

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Reserved for orders on :26/08/2019

Order passed on : 22/10/2019

WPCR No. 484 of 2019

- Steel Authority of India Limited Central Marketing Organization Through Assistant General Manager (Marketing) Regional Office “The Metropolitan”, 8th Floor, Bandra-Kurla Complex, Bandra (E), Mumbai, Maharashtra. Pin- 490 051., District : Mumbai, Maharashtra

---- Petitioner

Versus

1. Lalit Agrawal S/o Late Shyam Sunder Agrawal, Aged About 60 Years, R/o Udaya Society, Tatibandh, Raipur, Chhattisgarh. Pin- 492 001., District : Raipur, Chhattisgarh
2. Pankaj Agrawal S/o Lalit Agrawal, Aged About 33 Years, R/o Udaya Society, Tatibandh, Raipur, Chhattisgarh. Pin- 492 001., District : Raipur, Chhattisgarh
3. State of Chhattisgarh Through Police Station- Gudhiyari, Chhattisgarh.- 492 001., District : Gariyabandh, Chhattisgarh

-----Respondents

For Petitioner : Dr. Saurabh Kumar Pandey, Advocate
For Respondents 1 and 2/caveators : Mr. Prafull N. Bharat and Mr. Navin Shukla, Advocates
For Respondent/State : Ms. Akansha Jain, Deputy Govt. Advocate.

Hon'ble Shri Justice Rajendra Chandra Singh Samant

CAV Order

22/10/2019

1. Instant petition has been brought under Article 226/227 of the Constitution of India praying for issuance of appropriate writ(s)/direction(s)/order(s) etc.

2. It is submitted that the charge sheet was filed against respondent No.1 and 2 before the trial Court for prosecution in offences under Section 420, 465, 468, 473, 475, 485, 486 of the IPC and for other offences under the Trade Marks Act, 1999. The trial Court has framed the charges on 29-04-2014 against the Respondent No.1 and 2 for trial in offences under Section 103 and 108 of the Trade Marks Act and under Section 420 and 485 of the IPC. The order of framing charges was challenged before the Court of 9th Additional Sessions Judge Raipur in Criminal Revision No. 223/2014 which was decided on 07-08-2015 in which the charges under Section 420, 485 of the IPC were set aside. This order of the revisional Court is illegal, arbitrary and erroneous. In fact, it were only the charge under Sections 420 and 485 of the IPC were sustainable, whereas, the charges under Section 103 and 104 of the Trade Marks Act were not sustainable, because there had been no compliance of the Section 115 of the Trade Marks Act by the respondent concerned. It is submitted that subsequent to this order of revisional Court the trial against respondent No.1 and 2 cannot be said to be proper trial because the respondents 1 and 2 have been exonerated from the offences which they have committed. It is submitted that this illegality is going to cause huge damage to the petitioner as there are cases pending before the Bombay High Court against the private respondents praying for claim for damages against the illegal act of the private respondents.
3. On behalf of respondents 1 and 2 it is submitted that the petitioner had remedy available under Section 397 of the Cr.P.C. which he has not availed. On this point reliance has been placed on the judgments of Hon'ble the Supreme Court in the matter of **Commissioner of Income Tax and others Vs. Chhabil Dass Agrawal**, (2014) 1 SCC 603 and

Nivedita Sharma Vs. Cellular Operators Association of India and others, (2011) 14 SCC 337. The petitioner has also suppressed that the remedy was available to him. Referring to the order passed by the trial Court, revisional Court and also the complaint filed by the Enforcement Directorate against the private respondents in the year 2014, it is submitted that the cause of action was available to the petitioner for filing a writ petition in the year 2014-2015, besides this, this writ petition has been brought after inordinate delay of almost five years. Reliance has been placed on the judgment of Hon'ble the Supreme Court in the matter of **U.P. Jal Nigam and another Vs. Jaswant Singh and another**, (2006) 11 SCC 464 and **State of Haryana Vs. Ram Mehar and others**, (2016) 8 SCC 762. The delay and laches in seeking remedy in time cannot be excused. It is submitted that the private respondents have also faced trial for about five years and in case this petition is allowed, then there shall be a denovo trial. The trial against the private respondents is almost going to complete, therefore, the petition be dismissed at the motion stage.

