

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO. 65 OF 2017

Rajlaxmi ... petitioner
Through its Promotor,
Roshan Babulal Jain
Age 37 years, Occu: Business,
R/o 1240, Bhavani Peth, Pune-02

VERSUSA

1. The State of Maharashtra
Through Shrirampur Police Station,
Taluka Shrirampur
Dist. Ahmednagar
2. Sunil s/o Kisan Trimbake ... Respondents
Age 47 years, Occu: service,
R/o Rashin Tq. Karjat
District Ahmednagar.

Mr. Vikram R. Dhorde, Advocate for the petitioner.
Mrs. V. S. Choudhary, APP for the respondent State.
Mr. Sachin S. Deshmukh, Advocate for respondent No.2

**CORAM : T. V. NALAWADE AND
K. L. WADANE, JJ.**

RESERVED ON: : 3rd August, 2018

PRONOUNCED ON: : 10th August, 2018

JUDGMENT (Per K. L. Wadane,J.):

1. Rule. Rule made returnable forthwith. With the consent of the parties, the petition is taken up for final hearing.

2. In the present petition, the petitioner has challenged the first information report bearing Crime No.II-220/2016 registered against the petitioner with Shrirampur Police Station, District Ahmednagar for the offence punishable under sections 63, 64, 65, 69 of the Copyright Act, 1957 on 27.12.2016 and prayed for quashing the same.

3. Respondent No.2- Original complainant filed complaint with the police station contending that he is serving with Sanjay D.Ghodawat Group as a field officer. The Group is also in the business of manufacturing and selling edible salt in retail market by name "STAR SALT". It is further contended that upon getting knowledge that in Shrirampur market, salt is also sold by the name of STAR SALT by some other Company, he informed the said fact to the police station and thereafter, in presence of Panch witnesses, stock of the Star Salt was seized from the shop of one Nitesh Sangvi and also from the godown of wholesaler namely Chhallani Enterprises. On the basis of the complaint, the offence as referred above came to be registered against the accused including the petitioner.

4. We have heard Mr. Vikram R. Dhorde, learned counsel for the petitioner, Mrs. V. S. Choudhary, learned APP for respondent No.1 State

and Mr. Sachin S. Deshmukh, learned counsel for respondent No.2.

5. Mr. Dhorde, learned counsel for the petitioner submitted that the Group of respondent no.2 namely Sanjay D. Ghodawat had never got registration for the word "STAR SALT". Therefore, respondent No.2 Group cannot claim right over any deceptive matters except the specific representation of "STAR 555 " cumulatively as annexed in the original registration certificate. It is further submitted by Mr. Dhorde that the Sanjay D. Ghodawat Group has never got registration for the word "STAR SALT". Furthermore, the Trade name/mark or label of the petitioner is nowhere similar with the one registered by the the Sanjay Ghodawat Group. The learned counsel further submitted that Sanjay Ghodawat Group has no Trade Mark registered as "STAR SALT". Respondent No.2 has falsely complained and tried to misrepresent by not bringing the fact about their label/device as "STAR 555 SALT" and the petitioner's "STAR LITE SALT" on record. The said fact was purposely not mentioned in order to seize the the products of "STAR LIIT SALT". Mr. Dhorde further argued that the Trade Mark/Name of the petitioner is not deceptively similar with the Trade /Name of Respondent No.2 Group.

6. Learned counsel submits that looking to the relevant provisions, Trade Mark or Copyright, may be registered or unregistered, the proprietor is entitled to prosecute the person who infringes the Trade Mark or Copyright in reference to the Trade mark/device of which he is Proprietor, even though the same are unregistered.

7. Mr. Dhorde relied on the decision in the case of Bunny Ruben & ors. Vs. B. J. Panchal and another, 200(2) (Mh.L.J. 169, M/s Dhiraj Dharamdas Dewani Vs. M/s Sonal Info Systems Pvt. ltd., 2012 (3) ALL MR 209, Vinod Kumar choudhary & anr. Vs. The State of Zarkhand, reported in 2015 SCC Online Jhar 70, Decision of Punjab & Haryana High Court in the case of ANil Kumar Vs. State of Punjab & another (Cri.Misc. No.M-9229/2009 and the decision of Madras High Court in case of P. Manikam Vs. State (Cri.O.p.N.2139/13 and MP No.1/2013.

