

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ANIL K.NARENDRA

MONDAY, THE 1ST DAY OF JUNE 2015/11TH JYAISHTA, 1937

O.P.No.32682 of 2000 (N)

PETITIONER :

K.L.POLY,
S/O.LATE LONAPPAN,
KALATH HOUSE,
NELLAYI.P.O.,
PARAPPUKKARA VILLAGE,
MUKUNDAPURAM TALUK.

BY ADV. SRI.T.R.RAVI

RESPONDENTS :

1. STATE OF KERALA,
REPRESENTED BY THE CHIEF SECRETARY,
GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM.
2. THE DRUGS CONTROLLER OF KERALA STATE,
THIRUVANANTHAPURAM.
3. K.P.JAMES,
S/O.K.O.PAVUNNI,
KALATH HOUSE,
NELLAYI.P.O., THRISSUR DISTRICT,
PIN - 680 305.

R3 BY ADV. SRI.SAIGI JACOB PALATTY

R3 BY ADV. SRI.SABU GEORGE

R1 & R2 BY GOVERNMENT PLEADER SRI.P.V.ELIAS

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON
01-06-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

O.P.No.32682 of 2000 (N)

APPENDIX

PETITIONER'S EXHIBITS :-

- EXT.P1 : COPY OF THE PARTITION DEED NO.51 OF 1973
DTD.4.1.1973 EXECUTED BY LONAPPAN AND
OTHERS.
- EXT.P2 : COPY OF JUDGMENT IN O.S.4/1978 OF THE DISTRICT
COURT, TRISSUR.
- EXT.P3 : COPY OF JUDGMENT IN O.S.4/1993 OF -DO- -DO-
- EXT.P4 : COPY OF OBJECTION DTD.8.5.2000 SUBMITTED BY
THE PETITIONER BEFORE THE 2nd RESPONDENT.
- EXT.P5 : COPY OF ADDL.OBJECTION DTD.15.7.2000 -DO- -DO-
- EXT.P6 : COPY OF THE DRUGS AND COSMETICS (AMENDMENT) RULES,
2000.
- EXT.P7 : COPY OF ORDER No.L-4581 /2000/DC dtd.17.7.2000 PASSED
BY 2nd RESPONDENT GRANTING LICENCE TO 3rd RESPONDENT.

RESPONDENTS' EXHIBITS :- NIL.

True copy

P.A to Judge

ANIL K.NARENDRA, J.

O.P.No.32682 of 2000

Dated this the 01st day of June, 2015

JUDGMENT

The petitioner is the grandson of Kalath Ouseph Vaidyan. According to the petitioner, Kalath Ouseph Vaidyan invented certain ayurvedic medicines which earned high reputation and he was doing the business of manufacture and sale of ayurvedic preparations under the trade name 'Kalan Nelayi' and that his medicines were identified by the public by trade name 'Kalan'. Subsequently Kalath Ouseph Vaidyan gave his right to do the business of manufacture and sale of Ayurvedic preparations to his children, who formed a partnership in the year 1967 and continued the business as a partnership. In the year 1973, that partnership was dissolved by executing Ext.P1 registered document. Under Ext.P1 the exclusive right to do that business was given to the petitioner's father Lonappan. It is specifically mentioned in Ext.P1 that, the aforesaid Lonappan will have exclusive right to use the trade name 'Kalan'. The goodwill was also given to him. Thereafter, the said Lonappan was doing that business exclusively. Under a Will executed by the

said Lonappan his right has devolved up on the petitioner and according to him, he is having the exclusive right to use the said trade name 'Kalan'.

2. The petitioner would point out that, when Pavunni (brother of Lonappan) attempted to infringe the exclusive right of Lonappan to use the said trade name 'Kalan', he filed a suit as O.S.No.4 of 1978 before the District Court, Thrissur, against the said Pavunni and M/s.Kalan Pharmaceuticals, which was decreed by Ext.P2 judgment upholding the said exclusive right of Lonappan and restraining Pavunni and M/s.Kalan Pharmaceuticals, defendants 1 and 2 in that suit, from using the names "Kalan, Kalans, Kalan Nellayi, Sakshal Kalan, K.P.Ouseph Vaidyan, Kalan Vaidyan and Sakshal Kalan Vaidyan", in any notice, advertisement, pamphlet, leaf-let, literature, or carton of any Ayurvedic preparations prepared by them. The third respondent in this Writ Petition is the son of the aforesaid Pavunni.

