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### **TRADEMARKING OF RELIGIOUS MARKS IN INDIA: DIRECTION OF LAW OR DISCRETION OF COURT?**

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#### **Abstract**

*Religion, more or less, pervades each and every aspect of the life of a human being. This is especially true in a country like India where religion and religious affiliations are given utmost importance. However, slowly but steadily, religion is now pervading even areas previously not thought possible such as trade and commerce. The selling of products and services named after religions, Gods and Goddesses, holy books, places of worship, spiritual leaders, etc. is now quite a common occurrence in India despite the existence of Section 9(2) (b) of the Trade Marks Act, 1999 which stipulates that “a mark shall not be registered as a trademark if it comprises of any matter likely to hurt the religious susceptibilities of any class or section of the citizens of India”. Furthermore, various courts in India, at the state as well as national level, have interpreted Section 9(2) (b) in a different manner over the years as is evident in decisions such as the Attukal Bhagawathy Temple case and the case of Amrital Singh v. Lal Babu Priyadarshi. The position of India as well as other countries such as China, Singapore, United States and United Kingdom with respect to trademarking of religious marks will hence be elaborately analysed and interpreted in this paper with the help of legal provisions, case laws and examples in this regard. Furthermore, the question whether the existing provisions are sufficient or further changes are advisable will be discussed in detail, suggestions made in this regard and a conclusion reached thereafter.*

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## INTRODUCTION

Religion is something that is highly personal, subjective and close to the heart of each and every human being. A person's religion often influences their actions and behaviour, shapes their values and morals, provides them with mental and emotional support, confers on them a sense of purpose, influences the decisions they take and thereby play an extremely crucial role in their lives. However, taking advantage of the religious affiliations of people by means of selling products and services named after religions, deities, holy books, places of worship, religious leaders, etc. has now become quite a trend. What is more, such religious marks are not only used for selling purposes but also further trademarked and monopolised. Trademarks with religious connotations are highly likely to hurt religious sentiments. Furthermore, everybody has the right to use religious marks and the same should hence not be monopolised by one individual or group of individuals for their own personal benefit.

For example, the use of the name of a Hindu God or Goddess such as Ganesha, Krishna, Laxmi or Meenakshi, or holy book such as Ramayana with respect to beef products; or the use of the name of a Muslim prophet such as Muhammad or holy book such as Koran with respect to pork products would be tantamount to "hurting religious susceptibilities" as stipulated in Section 9(2) (b) of the Trade Marks Act, 1999.<sup>3</sup> Refusal to register words like "Hallelujah"<sup>4</sup>, "Lord Buddha" and "Sri Ramakrishna" as trademarks because they have religious connotations is also a good example of the same.<sup>5</sup> Furthermore, trademarking the picture of "Goddess Meenakshi", with respect to fertilisers, was also held to be tantamount to hurting religious sentiments.<sup>6</sup> However, as what all can be brought within the ambit of "hurting religious susceptibilities" under Section 9(2) (b) has not been defined anywhere, a considerable amount of discretion has been conferred on the judicial system. This has resulted in huge disparity between the judgements passed by the courts in India over the years.

Initially, the name of deities, temples and such were not allowed to be trademarked by the court as can be observed when the Tirupati Devasthanam Board attempted to register the name of "Lord Venkateshwara"<sup>7</sup> as a trademark. However, the scenario is quite different now as can be

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<sup>3</sup>Lavish Garg, Trademarking Religion: Examining the Judicial Conundrum of Section 9(2) (b) of Indian Trademarks Act, 9 Indian Journal of Intellectual Property 73, 73-87 (2018).

<sup>4</sup>Hallelujah Trade Mark, 93 IPLR 22 (1976).

<sup>5</sup>Supra 3.

<sup>6</sup>Sri Meenakshi Tamil Nadu's Application, 89 IPLR 144 (1976).

