

it cannot be excused by us as we are not the proper Court to entertain that application.

Mr. Shah has conceded, for the purpose of avoiding complication and additional expense, that the appeal to the District Court of Ahmedabad should be treated as an appeal from the order of the 20th December 1902, and not from that of the 14th September 1903. This to some extent simplifies the matters, and the proper order for us now to pass is that we reverse the decree of the District Court of Ahmedabad, and send back the case in order that it may be there determined whether on the footing of the appeal being one from the order of the 20th of December 1902, it is one which should be admitted.

The costs in the lower Court and in this Court will abide the result.

Decree reversed and case sent back.

G. B. R.

ORIGINAL CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

VADILAL SAKALCHAND* AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, v. G. F. BURDITT AND COMPANY (ORIGINAL DEFENDANTS), RESPONDENTS.*

Trade mark—Seller's design—Rights of manufacturer—Partnership—Dissolution—Partner continuing the business—Right to sue in respect of trade mark.

In the year 1892 M designed a label for goods ordered by his firm C. J. & Co. from J. F. A. & Co., the London manufacturers. The label consisted of a youth and girl in fancy dress and goods bearing the label became known in Bombay and up country as "Jori Mal."

By M's request the name of C. J. & Co. was printed on the border of the label in Persian and Gujarati characters.

In 1897, M's partner having retired from the firm, M, the 4th plaintiff, continued the business of C. J. & Co., with the other plaintiffs, under the name, style and firm of V. & Co.

* Suit No. 205 of 1903, Appeal No. 1371.

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V. & Co. then ordered goods bearing the label from B. W. A. & Co., in London, instructing them to place on the border of the label, the name of their firm, V. & Co., in English, Persian and Gujaráti characters.

In 1898, B. W. A. & Co., having become insolvent, the plaintiffs imported goods, without the label, from B. & Co., the defendants, who had taken up the business of B. W. A. & Co.

In 1899, the plaintiffs requested the defendants to arrange, if possible, to send out the goods under the "Jori Mal" label.

In 1900, the defendants, having purchased from B. W. A. & Co. their rights under the label, proceeded to place it on goods manufactured for and sold by them, leaving the border of the label blank, or inserting on the border, their own name, or, by special request, the names of the constituents, by whom the goods were ordered.

It was not expressly agreed, that B. W. A. & Co. should not supply goods under the label to constituents other than the plaintiffs.

The lower Court held, *inter alia*, (1) that the plaintiffs had lost their right to the exclusive user of the label as against the defendants, and (2) that the plaintiffs were not entitled to the rights, if any, of the firm of C. J. & Co., to the label.

On appeal, by the plaintiffs,

Held, the plaintiffs have failed to establish an exclusive right to the label.

In the absence of contract, a seller of goods has no exclusive right to a mark, which merely denotes goods which he sells, even though he may have designed the mark himself.

Such a mark may be a mere quality mark, indicating the reputation of the goods, irrespective of the reputation of the seller.

Obviously every trader being entitled, if not bound, to state truthfully the quality of the goods he sells, no one trader can restrain any other from exercising that right by a mark truthfully indicating quality. For neither of the two grounds for protection exists in such case. His reputation is not injured and no deception is practised on the public.

To give an exclusive right there must be something further. The mark must amount to a representation that the quality is wholly or in part due to and guaranteed by some person or persons concerned in or connected with the origin or history of the goods. In such cases the public are invited to rely on the reputation of the persons denoted, and no other person can, without their authority, make such representation. It is a question of evidence in each case, whether there is false representation or not.

Held, also,

A trade mark, belonging to a firm, would, in the absence of express provisions to the contrary, as part of the partnership assets, be available for any partner of that firm, carrying on that business.

Hirsch v. Jonas⁽¹⁾ followed, *Damodar Ruttonsey v. Hormusjee Adarjee*⁽²⁾ distinguished

(1) (1876) 3 Ch. D. 584,

(2) Unreported.

APPEAL from Chandavarkar, J.

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In 1892, Maneckchand Morarjee, one of the plaintiffs in this suit, designed a label for goods ordered by his firm, Chunilal Jamnadas, from the London manufacturers, J. F. Aldridge & Co.

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The label consisted of a youth and girl in fancy dress and goods bearing the label became known in Bombay and up country as "Jori Mal."

By the plaintiffs' request, the name of Chunilal Jamnadas was printed on the border of the label in Persian and Gujarati characters.

In 1896, the firm of Chunilal Jamnadas imported goods under the same label from B. Whalley Ashwell and Company in London.

In 1897, the firm having dissolved partnership, the plaintiff Maneckchand continued the business of Chunilal Jamnadas, in partnership with Vadilal Sakalchand, Runchordas Madhowji and Amilal Jadowji, the other plaintiffs, under the name, style and firm of Vadilal Sakalchand.

