
(2003) 04 BOM CK 0041

In the Bombay High Court

Case No : Notice of Motion No. 500 of 2003 in Suit No. 550 of 2003

Ayushakti Ayurved Pvt. Ltd., Dr. Pankaj Naram and Dr. (Mrs.) Smita Naram APPELLANT

Vs

Hindustan Lever Limited RESPONDENT

Date of Decision : 22-04-2003

Acts Referred:

High Court (Original Side) Rules — Rule 197

Citation : (2003) 3 ALLMR 421 : (2003) 5 BomCR 523 : (2003) 4 MhLj 915 : (2004) 28 PTC 59

Hon'ble Judges : S.A. Bobde, J

Bench : Single Bench

Advocate : R.M. Kadam, V.R. Dhond, Usha Chandrashekhar and Bhagwati Trivedi, for the Appellant; Virendra Tulzapurkar, Amit Jamsanderkar and V.G. Parelkar and V.R. Wararkar, instructed by Crawford Bayley and Co., for the Respondent

Judgement

S.A. Bobde, J.—This is a Plaintiffs motion for restraining the Defendants from selling their products hair oil, shampoo and soap (personal care products in Class 3) under the trade mark "AYUSH" so as to pass off or enable others to pass off the same as products of the Plaintiffs which according to the Plaintiffs are being sold under an almost identical trademark "AYUSHAKTI". The notice of motion is in a suit for the same relief based on the tort of passing mark and not on any statutory rights.

2. According to the Plaintiffs, after ascertaining in the market and conducting a manual search in the register maintained under the Trade Marks Act, they adopted the trademark "AYUSHAKTI" as an umbrella brand in respect of their goods. The Plaintiffs claim that several products such as shampoo, hair oil, soap, cough mixture and pain balms were sold under the mark "AYUSHAKTI". In 1996 the Plaintiffs applied for registration of the trademark AYUSHAKTI. The application is pending. In the year 1998 the name of the 1st Plaintiff company was changed from Dr. Pankaj Naram Herbal Remedies to Ayushakti Ayurved

Private Limited.

3. In July, 2002 the Plaintiffs noticed that product bearing a deceptively similar trademark has been launched in the market. Plaintiffs claim that they received enquiries from customers and patients about whether the AYUSH and AYUSHAKTI were both from the Plaintiffs. They, therefore, called upon the Defendants to cease and desist from using the mark in October, 2002. The Defendants refused to comply with the notice mainly on the ground that they were the assignees of the trade mark AYUSH in Class 3 and a pending registration application in Class 5 and that the mark sufficiently distinguish their product from those of the Plaintiffs. The Plaintiffs after replying to the Defendants reply and after the Defendants finally refused to refrain from using the mark AYUSH, have filed this suit on 28th January, 2003.

4. Mr. Kadam, learned Counsel for the Plaintiffs submitted that firstly the Defendants mark AYUSH is deceptively similar to the Plaintiffs mark AYUSHAKTI and therefore by using that mark on the Defendants products the Defendants are passing off their goods as those of the Plaintiffs. On this ground alone the Defendants are liable to be enjoined. On the other hand, Dr. Tulzapurkar, the learned Counsel for the Defendants denied that there was any deceptive similarity between the Defendants mark AYUSH and the Plaintiffs AYUSHAKTI and therefore the prayer for injunction is liable to be refused. In particular, the learned Counsel for the Defendants submitted that the Plaintiffs are not entitled to any relief much less an injunction since the Plaintiffs themselves have taken mark AYUSHAKTI from the mark AYUSH which stood on the register in the name of the other traders and therefore the Plaintiffs are not proprietors of the trademark. It is necessary to consider this point first.

5. The Plaintiffs adopted their mark sometime in April, 1996. According to the Defendants, the following marks were in existence when the Plaintiffs started using the mark AYUSHAKTI.