<sup>7</sup>Ashwani Bansal, Commercial's Law of Trade Marks in India 196 (Commercial Law Publishers, 2001).

clearly understood from the fact that the Attukal Bhagawathy Temple Trust was recently able to successfully trademark the picture of the temple deity “Attukal Devi”<sup>8</sup> as well as the title “Sabarimala of Women”<sup>9</sup> in association with the temple.<sup>10</sup> Another example where such disparity is blatantly evident is the case of *Mangalore Ganesh Beedi Works v. Union of India*<sup>11</sup> and the case of *Amrital Singh v. Lal Babu Priyadarshi*<sup>12</sup>. In the former case, the court refused to bar the trademarking of the word “Ganesha” with respect to cigarettes. However, in the latter case, the court barred the registration of the word “Ramayana” as a trademark with respect to incense sticks. Clearly defining what all can be brought within the ambit of “hurting religious susceptibilities” under Section 9(2) (b) and thereby reducing the discretion granted to courts in cases of trademarking of religious marks is hence the need of the hour.

### LEGAL PROVISIONS

Section 9 of the Trade Marks Act, 1999 prescribes certain “absolute grounds for refusal of registration of a trademark”. Clause 1 of the said Section lays down the ground for refusal of registration if the trademark intended to be registered is not capable of distinguishing the product or services from others, those that designate to serve kind, quality, etc. and those that have become customary. Section 9(2)(b) explicitly states about the refusal of registration of a trademark in cases where the same is expected to hurt or offend the religious sentiments or religious susceptibilities of any class or section of people in India. Apart from Section 9(2) (b), Section 295A of the Indian Penal Code, 1860 establishes the punishment for any deliberate attempt made to outrage the religious sentiments or feelings of any particular class by indulging in acts that insult the religion or religious beliefs of that class or group of people.

India is a very diverse country with at least nine religions in existence and thus the religious sentiments and beliefs of these groups must be safeguarded. The existence of so many religions and beliefs gave rise to the common trade practice of using religious symbols, name of Gods and Goddesses, etc. to trademark a product. This practice in itself is not considered offensive unless and until the usage of such symbols, names, etc. in relation to certain products and services offends the sentiments of a certain religious group.<sup>13</sup> Using symbols or terms in

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<sup>8</sup>Attukal Devi, Trademark No. 1420800.

<sup>9</sup>Sabarimala of Women, Trademark No. 1420799.

<sup>10</sup>Suo Moto Proceedings Initiated on a Petition Received from Sri R. S. Praveen Raj, Thiruvananthapuram, Regarding Trademark Registration of the Picture of the Deity of Attukal Temple, Thiruvananthapuram, Writ Petition (Civil) No. 14153 of 2009.

<sup>11</sup>Mangalore Ganesh Beedi Works v. Union of India, 1974 AIR 1832.

<sup>12</sup>Amrital Singh v. Lal Babu Priyadarshi, (2015) 16 SCC 795.

<sup>13</sup>Supra 7.

relation with the Muslim community on alcoholic drinks can be considered as an offensive act since Muslims consider alcohol to be “*haram*” and the same can hence be brought under the ambit of Section 9(2) (b).

There have been various instances where a trademark has been refused registration even before the existence of Section 9(2) (b). The application for registering the picture of “Goddess Meenakshi”<sup>14</sup> as a trademark was refused on the ground that it offended the sentiments of a religious group. Similarly, the term “Hallelujah”<sup>15</sup> was refused registration as a trademark for a clothing line because it was against the generally accepted norms of morality and thereby affected the sentiments of a religious group. But there have been instances where trademarks have been given for a particular term or symbol which can be considered as religious. Thus, it is the discretion of the court to grant such trademarks in cases considering the circumstances at hand. But it was in the case of *Amritpal Singh v. Lal Babu Priyadarshi*<sup>16</sup> that a blanket prohibition was introduced by the Hon’ble Supreme Court of India.

Article 25 of the Constitution of India guarantees every citizen the “right to freely practice, profess and propagate a religion” provided that the same is not against “public order, morality and health”. Trademarking a religious name, symbol, etc. would be against the wordings of Article 25 since it would act as a restriction to freely “practice, profess and propagate” a religion. For example, if a picture and title of a deity is granted trademark, it would restrict the free usage of that picture and term. Hence, Section 9(2) (b) in a way upholds the provisions of Article 25 by not granting trademark to any such names or symbols that offend religious susceptibilities.

