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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 4th February, 2014

+ **W.P(Crl.)1223/2011**

GODREJ CONSUMER PRODUCTS LTD Petitioner
Through: Mr. Rajiv Tyagi, Advocate

versus

CONTROLLER OF LEGAL METROLOGY & ORS. Respondent
Through: Mr. Dayan Krishnan, ASC

+ **W.P(Crl.)1259/2012**

GODREJ CONSUMER PRODUCTS LTD Petitioner
Through: Mr. Rajiv Tyagi, Advocate

versus

CONTROLLER OF LEGAL METROLOGY & ORS..... Respondent
Through: Mr. Dayan Krishnan, ASC

CORAM:
HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. Vide this common order, I shall dispose of two writ petitions bearing No. WP(Crl.) 1223/2011 and WP(Crl.) 1259/2012 as both the writ petitions are between the same parties and substantially common

question of law is involved in both the petitions.

2. The petition bearing No. WP(Crl.) 1223/2011 u/S 482 Cr.P.C. r/w Article 227 of the Constitution of India has been filed by the petitioner for issuing writ of *mandamus*, *certiorari* or any other appropriate writ, order or direction for quashing two criminal complaints bearing Nos. APP/WEST/ZIM/1926 and APP/WEST/ZIM/111/11 pending before learned Metropolitan Magistrate filed u/s 39 and 63 of SWM Act, 1976 and Rules 11 and 39 (2) of the Standards of Weights and Measures (Packaged Commodities) Rules, 1977.

3. It is the case of the petitioner that the petitioner is a marketer of personal hygiene, body care and shoe care products. The petitioner was a license holder of the trademark 'KIWI' which is an internationally reputed brand of shoe creams and shoe polishes. Respondent No.2 conducted an inspection at the departmental store of M/s. Reliance Fresh situated at 27, Ground Floor, Paschim Vihar Extn., New Delhi-110063 on 21st April, 2010 and took samples of certain products on display at the departmental store and, *inter alia*, inspected a packet/container of 'Kiwi shoe polish' displaying an MRP of Rs. 25/- (inclusive of taxes), manufactured in December, 2007, net

weight 40 gms. (when packed).

4. A notice dated 24th May, 2010 was issued to the petitioner whereby the petitioner was informed that it was liable to pay a fine of Rs.2000/- per Director for compounding of the offence for contravention of Sections 39, 48, 51 and 63 of SWM Act, 1976 and Rules 11 and 39 (2) of the Packaged Commodities Rules, 1977.

5. It is further alleged that respondent No. 2 again conducted an inspection at another departmental store of M/s. Bhatia Medical Store, situated at Cottage No. 37, West Patel Nagar, New Delhi-110008 on 15th September, 2010 and inspected a packet/container of 'Kiwi Wax Rich shoe polish' displaying an MRP of Rs.33/- (inclusive of taxes), manufactured in July, 2009, net weight 40 gms. (when packed) and thereafter, issued another notice dated 27th December, 2010 whereby the petitioner was directed to pay a fine of Rs.5000/- per Director for compounding of the offence for contravention of Sections 39 and 63 of SWM Act, 1976. It is alleged that there was no violation of SWM Act 1976 or the Rules 11 and 39 (2) of the Packaged Commodities Rules, 1977 as 'Kiwi Shoe polish' and 'Kiwi Wax Rich shoe polish', fell within the expression 'Cream' as appearing at S.No.6 of the Fourth Schedule to the Standards of Weights and Measures (Packaged

Commodities) Rules, 1977 and petitioner was required by law as existing at the relevant time, to declare the quantity of commodity qualified by the words “when packed”. The petitioner further pointed out that the impugned packet of ‘Kiwi shoe polish/Kiwi Wax Rich shoe polish/shoe cream’ was manufactured and sold before the amendment to Rule 11 and the Fourth Schedule to the Packaged Commodities Rules, 1977 came into effect. Even otherwise, it was in public interest that the petitioner made the correct disclosure with regard to the net weight of the packet as shoe polish/shoe cream packages naturally loose weight after packaging due to loss of moisture and evaporation of the turpentine oil which is one of the ingredients of the shoe polish/shoe cream. Therefore, no *mala fide* or *mens rea* could be attributed to the petitioner. Without considering the fact that the petitioner has not committed any infraction of law, the respondent insisted upon the petitioner to pay the compounding fine of Rs.2000/- and Rs.5000/- respectively failing which they shall be prosecuted in accordance with law. The petitioner did not submit to the unreasonable and unlawful stand taken by the respondents. Therefore, the respondents filed two complaints bearing Criminal Complaint Nos. APP/WEST/ZIM/1926 and APP/WEST/ZIM/111/11

before the learned Metropolitan Magistrate, Karkardooma Courts, New Delhi. Learned Metropolitan Magistrate, in a mechanical manner and without due application of mind, issued notice to all the Directors of the petitioner calling upon them to appear before the Court. The action of the respondent in instituting the criminal proceedings against the petitioner is without any basis and the proceedings are liable to be quashed.

