

Zahir Ahmed vs Azam Khan on 21 September, 1995

Equivalent citations: 1996CRILJ290

ORDER

A.K. Dutta, J.

1. By this Revisional Application under Section 482 of the Code of Criminal Procedure (hereinafter referred to as Code) the Petitioner-Accused, Zahir Ahmed, has prayed the Court for quashing of the relevant Proceedings/ investigation in G.R. Case No. 1000 of 1994, arising out of Section "K" Calcutta Case No. 255 dated 22-4-1994, for the reasons stated and on the grounds made out therein.

2. The Opposite Party No. 1-complainant-Azam Khan (hereinafter referred to as complainant) had filed the relevant petition of complaint before the Additional Chief Metropolitan Magistrate at Calcutta (hereinafter referred to as learned Magistrate) on 22-4-1994 on the allegations made therein against the accused for the alleged offences punishable under Sections 78 and 79 of the Trade and Merchandise Marks Act, 1958 and Section 63 of the Copyright Act, 1957, read with Section 420 of the Indian Penal Code, and had prayed before him (learned Magistrate) for directing the Deputy Commissioner of Police, Enforcement Branch, Calcutta, to investigate the case in terms of Section 156(3) of the Code by treating the petition of complaint to be the F.I.R. of the case. From the Annexure-B to the Revisional Application, being the xerox copy of the certified copy of the aforesaid petition of the complaint, it would also appear that the learned Magistrate on the same very day (22-4-1994) had directed the O/C, Enforcement Branch, to investigate the case under Section 156(3), Cr.P.C. and treat the petition of complaint as F.I.R.

3. The allegations made by the complainant in the petition of complaint (hereinafter referred to as F.I.R.) may shortly be stated as follows :-

The complainant's company is well-known manufacturer, blender and dealer in Hooka Tobacco Paste, which is commonly known as 'Jurak' in Soudi Arabia. One of the Trade Marks under which he markets such goods is the Trade Mark Six Sheesh (six hooka). The said Trade Mark with Six Sheesh (six hooka) container and get-up are well-known in Soudi Arabia. He is using the said Trade name/brand/design and also the get-up of the containers since 1992 and the entire production is earmarked for and sold and exported to Soudi Arabia. It was found on 21-4-1994, and subsequently ascertained that the accused had imitated the tin container which was being used by the complainant and were proposing to export their goods in such tin containers which were manifestly colourable imitation of his (complainant's) tin containers. Further enquiries had revealed that the accused and his servants/agents/employees were determined to use the similar tin containers using the same/similar and/or deceptively similar trade name, design and pictorial

impression in order to pass such goods as if those were manufactured by the complainant's company. One consignment consisting of a container load valued at Rs. 5.00 lacs approximately was proposed to be exported from Saudi Arabia by the accused, which could cause irreparable loss, prejudice and detriment to him (complainant). By asking for Six Sheesh brand customers at Saudi Arabia obviously refer to Six Sheesh (six hooka) Trade Mark owned by the complainant's company. The accused, with full notice and knowledge of the aforesaid circumstances, have purported to imitate the complainant's brand name/trade name/design by using Six Sheesh (six hooka), and the buyers of Jurak in Saudi Arabia would not be able to distinguish between the said trade name/design of the complainant's company and the colourable imitation thereof containing inferior quality of 'Jurak' of the accused.

4. The complainant has already applied for registration of the said marks in India, being Application No. 600647 dated 2-7-1993 and Copyright Application No. 6631, Receipt No. 30201, and is using such mark and design exclusively. The accused, is guilty of falsifying a Trade Mark Six Sheesh (Six Hooka) by suing a mark which is of the same type and deceptively similar to the genuine mark of the complainant used in his trade. He (accused) is guilty of deceptive adoption and fraudulent imitation of get-up and/or appearance and/or packing, and/or false trade description by making and possessing instruments for falsifying trade marks and/or selling goods or possessing or exposing for sale of goods falsely marked. He (accused) is thus guilty of commission of offence punishable under Sections 78 and 79 of the Trade and Merchandise Marks Act, 1958 and Section 63 of the Copyright Act, 1958, read with Section 420, I.P.C.