(1) "AYUSH" bearing registration No. 4720378 in Class 3 standing in the name of Jayalakshmi Oil and Chemical Industries Limited, Andhra Pradesh vide Exhibit C-2 to the affidavit in reply.

(2) "AYUSH" for which an application for registration made by Pradeep Paraskhanewala dated 8th July, 1994 was pending.

(3) "AYUSH" for which an application made by Ajanta Pharma on 14th August, 1996 was pending.

(4) "AYUSH" an application No. 587823 made by Shri Jatinder Sodi sometime prior to 8th July, 1994 was pending.

Therefore, according to the Defendants the Plaintiffs must be taken to have copied the mark from the register of which they have themselves taken a manual search as stated by them in paragraph 9 of the plaint. According to the Defendants, the fact that the Plaintiffs have copied the mark AYUSH is proved

according to the doctrine of *res ipsa loquitur* i.e. the thing speaks for itself. The Plaintiffs, therefore, have no proprietorship in the mark and cannot maintain the present action. The contention of the Defendants seems to be correct. Firstly, the Plaintiffs have made the following statement in paragraph 9 of the Plaint:-

"After ascertaining its availability in the consumer market and conducting a manual search under various classes, as set out in the Trade and Merchandise Marks Act 1958, the Plaintiffs began to use the mark "ayushakti" as an umbrella brand in respect of various products formulated by the 2nd and 3rd Plaintiffs, and manufactured and marketed by the 1st Plaintiffs."

6. In the affidavit in reply, the Defendants have categorically referred to this search and stated, in paragraph 33, that the Plaintiffs have not disclosed the result of the search report as to the availability of the mark. In rejoinder, the Defendant appear to be fully conscious of this challenge but have chosen to neither admit nor deny whether the manual search revealed that the mark AYUSH that was already on the register and that another application for registration of AYUSH was pending. In fact, it appears from the statement made in paragraph 25 of the plaint that the Plaintiffs in any case were aware of the pending of the application since that application was already under opposition from them when they took the search. Moreover, in paragraph 43 of the rejoinder, the Plaintiffs have stated that the result of the search report for the mark AYUSHAKTI is "inconsequential" though this apparently refers to a search conducted in the year 2002. It is obvious that the Plaintiffs were conscious of the crux of the Defendants averment that when the Plaintiffs took search in the year 1996 they came across the registered mark AYUSH and in any case came across the application for registration of the mark AYUSH and they copied the same. Even though the Plaintiffs were conscious of the issue they have chosen not to even formally make a denial that when they took search in 1996 they did not come across the mark AYUSH either as a registered trade mark or as a mark for which an application was pending. In fact the Plaintiffs have in their rejoinder made a statement which is vague and reads as follows:-

"The manual search undertaken in and around 1996 for the mark AYUSHAKTI in class 5 did not cite the mark AYUSH under application No. 662361, since the records at the trade Mark Registry in 1996 were grossly incomplete, and the search was complete only to the extent of application received until January 1994 and were available for search."

7. It appears highly unlikely that the Plaintiffs did not come across the mark AYUSH when they took a search of the register. I am, therefore, *prima facie* of view that in this case knowledge of the mark AYUSH can be presumed. There does not appear to be any doubt about the fact that one of the mark AYUSH No. 472037B was on the register on 11th May, 1997 and that the two marks bearing Nos. 603261 and 685711 for which applications were made on 8th July, 1994 and 6th November, 1995 were pending registration. The Plaintiffs must be taken to have knowledge of these marks, which were subsequently assigned by Mr.

