

Durga Dutt Sarma Vs. Navaratna Pharmaceutical Laboratories

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Court : Kerala

Decided On : Nov-30-1960

Reported in : AIR1962Ker156

Judge : M.A. Ansari, C.J. and; T.C. Raghavan, J.

Acts : Trade Marks Act, 1940 - Sections 6, 6(1), 21 and 46

Appeal No. : A.S. Nos. 233 and 301 of 1959

Appellant : Durga Dutt Sarma

Respondent : Navaratna Pharmaceutical Laboratories

Advocate for Def. : A. Madhava Prabhu and; D.R. Kammath, Advs.

Advocate for Pet/Ap. : M.U. Issac,; M.I. Varghese and; Mammen Varghese, Adv

Judgement :

Ansari, C.J.

1. The question arising for decision in the appeals is when a word or combination of words commonly used would be acquired as the trade mark of a person. The same issue arises for adjudication in the petition for the rectification of the Registers of Trade Marks. The two appeals, Nos. 233 and 301 of 1959, are against the decree by the District Judge, Ernakulam, in O.S. No. 233 of 1951. The plaintiff in the aforesaid action is a registered firm called the Navaratna

Pharmaceutical Laboratories, and has prayed against Pandit Durga Dutt Sharma, a resident of Jullunder City, a perpetual injunction and damages. The injunction as to restrain the defendant, hereafter referred to as Pandit Sharma, and others under him, from advertising, selling, or dealing in any preparation or preparations containing the term 'Navaratna', or any similar term; to restrain Pandit Sharma from trading under any name and style containing the term 'Navaratna', or any other similar term; and to restrain him from infringing the firm's registered trade mark 'Navaratna'. The damages claimed is Rs. 2,960-12-0, that being the total loss averred to have been caused by Pandit Sharma's wrongful acts. The petition connected, for hearing with the two appeals is under Section 46, read with Section 72 of the Trade Marks Act, 1940, by the defendant, and had been presented to the High Court on February 26, 1952, which is after the suit was instituted before the District Judge. Thereby Pandit Sharma had sought rectification of the Registers of Trade Marks at Trichur in this State and at Bombay, by the word 'Navaratna' itself, or in combination with other words being removed, due to the earlier registrations not being in accordance with the Trade Marks Act, 1940.

2. The circumstances culminating in the aforesaid litigations, can be shortly narrated. One Dr. Sarvothama Rao, who is still a partner of the plaintiff firm, founded the pharmaceutical concern, that was called Navaratna Pharmacy, in May 1926; and the word 'Navaratna' appears to have since then been associated with all the medicinal, pharmaceutical, and other preparations of the concern. He took in successively two partners, and from January 1, 1945, the firm name was changed from 'Navaratna Pharmacy' to 'Navaratna Pharmaceutical Laboratories'. The latter has since been used as the firm name, and another partner had been admitted in 1950. The plaintiff's case in the original suit is that Dr. Sarvothama Rao had registered by declaration the word 'Navaratna' and the name 'Navaratna Pharmacy' before the Registrar of Assurances, Calcutta. on December 18. 1928. The case further is that the word 'Navaratna', by constant use from 1926, had acquired a distinctive and secondary significance by its association with the firm's medicinal and other preparations. It is admitted in the case that the firm later had registered 'Navaratna' and 'Navaratna Pharmaceutical Laboratories', as its two trade marks under the Cochin Trade Marks Act, Act XIX of 11119. The relevant documents are Exts. J(1) and J (2) and both are of the year 1949. The provisions

of the aforesaid Act were similar to those of the Trade Marks Act, 1940 Act V of 1940; and under Section 78 (A) of the former, like Section 82 (A) of the latter, reciprocal recognitions of the registered trade marks were provided. Both Governments had issued the necessary notifications after the amended sections came into force on April 18, 1946; with the result that the plaintiff firm had, under Section 82(A) of the Trade Marks Act, 1940, applied for registration of the word 'Navaratna' in Bombay and other places, and informed the Trade Marks Registry that Navaratna' was a proprietary name and appeared on all the firm's products. The Registrar of Trade Marks advertised in accordance with Section 15(1) of the Trade Marks Act. and no opposition to the registration of the marks having been received, they were registered. To conclude this narration concerning registration of its trade marks by the firm, the position stated earlier continued till April 1, 1950; and, there- after, the Part 'B' States (Laws) Act, No. III of 1951, extended the Trade Marks Act, 1940, to what were then Part 'B' States, repealing the Cochin Act. After the repeal, the State Trade Marks Registry was closed from November 30, 1950 and the marks under the repealed Act were merged in the Central Act.

