

HEATON, J. :—I entirely agree. We are quite satisfied from a perusal of sections 435, 437 and 438 of the Criminal Procedure Code that that Code emphatically does not contemplate a reference of this kind. I only add that if we encourage references of this kind, it would open up an alarming vista of undesirable possibilities.

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Answer accordingly.

R. R.

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Heaton.

THE MADHAVJI DHARAMSEY MANUFACTURING CO., LTD. (APPELLANTS AND DEFENDANTS), v. THE CENTRAL INDIA SPINNING WEAVING AND MANUFACTURING CO., LTD. (RESPONDENTS AND PLAINTIFFS).^o

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January 18.

Infringement of trade-name—Manufacturers of cloth affixing numbers on pieces sold—Cloth known by the numbers affixed as being of a particular manufacture—Numbers, not quality marks—Agents and middlemen ordering out goods by numbers alone—Use of numbers protected, when they are particular marks of a manufacturer's goods—Numbers, when a trade-name—Cases of actual deception not necessary.

The plaintiffs were manufacturers of cloth on a large scale at their Mills in Nagpore, Central Provinces. In the year 1904, they commenced to manufacture a certain quality of black twill and to distinguish this particular cloth from all other cloths of their manufacture stamped on each piece of cloth the No. 2051 and immediately below that number stamped each piece with the No. 10 which denoted the colour and shade of the cloth. There was also on each piece of cloth a woven device of a serpent surrounded by a scroll containing the name of the Empress Mill. This twill had acquired a great reputation in the Indian markets and particularly in Sindh, the North-West Frontier Provinces and the Punjab, where the plaintiffs had their selling agents at Amritsar, Peshawar and Karachi. The dealers in these towns

^o O. C. J. Appeal No. 44 of 1915 ; Suit No. 26 of 1914.

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and other smaller towns would apply to the selling agents for the plaintiffs cloth and the cloth would be distributed by these dealers to smaller dealers in smaller towns and villages and so on until it ultimately found its way to the consumer. In or about July 1913, the defendants began to manufacture black twill cloth and on every piece of such twill put on the No. 2051 with the No. 10 below in the same position as No. 10 stamped on the plaintiffs' cloth. In addition the defendants annexed a label thereto representing an image of the Sun known as the 'Sooraj Chap' or Sun label and also a white ticket bearing the defendant company's name and other particulars in English, Gujarathi and Urdu languages. The plaintiffs alleged that by the year 1913 their No. 2051 had become identified with their goods and any black twill cloth stamped with the No. 2051 would be ordinarily taken by purchasers as being the well-known No. 2051 cloth of the plaintiffs and would be very likely passed off by rival companies as being the plaintiffs' goods. The plaintiffs contended that they were entitled solely to the use of the No. 2051 on their black twill and the use of that number by the defendants on a similar twill constituted an infringement of their rights. The plaintiffs accordingly sought to restrain the defendants by injunction from selling their black twill cloth with the No. 2051 stamped on it, and for an account of the profits made by the defendants by the sale of their black twill with the No. 2051 stamped on it. The defendants pleaded that the No. 2051 was merely a quality mark descriptive of goods and was so adopted by several dealers in black twill. They further relied on the fact that they had taken particular care to distinguish their goods from those of the plaintiffs by using different labels and devices. The trial Court decreed the plaintiffs' claim for injunction and account. On appeal by the defendants,

Held, (1) that the plaintiffs having established that the particular No. 2051 was an invariable indication of the cloth being of their manufacture, they were entitled to claim an exclusive right to the user of that number in connection with the black twill which they put on the market.

Barlow v. Gobindram⁽¹⁾ distinguished, *Wotherspoon v. Currie*⁽²⁾ and *Burmingham Vinegar Brewery Company v. Powell*,⁽³⁾ followed ;

(2) that it was not necessary for the plaintiffs to prove cases of actual deception, if the defendants had put into the hands of middlemen a means whereby ultimate purchasers were likely to be defrauded.