4. Learned counsel for the State/respondent No.3 agrees with argument advanced on behalf of the Respondents 1 and 2 prays that the petition may be dismissed.
5. In reply, learned counsel for the petitioner submits that the prosecution against the private respondents is a State case, therefore, the position of the petitioner is only that of a witness, who could not have known about the proceedings of the trial. In the petition under Article 226 of the Constitution of India the Court has power to exercise Constitutional jurisdiction and pass the order on the question of legality of the trial. The State has not been vigilant to apprise the Court regarding the

illegality and irregularity committed in the trial and appeal. Therefore, the petition is maintainable.

6. Heard learned counsel for the parties and perused the documents.
7. The submission and prayer made by the petitioner are mainly directed against the order of the revisional Court for setting aside the charges against the private respondents under Section 420 and 485 of the IPC. There is no observation or finding of the revisional Court in order dated 07-08-2015 that offences under Section 420 and 485 are not made out. The only reason given is this, that under Section 5 of the IPC it is provided that where the offence is punishable under any Special Act in that case the offence under the provisions of the IPC shall not be subject of the charge and this is the only ground and on this basis the charge under Section 420 and 485 of the IPC was set aside.
8. Section 5 of the IPC reads as under:-

“5. Certain laws not to be affected by this Act.—Nothing in this Act shall affect the provisions of any Act for punishing mutiny and desertion of officers, soldiers, sailors or airmen in the service of the Government of India or the provisions of any special or local law.”
9. On reading of the provisions under Section 5 of the IPC it is found that the provisions under the IPC shall not effect the provision of any Special Law or Local Law. This provision does not mention that the provision under any Special Law or Local Law shall have a overriding effect.
10. It was held by Madras High Court In re, **Satya Narayan Murthy** AIR, 1953 Mad. 137 (E) it was held in para 4 and 5 that:-

(4) A “Special law” is a law applicable to a particular subject; see S.

41 I.P.C. Under S. 5 I.P.C., no special law is repealed, varied, suspended or affected by the enactment of the Indian Penal Code. Although an offence is expressly made punishable by a special or local law, it will be also punishable under the Penal Code, if the facts come within the definition of, the Penal Code: --- 'The Queen v. Ramchandrappa' 6 Mad 249. The general principle of Law is that the Penal Code would apply if the acts fall within the Indian Penal Code though there may be specific offences and penalties under the Special Act. Accordingly, the High Court of Madras held that a prisoner might be punished under Section 465, I.P.C. for making false declaration under S. 5 of Act X of 1841 (Ship Registrar), though a specified penalty is provided by Section 23 of that Act. (see rulings of 1865 on Sec. 5). There has been similar decisions in regard to other special Acts. It is enough to cite a few cases, In regard to offence under Indian Penal Code and Provincial Insolvency Act, see-- 'Queen v. Ramachandrappa', 6 Mad 249; for offences under Local Boards Act and Indian Penal Code, see--'Molaiappa Goundan v. Emperor', 52 Mad 79; for conviction under Indian Penal Code though offence falls within purview of Motor Vehicle Act also, see -- 'Jiwa Ram v. Emperor', AIR 1932 All 69; for offences under Salt Act and Indian Penal Code, see-- 'Emperor v. Joti Prasad', AIR 1932 All 18; for Railways Act and Indian Penal Code, see-- 'Kuloda Prosad Mazumdar v. Emperor', 11 Cal W N 100 distinguished--'Chandi Pershad v. Abdur Rahman', 22 Cal 131, wherein it was held that a special penal provision as in the Railways Act would not always exclude the operation of the Penal Code.

