

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.02.2019

CORAM:

THE HONOURABLE MR.JUSTICE G.K.ILANTHIRAIYAN

CRL.O.P.No.86 of 2019

CrI.MP.No.57 of 2019

M/s. Venkateshwara & Co.,
Rep by its Proprietor C.Jayaprakash
No.21/22, Medavakkam Tank Road,
2nd Street, Kellys,
Chennai - 600 010. Petitioner/Accused - 1

Vs.

1. The Assistant Commissioner,
Video Piracy and Copy Right Wing,
Central Crime Branch, Egmore,
Chennai.
2. The Inspector of Police,
Central Crime Branch (CCBI),
Old Commissioner Office,
Egmore, Chennai - 600 008. Respondents 1 & 2/
Complainants
3. M/s T.M.C.Srinivasa Iyenger,
Rep. by its Partner V.Sivanesan,
No.151, Adhiyappan Naicken Street,
Sowcarpet, Chennai - 600 001. 3rd Respondent/
Defacto Complainant

PRAYER: Criminal Original Petition filed under Section 482 of Cr.P.C. praying to call for the records pertaining to the First Information Report in Crime No.458 of 2017 pending on the file of the first respondent police and quash the same.

For Petitioner : Mr.S.Prabakar, Senior Counsel for
Mr.N.M.Abdul Majeed

For Respondents

For R1 & R2 : Mr.Mohammed Riyaz
Additional Public Prosecutor.

For R3 : Mr.C.M.Gunasekaran

O R D E R

This Petition has been filed to quash the FIR in Crime No.458 of 2017 registered for the offences under Sections 63(a), 51 of Copy Right Act 1957 r/w Sections 103(a), 102(1)(a) of Trade Marks Act, 1999, against the petitioner.

2. The learned Senior Counsel appearing for the petitioner submitted that the petitioner is not a stranger to the defacto complaint and he is a wholesale and resale trader of the defacto complainant's Suganda Kumkum. The partners of the defacto complainant are the tenants of the petitioner and while enhancing rent for the premises, there was a dispute and as such false complaint has been foisted as against the petitioner. In fact , before registering the present FIR, the defacto complainant lodged complaint to the Deputy Commissioner of Police, Madurai for the same cause of action and the same was forwarded to the B-1, Villakkuthoon Police Station and the investigation is pending. For the very same cause of action, the present complaint has been lodged and registered with the above said offences. The petitioner never delivered any fake and duplicate goods to the retailers at Madurai, when the defacto complainant himself admitted that the petitioner had purchased the said Kumkum from him. The trade mark image of Suganda Kumkum registered at the Registrar of Trade Marks would show and depict a picture in background in which it was written as "Special Suganda Kumkum"- TMGS at 126, Audiappa Naick Street, Madras - 600 001 and not as a picture depicting use of a device of a woman holding a mirror and in the act of applying Kumkum as stated in the F.I.R.

2.1. He further submitted that the defacto complainant purchased the product from the partnership firm M/s. TMG Srinivasa Iyengar in the year, 2010. Whereas the petitioner purchased the goods viz., "Sungada Kumkum" even from the previous owners of the said partnership firm for the past several years. Therefore, the petitioner has no intention to cheat the defacto complainant by making fake and duplicate Kumkum as alleged in the FIR. In fact, the defacto complainant already lodged a complaint before the Deputy Commissioner, Madurai and the same was forwarded to B-1, Villakkuthoon Police Station, Madurai and as such the present complaint also lodged for the very same set of allegations and it is nothing but abuse of process of law.

2.2. The learned Senior Counsel further submitted that for the offences under Sections 63(a) and 51 Copy Right Act, 1957, are not at all attracted as against the petitioner. He submitted that any infringement committed under Section 51 of Copy Right Act, is punishable under Section 63(a) of the Copy Right Act. Accordingly, for the offence committed under Section 63 of Copy

Right Act punishable with imprisonment for a terms which shall not be less than six months but which may extend to three years and with fine. Therefore under sub section 2 of Section 155 of Cr.P.C., it is a non-cognizable offence and no police officer shall investigate a non-cognizable case without the order of the Magistrate. Therefore, the First Information Report ought not to have registered as against the petitioner by the police officers.