6. The petition has been contested by the respondent, who, in its reply submitted that two separate complaints were filed by the Department based on two different inspections conducted by two different officers of the Department in the area under their respective jurisdiction. The petitioner was issued notices only for violation of Rule 11 punishable under Rule 39(2) of the Standards of Weights and Measures (Packaged Commodities) Rules, 1977 in one complaint and in the other complaint notices were issued under Section 39 punishable u/s 63 of the SWM Act, 1976. As per the Fourth Schedule of the Standards of Weights and Measures (Packaged Commodities) Rules, 1977, fourteen items were allowed to use the term 'when packed' along with the declaration of the net content of the packages till 1st May, 2008. Thereafter, the term 'when packed' was not

allowed on any kind of items. Again, w.e.f. 2nd September, 2009, the term 'when packed' was allowed to be used with three items only i.e., soaps, cream (other than creams of milk) and lotion. Though, the article 'cream' was in the Fourth Schedule before deletion and also after reintroduction, but the petitioner's article has a generic name of shoe polish and do not fall in the category of 'cream'.

7. WP(Crl.) 1259/2012 has been filed on the allegation that respondent No.2 conducted an inspection at the premises of M/s. Shoe Vatika, situated at A-8, Block B-4, DDA Market, Keshav Puram, Lawrence Road, New Delhi on 5th July, 2011 and inspected a packet of Kiwi shoe polish, manufactured in March, 2010, net weight 15 gms. (when packed). A notice dated 30.9.2011 was issued calling upon the petitioner to pay fine upto Rs.25,000/- per Director for compounding of the offence for contravention of Section 18(1) and 36(1) of the Legal Metrology Act on the ground of violation of Standard of Weights and Measures Act, 1976 and Rule 11 of the Packaged Commodities Rules, 1977. Petitioner filed reply dated 9.11.2011 denying any violation of law. The respondent in a mechanical manner filed the Criminal Complaint No. NW/W&M/213/GEN/LMO/03 before learned Metropolitan

Magistrate, Karkardooma Courts, against the petitioner under Section 18(1) and 36(1) of the Legal Metrology Act and learned Metropolitan Magistrate summoned the Directors of the petitioner, which is liable to be quashed.

8. In reply, respondent filed the affidavit of Sh. Pankaj Roy Gupta, Zonal Officer in the office of Controller of Legal Metrology, Weights and Measures, Government of NCT of Delhi where it is alleged that the product in question does not come under the category of cream to which an exemption is provided in the Rule 11(4) read with the Third Schedule of the Legal Metrology (Packaged Commodities) Rules 2011. The product is covered under Rule 11(3) of the Legal Metrology (Packaged commodities) Rules, 2011. Furthermore, it has been declared as a shoe polish even on the container of the product. The product in question was not a shoe cream but a wax product that is chemically derived from petroleum and cannot be classified as, or covered under the definition of cream as given in the Third Schedule. Petition, being without any legal basis, deserves to be dismissed.

9. Since the dispute in both the petitions is substantially the same, I shall take up petition No. 1223/2011.

10. I have heard Sh. Rajiv Tyagi, Advocate for the petitioner and Sh. Dayan Krishnan, learned Additional Standing Counsel for the State and have perused the record.

11. It was submitted by the learned counsel for petitioner that the complaint has been filed without due application of mind. The same has been filed in the printed proforma but columns of the proforma has not been filled up and has been left blank, therefore, the allegations in the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence as alleged and the complaint deserves to be dismissed.

12. Moreover, the allegations give rise to a civil dispute as to whether the 'Kiwi shoe polish/Shoe cream' fell within the expression 'cream' appearing in the 4th Schedule of Standards of Weights and Measures (Packaged Commodities) Rules, 1977.