Article 18(3) of the International Convention for Civil and Political Rights (ICCPR) states that the “right to freedom of religion” is only limited to such restrictions that are prescribed by law and that are necessary for the protection of “public safety, order, health, morals and others’ fundamental rights and freedoms”. Article 18 of the Universal Declaration of Human Rights (UDHR) also states about the “right to religion”. As far as the global image is considered, the “right to religion” has been upheld in various international treaties and conventions. Monopolizing religious symbols and terms by trademarking would hence restrict people from accessing their “right to religion”

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<sup>14</sup>Supra 6.

<sup>15</sup>Supra 4.

<sup>16</sup>Supra 12.

## INTERNATIONAL PERSPECTIVE

### China

China is a multi-religious country with no official religion, just like India.<sup>17</sup> In furtherance to this Buddhism, Taoism, Islam and Christianity constitute the religion of majority population of the country.<sup>18</sup> Furthermore, folk religions such as Mazuism and Yellow Emperor Worship are also widely practiced in China.<sup>19</sup> Consequently, religious marks such as the name of religions, Gods or Goddesses, holy books, places of worship, spiritual leaders, etc. are often protected by means of trademark in the country.<sup>20</sup> Trademarking of the Shaolin Temple, with respect to goods and services, is a prime example of such a trademark.<sup>21</sup> However, registration of trademarks in China is subject to Article 10 of the Trademark Law, 1982. Furthermore, trademarking of religious marks in the country must comply with Article 36 of the Constitution.

In this regard, Article 36(3) of the Constitution stipulates that “no one may make use of religion to engage in activities that disrupt public order, impair the health of citizens or interfere with the educational system of the state”. Furthermore, Article 10(8) of the Trademark Law stipulates that “signs that are detrimental to socialist morality or customs, or having other unhealthy influences should not be used as trademarks”. In furtherance to this, in the case of *Shanghai Cheng Huang Jewellery Co., Ltd. v. Trademark Review and Adjudication Board of the State Administration for Industry and Commerce of China*<sup>22</sup>, a trademark that had been registered, with respect to jewellery and precious stones, was subsequently declared to be invalid by the court as the same offended the religious sentiments of the Taoist community. It can hence be inferred that trademarking of religious marks is, more or less, allowed in China subject to certain reasonable restrictions.

### Singapore

Singapore is also a multi-religious country with no official religion, like India and China.<sup>23</sup> In furtherance to this Buddhism, Christianity, Islam, Taoism and Hinduism constitute the religion

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<sup>17</sup>Andre Laliberte, Religion and the State in China: The Limits of Institutionalization, 2 Journal of Current Chinese Affairs 3, 3-15 (2011).

<sup>18</sup>Id.

<sup>19</sup>Daniel L. Overmyer, Religion in China Today: Introduction, 174, The China Quarterly 3077, 307-316 (2003).

<sup>20</sup>Wenqi Liu, Legal Protection for China's Traditional Knowledge, 7 Religions 1, 1-10 (2016).

<sup>21</sup>PTI, Shaolin Temple Fights to Protect Trademark, The Economic Times, Aug. 1, 2007.

<sup>22</sup>Shanghai Cheng Huang Jewellery Co., Ltd. v. Trademark Review and Adjudication Board of the State Administration for Industry and Commerce of China, Gao Xin Zhong Zi No. 539 (2014).

<sup>23</sup>Kerstin Steiner, Religion and Politics in Singapore - Matters of National Identity and Security? A Case Study of the Muslim Minority in a Secular State, 58 Osaka University Law Review 107, 107-134 (2011).

of majority of the country.<sup>24</sup> Furthermore Zoroastrianism, Judaism, Sikhism, Jainism and a few other religions are also practiced in Singapore.<sup>25</sup> Registration of trademarks in the country is subject to Article 7 of the Trade Marks Act, 1998. Furthermore, trademarking of religious marks in Singapore must comply with Article 15 of the Constitution. In this regard, Article 15(4) of the Constitution stipulates that “every person has the right to profess and practise his religion and to propagate it as long as it is not contrary to any general law relating to public order, public health or morality”. Furthermore, Article 7(1)(b), (4)(a), (5) and (6) of the Trademarks Act stipulate that “a trade mark shall not be registered if it is devoid of a distinctive character, contrary to public policy or morality, of such nature as to deceive the public or to the extent that the application is made in bad faith”.