2.3. He further submitted that the offences under Sections 103(a), 102(1)(a) of Trade Marks Act 1999, are cognizable offences and before making any search or seizure, the police officers shall obtain opinion from the Registrar on the facts involved in the offence relating to the Trademarks Act and shall abide by the opinion so obtained. No search or seizure made without obtaining opinion from the Registrar. In this regard, the learned Senior Counsel relied upon the order dated 09.04.2015 passed in S.B.Cr.Misc. Petition No.2786 of 2012, by the High Court of Rajasthan at Jodhpur in the case of Pintu Dey Vs. State of Rajasthan & Anr. and the order dated 13.06.2016, passed in Misc. Criminal Case No.1362 of 2015, by the High Court of Madhya Pradesh, Jabalpur in the case of Kasim Ali Vs. State of Madhya Pradesh and another and the order passed by the High Court of Punjab & Haryana in Crl.Misc.No.M-9229 of 2009 dated 22.02.2011 in the case of Anil Kumar Vs. State of Punjab and another. Hence, he prayed for quashment of the FIR.

3. Per contra, the learned Additional Public Prosecutor appearing for the respondents 1 & 2 submitted that the case has been registered as against the petitioner and another for which the petitioner is arraigned as A1, for the offences under Sections 63(a), 51 of Copy Right Act 1957 r/w 103(a), 102(1)(a) of Trade Marks Act 1999. Now the investigation is pending. He further submitted that there are specific averments and allegations to make out a prima facie case for the cognizable offences. It has to be investigated further and it cannot be quashed in the threshold.

3.1. He further contended that by a communication dated 08.12.2017, the Assistant Commissioner of Police, Central Crime Branch, Video Piracy Cell, Team-X, Egmore, Chennai, has obtained opinion that the trade mark of Kumkum is limited to the colours as shown in the representation annexed hereto and the Registration of this trademark shall give no right to the exclusive use of a device of a woman holding a mirror and in the act of applying Kumkum and the word "Suganda" appearing on the mark. Further the Assistant Commissioner of Police sought for opinion in respect of selling duplicate Kumkum in the product name of Suganda to the Registrar of Trade Marks. The Government of India, Trade Marks Registry, by communication dated

12.12.2017, submitted that as per the entry made in the electronic data base, a trade mark "Suganda Kumkum TMGS (Lable)" is a registered trade mark bearing application No.211602 in class 3 and presently stands in the name of M/s.N.Rangasamy Iyengar, N.Gopala Iyengar, T.M.Govinda Iyengar, S.Sampath and others. Further submitted that trade mark "TMGS" is a registered trade mark with the same persons and insofar as the "Suganda Kumkum", there are no registered trade mark under the said brand. Therefore, after obtaining opinion from the Registrar of Trademarks, by the communication dated 12.12.2017, the case has been registered.

3.2. The learned Additional Public Prosecutor further submitted that the offences under Sections 63(a) and 51 of Copy Right Act, though non cognizable offence, the case has been registered along with the offences under Sections 103(a), 102(1) (a) of Trade Marks Act 1999. Therefore, sub Section 2 of Section 155 is not applicable to the present case. Hence, he sought for dismissal of this petition.

4. The learned counsel appearing for the third respondent adopted the submissions made by the learned Additional Public Prosecutor.

5. Heard Mr.S.Prabakar, learned Senior Counsel appearing for the petitioner, Mr.M.Mohamed Riyaz, learned Additional Public Prosecutor appearing for the respondent 1 & 2 and Mr.C.M.Gunasekaran, learned counsel appearing for the third respondent.

6. The petitioner filed this petition to quash the FIR in Crime No.458 of 2017 registered from the offences under Sections 63(a), 51 of Copy Right Act 1957 r/w 103(a), 102(1) (a) of Trade Marks Act 1999, in which the petitioner is arraigned as A1. He is a proprietor of M/s. Venkateshwara & Co. The crux of the complaint is that the complainant is the partner of Srinivasa Iyengar Firm and they are running business of manufacturing cum distributing Kumkum in the name and style of "Suganda Kumkum" and the same was registered under the Trade Marks and Patent Rights. The shop keepers in Madurai are selling duplicate Kumkum in the name of Suganda Kumkum with their logo mark, colours and boxes. Hence the complaint.

7. The petitioner is the wholesale and resale trade of the defacto complainant's Sugantha Kumkum and having business transaction with the defcato complainant and its predecessor partners for more than 25 years. The allegations are that the sale of duplicate Kumkum in the name of Sugantha Kumkum with the same logo mark, colours and boxes. Further the offences under Sections 63(a) and 51 of Copy Right Act, are non cognizable

offence and the case has been registered along with the offences under Sections 103(a), 102(1)(a) of Trade Marks Act 1999, as such the FIR has been registered along with the other cognizable offences.