Paraskhanewala to the Defendants, on the principle of *res ipsa loquitur* as appointed by an English Court in the case of Brown Shoe Company Inc. reported in 1959 RPC at page 29. The Respondents there had evolved word "Natlurizet" as a trade mark in relation to ladies shoes. The trade mark "Naturalizer" belonging to the appellant was already in existence and on the register. The Court observed as follows:-

"Here it is true two words are involved "Naturalizer" and "Natlurizet". The Assistant Comptroller disposed of this part of the case by saying that on the question of discretion he found nothing in the evidence to establish that the Respondents had copied the Appellants mark. With all respect to him, that can hardly be a satisfactory way of dealing with the problem. No evidence by the Appellants on such a point could be expected. It must to my mind be a question of *res ipsa loquitur* or nothing. I find it impossible to treat the case as one of coincidence and to take the view that in evolving the word "Natlurizet" as a Trade Mark in relation to ladies shoes the respondent had no regard to the Appellants mark "Naturalizer".

In view of the above it is not possible to accept the submission of Mr. Kadam, learned Counsel for the Plaintiffs that this Court must hesitate to draw the conclusion because there is no evidence to prove that the Plaintiffs copied the mark AYUSH which was on the register and in any case in respect of which the application for registration was pending. Such direct evidence can hardly be expected. Admittedly the Plaintiffs have made a search when the mark was on the register. And they have failed to disclose the result of the search even when the Defendants specifically made such an averment.

8. Prima facie, in view of the fact that the Plaintiffs have admitted having taken a search and not disclosed the result of the search inspite of the specific plea raised by the Defendants, there seems every reason to believe the Defendants case that the Plaintiffs have copied the mark AYUSH which they came across in the course of the search. It is interesting to note that the Plaintiffs did not take an official search. Had they done so, it would have been virtually impossible for them to then say that they had no knowledge. I also do not accept the contention of the learned Counsel for the Plaintiffs that merely because it is possible to miss a particular mark in the course of a search and that Rule 24(2) of the Trade Marks Act contemplates that in a given case a mark may not be disclosed in a search, it should be believed that the Plaintiffs did not come across the mark in the course of the search which they undertook. It may be possible to accept the general proposition that in the course of the search a mark may be missed. In this case, it is not possible to do so because inspite of a specific plea raised by the Defendants the Plaintiffs have failed to disclose the result of the search made by them. It appears to be an attempt to gloss over the fact that they came across the mark AYUSH in the course of the search.

9. Of course, in this action it is not possible for the Plaintiffs to say that they came across the mark AYUSH and that that mark has no similarity to their mark

AYUSHAKTI since it is their own case that the marks are deceptively similar. It is, therefore, difficult to hold that the Plaintiffs did not copy the mark. It must, therefore, be held that the Plaintiffs do not have proprietary interest in the mark. In *Electrolux Ltd. v. Electrix Ltd. and Anr.*, reported in Vol. 71 RPC page 23, the Supreme Court observed, on page 40 of the Report, as follows:-

As to the question of acquiescence, the matter may perhaps be put in this way: When the Defendants started using the word "Electrix", they either knew of the Plaintiffs mark "Electrux" or they did not. If the Defendants did know of it - I make that assumption merely for the sake of argument - then they adopted and used "Electrix" at their peril and were not entitled to assume that the Plaintiffs accorded them their consent to the infringement involved merely because the Plaintiffs, knowing of the Defendants use of "Electrix", did nothing to enforce their rights. In this alternative, it would have been for the Defendants to apply for an obtain the Plaintiffs consent to their use of "Electrix", or, failing that, to adopt some other name instead of it. If on the other hand the Defendants did not know of the Plaintiffs mark "Electrux", that could only be because they omitted to take the precaution of searching the Register of Trade Marks. In this alternative, the position was that the Defendants chose to adopt and use the word "Electrix" taking the risk that any registered proprietor of a closely resembling mark in respect of goods of a relevant class might take proceedings against them for infringement. If they desired to avoid this risk, it was for them to search the Register and apply or and obtain consent to their use of "Electrix" from the registered proprietor of any such closely resembling mark, or, failing such consent to adopt some other name instead of "Electrix". Had they searched, they would have found the Plaintiffs mark "Electrux" and thus brought themselves within the alternative first above stated, with fatal results to their defence based on acquiescence. So far as I can see, they cannot claim to be in any better position because they omitted to search the Register and thus did not know of the Plaintiffs mark "Electrux". On that footing they cannot justly say that they adopted and used "Electrix" in the reasonable belief that they were entitled to do so. The most they can justly say is that they adopted and used "Electrix" on the assumption, made without proper enquiry, that there was no one entitled to object to their doing so."

