

SRI AMBAL & CO., MADRAS & ANR.

April 14, 1969

[S. M. SIKRI, R. S. BACHAWAT AND V. RAMASWAMI, JJ.]

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Trade and Merchandise Marks Act, 1958, ss. 2(j) and 12—Trade marks when deceptively similar—‘Sri Andal’ and ‘Sri Ambal’ though names of two different goddesses are deceptively similar in sound within meaning of s. 12(1)—Visual dissimilarity not decisive when sounds deceptively similar.

The appellant was the sole proprietor of a concern known as Radha & Co. The respondents Ambal & Co. were a partnership concern. The respondents as also the appellant were manufacturers and dealers in snuff, carrying on business at Madras and having business activities inside and outside the State of Madras. In 1958 the appellant sought registration of a trade mark consisting of a label with a picture of the goddess Sri Andal and the legend ‘Sri Andal’ in the central panel, and the words ‘Sri Andal Madras Snuff’ in various languages in the upper and lower panels. The appellant’s application was objected to by the respondents on the ground that it was deceptively similar to their registered trade marks. One of these consisted of a label containing a device of goddess Sri Ambal in the centre with the legend ‘Sri Ambal parimala snuff’ at the top of the label and the name ‘Sri Ambal & Co. Madras’ at the bottom. The other trade mark consisted of the expression ‘Sri Ambal’. The Registrar of Trade Marks held that the sound of ‘Ambal’ did not so nearly resemble the sound of ‘Andal’ in spite of certain letters being common to both the marks as to be likely to cause confusion or deception among a substantial number of persons. A Single Judge of the High Court and the Divisional Bench however took the opposite view whereupon the appellant came to this Court. No plea of honest concurrent use within the meaning of s. 12(2) of the Act could be raised in view of the concurrent finding in this respect by the Registrar as well as the two courts below.

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HELD : (i) The Registrar had expert knowledge and his decision should not be lightly disturbed. But both the courts had found that he was clearly wrong and that there was deceptive similarity between the two marks. In an appeal under Art. 136 of the Constitution the onus was upon the appellant to show that the concurrent finding of the courts below was erroneous and that the conditions of s. 12(1) had been satisfied [293 F]

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(ii) The question in issue was whether if the appellant’s mark was used in a normal and fair manner in connection with the snuff and if similarly fair and normal user was assumed of the existing registered marks, will there be such a likelihood of deception that the mark ought not to be allowed to be registered? The court had to decide the question on a comparison of the competing marks as a whole and their distinctive and essential features. [293 H—294 B]

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So considered there could be no doubt that the word ‘Ambal’ was the distinguishing feature of the trade mark of the respondent and the word ‘Andal’ was the distinguishing feature of the appellant’s trade mark. There is a striking similarity and affinity of sound between the words ‘Andal’

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A and 'Ambal' Giving due weight to the judgment of the Registrar and bearing in mind the conclusions of the Single Judge and the Divisional Bench it must be held that there was real danger of confusion between the two marks. [294 B-C]

(iii) There was no visual resemblance between the two marks but ocular comparison is not always the decisive test. The resemblance between the two marks must be considered with reference to the ear as well as the eye. [294 D]

(iv) The argument that on account of the different ideas conveyed by the words 'Ambal' and 'Andal' the accidental phonetic resemblance could not lead to confusion was not acceptable because it lost sight of the realities of the case. The Hindus in the South of India may be well aware that the words Ambal and Andal represent the names of two distinct goddesses. But the respondent's customers were not confined to the Hindus of the South of India alone and they were not likely to remember the fine distinctions between a Vaishnavite goddess and a Shivaite deity

The appeal, accordingly, must be disallowed.

[295 B—F]

[295 H]

D *In the matter of Broadhead's Application*, (1950) 57 R.P.C. 209, 214, *Coca Cola Co. of Canada v. Pepsi Cola Co. of Canada Ltd.* (1942) 59 R.P.C. 127, *De Cordova & Ors. v. Vick Chemical Coy.* (1951) 68 R.P.C. 103, and *Application by Thomas A. Smith Ltd. to Register a trade mark*, (1913) 30 R.P.C. 363, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 749 of 1966.

E Appeal by special leave from the judgment and order dated November 21, 1962 of the Madras High Court in Letters Patent Appeal No. 57 of 1962.