In 1897, the firm of Vadilal Sakalchand ordered goods under the label from B. Whalley Ashwell and Company, requesting them to place on the border of the label, the name of their firm, in English, Persian and Gujarati characters.

In 1898, B. Whalley Ashwell and Company having become insolvent, the plaintiffs imported goods, without the label, from the defendants Burditt and Company, who had taken up the business of B. Whalley Ashwell and Company.

In 1899, the plaintiffs requested the defendants to arrange, if possible, to send out the goods under the "Jori Mal" label.

In 1900, the defendants purchased from B. Whalley Ashwell and Company, their rights under the label.

The defendants then proceeded to place the label on goods manufactured and sold by them, leaving the border of the label blank, or placing on the border, their own names or, by special request, the names of the constituents, by whom the goods were ordered.

On the 2nd April, 1903, the plaintiffs filed a suit (being suit No. 205 of 1903) against the defendants, praying, *inter alia* :—

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(1) That the defendants may be restrained by injunction from importing into India or selling in India any goods on which is affixed the label aforesaid or any other label, which is a colourable imitation of the plaintiff's label aforesaid.

(2) That the defendants may be ordered to account for and pay to the plaintiffs all profits made by them out of any goods imported or sold by them, bearing the said label.

(3) That the defendants may be ordered to pay the costs of this suit.

Jardine, with him *Lowndes*, for the plaintiffs :—

The plaintiff's object in getting the Lady and Gentleman ticket was to distinguish his goods, from those of other merchants. The conception came from Maneckchand, the 4th plaintiff, and the plaintiffs never used any other label. Ashwell's object in printing similar tickets in blank, was to use them, if successful, through other indentors, if the plaintiff's orders fell off. The plaintiff was not aware of this fact and is not bound by it.

The firm of Chunilal Jamnadas dissolved partnership in 1897. For the effect of this see *Anookool Chunder Nundy v. Queen-Empress*⁽¹⁾ and *Sebastian on Trade marks*⁽²⁾. The right to the label passed to Manekchand, who continued the business.

The expression "their old label" in the correspondence shews, that the plaintiffs asserted ownership, after Ashwell's insolvency. The fact, that they did not object to the blank label is not material, because the label itself was a sufficient indication, that the goods were those of the plaintiff.

The label admittedly has a reputation and the defendants are not entitled to place goods, under the Lady and Gentleman ticket, in the same market as the plaintiff.

Robertson, with him *Branson*, for the defendants.

The label was the property of Ashwell and was partly designed by him. Even assuming that the label was originally the property of Chunilal Jamnadas, which is denied, the plaintiffs would not, in the absence of an assignment, have any rights in respect of it. Again the plaintiff, as the mere seller of goods, could not in any event claim an exclusive right against the manufacturer. See *Robinson v. Finlay*. *Ward v. Robinson*.⁽³⁾

(1) (1900) 27 Cal. 776.

(2) pp 106, 110 (4th Edn.).

(3) (1877) 9 Ch. D. 487.

After the insolvency of Whalley Ashwell & Co. in 1898, the plaintiffs imported goods from the defendants without the label. The correspondence between them shews that exclusive ownership was never alleged by the plaintiffs, at this time. Having, by their silence, induced the defendants to purchase the ticket, they are estopped from setting up an alleged right of ownership now.

The defendants are the successors of B. Whalley Ashwell & Co. and have acquired through them, the right to place the label on their goods.

CHANDAVARKAR, J. (after stating the facts). To sum up:— B. W. Ashwell & Co. had some print works exclusively engaged to them for India. They had piece-goods of different kinds manufactured for them and exported them to wholesale dealers in Bombay. Several of the dealers selected their own goods and the firm Chunilal Jamnadas made their selection. B. W. A. & Co. were asked by Chunilal J. to reserve the lady and gentleman ticket for them exclusively, and sent a design compounded of the two separate pictures of B. W. A. & Co. B. W. Ashwell & Co. agreed to that, and the goods, sent to that firm exclusively, had the ticket stamped on them, with the name of Chunilal J. printed on the borders, in the English, Gujaráti and Persian characters. At the same time, B. W. Ashwell & Co. put two small tickets by the side of the ticket. The goods imported came to be known in the Bombay market as "Jori Mal" and to be identified with Chunilal Jamnadas. That firm stopped in October 1897; it did not sell its good-will to any one; nor did it sell or purport to sell or assign its right to, or interest in the ticket. Had Chunilal Jamnadas any exclusive right of the kind now claimed by the plaintiffs, it is not probable that the firm would have let so valuable an asset as the mark alone. The plaintiffs then commenced to do business with B. W. Ashwell & Co., in the same way that Chunilal Jamnadas had done. B. W. Ashwell & Co. had to get the kind of piece-goods wanted by the plaintiffs manufactured and they (B. W. Ashwell & Co.) had engaged certain print works exclusively for their use. This must have been done by B. W. Ashwell & Co. on their own risk and responsibility. The plaintiffs imported a