I am of view that the Plaintiffs here are in a similar position.

10. A Division Bench of this court in *Bal Pharma Limited v. Centaur Laboratories Pvt. Ltd. and Anr.*, 2002 (24) PTC 226 after taking note of the decision of the Supreme Court in *Power Control Appliances and Others Vs. Sumeet Machines Pvt. Ltd.*, wherein the Supreme Court briefly referred to the judgment of the Appeal Court in England in *Electrolux LD (supra)* made the following observations:-

"The Judgment indicates that in a situation where the defendant to an action has been using the mark, even if concurrently, without making himself aware of the fact as to whether the same mark is the subject-matter of the registration and

belongs to another person, the first person cannot be heard to complain for he has been using it negligently in as much as he has not taken the elementary precaution of making himself aware by looking at the public record of Registrar as to whether the mark in question is the property of another. If, however, he had taken search and, knowing full well that the mark was the property of another person, continues to use the mark, then he runs the risk of a registered proprietor challenging his action for infringement and merely because it is done at a subsequent stage, he cannot be heard to complain on the ground of delay."

Though the aforesaid observations are made in the context of an application for infringement action, the observations are in principle relevant to an action for passing off also.

11. Prima facie, therefore, I am of view that the Plaintiffs are not entitled to make any grievance that the Defendants are passing off their goods as those of the Plaintiffs since the Plaintiffs appear to have knowledge of and have adopted mark AYUSH and started using the same as AYUSHAKTI.

12. Normally, on this point it should have been sufficient to dispose of the Notice of Motion, however, I have found it appropriate to consider the main argument of the Plaintiffs that the two marks AYUSH and AYUSHAKTI are deceptively similar. Mr. Kadam, the learned Counsel for the Plaintiffs relied on the fact that the Plaintiffs have reached the sale figures of Rs. 22.21 crores as is apparent from Exhibit "F" to the Plaint. He submitted that there is a whole range of products which is being sold by the Plaintiffs under the name AYUSHAKTI as apparent from the list of products. He, therefore, submitted that the Plaintiffs have acquired a goodwill in the products which are sold under the name AYUSHAKTI. He then placed heavy reliance on the affidavit of certain persons at Exhibits "H", "M", "M-1", "M-2", "M-3", "M-4", "N" and "P" to the Plaint. These are affidavits intended to show deceptive similarity and the likelihood of confusion between the Defendants product AYUSH and the Plaintiffs product AYUSHAKTI. I do not propose to decide the question of deceptive similarity on the basis of affidavits since it is the duty of the Court to consider whether there is a deceptive similarity. However, it is necessary to refer to the affidavits to point out the manner in which cases were to dispose are burdened by unnecessary and sometime inadmissible material. Dr. Tulzapurkar, learned Counsel for the Defendants has challenged, inter alia, the admissibility of the affidavits being not in accordance with the High Court (Original Side) Rules and referred to the casual manner in which they have been filed. The contention seems to deserve acceptance. Rule 196 of the High Court (Original Side) Rules prescribes before whom the affidavit must be sworn. The affidavit at Exhibit "H" does not even bear a date which is the requirement of Rule 200 and is made by an employee of the Plaintiffs. The affidavit at Exhibit "M" to the Plaint is also undated nor does it have any registration number nor is the deponent identified. It does not even contain a statement that the Notary Public personally knows the deponent. Similarly, the affidavit at Exhibit "M-1" is not notarised and hence the statements