The most familiar example however is of the identical

provisions contained in the Indian Penal Code regarding rash and negligent driving and under the Motor Vehicles Act. Thus where the accused while driving a motor car on the wrong side of the road & at a blind corner between two roads of considerable traffic came into collision with a motor bicycle and caused damage to the side car of the bicycle it was held that the accused was guilty of an offence under S. 279 I.P.C., and sentence of three months' rigorous imprisonment served on the accused by the lower Court was upheld. It was argued on behalf of the accused in this case that the more appropriate section would be S. 59 of the Motor Vehicles Act, but the Judges remarked that the offence committed by the accused was serious and that the mere fact that the Motor Vehicles Act also contained a provision for dealing with offences of this nature would not exclude the operation of the Indian Penal Code. Therefore, it is idle to contend that a special law repeals the provisions of the Indian Penal Code because both of them deal with offences arising under both the Acts.

(5) There are however two important restrictions. No prosecution under the Special law is admissible if it appears upon the whole frame of the Special Act that it was intended to be complete in itself and to be enforced by the penalties created by it. See --- 'Chandi Pershad v. Abdur Rahman', 22 Cal 131 at p. 138. The court of session has jurisdiction to hear appeals on sentences passed by a Magistrate under such special and local laws (Rulings of Madras High Court, 1865, on S. 409 Crl. P.C. Act XXV of 1861); and conversely, it is no reason for quashing a conviction under a special law, for instance, under S. 29 of Act V of 1861 (General police), that the facts would constitute an offence punishable under

the Penal Code: --- 'Kasimuddin in re,' 4 Myn. CrL.17. If the magistrate proceeds under the Penal Code it is better to drop the charge under the local Act. But, secondly, a person cannot be punished under both the Penal Code and the Special law for the same offence. If an offence under a special law is likewise one under the Penal Code it is punishable either under the special law or under the Code as laid down in --- Queen v. Ramchandrapa' 6 Mad 249 and --- 'Kasimuddin in re', 4 Myn. CrL. 17, but of course not under both as laid down in --- 'Rex v. Husson Ali', 5 N. W. P. 49, See also S. 26 of the General Clauses Act X of 1897, viz., where an act or omission constitutes an offence under two or more enactments the offender is 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 act or omission."

11. In the matter of **Gyanchand Madhok Vs. State**, 1954 LawSuit(HP) 24 the High Court of Himachal Pradesh has held in para 5 and 6 that :-

[5]. The learned Government Advocate pointed out that, since the Prevention of Corruption Act came into force in Himachal Pradesh only ON 29-06-1949, its provisions could not be applied to the trial of the cases relating to Kunwar Chand, Kharku and the tin cases, because in those three cases, the offence was committed before the Act came into force in Himachal Pradesh. As regards the battery case and the case relating to Pissa Lambardar, it is, no doubt, true that the alleged offences were committed after the Prevention of Corruption Act came into force in Himachal Pradesh. At the same time, it is urged that the provisions of Section 409, I.P.C., have not been repealed by Section 5, Prevention of Corruption Act. The learned Government Advocate cited,

'inter alia':--

(a) ' Bhup Narain v. State' AIR 1952 All 35 (D), where a Division Bench of that High Court observed as follows:

"Learned counsel for the applicant has urged that the applicant is a public servant. The offences he is alleged to have committed can all be grouped under the heading 'criminal misconduct' and the 'applicant could, therefore, be convicted under Section 5(2), Prevention of Corruption Act, which is as follows:

'Any public servant who commits criminal misconduct in the discharge of his duty shall be punishable with imprisonment for a term which may extend to seven years, or with fine, or both.'

Section 6 of the Act provides that no Court shall take cognizance of an offence punishable under Section 161 or Section 165, Penal Code, or under Sub-section (2) of Section 5 of this Act, alleged to have been committed by a public servant except with the previous sanction of persons mentioned in the section. In effect the argument of learned counsel is that where a public servant is guilty of an offence which can amount to 'criminal misconduct' as defined in Section 5(1), the prosecution must be deemed to be under Section 5(2), Prevention of Corruption Act, whether the accused is charged under that section or under appropriate sections of the Penal Code, and the provisions of the Prevention of Corruption Act should, therefore, apply.