A. K. Sen, K. Jayaram and A. Thiagarajan, for the appellant.

M. C. Chagla, N. K. Anand, M. P. Rao and O. C. Mathur, for respondent No. 1.

F The Judgment of the Court was delivered by

Bachawat, J. The appellant is the sole proprietor of a trading concern known as Radha & Co., The respondents Ambal & Co., are a partnership firm. The respondents as also the appellant are manufacturers and dealers in snuff carrying on business at Madras and having business activities inside and outside the State of Madras. On March 10, 1958 the appellant filed application no. 183961 for registration of a trade mark in class 34 in respect of "snuff manufactured in Madras." The respondents filed a notice of opposition. The main ground of opposition was that the proposed mark was deceptively similar to their registered trade marks. The respondents were the proprietors of the registered marks nos. 126808 and 146291. Trade mark no. 126808 consists of a label containing a device of a goddess Sri Ambal seated on a globe floating on water enclosed in a circular frame with the legend "Sri

Ambal parimala snuff" at the top of the label, and the name and address "Sri Ambal & Co., Madras" at the bottom. Trade mark no. 146291 consists of the expression "Sri Ambal". The mark of which the appellant seeks registration consists of a label containing three panels. The first and the third panels contain in Tamil, Devanagari, Telugu and Kannada the equivalents of the words "Sri Andal Madras Snuff". The centre panel contains the picture of goddess Sri Andal and the legend "Sri Andal".

Sri Andai and Sri Ambal are separate divinities. Sri Andal was a vaishnavite woman saint of Srivilliputtur village and was deified because of her union with Lord Ranganatha. Sri Ambal is the consort of Siva or Maheshwara.

The respondents have been in the snuff business for several decades and have used the word Ambal as part of their work for more than half a century. The question in issue is whether the proposed mark is deceptively similar to the respondents' marks. "Mark" as defined in s. 2(j) of the Trade and Merchandise Marks Act, 1958 includes "a device, brand, heading, label, ticket, name, signature, word, letter or numeral or any combination thereof". Section 12(1) provides that "save as provided in sub-section (3), no trade mark shall be registered in respect of any goods or description of goods which is identical with or deceptively similar to a trade mark which is already registered in the name of a different proprietor in respect of the same goods or description of goods." The Registrar of Trade of Marks observed :

"In a composite mark the distinctive words, appearing on it play an important part. Words always talk more than devices, because it is generally by the word part of a composite mark that orders will be given. Apart from that, the opponents have a registered mark consisting of the expression Sri Ambal. I have, therefore, to determine whether the expression Sri Andal, is deceptively similar to Sri Ambal."

He said :

"the sound of "Ambal" does not so nearly resemble the sound of "Andal", in spite of certain letters being common to both the marks, as to be likely to cause confusion or deception among a substantial number of persons."

The respondents filed an appeal in the Madras High Court. Jagadishan, J. observed :

"It is settled law that a trade mark comprehends not merely the picture design or symbol but also its descriptive name. A copy of colourable imitation of the

A name, would constitute an infringement of the mark containing the name. Nobody can abstract the name or use a phonetical equivalent of it and escape the charge of piracy of the mark pleading that the visual aspect of his mark is different from the mark of the person opposing its registration."

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He held :—

C "The words, Ambal and Andal, have such great phonetic similarity that they are undistinguishable having the same sound and pronounciation. In whatever way they are uttered or spoken, slowly or quickly perfectly or imperfectly, meticulously or carelessly and whoever utters them, a foreigner or a native of India, wherever they are uttered in the noisy market place or in a calm and secluded area, over the phone or in person, the danger of confusion between the two phonetically allied names is imminent and unavoidable."

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E Accordingly, he allowed the appeal and dismissed the appellant's application for registration of the trade mark. The appellant filed a letters patent appeal. The Divisional Bench of the High Court dismissed the appeal. The learned Registrar and the two courts below concurrently found that the appellant failed to prove honest concurrent use so as to bring his case within s. 12(3). The present appeal has been filed by the appellant after obtaining special leave.

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The Registrar was of the view that the appellant's mark was not deceptively similar to the respondents' trade marks. He has expert knowledge of such matters and his decision should not be lightly disturbed. But both the courts have found that he was clearly wrong and held that there is a deceptive similarity between the two marks. In an appeal under art. 136 of the Constitution the onus is upon the appellant to show that the concurrent finding of the courts below is erroneous. The appellant must satisfy the court that the conditions of s. 12(1) have been satisfied. If those conditions are not satisfied his mark cannot be registered.

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Now the words "Sri Ambal" form part of trade mark no. 126808 and are the whole of trade mark no. 146291. There can be no doubt that the word "Ambal" is an essential feature of the trade marks. The common "Sri" is the subsidiary part, of the two words "Ambal" is the more distinctive and fixes itself in the recollection of an average buyer with imperfect recollection.