3. In 1946 Pandit Sharma also had asked for the words 'Navaratna Kalpa' to be registered in respect of all his pharmaceutical preparations; and, when the said application was advertised, the plaintiff firm on April 1, 1950, opposed the registration on the grounds of, according to the applicant's own word, 'Navaratna' being descriptive and there being no satisfactory evidence of its having acquired distinctiveness. The registration asked by Pandit Sharma was, on that objection, not allowed; and, thereafter Pandit Sharma moved the Registrar of Trade Marks, Bombay, for removing the word 'Navaratna' from the Register of Trade Marks on the very ground. This application was also disallowed, because Suit No. 233 of 1951 asking for an injunction, had by then been filed in the District Judge's Court, and Section 72(A) of the Trade Marks Act, 1940, provides that if any suit Or other proceedings concerning the trade mark in question be pending before a High Court or a District Court, the application for rectification should be made to that High Court, or to the High Court within whose jurisdiction that District Court is situated. Pandit Sharma, therefore, filed O. P No. 19/1952 in the Travancore-Cochin High Court, claiming the word 'Navaratna' to be ordinarily used by Ayurvedic physicians for medicines prepared out of the nine precious stones, to be

descriptive of quality and contents of the nine stones, and to be a word common to the Ayurvedic system of treatment. The adjudication of the petition has been postponed till the decision in the firm's suit; and due to the common issues, has been connected with those on appeals from the decree in the firm's suit.

4. On the other hand, the plaintiff firm avers in the plaint that about the year 1950, it came to the firm's knowledge about Pandit Sharma having started use of the word 'Navaratna' to denote his medicinal preparations called 'Navaratna Kalpa' and his pharmacy called 'Navaratna Kalpa Pharmacy'; that this continuance to use the word 'Navaratna' with the medicine and his business notwithstanding protest from the firm, is likely to cause confusion in the public minds, enabling Pandit Sharma to pass off his preparations as those of the firm, and to carry on his business so as to deceive or mislead the public into the belief of the business being that of the firm and that for such infringements of the rights the plaintiff firm is entitled to injunction and damages. Broadly speaking, the defence to the suit is three-fold. The first is that the word 'Navaratna' being descriptive, the registration of the word as trade mark is invalid and likely to deceive. The next is that Pandit Sharma's use of the word 'Navaratna' is bona fide and descriptive of the use of the nine jewels in his medicine, and thirdly it has been pleaded that the uses of the words 'Navaratna Kalpa' for his preparation and the words 'Navaratna Kalpa Pharmacy' for his business, do not nor are likely to confuse or deceive the public. On these pleadings a number of issues have been framed, and the learned judge has partly decreed the suit.

5. He has held that the firm started using the word 'Navaratna' to denote their pharmacy in the year 1926, and the use has continued till the judgment on the case; but the word is proved to be a well-known Ayurvedic term, meaning the various ingredients used in that system of treatment, and, when used with Ayurvedic medicinal preparations is descriptive of the nature of their compositions. He has, therefore, held the word Navaratna in relation to the medicines manufactured by the firm, to be neither adapted to distinguish, nor distinctive; but the name of the firm, of which the word is a part, to have both these attributes. The next group of the conclusions in the judgment is that the registration of 'Navaratna' and 'Navaratna Pharmaceutical Laboratories' under the Trade Marks Act and the

renewals constitute prima facie evidence of the validity of the registration; that Pandit Sharma should establish their invalidity; and that as the firm's preparations contain nothing of the Navaratna as their ingredients, the word cannot be treated as adapted to distinguish, nor distinctive of the aforesaid preparations. Dealing with Pandit Sharma's claims to the use of the words 'Navaratna Kalpa' and 'Navaratna Kalpa Pharmacy', the learned judge has held that Pandit Sharma had not acquired any right by bona fide, long, and continuous use; but that there were not sufficient material on the record to decree the claim of passing off against the defendant. He has next found 'Navaratna Pharmaceutical Laboratories' to be properly registered, particularly because the firm had been using these words for a long time so as to distinguish its business from those of others. The relevant conclusion is in the end of paragraph 22, and reads thus:

