

E. Griffiths Hughes Ltd. Vs. Vick Chemical Co.

LegalCrystal Citation : legalcrystal.com/871407

Court : Kolkata

Decided On : May-19-1959

Reported in : AIR1959Cal654

Judge : K.C. Das Gupta, C.J. and ;H.K. Bose, J.

Acts : Trade Marks Act, 1940 - Section 6(1), 6(3), 10(2), 11, 14, 15(4) and 70

Appeal No. : A.F.O.O. No. 62 of 1955

Appellant : E. Griffiths Hughes Ltd.

Respondent : Vick Chemical Co.

Advocate for Def. : S. Chowdhury and ;P.P. Ginwalla, Advs.

Advocate for Pet/Ap. : B.N. Dutt Roy and ;A. Ganguly, Advs.

Disposition : Appeal dismissed

Judgement :

Bose, J.

1. This appeal is from the decision of the Deputy Registrar of Trade Marks, Calcutta, and raises primarily the question of construction of Section 6 of the Trade Marks Act, 1940.

2. On 22nd October, 1945 the appellant, a British Company carrying on the business of Manufacturing Chemists, applied before the Registrar of Trade Marks, Calcutta, for registration of a trade mark consisting of the words 'Karsote Vapour Rub' represented in special type and the words 'Protective comforting. Germ Killing' in smaller type, inside a black rectangular border, for a chemical product specified as a vaporising ointment. This Mark was advertised as accepted in the Trade Marks Journal of January 1949.

3. On 2nd May, 1947 the respondent, an American Company, also applied before the Registrar of Trade Marks, Calcutta, for registration of a trade mark consisting of the word 'Vapo Rub' for goods specified as 'Pharmaceutical preparations'. This mark was however advertised as accepted a month earlier in the Trade Marks Journal of December, 1948.

4. As a result of these advertisements the appellant and the respondent filed their oppositions against each other's application for registration. As is usual in such cases,

the parties produced before the Deputy Registrar, in support of their respective cases, evidence in the shape of affidavits affirmed by Doctors, nurses and dealers.

5. Some of the records of a litigation which the parties had in respect of these very Marks in the Court of Jamaica and which ultimately went up before the Privy Council, were also produced before the Deputy Registrar.

6. The learned Deputy Registrar after hearing the parties at length has directed registration of the Mark of the respondent with an amendment that instead of the word 'Vapo Rub' simpliciter, the word 'Vicks' should be introduced before the word 'Vapo Rub' and the mark of the Respondent should be registered as 'Vicks Vapo Rub'. With regard to the appellant's application for registration, the direction of the Deputy Registrar is, that the words 'Vapour Rub' should be deleted from the appellant's mark offered for registration, and only the word 'Karsote' should be registered as the appellant's mark. Being aggrieved by these directions of the Deputy Registrar, the British Company has preferred this appeal.

7. It is convenient to set out verbatim the provisions of Section 6 of the Trade Marks Act, 1940 (Act V of 1940) which are as follows :

Section 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 sex, 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 case 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 25th day of February, 1937, 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.'

8. Now the opening words of Section 6 make it quite clear that in order that a trade mark may be registrable under the Act it should contain one of the essential particulars designated in Clauses (a), (b), (c), (d) and (e) of Sub-section (1) of Section 6, which clauses are separate and distinct.

9. The contention of the appellant is that the word 'Karsote' in the appellant's trade mark 'Karsote Vapour Rub' is an invented word and as it thus satisfies the requirements of Clause (c) of Sub-section (1) of Section 6, it is a registrable trade mark. The appellant further contends that although the words 'Vapour Rub' are common words of the English language and such words may be regarded as generic words common to the trade the appellant is entitled to registration of the whole of the Trade Mark proposed for registration, subject to its disclaiming its right to the exclusive use of the words 'Vapour Rub' as provided in Section 13 (b) of the Trade Marks Act, 1940.

10. With regard to the trade mark of the respondent the appellant's contention is that it is not eligible for registration inasmuch as the word 'Vapo Rub' is a mere misspelling of the ordinary English words Vapour and Rub and as it is a word which has direct reference to the character and quality of goods--a factor, which according to Clause (d) of Sub-section (1) of Section 6, disqualifies a trade mark from being registered under the Act.

