

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO. 3987 OF 2016

- 1) Mr. Hemant s/o Vishwanathrav
Kunchanwar,
Age Major, Occupation Prop. of Hemant
Provision Stores,
R/o Near Post Office, Biloli Dist. Nanded.
- 2) Mr. Sachin s/o Nagnath Bhojge,
Age Major, Occupation Prop. of
Shivshankar Kirana and General Stores,
R/o Karla Tq. Biloli Dist. Nanded.
- 3) Mr. Shankar s/o Gangaram Kalmurge,
Age Major, Occupation Prop. of Rahul
Kirana,
R/o Burud Galli, Math Galli, Biloli
Dist. Nanded.

...Applicants

Versus

- 1) The State of Maharashtra
Through Police Inspector,
Biloli Police Station,
Biloli Dist. Nanded.
- 2) Kishor s/o Sarjerao Khaire,
Legal Executive of Vikram Tea
Processor Pvt. Ltd. Jalna,
Age 33 years, Occupation Service,
R/o Bhaishree Chambers, Veer
Savarkar Chauk, Jalna Dist. Jalna.

...Respondents

Mr. R. R. Chandak and Mr. P.K.Lakhotiya, Advocates for
applicants.

Mrs. V. S. Choudhary, Addl. Public Prosecutor, for respondent
No.1/ State.

Mr. Swapnil Patunkar, Advocate for respondent No.2.

WITH
CRIMINAL APPLICATION NO. 3988 OF 2016

- 1) Mr. Sunil s/o Marotrao Polawar,
Age Major, Occupation Prop. of Anant
Trading Company,
R/o. 104, Mondha Road, Tekale Galli,
Deglur Dist. Nanded.
- 2) Mr. Raghvendra s/o Ganesh Chidrawar,
Age Major, Occupation Business,
R/o. Old Peth Amrapur School,
New Sarafa Line, Deglur Dist. Nanded.
- 3) Mr. Vaibhav s/o Haridas Yerawar,
Age Major, Occupation Business,
R/o Sharda Nagar, Deglur
Dist. Nanded.
- 4) Mr. Prakash s/o Bashetti Surkutlawar,
Age Major, Occupation Prop. of
M/s. Bashetti Lachmanna Surkotalawar,
R/o Amrutwar Galli, Deglur Dist.
Nanded.

...Applicants

Versus

- 1) The State of Maharashtra
Through Police Inspector,
]Deglur Police Station,
Deglur Dist. Nanded.
- 2) Kishor s/o Sarjerao Khaire,
Legal Executive of
Vikram Tea Processor Pvt. Ltd. Jalna
Age 33 years, occupation Service,
R/o Bhaishree Chambers, Veer Savarkar
Chauk, Jalna Dist. Jalna.

...Respondents

Mr. R. R. Chandak and Mr. P.K.Lakhotiya, Advocates for
applicants.

Mrs. V. S. Choudhary, Addl. Public Prosecutor, for respondent No.1/ State.

Mr. Swapnil Patunkar, Advocate for respondent No.2.

**CORAM : T. V. NALAWADE &
SMT.VIBHA KANKANWADI. JJ.**

DATE : 29-10-2018.

ORAL JUDGMENT : (Per SMT. VIBHA KANKANWADI, J.)

1. Rule. Rule made returnable forthwith. Heard both sides for final disposal.

2. Both the applications raised similar issue and therefore they are disposed of by this common Judgment. Both the applications have been filed invoking the inherent powers of this Court under Section 482 of Code of Criminal procedure as well as Article 226 of the Constitution of India for quashing and setting aside two different First Information Reports lodged by respondent No.2 at two different Police Stations. Criminal Application No. 3987 of 2016 is filed for quashing and setting aside First Information Report bearing No. 136 of 2016 dated 13-06-2016 registered at Biloli Police Station Tq. Biloli Dist. Nanded and Criminal Application No. 3988 of 2016 has been filed for quashing and setting aside the First Information Report bearing No. 380 of 2016 dated 13-06-2016 registered with Deglur Police Station, Deglur Dist. Nanded. Both the FIRs have been filed contending that the present applicants have committed offence

punishable under Section 63 and 65 of the Copyright Act.

