

\$~9

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 08.01.2020

+ CRL.M.C. 476/2017 & CrI.M.A.2091/2017

KULWINDER SINGH & ORS. Petitioners

Through: Mr.Amar Vivek, Adv. with Mr.K.K.
Gautam, Adv.

versus

STATE & ANR. Respondents

Through: Mr.Kamal Kr. Ghai, APP for State.
SI Kulvinder Singh, Insp.Amit Issar
& Insp.Jitendra Singh, Sec.II/EOW.
Mr.Dushyant K. Mahant, Adv. with
Ms.Shivani G. Mahant, Adv. for R-2.

CORAM:
HON'BLE MR. JUSTICE SURESH KUMAR KAIT

J U D G M E N T (O R A L)

1. Vide the present petition, petitioners seek direction thereby to set aside impugned judgment and orders dated 23.11.2016 passed by learned CMM-02, Central District, Delhi in case No.294814/16 and discharge the petitioners in case FIR No.394/2005 registered at Police Station Kotwali.
2. The brief facts of the case are that the respondent no.2 on 01.07.2005, filed a complaint against unknown persons, despite the fact that earlier

Respondent no.2 had obtained interim injunction dated 12.02.2002 against Petitioner no. 1 before this Court in Civil suit no. 1256/2002 and even they had lodged an FIR on same and similar cause of action dated 08.01.2004, being FIR No.3 against Petitioner no. 1 & Ors. under Section 420/486 IPC and under sections 78/79 of The Trade Marks Act and under sections 63/64/68-A of The Copyright Act, registered at Police Station Division no. 6, Ludhiana. In pursuance of the said complaint dated 01.07.2005, process of search and seizure was issued against the Petitioners, and the goods of petitioners were seized. Thereafter, cancellation was filed by the prosecution /respondent no.1 on 26.09.2006 and not being satisfied with the same, the director of respondent no.2 M/s B M Metal Works Pvt. Ltd filed a protest petition against the petitioners. The petitioners have been contesting the said complaint and proceedings therein primarily on the ground that the complaint was actuated with malafide and malicious intent and was replete with abuse of process of court for various reasons such as that no criminal prosecution of the petitioners could take place in the first instance under The Trademarks Act and The Copyright Act, as the wrappers and goods of the petitioners were duly registered and were separate and distinct than the goods of the complainant. Further, the complaint filed on 01.07.2005 was

time barred, as the maximum punishment in these offences was three years, whereas the limitation for invoking the process of court was also three years. In this case, the complainant having filed a Civil Suit in February 2002 and was well aware of the wrappers of the petitioners, yet, he chose to file the instant complaint against unknown persons only on 01.07.2005. Moreover, the complaint was maliciously filed against some unknown persons allegedly '*fly by night operators*', yet, allegations were made only against the petitioners and only the goods of the petitioners were recovered with malicious intent. Not only this, the complainant had already lodged another FIR against the petitioner no.1 and others in Ludhiana, in which the petitioner no.1 had already undergone trial. The trial court had acquitted the petitioner no.1 & Ors., but the sessions court erroneously remanded the case back, against which the High Court of Punjab and Haryana, at Chandigarh has granted stay of the order. Thus, present complaint was clearly an abuse of process of court and the proceedings against the petitioners could not continue.

3. Learned counsel appearing on behalf of the petitioners submits that the complainant had falsely implicated on the infringement of his alleged copyright pertaining to '*Ball Head Racer and Screw Racer Packaging*',

whereby the complainant had otherwise wrongly and falsely claimed that the petitioners has indulged in passing off his trade mark and copyrights, which were registered by the complainant.

4. Further submitted that at the time of the filing of the suit bearing CS(OS) No.1256/2007 or thereafter, the petitioners never ever used the injuncted wrappers. The complainant had wrongly placed the specimen of wrappers before this Court which are incomplete, whereas, infact the petitioners were using entire different wrappers in 2002, the copy of the black wrappers used by the complainant in 2002 and the ones being used by the petitioners at the relevant time are appended in the petition as Annexure P-1, while similar comparative Red wrappers of complainant and petitioners [used in 2002] are appended in the petition as Annexure P-2 (Colly).