In furtherance to this, in the cases of *Han’s (F&B) Pte Ltd. v. Gusttimo World Pte Ltd.*<sup>26</sup> and *Eley Trading Sdn Bhd v. Kwek Soo Chuan*<sup>27</sup>, the court opined that permitting a business to trademark words or phrases that other businesses may also legitimately require the use of was *prima facie* opposed to the interest of the public. Furthermore, in the latter case, the trademark that had been registered, with respect to incense sticks and scented oils, was subsequently declared to be invalid by the court as the word that had been trademarked featured prominently in Buddhist publications and was also very much associated with the Buddhist religion. It can hence be inferred that trademarking of religious marks is not allowed in Singapore despite the country not have any legal provision expressly stipulating the same.

### **United Kingdom**

The Church of England is the official state church of the United Kingdom and the monarch of the country is the Supreme Governor of the said church.<sup>28</sup> Despite this, apart from Christianity, religions such as Islam, Hinduism, Sikhism, Judaism, Buddhism, Jainism, Neopaganism and Bahá’í Faith are also practiced in the United Kingdom.<sup>29</sup> Registration of trademarks in the country is subject to Article 3 of the Trade Marks Act, 1994. In this regard, Article 3(1) (b), (2) and (6) of the Act stipulates that “a sign shall not be registered as a trademark if it is devoid of a distinctive character, contrary to public policy or to accepted principles of morality, of

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<sup>24</sup>Id.

<sup>25</sup>Joseph B. Tamney, Religion and the State in Singapore, 30 Journal of Church and State 109, 109-128 (1988).

<sup>26</sup>Han’s (F&B) Pte Ltd. v. Gusttimo World Pte Ltd., [2015] 2 SLR 825.

<sup>27</sup>Eley Trading Sdn Bhd v. Kwek Soo Chuan, [2017] SGIPOS 15.

<sup>28</sup>David Voas and Steve Bruce, Religion: Identity, Behavior and Belief Over Two Decades, 36 British Social Attitudes 1, 1-29 (2019).

<sup>29</sup>Clive D. Field, Measuring Religious Affiliation in Great Britain: The 2011 Census in Historical and Methodological Context, 44 Religion 357, 357-382 (2014).

such a nature as to deceive the public or to the extent that the application is made in bad faith”. In furtherance to this, the word “Jesus” with respect to clothing, cosmetics, optical apparatus, precious metals, stationary, leather, textiles, games, etc. was denied registration as a trademark due to being contrary to public policy and few other such considerations.<sup>30</sup>

Though the United Kingdom does not have a written constitution, Article 9(2) of the European Convention on Human Rights (ECHR) stipulates that “freedom to manifest one's religion or beliefs shall be subject to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others”. Article 18(3) of the International Convention on Civil and Political Rights (ICCPR) also contains a similar provision. Furthermore, the Human Rights Act, 1988 makes the ECHR enforceable in the courts of the country, thereby making the provisions of the convention tantamount to the laws of the United Kingdom. It can hence be inferred that trademarking of religious marks is not allowed in the country despite the United Kingdom not have any legal provision explicitly prescribing the same.

### **United States**

The United States is a Christian majority country.<sup>31</sup> However, several other religions such as Judaism, Islam, Bahá'í Faith, Rastafarianism, Buddhism, Hinduism, Jainism, Sikhism and Taoism are also practiced here.<sup>32</sup> Consequently, religious marks are often protected by means of trademark in the country. Trademarking of the Episcopal Church, with respect to religious instruction services, is a prime example of such a trademark.<sup>33</sup> As opposed to several other countries, protection of religious marks by way of trademark is allowed in the United States as they believe that protection of reputation is also as important as making profit and selling goods.<sup>34</sup> Furthermore, goods and services in the country are often named after religions, deities, holy books, places of worship, religious leaders, etc. and also thereafter registered as

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<sup>30</sup>Trade Marks (International Registration) Order 1996 in the Matter of: Requests by Basic Trademark SA for Protection in the United Kingdom of (1) International Trade Mark No. 689374 in Class 25 and (2) International Trade Mark No. 776058 in Classes 3, 9, 14, 16, 18, 24 and 28.

<sup>31</sup>The Boisi Center, Religious Pluralism in the United States, Papers on Religion in the United States (Aug. 25, 2021, 10:00 AM), [https://www.bc.edu/content/dam/files/centers/boisi/pdf/bc\\_papers/BCP-Pluralism.pdf](https://www.bc.edu/content/dam/files/centers/boisi/pdf/bc_papers/BCP-Pluralism.pdf).