3. The respondent No.2 had filed a written complaint with the concerned Police Station stating that, he is an employee of company by name Vikram Tea Processor Pvt. Ltd. He has been authorised by the directors of the company to lodge complaint by passing a resolution. Their company is in the manufacturing of various types of tea and distributing it for sell. They have tea by brand name Bhaishree Vikram No.11, Bhaishree Vikram Coupan No.5 Titli, Vikram Gold, Vikram etc. Their brand is popular because it is of high quality and they have a good marketing. They have obtained Copyright for tea in its packet by name Bhaishree Ki Vikram. The Copyright has been granted vide No. A-100998/2013 on 07-06-2013 by Copyright Office New Delhi. Thereafter they have also received Copyright in respect of their product Bhaishree Ki Vikram No.11 vide registration No. A-104192/2013 on 02-09-2013. Since both these brands have been registered with the Copyright, they have protection and they are using the peculiar packet for their product. They have credited a particular type of Cup and Saucer and they have also right over the colour combination. The background is of blue colour for both the brands, and therefore, it is very much popular. Their product is identified with the picture of Cup and Saucer. Some persons take disadvantage of the popularity of their product and started manufacturing duplicate articles with similar

type of packets in order to confuse the customers. Such violated articles are kept for sell at Parbhari, Nanded, Deglur etc. Devkrupa Tea Company is the company which is violating their Copyright and time and again by virtue of orders of Court the said company has been restrained and prosecuted for violations. Such FIR was lodged with Nanalpeth Police Station, Parbhani against Deokrupa Tea Company. The charge-sheet was filed by the police with Judicial Magistrate First Class, Parbhani. In spite of the said fact, said Deokrupa company has not restrained itself from duplicating the copyrighted articles of the company of the informant. They are distributing similar product under the name Awas Santoor Dust Chah. When information was received in respect of the duplicate articles being sold, the informant went to police station and with the help of police certain raid was conducted. The violated articles worth Rs.10,675/- was seized. It is stated that, Deokrupa Tea Company owner Jagdish Prasad Sarda has caused the violated articles to be sold through Shivshankar Kirana Store, Hemant Provision Store, Rahul Kirana Store, thereby they all have violated the Copyright Act. The present applicants are the owners of the said Kirana Stores.

4. The applicants are contending that, they are small retailers, they had no knowledge about any legal compliance made under the Copyright Act. The distributor had come to the shop and sold the goods on bills. They had purchased it without any knowledge that

the product is the violated Copyright product. The FIR does not show any *prima facie* case against them. There was no malafied intention or criminal intention in keeping those articles for sell by them. The dispute is purely civil in nature but criminal colour has been given. They have not infringed any copyright of any person and therefore they have prayed for quashment of the report.

5. The applicants in Application No. 3988 of 2016 are the small retailers from Deglur town. They run shop by name Anant Trading Company, Damayya Gangayya Chidrawar, Vithalkrupa Provisions, grocery shop of Bashetti Surkutlawar. In the said FIR it is stated that, violated articles worth Rs.59,370/- was found.

6. Heard learned advocate Mr. R. R. Chandak for applicants, Mrs. V. S. Choudhary, Addl. Public Prosecutor for respondent No.1/ State and Mr. Swapnil Patunkar, learned advocate for respondent No.2. Perused the record. The respondent No.2 has filed on record extract from register of Copyright in respect of the work Vikram also Bhaishree Ki Vikra No.11. Judgment of learned District Judge -1, Jalna in Regular Civil Suit No. 06 of 2010 dated 19-10-2013 between Gujrat Tea Traders Private Ltd. Company Versus Devkrupa Tea Company has also been produced wherein the suit came to be partly decreed and the defendant was restrained from manufacturing, selling, advertising etc. a similar brand name as 'Assam No.99 Chay'

which was stated to be deceptively similar to plaintiff's Vikram No.11. No doubt the first appeal is admitted before this Court. It has been submitted on behalf of the applicants that the applicants had no knowledge about copyright taken by the informant's company and since they are the small traders, they purchased it through an agent / distributor and then it was kept for sell. When there is absolutely no criminal intent, they cannot be held responsible for any violation. Offence cannot be said to have been made out against them.

7. Per contra, the learned advocate appearing for the respondent vehemently submitted that, in order to protect the product of the company of the informant, informant had obtained the Trademark as well as Copyright. The Copyright Act gives protection to the products of the person who takes Copyright. The learned advocate tried to demonstrate as to how the product of the informant's company and the articles which were seized from the custody of the present applicants was similar and deceptive. On the basis of the comparison which he demonstrated, he tried to say that, there is violation of the Copyright.

8. It is alleged that, the present applicants have committed offence punishable under Section 63 and 65 of the Copyright Act. Section 63 of the Copyright Act provides for offence of infringement

of Copyright and other rights conferred by the Act. Section 2 (i) (m) defines what is "infringing copy" ;

"infringing copy" means –

(i) in relation to a literary, dramatic, musical or artistic work, a reproduction thereof otherwise than in the form of a cinematographic film;

(ii) in relation to a cinematograph film, a copy of the film made on any medium by any means;

(iii) in relation to a sound recording, any other recording embodying the same sound recording, made by any means;

(iv) in relation to a programme or performance in which such a broadcast reproduction right or a performer's right subsists under the provisions of this Act, the sound recording or a cinematographic film of such programme or performance, if such reproduction, copy or sound recording is made or imported in contravention of the provisions of this Act;"

9. Section 63 runs as follows ;

"63. Offence of infringement of copyright or other rights conferred by this Act. Any person who knowingly infringes or abets the infringement of-

(a) the copyright in a work, or

(b) any other right conferred by this Act, [except the right conferred by section 53-A]

[shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to three years and with fine which shall not be less than fifty thousand rupees but which may extend to two lakh

rupees :

Provided that [where the infringement has not been made for gain in the course of trade or business] the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than six months or a fine of less than fifty thousand rupees.] ”

Thus, taken into consideration the definition of infringing and infringement it can be said in this case that the present applicants are not the manufacturers. Under such circumstance Section 63 cannot be made applicable to them.

