

BENSON
AND
ABDUR
RAHIM, JJ.

KADIR
IGRAHI
ROWTHEN

v.
ARUNA-
CHELLAM
CHETTIAR.

with this question in paragraphs 11 to 15 of his judgment, and we are of opinion that the cases quoted by him *Smaya Pillai v. Munisami Ayyan*(1) and *Mayan Pathuti v. Pakuran*(2) and *Turner v. The Bank of Bombay*(3), justify us in the view that we take as to the proper construction to place on section 36 of the Trusts Act.

We therefore dismiss these second appeals and the civil revision petition with costs.

APPELLATE CIVIL.

*Before Sir Arnold White, Chief Justice, and Mr. Justice
Krishnaswami Ayyar.*

MAHOMED ESUF (DEFENDANT), APPELLANT,

v.

RAJARATNAM PILLAI (PLAINTIFF), RESPONDENT.*

*Trade mark, infringement of—Essentials necessary to maintain
action for.*

It is settled law that a dealer in, or a manufacturer of a particular article who adopts a name for that article, whether the name be a purely fancy name or a descriptive name, cannot restrain another dealer from using the same name simply upon the ground that the article so named has acquired a reputation, even though it may be that the public have grown accustomed to buy the article in question only relying on the name and without examining the quality of the article. For a man to be entitled to restrain another from using a particular name with reference to a commodity he must show that the public have grown to associate that particular name with himself as the manufacturer of, or dealer in, the article.

Barlow v. Govindram, [(1897) (I.L.R., 24 Calc., 364), referred to.]

SECOND APPEAL against the decree of M. Mundappa Bangera, Subordinate Judge of Trichinopoly, in Appeal Suit No. 93 of 1906, presented against the decree of M. J. Veeraragava Aiyar, District Munsif of Trichinopoly, in Original Suit No. 321 of 1903.

The plaintiff sued for an injunction to restrain the defendant from passing off cigars of his own manufacture as the goods of

(1) (1899) I.L.R., 22 Mad., 289.

(3) (1901) I.L.R., 25 Bom., 52.

(2) (1899) I.L.R., 22 Mad., 348.

* Second Appeal No. 36 of 1908.

the plaintiff by selling them under the name of " Albert " a name by which the plaintiff's cigars had acquired a reputation during the past seventeen years.

The defendant denied plaintiff's right to the exclusive use of the name " Albert " and that the name signified in the market that the goods to which it was affixed were the manufacture of the plaintiff. He alleged that he and his family had been selling cigars and using the said name from a time prior to the year from which plaintiff's firm had been using it; that there was no infringement of plaintiff's right and that plaintiff's suit was barred by limitation.

The District Munsif upheld the defendant's contention and dismissed the suit with costs.

On appeal, the Subordinate Judge found that " the plaintiff's cigars had acquired a wide reputation under this name (i.e., Albert) throughout India and that he sold them by thousands and lakhs between 1887 and 1890." The decree of the lower Court was reversed and an injunction was granted as asked for by plaintiff.

Defendant appealed to the High Court.

L. A. Govindaraghava Ayyar for *P. R. Sundara Aiyar* and *T. Natesa Aiyar* for appellants.

E. R. Osborne for respondent.

JUDGMENT (SIR ARNOLD WHITE, C.J.).—This appeal has been strenuously argued by Mr. Govindaraghava Ayyar. I see no reason to quarrel with his statement of law with regard to the question we have to determine. I think it may be said to be now well settled that a dealer in, or, a manufacturer of, a particular article, who adopts a name for that article, whether the name be a purely fancy name or a descriptive name, cannot restrain another dealer from using the same name simply upon the ground that the article so named has acquired a reputation, even though it may be that the public have grown accustomed to buy the article in question relying on the name and without examining the quality of the article. For a man to be entitled to restrain another from using a particular name with reference to a commodity he must, I think, as the law stands, be in a position to show that the public have grown to associate that particular name with himself as the manufacturer of, or dealer in, the article. I do not know that

WHITE, C.J.,
AND
KRISHNA-
SWAMI
AYYAR, J.
—
MAHOMED
ESUF
v.
RAJARATNAM
PILLAI.