in it are not on oath. The affidavits at Exhibit "M-2" and "M-3" are made in Bombay, but not before the Authority prescribed in Rule 197 of the High Court (Original Side) Rules. These affidavits do not contain a statement that the deponents are personally known to the Notary Public who has notarised the said affidavit. The affidavit at Exhibit "P" to the Plaint, does not give the address of the place where the deponent carries on business. It is obvious that these affidavits are made in a casual manner and are not in accordance with the Rules. They have obviously been filed to support the Plaintiffs case. The Affidavit at Exhibit "H" is made by an employee of the Plaintiffs and contain the statement that someone rang up the Deponent and wanted to know if Ayush, marketed by the Defendant was also the product of the Plaintiffs. The other affidavits are similar in nature and I do not propose to deal with the same in detail. There are, however, two affidavits that seem to be in order in the sense that they are properly sworn i.e. the Affidavit at Exhibit "N" and Exhibit "P". The first is by a shop keeper, who has stated that the brand AYUSHAKTI is popular and has acquired goodwill. The affidavit also states that some unnamed customer has asked for AYUSHAKTI brand product thinking that they are the same as AYUSHAKTI products originating from Ayushakti Ayurved Pvt. Ltd. The shop keeper also goes on the state that they are deceptively similar. The affidavit at Exhibit "P" makes similar statements pertaining to the deceptive similarity and confusion. It must be noted that the affidavits are not of any person who has stated that he found the two marks deceptively similar. Shop keepers do not give the names of the persons who found the product deceptively similar. It is difficult to rely on these affidavits. In any case, this is a matter which has to be decided by the Court itself. It appears that this evidence which is filed is entirely unsatisfactory and it is difficult to rely on it. It would be better if such evidence is altogether excluded.

13. Dr. Tulzapurkar, the learned Counsel for the Defendants has rightly relied on a passage of Passing Off Law and Practice, Second Edition where the learned Author has suggested that a survey would be the practical method for evidence as to reputation and confusion since where it is practical to adduce direct evidence from witnesses who are familiar with the Plaintiffs goods or services or who have been deceived by the Defendants conduct cannot be adduced where it is not practical to the Author has laid down the series of guidelines which should be followed if the survey is to be undertaken. They are as follows:-

"7.35 (1) The interviewees must be selected by a method which ensures that a representative cross-section of the relevant public is interviewed.

(2) The survey must be large enough to be statistically relevant.

(3) The survey must be conducted fairly.

(4) All surveys conducted must be disclosed to ensure that those relied upon are a fair representation of the totality of the results obtained and full disclosure must be made in relation to each survey.

(5) All answers given must be disclosed to ensure that the opposing party has the opportunity of verifying that the responses have been correctly assessed and coded.

(6) The questions must be framed so as not either to lead the respondent or to cause the respondent to speculate."

14. There is no reason why such survey should not be produced before this Court, particularly at the stage of interlocutory stages where this issue becomes relevant. It would assist the Court substantially. In *Mothercare U.K. Ltd. v. Penguin Books Ltd.*, 1988 R.P.C. 113, the Court of Appeal deprecated the practice of such affidavits as in the present case in the following words:-

"In truth there has in my judgment, been a very considerable amount of overkill on both sides in the preparation of the affidavits and exhibits for this interlocutory application. The proliferation of affidavits, assertions and counter-assertions appears to be increasingly the practice where wealthy companies are involved in applications for interlocutory injunctions, particularly in passing off, copyright or trademark cases. This is strongly to be deplored not only does it greatly increase the cost of litigation, already notoriously high, but it means that even more time has to be spent by the court on such cases, to the detriment of other litigants whose cases therefore take longer to come on."

These observations would in my view apply not only to this case but to most cases involving similar action brought before this Court.