10. Section 65 of the Copyright Act runs as follows ;

"65. Possession of plates for purpose of making infringing copies. – Any person who knowingly makes, or has in his possession, any plate for the purpose of making infringing copies of any work in which copyright subsists shall be punishable with imprisonment which may extend to [two years and shall also be liable to fine]. ”

It appears that, this Section has been tried to be applied to the present applicants because they are stated to be found in possession of the infringing copies / articles. The most important ingredient that is required to be considered under this section is that, such person should possess the infringed copy with a knowledge. There is absolutely no record to show that, at any point of time they were

made known about the Copyrights of the company of the informant. Further it can be seen that, only on the basis of say of the informant that, the other product was deceptive, action for infringement appears to have been taken. There cannot be a Copyright in respect of use of colour or specific look. There has to be more differential details which would appear similar or deceptive in order to attract Section 63 or 65 of the Copyright Act.

11. In one of the decision by this Bench in Anant s/o Tukaram Teke and others Versus The State of Maharashtra and another, in Criminal Application No. 1471 of 2013, this Court on 24-09-2018 made some observations. Though it was an offence under Section 420 read with 34 of the Indian Penal Code and Section 27, 28, 103 and 104 of Trademark Act, the points were similar and the provisions which are *pari materia* were considered. Following observations have been made,

"21. If the provisions of the Act and Copy Right Act are compared, it can be said that most of the provisions with regard to the procedure of registration and taking action are similar. There is some difference in the procedure for registration under the Copy Right Act and the procedure for taking action by police. This difference is apparent and there are reasons for the same in the provisions of the two Acts."

"22. In section 14 (1) (c) of Copy Right Act, the meaning of 'copy right' is given. Section 17 shows as to

who can be treated as first owner of copy right. Section 22 gives the period for which the right under Copy Right Act subsists. Section 45 concerns with registration of copy right and it's procedure shows that first certificate needs to be obtained from Registrar appointed under the Act to certify that there is distinctiveness. This provision is important in the present matter. Section 48 of Copy Right Act tells importance of registration under Copy Right Act as the certificate can be used as a prima facie evidence. Section 51 gives circumstances in which breach of copy right shall be inferred. Section 63 provides for punishment for infringement of copy right. Section 64 of the Copy Right Act shows that power is given to even Police Sub Inspector to make seizure if there is infringement of copy right and for that no opinion needs to be obtained by police officer from Registrar appointed under both the Special Enactments. It can be said that there is no such necessity under Copy Right Act as before allowing registration under Copy Right Act, there is comparison already made by competent authority and the registration is in respect of artistic work which needs to be presumed as 'original work'."

"....."

"24) With the change in society and increase of education in society, the needs of the society changed and different approach is developed by persons to satisfy those needs. There was a time when only few companies were there in tea industry having trade mark which had become popular. In those days, poor persons could not afford to purchase branded tea and they were opting for

purchasing loose tea powder. The educated persons who liked particular taste were preferring tea of particular company having particular trademark. The advertisement of tea is made with regard to it's taste, colour, aroma and also strength. On that basis, many persons buy the tea. Some like colour, some like taste, some like aroma and liking of some depend on the strength of tea. These days when persons go to mall or shop, they make demand of tea of a particular company and also by giving particular trade name given by the particular company."

"25) Those days when there was possibility of deception have gone and people know as to which brand of which company they like. They take the decision about choosing also on the basis of price. Thus, these days there is not that possibility of deception of customers which was there in the past. These developments in the society needs to be kept in mind by the Courts for deciding the matter like present one and it is not possible to hold for criminal case that there is infringement of right under the Act."

12. The contents of the FIR show that, the product which is alleged to be deceptive was manufactured by somebody else but only the present applicants were found to be possessing those articles. Here except the word of the informant, there is nothing which would show that the article was deceptive and the applicants had knowledge that there was a Copyright taken by the company of the informant. Under such circumstance, it would be futile exercise to ask the

applicants to face trial with such kind of material. Case is made out to invoke the provisions of Section 482 of Code of Criminal Procedure as well as Article 226 of the Constitution of India. Hence, following order.

ORDER

- 1) Both the applications are allowed.
- 2) Relief is granted in terms of prayer Clause 'B'.
- 3) Rule is made absolute in those terms.

(SMT. VIBHA KANKANWADI)
JUDGE

(T. V. NALAWADE)
JUDGE

vjg/-.