5. Learned counsel further submits that the petitioners have also placed on record a comparative chart, of three different wrappers being used [in Red in 2002] by various other parties in similar trade, which is appended in the petition as Annexure P-3/3. However, the petitioners had already changed their wrappers to blue colour and in place of red, they had changed the same to orange colour. However, inspite of this, the complainant filed a contempt petition before this Court and thereafter the petitioners gave an

undertaking not to use the same and further changed the wrappers significantly. Petitioners thereafter started using blue wrappers with rings and orange wrappers with rings, which were strikingly different and distinct than the wrappers of the complainant. A copy of the comparison of black wrappers of the complainant, the black ones used by petitioners in 2002, the changed ones in blue colour and thereafter the blue wrappers with rings and also a comparative chart of few other wrappers in black in the market are appended in the petition as Annexure P-4 (colly). Likewise the orange wrappers with rings currently being used by the petitioners together with the old wrappers in red colour are appended in the petition as Annexure P-5 (colly).

6. Learned counsel further submits that ever since the disposal of the contempt proceedings before this Court, the petitioners have never used the wrappers other than the ones appended in the petition as Annexure P-6 (colly). These facts have conveniently been withheld by the complainant from the knowledge of the Trial Court. Not only this, the wrappers of the market leader of such similar products, who got registered his wrappers ahead of all, are appended in the petition as Annexure P-7.

7. Also submits that the petitioners are using their Trademark '*Rajis*' since the year 1999 and there is no dispute about the same and a copy thereof is appended in the petition as Annexure P-8. Not only this, a certificate from the Registrar of Copyrights to the effect that there is no deceptive similarity with the wrappers of the petitioners is appended in the petition as Annexure P-9.

8. Learned counsel further submits that inspite of the stay orders dated 12.02.2002 granted by this Court, the complainant withheld material facts from the knowledge of the Trial court while filing these complaints in July 2005. The cancellation report dated 14.11.2006 filed therein is also matter of fact.

9. In view of above facts, the petitioners filed an application dated 22.02.2014 for discharge on the grounds enumerated in section 300 Cr.P.C. before the learned Trial Court. However, the said application has been dismissed vide order dated 23.11.2016 and matter has been fixed for framing of charge against the petitioners.

10. The present petition has been filed on the ground that the impugned criminal complaint was malicious and the same was hopelessly barred by

limitation. The complainant had knowingly and with malicious intent filed a complaint against unknown persons. The complainant had only averred that he did not know the identity of the persons who were allegedly infringing his goods, as they were fly by night operators and their identity was unknown. Whereas, the complainant had already instituted a civil suit against petitioner no.1 & Ors. on 17.10.2002 and had lodged FIR against petitioners on 08.01.2004 before the Ludhiana Police on the same grounds. Only to tide over limitation of three years, as the complaint was filed in July 2005, such a clever move had been adopted. The Trial Court did not appreciate this aspect earnestly.

11. It is submitted that the impugned complaint has been made with malafide intent and is an abuse of process of court, because the complainant clearly averred that the complaint was being filed against unknown persons, whose identity was not known, whereas the complainant knew the identity of the petitioners, thus, clearly and consciously filed complaint against unknown persons. The Trial Court did not appreciate that the wrappers of the petitioners were registered under the Copyright Act at the relevant time and as such, no offence under the Copyright Act, could be made out. There was no conclusive evidence of the Trademark violation at all, as the

Trademark of the petitioners is 'Rajis', which is a registered brand and the same is clearly distinguishable from the Trademark BM of the Respondents. As such, only on this ground the petitioners ought to have been discharged, but such legal aspects, even though vehemently argued before the Trial Court, yet, these were clearly ignored by the Trial Court while rendering the impugned judgment. In addition to above, the Trial Court did not appreciate that on the same allegations, an FIR had been lodged by the complainant against petitioner no.1 in Ludhiana, wherein petitioners had undergone trial and were acquitted on 22.09.2012. Though said judgment had been set aside to a limited extent, thereby the Sessions Court remanding the case, but the said orders have been stayed by the High Court of Punjab & Haryana. Thus, on the touchstone of section 300 Cr.P.C. the petitioners herein ought to have been granted the benefit thereof. The petitioners could not be subjected to another trial at the behest of the complainant, with the same allegations. The Trial Court clearly fell into an error on this count.

