

(1968) 04 MAD CK 0033
In the Madras High Court
Case No : A.A.O. No. 405 of 1964

Shamlal and Others

APPELLANT

Vs

Parley Products Manufacturing Co. (P) Ltd., Bombay and
Another

RESPONDENT

Date of Decision : 06-04-1968

Acts Referred:

Citation : AIR 1967 Mad 116

Hon'ble Judges : Venkatadri, J

Bench : Single Bench

Judgement

1. This is an appeal against an order of the Assistant Registrar of Trade Marks in an application filed by the appellants for the registration of their trade mark containing inter alia the expression "pearl" and the letters JJ in class 30 in respect of a designation of goods which was worded Biscuits. When this application was advertised in the Trade Marks Journal of 1-6-1963, the respondents filed a notice of opposition under S. 21 of the Act. The respondents are a well known manufacturers of biscuits. They are the registered proprietors of a reputed trade mark consisting of the expression "Parle's" under Mark No. 9202 which has acquired a great reputation in the market. They contended that the mark sought to be registered by the appellants was deceptively similar to their mark and that therefore its registration was barred under S. 12(1) and (3) of the Act. The respondents also contended that having regard to their extensive reputation acquired by the trade mark "Parle's" the registration of the appellants trade mark was also barred u/s 11 as likely to deceive or cause confusion.

(2) The Assistant Registrar of Trade Marks framed issues, whether the prior registration of trade mark No. 9202 was not a bar to the registration of the appellant's mark, whether S. 11(1) was not a bar to the registration of the mark and whether the appellants were entitled to registration under S. 12(3) because of honest concurrent user. After considering the relevant evidence in the case, the learned Assistant Registrar found that the mark sought to be registered by

the appellants was deceptively similar to the mark of the respondents and was likely to cause confusion, and that the motive of the appellants was not honest as they wanted to pilfer for themselves the reputation of the respondents, and dismissed the application. Aggrieved by this order, the applicants before the Assistant Registrar of Trade Marks have now filed the appeal.

(3) The only point for consideration in this appeal is whether the marks "pearl" and "parle"s" are deceptively similar and therefore likely to cause confusion in the minds of the public. I am reminded of the words of Parker J. in *Pequotist Co. Ltd.'s. Application*, 23 RPC 774 quoted with approval in *Ciba Ltd. Vs. M. Ramalingam and S. Subramaniam trading in the name of South Indian Manufacturing Co. and Another*, :-

"You must take the two words, you must judge them both by their look and by their sound. You must consider the goods to which they are to be applied. You must consider the nature and kind of customer who would be likely to buy those goods. In fact, you must consider all the surrounding circumstances, and you must further consider what is likely to happen if each of those trade marks is used in normal way as a trade mark for the goods of the respective owners of the marks".

Number of cases have been considered in the court of appeal and the House of Lords on the aspect of visual and phonetic similarity in the trade marks. In *re. Electrix Ltd.* 1959 RPC 283, the House of Lords upheld the decision of the Court of Appeal disallowing an application to register the word "Electrix" as it was identical in sound with "Electrux" which had been earlier registered with respect to the same kind of goods. Similarly in *Society Mosavon Oreal and Golden Ltd. v. Coiffeur Supplies Ltd.*, 1961 RPC 219 it was held that the particular mark "Plix" would be infringed by the word "Palaxe" as the latter very closely resembled the former and as the dealers might use the names verbally in such a way as to cause confusion. So also in *Velva Glo's Trade Mark*, In *re.* 1961 RPC 255, the mark "velveglo" was held to be too similar to the mark "velglo" which had earlier been registered in respect of the same goods and therefore, registration was refused.

In our own High Court, number of cases have been decided on the aspect of visual and phonetic similarities in respect of the same goods. In *Parry and Co. Ltd. Vs. Perry and Co.*, , a Division Bench of this court held that the marks "Parry"s" and "Perrys" so closely resembled each other that there was real danger of deception or of causing confusion if they were used in respect of the same goods, and that the words used were strikingly similar when pronounced and were also deceptive to the eye if looked at from a distance. In *Ciba Ltd. Vs. M. Ramalingam and S. Subramaniam trading in the name of South Indian Manufacturing Co. and Another*, the word "Cibol" was considered as closely resembling the word "Cibol" was considered as closely resembling the word "Ciba" which had previously been registered. In *Corn Products Refining Co. Vs. Shangrila Food Products Ltd.*, , the Supreme Court held that the words "gluvita"

and "glucovita" would lead to confusion and render deception likely in view of the similarity of the two trade marks.

In *Chinnakrishna Chettiar v. Sri Ambal and Co.*, 1964 2 MLJ 206 Anantanarayanan J. in a very considered judgment, wherein he has reviewed the English case law also on the subject, has observed that the test of phonetic similarity is one which has to be applied on broad principles, that the words have to be judged both by appearance where both are incorporated in visual designs and also by phonetic affinities and that the nature of the goods to which they are to be applied and the nature and kind of customers who might buy such goods are all relevant circumstances. The learned Judge, has further observed that the test is that of a customer who knows only one of the two expressions namely the pre-existing one and might have only an imperfect recollection of it, when demanding a favourite brand. The question, according to the learned Judge, is whether there is likelihood of deception by the overall and phonetic similarity of the two expressions of words. Finally, the Division Bench of this court held that phonetic similarity did exist between the words "Sri Andal" and "Sri Ambal". It is also useful to refer to the observations of Jagadisan, J. who disposed of the appeal singly, which have been quoted by the Division Bench at page 210:

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

In the recent decision of the Supreme Court in the case of *Amritdhara Pharmacy Vs. Satyadeo Gupta*, the words "Amritdhara" and "Lakshmandhara" came up for consideration as to whether they were likely to cause confusion. It was said that the question had to be approached from the point of view of a man of average intelligence and imperfect recollection and to such a man the overall structural and phonetic similarity of the two names was likely to cause confusion.

(4) On a consideration of the case law and the facts of the case, I am of the view that the appellants have not discharged the onus which lies on them of proving that a simultaneous, normal and fair use of the competing marks will not lead to confusion or deception among the members of the public. The finding of the Assistant Registrar is correct and cannot be assailed in this appeal.

(5) In regard to the question of concurrent user, I do not feel justified in interfering as I am in agreement with the finding of the Registrar that the motive of the appellant was not honest.

(6) In the result, the appeal is dismissed. But there will be no order as to costs.

(7) Appeal dismissed.