3. When there was another attempt in the year 1993 to infringe the exclusive right of the petitioner, to use the trade name 'Kalan' he filed O.S.No.4 of 1993 before the District Court, Thrissur,

against Smt.Flyci wife of James (son of Pavunni), Sunny (son of Thomas) and against M/s.Kalan Drugs and Remedies run by Smt.Flyci. The said suit was filed on the allegation of misuse of the word 'Kalan' and mischief of passing of played by the defendants therein. The petitioner has also filed O.S.No.11 of 1997 before the District Court, Thrissur against the State officials and the officers of the Drugs Department against granting any licence to any person using the name 'Kalan' for establishing any concern or for selling medicines.

4. O.S.No.4 of 1993 was tried along with O.S.No.11 of 1997 and evidence was recorded in O.S.No.4 of 1993. On an evaluation of the evidence the trial court in Ext.P3 judgment came to the conclusion that the name 'Kalan' is a family name and therefore the petitioner herein, who is the plaintiff in O.S.No.4 of 1993 could not claim exclusive right to use that name and any member of the family is entitled to use the said word in any form he or she likes. However, the court held in paragraph 45 of Ext.P3 judgment that, as far as the rights made mentioned of in the said paragraph is concerned, the plaintiff has exclusive rights. However on the basis

of the earlier finding, the suits were dismissed.

5. The judgment and decree of the court below in O.S.No.4 of 1993 and O.S.No.11 of 1997 were under challenge before this Court in A.S.No.483 of 2000 and A.S.No.355 of 2000 respectively.

6. The third respondent approached the second respondent for licence to conduct business of manufacture and selling of Ayurvedic preparations using the trade name 'Kalan'. The petitioner filed Ext.P4 objections on 08.05.2000, inter alia, pointing out that it is his exclusive right to use the trade name 'Kalan' and other allied expressions. Ext.P4 objection was followed by additional objections. The second respondent by Ext.P7 order disposed of the application submitted by the third respondent by granting licence to him for manufacture of certain items and paragraphs 4, 5 & 6 of the said order read thus:-

"4. The case of applicant Sri.K.P.James is that O.S.11/97 of the Hon'ble District Court, Thrissur had been disposed of by the Hon'ble Court dismissing both O.S.4/93 and O.S.11/97 and hence he had the right to conduct the business in the name of KALANS PRODUCTS. The objection of Sri.K.L.Poly was that the

matter was now before the Hon'ble High Court was he had filed an appeal against the order of the Hon'ble District Court.

5. The merits of the application and the plea of the applicant and the objection of Sri.K.L.Poly are considered in detail in accordance with the direction of the Hon'ble High Court. The question of the name of the business of the applicant is a matter already examined by the Court and settled. Further dispute in the matter are also those to be considered by appropriate Courts only. Hence if the applicant is found eligible for grant of licence on merits as per the Drugs and Cosmetics Act and Rules there is no bar in approving the business name KALANS PRODUCTS at this stage.

6. As far as the merits of the application are concerned, they had been verified earlier by the Drugs Inspector and were found to be in order. This office had found that facilities for manufacture of Arishtasavas and Bhasmas were inadequate and hence had not permitted these items while granting licence on 8/5/2000. This situation remains the same. The application when considered afresh is to be examined in

accordance with the new Good Manufacturing Practice norms published by Government of India on 23/6/2000 prescribing facilities for manufacture of Ayurvedic Drugs. The application is scrutinised again with reference to the new norms and it is found that separate sections for manufacture of Lehyams, Pills and Choornas are also to be provided though there is adequate space to accommodate these sections. What is needed is suitable partitioning and re-arrangement of equipments. The facilities as such are adequate to permit Thailas, Kuzhambu, Ghrithams and Soaps. The application is disposed of with grant of licence for manufacture of these items only.”

7. It is aggrieved by Ext.P7 order passed by the second respondent the petitioner is before this Court in this Writ Petition seeking a writ of certiorari to quash Ext.P7 and for other consequential reliefs.

8. A reading of Ext.P7 order passed by the second respondent would show that the said respondent considered the application made by the third respondent, in the light of the findings of the court below in Ext.P3 judgment while dismissing O.S.Nos.4 of

1993 and 11 of 1997, that the plaintiff, the petitioner herein, could not claim any exclusive right to use the name 'Kalan' and any member of the family is entitled to use the said word in any form he or she likes.