'.....that the firm as it is now constituted, and its predecessors-in-title have been using the name 'Navaratna Pharmacy' for a long time, and 'Navaratna Pharmaceutical Laboratories' later, so as to distinguish his business from those of other'

The learned Judge has next held that the aforesaid trade mark, 'Navaratna Pharmaceutical Laboratories' has been infringed by the use of the words 'Navaratna Kalpa Pharmacy', and not by the words 'Navaratna Kalpa', that Pandit Sharma has been using in connection with his preparations. He has, accordingly, granted injunction, forbidding Pandit Sharma from using the words 'Navaratna Kalpa Pharmacy' or any name colourably differing from the firm's trade mark of 'Navaratna Pharmaceutical Laboratories' in respect of his goods, and of the place of their manufacture and from disposing of the goods marked in this manner. The other prayers have been disallowed, and both the parties have appealed against the decree.

6. Thus the common issues arising for decision in all the three cases before us are: Whether the word 'Navaratna' a descriptive word in Ayurvedic medicines, has, by the firm's long user, 'acquired such a secondary distinctive meaning as to justify its being registered as the firm's trade mark under Section 6 of the Trade Marks Act, 1940; and whether the name 'Navaratna Pharmaceutical Laboratories' has

been correctly registered as the firm's trade mark, so as to justify the firm claiming injunction against imitation of similar words on goods by Pandit Sharma in order to prevent purchasers being deceived into believing the goods to be of the firm. It is further clear that should the firm fail in establishing the word 'Navaratna' by the firm's user to have gained a secondary meaning, the words cannot be used as a trade mark, and the application for the correction of Trade Mark Registers would be allowed: for, the law, as we shall presently show, is well established that nobody can be allowed monopoly of words in common use.

7. Pandit Sharma has claimed that the word 'Navaratna' means nine precious jewels reduced to ash and used for medicinal purposes. Exhibits XVII, XVIII and XIX are extracts from Sanskrit Books and Exhibits XVII(a), XVIII(a) and XIX(a) and (b) are their translations. They establish that the word denotes the composition of nine jewels when reduced to ash. In addition Sharma as D. W. 1 has sworn to several catalogues such as Exhibits IV, V, VI, VII, VIII, IX, X and XXI where the word is used as descriptive of the nine jewels after being so reduced. Indeed, the firm's plaint avers that Navaratna by long use with the firm's medicines has gained a special meaning; and it is common ground that the word has Sanskrit origin and means excellent. It follows that the word is not invented, is from Ayurvedic medical dictionary, or part of the ancient language, and it should be next determined under what circumstances must the firm alone be allowed to use it, excluding others from its proper use. In this connection, it is well to remember that the word was registered as the trade mark under Section 6 of the Cochin Trade Marks Act, which is similar to Section 6 of the Indian Trade Marks Act, 1940, and reads as follows:--

"6 (1) A trade mark shall not be registered unless it contains or consists of at least one of the following essential particulars namely:--

- (a) the name of a company, individual, or firm, represented in a special or particular manner;
- (b) the signature of the applicant for registration or some predecessor in his business;

(c) one or more invented words;

(d) one or more words having no direct reference to the character or quality of the goods, and not being, according to its ordinary signification a geographical name or surname, or the name of a sect, caste or tribe in India;

(e) any other distinctive mark, provided that a name, signature, or any word, other than such as fall within the descriptions in the above clauses, shall not be registrable except upon evidence of its distinctiveness.

(2) For the purposes of this Section, the expression 'distinctive' means adapted in relation to the goods in respect of which a trade mark is proposed to be registered, to distinguish goods with which the proprietor of the trade mark is or may be connected in the course of trade from goods, in the course of which no such connection subsists, either generally, or, where the trade mark is proposed to be registered subject to limitations, in relation to use within the extent of the registration.