Singer Manufacturing Company v. Loog⁽⁴⁾ and *Lever v. Goodwin*,⁽⁵⁾ followed.

(1) (1897) 24 Cal. 364.

(3) [1897] A. C. 710.

(2) (1872) L. R. 5. H. L. 508.

(4) (1880) 18 Ch. D. 395 at. p. 412.

(5) (1887) 36 Ch. D. 1.

SUIT for injunction and damages.

The plaintiffs were manufacturers of cloth on a large scale at their Mill in Nagpur, Central Provinces.

In 1904, the plaintiffs commenced to manufacture a certain quality of black twill, and for the purposes of reference they distinguished it from other kinds of cloth manufactured in the mill by assigning to this twill No. 2051. The shade colour of the twill was distinguished by a series of numbers commencing from 1. The black twill in dispute was distinguished by No. 10 put immediately below No. 2051.

The said cloth of the plaintiffs had acquired a great reputation in the Indian markets, and particularly in Sindh, the Punjab and in the North-West Frontier Provinces, and was generally known and ordered by persons wanting the same by the name of No. 2051. The said number had become identified with the plaintiffs' goods, and any black twill cloth stamped with the No. 2051 was usually taken by purchasers as being the well-known No. 2051 cloth of the plaintiffs. On each piece of the said cloth of the plaintiffs was also woven the device of a serpent surrounded by a scroll containing the name of the Empress Mill.

In or about July 1913, the defendants who were a Company carrying on the manufacture of cloth in Bombay put on the market a black twill cloth which they called drill and which was also marked No. 2051, with the No. 10 below in the same position as the No. 10 was stamped on the plaintiffs' cloth. The defendants annexed to every piece of said cloth a label representing an image of the Sun known in the Bazar as 'Sooraj Chap' or Sun label. In addition thereto a white commission agent's label was annexed indicating in the English, Gujarathi and Urdu languages where

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the said cloth was manufactured and where it could be purchased. On each piece of the said cloth were printed in Gujarathi the words "Goods manufactured in India," and "Madhowji Dharamsey Manufacturing Company." The plaintiffs alleged that by the year 1913 their black twill had become thoroughly known amongst purchasers by its number alone, so that anybody who wanted to buy the plaintiffs' black twill would not write an order "a bale of black twill from Nagpur Mill bearing the mark of the serpent and the number 2051," but would simply order "a bale of black twill No. 2051." The plaintiffs therefore claimed to be entitled solely to the use of their number on their black twill and contended that the use of that number by the defendants on a similar twill constituted an infringement of their right. The plaintiffs prayed *inter alia* that the defendants may be restrained by an injunction from selling their black twill cloth with the No. 2051, stamped or printed, or otherwise placed thereon, and from passing off or putting on the market so as to enable others to pass off the defendants' black twill cloth as the No. 2051 black twill cloth of the plaintiffs. The plaintiffs further sought an account of the profits made by the defendants by the sale of the said black twill cloth bearing the No. 2051 or in the alternative damages to the extent of Rs. 10,000. The defendants denied that the plaintiffs had any exclusive right to or property in the No. 2051 and pleaded that the whole get-up of their product was so widely different from that of the plaintiffs that it would be impossible for the defendants or others to pass off the defendants' drill cloth for the plaintiffs' twill. The defendants also relied upon the fact that their cloth was stamped on the warp side of the cloth as all drills usually were, whereas the plaintiffs utilized the weft side of their

cloth for stamping. The suit was tried by Macleod J. His Lordship after reviewing the facts of the case proceeded to observe as follows :—

