

(1903) 01 CAL CK 0020

Calcutta High Court

Case No: Criminal Appeal No. 864 of 1902

Holland Bombay
Trading Company

APPELLANT

Vs

Buktear Mull and Bal
Kissen

RESPONDENT

Date of Decision: Jan. 29, 1903

Final Decision: Dismissed

Judgement

1. The Appellants have been convicted of offences under secs. 482 and 486 of the Indian Penal Code with respect to some white shirtings which were not imported by the Holland Bombay Trading Company, but which bore a mark which was reasonably calculated to cause it to be believed that the white shirtings in question were the merchandise of that company. The fact that the Appellants had in their possession for the purposes, of sale some packages of white shirtings bearing the mark H.P.F.C. 40000 and a label with two lions and two snakes and an oval stamp containing written in it the words "Sole importers Holland Export Company" and a buff heading is not denied. Nor is it denied that for many years past the complainant company, the Holland Bombay Trading company, have been importing from Holland white shirtings bearing the mark H.B.T.C. 40000, a label with a lion and a snake design and an oval stamp containing written in is "Sole importers the Holland Bombay. Trading Company Limited" and a buff heading. A comparison of the white shirtings, found in the possession of the Appellants, with the white shirtings imported by the complainant company, discloses the fact that the letters H.B.T.G. in the one piece, and H.P.F.C. in the other, are printed in precisely similar type and are precisely similar in size and colour. The same observation is to be made as to the figures 40000 appearing in each piece. The Defendant's label, it is true, represents two lions and a snake, while the complainant's is one lion and a snake, but in colour and size the labels are similar. The oval stamp is also similar in size, colour and type in both pieces.

2. It was not seriously contended nor indeed could it be contended that the Appellant's mark was not so similar to that of the complainant, that an ordinary purchaser would suppose that when really buying the goods sold by the Appellant, he was buying the goods imported by the complainants.

3. Two points have been argued before us in appeal. They are, first, that the complainant company had no property in the mark, and secondly, that the Appellants throughout acted *bona fide*, and therefore are protected by the exception in sec. 486. The history of the mark appears to be this :

Previous to the year 1895, goods were imported by the Holland Bombay Trading Company from Holland marked H. T. C. 4000. The manufacturer was a person whose name was H. Tan Cate & Co. in the early part of 1895, the goods imported from the manufacturer H. Tan Cate & Co., were marked 40000 instead of 4000. Later on, the complainant company began to import shirtings manufactured by the Royal Weaving Company, in Holland, and those goods they were in the habit of selling under the mark H.B.T.C. 40000. They gradually ceased to import goods marked H.T.C. 40000 and for some years have been importing and selling goods under the mark H.B.T.C. of 40000.

4. It is contended on behalf of the Appellants that H.B.T.C. 40000 is merely an alteration of the mark H.T.C. 40000, that H. T. C. were the initials of H. Tan Cate, the manufacturer; and that H.T.C. 40000 was the manufacturer's mark; that the company in adopting a mark, which merely was an imitation of H. Tan Cate's mark, had themselves infringed H. Tan Cate's rights; and their assumption of the mark being unlawful in its inception, they could have no lawful right to its user now.

5. In our opinion the complainants have shown conclusively that the marks put on the white shirtings, imported by them, were not the manufacturer's marks but were the importer's mark. It is unnecessary on this point to go into the oral evidence in detail, because, in our opinion the letters which have been produced, show conclusively that the Magistrate was correct in his conclusion on this point. The shirtings originally imported appear to have been mentioned bearing the number 4000 in addition to the initials H. T. C. Two letters, one dated the 5th January 1895, and the other dated the 21st of January 1895, from H. Tan Cate & Co., to the Holland Bombay Trading Company, have been produced. In the former H. Tan Cate and Co. acknowledge the Holland Bombay Trading Company's request to change the 4000 into 40000, and in the latter of the two they called attention to the fact that they have complied with that request. There is oral evidence that it was the importer who directed the manufacturer what mark to be put upon the shirtings. This is corroborated by a letter, dated the 26th of January 1895, which shows that it was from the Bombay office of the complainant company that the direction as to what mark was to be put on the shirtings came. There is also a letter, dated the 20th of June 1895, in which H. Tan Cate and Co. asked for instructions as to the details for stamping the shirtings which they proposed to deliver to the complainant company.