(3) In determining whether a trade mark is adapted to distinguish as aforesaid, the tribunal may have regard to the extent to which:--

(a) the trade mark is inherently so adapted to distinguish and

(b) by reason of the use of the trade mark or of any other circumstances, the trade mark is in fact so adapted to distinguish:

Provided that in the case of a trade mark which has been continuously used (either by the applicant for registration or by some predecessor in his business, and either in its original form or with additions or alterations not substantially affecting its identity) in relation to the same goods as those in relation to which registration is applied for, during a period from a date prior to the first day of Chingom 1114, to the date of application for registration, the Registrar shall not refuse registration by reason only of the fact that the trade mark is not adapted to distinguish as aforesaid, and may accept evidence of acquired distinctiveness as entitling the trade mark to registration.'

The section being almost identical to Section 6 of the Indian Trade Marks Act, it is well to recall what has been observed in Registrar Trade Marks v. Ashok Chandra Rakhit Ltd., (S) AIR 1955 SC 558, where it was held that as the law of Trade Marks adopted in the Indian Trade Marks Act merely reproduces the English Law with only slight modifications, a reference to the judicial decisions on the corresponding section of the English Act, is apposite and helpful. Pandit Sharma's learned advocate has, therefore referred us to a series of English cases, as well as those in his country, in support of his argument that the word Navaratna has been incorrectly registered as the firm's trade mark; but, before dealing with some such cases we would quote the classical definition by Kay, J. In re Australian Wine Importers, Ltd., 1889-41 Ch. D. 278 at page 280, which is incorporated in most enactments dealing with trade mark. There the learned Judge defines those words in these terms:--

'The trade mark means the mark under which a particular individual trades, and which indicates the goods to be his goods -- either goods manufactured by him or goods selected by him, or goods which, in some way or other, pass through his hands in the course of trade. That is the meaning of a trade-mark. It is a mode of designating goods as being the goods which have been, in some way or other, dealt with by A.B.. the person who owns the trade-mark.'

It follows that a word in common use cannot be appropriated by a person solely as his own, unless it be established by strong and irresistible evidence that the original meaning of the word is lost and another acquired by use of the word by the person claiming the monopoly. A Company in Cellular Clothing Co. v. Maxton and Murray, (1899) AC 326. claimed to have, by ten years' use on fabric of their choice, acquired the trade mark of word 'cellular cloth' and it was made against a wholesale firm in Edinburgh, who sold cotton and woollen goods, which they had recently described as 'cellular'. In these circumstances, the House of Lords held that the word 'cellular' was an ordinary English word, which appropriately and conveniently described the cloth, of which the goods sold by the respondents, were manufactured; and that the term had not been proved to have acquired a secondary or special meaning, so as to denote only the goods of the appellants. In re Leopold Cassella and Co., 1910-2 Ch. D. 240, at pp. 243, 244, 245 the claim

laid was for the registration of the word "diamine"; and it was proved that the word had been used by the applicants as a trade mark for twenty years, had become extensively known to the trade in the United Kingdom as indicating the goods of the applicants. But the word was a known chemical term which indicated that the substance, to which the word was applied, contained two amine groups, and was used by the applicants for their dyes, whether they contained one, two or more amine groups, or no amine group at all. In these circumstances, it was held that the word was not distinctive, firstly, because it was descriptive; and secondly, because it was used deceptively, and that the application ought not to be allowed to proceed. So holding Cozens Hardy, M. R., observed:

'It is a word which indicates that the body to which the epithet is applied has a certain composition and contains two amine groups. I fail to see what justification there can be for giving the applicants a monopoly in the use of this epithet. Other persons manufacturing similar bodies containing two amine groups may reasonably desire to use this word as descriptive of the character or quality of their goods. There appears to be no other single word which could express this fact.....'

Buckley, L.J., explains at page 245 the reason in these words:--

"It was held.....that some words (instancing laudatory epithets) are not capable of being registered, but ought to be open to all the world. I assent. But this principle is not confined, in my opinion, to laudatory epithets. It extends so as to forbid the appropriation by one trader of any word forming part of the common stock of the English language, unless the word is one adapted to distinguish the goods in the sense which I have mentioned.'