5. The petitioner-accused, however, contends his revisional application that he is a reputed businessman engaged in manufacture, blending sale of hooka tobacco paste under the name "ZAMAN TOBACCO". He is engaged in the sale of Hooka Tobacco since 1990, both in India and he manufactures goods of high standard including Amber and Six Sheeshas, and these acquired considerable goodwill and reputation. Apart from the goods which are exported by him he has also been selling Hooka Tobacco paste, also known as Jurak in the local market since 1990 under the trade name "Six Sheeshas". The said trade name was coined and/or adopted by him in or around 1990 and a designer's services was taken for the purpose of creating the aforesaid trade name. He has also applied for registration of the said mark to the Registrar of Trade Marks in February, 1994. He has been exporting Hooka Tobacco paste under various trade names to 'the Middle East countries, including Saudi Arabia, where his products are immensely popular. The allegations made by the complainant in the F.I.R. are thus false to his knowledge. The complainant had also suppressed several material facts, which if disclosed, the learned Magistrate would not have taken any action on the basis of such complaint. It is thus contended by the petitioner-accused that the entire proceedings initiated against him and pending before the learned Magistrate is not maintainable in law, and is void ab initio in as much as the allegations made in the F.I.R.. if accepted in its entirety, do not disclose any offence, far less any cognizable offence, committed by him. It is further contended that the learned Magistrate had acted mechanically in directing the O/C, Enforcement Branch, to investigate the case under Section 156(3) of the Code by his Order dated 22-4-1994, as he did, without due application of his mind to the facts of the case. It is further contended by him that the complainant is not the registered owner/ proprietor of the purported

trade name/copyright in question, and as such there could be no question of infringement/ violation of the same, as alleged by him (complainant).

6. The relevant criminal proceedings investigation has thus been sought to be quashed by the petitioner mainly and inevitably on the ground that the allegations made in the F.I.R., taken in their face value and accepted in their entirety, do not prima facie constitute any cognizable offence, as alleged. The prosecution case is also patently absurd and inherently impossible, and any further investigation in the proceeding would clearly amount to gross abuse of the process of the Court.

7. Let us now, therefore, consider whether the allegations made in the petition of complaint, which was directed by the learned Magistrate to be treated as F.I.R., such as they are, without adding anything thereto or subtracting anything therefrom, make out any cognizable offence against the accused. It would seem worth bearing in mind that the complainant has alleged that the accused has allegedly committed offences punishable under Sections 78 and 79 of the Trade and Merchandise Marks Act, 1958 and Section 63 of the Copyright Act, read with Section 420, I.P.C., on the allegation made therein.

8. To the alleged offence punishable under Sections 78 and 79 of the Trade and Merchandise Marks Act, 1958 first. The punishment prescribed for the aforesaid offences appear to be two years. Undeniably, the said alleged offences are clearly not cognizable offences. Such alleged offences could not be investigated by the police as cognizable offence as such. The learned Magistrate could neither conceivably have directed investigation of such offences by the police under Section 156(3) of the Code, as he did by passing the relevant order dated 22-4-1994.

9. To the alleged offence punishable under Section 420, I.P.C., next, which is indeed a cognizable offence, but unhappily for the opposite parties herein, the allegations made in the F.I.R., as they are, do not seem to make out an offence punishable thereunder. The only allegation made therefor in the F.I.R., as contained in paragraphs 7 and 12 thereof, is that the accused is also guilty for having committed an offence punishable under Section 63 of the Copyright Act, read with Section 420, I.P.C.

10. In terms of Section 415, I.P.C., "whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

11. The ingredients required to constitute an offence of cheating are:

1. There should be fraudulent or dishonest inducement of a person by deceiving him,
- 2(a) the person so deceived should be induced to deliver any property to any person or to consent that any person shall retain any property, or

(b) the person so deceived should be intentionally induced to do or omit to do anything which he would not do or omit if he were not so deceived, and

3. In cases covered by (2)(b) the act or omission should be one which causes or is likely to cause damage or harm to the person induced in body, mind, reputation or property.