12. On the other hand, learned counsel appearing on behalf of respondent no.2 submits that the application under Section 300 Cr.P.C. filed by the petitioners was a classic case of abuse of process. The application was predicated on purposeful and flawed reading of Section 300 of the Cr.P.C.

which bars a second trial when the previous trial on the same set of facts and circumstances has culminated into conviction/acquittal.

13. Section 26 of the General Clauses Act provides, "*Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence (emphasis supplied).*"

14. Section 300 of Cr.P.C. provides, "*A person who has once been, tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under sub-section (1) of Section 221 or for which he might have been convicted under sub-section (2) thereof (emphasis supplied).*"

15. Learned counsel for respondent no.2 submits that both the provisions employ the expression "*same offence*". For purposeful reading, petitioners were reading the cause of action in Ludhiana and in Delhi as same offence.

In *Roshan Lal & Ors. vs. State of Punjab: AIR 1965 SC 1413*, the accused had caused disappearance of the evidence of two offences i.e. u/s 330 and 348 IPC, therefore, he was alleged to have committed two separate offences u/s 201 IPC. Accordingly, it was held that, “*neither Section 71 IPC nor Section 26 of the General Clauses Act came to the rescue of the accused and the accused was liable to be convicted for two sets of offences u/s 201 IPC. If there are two distinct and separate offences with different ingredients under two different enactments, double punishment is not barred. Same is the situation with the instant case at hand. The offence complained of which is subject matter of the FIR in Ludhiana is distinct from the one pending adjudication before this Court. Courts have taken a view repeatedly, that a case of cheque bouncing can give rise to a complaint under Section 138 of the Negotiable Instruments Act as well as offence of cheating under Section 420 IPC. In the instant case, we are not even dealing with one cause of action but two distinct and separate cause of action giving rise to two separate FIRs and two separate proceedings.*”

16. Learned counsel further submits that it is also paramount to mention that order of the Ludhiana proceedings shall demonstrate, the acquittal of the accused was not on merits. It is observed in order that search and seizure in

Ludhiana was not conducted by a Competent Authority. This is not the case in the instant proceeding pending before this Court. The respondent is engaged in the business of manufacturing and marketing bicycle parts for over six decades. The said cycle parts are marketed under the trade mark comprising a trade dress which has distinctive colour combination, lay out, arrangement of features and get up to distinguish the cycle parts of the respondent no.2 from those of other in the market. One of such cycle parts of the answering respondent are 'Ball Head Racers'. Thus, the respondent is the registered trade mark proprietor and copyright owner in relation to ball head racers and screw head racers packaging which are used as cycle parts. The respondent no.2 had filed Civil Suit No. 127 of 2002 before this Court seeking permanent injunction restraining infringement of respondent's registered trade mark, copyright, passing off, rendition of accounts, delivery up, etc. against the use of the impugned cartons by R. S. Industries-business concern of Petitioner No. 1 and the said petitioner suffered a decree against him and agreed to pay token damages of ₹3 lacs to the Respondent.

17. It is further submitted that the defendant in the said suit namely, R. S. Industries alongwith their dealers and stockists, wilfully disobeyed the interim injunction issued vide order dated 12.02.2002. Thereafter, all the

Petitioners were also prosecuted for contempt. The said contempt petition was disposed off by this Court on 21st March, 2003 wherein it was undertaken that impugned packaging was going to be changed. However, when it came to the knowledge of the respondent that R.S. Industries had obtained Copyright Search Certificates under Section 45(1) of the Copyright Act, 1957, which had been issued by the Registrar of Trademark certifying that no trade mark identical with or deceptively similar to the said artistic work, has been registered under the Trade & Merchandise Marks Act, 1958 by any other person other than M/s R.S. Industries, the respondent filed a civil writ petition in this Court for quashing the said certificates. The Registrar of Trademark has issued Certificate No. CC-27/2002-03 dated 19.07.2003, CC-28/2002-03 dated 19.07.2003 and CC-2470/2002-03 dated 08.04.2003 in respect of the same packaging which were found to be deceptively similar by this Court to registered trademarks Nos. 556912 and 556915 dated 21.08.1991, while issuing the interim injunction.