Motor cab proprietors in London in Registrar of Trade Marks v. W and G. Du Cros, Ltd., (1913) AC 624. applied for the registration as the trade mark for their motor vehicles two letters, that had been used by them for about three years on and in connection with their motor cabs in London. These were 'W' and 'G' in ordinary block letters, and they had become in fact distinctive in the London district, but not elsewhere. The Registrar of Trade Marks had refused the applications, and the House of Lords held that the marks, being not distinctive within the meaning of the

word in Section 9(5) of the English Trade Marks Act, 1905 were not registrable. The respondents in *A Baily and Co. v. Clark Son and Morland*, (1938) AC 557 alleging distinctiveness, had obtained registration as a trade mark of the word 'Glastonburys' in connection with sheepskin, slippers, and the appellants, who were not aware of the respondents' having obtained the registration, applied on becoming aware, to rectify the register by expunging it. The House of Lords held that although the mark was distinctive in fact, it was not 'adapted to distinguish' the respondents' goods from those of other manufacturers of similar goods in the town of Glastonbury, who ought not to be hampered or restricted, by the presence of the mark on the registrar. The Privy Council in *Canadian Shredded Wheat Co. Ltd. v. Kellogg Co; of Canada Ltd.*, AIR 1938 PC 143 held that where the words are purely descriptive and in common use, it is difficult to conceive a case in which they could acquire a secondary meaning, and that, in order to ascertain whether words have acquired secondary meaning, it is of primary importance to see how the manufacturer had used the words, i.e., to see whether he used them as a trade name or common law trade mark for the purpose of indicating the origin of the goods, or whether they were used by him merely descriptively. A company which manufactured most of its products, in Yorkshire, applied in *Yorkshire Copper Works Ltd. v. Registrar of Trade Marks*, (1954) 1 WLR 554 for registration of the word 'Yorkshire' as a trade mark for goods specified as:

'Solid drawn tubes and capillary fittings, all being made of copper or non-ferrous copper alloys'.

There was no other manufacturer of such goods: in Yorkshire, and evidence was filed that the mark had acquired '100 per cent distinctiveness'. The House of Lords held that even though the mark might have acquired such distinctiveness, the Registrar of Trade Marks in considering whether it fell within Section 9(1) (e) of the Trade Marks Act, was still bound under Sub-section (3) to have regard to the extent to which it was 'inherently adapted to distinguish' the goods in question; and, inasmuch as it was not so adapted, it should not be registered. Lord Simonds, L.C., dealing with the words 'geographical name' observed that a geographical name can only be inherently adapted to distinguish the goods of A, when it is such a name as would never occur to B to use in respect of his similar

goods. In *Electrix, Ltd. v. Electrolux Ltd.*, (1959) 3 WLR 503 a company manufacturing electrically driven apparatus, sought to obtain registration of their mark 'Electrix', which it had used in respect of its vacuum cleaners since 1933; but it was held that as the word 'Electrix' was inherently incapable of registration, the word 'Electrix' was also unregistrable; for, trade marks appeal to the ear as well to the eye, and the objection to the registration of a word in its proper spelling, applied equally to a word, which was merely its phonetic equivalent.

8. Such are some of the English Cases, and we find the decisions by the High Courts in this country not to be different. In *Hindustan Development Corporation Ltd. v. Dy. Registrar of Trade Marks*, AIR 1955 Cal 519 it was held that the word 'Rasoi', even if it be held to have a direct reference to the character and quality of the goods and to be distinctive, nevertheless will be ineligible for registration in view of the fact that it is a common word of the language, of which no monopoly should be granted to a particular trader. Judges further held that the common words of a language are public property, and no one should be allowed to appropriate one of such words to his exclusive use and thereby deprive other persons of the legitimate right to use the said word. The trade mark 'Amritdhara' in *Ram Rakhpal v. Amrit Dhara Pharmacy*, AIR 1957 All 683 was held not to be adapted to distinguish either inherently or in fact used before the date of the application for its registration, and to be only the name of a medicine made from camphor, thymol and menthol for the purpose of relief from pain and ache. It was further held in the case that there was no evidence of anything in the use of the trade mark on account of which it might have acquired a secondary meaning. Any survey of the case law would be incomplete without reference to the observation of the Supreme Court in *Corn Products Refining Co. v. Shangrila Food Products*, AIR 1960 SC 142 where it has been found that a trade mark may acquire a reputation in connection with the goods in respect of which it is used, though a buyer may not know who the manufacturer of the goods is. It was further held that in order that a trade mark may acquire reputation among the general public what is necessary is that the reputation should attach to the trade mark; it should appear that the public associated that trade mark with certain goods and the reputation is the reputation of the trade mark, and not that of the maker of the goods bearing that trade mark.