The vital question in issue is whether, if the appellant's mark is used in a normal and fair manner in connection with the snuff

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and if similarly fair and normal user is assumed of the existing registered marks, will there be such a likelihood of deception that the mark ought not to be allowed to be registered (see *In the matter of Broadhead's Application*⁽¹⁾ for registration of a trade mark). It is for the court to decide the question on a comparison of the competing marks as a whole and their distinctive and essential features. We have no doubt in our mind that if the proposed mark is used in a normal and fair manner the mark would come to be known by its distinguishing feature "Andal". There is a striking similarity and affinity of sound between the words "Andal" and "Ambal". Giving due weight to the judgment of the Registrar and bearing in mind the conclusions of the learned Single Judge and the Divisional Bench, we are satisfied that there is a real danger of confusion between the two marks.

There is no evidence of actual confusion, but that might be due to the fact that the appellant's trade is not of long standing. There is no visual resemblance between the two marks, but ocular comparison is not always the decisive test. The resemblance between the two marks must be considered with reference to the ear as well as the eye. There is a close affinity of sound between Ambal and Andal.

In the case of *Coca-Cola Co. of Canada v. Pepsi Cola Co. of Canada Ltd.*⁽²⁾, it was found that cola was in common use in Canada for naming the beverages. The distinguishing feature of the mark Coca Cola was coca and not cola. For the same reason the distinguishing feature of the mark Pepsi Cola was Pepsi and not cola. It was not likely that any one would confuse the word Pepsi with coca. In the present case the word "Sri" may be regarded as in common use. The distinguishing feature of the respondent's mark is Ambal while that of the appellant's mark is Andal. The two words are deceptively similar in sound.

The name Andal does not cease to be deceptively similar because it is used in conjunction with a pictorial device. The case of *De Cordova & Ors. v. Vick Chemical Coy.*⁽³⁾ is instructive. From the Appendix printed at page 270 of the same volume it appears that Vick Chemical Coy were the proprietors of the registered trade mark consisting of the word "Vaporub" and another registered trade mark consisting of a design of which the words "Vicks Vaporub Salve" formed a part. The appendix at page 226 shows that the defendants advertised their ointment as "Karsote vapour Rub". It was held that the defendants had infringed the registered marks. Lord Radcliffe said: "... a mark is infringed

(1) (1950) 57 R.P.C. 209, 214.

(2) (1942) 59 R.P.C. 127.

(3) (1951) 68 R.P.C. 103.

A by another trader if, even without using the whole of it upon or in connection with his goods, he uses one or more of its essential features."

B Mr. Sen stressed the point that the words Ambal and Andal had distinct meanings. Ambal is the consort of Lord Siva and Andal is the consort of Ranganatha. He said that in view of the distinct ideas conveyed by the two words a mere accidental phonetic resemblance could not lead to confusion. In this connection he relied on *Venkateswaran's Law of Trade and Merchandise Marks*, 1963 ed., page 214, *Kerly's Law of Trade Marks and Trade Names*, 9th ed., page 465, art. 852 and the decision *Application by Thomas A. Smith Ltd., to Register a trade mark*⁽¹⁾. In that case Neville, J. held that the words "limit" and "summit" were words in common use, each conveying a distinctly definite idea; that there was no possibility of any one being deceived by the two marks; and there was no ground for refusing registration. Mr. Sen's argument loses sight of the realities of the case. The Hindus in the south of India may be well aware that the words Ambal and Andal represent the names of two distinct goddesses. But the respondent's customers are not confined to Hindus alone. Many of their customers are Christians, Parsees, Muslims and persons of other religious denominations. Moreover, their business is not confined to south of India. The customers who are not Hindus or who do not belong to the south of India may not know the difference between the words Andal and Ambal. The words have no direct reference to the character and quality of snuff. The customers who use the respondent's goods will have a recollection that they are known by the word Ambal. They may also have a vague recollection of the portrait of a benign goddess used in connection with the mark. They are not likely to remember the fine distinctions between a Vaishnavite goddess and a Shivaite deity.

F We think the judgment appealed from is right and should be affirmed. We are informed that the appellant filed another application no. 212575 seeking registration of labels of which the expression "Radha's Sri Andal Madras Snuff" forms a part. The learned Registrar has disposed of the application in favour of the appellant. But we understand that an appeal is pending in the High Court. It was argued that there was no phonetic similarity between Sri Ambal and Radha's Sri Andal and the use of the expression Radha's Sri Andal was not likely to lead to confusion. The Divisional Bench found force in this argument. But as the matter is *sub-judice* we express no opinion on it.

H In the result, the appeal is dismissed with costs.

G.C.

Appeal dismissed.

(1) (1913) 30 R.P.C. 363.