
(2011) 03 MAD CK 0308

In the Madras High Court

Case No : S.A. No's. 175 and 176 of 2010 and M.P. No's. 1 and 1 of 2010

Malar Network (P) Ltd.

APPELLANT

Vs

Arun Prasath D.

RESPONDENT

Date of Decision : 28-03-2011

Acts Referred:

Penal Code, 1860 (IPC) — Section 420

Trade Marks Act, 1999 — Section 30, 30(1), 31, 31(1)

Citation : (2011) 2 LW 865 : (2011) 46 PTC 284

Hon'ble Judges : V. Periya Karuppiaho, J; R. Banumathi, J

Bench : Division Bench

Advocate : Perumbulavil Radhakrishnan, for the Appellant; R. Devaprasad, for the Respondent

Final Decision : Dismissed

Judgement

V. Periya Karuppiaho, J.—These appeals are directed against the order dated 08.04.2010 made in O.A. Nos. 27 and 28 of 2010 in C.S. No. 24 of 2010.

2. The brief facts of the cases are as follows:

(i) The Plaintiff is the Appellant. The Plaintiff filed Original Applications in O.A. Nos. 27 and 28 of 2010 seeking interim injunction restraining the Respondent/Defendant by himself, his servants, agents or assigns, or anyone claiming through them from in any manner passing off the Respondent/Defendant's products and services as "malar tv" or "MALAR.TV" bearing the offending trade mark with identical and/or deceptively similar colour scheme, get up and write up as and for the trade mark of the Plaintiff viz., "malar tv" or "MALAR.TV" and the domain name "MALARTV.IN" and "MALARTV.COM" either by misrepresentation to the public and offering for sale or in any manner advertising on the internet or in any other communication media by dissemination of signals by using the Respondent/Defendant's offending mark and domain name/web site "malar. tv" with or without such suffixes or prefixes that may be deceptive in respect of the Respondent/Defendant's products and services pending disposal

of the suit and for interim injunction restraining the Respondent/Defendant by himself, his servants, agents or assigns, or anyone claiming through him from in any manner infringing the Plaintiff's trade mark "MALAR TV" mark in respect of the Respondent/Defendant's domain name, website and mark in respect of the Respondent/Defendant's products and services, with any write up or any other representation or words which are in any manner identical to and deceptively similar with the trade mark of the Plaintiff pending disposal of the suit.

(ii) The Appellant/Plaintiff got the name "Malar TV" registered as its trade mark as early as 2003 with the intention to do business in Telecommunications, T.V. Channels as well as in websites and related fields and it has been taking steps to commence the business. The Appellant/Plaintiff is part of a larger business group which includes "Dina Malar" news paper and other allied services. The Defendant's domain name is "Malar. Tv" whereas the domain names of the Plaintiff are (a) Malar TV. Com and (b) Malar TV. in.

(iii) The case of the Defendant is that he is the prior user of the domain name "Malar. TV" and also doing business since May, 2009 and he cannot be enjoined at the instance of the Plaintiff and the Plaintiff has not commenced its business since 2003. According to the Defendant, the word "Malar" in Tamil, is a generic word to the field of newspaper, which means Magazine. Similarly, the word "Television" is a generic word to the field of electric media telecasting various programmes. Moreover, the Defendant do not use lotus as symbol or similar colour of that of the Plaintiff.

(iv) After hearing the submissions of both sides, learned single Judge of this Court is of the view that the Defendant is the prior user of the trade name "Malar. TV" and he could not be enjoined from using it. Therefore, the learned single Judge Ordered the above O. As to the limited extent as follows:

the Defendant shall get his website name modified as "Arun's Malar. TV" and as far as domain name is concerned, it could exist as such and no injunction is granted as against such use. Within a week, the Defendant shall carry out the aforesaid modifications.

3. Aggrieved by the above orders of the learned single Judge, the Plaintiff has filed the present appeals contending that the learned single Judge failed to see that the Appellant/Plaintiff had registered trade mark as early as 2003 whereas the Respondent/Defendant had not even applied for registration and the Appellant/Plaintiff had also registered the domain names as early as 2005 and 2007 whereas the Respondent/Defendant had registered the domain name only in May, 2009. It is further contended that the learned single Judge erred in holding that the trade mark "malar tv" had become public juris. It is also contended that the learned single Judge erred in concluding that "Malar TV" is a channel whereas they are doing the business of Cable T.V. connection in Virudhunagar with their cable transmissions in the local area.