9. Applying the aforesaid test to the decision of the first question before us, it is clear that the firm can only succeed if it were to establish to our satisfaction that the word 'Navaratna' has become so closely associated with its medicinal preparations as to lose the meaning assigned to that word by the recognised Ayurvedic medical books, and to become associated only with the firms' preparations, not only in Cochin, hut in the entire country. The evidence shows the word 'Navaratna' being used by the firm on its several preparations when sold in the market, to have been registered as its Trade Mark for a long time, and the plaintiff firm to be gradually increasing its earnings from the sale of such preparations with the words printed in very bold types. But that, in our opinion, does not suffice to show that the word has lost the Ayurvedic medical meaning^ or the general public in this country have come to recognise the word as only the trade marie of the firm's medicinal preparations. Because such a secondary meaning has not been established, the word has not in fact become so distinctive as to justify the firm being given the benefit of the proviso to Section 6(1) (e) of the Cochin Trade Marks Act. In these circumstances, we feel that die learned Judge was right in holding the firm's claim to the word being its trade mark not to be justified, and because the monopoly is not established, we do not see how the firm can stop Pandit Sharma bona fide using it.

10. Another consequence of the word not having lost its original meaning is that the Register of the Trade Marks under the Trade Marks Act, 1940 has to be corrected, so far as the word Navaratna is concerned, except in the combination, which we propose to state shortly, and it must be ordered to be deleted. Such order can be passed under Section 46 of the Trade Marks Act; for, it confers on the Court the jurisdiction to cancel the registration of a trade mark on the ground of failure to observe the conditions relevant for the entry being made in the Registry, and as the word Navaratna is not covered by Section 6(1)(e), it follows that earlier registration of the word as Trade Mark was not correct. Therefore, the registration of the word Navaratna, either alone, or in combination with other words, except the one which we would presently mention, must stand cancelled.

11. We do not think that such order will work hardship on the plaintiff firm or cause irreparable loss; for, though there may not be a right to the exclusive use of a

word, the law does recognise a trader's right to prevent others from personating his business by using Such descriptive words as would lead the customers to suppose that they are trading with the firm. The principle, on which such a rule rests, is that a person will not be allowed to pass off his goods as those of a rival trader and obtain the benefit which is intended for the rival. Therefore, should a person be found to be passing off his goods, as of the firm, the right of action for damages would not stand affected by the firm not having a trade mark. So far as the present action is concerned, the finding of the learned Judge is that material sufficient to sustain such a passing off of the firm's goods by Sharma, has not been established. Neither the two packets in which the 'Navaratna Kalpa' is being sold, nor the way in which the medicines are distributed by Sharma, show his passing off his preparations as those of the firm, because Pandit Sharma is shown examining persons before selling them his Navaratna Kalpa. In these circumstances, we feel the passing off action has been rightly dismissed; and the plaintiff firm, having no monopoly over the word Navaratna, cannot stop others from using the word.

12. The next important question, that arises for adjudication is how far the combination of the three words 'Navaratna Pharmaceutical Laboratories' have been properly registered as Trade Mark under the Cochin Act, or should they also be struck down on the ground, on which the word 'Navaratna' been held not to be legally registrable. In this connection, it will be useful to remember that though a word may not be subject to exclusive use, it may properly become subject to trade mark by combination with another word where the combination is new and showing the ownership of the goods on which they be affixed. This is firmly established from AIR 1957 All 683 and Satya Deo v. Amrit Dhara Pharmacy, AIR 1958 All 823 where the combination of words was held to be validly registrable. The view is further supported by Hamilton Brown Shoe Co. v. Wolf Bros. and Co., (1915) 60 Law Ed 629, where the words "The American Girl" were held neither geographical nor descriptive as applied to women's shoes made and sold in the United States and, therefore, the subject of exclusive appropriation as a trade mark for such product. It follows that should the combination be new or original, the combination would be properly registered. There is evidence in the case about the plaintiff firm having, before the Trade Marks Act 1940, filed declaration of