11. It is further submitted on behalf of the appellant that the Deputy Registrar of Trade Marks had no jurisdiction to direct registration of the respondent's mark, offered for registration, by introducing the word 'Vicks' before the word 'Vapo Rub' and thus amending it suo motu and without an application made by the respondent for the purpose.

12. The contention of the respondent on the other hand is that the word 'Vapo Rub' is an invented word or at any rate a 'distinctive mark' within the meaning of the expression 'any other distinctive mark' occurring in Clause (e) of Sub-section (1) of Section 6 of the Act and as it is a trade mark which is inherently adapted to distinguish and by reason of its use and on account of other circumstances it is in fact so adapted to distinguish, the mark is registrable under the Act. It is further contended by the respondent that in any event the Mark being in continuous use in India from a date prior to 25th February, 1937 has acquired distinctiveness even if it be found that it is not adapted to distinguish and the Registrar therefore cannot refuse registration of the Mark in view of the proviso to Sub-section (3) of Section 6 of the Act.

13. The respondent further seeks to justify the Deputy Registrar's order for registration of their Mark with amendment, as being permissible under Section 14 (3)

and Section 15(4) of the Act.

14. The respondent resists the registration of the appellant's trade mark 'Karsote Vapour Rub' on the ground that it is not distinctive of the goods of the appellant and is not adapted to distinguish their goods. Furthermore the registration of the appellant's trade mark is likely to deceive and cause confusion and as such the registration of it is prohibited by Section 8 (a) of the Act.

15. The respective contentions of the parties may now be considered in the light of the authorities and the provisions of the Trade Marks Act, 1940. The argument of the respondent that the word 'Vapo Rub' is an invented word can be disposed of, at the very outset by pointing out that it is not an invented word. It is plain that the word 'Vapo Rub' suggests the combination of two ordinary English words 'Vapour' and 'Rub' with a slight distortion of the word 'Vapour'. It has been now authoritatively established that the combination of two English words is not an invented word even though the combination may not have been in use before; nor is a mere variation of the orthography or termination of a word sufficient to constitute an invented word if to the eye or ear the same idea would be conveyed as by the word in its ordinary form. It is no doubt true that by the dropping of 'U' and 'R' the word 'Vapo' ceases to be an ordinary English word and some element of novelty is introduced into it, which gives it the appearance of a coined word, but still it does not attain the status of an invented word which is a word not to be found in the existing vocabulary. In the case of *In re Dunlop Rubber Co. Ltd.*, (1942) 59 RPC 134, the mark 'Trakgrip' was allowed to be registered as a coined word and as distinctive of the applicant's goods, as the court was of the view that other traders were not likely, in the ordinary course of their business, to desire to use such a word in connection with pneumatic tyres,

16. At the same time, it may be safely assumed that the word 'Karsote' in the appellant's mark is an invented word.

17. The next question that arises for consideration is whether the mark of the respondent can be regarded as a distinctive mark within the meaning of the expression as used in Clause (e) of Sub-section (1) of Section 6. Now the mark can fall within Clause (e) if there is 'evidence of distinctiveness.' So the further question that arises is what is 'distinctiveness.' The answer to the question is furnished by Sub-section (2) read with Sub-section (3) of Section 6. The expression 'distinctive' is defined in Sub-section (2) as meaning some quality or feature in the trade mark which earmarks the goods as distinct from the goods of other manufacturers or producers. But Sub-section (3) of Section 6 provides what factors the Registrar should take into consideration in determining whether the requirements of Sub-section (2) are satisfied. Sub-section (3) requires the Registrar to satisfy himself about two factors (a) 'inherent distinctiveness' and (b) 'distinctiveness in fact'. If he finds that the two factors co-exist then he is to decide whether the two factors exist to such an extent as to justify him in holding that the mark is 'distinctive' as contemplated in Sub-section (2).

18. If however the proviso to Sub-section (3) is applicable to the case then the question whether the trade mark is adapted to distinguish or not becomes immaterial and the Registrar can direct registration solely on the evidence of acquired distinctiveness. In other words if the proviso is attracted then the 'acquired distinctiveness' is conclusive] and entitles the mark to be registered. But if the proviso does not apply then the 'acquired distinctiveness' is not conclusive, and the

Registrar has to find that adaptability to distinguish is present in the trade mark proposed to be registered.