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certain class of goods out of those exported by B. W. Ashwell & Co., who exported them to none else under the agreement with the plaintiffs. There were risk and expense on either side. It was under these circumstances that the lady and gentleman ticket was used, when B. W. Ashwell & Co. became bankrupt, and the defendant took up their business. Ashwell would not let the defendant use his tickets. The defendant had therefore to deal with the plaintiffs without the lady and gentleman ticket and was a long time arranging for Ashwell's permission to use the old tickets. The plaintiffs kept on asking for the use of the old ticket on their goods, but, at the same time, they were content to receive the goods from the defendant, with other tickets on. They knew, what the hitch was, and that the defendant was trying to come to an arrangement with Ashwell. The plaintiffs, therefore, waited without setting up an exclusive right. On one occasion the plaintiffs received from the defendant a consignment, stamped with the lady and gentleman ticket on the goods, with B. W. Ashwell & Co.'s name on it. And the goods so received were sold by the plaintiffs. For some time after the defendant had succeeded in getting an assignment of the right to use the old tickets from Ashwell, the plaintiffs continued to deal with the defendant and then broke off. And now having left the defendant in the lurch they say, that the lady and gentleman ticket which had been used on the goods imported by them, first from B. W. Ashwell & Co., and afterwards from the defendant, has become exclusively theirs and that the defendant has no right to use it, because they assert that it is their mark, identifying solely the goods imported by them. The facts of the case, as I have stated them, and as they are, in my opinion, proved by the evidence, both oral and documentary, are wholly against the plaintiffs' claim. The plaintiffs' conduct, during what I have called the "interregnum"—the fact that the firm Chunilal Jamnadas, when it dissolved, neither by conduct, nor words, showed that it had a right of exclusive user, the hesitative manner in which the witnesses examined for the plaintiffs spoke about the exclusive identification of the ticket with the plaintiffs' name, while admitting the user by plaintiffs of other labels for their goods; the absence of

any testimony from up country dealers and the non-production of their letters; the fact that B. W. Ashwell & Co. took care to attach two smaller tickets to the tickets in question with their name on them making the design a compound matter, in which they were interested jointly with those, whose names were printed on the blank borders of the picture; the fact, moreover, that B. W. Ashwell & Co. on the one hand had certain print works engaged exclusively by him for India, which meant the undertaking by them of considerable risk and expense, that on the other hand, the plaintiffs selected a certain class of goods for sale by them in the Bombay market and imported them from B. W. Ashwell & Co., who reserved those goods exclusively to plaintiffs in that market, and that the lady and gentleman ticket came, under the circumstances, to be reserved by B. W. Ashwell & Co. for the use at first of Chunilal Jamnadas and then of the plaintiffs—all this, in my opinion, leads to no other inference, than that the ticket was not, and has not become the exclusive property of the plaintiffs' goods. I attach no importance to the defendant's statement made in his deposition that he "assumes" that the ticket is well-known in the Bombay market in connection with the plaintiffs' firms. I cannot act upon that statement as an admission, when it is guardedly put forward as an assumption. Upon the view most favourable to the plaintiffs, on the circumstances of the case, the plaintiffs' right cannot be higher than this, that the ticket was the joint concern of the parties, as long as they dealt with each other, and that when they ceased so to deal, each was at liberty to use the mark for his goods, provided he did not use the name of the other on the ticket. This view of the case seems to me to best fit in with the conduct of either party. It explains, why plaintiffs acted as they did, during the period of the interregnum, and why they have failed to put into the witness-box some of their up country customers, or to produce their letters to show that the trade mark is known in the Indian market as exclusively theirs. It explains, on the other hand, when plaintiffs ceased to deal with the defendant and began to import goods through Patuck from some one else using the lady and gentleman ticket, why the defendant took no steps to assert his exclusive right.