<sup>32</sup>Id.

<sup>33</sup>Episcopal Church, Trademark No. 3379870.

<sup>34</sup>Supra 21.

trademarks.<sup>35</sup> In this regard, the word “Jesus”<sup>36</sup> with respect to jeans, “God”<sup>37</sup> with respect to computer application software and “True Religion”<sup>38</sup> with respect to handbags, belts, etc. were registered as trademarks in the United States by BasicNet, Morell International Inc. and Guru Denim Inc. respectively. Furthermore, the words “The God Helmet”<sup>39</sup> with respect to fitness evaluation and consultation have also been trademarked in the country.

However, registration of trademarks in the United States must comply with and is subject to Section 2 of the Lanham Act, 1946. In this regard, Section 2(a) of the Act stipulates that “no trademark should be refused registration unless it consists of immoral, deceptive or scandalous matter; or matter which may falsely suggest a connection with persons, institutions or beliefs; or bring them into contempt or disrepute”. In furtherance to this, in the case of *In Re Riverbank Canning Co.*<sup>40</sup>, the court opined that the word “Madonna” could not be trademarked, with respect to wine and other similar products, as the word was often associated with Virgin Mary and thus would constitute immoral or scandalous matter. It can hence be inferred that trademarking of religious marks is allowed in the country to a considerable degree.

## CRITICAL ANALYSIS

The practice of not granting trademarks to proprietors who use religious symbols, terms and other related material existed even before the enactment of the legislation that governed the same. Even before the enactment of any such legislation, the Bombay Mill Owners Association maintained a proprietor register for trademarks and refused to grant trademarks in cases where it contained religious names.<sup>41</sup> However, after the introduction of a codified trademark law in the country, the ground for refusal of trademarks on the basis of hurting religious sentiments was followed.<sup>42</sup> The provision mainly stated about hurting the religious sentiments of the people and did not define any aspect of such susceptibilities and it was very much understood that a blanket prohibition was never envisaged by the law.<sup>43</sup> The same provisions were carried

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<sup>35</sup>Id.

<sup>36</sup>Allison McCowan, Jesus Jeans and Jesus Surfing: Trademarking Jesus, Journal of Business and Intellectual Property Law (Aug. 24, 2021, 4:00 PM), <http://ipjournal.law.wfu.edu/2013/03/jesus-jeans-and-jesus-surfed-trademarking-jesus/>.

<sup>37</sup>God, Trademark No. 5004970.

<sup>38</sup>True Religion, Trademark No. 3628973.

<sup>39</sup>The God Helmet, Trademark No. 4531717.

<sup>40</sup>In Re Riverbank Canning Co., 95 F.2d 327.

<sup>41</sup>Kapil Wadhwa and Dr. Abhishek Manu Singhvi, Venkateswaran on Trademarks and Passing off 155 (Lexis Nexis, 2015).

<sup>42</sup>Supra 3.

<sup>43</sup>Id.



forward to the successive enactments and trademark laws in the country.<sup>44</sup> Section 11(d) of the Trade and Merchandise Act, 1958 and Section 9(2) (b) of the Trade Marks Act, 1999 show a similar picture to the provision that was followed in the Trade Marks Act, 1940.

Considering the provisions of the legislations governing trademarks, it is impossible to draw a straight line between trademarks hurting the religious sentiments of the people and granting the trademark to the proprietor. Hence, it is upon the direction of the court that a case on whether to grant the trademark is decided. It was the discretion of the court to adjudicate a case considering the different circumstances and interpret the same provision on a case-to-case basis. This discretionary power of the court can be clearly understood in the case of *Mangalore Ganesh Beedi Works v. Union of India*<sup>45</sup>, where the Allahabad High Court granted the use of trademark of the term “Ganesha” on beedi packets. The respondent on the other hand claimed that smoking beedi is considered as a wrong in Hinduism and also the packet would later be squeezed and thrown into the dustbin after usage, which is equally wrong and both this hurt the religious sentiments of the people belonging to the Hindu community. This argument was, however, not accepted by the court and the trademark was granted by declining the bar for registration.

