

K.R. Chinna Krishna Chettiar Vs Shri Ambal and Co., Madras & Anr

Court: Supreme Court of India

Date of Decision: April 14, 1969

Acts Referred: Constitution of India, 1950 " Article 136
Trade and Merchandise Marks Act, 1958 " Section 12(1)

Citation: AIR 1970 SC 146 : (1970) 1 AnWR 21 : (1969) 2 SCC 131 : (1970) 1 SCR 290

Hon'ble Judges: V. Ramaswami, J; S. M. Sikri, J; R. S. Bachawat, J

Bench: Full Bench

Advocate: A.K. Sen, K. Jayaram and A. Thiagarajan, for the Appellant; M.C. Chagle, N.K. Anand, M.P. Rao and O.C. Mathur, for the Respondent

Final Decision: Dismissed

Judgement

R.S. 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 center panel contains the picture of goddess Sri Andal and the legend "Sri Andal".

2. Sri Andal and Sri Ambal are separate divinities. Sri Andal was a vaishnavite woman saint of Srivilliputur village and was deified because of her

union with Lord Ranganatha. Sri Ambal is the consort of Siva or Maheshwara.

3. 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 Section 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 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 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.

He held :-

The words, Ambal and Andal, have such great phonetic similarity that they are undistinguishable 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, 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.

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 Section 12(3). The present appeal has been filed by the appellant

after obtaining special leave.

4. 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 Article 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 Section 12(1) have been satisfied. If

those conditions are not satisfied his mark cannot be registered.

5. 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.

6. 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 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 (1950) 57 R.P.C.209 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.

7. 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.

8. In the case of Coca-Cola Company of Canada v. Pepsi Cola Company of Canada Ltd. (1942) 59 R.P.C.127 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.

9. 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 and

Ors. v. Vick Chemical Coy. (1951) 68 R.P.C.103 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 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.

10. 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, Article 852 and the decision Application by Thomas A. Smith Ltd., to Register a trade mark (1913)

30 R.P.C. 363 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.

11. 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.

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