The Act was passed in 1947 with the avowed object of making more effective provisions for the prevention of bribery and corruption by a public servant. Section 3 and 6 of the Act make

certain amendments in the procedure, while Section 4 and 7 make certain amendments to the rules prescribed in the Evidence Act. Section 3 and 4 apply to cases under Section 161 and 165, Penal Code, only. The definition of 'criminal misconduct' in Section 5 and Sub-Section (b) and (c) can include cases which would not fall under any provision of the Penal Code. Where, therefore, a new offence has been created under this Act there can be no doubt that the accused must be proceeded against in accordance with the provisions of this Act. Where, however, the offence is one which was punishable under the Penal Code and is now made punishable under this Act also, the question arises whether it is open to the prosecution to proceed against the accused under the general law, that is under the Penal Code, or under the special provisions contained in this Act. Sub-section (2) of Section 5 provides for seven years rigorous imprisonment for criminal misconduct by a public servant, or fine, or both, while some of the sections of the Penal Code, which deal with offences which might come under the definition of 'criminal misconduct', provide for heavier or lighter punishment.

The general rule '*generalalia specialibus non derogant*' on which reliance has been placed has not been held to be of universal application by Courts in India.

Section 26, General Clauses Act (10 of 1897) is as follows:-

'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.'

The applicant is being prosecuted under various sections of the Penal Code, some of which provide for a sentence of more than seven years, while the others provide for much lesser sentence. In the charge-sheet no mention has been made of the Prevention of Corruption Act and the trial, so far as we can see, has proceeded in accordance with the provisions of the Criminal P.C. and the charge-sheet mentions only sections of the Penal Code. At the conclusion of the trial, the accused must be convicted, if his guilt is proved, in accordance with the provisions of the Penal Code and it cannot be said that the Court convicting the accused can apply Sub-section (2) of Section 5, Prevention of Corruption Act, and sentence him to seven years' rigorous imprisonment where the section under which he is charged provides for a lesser sentence. The applicant not having been charged under sub-s. (2) of Section 5, Sections 4 and 7 of the Act cannot be made applicable to him."

(b) 'In re, Satyanarayanamurthy', AIR 1953 Mad 137 (E). There, a single Judge of that High Court, dissenting from – 'AIR 1952 Punj 89 (A)', observed:

"The substantial point of law taken before me is the contention based upon the decision of the Punjab High Court in --'AIR 1952 Punj 89 (A)', wherein it was held that Section 5(1)(c) of Act 2 of 1947 repealed 'pro tanto' Section 409, I.P.C. but with greatest respect for the decision, I find no reason whatsoever for holding that Section 5(1) (c), Prevention of Corruption Act, repeals

Section 409, I.P.C.

.....

(c) 'Madho Prasad v. State' AIR 1953 Madh-B 139 (L). There, Dixit J. following-- 'AIR 1953 Mad 137 (E) and dissenting from – AIR 1952 Punj 89 (A)', held as follows:

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“Where a new offence is created under any enactment, the accused must be dealt with in accordance with the provisions of that enactment; where on the other hand, a statute makes an act already punishable under some former law, punishable and there is nothing in the later enactment to exclude the operation of the former one, then the accused person can be pro-ceeded against under either of the enactment?.”

(d) 'Mahomed Ali v. State', AIR 1953 Cal 681 (M), where a Division Bench of that High Court held that:

“In the face of the amendment made in Section 5, Prevention of Corruption Act, 1947, by the substitution of new Sub-section (4) in place of old one by the amending Act, 59 of 1952, it cannot be argued that the operation of that Act, in the case of a public servant, excludes the operation of Section 409, Penal Code. The amendment makes it clear that the prosecution can elect to charge a public servant either under Section 409, Penal Code, or under Section 5(1)(c), Prevention of Corruption Act, 1947. Hence, the trial of a public servant before a special Judge under Section 409, Penal Code is valid. AIR 1952 Punj 89 (A)', superseded by amending Act 59 of 1952.”