MACLEOD, J. :—I think there can be no doubt that a manufacturer can establish the right to the use of a particular number as a trade-mark, as well as a right to use a particular device, or he may use the two in conjunction. Therefore, it does not matter much what the particular drawing or number on the manufactured goods consists of, provided that the goods become known, in the market, by that particular device or number. Then if there is a device as well as a number, it depends on the evidence in each case as to what is the dominant part of the manufacturer's mark, whether the device or the number or the two in conjunction, and if the plaintiffs establish the fact on their evidence that goods become known in the market and are sold by that particular number, then it is not necessary for them to prove that the purchasers have actually been deceived by the defendants using this particular number. But it is for the plaintiffs to satisfy the Court that the similarity between the respective marks of the plaintiffs and the defendants is such as to be calculated to mislead purchasers. It is permissible for the plaintiff to ask for an injunction against a rival trader, as soon as he knows that other goods bearing his mark and stamp are found placed on the market. When the plaintiffs' black twill was placed on the market it was probably known either as Serpent Chap or Nang Chap No. 2051 of the Empress Mills or perhaps by the description Empress Mill Nang Chap ; but the evidence adduced now proves conclusively that, as time went on, purchasers, whether retail or wholesale, and wholesale dealers may be purchasers only of a single bale or a large number of bales, sent their orders for black twill No. 2051, without referring either to the plaintiffs'

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name or the serpent device. And there can be no doubt that what they expected to get when they gave that order was plaintiffs' black twill because there was no other black twill on the market, at that time, bearing No. 2051, except the plaintiffs'. It has been suggested that purchasers must have associated the plaintiffs' name with the number. That in a sense is correct, but it does not mean that a shopkeeper in a frontier village when asking for a bale of black twill No. 2051, was bound to have in his mind the personality of the plaintiff Company. All he would require to have in his mind was that he bought this particular kind of cloth before with the plaintiffs' mark on it, and he wanted to have it again. If the purchaser has to be actually acquainted with the personality of the manufacturer, it is clear that manufacturers in the export trade would never have any chance of establishing their right to any particular trade-mark. It is obvious that the purchaser of a particular kind of cloth, bearing a particular device manufactured in Manchester, if he happens to be on the other side of the globe, will have no idea whatever of the manufacturer except as a person who has sent out the particular goods which he wants to buy.

There is no necessity for me to go through the evidence taken on commission at length, because the general effect of it is clear, namely, that these various dealers have shown and have produced in each case, particulars of orders from their constituents, for this particular black twill, by the No. 2051. Nor is it necessary, as is usually argued in this class of cases, for the plaintiffs to prove that the purchaser has been deceived or will be deceived if he had both kinds of cloth placed before him. This would not, in any event, be the case when the actual purchase is made. It is sufficient if the Court is satisfied that a purchaser

when wanting to buy the plaintiffs' cloth may be misled into buying the defendants'. Now the defendants say that they protect themselves by placing other marks totally different from the plaintiffs' marks on their twill. That would only be effective if they had proved that the purchasers knew the plaintiffs' goods by some other portion of the device than the number. That a practice exists amongst the Bombay Mills of copying numbers appertaining to goods of rival Mills which have attained a certain popularity in the market, is clear from the circular defendants have put in, which has been sent round by the Mill Owners' Association to its various members. In that they refer to the objectionable practice current among Mills of copying each other's numbers. And however much the defendants may protest that their multi-coloured ticket distinguishes their goods from the plaintiffs' so that there can be no possibility of deception, the fact remains, as I pointed out in the argument, that the defendants without any reason whatever,—for none has been called to show why this number was assigned to their black twill—copied this number, which the plaintiffs have been using since 1904. If there was no importance attached to the number there was no possible reason why they should have fixed upon it, rather than on any of the other hundreds and thousands of numbers, one of which they might have attached to this particular kind of twill. The only reason the Court can give for their having fixed upon this particular number, must be that the purchasers of this kind of cloth attached considerable importance to the number and bought the plaintiffs' cloth by that number, and the defendants thought, if they used this particular number, they might induce the purchasers to buy their cloth, instead of the plaintiffs'. Their cloth is somewhat heavier and somewhat cheaper than