18. On the basis of these fraudulent certificates only, M/s R.S. Industries and their dealers were allegedly selling their products in said cartons, use of which had been injuncted by this Court two years even before these certificates were fraudulently obtained. The said industry went to the extent

of filing a Civil Suit in the District Court, Delhi against the respondent in the year 2003 and alleged infringement of its artistic work by the respondent. In the case before District Court which was transferred to this Court—it was fraudulently concealed by the plaintiffs therein that two proceedings were pending between the parties in this Court since the year 2002. M/s R.S. Industries alongwith their dealers kept on violating the injunction order passed by this Court and the undertakings given by them. The respondent, thereafter, filed another contempt petition bearing number CCP 13 of 2004 before this Court when in January 2004, Petitioner No. 1 and his family members were infringing Respondent's intellectual property in Ludhiana. Resultantly, FIR dated 08.01.2004 was filed against Petitioner No. 1 and other persons.

19. In the month of September, 2005, it again came to the notice of the respondent that '*ball head racers*' and '*screw head racers*' were being sold in the similar packaging in Delhi which was falsification of respondent's packaging. Accordingly, the respondent filed a criminal complaint before the Chief Metropolitan Magistrate, Tis Hazari, Delhi and the said Court after satisfying himself of a prima facie case against the petitioners, was pleased to issue search warrant and pursuant to which raids were conducted at the

premises of petitioners respectively and goods packed in the packaging, which was deceptively similar to the injuncted packaging of R.S. Industries, were recovered from shops of the petitioners. On the basis of the said recovery, the respondent filed another contempt petition vide CCP 122/05 before this Court. The contempt petitions 13/04 and 122/05 were disposed off by this Court vide order dated 29.03.2006. The respondent preferred an appeal bearing numbers FAO (OS) 250 and 259/06 before the Division Bench of this Court. However, vide order dated 15.05.2006, the said bench was pleased to dispose off the appeals after directing the respondents therein, namely M/s R. S. Industries to manufacture the cartons as per their undertakings. Thus, there is no merit in the present petition and the same deserves to be dismissed.

20. It is not in dispute that search and seizure had taken place at the only manufacturing unit of M/s R.S. Industries of petitioner no.1 at Ludhiana on 08.01.2004. Pursuant thereto, criminal complaint against petitioner no.1 and others was filed and the Trial Court acquitted the accused therein. Being aggrieved, the respondent filed the appeal and the appellate court set aside the acquittal and remanded the case for fresh consideration. However, the same has been stayed by the High Court of Punjab & Haryana.

21. In my considered opinion, if M/s R.S. Industries has a different manufacturing unit in Delhi, cause of action would be separate and distinct. When the said industry has only one manufacturing unit in Ludhiana and case is already pending before the High Court of Punjab & Haryana, therefore, no separate cause of action arises to prosecute the petitioners any further.

22. It is not the case of the respondent that the industries named above had different manufacturing units and despite the search and seizure conducted at Ludhiana, they continued to manufacture the same item. Whereas in the present case, the search and seizure has been conducted at the shops of the petitioner nos.2 to 4 in Delhi, where they were selling goods under the brand name 'Rajis', which were produced in same unit at Ludhiana. It is also not the case of the respondent that after the search and seizure which took place at Ludhiana, there were other manufacturing units of the petitioner no.1 and despite the permanent injunction by this Court, the same goods were still being manufactured and supplied to the various customers including petitioner nos.2 to 4 herein.

23. Though counsel for the respondent no.2 has shown an invoice of 2005 issued by petitioner no.1 to petitioner nos.2 to 4, but said receipt does not

show that the goods mentioned therein were manufactured after the search and seizure dated 08.01.2004.

24. When such a situation is non-existent in the present case, then the present case would be double jeopardy for the petitioner. Accordingly, I hereby set aside the complaint and the proceedings pending before the Trial Court against the petitioners.

25. The petition is, accordingly, allowed and disposed of.

26. Pending application stands disposed of.

(SURESH KUMAR KAIT)
JUDGE

JANUARY 08, 2020
ab