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The present case seems to me to resemble somewhat *Robinson v. Finlay. Ward v. Robinson*⁽¹⁾ and is within the incidence of the principle of that decision. Here, as there, at the time of the commencement of the relations between the parties, no one of them had any right to the trade mark, whatever, as connected with the piece-goods exported. Here, as there, the trade mark was adopted as the result of joint consultation between the parties. There it was proved, that the goods were quoted in the market as "Robinson's"⁽²⁾ first, as here, the goods are alleged to be quoted as the plaintiffs'. In *Robinson v. Finlay*⁽³⁾, James, L. J., said :—"The case is not like one depending on the relation of master and servant, or principal and agent, but is more like a partnership; that is to say, the mark was adopted by persons joined in a matter in which they were interested jointly, not as master and servant, but by way of a partnership. The *onus probandi* is thrown upon the plaintiff in each case to prove that he has that monopoly and sole right which he alleges to use the marks or combination of marks, and that the defendant is unlawfully using the same." Baggallay, L. J., said :—"It being clear upon the evidence that the designs were designs... in which all three were interested, it follows that, upon the termination of that adventure, none of the three could claim any title against the other." Bramwell, L. J., said :—"Here was a compound matter which the parties agreed to, and upon coming to the arrangement which they did come to, they made no provision as to what should happen when that arrangement ceased to exist between them, and the consequence is that each party must stand upon what one may call his natural rights under the circumstances, that is to say, that each may do what he is not forbidden to do."

The findings on the issues were, *inter alia*, as follows :—

(1) The plaintiffs have been in the habit of importing into Bombay and selling piece-goods distinguished by the label annexed to the plaint, as alleged, but the label on the goods had two smaller tickets attached to it, containing B. W. A. & Co.'s name till November 1898, besides the plaintiffs have also import-

(1) (1878) 9 Ch. D. 487.

(2) (1878) *Ibid* p. 489.

(3) (1878) *Ibid* p. 498.

ed the same quality of goods stamped with other labels and sold them as goods of their import and merchandise.

(2) The goods bearing that label have acquired a reputation in the Bombay market as "Jori Mal," but it is not proved that plaintiffs' goods have acquired that reputation, the evidence showing that they have sold the goods stamped with other labels.

(3) The conduct of the defendants is not calculated to deceive the purchasers into the belief, that the defendants' goods are the plaintiffs'.

(4) The plaintiffs are not entitled to the rights, if any, of the firm of Chunilal Jamnadas to the said label.

(5) The design was a suggestion of the plaintiffs borrowed from two separate tickets of B. W. Ashwell and Company. The ticket is known as the lady and gentleman ticket.

(6) The plaintiffs have lost their rights to the exclusive user of the ticket as against the defendant.

(7) There is no estoppel.

The suit was dismissed with costs.

The plaintiffs appealed.

The following were the grounds of appeal *inter alia* :—

(1) That the learned Judge erred in holding that the tickets had not acquired reputation in connection with the plaintiffs' goods.

(2) That the learned Judge erred in giving weight to the evidence that the plaintiffs sold goods under tickets, other than the lady and gentleman ticket.

(3) That the learned Judge ought to have held that the 4th plaintiff Maneckchand having been partner in the firm of Messrs. Chunilal Jamnadas and his partner Chunilal Sakalchand on the dissolution of the firm of Chunilal Jamnadas not having continued the business in the goods with the lady and gentleman ticket, abandoned his right to use the same, and the said 4th plaintiff having started the plaintiffs' firm as successor to the said firm of Chunilal Jamnadas and having continued to use the said ticket was or became entitled to the exclusive use of the ticket in question as against his said former partner Chunilal Sakalchand.

(4) That the learned Judge was wrong in holding that B. Whalley Ashwell and Company had any right of using solely or jointly with the said Chunilal Jamnadas or with the plaintiffs the lady and gentleman ticket complained of.

Lowndes, with him *Inverarity* and *Jardine*, for the appellants (plaintiffs):—The case of *Robinson v. Finlay*⁽¹⁾ does not apply. The public has relied upon the reputation of the plaintiffs for

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their general business capacity and integrity. The mark, which attracts custom, by indicating such reputation is entitled to protection, see *Damodar Ruttonsey v. Hormusji Adarji*⁽¹⁾. In the present case there was a joint adventure as in *Re Jones Trade Mark*⁽²⁾ but the correspondence shews that the contract was, that the ticket should be the exclusive property of Chunilal Jamnadas.

Chunilal Jamnadas acquired a great reputation under the ticket. When the firm was dissolved, the retiring partner did not claim it. That partner's interest in the trade mark accordingly passed to Maneckchand the 4th plaintiff, who continued the business, see Sebastian on Trade Marks⁽³⁾.

Branson, with him *Robertson*, for the respondents (defendants):—This is not a case of registering, but of using a Trade Mark. The law is wider, with reference to user, see *In re The Australian Wine Importers, Limited*⁽⁴⁾. The case of *Hirsch v. Jonas*⁽⁵⁾ applies. The lady and gentleman ticket merely indicated that the goods were manufactured by the defendants. The plaintiffs, as the sellers, could not have an exclusive right to the ticket, see *Robinson v. Finlay, Ward v. Robinson*⁽⁶⁾. Even assuming that the plaintiffs were originally the owners, their conduct, after the insolvency of B. Whalley Ashwell and Company, estops them from setting up such ownership now.