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the plaintiffs' cloth. Not content only with copying the No. 2051, they have also added the 10 which has nothing to do, in its sense, with colour. It has been suggested that it describes weight. That cannot be the case, because it has been proved that each piece of the defendants' cloth weighs from 11½ to 12 lbs. Therefore, it is quite clear that the plaintiffs thought there was some magic in the 10 as well as in the 2051 which induced the purchasers to buy the plaintiffs' cloth. Again it may be said that if no importance was attached to the number, the defendants, when the plaintiffs gave them notice, could easily have changed the number of this particular kind of twill rather than run the risk of litigation, in order to defend their alleged right to use it.

His Lordship accordingly decreed the plaintiffs' claim. The relief was granted in the following form :—

This Court doth pass judgment for the plaintiffs and doth order and decree that the defendants, their servants and agents be and they are and each of them is hereby restrained from selling black twill cloth with the No. 2051 stamped or printed or otherwise placed thereon whether with or without the No. 10 beneath it and from passing off or putting on the market so as to enable others to pass off the defendants' black twill cloth as the No. 2051 black twill cloth of the plaintiffs; and this Court doth declare that without prejudice and subject to their right to appeal against the decree the said defendants by their advocate hereby undertake to remove and efface the said No. 2051 from all black twill cloth of their manufacture in their possession, power or control and this Court doth further order that it be referred to the Commissioner of this Hon'ble Court for taking accounts to take an account of the

profits made by the defendants by the sale of their black twill cloth bearing the said No. 2051 with or without No. 10 thereon and this Court doth further order that the said parties do appear before the said Commissioner either in person or by advocate or attorney and that the said Commissioner do ascertain and report to this Hon'ble Court with all convenient despatch upon the matters hereby referred.

The defendants appealed.

Setalvad, with *Kanga* and *Vakil*, for the appellants :—The defendants' cloth bears different labels and devices and is so entirely dissimilar from the plaintiffs' cloth that there is no likelihood of deception. The test is whether ordinary purchasers exercising ordinary caution are likely to be misled: *Singer Manufacturing Company v. Loog*.⁽¹⁾ The defendants put their own name on their cloth. Notice of goods being manufactured by persons selling them is strong evidence of *bona fides* in their favour: *Singer Manufacturing Co. v. Wilson*.⁽²⁾ Purchasers are either wholesale dealers or ultimate consumers. The former are people who generally know how to read and write and are familiar with goods manufactured in this country. The latter are generally supposed to be illiterate who would give their attention on the label and device more than on the number. Moreover the plaintiffs have no exclusive right or property in No. 2051. The mere fact that a cloth is known by a particular number is not sufficient. The plaintiffs must further show that the number came to be associated with the cloth of plaintiffs' manufacture alone: see *Ralli v. Fleming*.⁽³⁾ Evidence shows that No. 2051 is merely description of cloth and denotes

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⁽¹⁾ (1882) 8 App. Cas. 15.

⁽²⁾ (1876) 2 Ch. D. 434.

⁽³⁾ (1878) 3 Cal. 417.

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black twill and No. 10 denotes black colour. Evidence adduced is of wholesale dealers or commission agents, not of retail dealers or unwary purchasers. The wholesale dealers and commission agents merely depose to their opinion, viz., that an ultimate consumer may be deceived. Their opinion is valueless. They admit they themselves would not be deceived. For restricting exclusive user of numerals: see English Trade Mark Act of 1883 and compare it with Trade Mark Act of 1905, sections 2, 39-64. - The Indian Trade Mark Act of 1889 also puts 'numbers' under trade descriptions and not as forming an essential of trademark: see *Barlow v. Gobindram*,⁽¹⁾ and Sebastian, pp. 93, 94 (5th Edn.).

