

**HIGH COURT OF MADHYA PRADESH, JABALPUR**

**BENCH INDORE**

**( Single Bench )**

**( Hon'ble Shri Justice Jarat Kumar Jain )**

**Misc. Criminal Case No.1362 of 2015**

Kasim Ali s/o Akbar Ali and another

**V E R S U S**

State of Madhya Pradesh and another

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Shri M.M.Bohara, learned counsel for the applicants.

Smt. Mamta Shandilya, learned Deputy Govt. Advocate for the Non-applicant No.1/State.

Shri Aniruddha Gokhale, learned counsel for the Non-applicant No.2/Complainant.

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**O R D E R**

( Passed on this 13th day of June, 2016 )

**THIS** petition under Section 482 of the Code of Criminal Procedure [in brief “the Code”] has been filed for quashment of FIR under Section 420 of IPC and under Section 63 of the Copyright Act, 1957 [in brief “the Act, 1957”] registered at Police Station Sadar Bazar, Indore and subsequent proceedings before JMFC, Indore in Criminal Case No.19746/2014 against the applicants.

[2] Non-applicant No.2/complainant has filed a written complaint against the applicants alleging that they are using the brand name “SENTINEL” for their electric products; whereas the trade mark has been registered by

“M/s Vertex Manufacturing Co. Pvt. Ltd.”. Thus, they are misusing the trade mark and cheating the customers as well as the Company by selling fake electric products. On this basis, Police Station Sadar Bazar, Indore registered a Crime No.12/2014 for the offence under Section 420 of IPC and under Section 63 of the Act, 1957 against the applicants. The police has seized the fake electric products from possession of the applicants and after completing the investigation submitted final report before the JMFC, Indore. Before the Magistrate, the applicants have raised the objection that the trade mark is not registered in the Company's name, therefore, they be discharged. However, learned Magistrate rejected the objection and framed the charges under Section 420 of IPC and under Section 63 of the Act, 1957 against the applicants.

[3] The applicants averted in this petition that initially SENTINEL trade mark was registered in favour of the Vertex through Proprietor N.K. Bhimani which was removed on 11.08.2008 and on 09.03.2013 applicant No.1 has made an application under Section 23 (2), Rule 62 (1) of the Trade Marks Act, 1999 [in brief “the Act, 1999]. However, M/s Vertex Manufacturing Co. Pvt. Ltd. on 18.07.2013 has filed an application for registration of the trade mark over SENTINEL. It is further averted that without any power or authority, the Vertex Company entered into an agreement with the complainant Mr. Sachidanand Chitale; whereas the trade mark SENTINEL was expired on 11.08.2008. Therefore, such an agreement being *void ab*

*initio*. Thus, the applicants have not committed any offence which is punishable under Section 63 of the Act, 1957 or under Section 420 of IPC. If there is any infringement of right of the complainant then the action may be taken under the Act, 1999. Section 115 of the Act, 1999 provides a specific procedure for taking cognizance but the procedure has not been complied, therefore, the Court cannot take cognizance for the offence under the Act, 1999. In such circumstances to continue such prosecution against the applicants is misuse of process of law.

[4] Learned counsel for the applicants submits that the applicants have not committed any offence under Section 63 of the Act, 1957 and under Section 420 of IPC. However, it may be a case of infringement of right under the Act, 1999. Section 115 of the Act, 1999 provides that an offence under Section 107, 108 or 109, the Court can take cognizance on complaint in writing made by the Registrar and police officer not below the rank of Deputy Superintendent of Police is authorized for search and seizure. But in the present case no such procedure has been followed.

[5] It is further submitted that the complainant has not produced Certificate of registration contemplated under Section 23 of the Act, 1999 or entry in register contemplated under Section 45 of the Act, 1957. It appears that SENTINEL trade mark has not been registered in the name of Vertex Co. In similar facts, Punjab & Haryana High Court in the case of Anil Kumar v/s State of Punjab, in Cri.

Misc. No.M-9229 of 2009 decided on 22.03.2011 and in the case of Satpal v/s State of Punjab, in Cri. Misc. No.M-23090 of 2009 decided on 11.10.2010, held that offence under Section 63 of the Act, 1957 and under Section 420 of IPC has not been made out and quashed the proceedings.