4. It is the case of the Appellant that the Appellant has been using the mark

"MALAR TV" and "MALAR TELEVISION" continuously since its adoption in the year 2000 related to media and entertainment. The Appellant was incorporated as a company under the Companies Act, 1956 on 06.12.2000 and continues to carry out its activities under the name "Malar Network Private Limited". The Appellant attempted on various occasions to get Government approvals and has entered in satellite up linking agreements etc., It is the further case of the Appellant that the Respondent does not have any company or business entity that carries on business relating to television so as to say that the domain is an extended exposure of such corporate entity. The Respondent's domain name Malar. TV has been registered many years after the registration and usage of the marks "MALAR TV, MALAR TELEVISION" and the corporate name "MALAR NETWORK" by the Appellant. A prefix or suffix, addition or deletion of dot, conversion to plurality or singularity to a registered mark does not create a distinct mark or identification or entitle any claim or right. The Respondent has not represented to the registering authority before seeking registration of the domain name as warranted under the policy. A right which never existed in the Respondent cannot be created despite infringement of the Appellant's registered trade mark and prior usage.

5. The Appellant relied on the following decisions:

- (i) Amritdhara Pharmacy Vs. Satyadeo Gupta, ;
- (ii) Durga Dutt Sharma v. Navarathna Pharmaceuticals Laboratories AIR 1967 SC 980
- (iii) Cadila Health Care Ltd. Vs. Cadila Pharmaceuticals Ltd.,
- (iv) Uniply Industries Ltd. Vs. Unicorn Plywood Pvt. Ltd. and Others,
- (v) Revlon Inc. v. Hosiden Laboratories PTC 378 Delhi
- (vi) Acqua Mineral Ltd., v. Promod Borse 2001 PTC 619
- (vii) Tata Sons v. Manu Kasauri 2001 PTC 432 Delhi;
- (viii) The Andhra Perfumery Works joint family Concerns Vs. Karupakula Suryanarayaniah and Others, ;

6. The case of the Respondent is that the Respondent/Defendant is a postgraduate in M. Sc. (Electronic Media) and is interested in producing short films and he also did so during his post graduation. In order to bring out short films produced by the students, the Respondent wanted to publish website with the word "malar", comparing the budding students as blossoming flowers. After a sincere search, the Respondent registered his domain name as malartv. in with ICANN, the international domain name provider. The Respondent spent a sizeable amount for preparing the website and software and also collected short films and documentaries from different persons and published the website on 16.05.2009. Before publishing the website, the Respondent made wide publicity in colleges as well as through media including the Appellant. Even though the Appellant has not

telecasted any programme with his registered trade mark name, filed the suit in C.S. No. 24 of 2010 and by filing O.A. Nos. 27 and 28 of 2010 obtained an order of interim injunction. The Appellant has also filed a false complaint against the Respondent in January, 2010 and the Respondent was in jail from 22.01.2010 to 28.01.2010. The Appellant had not published its website till the filing of suit and they have also not produced any document to show that they had published websites with domain names "malartv. in" and "malartv.com". By registering the trade mark and domain name, the Appellant will not accrue any right over the trade mark unless and until the same was put to use in the public domain. Moreover, the font, colour combination and style of writing of the website are not deceptively similar to confuse the user. The internet users are well versed with short symbols and they are very well aware that a dot in the domain name at the wrong place will take them to a different website. In the present case, the Respondent's domain name has a dot in between "malar" and "tv" whereas the Appellant's domain name has a dot between "malar tv" and "com", "malar tv" and "in". That apart, pursuant to the orders of the learned single Judge, the Respondent has added the word "Arun's" to his website "malartv".