8. As against this, Mr. Sachin Deshmukh, learned counsel for respondent No.2 has argued that respondent No.2 Group has acquired goodwill in the market and selling edible salt in the brand name "STAR 555 SALT". The petitioner, by way of some artistic work, brought into market the salt in the name and style "STAR LITE SALT". According to Mr. Deshmukh, the product under Trade Mark of the

petitioner is deceptively similar with the product under Trade Mark of respondent No.2 i.e. "STAR 555 SALT". Trade Mark of the petitioner is deceptively similar in its look, its feature, colour combination, by which a man of ordinary prudent can lead to confusion that product of the petitioner is product of respondent No.2. Group. According to Mr. Deshmukh, only with few changes in trade mark, the petitioner brought the edible salt in the market in the name ""STAR LITE SALT" which is phonetically similar with the trade name of respondent No.2 Group.

9. Learned counsel Mr. Dehsmukh has relied on the decision of the apex Court in the case of Rajesh Bajaj Vs. State NCT of Delhi and others, reported in (1999) 3 Supreme Court Cases 259 to contend that if averments in complaint prima facie make out a case for investigation, the High Court cannot quash the complaint because one or two ingredients of the offences have not been stated in detail. The learned counsel also relied on the decision in the case of Superintendent of Police , CBI & others Vs. Tapan Kumar Singh, reported in (2003) 6 Supreme Court Cases 175 and decision of Delhi High Court, in the case of New Hariom Industries & Anr. Vs. Dandi Salt P. Ltd., reported in 2011(48) PTC231(Del).

10. We have carefully examined photocopies of the Trade Marks/Names of the petitioner as well as respondent No.2 Group, placed on record at Exhibit E, page 61. Looking to the said two Trade Marks/Names, it appears that Trade Mark of the applicant i.e. STAR LITE SALT is in square, having blue colour followed by white block in which trade name STAR LITE SALT is written and below that there is photograph of a man, woman and a child. Whereas, Trade Mark of respondent No.2 Group appears to be in Red colour and background of word "STAR" appears to be light blue colour followed by picture of a man, women and a child. Trade Mark/Name may be phonetically similar. However, it does not appear to be visually similar and there is considerable difference between the two as regards look. Looking to the artistic work, both the trade marks/names appear to be different.

11. One of the test to determine whether or not there has been a violation of copy right is to see if the reader, spectator, or the viewer, after having read or seen both the works would be clearly of the opinion and get an unmistakable impression that the subsequent work appears to be a copy of the first. In otherwords, dealing with the question of infringement of a copy of respondent No.2 Group's work by the

petitioner's work, the court is to test on the visual appearance of the object and drawing, design or artistic work in question and by applying the test i.e. "Lay observer Test" whether to persons who are not experts in relation to objects of that description, the object appears to be a reproduction. If to the "lay observer" it would not appear to be reproduction, there is no infringement of the artistic copy right in the work.

12. We have examined the two artistic works i.e. work of the petitioner as well as respondent No.2 group. There is no resemblance between the two. Judging by the eye alone, they appear to us to be totally different. We do not think that any one looking at these two works would say that they are similar in any manner nor do we think that any one would say the design, the lay out and the manner of the two works are similar. Applying various tests set out above, we are unable to agree that the petitioner had committed act of piracy by way of copying copyright of the respondent No.2. There is nothing on record to prima facie show that artistic work of respondent No.2 Group is "Original" work.

13. Looking to the allegations in the complaint it appears that the

complaint is lodged with the accusation that the petitioner is manufacturing, selling the goods i.e. salt under the name and style "STAR LITE SALT, which is visually and phonetically similar with the product of respondent No. 2 namely " START 555 SALT". Therefore, the offence falls under the provision of section 102 punishable under section 103 and under section 104 of the Trade Marks Act.