13. It is the case of the respondent that the petitioner has qualified the net weight of 'Kiwi shoe polish' by the words 'when packed'. It was submitted that the shoe polish/cream, when packed, contains moisture and turpentine oil which evaporates with the passage of time, as such, due to natural reasons, the product is designed to loose weight with time. As such, the petitioner qualified the net weight of

the package with the words 'when packed'. As per the Tariff Item 34.05 of the Central Excise Tariff Act, 1985, the Central Government has used the expression 'Polishes and creams' interchangeably for footwear. As such, as per this Tariff, even according to the Central Government, the 'shoe polish and cream' are one and the same thing. The SWM Act, 1976 has also been enacted by the Central Government. Therefore, the product of the petitioner would fall under serial No. 3 of the 4th Schedule to the Standards of Weights and Measures (Packaged Commodities) Rules Act, 1977 which prescribes that the net weight of the product 'cream' can be qualified by the words 'when packed'. Rule 11 of the Standards of Weights and Measures (Packaged Commodities) Rules, 1977 provided for the declaration of quantity in relation to the commodities specified in the 4th Schedule which will likely to undergo significant variations in weight or measure on account of environmental or other conditions and as such, may be qualified by the words 'when packed'. As such, it was submitted that the impugned Criminal Complaints and the Summoning Orders deserve to be quashed.

14. Reliance was placed on *R.P. Kapur vs. State of Punjab*, AIR 1960 SC 866; *Alpic Finance Ltd. vs. P. Sadasivan and Another*,

(2001) 3 SCC 513; *Madhavrao Jiwajirao Scindia and Ors. vs. Sambhajirao Chandrojirao Angre and Ors.*, (1988) 1 SCC 692.

15. Rebutting the submissions of learned counsel for the petitioner, it was submitted by the learned Additional Standing counsel for the respondent that the petitioner was selling Kiwi brand shoe polish with the words ‘when packed’ along with the declaration of the net contents on the packages of the shoe polish. As per the 4th Schedule of Standards of Weights and Measures (Packaged Commodities) Rules, 1977, the words ‘when packed’ were not allowed to be used for shoe polish and could only be used for the commodities specified therein. The words ‘when packed’ can be used for certain products, including “cream (other than cream of milk)”. The petitioner is attempting to classify shoe polish within the category of “cream (other than cream of milk)” and as such, he is claiming that the use of the words ‘when packed’ is justified and is not in contravention of the provisions of Standards of Weights and Measures (Packaged Commodities) Rules, 1977. It was submitted that the test to determine which category of products, the product falls in, is the “common parlance test”. As per the common parlance test, the words ‘shoe polish’ must be construed in the popular sense and cannot be

considered to fall within the meaning of cream. As per the case of the petitioner itself, the product has been described as shoe polish and not cream, on the packaging of the product. Alternative remedy was available to the petitioner to file the revision before the Sessions Court, if he was aggrieved by the summoning order. Instead of doing so, the writ petition has been filed which should not have been resorted to. Moreover, in the writ petition, the Court cannot embark upon the disputed questions of fact. As such, the petition is not maintainable and the same is liable to be dismissed.

16. The short question for consideration is whether there is sufficient grounds for invoking the power u/S 482 Cr.P.C. for setting aside the proceedings pending before the Magistrate. In ***R.P. Kapur (supra)***, relied upon by learned counsel for the appellant, Hon'ble Supreme Court considered the scope of inherent powers of the High Court u/s 561-A of Criminal Procedure Code, 1898, which is *para materia* the same as Section 482 of Criminal Procedure Code, 1973.

It was observed as under:-

“The inherent power of High Court under Section 561-A of the Code cannot be exercised in regard to matters specifically covered by the other provisions of the Code. The inherent jurisdiction of the High Court can be exercised to quash proceedings in a proper case either to prevent the abuse of the

process of any court or otherwise to secure the ends of justice. Ordinarily criminal proceedings instituted against an accused person must be tried under the provisions of the Code, and the High Court would be reluctant to interfere with the said proceedings at an interlocutory stage. It is not possible, desirable or expedient to lay down any inflexible rule which would govern the exercise of this inherent jurisdiction.

Some of the categories of cases when the inherent jurisdiction to quash proceedings can and should be exercised are:

- (i) Where it manifestly appears that there is a legal bar against the institution or continuance of the criminal proceeding in respect of the offence alleged. Absence of the requisite sanction may, for instance, furnish cases under this category.*
- (ii) Where the allegations in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged, in such, cases no question of appreciating evidence arises; it is a matter merely of looking at the complaint or the First Information Report to decide whether the offence alleged is disclosed or not.*
- (iii) Where the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or the evidence adduced clearly or manifestly fails to prove the charge. In dealing with this class of cases it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question. In exercising its jurisdiction under S.561-A the High Court would not embark upon an enquiry as to whether the evidence in question is reliable or not. That is the function of the trial magistrate and ordinarily it would not be open to a party to invoke the High Court's inherent jurisdiction and contend that on a reasonable appreciation of the evidence the accusation made against the accused would not be sustained."*

17. In *Alpic Finance Ltd.(supra)*, Hon'ble Supreme Court referred to its earlier decision in *Nagawwa vs . Veeranna Shivalingappa Konjalgi and Others*, (1976) 3 SCC 736, when it was held that the Magistrate while issuing process against the accused should satisfy himself as to whether the allegations in the complaint, if proved, would ultimately end in the conviction of the accused. It was held that the order of Magistrate issuing process against the accused could be quashed under the following circumstances:-

“(1) Where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;

(2) Where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;

(3) Where the discretion exercised by the magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and

(4) Where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of complaint by legally competent authority and the like.”