19. With these introductory words on the question of interpretation of Section 6 of the Act I now pass on to the consideration of the evidence as to user which has been adduced in this case. Now it is well-settled that in the case of all applications for registration of trade marks, including opposed applications, the rights of the party or parties are to be determined as at the date of the application for registration. The evidence which is tendered before the Registrar is normally by way of affidavits of persons who are competent to testify to the user of the particular mark.

(19a) Section 70, Clause (b) of the Trade Marks Act 1940 is as follows :--

'Section 70.

In all proceedings under this Act before the Registrar * * * * *

(b) evidence shall be given by affidavit provided that the Registrar may, if he thinks fit, take oral evidence in lieu of or in addition to such evidence by affidavit.'

20. The principal affidavit on behalf of the respondent is of Robert M. Dunning dated 20th July, 1948. It appears from this affidavit that Mr. Lunsford Richardson, the founder of the respondent company's business had coined the word 'Vapo Rub' in the year 1911 and this trade mark has been in use in India since at least 1925.

21. It further appears from this affidavit that Declarations of ownership of this trade mark were filed and registered under the Registration Act, in India so far as the Carton was concerned, on 18th April, 1928, and so far as the word 'Vapo Rub' was concerned, on 3rd March, 1935, and the records of the company as to shipments to India of products bearing the trade mark 'Vapo Rub' show that shipments to India started from the years 1924-25 and gradually increased in volume. The particulars of such shipments up to 1947-1948 and of the publicity or advertisement expenses for the period 1935-36 to 1947-1948 are set out in this affidavit. It may be pointed out that in the Carton which was registered in this Country on 18th April, 1928 the word 'Vicks' is more prominently displayed than the word 'Vapo Rub'.

22. Several supporting affidavits made in October, 1948 have also been filed on behalf of the respondent company. William Strachen, an employed of and at the date of the affidavit, the manager of Bathgate and Co. Ltd., a firm of Chemists and Druggists of Calcutta has stated in his affidavit that the Mark 'Vapo Rub' had been in use for 20 years, that is since about 1928. Others who have made affidavits are Ferozuddin, a dealer, Dr. Walmsley Fisher, a Surgeon and registered medical practitioner in Calcutta since 1929, Mrs. Dumayne, a nurse registered since 1929, Devaraja Nayagar, a dealer of Madras engaged in the retail sale of drugs since about 1923 : Thammanna Gounder, also a dealer of Madras since about 1918: Dr. Venugopalan, a medical practitioner of Madras; Amar Nath Gupta, a dealer of Delhi; Tekchand, a dealer of New Delhi; Roshanlal, another dealer and chemist of New Delhi; Beni Prosad also a dealer of New Delhi; Sabuwalla, a dealer of Bombay, and Kesharlal Raichand a dealer of Bombay. The Deputy Registrar has dealt with all these affidavits (except the affidavit of Mr. Dunning, the two Doctors and the nurse) together and in view of certain similarity of the wordings in these affidavits, has remarked, following the well-known observations of Evershed M. R. (In the matter of Broadhead's case,

(1950) 67 RFC 209 at p. 211) that 'every player in the orchestra plays in unison the same monotonous tune', and has rejected these affidavits. The Deputy Registrar has however relied on some other affidavits filed on behalf of the respondent by way of reply to the affidavits filed by the appellant. It appears to me that it will not be unreasonable to place reliance on the affidavit of K. R. Sawhney dated 29th July, 1952 the proprietor of British Medical Stores having its place of business at Chandni Chawk, Delhi. He is doing business as chemist and druggist since about 1935 and he has sold 'Vapo Rub' which is also known as Vicks Vapo Rub since about 1942. It is since 1947 that he has seen Karsote Vapour Rub in the market. The next affidavit which can be taken into consideration is that of F. X. Braganca, the manager of Alex Ross and Sons of 21 Park Street, Calcutta, a firm of Chemists and Druggists. He has known the product 'Vapo Rub' which is also known as 'Vicks Vapo Rub' for the last 16 years, that is, since about 1936. If he had seen the words 'Vapour Rub' on a piece of paper it would only suggest to him 'Vicks Vapo Rub' product.