7. The Respondent relied on the following decisions:

- (i) Satyam Infoway Ltd. Vs. Sifynet Solutions Pvt. Ltd., ;
- (ii) Heinz Italia and Another Vs. Dabur India Ltd., ;
- (iii) Century Traders Vs. Roshan Lal Duggar Co., ;
- (iv) N. Rangaraw and Sons v. Koya's Perfumery Works CDJ 2010 MHC 2308
- (v) Cluett Peabody and Company v. Arrow Apparels 1998 PTC 18
- (vi) Uniply Industries Ltd. Vs. Unicorn Plywood Pvt. Ltd. and Others,

8. Heard Mr. Perumbulavil Radhakrishnan, learned Counsel for the Appellant in both the appeals and Mr. R. Devaprasad, learned Counsel for the Respondent in both the appeals.

9. Apart from the above submissions, the learned Counsel for the Appellant would submit in his arguments that the Appellant's trademark was registered in accordance with the Trademarks Act, which was in the year 2003 and a registration certificate issued by the Trademark Registry would go to show that the word "malar" along with a symbol of lotus has been registered even in the year 2001 and subsequently malar tv along with the symbol of lotus flower for Malar Network Private Limited, by the Appellant herein in the year 2006. Apart from that, malar tv with a symbol of lotus as in page 35 of the typed set of papers has been registered with the Trademarks Registry for the purpose of broadcasting television, broadcasting radio, broadcasting cable television, news information, mass media, telecommunication included in Clause 38. He would also draw the attention of the court that the said registration of trademarks would conclusively prove the right of the Appellant over the said marks and it is

a prima-facie document to show the right to use the said trademark. He would also draw the attention of the Court that it has been laid down in Section 31 of the Trademarks Act. However, he would also draw the attention of the Court that the Respondent had infringed the said trademark by using the said words malar.tv with the similar emblem in the internet. He would also submit that the learned Single Judge had permitted the Respondent to prefix "Arun"s before the malar.tv" would not in any way change the character of the said usage. He would further submit that the Appellant had registered the domain names as "malartv.com" and "malartv. in" as early as 2005 and 2007, whereas the Respondent had registered its domain name only in May 2009 and had started its use in the internet. He would also submit that the user of the said name "malar.tv" from 2009 onwards would not in any way give any right to the Respondent to infringe the trademark of the Appellant registered in accordance with law. He would further submit that the decision of the learned Single Judge of this Court that the word "malar" and the word TV are the words of publiciuries applicable to common names referring "malar" means the flower as well as the edition of newspaper and TV refers to Television. He would also submit that the registration trademark would also amounting to the exclusive right for the Appellant prohibiting others not to infringe such trademark. The learned Single Judge has also failed to understand that the prefix of "Arun"s before malar.tv" will not in any way change the domain name, but remains the same. He would further submit that the Appellant has played certain programmes in collaboration with Vijay TV under the banner malar tv and therefore, it can not be said that the Appellant has not used the registered name. He would cite a judgment of the Hon ble Apex Court reported in between Satyam Infoway Ltd. Vs. Sifynet Solutions Pvt. Ltd., , " for the ratio that the registration of trademark will also cover the user of domains in internet through registration with WIPO and ICANN, the registering authorities of domains, in accordance with uniform domain name disputes resolution policy. He would also submit in his argument that the domain names or internet sites are entitled to the protection through Trademark Law, as per the judgment of Hon ble High Court of Delhi reported in between Tata Sons Limited v. Manu Kosuri and Ors. 2001 PTC 432. He would rather bring it to the notice of this Court yet another judgment of Hon ble High Court of Delhi reported in between Acqua Minerals Limited v. Pramod Borse and Anr. 2001 PTC 619 for the same preposition. He would also submit that the Respondent who is not in good faith in using the trademark already registered by the Appellant cannot exercise any right over the use of his domain name as malar.tv in the website and therefore the use of malar.tv or " Arun"s malar.tv" in the website by the Respondent is clearly infringing the right of the Appellant. He would draw the attention of the Court to the ingredients of Section 31(1) of Trademarks Act in support of his arguments. He would once again stressed in his argument that when once prima-facie case is established on the part of the Appellant, the statutory right of using the trademark shall be protected by the courts and the Respondent cannot claim any injury if prevented from using the said marks and therefore, the balance of convenience is only in favour of the Appellant and in