WHITE, C.J.,
 AND
 KRISHNA-
 SWAMI
 AYYAR, J.
 ———
 MAHOMED
 ESUF
 v.
 RAJAKATNAM
 PILLAI.

one need refer to authorities at any length. I may refer to a decision of the House of Lords in *Reddaway v. Banham* reported in 1896 A.C., 199 (see too *John Smith v. Reddaway & Company*(1)). The House of Lords case was a very strong one, because there the name which was adopted was a true description of the particular commodity. We find the law laid down, I think, quite accurately, by Mr. Justice Sale in *Barlow v. Gobindram*(2). He puts it thus. I quote the head-note :—“To show that a particular trade number has acquired a reputation in the market, and that purchasers buy the goods by that number and not from an examination of the nature or quality of the cloth is not sufficient to establish the right of exclusive user of that number. There must be such an association between the number and the firm’s name as to indicate in the understanding of the public that the goods bearing that number came from that particular firm.” The same view was taken in a later Calcutta case *Munna Lal Serowjee v. Jawala Prasad*(3). And, as regards our own Court, we find the law laid down in substantially the same terms in *Noorodeen Sahib v. Charles Souden*(4). Therefore, it seems to me that law does not present any serious difficulty in the case.

Of course it must be borne in mind that we are dealing with this case in second appeal and the question we have to consider, and really the only question we have to consider, is “has the learned Subordinate Judge found that the reputation acquired by this particular brand of cigars—the Albert brand—was acquired in connection with cigars bearing that brand which were manufactured by the plaintiff, or, in other words, has the public come to associate the name of the plaintiff with that particular brand?”

Now let us just see what the findings of the learned Subordinate Judge are. In paragraph 7 of his judgment he says “Plaintiff’s cigars had acquired a wide reputation under this name throughout India and he sold them by thousands and lakhs, between 1887 and 1890.” Mr. Govindaraghava Ayyar asked us to regard that finding as merely a finding that cigars known as “Albert” cigars had acquired a wide reputation under this name throughout India. Well, if that be what the learned Subordinate Judge meant, it seems to me the reference to the

(1) (1905) I.L.R., 32 Calc., 401.

(3) (1908) I.L.R., 35 Calc., 311.

(2) (1897) I.L.R., 24 Calc., 384.

(4) (1905) 15 Mad. L.J., 45 and 46.

plaintiff is meaningless. What he finds is that the plaintiff's cigars had acquired a wide reputation. He seems to find that these cigars known as the "Albert" brand had acquired a wide reputation as the plaintiff's cigars and not merely as cigars known as the "Albert" brand. That this is what the learned Subordinate Judge meant seems clear when we read this paragraph 7 by the light of his further findings in the case.

Turning to paragraph 9, we find "plaintiff's case is that his cigars became famous under that name and that the defendant should not be allowed to put up his cigars as those of the plaintiff by adopting the same name and thereby diverting his customers and depriving him of the profits which he might make by the sale of his own "Albert" cigars." And then, in paragraph 12, we find "taking the evidence, oral and documentary, adduced in this case as a whole, there can be no doubt that plaintiff has succeeded in proving that he was the first man in the market with the name of "Albert" for the cigars of his manufacture and that his cigars had acquired a reputation as such before the defendant began to pass off his cigars under the same name." I think, therefore, we have findings that cigars had acquired a reputation as cigars manufactured by the plaintiff's firm.

Mr. Govindaraghava Aiyar has asked us to say that the judgment shows that the learned Subordinate Judge had not addressed his mind to that aspect of the case. Taking the judgment as a whole, I see no reason why we should hold that the learned Subordinate Judge has not considered this question. I think this second appeal should be dismissed with costs.

KRISHNASWAMI AYYAR, J.—I agree. I am not satisfied with the discussion by the Subordinate Judge of the evidence bearing on the question as to whether the plaintiff has acquired a right in the trade mark and whether the defendant has been guilty of an infringement of the same. Mr. Govindaraghava Aiyar has asked us to send the case back for a further finding on the ground that the evidence has not been properly discussed. But I think the finding is clear, and it is not open to us to send a case back merely because the Subordinate Judge has not discussed the evidence in as satisfactory a manner as he should have done.

WHITE, C.J.,
AND
KRISHNA-
SWAMI
Ayyar, J.
—
MAHOMED
ESUF
v.
RAJARATNAM
PILLAI.