(e) 'Gopal Das v. State', AIR 1954 All 80 (N), where a Division Bench of that High Court observed that:

“There is no discrimination against an accused who is proceeded against for an offence under Section 409, I.P.C., and not for an offence under Section 5(1)(c), Prevention of Corruption Act. The provisions of Section 409, I.P.C., therefore, do not go against Article 14 of the Constitution and are not void in view of Article 13(1) of the Constitution.”

(f) 'Jayarama Iyer v. State of Hyderabad', AIR 1954 Hyd 56 (O), where a Division Bench of that High Court was of the opinion that: “Where an act or omission constitutes an offence both under the Penal Code and under the Prevention of Corruption Act, it is not obligatory to charge the accused with an offence under the latter Act, and unless an accused is so charged under the Prevention of Corruption Act, the procedure laid down under that Act, as well as under Sections 6 and 7, Criminal Law Amendment Act, 1952, cannot apply.

Section 5(1)(c), Prevention of Corruption Act, as it stood prior to the Prevention of Corruption (Second Amendment) Act of 1952, did not 'pro tanto' repeal Section 409, Penal Code, so far as it relates to offences by public servants. A public servant can, therefore, be prosecuted under Section 409, Penal Code, notwithstanding Section 5(2) of that Act. 'AIR 1953 Madh-B 139 (L)',---'AIR 1953 Mad 137 (E)', followed;---'AIR 1952 Punj 89 (A)', dissented form.”

(g) 'In re, Govindaswami', AIR 1954 Mad 401 (P). There, a single Judge of that High Court, following--'AIR 1953 Mad 137

(E)', held that:

“Where a complaint sets forth certain facts disclosing a minor offence and also a graver offence, the prosecution should ordinarily be for the graver offence. Thus, the offence under Section 409, Penal Code, being graver than the offence under Section 5(1) (c), Prevention of Corruption Act, prosecution should be for the graver offence under Section 409, Penal Code, even though the facts disclosed fall within Section 5(1)(c), Prevention of Corruption Act. ‘Dholiah v. Sub-Inspector of Police, Wellington Station’, AIR 1931 Mad 702 (Q), followed.”

[6]. In consonance with the view of the Madras, Madhya Bharat, Hyderabad, Allahabad and Calcutta High Courts, I would hold that the provisions of Section 409, I.P.C., have not been repealed by Section 5, Prevention of Corruption Act. Therefore, quite irrespective of whether the offences alleged to have been committed by the petitioner, pertain to a period before or after the Prevention of Corruption Act came into force, it must be held that the trial Magistrate has jurisdiction to proceed with the trials.”

12. It was held in the matter of **Emperor vs Joti Prasad Gupta**, Allahabad 18, 136 Ind Cas 91 that where a special enactment dealt with offence of similar to offence dealt with by a general enactment do not follow the provisions of general enactment, if it had been repealed to that extent.
13. Therefore, the general rule appears to be this that if the provision under the special enactment and the general enactment are identical, in that case the offence shall be tried under the provisions of the special enactment
14. The offences in question in this case are as under:

Sections 103 and 104 of the Trade Marks Act, 1999:-

“103. Penalty for applying false trade marks, trade descriptions, etc.—

Any person who—

- (a) falsifies any trade mark; or
- (b) falsely applies to goods or services any trade mark; or
- (c) makes, disposes of, or has in his possession, any die, block, machine, plate or other instrument for the purpose of falsifying or of being used for falsifying, a trade mark; or
- (d) applies any false trade description to goods or services; or
- (e) applies to any goods to which an indication of the country or place in which they were made or produced or the name and address of the manufacturer or person for whom the goods are manufactured is required to be applied under section 139, a false indication of such country, place, name or address; or
- (f) tampers with, alters or effaces an indication of origin which has been applied to any goods to which it is required to be applied under section 139; or
- (g) causes any of the things above-mentioned in this section to be done, shall, unless he proves that he acted, without intent to defraud, 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 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.