23. Besides these affidavits, the affidavits of P. B. Johnson, M. K. Stremen, H.D. Sunawala and L.C. Bullack who are employees of Muller and Phipps (India) Ltd., the distributors of the Vick Chemical Company since about 1935, are helpful and can be relied on. The affidavit of Mr. Johnson shows that the sales of the respondent's products were effected in India through the offices of Muller and Phipps (India) Ltd., between the period 1936 and 1948 and in 1936 the sale was to the extent of Rs 13583/- and in 1947 the extent of such sale amounted to Rs. 223776/- and in 1948 the figure was Rs. 177255/-. The total amounts of the sales for the years 1936 to 1948 have been collected from the various account books and records of the company (Muller and Phipps. (India) Ltd.) and have been set out in this affidavit. This is good secondary evidence of the entries in the original records.

24. The affidavit of Jagan Nath Jaini who is the Advertising Agent in India of the respondent can also be safely relied upon. This affidavit shows that since 1935-36 the respondent company was spending large sums as advertisement expenses, every year and in the year 1935-1936 the amount so spent was Rs. 13282/13/6 and in 1949-50 the figure went up to Rs. 29,427/-. The cuttings of the Advertisements however show that the word 'Vicks' has always been associated and used with the word 'Vapo Rub' in the advertisements and sometimes the word 'Vicks' is more prominently displayed than the word 'Vapo Rub'.

25. Thus there is satisfactory evidence to show that the product of the respondent company has been sold in the Indian Market from sometime prior to 1930 and the mark 'Vapo Rub' has been always associated with and understood to be as indicative of the products of the respondent.

26. It is also clear that instead of the word 'Vapo Rub' simpliciter the combination of the words 'Vicks' and 'Vapo Rub' has occasionally served as the Mark denoting the goods of the respondent. There is also no doubt, that the word 'Vapo Rub' is also descriptive to a certain extent of the character and quality of the goods but as has been pointed out by Fletcher Moulton L.J. in the case of Re Joseph Crossfield and Sons Ltd., (1910) 1 Ch. 130 at p. 145, there is no absolute incompatibility between what is descriptive and what is distinctive.

27. It has been pressed upon us that in the British Pharmaceutical Codex there is a description given of such ointments in the following words : --

'Vapour Rubs are preparations of menthol with other volatile substances in a basis of soft paraffin and are applied to the chest for their local action and on account of their value when inhaled' and so the words 'Vapour Rubs' being generic terms and the word 'Vapo Rub' being merely a misspelling of the words 'Vapour Rub', no distinctiveness can be acquired in respect of such word.'

28. Now although the British Pharmaceutical Codex 1934 received statutory recognition in India under the Indian Drugs Act 1940 (see Section 2(d). Sections 8 and 16) it is quite clear from the evidence that the word 'Vapo Rub' had become associated with the vaporising ointments manufactured by the respondent and had become current in the Indian Market since about 1925 and long before 1934 when British Pharmaceutical Codex was published. Reliance is also placed by the appellant on British Pharmacopoeia which is also recognised by the Drugs Act 1940 and wherein the Pharmaceutical Formulae of Chest Vapour Rub is set out; but it is to be pointed out that it was in 1929 that in this British Pharmacopia the formulae of Chest Vapour Rub first came to be published.

29. The appellant company has also adduced evidence by way of affidavits and otherwise to prove that the word 'Vapo Rub' had become generic term. But it is admitted in the affidavit of Mr. Green that the appellants mark has been in effective user in India only since about November, 1945. In the supporting affidavits of Rajaratnam, Mohamed Yousuff, Subramaniam who are dealers of Madras it is stated 'that 'Karsote Vapour Rub', Vicks Vapo Rub and other preparations of Vapour rub type have been sold in the Indian Market as different brands of Vapour rub products, for the same effect also is 'the affidavit of Shanghvi, a Calcutta dealer, who says that since 1941 his firm was dealing in 'Vapour Rub' products, and customers and mofussil dealers often ask for Vapour Rub preparations without mentioning the brand. The affidavit of Nabendu Roy another Calcutta dealer is to the effect that the difference in the spelling between 'Vapo Rub' and Vapour Rub' is so negligible that 90 per cent of the people dealing in such products do not notice the difference in spelling.