Lastly, the injunction is too wide. It must be confined to such places as have been proved to be markets for plaintiffs' goods and not extended to the whole of India. Further plaintiffs are only entitled to such profits as are attributable to our use of their trade mark and not to all profits: see *Cartier v. Carlisle*.⁽²⁾

Desai, with *Inverarity*, *Strangman* and *Jinnah*, for the respondents:—Cloth No. 2051 was invariably associated in the mind of the purchasers as the manufacture of the plaintiffs. When black twill No. 2051 is ordered the purchaser expects to get the article made by the plaintiffs and not a similar article made by any other manufacturer. The purchaser expects to get that twill to which he has got accustomed: see the remarks of Lord Halsbury in the *Birmingham Vinegar Brewery Company v. Powell*.⁽³⁾ See also *Wotherspoon v. Currie*⁽⁴⁾ and *Lever v. Goodwin*.⁽⁵⁾ There is nothing to show that No. 2051 indicates merely a quality in the abstract, and not an association with plaintiffs' goods. *Ralli v. Fleming*⁽⁶⁾ and *Barlow v.*

(1) (1897) 24 Cal. 364.

(4) (1872) L. R. 5 H. L. 508.

(2) (1862) 31 Beav. 292.

(5) (1887) 36 Ch. D. 1.

(3) [1897] A. C. 710.

(6) (1878) 3 Cal. 417.

Gobindram⁽¹⁾ can be distinguished on this ground. Those cases relate to goods *imported*.

If goods came to be known by a particular number, the difference in the labels and devices is immaterial. There is no reasonable explanation for the adoption of the number selected by the plaintiffs. Even when numerals are concerned, the principles to be applied should not be different from those applicable in the case of ordinary trademarks : see *Seizo v. Provezende*.⁽²⁾

As to the form of decree, the amendment suggested would enable the defendants to do indirectly what they are forbidden to do directly. As regards accounting of profits see the order made in *In re Avery's patent*.⁽³⁾

C. A. V.

SCOTT, C. J.:—As to the main facts there is no dispute. They are concisely stated in the first paragraph of the judgment of the lower Court as follows:—

The plaintiffs are manufacturers of cloth, which they manufacture in their Mill, in Nagpur, in the Central Provinces. In 1904, they commenced to manufacture a certain quality of black twill and for the purposes of reference they distinguished it from other kinds of cloth manufactured in the Mill, by assigning to this twill No. 2051. The shade colour of the twill was distinguished by a series of numbers commencing from 1. The black twill was distinguished by No. 10. The number 2051 was in no way descriptive of the twill cloth. On each piece of cloth, was also woven the device of a serpent surrounded by a scroll containing the name of the Empress Mill. This twill was put on the market in the North-West Frontier Provinces, Sindh and the Punjab where the plaintiffs have got their selling agents at Amritsar, Peshawar and Karachi. The dealers in these towns and other smaller towns would apply to the selling agents for the plaintiffs' cloth and the cloth would be distributed by these dealers to smaller dealers in smaller towns and villages and so on until it ultimately found its way to the consumer. In or about July 1913, the defendants who were a Company carrying on the manufacture of cloth in Bombay, put on the market a black twill cloth which was also marked "2051"

(1) (1897) 24 Cal. 364.

(2) (1865) L. R. 1 Ch. 192.

(3) (1887) 36 Ch. D. 307.

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with the number 10 below. In addition there was a printed ticket affixed to each piece, a sample of which was affixed to the piece of cloth manufactured by the defendants put in as an Exhibit in this case and there was also a white ticket bearing the defendants' name and other particulars.

The plaintiffs allege that by 1913 their black twill had become known amongst purchasers in Sindh, the Punjab and the Frontier Provinces by its number alone, so that any body who wanted to buy the plaintiffs' black twill would not write an order "a bale of black twill from Nagpur Mill bearing the mark of the serpent and the number 2051" but would simply order "a bale of black twill No. 2051."