8. The foremost point raised by the learned Senior Counsel appearing for the petitioner is that that offences under Sections 63(a) and 51 of Copy Right Act are non cognizable offences as such, there is no power under sub Section 2 of Section 155 of Cr.P.C. that, no police officer shall investigate a non cognizable offence without the order of a Magistrate. The judgment relied upon the learned Senior Counsel in S.B.Cr.Misc. Petition No.2786 of 2012, dated 09.04.2015 by the High Court of Rajasthan at Jodhpur in the case of Pintu Dey Vs. State of Rajasthan & Anr. , which reads as follows :-

"As per section 63, the offence under the said Act is punishable with imprisonment for a terms which shall not be less than six months but which may extend to three years and with fine. The offence falling under section 65 of the Act of 1957 is punishable with imprisonment which may extend to two years and an offence falling under section 68A of the Act of 1957 shall punishable with imprisonment, which may extend to three years.

Hon'ble Supreme Court in Rajeev Chaudhary's case (supra) has held as under:

"In this context, the expression "not less than" would mean imprisonment should be 10 years or more and would cover only those offences for which punishment could be imprisonment for a clear period of 10 years or more. Under Section 386 punishment provided is imprisonment of either description for a term which may extend to 10 years and also fine. That means, imprisonment can be for a clear period of 10 years or less. Hence, it could not be said that minimum sentence would be 10 years or more. Further, in context also if we consider clause (i) of proviso (a) to Section 167(2), it would be applicable in case where investigation relates to an offence punishable (1) with death; (2) imprisonment for life; and (3) imprisonment for a term of not less than ten years. It would not cover the offence for which punishment could be imprisonment for less than 10 years. Under Section 386 of the

IPC, imprisonment can vary from minimum to maximum of 10 years and it cannot be aid that imprisonment prescribed is not less than 10 years."

In Amarnath Vyas vs. State of A.P. (supra), the Andhra Pradesh High Court after relying on the decision of Hon'ble Supreme Court in Rajeev Chaudhary's case (supra), has

held as under:

"11. Both these judgments discussed hereinabove have not considered the judgment of the Apex Court in Rajeev Chaudhary v. State (N.C.T.) of Delhi AIR 2001 SC 2369: (2001 Cri LJ 2941). The provisions of Section 167(2) Clause (1) proviso (a) of the Cr.P.C. came up for consideration before the Apex Court in the said judgment. The offence involved, as can be seen from the matrix of that case, is extortion punishable under Section 386 of IPC. The punishment prescribed therefor is imprisonment of either description for a term, which may extend to 10 years and shall also liable to fine. The expression 'imprisonment which may extend to 10 years' was discussed by the Apex Court in juxtaposition to the other expression 'imprisonment for 10 years or more'. The proviso under Clause (1) of Section 167, Sub-clause (2) of the Cr.P.C. reads that if the period of ninety days exceeds in the case of investigation relating to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years, the remand prisoner, as a matter of right, is entitled to bail. Therefore, the expression used therein inter alia that imprisonment for a term not less than ten years, as per the judgment of the Supreme Court, could not be equated with imprisonment for ten years or more; and that the expression would cover only those offences punishable with imprisonment for a clear period of ten years or more. Inasmuch as under Section 386 IPC the punishment provided is imprisonment for either description for a term which may extend to ten years, it was considered by the Apex Court and held that such an

imprisonment cannot be equated with the sentence of imprisonment for ten years or more. In the view of the Apex Court, imprisonment for a term, which may extend to ten years cannot be construed as similar to the sentence of ten years or more. In paragraph No. 6, the Apex Court held thus:

"In this context, the expression 'not less than' would mean imprisonment should be ten (10) years or more and would cover only those offences for which punishment could be imprisonment for a clear period of ten (10) years or more. Under Section 386 punishment provided is imprisonment of either description for a term, which may extend to ten (10) years and also fine. That means, imprisonment can be for a clear period of ten (10) years or less. Hence, it could not be said that minimum sentence would be ten (10) years or more. Further, in context also if we consider Clause (i) of proviso (a) to Section 167 (2), it would be applicable in case where investigation relates to an offence punishable (1) with death; (2) imprisonment for life; and (3) imprisonment for a term of not less than ten years. It would not cover the offence for which punishment could be imprisonment for less than ten (10) years. Under Section 386 of the I.P.C., imprisonment can vary from minimum to maximum of ten (10) years and it cannot be said that imprisonment prescribed is not less than ten (10) years." In view of the said authoritative pronouncement of the Apex Court, the expression used in Second category of II-Part of Schedule-I of the Cr.P.C. viz., that the term of imprisonment for three years or upwards, but not more than seven years, cannot be equated with the expression used in Section 63 of the Act viz., the imprisonment which may extend to three years.