But in other cases, such as when the picture of “Goddess Meenakshi” was registered for trademarking fertilizers and manure mixtures, the same was refused on the ground that it hurt the religious sentiments of the people.<sup>46</sup> Here, it is difficult to draw a distinction between the two cases. Hence, it can be understood that it is the pure discretion of the court to decline the bar for registration considering the circumstances of the case and the courts have failed to maintain a uniform standard to draw such a distinction. But later in 2015, the Supreme Court of India adopted a blanket prohibition which stated that the mere usage of religious names for trademarking a product will be affected by Section 9(2) (b) of the Trade Marks Act, 1999 and the same would be refused on the basis of certain considerations.

The blanket prohibition on registration of names of religious books extending to all names associated with religion was adopted by the Supreme Court for the first time in the case *Amritpal Singh v. Lal Babu Priyadarshi*<sup>47</sup>. In this particular case, the appellant filed for registration of trademark of the word “Ramayana” for incense sticks and perfume that would

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<sup>44</sup>Id.

<sup>45</sup>Supra 10.

<sup>46</sup>Supra 5.

<sup>47</sup>Supra 11.

be manufactured and sold. However, the respondent claimed that allowing such a registration would be against the spirit of Section 9(2) (b) since it would give the proprietor an exclusive right over the name of a religious text. The ruling of the court was in accordance with the claim of the respondent and the court went on to state that no single person should have the exclusive right to use the name of any holy or religious text.

Reference to Report 8 on the Trade Marks Bill, 1993 was also made by the court to point out the opinion that had been made by the committee with regards to usage of symbols that referred to any particular God or Goddesses, place of worship, etc. stating that the same would not be granted trademark.<sup>48</sup> But it is important to note in this case that the court failed to establish whether the registration of such a trademark offended the religious sentiments of any group involved. But instead, the court just ruled that exclusivity cannot be granted and the usage is contrary to Section 9(2) (b). Here, it can be clearly understood that exclusivity cannot be the sole reason for not granting trademark under Section 9(2) (b) considering the wordings of the Section. The Hon'ble Supreme Court, in this instance, failed to explain the applicability of exclusivity with regards to the Section. It was very vague and unclear whether it hurt the sentiments of a group of people and the same aspect was overlooked by the Hon'ble Court.

Prohibiting the usage of names of religious texts as trademarks would logically prohibit the usage of names of Gods and Goddesses. There are over nine religions in India and the Hindu religion itself has 330 million different Gods and Goddesses.<sup>49</sup> Considering the total numerical value of names that is prohibited under this provision would result in an astronomical number of names having such prohibition. But there have been instances where such trademarks were given to the name of Gods and Goddesses like in the case of *S. P Chengalvaraya Naidu v. Jagnath*<sup>50</sup> and *Registrar of Trade Marks v. Ashok Chandra Rakhit Ltd.*<sup>51</sup>. In fact, the trademark journals in itself would have a considerable number of names of Gods, Goddesses and other religious terms trademarked.<sup>52</sup> This gives rise to an inconsistency in applying the Section in similar cases, thus denoting an unjust practice that is followed.

It is a well settled fact that common names cannot be trademarked and the same is clear under Section 9(1) of the Trade Marks Act, 1999. Similarly, religious names lack such distinctiveness and cannot be trademarked. The courts in many cases have pointed out the same and stated that

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<sup>48</sup>Government of India, Lok Sabha's Eighth Report on the Trade Marks Bill, 1993 (1995).

<sup>49</sup>W. J. Wilkins, Hindu Mythology: Vedic and Puranic, 52 (Thacker, Spink & Co., 1900).

<sup>50</sup>*S. P Chengalvaraya Naidu v. Jagnath*, JT 1993 (6) SC 331.

<sup>51</sup>*Registrar of Trade Marks v. Ashok Chandra Rakhit Ltd.*, AIR 1955 SC 555.