The plaintiffs contend that they have established this by their evidence and that they are, therefore, entitled solely to the use of that number on their black twill and that the use of that number by the defendants on a similar twill constitutes an infringement of their rights.

The learned Judge held that the No. 2051 was the dominant characteristic of the plaintiffs' goods among purchasers in the Indian markets in which it had an extensive sale and that it was under this designation that the constituents of up-country middlemen were in the habit of ordering the plaintiffs' twill of that description: and, being of opinion that the defendants had copied the plaintiffs' number in order to induce purchasers to buy the defendants' cloth, which was rather heavier and cheaper than the plaintiffs', instead of the plaintiffs' cloth, passed the decree for an injunction and damages which is now under appeal.

The main contention of the appellants is that the learned Judge erred in assuming that purchasers ordering twill No. 2051 or 2051/10 expected to get the plaintiffs' particular manufacture bearing that mark and that on the evidence the plaintiffs had failed to prove that purchases of black twill No. 2051 or 2051/10 were made on account of special preference for the plaintiffs' particular cloth and that the number or combination of figures were merely a manufacturer's number or quality number, to which the defendants had as much right as the plaintiffs.

It will be convenient to deal with the question of quality numbers first. The argument that numbers on goods are merely manufacturer's quality numbers may be perfectly correct in a state of facts such as was proved to exist in *Barlow v. Gobindram*,⁽¹⁾ relied upon by the appellants' counsel, where the Court found that the same importers imported into India cloth of identically the same quality, kind and measurement under different numbers as well as different object designs. But that contention is inappropriate where the cloth of a particular factory when of a particular kind *invariably* bears not only a trade device but also a fancy combination of figures designed for that particular cloth. The number not only represents no other cloth but that particular cloth never bears any other number—so that as far as quality is concerned (*i.e.* the ultimate result of the material and processes employed in that factory for the production of that cloth) there is no standard of comparison but another piece of the same cloth of the same manufacture. The simple question, then, in such circumstances, is whether the defendant in the passing-off case is doing something calculated to deceive purchasers into the belief that they are buying the particular article which they know as bearing the particular number. It is not a case of a known quality of one manufacturer indicated, for reasons of convenience, by various numbers, as in *Barlow v. Gobindram*,⁽¹⁾ but of the particular mark in dispute being an invariable indication of the cloth of the plaintiffs' manufacture. It is, however, contended that the plaintiffs cannot claim an exclusive right to the user of the particular combination of figures unless it is shown that the purchasers consciously associate the figures with the plaintiff-company. But where goods have acquired, by a particular fancy description, combination or

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device, a reputation in the market it is immaterial that the customers do not know, who the maker is. In *Wotherspoon v. Currie*⁽¹⁾ Lord Hatherley said:

"...the name of the article again, if it has acquired a name, should not, by any honest manufacturer be put upon his goods if a previous manufacturer has, by applying it to his goods, acquired the sole use of the name. I mean the use in this sense, that his goods have acquired by that description a name in the market, so that whenever that designation is used he is understood to be the maker, where people know who the maker is at all—or if people have been pleased with an article, it should be recognized at once by the designation of the article, although the customers may not know the name of the manufacturer."

So also Lord Halsbury in *Birmingham Vinegar Brewery Company v. Powell*⁽²⁾ said:

It may be true that the customer does not know or care who the manufacturer is, but it is a particular manufacture that he desires. He wants Yorkshire Relish to which he has been accustomed, and which it is not denied has been made exclusively by the plaintiff for a great number of years. This thing which is put into the hands of the intended customer is not Yorkshire Relish in that sense. It is not the original manufacture. It is not made by the person who invented it. Under these circumstances it is a fraud upon the person who purchases to give him the one thing in place of the other."