Lowndes, in reply, cited *Massam v. Thorley's Cattle Food Company*⁽⁷⁾.

BATTY, J.:—In this case the plaint alleges that the plaintiffs have been in the habit for some years of importing into Bombay and selling piece-goods, distinguished by a particular label placed on each piece of cloth and on the outside of the wrappers; and that the plaintiffs' goods bearing the label in question have acquired a very great reputation in Bombay and up country and are known as the "Jori Mal" from the label. The principal feature of the label is a picture of a youth and girl, each in fancy costumes. The plaint proceeds to state that the plaintiffs

(1) Unreported.

(2) (1886) 53 L. T. (N. S.) 1.

(3) p. 106. (4th Edn.).

(4) (1889) 41 Ch. D. 278 at pp. 281, 282.

(5) (1876) 3 Ch. D. 584.

(6) (1877) 9 Ch. D. 487.

(7) (1880) 14 Ch. D. 748 at p. 761.

orders for goods sold with the label, were executed by Messrs. Ashwell & Co., whose successors in business are the defendants, and that recently the defendants have been importing and selling in Bombay piece-goods with a label which in its main features is an exact copy of the plaintiffs' label. This conduct, as calculated to deceive purchasers into the belief that the defendants' goods are the plaintiffs' well-known goods, and so to occasion great damage and loss to the plaintiffs, is characterized in the plaint as wrongful and forms the ground of this action.

The prayers in the plaint are (1) for an injunction restraining the defendants from importing and selling goods with the label in question or with any colourable imitation thereof, (2) for an account and recovery of profits made by such sales by defendants and (3) damages and such other relief as the case may require.

The label used by the plaintiffs is A to the plaint. That used by the defendants is B. On the plaintiffs' label the name of their firm Amilal Jadowjee and Premchand Wadilal appears in English, Gujarati and Persian on the borders at the top, bottom and side. The borders on defendants' label are left blank. In every other respect the two labels appear to be indistinguishable.

The defendants in their written statement alleged *inter alia* that the label referred to in the plaint was designed and printed by Messrs. Ashwell & Co. and that it was their property, was used by them on goods manufactured and sold by them and was placed by them on goods indented for by their constituents when so required, and that the borders were filled up with the names and addresses of constituents who wished it: that the plaintiffs' firm had such use of the ticket but without any agreement giving them any exclusive use thereof. The defendants also stated that Messrs. Ashwell & Co. ceased to do business and that as for about 18 months they refused to sell their tickets to the defendants except on one occasion, the defendants were unable to use the label in question, and that the plaintiffs during that period made no claim to the label as of right, but requested the defendants to obtain the permission of Messrs. Ashwell & Co. to the import of goods bearing that label and are thus estopped from disputing the right of the defendants as purchasers from

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Messrs. Ashwell & Co. of the right to use the label. The defendants further alleged that they bought from Messrs. Ashwell & Co. in June 1900, the exclusive right to the use of the label and are owners thereof and have never agreed to give the exclusive use of the ticket to plaintiffs. The written statement admits that the defendants after supplying goods to plaintiff with the label A to the plaint, cannot allow other dealers to use that label but asserts the right to use the ticket B with the borders filled in with their own or any names other than the plaintiffs, and also asserts that they and Messrs. Ashwell & Co. have used the label in question on many descriptions of goods sold and imported by them and not only on one particular class of goods.

[His Lordship here referred to the issues, the findings upon them recorded by the lower Court and the grounds of appeal, and then went on :—]

On, one point, not set forth in the plaint, counsel for the appellants laid great stress in arguments. It is this. One of the present plaintiffs, Maneckchand Morarjee, was from 1892 to 1897 a partner in a firm trading under the style of Chunilal Jamnadas and alleges that it was in 1892, when he was a member of that firm, that he selected the label in dispute to be attached to and sold with goods for which he indented through Aldridge Salmon & Co. The appellants' account of this is confirmed by Exhibit T (p. 77) and by the evidence of T. R. Parukh, then salesman for Aldridge Salmon & Co., and does not appear to be displaced by the contention for respondents that Exhibit T relates solely to tickets received from Ashwell & Co. For the passage referring to the return of selected specimens does not necessarily apply to the orders of Chunilal Jamnadas, and the specific description of his requirements suggests that the device he wanted was not one already supplied from England for approval. Moreover there is no evidence that the specimen labels Aldridge Salmon & Co. had received were obtained from Messrs. Ashwell & Co. It may therefore be taken that the use of the device was one initiated by Morarjee. Counsel for appellants thereupon contends that the goods sold with that label by Chunilal Jamnadas became associated with the reputation of that firm, and that Maneckchand Morarjee as a late

partner of that firm and continuing business on the same premises, is entitled to the benefit of the reputation so acquired in connection with such goods and that the finding of the lower Court to the contrary is erroneous.