14. Section 101 corresponds to the section 77 of the Trade and Merchandise Act, 1958. This section defines as to when a person shall be deemed to falsify a trade mark or lately apply to goods a trade mark. It will be a falsification of a trade mark if without the consent of the proprietor, a person makes a trade mark or a deceptively similar mark. It will also be falsification where a person falsifies a genuine trade mark. It may be by alteration, addition, effacement or otherwise. Under sub section (2) a person shall be deemed to falsely apply to goods a trade mark when, without the consent of the proprietor, he applies it or a deceptively similar mark to goods or to any package containing goods, or uses any package bearing a mark identical with or deceptively similar to the trade mark of the proprietor, for the purpose of packing, filling, or wrapping therein any goods other than the proprietors' genuine goods.

15. So looking to the entire contention in the first information report the offence squarely covered under the provisions of section 102 of the Trade Marks Act. Under the provision of section 115 of the Trade Marks Act certain restrictions are put for taking the cognizance for the offence under section 107, 108 or 109. The Court shall not take the cognizance of the complaint except the complaint in writing made by the Registrar or any officer authorized him by writing. The offences punishable under section 103 or 104 or 105 are cognizable and police not below the rank of Deputy Superintendent of Police is authorized to search and seize without warrant the goods, die, block, machine, plate, other instruments or things involved in committing the offence. Such police officer before making any search or seizure shall obtain the opinion of Registrar on facts involved in the offence relating to trade mark and shall abide by the opinion so obtained.

16. The relevant provision of section 115 reads as follows :

“115. Cognizance of certain offences and the powers of police officer for search and seizure. –

(1) No court shall take cognizance of an offence under section 107 or section 108 or section 109 except on complaint in writing made by the Registrar or any officer

authorised by him in writing:

Provided that in relation to clause (c) of sub-section (1) of section 107, a Court shall take cognizance of an offence on the basis of a certificate issued by the Registrar to the effect that a registered trade mark has been represented as registered in respect of any goods or services in respect of which it is not in fact registered.

(2) No court inferior to that of a Metropolitan Magistrate or Judicial Magistrate or Judicial Magistrate of first class shall try an offence under this Act.

(3) The offences under section 103 or section 104 or section 105 shall be cognizable.

(4) Any police officer not below the rank of deputy superintendent of police or equivalent, may, if he is satisfied that any of the offences referred to in sub-section (3) has been, is being, or is likely to be, committed, search and seize without warrant the goods, die, block, machine, plate, other instruments or things involved in committing the offence, wherever found, and all the articles so seized shall, as soon as practicable, be produced before a Judicial Magistrate of the first class or Metropolitan Magistrate, as the case may be:

Provided that the police officer, before making any search and seizure, shall obtain the opinion of the Registrar on facts involved in the offence relating to trade

mark and shall abide by the opinion so obtained.

(5) Any person having an interest in any article seized under sub-section (4), may, within fifteen days of such seizure, make an application to the Judicial Magistrate of the first class or Metropolitan Magistrate, as the case may be, for such article being resorted to him and the Magistrate, after hearing the petitioner and the prosecution, shall make such order on the application as he may deem fit.”

17. On perusal of papers of investigation it appears in the present matter that the investigation was carried by Police Sub Inspector, Shrirampur Police Station, Dist. Ahmednagar. Furthermore, no opinion of the Registrar is taken before carrying the investigation. At the initial stage matter requires to be examined by the expert i.e. the Registrar. Therefore, the investigating officer has to act upon the opinion given by the Registrar. Herein the present case no such opinion of the Registrar was taken by the investigating officer, nor the alleged offence is investigated by the officer not below the rank of Deputy Superintendent of Police. So the above two facts are in contravention of provisions of section 115 sub-clause 4 and its proviso clause. So basically the investigating officer was not authorized to carry the investigation and due to such irregularity committed by the investigating officer he was

not authorized to investigate the matter and file the charge-sheet.

18. In view of the above, if the investigation is carried out without authority, in such circumstances, the first information report and the criminal case instituted against the petitioner is liable to be set aside.

Hence, following order :

ORDER

1. Criminal writ petition is allowed.
2. Relief is granted in terms of prayer clause 'B'.
3. Rule is made absolute in above terms.

(K. L. WADANE, J.)

(T. V. NALAWADE, J.)

JPC