104. Penalty for selling goods or providing services to which false trade mark or false trade description is applied.—Any person who sells, lets for hire or exposes for sale, or hires or has in his possession for sale, goods or things, or provides or hires services, to which any false trade mark or false trade description is applied or which, being required under section 139 to have applied to them an indication of the country or place in which they were made or produced or the name and address of the manufacturer, or person for whom the goods are manufactured or services provided, as the case may be, are without the indications so required, shall, unless he proves,—

- (a) that, having taken all reasonable precautions against committing an offence against this section, he had at the time of commission of the alleged offence no reason to suspect the genuineness of the trade mark or trade description or that any offence had been committed in respect of the goods or services; or
 - (b) that, on demand by or on behalf of the prosecutor, he gave all the information in his power with respect to the person from whom he obtained such goods or things or services; or
 - (c) that otherwise he had acted innocently,
- 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 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.”

Section 420 and 485 of the IPC are reproduced as under:-

“420. Cheating and dishonestly inducing delivery of property.—Whoever

cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

485. Making or possession of any instrument for counterfeiting a property mark.—Whoever makes or has in his possession any die, plate or other instrument for the purpose of counterfeiting a property mark, or has in his possession a property mark for the purpose of denoting that any goods belong to a person to whom they do not belong, shall be punished with imprisonment of either description for a term which may extend to three years or with fine, or with both.”

15. The offence under Section 485 of the IPC falls under Chapter 18 of the IPC regarding offence relating to documents and to property marks which starts with Section 463 which defines forgery. Section 463 reads as under:-

“463. Forgery.— Whoever makes any false documents or false electronic record or part of a document or electronic record, with intent to cause damage or injury, to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery.”

16. Section 463 and Section 485 have to be read together to make out sense, that why a person should be accused, charged or held guilty for such an offence that is under Section 485 of the IPC. It is included in Section 485 of the IPC that the purpose of possession of any instrument for counterfeit a property mark should be for denoting that any goods belongs to a person to him that not belonged., which is intent of committing such offence to defraud some person, therefore, provision under Section 485 of the IPC punishes for 'mens rea'.

17. The word 'mens rea' had nowhere been mentioned in the IPC, while defining the offences words have been used in respective provisions to indicate the criminal intention required for commission of such offence, such words, fraudulently, defraudulently, dishonestly, intentionally,

voluntarily etc.

18. In **Kartar Singh, Kripa Shankar Rai V. State of Punjab**, (1994) 3 SCC 569 five judges of Hon'ble the Supreme Court have held in para 115 that :

“**115.** In a criminal action, the general conditions of penal liabilities are indicated in old maxim “actus non facit reum, nisi mens sit rea” i.e. the act alone does not amount to guilt, it must be accompanied by a guilty mind. But there are exceptions to this rule and the reasons for this is that the legislature, under certain situations and circumstances, in its wisdom may think it so important, in order to prevent a particular act from being committed, to forbid or rule out the element of mens rea as a constituent part of a crime or of adequate proof of intention or actual knowledge. However, unless a statute either expressly or by necessary implication rules out 'mens rea' in cases of this kind, the element of 'mens rea' must be read into the provisions of the statute. The question is not what the word means but whether there are sufficient grounds for inferring that the Parliament intended to exclude the general rule that mens rea is an essential for bringing any person under the definition of 'abet'.”

19. In view of the above principles that are in existence, it can be held that the offence under Section 485 of the IPC is an offence where a criminal intention or mens rea of a person is a key ingredient, on the basis of which he may be punished.
20. On going through the provisions under the Trade Marks Act, 1999 falsifying and falsely applying trade mark has been defined under Section 102 of the Trade Mark Act, 1999 which reads as under:-