<sup>52</sup>*Supra* 3.

religious names cannot be monopolized. The Bombay High Court has held that the term “Laxmi” cannot be trademarked since it is a common name.<sup>53</sup> But, the problem arises where these name of Gods and Goddesses are also common personal names. So, what should be the distinction between the common names of persons and common names of Gods and Goddesses?<sup>54</sup> Is it necessary that the names of Gods and Goddesses must be treated specially and differently? In the recent judgment by the Madras High Court, the court held that “Vishnu” was a very common personal name and did not belong to any religion.<sup>55</sup>

Similarly, there must be some distinctiveness in the name that is trademarked. It is difficult to trademark the names of Gods and Goddesses considering the fact that it is impossible to create a secondary distinctiveness. In the case of *Bhole Baba Milk Food Industries Ltd. v. Parul Food Specialities Pvt. Ltd.*<sup>56</sup>, the Delhi High Court held that “Krishna” was a common name and referred to Lord Krishna, a popular Hindu deity associated with milk and milk products according to the Hindu Puranas, and the same has therefore not acquired any distinctiveness. Hence, the court held that the name cannot be monopolized in association with dairy products. In the same case, the respondent sold products under the label “Parul’s Lord Krishna” with the term “Krishna” highlighted wherein the court directed the respondent to use all the three words in similar font to avoid any kind of confusion.

In another case, *Kewal Krishna Kumar v. Rudi Roller Flour Mills*<sup>57</sup>, the appellant had obtained a trademark for the term “Shiv Shakti” in 1832. The question before the court was whether the same could be trademarked or not. The respondent applied for trademarking the term, “Shakti Bhog”. The court held that “Shiv Shakti” is phonetically far away from the term “Shiv Bhog”. Even though the term “Shakti” is common in both the trademarks, it merely acts as a descriptive word. The court hence stated that there cannot be any monopoly over the word “Shakti” which was merely a descriptive word. This case clearly deals with the aspect of drawing a secondary distinctiveness. In both the trademarks mentioned in the case, the common term is a mere description and the two trademarks have their own distinctive features as required by the legal provisions governing the same.

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<sup>53</sup>Freudenberg Gala Household Products v. GEBI Products, CA 72/201 (Bom).

<sup>54</sup>S. K. Sachdeva v. Shri Educare Limited, CS (OS) 1151/2014.

<sup>55</sup>Ananthaya v. Vishnu, CA 421/2016 (Mad).

<sup>56</sup>Bhole Baba Milk Food Industries Ltd. v. Parul Food Specialities Pvt. Ltd., 2011 (48) PTC 235 (Del).

<sup>57</sup>Kewal Krishna Kumar v. Rudi Roller Flour Mills, 2007 (35) PTC 848 Del.

Recently, the Attukal Bhagawathy Temple Trust in Kerala acquired trademark protection for a picture of its deity<sup>58</sup> and for the title<sup>59</sup> “Sabarimala of Women”. The same was questioned in the High Court of Kerala stating that it violated the provisions contained in Section 9(2) (b) and also provided the temple trust with monopoly over the deity and the title.<sup>60</sup> The court dismissed the said petition and granted trademark to the Temple Trust.<sup>61</sup> The Court stated that “what assumes significance is the status of the deity as also that of the Trust in relation to the deity.”<sup>62</sup> In order to create the connection between the traded goods and service and the person acting as the proprietor, the court first elevated the status of the Trust as the Manager of the estate of the idol and then granted the secondary distinctiveness holding.<sup>63</sup>

But whatever the case maybe, by holding the trust as the Manager, the court has overlooked the bigger problem at hand, that is, monopolizing the idol and the title. Also, the same violates the “right to free practice of religion” guaranteed under Article 25 of the Constitution of India by excluding others from using the title or name of the deity. Hence, these cases and judgments prove that there still do not exist a clear and uniform threshold to determine the granting of trademarks in cases where it questions the provision under Section 9(2) (b) of the Trade Marks Act, 1999. Also, the aspect of hurting religious sentiments has been overlooked by the courts in many cases by focusing more on monopolizing a common name.

As far as the global scenario is considered, many countries like Singapore, United Kingdom, etc. have provisions that restrict the registration of trademarks which hurt the religious sentiments of a class or a community.<sup>64</sup> China and United States, however, are two countries that do not have any such restrictions on registering a religious mark as a trademark under reasonable circumstances.<sup>65</sup> But liberalizing the registration of trademarks without considering the sentiments of people can be a bane and similarly, too much restriction on religious basis would also defeat the purpose. Hence, it is important to find something between the two. India, though trying to strike that balance, has failed to provide the necessary guidelines that would help in applying the law governing the same. This has led to the unjust and unfair practice of

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<sup>58</sup>Supra 8.