favour of granting temporary injunction against the Respondent. He would further submit that the Respondent shall not be permitted to use the name malar.tv of "Arun"s malar.tv" or in whatever name the word "malar" or tv can be prefixed or suffixed and if it is permitted, the Respondent would be committing of passing off the rights of the Appellant irrespective of the commencement of the use of such names by the Appellant. He would further submit that he had incurred lot of expenditure towards the publicity and the reputation earned in the market would be damaged through the passing off and therefore, temporary injunction as sought for by the Appellant ought to have been granted. He would rely upon the judgment of the Hon ble Apex Court reported in between Heinz Italia and Another Vs. Dabur India Ltd., , for the principle that for an occasion for passing off the Plaintiff as to establish prior user to secure an injunction and that the registration of the mark or similar mark in point of time is irrelevant. He would also bring it to the notice of this Court a passage in the judgment of the Hon ble Apex Court reported in Satyam Infoway Ltd. Vs. Sifynet Solutions Pvt. Ltd., for the principle that unless good will can be established by the Plaintiff by showing that the public are associated with the trademark name, it cannot succeed for passing off an action. He would also submit that the infringement of trademark of the Appellant as well as passing off the reputation of the Appellant by the Respondent would certainly be continued even though the name malar.tv has been altered with prefixing Arun s and therefore the judgment of the learned Single Judge in both the applications may be set aside and temporary injunctions may be ordered.

10. The learned Counsel for the Respondent would submit in his argument that no doubt the Appellant is the registered owner of the trademark malar tv and other domains, viz., malartv. in and malartv.com , but they have not at all used the said names anywhere from the date of registration nor they commenced the business or telecasted in the name nor they used the domain names. He would further submit that the registration is one thing and user is another thing and the ingredients of Section 31 did not prohibit the prior user from using the said mark registered under the said Act. He would further submit that the Respondent had selected the name "malar" in order to encourage the youngsters to produce their films and other subjects, they have preferred to be telecasted in his website and bring them from buds to flower i.e., blossoming and the said blossoming in Tamil will also be called as "malar" and the word "malar" is a general term used by the people and it is not an exclusive word merely on the registration of the trademark by the Appellant. He would further submit that the word TV , a word otherwise used for television, is also a common word used by so many television companies, namely, Sun TV, Vijay TV and so on. He would also submit that both the words "malar" and TV are nothing but publici juries or publici generis and they can be used by anybody merely because it can be used by trademark. He would further submit that he applied for registration with ICANN, a registering authority for website and the terms and conditions imposed by the said registering authority was accepted and accordingly it was registered as malar.tv

in the website. He would further submit that the pictorial appearance of the malar.tv used by the Respondent is not identical to the designs and pictorial appearance of the registering trademark of the Appellant and therefore, it has no similarity. Even otherwise, the learned Single Judge has directed the Respondent to change its name as "Arun's malar.tv" by prefixing Arun s and the appearance of the present domain name of the Respondent is now lengthier than earlier and it cannot be similar before of malar.tv , even if the Appellant has got any right over the said name in the website. He would further submit in his argument that the Respondent has used his name in a bonafide belief that nobody have registered the said words "malar" and TV much less the Appellant, since he did not know the registration of the name malar tv by the Appellant and had registered with ICANN and commenced the use of the said name from 16.05.2009 onwards. The registration with ICANN was permitted since there was no name registered with them and accordingly, the Respondent had bonafidely commenced its use. He would also submit that the Appellant s case was that he is yet to commence the use of malar tv either in website or in mass media or in satellite transmission, since he was not granted with permission to do the same and hence there is no spoiling of the reputation of the malar tv by the Respondent. Similarly, there is no question of any passing off as put forth by the Appellant. He would also draw the attention of the Court that a complaint was given against the Respondent by the Appellant and a First Information Report was registered u/s 420 IPC also and the Respondent was arrested by the police for no fault of his and he was in judicial custody for about eight days and subsequently he was granted bail and in the said First Information Report, the Appellant had candidly admitted that he is yet to commence his business in the name of malar tv . The said admission of the Appellant would go to show that he has falsely claimed that he had telecasted certain programmes through Vijay TV and other TV channels. He would, therefore, request that the injunction seeking the grant of passing off nor the infringement of trademark cannot be available to the Appellant.