“102. Falsifying and falsely applying trade marks.—(1) A person shall be deemed to falsify a trade mark who, either,—
 (a) without the assent of the proprietor of the trade mark makes that trade mark or a deceptively similar mark; or
 (b) falsifies any genuine trade mark, whether by alteration, addition, effacement or otherwise.
 (2) A person shall be deemed to falsely apply to goods or services a trade mark who, without the assent of the proprietor of the trade mark, —
 (a) applies such trade mark or a deceptively similar mark to goods or services or any package containing goods;
 (b) uses any package bearing a mark which is identical with or deceptively similar to the trade mark of such proprietor, for the purpose of packing, filling or wrapping therein any goods other than the genuine goods of the proprietor of the trade mark.
 (3) Any trade mark falsified as mentioned in sub-section (1) or falsely applied as mentioned in sub-section (2), is in this Act referred to as a false trade mark.
 (4) In any prosecution for falsifying a trade mark or falsely applying a trade mark to goods or services, the burden of proving the assent of the proprietor shall lie on the accused.”

21. The key ingredient of this provision is falsifying the trade mark without assent of the proprietor of the trade mark by making such trade mark or deceptively similar mark. It is not a case of deceptively similar mark, it is a case where the private respondents have falsified the trade mark without assent of the proprietor. Therefore, the provisions under Section 103 and 104 of the Trade Marks Act, 1999 do not have ingredients of guilty mind, i.e., mens rea and fraud. Hence, the ingredients as it is present in Section 485 of the IPC that the purpose of falsifying or counterfeiting the trade mark has to be with intention to cause damage or injury to the public or to any person, is totally missing in the provision of Section 103 and 104 of the trade mark Act. Therefore, for these reasons, it cannot be said that provisions under Section 103 and 104 of the trade Marks Act and Section 485 of the IPC are identical provisions. The principles as laid down in the case laws referred hereinabove are these, that a person cannot be punished under both the Penal Code and the special law for the same offence, if the offence in any special law and the IPC are identical. This is what

the definition under Section 26 of the General Clauses Act, 1897 that where an act or omission constitutes an offence under two or more known enactments then the offender shall be liable to be prosecuted and punished under either or any of those enactment, but shall not be liable to be punished twice for the same offence. In re Govindaswami (supra) it has been held that where the offence under Penal Code is graver than the offence under any special act, in that case, prosecution shall be for the graver offence under the Penal Code.

22. On scrutiny of the penal provision under the Trade Marks Act, 1999 and the offence that were charged by the trial Court against the private respondents under Penal Code, do not pass the test of general rule that the offence under the Trade Marks Act, 1999 and Penal Code are identical. The possession of instruments for counterfeiting a property mark or trade mark is coupled with intention to defraud under Section 485 of the IPC and followed by intention to cheat that is the offence under Section 420 of the IPC. The offence under Section 420 of the IPC is a graver offence as it is punishable to the extent of 7 years along with fine sentence which again find support from the principle laid down In re Govindaswami (supra).
23. After over all discussion that has been made hereinabove, it is held that the offences charged against the private respondents under the provisions of Trade Marks Act, 1999 are not identical with the offence charged against them under the provisions of the IPC. Further, the charge against the private respondents under the IPC have more gravity compared to the offences under the Trade Marks Act, 1999. Hence, for these reasons it is held that the order passed by the 9th Additional Sessions Judge in Revision No. 223/2014 is erroneous and

against the provisions of Law which cannot be sustained, hence, this order is quashed. The trial against the private respondents shall continue for charges under Section 420 and 485 of the IPC before the trial Court in accordance with law.

24. The objection raised by the respondents' counsel are not entertainable for the reason that this petition was brought after exercise of revisional jurisdiction against the order of the trial Court which was though exercised by the respondents in which this petitioner was not a party, however, on such condition it was not possible for the petitioner to file a repeat revision petition, hence, the petition under Article 226 of the Constitution of India is maintainable. As regards the objection regarding delay in seeking remedy that has been well explained by the petitioner side that it was the State case and the petitioner itself was not prosecuting the same, therefore, the petitioner was not in a position to learn about the development of trial and consequently it is a case in which a serious illegality was committed by the revisional Court by discharging the private respondents from the offences under Section 420 and 485 of the IPC. Therefore, the delay if any in this case is excusable.
25. The petition stands disposed off.

Sd/-

(Rajendra Chandra Singh Samant)
Judge