[6] Learned counsel for the applicants submits that Section 27 of the Act, 1999 provides that no action for infringement of unregistered trade mark can be taken. In the present case, the Non-applicant No.2 has not produced any Certificate of registration of trade mark. Therefore, no prosecution can be instituted against the applicants.

[7] On the other hand, learned counsel for the Non-applicants vehemently oppose the prayer and submit that the offence has rightly been registered under the Act, 1957. The provisions of trade mark Act are not applicable in this case. There is an infringement of rights of goodwill of the Non-applicant No.2. The documents which are not filed along with the final report, cannot be considered at this stage. For this purpose placed reliance on the judgment of Hon'ble apex Court in the case of HMT Watches Ltd. v/s M.A.Abida [(2015) 11 SCC 776]. It is further submitted that the trade mark is registered in the name of M/s Vertex Manufacturing Co. Pvt. Ltd. for last 45 years. The disputed questions of fact cannot be decided at this stage. The Trial Court has rightly framed the charges against the applicants. Therefore, petition be dismissed.

[8] After hearing learned counsel for the parties, perused the record.

[9] It is alleged in the written complaint of Non-applicant No.2 that the applicants are manufacturing electric goods using similar trade mark which is registered in the name of M/s Vertex Manufacturing Co. Pvt. Ltd. and, therefore, the customers were being cheated by the applicants. The final report has been filed under Section 420 of IPC and under Section 63 of the Act, 1957.

[10] Section 63 of the Act, 1957 is as under :-

**“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 53A**

**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.**

**Explanation.- Construction of a building or other structure which infringes or which, if completed, would infringe the copyright in some other work shall not be an offence under this section.”**

[11] Section 13 of the Act, 1957 deals with the work in which copyright subsists. Section 13 of the Act, 1957 reads as under :-

**“13. Works in which copyright subsists :- (1) Subject to the provisions of this section and the other**

**provisions of this Act, copyright shall subsists throughout India in the following classes of works, that is to say,-**

- (a) original literary, dramatic, musical and artistic works;**
- (b) cinematograph films; and**
- (c) sound recording.”**

**[12]** In view of Section 13 of the Act, 1957 Copyright Act is applicable in original literary, dramatic, musical and artistic works, cinematograph films, sound recording. The provision of the Act, 1957 are not applicable for the purpose of electric products using the same or similar trade mark which is registered in the name of Vertex Co.

**[13]** From the facts, as averted in the FIR, it seems that the applicants have committed the offence under Section 102 of the Act, 1999 which is punishable under Section 103 of the Act, 1999. For the ready reference, Sections 102 and 103 are reproduced 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 marks 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.**

**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.”

[14] The Act, 1999 provides a procedure under Section 115 for taking cognizance. It is useful to refer Section 115 which is as under :-

*“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 authorized 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 of the 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 restored to him and the Magistrate, after hearing the applicant and the prosecution, shall make such order on the application as he may deem fit.”**

[15] There is allegation in the FIR that the applicants were using the same trade mark or a deceptively similar trade mark to goods or package containing goods, which is registered in the name of Vertex Manufacturing Co. There by they have committed the offence defined under Section 102 which is punishable under Section 103 of the Act, 1999. Section 115 (3) of the Act, 1999 provides that the offences under Section 103, Section 104 and Section 105 shall be cognizable. Sub-section (4) of Section 115 provides that any police officer not below the rank of Deputy Superintendent of Police, if he is satisfied that an offence under Section 103 or 104 or 105 has been committed or is likely to be committed, may search and seize goods, die, block, machine etc. without warrant. It is also provided that before making any serach and seizure, he 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.

[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.

[19] Accordingly, this petition is **allowed**. The FIR registered at Police Station Sadar Bazar, Indore at Crime No.12/2014 for the offence under Section 420 of IPC and

under Section 63 of the Copyright Act, 1957 is hereby quashed and further proceedings in Criminal Case No.19746/2014 pending before JMFC, Indore against the applicants are also quashed.

**[ JARAT KUMAR JAIN ]**  
**JUDGE**

Sharma AK/\*