18. Relying upon these authorities, the basic submission of learned counsel for the petitioner is that the various columns of the printed

proforma of the complaint are not filled up and left blank and, therefore, the allegation in the complaint even if they are taken at their face value, do not constitute the offence as alleged. Copy of the complaint has been placed on record and perusal of the same goes to show that only date and the inspection memo number are blank, however, no prejudice is caused to the petitioner because in the petition itself, the date of inspection and the notice giving the entire details have been mentioned, copy of which has also been placed on record. Therefore, it cannot be said that the allegations made in the complaint do not constitute the offence alleged against the petitioner which warrants quashing of the complaint.

19. As regards the next limb of argument that basically it is a civil dispute as to whether the 'Kiwi shoe polish' falls within the expression 'cream' appearing in Fourth Schedule to the Standards of Weights and Measures (Packaged Commodities) Rules, 1977. In *Alpic Finance* (supra), Hon'ble Supreme Court has referred to *Trisuns Chemical Industry v. Rajesh Agarwal*, (1999) 8 SCC 686 wherein it was held that merely because an act has a civil profile is not sufficient to denude it of its criminal outfit. Reference was also made to *Pratibha Rani vs. Suraj Kumar*, (1985) 2 SCC 370, where

the question arose when the civil as well as the criminal remedy is available to a party, can a criminal prosecution be completely barred. It was held that there are a large number of cases, where criminal law and civil law can run side by side. The two remedies are not mutually exclusive but clearly coextensive and essentially differ in their content and consequence. The object of the criminal law is to punish an offender who commits an offence against a person, property or the State for which the accused, on proof of the offence, is deprived of his liberty and in some cases even his life. This does not, however, affect the civil remedies at all for suing the wrongdoer in cases like arson, accidents, etc. It is an anathema to suppose that when a civil remedy is available, a criminal prosecution is completely barred. The two types of actions are quite different in content, scope and import.

20. The present case stands on a much better footing, inasmuch as, the complaint has been filed by the respondent for violation of SWM Act, 1976 and Rules 11 and 39 (2) of the of the Standards of Weights and Measures (Packaged Commodities) Rules, 1977 for contravention of which penalty is liable to be imposed, as such, criminal proceedings was the only remedy which has been initiated

by the respondent. In fact, it is the petitioner who is trying to give the controversy a colour of civil dispute by urging that ‘Kiwi shoe polish’ falls within the expression ‘cream’ appearing in 4th Schedule of the Standards of Weights and Measures (Packaged Commodities Rules) Act, 1977 and, as such, there is no violation of the rules.

21. It is not the case of the respondent that the shoe polish falls within the expression of ‘cream’ so that the petitioner can get benefit of the rules mentioned above. Therefore, it will be a question of fact whether “Kiwi shoe polish” falls within the expression ‘cream’ or not. In a writ petition, ordinarily such disputed question of facts are not required to be entertained. The moment there is a debatable area in the case, it is not amenable to the writ jurisdiction of the High Court. This Court in exercise of jurisdiction under Article 226/227 of the Constitution cannot adjudicate the matter where the foundational facts are disputed. Rival contentions of the parties cannot be decided in a writ proceedings as held in *Himmat Singh vs. State of Haryana & Ors.*, (2006) 9 SCC 256; *Mukesh Kumar Aggarwal vs. State of Uttar Pradesh & Ors.*, (2009) 13 SCC 693; *Bhagavat Singh and etc. vs. State of Tamil Nadu and Ors.*, 1998 Cr.LJ 3513. This Court is not required to embark upon an enquiry whether the allegations in

the petition which are controverted by the respondents are correct or not.

22. It will be open to the petitioner to urge all these facts before the learned Metropolitan Magistrate who is seized of the complaint. However, there are no grounds for invoking the extraordinary jurisdiction of this Court for quashing of the complaint, as prayed by the petitioner, as such, the same is dismissed.

SUNITA GUPTA, J

FEBRUARY 04, 2014

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