11. He would further submit that the Respondent has spent lot of money for publicity regarding his malar.tv in the website with the colleges through media and other methods and had earned a good reputation and now the Respondent is known by the user of malar.tv or "Arun's malar.tv" after its modification. He would further submit that the Appellant cannot insist for any injunction at this stage, since he has not used the name malar tv for more than six years and the said registration cannot be a tool for preventing others to use such words contained in the said trademark. He would rely upon the judgment of the Hon ble High Court of Bombay reported in between Cluett Peabody & Co. Inc. v. Arrow Apparals 1998 PTC 18 Bom for the aforesaid argument.

12. He would further submit that the direction issued by the learned Single Judge to prefix the name Arun s before the domain name malar.tv has been complied with by the Respondent and the entire appearance of the name has been changed and it does not resemble the trademark name of the Appellant. He

would further submit that there are so many similar prefixes being used by various newspapers in the names of Siruvar Malar Thanga Malar , Ilaingar Malar Kudumba Malar , Mangaiyar Malar etc., and therefore, prefixing of the word Arun s will change the entire resemblance and the order of the learned Single Judge relying upon those usage by other journals is perfectly alright. Therefore, he would request the court to dismiss the appeals as not sustainable.

13. We have given anxious thoughts to the arguments advanced on either side.

14. The contention of the Appellant, who is the Plaintiff before the learned single Judge, was that they have registered the name "malar tv" before the Trademark Registry in the year 2003 and they are the owners of the said names and their right has to be protected under the provisions of Trademarks Act. The said registration of the trade name "malar tv" was done by the Appellant on 22.12.2003. The said registration certificate was produced in page 35 of the typed set of papers. It contains the logo of lotus flower with the words "malar tv". The said registration would explain that it was in respect with broadcasting television, broadcasting radio, broadcasting cable television, news information, mass media, telecommunication included in clause-38. Apart from that, the words "malar television" was also registered in the year 2006 towards software included in clause - 9 and the same logo lotus is also incorporated. The word "malar" was already registered before the Trademarks Registry on 16.11.2001 with the lotus flower. Therefore, we could understand that the Appellant / Plaintiff is the holder of the Trademark "malar tv" with lotus flower logo as in page 35. It is no doubt true that he is entitled to the benefits under the provisions of Trademarks Act. According to Section 30(1) of the Act, prima - facie right over the said mark is established by the Appellant.

15. However, it is the argument of the Respondent that it does not confer any prima facie case of user over the said mark. It is an admitted fact that the Appellant has not launched any television in the name of "malar tv" so far. The reason put forth by the Appellant is that he is yet to get the permission from the Government for launching such satellite transmission. It is also an admitted case of the Appellant that he had not commenced any broadcasting or having any communication system in the internet under the banner "malar tv". However, it has been stated that he had produced two programmes for Vijay TV and other T v. and it was broadcasted in such televisions. However, there is no documents produced to establish the same in order to show the user. Per contra, the First Information Report registered against the Respondent on a complaint given by the Appellant in the year 2010 would go to show that he is yet to commence any business under the name of "malar tv". The clear admission made by the Appellant in the complaint given by him against the Respondent would go to show that he has not commenced any business under the name "malar tv" so far. Therefore, we can safely come to a conclusion that the Appellant has not used the name so far. In contrary the Respondent has commenced the website in the name "malar.tv" on 16.05.2009. The grievance of the Appellant is that he has

commenced the usage of "malar tv" in his website, which is contrary to law and therefore, the usage of the name by the Respondent is found to be categorically admitted by the Appellant. Whether the use of the name "malar tv" is a bonafide one is a question.

