

(1963) 09 MAD CK 0011
In the Madras High Court
Case No : A.A.O. No. 280 of 1960

N. Arumugam Pillai

APPELLANT

Vs

K.S. Syed Abbas and Another

RESPONDENT

Date of Decision : 18-09-1963

Acts Referred:

Trade and Merchandise Marks Act, 1958 — Section 11, 12(1)

Citation : AIR 1964 Mad 204

Hon'ble Judges : S. Ramachandra Iyer, C.J.; Ramakrishnan, J

Bench : Division Bench

Advocate : T.S. Nagaswami Iyer and V. Natarajan, for the Appellant; N. Venkatarama Iyer, for the Respondent

Final Decision : Allowed

Judgement

S. Ramachandra Iyer, C.J.—This is an appeal u/s 109 (1) of the Trade Marks Act, 1958 against the order of the Assistant Registrar of

Trade Marks, Madras, registering a trade mark in respect of chewing tobacco manufactured by the respondent. The appellant has been doing

business in the sale of chewing tobacco since 1935. He applied in 1942 for registration of a trade mark under the name of "Thangabaspam

Tobacco". The design consists of that name and below it was a circle; inset within it is a photograph of the appellant. At the top portion of the

circle, the words "Thanga Baspam Tobacco" are printed in English. Then follows the address of the appellant. This trade was registered as No.

893y, and we are told that, after the expiry of the period of registration, it has been further renewed. subsequently, the appellant appears to have

registered the words "Thanga Baspam" alone as his mark for the sale of his tobacco. The registration number for this is 139406.

While so, the respondent who was living about 30 miles from the appellant sought registration of a mark under the name of ""Thangapavun (Gold

sovereign) tobacco"". His design consists of the above words then there is a design of an ellipse; inset within it are pictures of the two sides of a

gold sovereign. There can be little doubt-and indeed, this point was conceded before the Assistant Registrar -that the general design of the

respondent's mark is different from the appellant's. But what is complained of is that, by seeking to register his mark as ""Thangapavan"" the

respondent is likely to cause confusion in the mark, as that is phonetically similar to, and closely resembles, the appellant's mark ""Thanga Baspam"".

The respondent had another case as well. He said that he had been trading under the mark ""Thangapavun"" since 1948, and that registration should

be allowed in his favour as he had concurrent use of the identical wore. But, at the hearing, the respondent gave up his case about concurrent user.

On behalf of the appellant, it was conceded that, so far as visual similarity is concerned, there was no resemblance between the marks; but, what

was contended before the Assistant Registrar was that there was such a phonetic similarity between the words ""Thangabaspam"" and

Thangapavun"" that it is likely to mislead the public. The Registrar overruled this contention, saying ""I think that, phonetically as well as visually,

these two expressions do not resemble. The words do not simulate identical reactions. One suggests gold ash and the other a gold coin. The

opponent, by virtue of the registration of an expression containing the word ""Thanga"", is probably under the mistaken view that he can prevent

the registration of any word containing the word ""Thanga"". I do not think that the opponent is entitled to claim monopoly to the word ""Thanga"".

We are unable to accept this reason as valid, what one should consider in matters of this kind is whether an average person with imperfect

memory is likely to be misled if the two marks were put up in the market. On that question, there can be very little difficulty, for, very few people of

that type will pause to consider the discrimination between the words ""Thangabaspam and Thangapavun"". Indeed, in a similar case, which came

recently before the Supreme Court, in Amritdhara Pharmacy Vs. Satyadeo Gupta, , it was held that the words ""Lakshmandara"" and ""Amritdhara

so closely resembled each other that the purchasing public were apt to be misled. Applying the principles laid down in that case, we are of opinion

that the use of the word ""Thangapavun"" as a part of the respondent's mark is likely to mislead the public. It follows that the registration of the respondent's mark cannot be permitted if he were to use the prefix ""Thangapavun"" in relation to his goods,

2. Mr. N. Venkatarama Aiyar then contended that, if that be our view, the respondent should be given an opportunity to prove his case that he had concurrent use of the word ""Thangapavun"" along with the appellants. As we said, this case was expressly given up at the hearing before the Assistant Registrar. But, learned counsel would say that the case of concurrent user was given up, because the appellant, on his side, gave up his case that the two marks could not be said to have any resemblance with each other so far as the visual representation is concerned.

We are unable to see from the order of the Assistant Registrar that the giving up of a part of the case by the respondent was in any way related to the appellants giving up that part of his case. indeed, there is no evidence before us in the shape of an affidavit as to what happened at the trial to come to the conclusion that the concession on the side of the respondent was occasioned and was conditioned by another concession on the side of the appellant. On the other hand, it is plain from the order of the Assistant Registrar that the appellant did pursue his case that there was phonetic similarity between the two marks. That being so, it does not appear likely that the respondent could at all have withdrawn his case of concurrent user. We are therefore unable to sustain the order of the Assistant Registrar, and we accordingly set aside that order. Undoubtedly, it will be open to the respondent to delete the word ""Thangapavun"" in his "mark and obtain registration of the rest of the mark if need be by adding another dissimilar prefix to ""Pavun"".

3. The appeal will be allowed with costs.