15. Now to take up the question of the deceptive similarity between the two marks. Mr. Kadam, the learned Counsel for the Plaintiffs submitted that the Plaintiffs have acquired a large reputation and goodwill in the AYUSHAKTI which said to be adopted in April, 1997. He referred to the product marketed by the Plaintiffs and submitted that the Plaintiffs have acquired goodwill in AYUSHAKTI. According to the learned Counsel, their goodwill would suffer if the Defendants are allowed to use their mark AYUSH since it is deceptively similar to the Plaintiffs mark AYUSHAKTI. It is argued on behalf of the Plaintiffs that the whole of the offending mark AYUSH is included in the Plaintiffs Mark AYUSHAKTI and is even otherwise deceptively similar. It is argued that the products sold under both the marks are similar and in the present case gives rise of both kind of confusion i.e. confusion in relation to the word and confusion as to the source. According to the learned Counsel, the distinctive and memorable part of the Plaintiffs mark AYUSHAKTI is its prefix AYUSH and this has been bodily lifted by the Defendants. Therefore an unwary buyer may be deceived into buying AYUSH. The learned Counsel submitted that the first syllable is always more important and determinative and relies on several authorities in support of his contentions. On the other hand Dr. Tulzapurkar, the learned Counsel for the Defendants submitted that it is a combination of two common-words. The pronunciation of the two words AYUSH and AYUSHAKTI are different. Therefore there is no likelihood of confusion. The mark according to him are not deceptively similar.

Before turning to the authorities, it would be worthwhile to consider the two marks directly. It is obvious that the Plaintiffs mark AYUSHAKTI is a combination of the two words AYU which denotes life and SHAKTI which denotes strength. Thus both parts of this word i.e. AYU and SHAKTI are important and neither can be ignored. There is no way AYUSHAKTI these words can be pronounced without an emphasis on shakti or at least fully pronouncing it. It is, therefore, not possible to slur on shakti.

16. On the other hand, the Defendants word AYUSH is a short script word which does not contain that part of the Plaintiffs word which is emphasised therein i.e. Shakti. The Defendants word contain only two syllable and the word is complete in itself. A word like "SHAKTI" will have to be consciously added to it and it is difficult to see who the word AYUSH can be confused for the understood as AYUSHAKTI. The learned Counsel for the Defendants have given an example which is worth nothing. The two words "DEVATA" and "DEVBHAKTI" cannot be considered to be phonetically similar. This example highlights the difference in the present case. In this view of the matter, prima facie, upon a phonetical and visual consideration of the two words AYUSHAKTI and AYUSH I find that there is no deceptive similarity, and in any case of such a kind that would enable the Defendants to pass off their goods under the trade mark AYUSH as those of the plaintiffs which under the trade mark AYUSHAKTI. There is no doubt that some customers may wonder if AYUSH comes from same company as AYUSHAKTI because both have AYUSH word. That is far from saying that the two marks are so deceptively similar that it would enable the Defendants to pass off their goods as those belonging to the Plaintiffs.

17. The learned Counsel for the plaintiffs relied on a decision of the House of Lords in Parker-Knoll Limited v. Knoll International Limited, 1962 RPC 265 in which that Court granted an injunction against passing off by the use of the word KNOLL and KNOLL INTERNATIONAL since the plaintiffs goods were sold under the registered trade mark PARKER KNOLL. That is a case where the Defendants claimed a right to use the word "KNOLL" since it was their own name. I find it difficult to view the word situation in that case and the present case as similar. Thee the Defendants has started using the later half of the Plaintiffs work PARKER KNOLL by adopting "KNOLL" alone. It is clear in speech this creates sort of identification with the earlier word "PARKER KNOLL" which ends similarly. The situation is different from AYUSH and AYUSHAKTI. When the word AYUSH is pronounced it does not leave in the mind of the hearer the same effect as the word AYUSHAKTI which terminates very differently. The next judgment relied upon on behalf of the Plaintiffs is a decision in a matter of Rysta Limited reported in Vol.LX RPC 87. That was a case where an application was made for registration of the word mark "Rysta". The was opposition to such a registration by the owners of the registered mark "Aristoc". The Assistant Comptroller allowed the registration and held that the confusion between with the marks was not probable. That decision was reversed by the Court on the ground that if the word mark Rysta (standing alone) was allowed. It would create confusion with the