30. This Nabendu Roy is dealing in Karsote Vapour Rub and Vicks Vapo Rub since about 1947. The affidavit of Chhotalal J. Seth, another Calcutta dealer is that his firm was dealing in Vapour Rub preparations since 1947 and he is acquainted with the term since 1947. The affidavit of Fidahusein of Spencer and Co., is that he has always regarded 'Vapo Rub' as being a misspelling of the words Vapour Rub. His customers always ask for Vicks when they want to purchase Vicks Chemical Company's preparations. The affidavit of Dr. B.P. Nundi is that he is acquainted with Vapour Rub preparations since 1948. He considers Vapo Rub as misspelling of the term Vapour Rub. The affidavits of the two nurses Mabal Poole and Emily Livesay are rather vague but they also state that Vapo Rub is a misspelling of the words Vapour Rub and there are different brands in the market such as Karsote, Kipak and Vicks. The affidavit of C. A. Barnes is to the effect that the respondent advertised their products in the British publications 'Nursing Mirror', 'Sunday Pictorial' and 'News of the World' having circulation in India, as 'Vick Brand Vapour Rub' preparation. The annexures show that during the period 1938 to 1944, such advertisement was made and the word 'Vick' was always more prominently displayed.

31. The affidavit dated 1st August, 1951 of George Ernest Large, the Secretary of Gordon Gotch Ltd., London, carrying on the business of exporter of British newspapers and periodicals is that copies of the 'Sunday Pictorial', 'Nursing Mirror' and 'News of the World' have been regularly sent out to India during the last 12 years

at least and his estimate is that about 350 copies of the 'News of the World', 1000 copies of the 'Sunday Pictorial' and 5 copies of the 'Nursing Mirror' had been normally sent to India.

32. This is in substance the state of the appellant's affidavit evidence. But like some of the first set of respondents supporting affidavits filed in October, 1948, most of these affidavits filed on behalf of the appellant suffer from the defect of being stereotyped in character.

33. It has been pointed out that it is not the right or proper way of preparing evidence for a case of this kind to put before members of the public, a statutory declaration already drafted containing statements of facts and statements as to what the witness would have thought if certain things had happened or impressions of the witness without previously ascertaining by means of non-leading questions and answers that it represents his views. It really amounts to putting a series of leading questions which suggest the answer required in the most complete manner and put into the mouth of the witness words which he might not have thought of using, although when the declaration is put before him, he may think, and think quite honestly, that it accurately represents the facts.

34. It has at the same time been pointed out that merely because several affidavits filed in trade mark cases or passing off cases are precisely in the same form, it does not follow that any of these affidavits has been obtained by any improper means. See In the matter of an Application by Edward Hack, (1941) 58 RPC 91 at pp. 110-111.

35. In the later case known as (1950) 67 BPC 209 at p. 211, and already referred to the practice of tendering evidence by way of affidavits drafted in precisely the same form and with the same defects, was deprecated by the Court of Appeal in England.

36. Evershed M. R. observed:--..

'..... Every player in the orchestra plays in unison. Not only that, but I find that the points which now are the vital points in the case remain shrouded in ambiguity or indeed, are passed over altogether sub silentio.'

37. Now many of the affidavits filed by the respective parties in the case before us do not give sufficient indication of the status of the persons swearing the affidavits, and it becomes therefore difficult for the Court to form an opinion as to the weight which should be attached to the particular affidavits. The affidavit of Colonel Walmsley Fisher gives us an idea about his qualifications and status. The affidavit of Mrs. Dumayne indicates that she has held responsible, positions in well-known hospitals. These two affidavits also enable the Court to form the opinion that this doctor and the nurse are persons of considerable experience and they had opportunities of acquiring an idea as to the extent of the user of the mark 'Vapo Rub' and about the reputation it enjoys and as to whether the mark has acquired any distinctiveness or not. So it is not unreasonable to place reliance on such affidavits, and I am not inclined to ignore or brush aside these affidavits as worthless or unreliable.

38. So taking into consideration these two affidavits and the other affidavits of the respondent company to which I have already made reference in an earlier part of this judgment as reliable affidavits, I hold that the Mark 'Vapo Rub' has been continuously in user in India from a date prior to 25th February, 1937 and up to the date of the

application of the respondent company for registration and even later than that, and this mark has acquired sufficient distinctiveness in fact, to entitle) the mark to registration.