6. The only point which could be urged in support of the Appellant's contention is that, there is some evidence that the first lot of shirtings which were sent out to Bombay to the Holland Bombay Trading Company, were to be sold by them on commission, but this fact, even if it be a fact, in our opinion, does not weigh against the overwhelming evidence contained in the correspondence that it was the complainant company who were directing the manufacturer to put on the shirtings their marks and not the manufacturer who was delivering to the export company shirtings marked with marks selected by himself. If the marks were the marks of the manufacturer, and not of the Trading Company, it is difficult to see on what authority they directed the manufacturer to give up the mark 4000, and in its place put the mark 40000 on the shirtings. The suggestion, therefore, that the mark was the manufacturer's mark fails. The Holland Bombay Trading Company, therefore, did nothing unlawful in placing on their goods the mark H.B.T.C. 40000 which, it was suggested, was an infringement of the manufacturer's right. Now, it is shown that the complainant company have been accustomed for many years past, to use the marks of which the marks on the goods found in the Appellants' possession are a colourable imitation. In our opinion, they have established their right to the mark, and which is further shown by the fact that they registered it in the Government Gazette at Amsterdam on the 23rd Of November 1901.

7. The only other question which remains to be considered is, whether the Appellants have proved that, they took all reasonable precaution against committing an offence under sec. 486, and that they had no reason to suspect the genuineness of the mark, and that on request being made on behalf of the complainants they gave all the information in their power with respect to the persons from whom the goods were obtained or that they otherwise acted innocently. It is to be observed that under this section the onus is not thrown upon the complainant to show that the Appellants acted dishonestly, but the onus is thrown upon the Appellants to bring, themselves within the exceptions to the section.

8. Now, the story they have told is a peculiar one.

9. It is said that a sample bearing the letters H.T.C. 40000 was brought to the Appellants' place of business and that they purchased from one Mr. Sadka five cases of the shirtings of the sample H.T.C. 40000. They say that when the goods arrived they were found to be marked H.P.F.C. 40000 and that they were surprised at the mark being different from the mark on the sample, and asked Mr. Sadka for an explanation. He said that, the H.P. stood for Hans Pracyer the shipper, and, with this explanation, the Appellants say, they were satisfied, and that they accepted the goods. Mr. Sadka was not called to give evidence on behalf of the Defendants, but they contented themselves with producing the Invoice and Policy of Insurance for the goods.

10. We are unable to believe the story. We observe that the explanation given of the difference between H.T.C. and H.P.F.C. is no explanation at all. The sample has not been produced and, we do not believe that the trader who had contracted for goods marked H.T.C. 40000 would have accepted the goods marked H.P.F.C. 40000 without a more satisfactory explanation than that which was afforded to the Appellants.

11. In our opinion this story about the contract with Sadka, if it was true, would have raised the Appellants' suspicion with regard to the mark, and, so far from assisting the Appellants to bring themselves within the exception, it tells against them, even if it were true, and" still more so if it has been concocted for the purpose of concealing from the complainants the source from which the falsely-marked goods came.

12. It has been found as a fact that, the Appellants had dealings with the Holland Bombay Trading Company, and, that as traders in the market, they were familiar with the marks borne by the white shirtings imported by that company. There seems no reason for us to suppose that the Magistrate on that point, has not come to a correct finding; and if that is so, it appears to us impossible to say that; the Appellants have brought themselves within the exception to the section to which we have referred. In our opinion, therefore, the Appellants have failed to establish either of the points which were relied upon to upset this conviction. We think that, the complainants had a right to the mark with which the white shirtings, imported from Holland by them, were marked, and it is clear that the mark on the white shirtings in the possession of the Appellants was so like the complainant's mark that an ordinary purchaser would suppose that the goods so marked, were those of the complainants. On the second point, we do not think that the Appellants have brought themselves within the exception, because, they have told a story with regard to the contract for the purchase of the goods which, we are unable to believe; and one which, if it were true, would have disclosed the facts which would have raised suspicion as to the genuineness of the mark. For these reasons, we dismiss the appeal and affirm the conviction and sentence.