12. It is trite that the penal provisions shall have to be construed strictly. True there may be certain other class of offences which may fall in between classification II and classification III of Second Part of Schedule-I. Merely because they are not coming squarely within the

domain of classification-III, they, cannot automatically be treated as included in the classification-II. By default, they cannot be considered as coming within the purview of the classification-II. Having regard to the fact that the judgments of Kerala and Gauhati High Courts supra have not considered the judgment of the Apex Court in Rajeev Chaudhary's case 2001 CriLJ 2941 (supra), with due respect, they cannot be considered as having laid down the correct proposition of law. Therefore, the expression 'imprisonment for a term which may extend upto three years', in my considered view, would not come squarely within the expression 'imprisonment for three years and upwards'. Therefore, the offence punishable under Section 63 of the Act cannot be considered as 'non-bailable' one."

Admittedly, offences punishable under sections 63 and 68A of the Act of 1957 carry maximum punishment which can be extended up to three years.

Part-II of Schedule-I of CrPC reads as under:

"II - CLASSIFICATION OF OFFENCES AGAINST OTHER LAWS

Offence	Cognizable or non-cognizable	Bailable or non-bailable	By what court
1	2	3	4
If punishable with death, imprisonment for life, or imprisonment for more than 7 years,	Cognizable	Non-bailable	Court of Session.
If punishable with imprisonment for 3 years, and upwards but not more than	Cognizable	Non-bailable	Magistrate of the first class

7 years.

If punishable with Non-cognizable Bailable Any Magistrate imprisonment for less than 3 years or with fine only.

As held by the Andhra Pradesh High Court in Amarnath Vyas's case (supra), there may be certain other class of offences which may fall in between Classification II and Classification III of second part of Schedule-I of CrPC but merely because they are not falling squarely within the domain of Classification III, they cannot automatically be treated as included in Classification-II. By default, they cannot be considered as coming within the purview of Classification II, I am totally in agreement with the above proposition laid down by Andhra Pradesh High Court.

Hence, as per the law laid down by Hon'ble Supreme Court in Rajeev Chaudhary's case (supra) and by Andhra Pradesh High Court in Amarnath Vyas's case (supra), the expression "imprisonment for a term which may extend up to 3 years" would not come within the expression "imprisonment for 3 years and upwards". Therefore, the offence punishable under sections 63 and 68A of the Act of 1957 cannot be considered as cognizable offence.

Sub-section (2) of section 155 of CrPC reads as under:

"(2) No police officer shall investigate a noncognizable case without the order of a Magistrate having power to try such case or commit the case for trial."

As per the above provision, no police officer shall investigate a non-cognizable case without an order of a Magistrate.

In view of the above discussions, the action of registration of the impugned FIR

against the petitioner without there being any order of the Magistrate having power to try such case or commit the case for trial is violative of sub-section (2) of section 155 of the CrPC.

As pointed out above, the case has been registered along with the other offences under the Trade Marks Act. Therefore, the police officer can register a case and investigate for the offences under non-cognizable offence along with other cognizable offences. Therefore, the judgment relied upon by the learned Senior Counsel appearing for the petitioner is not helpful to the case of the petitioner.

9. The another point raised by the learned Senior Counsel appearing for the petitioner is that before registering the case and search & seizure, under the Trade Marks Act, opinion has to be obtained from the Registrar. In this regard the learned Senior Counsel relied upon the judgment dated 13.06.2016, passed in Misc. Criminal Case No.1362 of 2015, by the High Court of Madhya Pradesh, Jabalpur in the case of Kasim Ali Vs. State of Madhya Pradesh and another as follows :-

[16] In the present case, no such opinion has been obtained from the Registrar and search and seizure has been conducted by the Sub Inspector. Thus, the mandatory provisions of the Act, 1999 have not been complied with. When statutes, which create an offence provide for a procedure the Court or the authorities cannot ignore the same. In the present case, the procedure provided under Section 115 of the Act, 1999 has not been complied with, therefore, the Court is not competent to take cognizance of the offence under Section 103 of the Act, 1999.