<sup>59</sup>Supra 9.

<sup>60</sup>Jithin Saji Isaac, A Nod to Appropriating Deity, 10 Journal of Intellectual Property Law and Practice 1, 1-3 (2015).

<sup>61</sup>Id.

<sup>62</sup>Id.

<sup>63</sup>Supra 10.

<sup>64</sup>Ankita Ansari, Commercialising Religion via Trademarking God 23 The Journal of World Intellectual Property 75, 75-81 (2020).

<sup>65</sup>Id.

granting trademark in the country under Section 9(2) (b) when compared to legislations and practices followed by other countries.

## **RECOMMENDATIONS**

India is a diverse country with many religions and beliefs. The people in the country consider religion close to their heart and daily life. This has made religion to be a basis of many political and communal issues in the country. A percentage of the population in the country is willing to fight and die for their religion and there have been instances proving the same. Considering the fact that religion is a very sensitive topic in the country, it is important to have provisions that are fool proof with respect to this aspect of the society. As far as the Trade Marks Act, 1999 is considered, Section 9(2) (b) speaks about the refusal to grant trademark to those terms or symbols that hurt the religious sentiments of the people. But the Section in itself is vague and unclear. It provides too much discretion to the court to decide whether to grant a trademark or not. The Section does not define the terms or religious connotations that can be restricted under the Section. Neither does it provide any guidelines for the court to act on this basis.

This loophole in the Section has led to unjust practices and the court granting and refusing to grant trademarks in various cases without setting a clear boundary. The earlier decisions of the court have lacked uniformity and consistency. In many cases, the court has overlooked the aspect of hurting the religious sentiments of a religious group and refused to grant trademark since it monopolizes a term and this same justification has been brought under Section 9(2) (b). It is important to set guidelines on which the court can act in accordance with Section 9(2) (b). The guidelines should define the threshold or rather the division where a trademark can be granted and not granted considering the provisions of the Section. This is important to maintain uniformity and make sure that a just and fair practice of granting trademarks is followed.

Similarly, in many cases, the court has refused to grant trademark stating that a particular term cannot be monopolized. Section 9(1) states that a trademark can be granted only if the term or symbol that is to be registered is distinguishable. But the degree of distinction need is not defined anywhere in the Section. The blanket prohibition refuses the registration of names of holy texts and books, leading to the refusal of the registration of the names of Gods and Goddesses. But in many cases, the same names are also names of people and this creates confusion. It is necessary that there needs to be a barrier in registering common names but in many cases, it is not possible to create a distinction. Hence, proper and structured guidelines

addressing the same issue is necessary for the court to function according to the objectives that are sought to be achieved by Section 9(2) (b) of the Trade Marks Act, 1999.

## CONCLUSION

In India, Section 9(2) (b) of the Trade Marks Act, 1999 restricts the registration of trademarks in cases where it hurts the religious sentiments of a class or community. This was a practice that has been followed even in the previous legislations and it is important in a country like India with various religions and beliefs.<sup>66</sup> But the age-old legislations and the amended legislation have failed to provide proper guidelines according to which the Section can be applied. This has resulted in the courts having higher discretionary power to decide cases by examining the circumstances and not properly applying the Section or overlooking the provisions embedded therein. There have been many instances where the courts have granted trademark which is in contradiction to the provisions mentioned in Section 9(2) (b) and similarly, the courts have refused to grant trademarks in cases where the same did not offend religious susceptibilities.<sup>67</sup>

This has resulted in not having a uniform pattern and unjust way of granting and refusing to grant trademarks. It was not until 2015 that a blanket prohibition was applied to the registration of trademarks with names of holy texts and thereby prohibiting the registration of names of Gods and Goddesses as trademarks.<sup>68</sup> But even after this, there have been confusion regarding the guidelines or factors that should be considered before granting registration to a trademark. It is the need of the hour to provide proper guidelines addressing the issues especially in this situation where the crimes on behalf of religion are increasing. Furthermore, questions such as whether it is actually necessary for the names of deities to be treated specially and differently from that of common people has to be answered taking into consideration the fact that several people in India are in fact named after Gods and Goddesses.

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<sup>66</sup>Supra 3.

<sup>67</sup>Id.

<sup>68</sup>Supra 12.