 B. 584.

a ticket of Cassella & Co., who are the persons really interested in the result of this suit, but they seem after a short time to have dropped the use of that ticket altogether, possibly because they did not find it take in the market. Thus up to 1892 there was no label attached to scarlet aniline dye which was at all like the plaintiffs' or likely to be mistaken for theirs. In 1892, or shortly before the commencement of that year, Cassella & Co. had Ex. B designed and the circumstances under which that [598] was done are described in their letter to the defendant of the first December, 1892, (1) and in that they say: "We had seen the plaintiffs' label before we got up ours registered in Germany in 1892, and as our lithographer had also seen the same label before, we at the time gave special orders to have the design drawn up in such a manner that no part thereof could be considered an imitation of the plaintiff's label." Now it is quite possible for a label, no part of which is a copy of another label, to be a colourable imitation of that other label, and to be so like it in general appearance as to be likely to deceive purchasers. Such was the case in Orr Ewing's case (2), and it seems to me the special orders given by Cassella & Co. might have been, and were probably, coupled with orders to make their label have the same general appearance as the plaintiffs'. Then for what purpose were these labels prepared? The defendant in his evidence says that he went to Cassella & Co., in Frankfort to get a monopoly of magenta dye from them. This he could not get, as they had already given it to some one else, but they showed him tins of scarlet dye with label B on it and asked him to push the business of it in Bombay. Clearly, then, label B was prepared for the express purpose of being put on tin of scarlet dye which were to be sent to Bombay for sale, where their former elephant label (No. 6) had failed to secure markets. What the defendant thought of in using the ticket appears from his letter of 2nd April 1892, to Cassella & Co.:—"We are quite sanguine that if you have a free use of the ticket it will help us to drive out of the market Soda Fabrik's scarlet \* \* \*. As to your suggestion to select another ticket in place of the elephant one, it will of course take a long time to introduce same in the market and thus throw unnecessary hindrance in the way." If B were quite unlike A, and not likely to be mistaken for it, it would be a new ticket, and it would be a long time before that could be introduced in the market and the difference between using B and some other ticket can only be that B, was so like some other ticket which has already a hold on the market, as to make it possible to slip it in and get the benefit of the reputation of that other ticket. The only ticket then in the market [599] resembling B was the plaintiffs'. To my mind the only conclusion to be drawn from this evidence is that Cassella & Co. had B designed in order to pass off their scarlet dye in Bombay as the plaintiffs' and that the defendant, being of opinion such a course was possible, took the goods with the same object. In such a case the Court will, without further enquiry, restrain a defendant—*Cope v. Evans* (3).

Further, against the defendant his own conduct is evidence, and I think his conduct is such as to prove against him that the resemblance between the tickets was calculated to deceive (see per Lord Blackburn, 7 Ap. Ca., at p. 230). Then as to the appearance of the tickets themselves. It is quite true that no one portion of B is a copy of a similar portion of A, and that no one, taking the two into his hands and comparing the one with the other, could mistake B for A. But purchasers do not so look

(1) 17 B. 587.

(2) 7 Ap. Ca. 219.

3) L.R. 18 Eq. 138.

1893  
MARCH 24,  
ORIGINAL  
CIVIL.  
17 B. 584.

at the labels. What they look at is the general appearance and effect of the label, and all that is necessary in order that the Court should stop the use of a label is that its general appearance and effect is such as would render it likely to make purchasers suppose they are purchasing an article of a party who is complaining of the use of the defendant's label (see Orr Ewing's case (1)). In my opinion, the general effect of the two labels is practically the same, and the only difference which could possibly strike the eye at first sight is the *jhool* on the defendant's elephant; but I very much doubt whether an ordinary purchaser would ordinarily notice this, or if he did, that he would remember whether there was or was not a *jhool* on the plaintiffs' label which he had seen before. If he did notice and remember, I am of opinion that in all probability he would put it down to some change or variation made by the plaintiffs' themselves (see the judgment in Orr Ewings' case). On the whole, I have come to the conclusion on my own view of the labels, and taking into account the character of the elephant labels already in the markets other than A and B, and from the conduct of the defendant, that his label is calculated to deceive a purchaser into the belief that his goods were those of the plaintiffs and, from the conduct of [600] Cassella & Co. and the defendant, that the label was introduced with that intention. This is sufficient to decide the case, and I am, therefore, of opinion that the decree of Parsons, J., should be reversed and a decree passed for the plaintiffs.

I may add, with regard to one of the arguments used in behalf of the defendant, that it seems to me that it was practically impossible for the plaintiffs to get any evidence of purchasers having been actually deceived. The first shipment of Cassella's goods was only made in the end of January 1892, and by the beginning of March the plaintiffs had interfered and objected to the use of Cassella's ticket, and by the beginning of July the present suit was filed; and after the plaintiffs had interfered, it would have been almost impossible, and certainly exceedingly damaging to their case, for the defendant to have attempted to pass Cassella's goods off as the plaintiffs'. If they had succeeded in doing so, they would have been making most cogent evidence for their adversaries.

*Decree reversed.*

Attorneys for the appellants:—Messrs. *Payne, Gilbert and Sayani.*

Attorneys for the respondent:—Messrs. *Pestonji Rustomji and Kolha.*