'Navaratna Pharmacy' being the firm trade name. There is no evidence that prior to the date anybody had used such a combination. It is also firmly established that on February 17, 1948, the firm registered 'Navaratna Pharmaceutical Laboratories,' whose certificate is Ext. J. (2) and that was under the Cochin Trade Marks Act. There is also no creditable evidence that there was any person or corporation using similar combination of words. We have further evidence in this case, which has been believed by the trial Judge, that the firm's income from the sales of the medical preparations has risen to Rs. 4,87,000. In addition, we have list of towns fairly widespread all Over the country where the firm's goods were being sold. In such circumstances, we feel the combination of the aforesaid words has sufficient distinctiveness to justify their registration as the firm's trade mark. Therefore, the finding of the learned Judge on this point is upheld and it follows that the word Navaratna used in connection with this trade mark will stand. In fact, the use of these words as the firm's trade mark has not been very strongly challenged before us.

13. And this brings us to the third question in the case namely, whether the grant of the injunction by the learned Judge is correct. The learned Advocate for Pandit Sharma has argued that having dismissed the passing off action, the learned trial Judge was wrong in granting the injunction against the use of the words 'Navaratna Kalpa Pharmacy.' But then, it cannot be overlooked that once the trade mark is validly obtained, the infringement consists either in using it, or so imitating it on another's goods as to deceive a purchaser into believing the imitated goods to be of the owner of the trade mark. The position is the same where the purchaser becomes thereby liable to be so deceived into believing. In other words, Section 21 of the Act will be attracted, not only when somebody is deceived, but also where there be likelihood of a person being deceived. In this connection, we may refer to the following passage from Kerly on Trade Marks Seventh Edition, pp. 615, 616:

"A trade mark is likely to deceive or cause confusion by its resemblance to another already on the Register if it is likely to do so in the course of its legitimate use in a market where the two marks are assumed to be in use by the traders in that market."

The rule was summed by Parker, J. in *Pianotist Co. Ltd.'s Application* (1906) 23 RPC 774 at p. 777 in these words:

'You must take the two words. You must judge of 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 a normal way as a trade mark for the goods of the respective owners of the marks.'

In *Abdul Rahim v. G. S. Muthiah and Brothers*, AIR 1958 Mys 134 the appellant applied for registration of his trade mark in respect of his bidis. It consisted of a label containing the device of a pedestal supporting at its head five steins, each carrying a rose the stems being arranged fanwise. The words "Aindu Roja Poo Mark Beedi" were found above the device. The respondent opposed the registration on the ground that he had been making use of a trade mark consisting of a branch of a rose plant having a full blown rose and four buds on it, described and known as 'Poo Mark Beedi,' and as the appellant's mark also consisted of five flowers with the words 'Aindu Roja Poo Mark', the appellant's mark was calculated to cause confusion and to deceive. It was held that the salient features of the two marks were so similar as to give rise to confusion and to lead themselves to deception. It was also held that there being the same similarity of the central feature in the two marks and the class of customers being the same, these factors would result in a very real danger of confusion and therefore the registration of the appellant's trade mark was rightly refused.

14. Applying the aforesaid test to the facts of the case before us, we hold the learned trial Judge was right in holding that the word Navaratna, however spelt, is the most important word in both the names, and the addition of the word 'Kalpa' is not sufficient to override the deceptive resemblance. We think because of the possibility of the deception, the order by the learned trial Judge must stand.

15. That brings us to the final order on the application for the Trade Mark Register being rectified. We direct that, excepting the registration of the Navaratna Pharmaceutical Laboratories, the word Navaratna in all other trade marks of the

firm, should be cancelled, So also the word 'Navaratna'. Let the Trade Marks Register be accordingly rectified.

16. The result is that the plaintiff firm's appeal and the defendant's appeal fail, and O.P. 19/1952 will stand allowed to the extent indicated above. Pandit Sharma is allowed four months to comply with the direction against him. The costs in the O. P. are allowed, against the firm advocate's fee being Rs. 100; and the parties will bear costs of their appeals.

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