existing mark having "Aristoc". I see no parallel between the two cases. Obviously, both the words in question were single words without any suffixation and none of the word was a combination of two words such as the case here. Moreover, it was clear that the word sought to be registered - "Rysta" was a central part of the word "Aristoc" and was bound to create confusion in the pronunciation. Moreover, it is necessary to be cautions in relation to English case proceeding in the English way of pronunciation. The Supreme Court in Corn Products Refining Co. Vs. Shangrila Food Products Ltd., , has observed in paragraph 17 as follows:-

"It is well known that the question whether the two marks as likely to give rise to confusion or not is a question of first impression. It is for the court to decide that questions, English cases proceeding on the English way of pronouncing an English word by Englishman, which it may be stated is not always the same, may not be or much assistance in our country in deciding questions of phonetic similarity. It cannot be overlooked that the word is an English word which to the mass of the Indian people is a foreign word. It is well recognised that in deciding a question of similarity between two marks, the marks have to be considered as a whole. So considered, we are inclined to agree with Desai, J. that the marks with which this case is concerned are similar. Apart from the syllable co in the appellant's mark, the two marks are identical. That syllable is not in our opinion such as would enable the buyers in our country to distinguish the one mark from the other."

I would therefore consider the decision in Rysta Ltd. (supra) case as not applicable. Similarly, I find that the reliance on the case in Ruston and Hornsby Ltd. Vs. The Zamindara Engineering Co., , where the words "RUSTON" and "RUSTAM INDIA" were found to be deceptively similar is of no application here. In that case the goods were being sold under the trade mark "Ruston". Defendant started selling similar goods under the trade mark "Rustam". They were found to be similar and indeed, reflects, they are. The Court also negated the contention that Rustam India would make any difference. There is no similarity between the present case and the case of Ruston and Hornby Ltd., (supra). Reliance on a decision of the Division Bench of this Court to which I was a party in the matter of Indchemie Health Specialities Pvt. Ltd. v. Naxpar Labs Pvt. Ltd. and Anr., reported in 2002 (24) PTC 341 Bom also does not help the Plaintiffs. That was a case where two words "Cheri" and "Cherish" were found to be phonetically similar and therefore an injunction was granted.

18. It must be born in mind that the authorities in these matters must be used with great cautions. There is often a uniqueness in the comparison of the two words in each case. Even though a part of one word is the whole of another the emphasis can be so different that they do not give rise to any deceptive similarity.

19. On the other hand, the learned Counsel for the Defendant relied on the decision reported in 1979 RPC 155, where the word "TORNADO" was allowed to be registered inspite of the established user of the word "TORNA". In other word,

the word "TORNADO" was not found to be deceptively similar because of the way it pronounced. The reasons are worth noting.

"The two words TORNA and TORNADO are pronounced quite differently; the final a in Torna is uninflected and almost lost, the emphasis being on the first syllable of this two syllables word, the word Tornado is a three syllables formed by the long vowel a. I am of the opinion that, phonetically, the two words, and hence oral references to the two marks in suit, are well separate and that there is no reasonable likelihood that one will be mistaken for the other even when a proper allowance is made for imperfect recollection."

The above is a good example of how different pronunciation of the two words eliminate chances of confusion even though an allowance is made for imperfect recollection. In the present case AYUSH is pronounced quite differently, AYUSHAKTI as anybody pronouncing or hearing it would notice immediately. I am, therefore, prima facie of view that there is no deceptive similarity in the two words and the plaintiffs are not entitled to injunction. In fact, there is no need for such injunction since the Defendants goods are not likely to be mistaken for those of the Plaintiffs.