39. The further question that arises is whether the Deputy Registrar was within his rights in suo motu amending the respondent's mark proposed for registration by adding the word 'Vicks' before the word 'Vapo Rub' and directing registration of this amended mark. Mr. Ginwalla has argued that the definitions of the words 'Limitations' and 'Trade Mark' as given in Section 2, Clauses (E) and (L) in the Act and the provisions of Sections 19 (2) and 15(4) of the Act make it clear that the Registrar has power to direct registration of trade mark with amendments made by him.

40. Mr. Dutt Roy on the other hand has contended that the only power the Registrar has of allowing amendment of a trade mark proposed for registration is before or at the time of acceptance of the mark for advertisement for purposes of registration; and also after acceptance, provided the applicant makes application for or asks for such amendment. Reliance is placed by Mr. Dutt Roy on Sections 14(1), 14(3), 15(1) and Section 16 (which says that it is only the accepted trade mark which can be registered) of the Act.

41. It appears to me that the contention of Mr. Dutt Roy is correct. The words 'Conditions and limitations' in Sections 10(2) and 15(4) of the Act have no reference to the power of amendment of the trade mark. The words 'Conditions and limitations' have reference to such things like mode of user of the trade mark or as to the area of its user. As for example it may be a condition of the registration that the mark is to be used in relation to goods to be sold only in the State of West Bengal, or the mark is to be used only on goods sold in jars or bottles, or the mark is to be used by way of printed adhesive labels and so on.

42. In my view the learned Deputy Registrar was not justified in suo motu amending the proposed trade mark of the respondent company and directing registration of such amended trade mark. But no fault can be found with the Deputy Registrar's direction correcting the name of the respondent company as 'Vick Chemical Company' instead of Vicks Chemical Company, as it is within the competence of the Deputy Registrar to correct such an error under Section 14 (3) of the Act.

43. The learned Deputy Registrar's direction that only the word 'Karsote' of the appellant's proposed trade mark 'Karsote Vapour Rub' do proceed to registration, is equally untenable. Section 11 of the Act gives an indication that it is the whole mark which is proposed for registration that is to be registered. The Deputy Registrar had no power to cut out the words 'Vapour Rub' from the appellant's trade mark and direct registration of the amended mark 'Karsote'. The Deputy Registrar had no power to dissect the mark and then conclude that some component parts were distinctive and some were not distinctive, and on that ground direct registration of a part or the mark and refuse registration of the other parts. He must consider the combination mark as a whole. It is to be noted however that the respondent has not challenged before us that the order of the Deputy Registrar directing registration of the word 'Karsote' is bad.

44. Now the next question that arises is whether the learned Deputy Registrar is right in refusing registration of the appellant's proposed trade mark as a whole. I think he

is right.

45. There is hardly much room for doubt that the use of the words 'Vapour Rub' in the appellant's trade mark is likely to deceive or cause confusion and lead ordinary and unwary people into thinking that the products of the appellant company were really the products of the respondent company. It is not at all unlikely that when a person goes into a shop or speaks over the telephone and asks for 'Vapo Rub' the shop keeper may in view of the phonetic similarity between the words 'Vapour Rub' and 'Vapo Rub' think that the customer is asking for 'Vapour Rub' product of the appellant and thus hand over the appellant's product instead of the respondent's product to the customer although the latter intended to buy the product of the respondent company.

46. The onus of proving that a mark is not likely to deceive or cause confusion is on the applicant and if it is not clear that deception may not result the registration should be refused. (See *Eno v. Dunn*, (1890) 7 RPC 313.; *In re Me Dowell's Application*, (*Mc Dowell v. Standard Oil Co.*), (1927) 44 RPC 335; and *Aristoc Ltd v. Rysta Ltd.*, (1945) 62 RPC 65.

47. It appears to me that the user by the appellant of the proposed trade mark 'Karsote Vapour Rub' will not in the facts and circumstances of this case be a 'bona fide user' within the meaning of that expression as used in Section 26 of the Act, and the application of the appellant for registration of the proposed mark has been rightly refused by the Deputy Registrar.

48. In the result the order of the Deputy Registrar of Trade Marks will stand with this modification that instead of the respondent company's amended mark 'Vicks Vapo Rub' the respondent company's mark 'Vapo Rub' do proceed to registration.

49. Subject to the modification stated above, the Appeal is dismissed.

50. Each party will bear its own costs.

51. Certified for two Counsel.

Das Gupta, C.J.

52. I agree.