The evidence appears to us to be convincing that the plaintiffs' twill cloth had by or before 1911 (the year in which the defendants claim to have introduced the marks complained of) acquired in the Northern India markets a reputation under the designation of 2051 and, when black, of 2051/10 and that purchasers desiring that cloth ordered it rather by those figures than by any other designation and that the figures had become by use the dominant designation. It is said that the witnesses for the plaintiffs were middlemen or commission agents and not the ultimate buyers and that the witnesses would not be deceived. To this the answer is that their testimony as to the form in which order

⁽¹⁾ (1872) L. R. 5. H. L. 508 at

⁽²⁾ [1897] A. C. 710 at p. 713:

for the plaintiffs' cloth is usually given is good proof of the association formed in the minds of ultimate buyers between the figures and the article produced by the plaintiffs.

It is also contended that no case of actual deception has been proved but this is not necessary. It is sufficient to justify relief if the Court is satisfied, as we are here, that the defendant is putting into the hands of middlemen a means whereby ultimate purchasers are likely to be defrauded: see *Singer Manufacturing Company v. Loog*⁽¹⁾ and *Lever v. Goodwin*.⁽²⁾ It has been contended that as the plaintiffs and defendants affix to their cloth distinctive trade marks no importance should be attached to the figures; but it is a matter of common experience that the attention of buyers is often not attracted by the most prominent design. Experience alone shows which device has caught the attention of buyers. Here there can be no doubt that far more importance is attached to the figures than to the pictorial representations and the conclusion is almost irresistible that the defendants knowing the importance attached by buyers to the plaintiffs' combination of figures adopted that combination in the hope of securing for their cloth some of the plaintiffs' customers.

In our opinion the judgment of the lower Court is right and should be affirmed.

As regards the form of injunction objection has been raised as to its local extent and as regards the form of the inquiry as to damages that it is sweeping.

In our opinion the injunction must be wide enough to cover all possible Indian channels of approach to the ultimate buyers and should not be limited as contended

⁽¹⁾ (1880) 18 Ch. D. 395 at p. 412.

⁽²⁾ (1887) 36 Ch. D. 1, 3, 7; 4 R. P. C. 492, 496.

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by appellants, and as regards the form of inquiry as to damages it appears to us that it would be neither reasonable nor practicable to restrict the inquiry as suggested. The wide form of inquiry was adopted after argument in *Lever v. Goodwin*⁽¹⁾ and has been rightly applied in the present case.

The appeal must be dismissed with costs.

Solicitors for plaintiffs: Messrs. *Payne & Co.*

Solicitors for defendants: Messrs. *Ardeshir, Hormusji & Co.*

Appeal dismissed.

G. G. N.

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August 25.

Before Sir Stanley Batchelor, Kt., Acting Chief Justice and Mr. Justice Shah.

GANESH KRISHNA KULKARNI AND ANOTHER (ORIGINAL PLAINTIFFS),
APPELLANTS v. DAMOO VALAD NATHU SHIMPI AND OTHERS (ORIGINAL
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*Civil Procedure Code (Act XIV of 1882), sections 278, 282, 283 and 287—
Civil Procedure Code (Act V of 1908), Order XXI, Rules 62 and 63—
Attachment of mortgaged property—Application to sell the property subject
to mortgage lien—Property ordered to be sold free of mortgage—Order not
referable to section 283—Suit on mortgage a year after the date of the
order—Limitation Act (IX of 1908), Article 11.*

The property in dispute was attached by the defendant's father under a decree obtained by him in a suit of 1882. The plaintiffs' father in response to a notice from the Court applied to have the property sold subject to his mortgage lien. In 1883 the Court rejected the application and directed that the property should be sold free from the alleged mortgage claim. Thereupon in 1910 the plaintiffs sued to recover the amount due on the mortgage. Both the lower Courts held that the order of 1883 was passed under section 282 of

(1) (1887) 36 Ch. D. 1, 3, 7; 4 R.P.C. 492, 496.

* Second Appeal No. 13 of 1915.