20. Dr. Tulzapurkar, the learned Counsel for the Defendants further submitted that the mark AYUSHAKTI is descriptive of the mark of the Plaintiffs and in any case laudatory and therefore the Plaintiffs cannot claim a monopoly to prevent Defendants from using the mark AYUSH. I think there is substance in this contention. In the first place though the words may not be strictly descriptive of the Plaintiffs mark it does tend to be descriptive and in any case laudatory in the sense that it suggests that use of the product would contribute to life, well being and strength. In a situation such as this it is settled law that where such words are used, unless the Plaintiff shows that the words have acquired a secondary significance, such that it has displaced the primary significance and meaning of the word, the Defendants should not be prevented from using similar words which are part of common language. Viewed from that angle, it is clear that the Plaintiffs mark AYUSHAKTI is not too exclusive or so inevitably associated with the Plaintiffs product that the word AYUSH standing alone cannot be used by anyone else.

21. Dr. Tulzapurkar, the learned Counsel for the defendants has relied on a decision of the House of Lords reported in *The Cellular Clothing Company Limited v. Maxton and Murray*, reported in 1899 A.C. 326, where the following observations are made:-

"If it can be shown that representations to the effect that the goods were manufactured by the plaintiffs be made directly or by implication, by the language used, the plaintiffs would of course be entitled to a remedy. But where the plaintiffs proof shows that the only representation by the defendants consists in the use of a term of terms which aptly and correctly describe the goods offered for sale, as in the present case, it must be a condition of the Plaintiffs

success that they shall prove that these terms no longer mean what they say or no longer mean only what they say but have acquired the secondary and further meaning that the particular goods are goods made by the plaintiffs, and, as I have already indicated, it is in my view difficult to conceive cases in which the facts will come up to this. Unless that be proved, there is no room for a charge of violation of any right, or indeed for a charge of fraud for the defendants are only exercising the right which they possess as much as the plaintiffs do, and which every one has, to employ words in ordinary use which are an apt and proper description of the goods for sale."

I think the observations are applicable to the present case.

22. Having come to the conclusion that there is no confusion likely to arise in the two rods I am also of view that the use of the word AYUSH would not create any confusion as there is reason for coming to this conclusion that there is no confusion in the words. Since the words are not similar, and are pronounced and also read differently, there is no reason for customers to imagine that the product AYUSH has the same origin as those of the products sold under the name AYUSHAKTI. Merely because it is possible to imagine that a given person may get confused as to the product, it is no reason to imagine that every one would get confused. I do not believe that the law is that if a single person get confused it must be taken that the words create such confusion. It must be remembered that claims in passing off action are not for an infringement of property rights but for misrepresentation by the Defendant. Therefore, if the alleged confusion is the result of the exercise by the Defendant of his legitimate rights to use certain common words in order to compete with the Plaintiff the Court must be hesitant in granting such an injunction. At the prima facie stage, without actual instances of witness having been deceived, it would be sufficient for the court to form a broad impression that there is no confusion by and large and not decide merely on the basis of an affidavit of a person who claims that he got confused or as observed in some cases. In this view of the matter, I consider it appropriate to refuse the injunction.

23. I must mention at this stage that the learned Counsel for the Defendants argued that the Plaintiffs have not acquired reputation in the good since they have not proved sales and advertisement of their product AYUSHAKTI I have not dealt with the point in view of my prima facie conclusion on the question of deceptive similarity and confusion. Similarly, I have not dealt with the question raised by the learned Counsel for the Plaintiffs that the Defendants acquired under the Deed of Assignment the mark AYUSH from several persons even though the registration of the said mark had lapsed.

24. The Notice of Motion is hereby dismissed with costs.

All Authorities concerned to act on an ordinary copy of this Order duly authenticated as true copy by the Associate of this Court.