The retiring partner in this case, it is urged, has not continued business on his own account and Manekchand Morarjee is therefore entitled to the benefit of the reputation which his firm had acquired. No argument has been adduced for the respondents to show that if Manekchand Morarjee is entitled to the exclusive use of the trade mark in dispute, any objection could be taken in this case to his instituting this suit in the name of the new firm of which he is a member. A trade mark belonging to a firm would in the absence of express provisions to the contrary, as part of the partnership assets, be available for any partner of that firm carrying on the business. *Robinson v. Finlay* ⁽¹⁾; *Condy v. Mitchell* ⁽²⁾; *Sebastian on Trade Marks*, pp. 105 *et seq* and cases there cited. It is not suggested that in this case any provisions to the contrary had ever existed and I therefore think that whatever rights the firm of Chunilal Jamnadas may have acquired in respect of the label in dispute, would, without formal assignment, be claimable by Manekchand Morarjee on behalf of his present firm.

The important question remains whether that part of the label to which the defendants deny the plaintiffs' right, indicates a reputation acquired for the goods by either or both of such firms. The name of the plaintiffs' firm on the label is the only part of it which defendants admit to have any connection with the plaintiffs' reputation. And if plaintiffs fail to prove anything further, the mere fact that the rest of the device was of their own selection or invention, would not advance their case beyond that of the plaintiff in the case of *Hirsch v. Jonas* ⁽³⁾. For in that case the plaintiff, a cigar merchant, who had ordered supplies of cigars from a Havannah manufacturer, had himself furnished the device which he requested the manufacturer to affix to each box supplied, and which the manufacturer placed on the side of each box with his own name added.

(1) (1878) 9 Ch. D. 487.

(2) (1877) 37 L. T. N. S. 268, 766.

(3) (1876) 3 Ch. D. 534; 45 L. J. Ch. 364; 35 L. T. N. S. 228.

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On the plaintiff bringing an action to restrain the manufacturer from selling any boxes having the label affixed, Sir George Jessel M. R. refused an injunction, observing that there was no contract that Genir, the manufacturer, should not supply cigars under this label to any one else. The concluding passage of his judgment runs as follows:—

“I can understand a man saying, ‘I am not the actual manufacturer of goods but the selector of goods, and my reputation for cleverness and selection is so great, that goods marked with a mark to show that they had been selected and approved of by me will fetch a higher price in the market.’ If *Hirsch* had put on the box ‘*Gloria de Inglaterra Havannah* cigars, selected by *Hirsch*,’ he might have had a case to prevent other people imitating that. It would show that the cigars selected were approved of by him. If he got a great reputation in that way, I can understand he would have a right of protection for that which indicates to the public that the cigars were selected and approved of by him. That is not his case. There is nothing on the boxes to show anything about *Hirsch* at all. All he says is that the trade knows this mark as denoting cigars sold by him, which I dare say it does. It appears to me at present that he has no case whatever, and there is no use my granting an injunction. I do not know whether he may make out a contract hereafter.”

Thus, in the absence of contract, a seller of goods has no exclusive right to a mark which merely denotes goods which he sells, even though he may have designed the mark himself.

Such a mark may be a mere quality-mark, indicating the reputation of the goods irrespective of the reputation of the seller.

Obviously every trader being entitled if not bound to state truthfully the quality of the goods he sells, no one trader can restrain any other from exercising that right by a mark truthfully indicating quality. For neither of the two grounds for protection exists in such case. His reputation is not injured and no deception is practised on the public.

To give an exclusive right there must be something further. The mark must amount to a representation that the quality is wholly or in part due to and guaranteed by some person or persons concerned in or connected with the origin or history of the goods. In such cases the public are invited to rely on the reputation of the persons denoted, and no other person can, without their authority, make such representation.

The only question then in this case is whether the device in the label B is a false representation of this last mentioned character. "It is a question of evidence in each case whether there is false representation or not." (*Burgess v. Burgess*⁽¹⁾ and Lord Herschell in *Reddaway v. Banham*⁽²⁾). *Prima facie*, the device itself does not purport to suggest any such representation. Being merely a picture of a youth and girl in fancy costume, the utmost it seems on the face of it to suggest in connection with the goods is that they may be used for the purpose of such or other costumes and will satisfy the public taste. It does not indicate any one as responsible for their attractiveness, much less that they are the better for being sold by any individual firm. It does not even indicate any individual firm. Unquestionably the legends on the margins of the label A do perform that function. But then those legends are expressly omitted from the label B and defendants disclaim all intention to use them.