[17] Now I have considered whether the offence under Section 420 of IPC is made out against the applicant. There is no complaint from any person or consumers that they have been cheated by the purchase of any electric goods which is said to be manufactured by the applicant No.1 and which contained deceptively similar trade mark as of M/s Vertex Company. From the facts, the offence under Section 420 of IPC has not been made out.

[18] With the aforesaid, it is clear that the Court has wrongly taken the

cognizance for the offence under Section 63 of the Act, 1957 and under Section 420 of IPC and from the facts the applicants may be prosecuted for the offence under Section 102 read with Section 103 of the Act, 1999. However, the mandatory procedure provided under Section 115 of the Act, 1999 has not been complied with. Hence, applicants cannot be prosecuted for offence under Trade Marks Act, 1999. Therefore, to continue such proceedings is mis use of process of law.

10. It is seen from the communication dated 08.12.2017, the Assistant Commissioner of Police, Central Crime Branch, Chennai, requested opinion from the Registrar of Trade Marks. On receipt of the said communication, the Registrar of Trade Marks by communication dated 12.12.2017, opined as follows :-

"Sir, This has reference to the above. With regard to the query raised by you in point No.1) it is hereby informed that as per the entry made in the electronic data base, a trade mark "Suganda Kumkum TMGS (Lable)" is a registered trade make bearing application No.211602 in Class and presently stands in the name of M/s.N.Rangasamy Iyengar, N.Gopala Iyengar, T.M.Govinda Iyengar, S.Sampath, R.Narayanan, G.Srinivasan and R.Srinivasan, trading as T.M.G.Srinivasa Iyengar, No.132, Audiappanaiken Street, Madras - 600 079, South India. This registration is valid upto 1st October, 2018. A copy of the Application details in respect of application No.211602 is attached herewith for your reference.

With regard to the query raised by you in point No.2) it is hereby informed that as per the entry made in the electronic data base, a trade mark 'TMGS' is a registered trade mark bearing application No.256940 in Class 3 and presently stands in the name of M/s.N.Rangasamy Iyengar, N.Gopala Iyengar, T.M.Govinda Iyengar, S.Sampath, R.Narayanan, G.Srinivasan and R.Srinivasan, trading as T.M.G. Srinivasa

Iyengar, No.132, Audiappanaiken Street, Madras - 600 079, South India. This registration is valid upto 22nd May, 2024. A copy of the Application details in respect of application No.211602 is attached herewith for your reference.

With regard to the query raised by you in point No.3) as per the search made in the electronic records maintained by this office, there are no registered trade mark under the brand/LOGO "TMGS" "SUGANDA KUMKUM", of any other person."

11. The procedure contemplated under Section 115 of Trade Marks Act, while taking certain cognizable offence by the police authority is that, before making any search and seizure, he shall obtain opinion of the Registrar on facts involved in the offence relating to trademark and shall abide by the opinion so obtained. In the case on hand, as stated above, the Assistant Commissioner of Police obtained opinion dated 12.12.2017 and only thereafter, the case has been registered on 15.12.2017. Therefore, the procedure laid down under the Act strictly followed by the first and second respondents. This judgment also is not helpful for the petitioner, since the question of without opinion from the Registrar, is not arise.

12. It is also seen from the First Information Report that there is a specific allegation as against the petitioner, which has to be investigated. Further the FIR is not an encyclopedia and it need not contain all facts and it cannot be quashed in the threshold. This Court finds that the FIR discloses prima facie commission of cognizable offence and as such this Court cannot interfere with the investigation. The investigating machinery has to step in to investigate, grab and unearth the crime in accordance with the procedures prescribed in the Code. However, considering the F.I.R. in Crime No.458 of 2017, the second respondent is directed to complete the investigation and file final report within a period of three months from the date of the receipt of a copy of this Order.

13. In view of the above discussion, this Court is not inclined to quash the FIR and the Criminal Original Petition stands dismissed. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//
Sub Assistant Registrar

rts

To

1. The Assistant Commissioner,
Video Piracy and Copy Right Wing,
Central Crime Branch, Egmore,
Chennai.
2. The Inspector of Police,
Central Crime Barach (CCBI),
Old Commissioner Office,
Egmore, Chennai - 600 008.
3. The Public Prosecutor,
High Court of Madras,
Chennai.

+1 cc to Mr.C.M.Gunasekaran, Advocate SR.No.17535

CrI.O.P.No.86 of 2019
CrI.MP.No.57 of 2019

SSD(CO)
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