9. Today when the case was taken up for final hearing, the learned counsel for the petitioner would submit that, during the pendency of this Original Petition, Ext.P2 judgment in O.S.No.4 of 1978 and Ext.P3 judgment in O.S.No.4 of 1993 were set aside by this Court by a common judgment dated 18.10.2011 in A.S.Nos.17 of 1988, 355 of 2000 and 483 of 2000. By the very same judgment, C.M.A.No.59 of 2000, which arises out of the order in I.A.No.271 of 1997 in O.S.No.3 of 1997, a petition for injunction, which was dismissed by the court below was also disposed of directing that court to dispose of O.S.No.3 of 1997 expeditiously. The operative portion of the common judgment of this Court dated 18.10.2011 in the above case reads as follows:-

“In the result, the decrees in O.S.4 of 1978 and O.S.4 of 1993 are set aside and modified decrees are passed in O.S.4 of 1978 and O.S.4 of 1993 as follows:

(i) O.S.4 of 1978 is decreed to the extent that the defendants are permanently restrained from using the word 'Kalan' (independently), and using the words 'Kalan's', 'Kalan Nelayi' and the photo of late Ouseph Vaidyan in any notice, advertisement, pamphlet, leaf-let, literature or carton of any Ayurvedic preparation manufactured and sold by the defendants. The plaintiff in the said suit will be entitled to costs from the defendants.

(ii) The judgment and decree in O.S.4 of 1993 is set aside and a decree for permanent prohibitory injunction is passed restraining the defendants from using the word 'Kalan' (independently) and using the words 'Kalan's' and 'Kalan Nelayi' in any notice, advertisement, pamphlet, leaf-let, literature or carton of any Ayurvedic preparation manufactured and sold by the defendants in the said suit and the emblems. The plaintiff will be entitled to costs from the defendants in the case.

(iii) Dismissal of O.S.11 of 1997 is confirmed.

(iv) The court below is directed to dispose of O.S.3 of 1997 as expeditiously as possible at any rate within a period of nine

months from the date of receipt of a copy of this judgment.”

10. The learned counsel for the petitioner would point out that the defendants in O.S.Nos.4 of 1978 and 4 of 1993 have not chosen to challenge the judgment and decree of this Court in A.S.Nos.17 of 1988 and 483 of 2000 and that, S.L.P.(Civil) Nos.16183-16185 of 2012 at the instance of the petitioner against certain findings in other issues in the aforesaid judgment are now pending consideration before the Apex Court. In such circumstances, the learned counsel for the petitioner would submit that Ext.P7 order requires re-consideration in view of the changed circumstances, since that order was passed by the second respondent mainly relying on Exts.P2 and P3 judgments of the court below in O.S.Nos.4 of 1978 and 4 of 1993, which have already been set aside in the common judgment of this Court referred above.

11. A reading of Ext.P7 order would show that the second respondent disposed of the application for grant of Drug Licence made by the third respondent in certain items, under the business name 'Kalan Products', taking note of the contention of the third

respondent relying on the judgment and decree in O.S.Nos.4 of 1993 and 11 of 1997 that, he had the right to conduct business in the name 'Kalan Products'. In Ext.P7 order, the second respondent has also noticed the contention of the petitioner that, the aforesaid judgment and decree relied on by the third respondent is under challenge in the appeals pending before this Court. Now, by judgment dated 18.10.2011 this Court set aside the judgment and decree in O.S.Nos.4 of 1978 and 4 of 1993 and passed modified decrees to the extent indicated in the operative portion of that judgment, which has already been extracted in paragraph 9 of this judgment.

12. In such circumstances, the third respondent cannot now contend that he had the right to conduct business in the name of 'Kalan Products'. Therefore, the licence granted to the third respondent in Ext.P7 requires re-consideration at the hands of the second respondent in terms of the judgment and decree of this Court dated 18.10.2011 in A.S.Nos.17 of 1988 and 483 of 2000.

In such circumstances, the Writ Petition is disposed of directing the second respondent to re-consider the application made by the

third respondent for licence and pass fresh orders taking note of the changed circumstances, especially the reversal of Exts.P2 and P3 judgments of the court below, by the judgment and decree of this Court dated 18.10.2011 in A.S.Nos.17 of 1988 and 483 of 2000. The second respondent shall pass necessary orders in this regard, as expeditiously as possible, at any rate, within a period of three months from the date of receipt of a certified copy of this judgment. Needless to say that, any decision taken by the second respondent as directed above, shall be with notice to the petitioner and also to the third respondent and after affording them a reasonable opportunity of being heard. Till orders are passed as directed above, Ext.P7 order shall continue to be in force.

ANIL K.NARENDRA, JUDGE

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