But the appellants would contend that the pictorial part of the device is so identified in the mind of the public with the firm specified on the margins of label A as to form part and parcel of their commercial signature. It is of course a question of fact that could only be answered by evidence, whether the figures in fancy dress are so associated by consumers with plaintiffs' firm that taken by themselves they would be recognized as a pictorial supplement or duplicate of their trading style. It must be noted that in the plaint which I have already quoted, there is nothing to foreshadow the existence of any evidence to show that the reputation of the goods is in any manner or degree due to the connection of the plaintiffs' firm with their origin or history.

Paragraph 2 of the plaint states that the plaintiffs' goods bearing the said labels have acquired a very great reputation in Bombay and up country, and are known as the Jori Mal. The first sentence indicates a reputation due to the goods, not to the plaintiffs. The second suggests that the goods are enquired for not as the plaintiffs' goods, but simply as goods associated with a label indicating their attractiveness and suitability for picturesque costumes. The plaint makes no attempt

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(1) (1853) 3 De G. M. & G. 896. (2) [1896] A. C. 199 at p. 210.

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to attribute the reputation of the goods to anything that the plaintiffs' firm has done. The inference that suggests itself is that the firm has derived a reputation for the goods, but not that the goods have derived their reputation from the firm. The plaint indicates nothing on the part of the firm as having raised the goods in public estimation and there is nothing in the allegations to show that the plaintiffs can claim more credit for the value attached by the public to the goods, than they could for the value attached to currency notes that may pass through their hands.

With regard to the evidence in the case appellants' counsel was constrained to admit that it was all equally bad. This is ascribed to the difficulty witnesses had in understanding what were the facts on which their evidence was required. But the question in issue was really a simple one, *viz.* what was the fact of which the purchasing public required to be satisfied when enquiring for the goods in question and of which the label is accepted as a guarantee. And unless the answer was that the public insisted on ascertaining that the goods were bought from the plaintiffs' firm, it would be valueless for the purposes of the claim. It was for the plaintiffs to show that any enquirers for the goods attached importance to that point. As observed by the lower Court no letters from up country constituents have been put in for this purpose. This is in itself a very significant fact. For it indicates that there is no evidence that any stress was laid on plaintiffs' connection with the goods by purchasers who did not deal directly with the plaintiffs and who if they were not indifferent on the point would presumably have insisted on it.

Purchasers in Bombay dealing with the firm direct, of course knew that plaintiffs sold the goods in question. But that did not satisfy them; and the evidence of the plaintiff Morarjee shows that customers objected to the goods when sold with another label—not on the ground that they were not plaintiffs' goods—but on the ground that they were of inferior quality. Thus the label was taken as a guarantee of quality, and indifference was shown to the fact that plaintiffs were the sellers. Another witness, Kessojee Sunderjee, distinctly says

“the term Jori Mal conveys to the purchaser the idea of chocolate goods, black and other kinds of chintz,” that is it designates the quality and not the seller. A third witness, Meghji Jagji, says the ticket indicates the goods are “ assal ” (excellent).

Not a single witness cites an instance of the slightest importance being attached to the plaintiffs’ connection with them as sellers. Some stress has been laid upon the admission of the defendant that he assumes the ticket has been identified with the plaintiffs. But this admission I think carries the plaintiffs’ case no further than that of the cigar seller in *Hirsch v. Jonas*⁽¹⁾, where the mark in question was known as denoting goods which the plaintiff sold.

It is argued for appellants that the public relies upon the reputation of a selling firm for its general business capacity and integrity, as an assurance that full measure will be given; that the goods it sells will be in good condition and other similar advantages, and that marks indicating such a reputation perform the functions of a signboard in attracting custom and are entitled to the same protection.

But a signboard is localised and stationary and manifestly does not denote the repute attained in respect of any specific class of goods. It professes only to assert the repute attaching to the establishment in respect of all the goods in which it deals. It is for that purpose alone it is used by the seller and understood by the public, and it connotes no proprietary or exclusive right in the reputation of any particular goods but only the conduct of the firm in respect of all its goods alike. But the plaintiffs do not profess or claim so to use the pictorial device now in question, and a trade-mark, as it cannot exist in gross, is not capable of being so used and understood. The plaintiffs do not claim that they use the same device on all the goods they sell, so as to denote merely that they sell the goods and that they alone are entitled to the credit for the way they carry on the business of selling. They claim the mark as asserting a something in favour of this particular class of goods implying that the qualities for which those specific goods themselves stand in good repute are in some way due to the plaintiffs’ exertions. If the plaintiffs used the

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same mark on all the goods and packages they send out, they might then reasonably claim that the public knew the mark only to mean that these goods are sold by and can be bought from the plaintiffs, and the public could attach to that representation whatever value the plaintiffs' reputation as salesmen might justify. But when plaintiffs ostensibly reserve the mark for one set of goods alone, they claim a reputation in respect of those goods apart and distinct from their own general reputation as sellers. And neither their plaint nor their evidence asserts any such special reputation in any way connecting them exclusively with the merits claimed for the goods. It would be very different if the exclusive right to the mark were claimed on the ground that it truthfully indicated the plaintiffs' reputation, not for their own general business, but for their special connection with the repute of the goods. But the grounds above considered do not claim for plaintiffs any credit for the manufacture, importation or selection of the goods or on account of any exclusive right they have to sell them. The plaint it is true alleges that the plaintiffs have imported the goods. But neither the plaint nor the label B nor the arguments of counsel can suggest that the goods are any better on that account or that the public are informed of that fact by the label B, or are in any way affected by it.