16. The case of the Respondent is that both the words "malar" and "TV" are publici generis, which are used by the public and the registration cannot taken away the right of the public to use those words in their business. For the said purpose, it has been pointed out that "malar" is being used by everybody by prefixing or suffixing certain other words like, Siruvar Malar Thanga Malar , Ilaigar Malar Kudumba Malar , Mangaiyar Malar etc., by various journals and it has become a common word and therefore, it cannot be prevented by the Appellant, even though he has got a registration. Similarly, the word "TV" is being used by several TV Channels as abbreviation for television. According to the judgment of this Court reported in between N. Ranga Rao & Sons, represented by its Power of Attorney Agency B.M. Dwarakanath v. Koya's Perfumery Works, Bangalore CDJ 2010 MHC 2308 any word, abbreviation or acronym which has become "publici juries" cannot be claimed by anybody as exclusively belonging to them. Now, we have to see whether the word "malar" is a "publici juries or publici generis". The meaning of the word "malar" is flower. It can be a noun as well as verb, when it is used at appropriate places. The object of naming "malar.tv" by the Respondent was told to have instigate or awaken the youngsters to come with their productions like short films and other documentary films for being telecasted in the website of the Respondent and therefore the word "malar" is being used calling the youngsters to blossom from budding stage, despite, the word "malar.tv" is certainly similar to the trademark registered by the Appellant. As regards the meaning of noun "malar" would be the flower and it is in common use of every public and therefore, it is a word of "publici generis / juries". No doubt, the word "TV" is the abbreviation of television and this short form of television "TV" is being used by every channel and it has been registered by various "TV" channels. There is no doubt that the television or "TV" are generic terms and there is no harm in using the word "TV", when it is being used by any person to denote his telecasting. However, in this case the learned single Judge has directed the Respondent to prefix "Arun's" before the name of "malar.tv" so as to differentiate the trademark of the Appellant, namely, "malar tv". Even though the word "malar" is a generic term, it has been directed by the learned single Judge and the present usage of the word "Arun's malar.tv" is certainly different from the word "malar tv", where the registration of trademark was done by the Appellant.

17. However, the said mark has not been used by the Appellant till today. The judgment of Bombay High Court reported in 1998 PTC 18 cited supra would laid down the principle of non-user of the registered trademark. In the said judgment, the trademark even though registered was not used for 30 years without commencing the business under the name of the said trademark. In such occasion, the non-user of the said trademark will not make any reputation of the

mark so as to give rise to prima - facie case of the reputation of the said mark. Apart from that it has emphasised that such registration would monopolise the said mark which is not the object of the Act. As far as this case is concerned, even though the name "malar tv" was registered in the year 2003 and the domain names "malartv.com" and "malartv. in" have been registered, there is no commencement of business even today. The user of the name "malar tv" in the internet as a website had commenced from 16.05.2009 onwards and therefore, the non-user of the name registered by the Appellant will not in any way a hindrance to the use of the name "Arun"s malar.tv" as directed to be modified by the learned single Judge.

18. As regards the user of name "malar.tv" or "Arun"s malar.tv" by the Respondent, there cannot be any passing of, since the domain names "malartv.com" or "malartv. in" or trade name "malar tv" have not been put in use by the Appellant. As already discussed, the Appellant has not used those names still. In the judgment of the Hon"ble Apex Court reported in Satyam Infoway Ltd. Vs. Sifynet Solutions Pvt. Ltd., , it has been categorically laid down as follows:

26. This brings us to the merits of the dispute between the parties. As we have already said, a passing - off action is based on the goodwill that a trader has in his name unlike an action for infringement of a trade mark where a trader"s right is based on property in the name as such. Therefore, unless goodwill can be established by the Appellant by showing that the public associates the name "Sify" with the services provided by the Appellant, it cannot succeed.

According to the judgment of the Hon"ble Apex Court, we could see that there cannot be any passing off action, when there is no goodwill or reputation earned so far. In this case, the Appellant admittedly has not commenced the business and therefore, there could not be any goodwill or reputation earned by the Appellant in doing business of satellite transmission or mass media transmission through websites and through internet. Per contra, the Respondent is said to have incurred much expenditure in promoting the name of "malar.tv" registered with ICANN towards his web TV transmission. Further, all these expenditure could be considered with the support of the evidence in the course of trial. At this juncture, it is enough for us that the Appellant had not hitherto earned goodwill nor reputation by doing the business under the banner of "malar tv" in the website or through satellite transmission. Certainly, there cannot be any passing off as apprehended by the Appellant. In the judgment of the Delhi High Court reported in between Century Century Traders Vs. Roshan Lal Duggar Co., , the following judgment of the Hon"ble Apex Court reported in between Corn Products Refining Co. Vs. Shangrila Food Products Ltd., ,. The relevant passages would be thus:

13. The Supreme Court in Corn Products Refining Co. Vs. Shangrila Food Products Ltd., laid down the rule vis-a-vis user of a mark as opposed to registration of mark. It observed that the onus of proving user is on the person who claims it. It did not approve of looking into the register of trade marks

where a mark may be entered to be any proof of user. To quote from the speech of A.K. Sarkar, J. "Now, of course, the presence of a mark in the register does not prove its user at all. It is possible that the mark may have been registered but not used. It is not permissible to draw any inference as to their user from the presence of marks in the register

14. Thus, the law is pretty well settled that in order to succeed at this stage the Appellant had to establish user of the aforesaid mark prior in point of time than the impugned user by the Respondents. The registration of the said mark or similar mark prior in point of time to user by the Appellant is irrelevant in an action for passing off and the mere presence of the mark in the register maintained by the trade mark registry did not prove its user by the persons in whose names the mark was registered and was irrelevant for the purposes of deciding the application for interim injunction unless evidence had been led or was available of user of the registered trade marks. In our opinion, these clear rules of law were not kept in view by the learned single Judge and led him to commit an error.

In view of the said judgment, there cannot be any passing off as put forth by the Appellant over the trademark name of the Appellant "malar tv", since it was not put in use. As regards the infringement of the trademark name of the Appellant "malar tv", we have already discussed that the learned single Judge has prefixed the name "Arun's" before "malar.tv" and the said prefixation of "Arun's" would be similar to that of various journals carried over the names as, Siruvar Malar Thanga Malar , Ilaigar Malar Kudumba Malar , Mangaiyar Malar etc. We have also discussed about the usage of the word "malar" as a generic word. However, it has been registered by the Trademark Registry, in favour of the Appellant. Certainly, the prefixation of the word "Arun's" had led to remove the similarity and nobody can be carried away by the presence of the word "malar.tv" along with "Arun's" and consider that it is the "malar tv" of the Appellant. It is a matter of common experience that all the browsers of the internet and the viewers of the websites are literate people. Such a wary and literate browsers or viewers will not be taken away with "Arun's malar.tv" would be the same of "malar tv" of the Appellant / Plaintiff. Moreover, the Appellant has not at all commenced his business in the name of "malar tv". In the said circumstances, the infringement of trademark will not come into play as the unwary viewers will be carried away by the name "Arun's malar.tv" as modified by the learned single Judge. The judgments referred to by the learned Counsel for the Appellants in (i) Amritdhara Pharmacy Vs. Satyadeo Gupta, ; (ii) AIR 1967 SC 980 (cited supra) and (iii) Ruston and Hornsby Ltd. Vs. The Zamindara Engineering Co., are on different facts which are dealing with the similar words used by the parties. As far as this case is concerned, the construction of words are entirely different after the modification of name as "Arun's malar.tv" as directed by the learned single Judge. Since the class of people who are browsing internet as well as website are literate persons, who would not likely to be carried over the different names of the Appellant and Respondent, we are of the firm view that there is no prima -

facie case for infringement. Therefore, the provisions of Section 31 of Trademarks Act are not applicable to the present case.

19. Considering the absence of any prima - facie case in favour of the Appellant / Plaintiff and if for any reason interim injunction has been granted against the Respondent / Defendant, certainly the reputation earned from the commencement of the website of the Respondent / Defendant from 16.05.2009 and the goodwill and reputation earned by him either in the name of "malar.tv" or "Arun"s malar.tv" as the case may be would be put into jeo-pardy. Further, the Appellant has not at all commenced the business so as to sustain any loss either towards infringement or towards passing off and therefore, the balance of convenience is only in favour of the Respondent in not granting the injunction. Therefore, we are of the firm view that the learned single Judge is correct in his view to dismiss the applications after ordering the modification of the name from "malar.tv" as "Arun"s malar.tv", which has been promptly complied with by the Respondent.

20. For the foregoing discussions, both the appeals are liable to be dismissed and accordingly dismissed. Consequently, connected Miscellaneous Petitions are closed.