Appellants' counsel has referred us to the case of *Damodar Ruttonsey v. Hormusji Adarjee*⁽¹⁾, an unreported case, decided by Mr. Justice (afterwards Sir Arthur) Strachey in the first instance and confirmed on appeal by Sir Charles Farran and Mr. Justice Fulton. But that case is very clearly distinguishable from the present and that in the most essential points. For, in the first place, it was held in that case that the plaintiff with the knowledge and assent of Wills, the manufacturer, represented the arrangement between them as giving him (the plaintiff) an absolute and independent right to use the design against all other persons including Wills himself. The correspondence proved that Wills assented to this view of the agreement. The appellate Court held the defendants "tacitly admitted the plaintiffs' contention that they (defendants) had no right to use the brands under any

(1) Unreported.

circumstances." In the present case, however the plaintiffs allege no contract express or implied as the basis of their claim. In the next place Sir Arthur Strachey's judgment in the case cited, lays great stress on the part the plaintiffs took in directing and regulating the preparation of the goods. "The cigarettes," says Sir Arthur Strachey, "*were selected by the plaintiff in the sense that he prescribed both by description and by sample, the kind and quality of tobacco and the size and make of the cigarettes and from time to time suggested improvements both in quality and make.*" And again: "The popularity of the cigarettes is, in my opinion, due entirely to the exertions of the plaintiff, who is one of the greatest importers of tobacco in India, who has the most extensive experience of the tastes of native smokers, who has given the cigarettes the advantages of name and design which his experience told him would probably attract customers... He has thus become *known* everywhere as their sole importer." Moreover the evidence of dealers was said to be conclusive that it was the importer and not the manufacturer on whom they relied. So in the appellate Court's judgment Sir Charles Farran said "Not only did the plaintiff give directions as to the kind of tobacco to be used in the cigarettes and as to the kind of boxes in which they were to be placed and as to the device which the boxes were to bear but he also corrected from time to time faults which Wills and Company fell into in manufacturing and packing the cigarettes for him." And Mr. Justice Fulton observed: "the plaintiff's name had become associated in the public mind with the importation of cigarettes bearing the device, &c." "To the great body of purchasers the essential fact was that these were cheap cigarettes which suited their taste and *were imported* by the plaintiffs under the devices, &c." These findings in my opinion very clearly differentiate the case cited from the present, in which plaintiffs have failed both in showing that the public relied upon their good name as importers, selectors or sellers, and also in suggesting any connection between themselves and these particular goods on which the public could have relied as a guarantee of the goods. The evidence in this case at most shows that the goods, first during the time of Chunilal Jamnadas and afterwards in the time of the present firm, acquired a reputation in

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the market as Jori Mal; and the bare fact that the name of either or both of those firms had become known as the name of persons who sold the goods in question, is an utterly insufficient ground for a claim to the exclusive right to a label which on its face indicates only the use for which the goods are suitable, and which has not been shown by evidence to be understood in any other sense by the public. No authority has been cited to us for the position that a seller merely because he sells goods is entitled exclusively to the reputation which the goods have acquired.

The remarks of Lord Herschell in *Birmingham Vinegar Brewery Co. v. Powell*⁽¹⁾, to which we have been referred, have no bearing on this case, but treat of the very different rights of the manufacturer of goods. In the view taken of the plaintiffs' connection with the piece-goods sold by him, it is unnecessary to discuss the bearing and value of the evidence recorded as to the inaction of the plaintiffs when the labels now claimed by them were withheld by Ashwell and Company. It suffices for the decision of this particular case that the plaintiffs have failed to show the label in dispute to be a representation that the goods to which it is attached are goods which owe their reputation in any sense or degree to the plaintiffs. For these reasons the decree of the lower Court is confirmed and the appeal is dismissed with costs throughout.

JENKINS, C. J.—I concur.

Decree confirmed.

Attorneys for appellants:—*Messrs. Bicknell, Merwanji and Romer.*

Attorneys for the respondents:—*Messrs. Crawford, Brown & Co.*

A. H. S. A.

(1) [1897] A. C. 710.