12. Sadly for the opposite parties, there is not the merest and faintest whisper about any of the aforesaid ingredients within the four corners of the F.I.R. The F.I.R. being, what it is, no case for an offence punishable under Section 420, I.P.C. could be said to have been made out as such. And, as held by a learned single Judge of Karnataka High Court in Syed Kaleem v. Mysore Lakshmi Beedi Works, 1993 Cri LJ 232, In view of Sections 78 and 79 of the Trade and Merchandise Marks Act, 1958 providing penalty for applying false trade descriptions etc. and selling goods to which a false trade mark or false trade description is applied, as alleged in the relevant case before us, a charge under Section 420, I.P.C. becomes wholly inapt, I fully concur with the said view.

13. In view of the discussions above, there could be little mistaking that the F.I.R., as it is, does not make out the alleged offence punishable under Section 420, I.P.C., against the accused. So also feebly conceded by the learned advocates for the opposite parties herein in the long last on being queried by the Court. The allegations in the F.I.R., as indicated above, do neither seem to make out an offence punishable under Sections 420/511, I.P.C., as vainly sought to be urged by the learned Advocate for the State-opposite party No. 2.

14. To the alleged offence punishable under Section 63 of the Copyright Act, 1957 (hereinafter referred to as Act) last.

Section 63 of the Act reads as follows:

"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...."

15. Since the punishment prescribed therefor may extend to three years and with fine, the offence punishable thereunder is, undeniably, a cognizable offence.

16. In terms of Section 14 of the Act "Copyright", for the purpose of the Act, means the exclusive right, subject to the provisions of the Act, to do or authorise the doing of any of the acts mentioned therein in respect of a work or any substantial part thereof.

17. In terms of Section 13, copyright shall subsist throughout India in the classes of works mentioned therein, subject to the provisions therein and the other provisions of the Act.

18. Section 17 of the Act provides that the author of a work shall be the owner of the copyright therein, subject to the provisions of the Act.

19. And, in terms of Section 51 of the Act, copyright in a work shall be deemed to be infringed -

"(a) when any person, without a licence granted by the owner of the Copyright or the Registrar of Copyrights under this Act or in contravention of the condition of a licence so granted or of any condition imposed by a competent authority under this Act -

(i) does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright, or....

20. Bearing the aforesaid provisions of the Act in mind let us now turn to the allegations made by the complainant in the F.I.R. to find whether the allegations made therein, as they are, make out an offence punishable under Section 63 of the Act.

21. As already set out at the outset, it is alleged by the complainant in the petition of complainant (F.I.R.) that his company is a well-known manufacturer, blender, and dealer in Hooka Tobacco Paste, which is commonly referred to and described in Saudi Arabia as Jurak; and one of the trade marks under which he (complainant) markets such goods is the trade mark Six Sheesh (Six Hooka). -The said trade mark is distinctive of his company's goods containing such marks. He is using the said trade name/brand/design and also the, get-up of the containers since 1992, and the entire production is ear-marked for and sold and exported to Saudi Arabia. The Six Sheesh (Six Hooka) trade mark has been developed by him (complainant) and is owned by his company to the full notice and knowledge of the accused. The complainant has been using such mark and design exclusively, and had already applied for registration of the said mark in India, being Application No. 600647 dated 2-7-1993 and Copyright Application No. 6631 under Receipt No. 30201.

22. It was discovered on 21-4-1994 and ascertained upon enquiries that the accused had imitated the tin containers developed by the complainant and was proposing to export their goods in such tin containers, which were manifestly colourable imitation of the tin containers of the complainant's company, using the same/ similar and/ or deceptively similar trade name, design and pictorial impression in order to pass such goods as if those were manufactured by the complainant's company. One consignment consisting of a container load valued at Rs. 5.00 lacs approx. was proposed to be exported from India to Saudi Arabia by the accused with the same get-up packing in which the goods of the complainant's company are sold in Saudi Arabia, identifying the same as being merchandise belonging to the complainant's company. It is thus alleged in paragraph 7 of the F.I.R. that the accused is guilty of falsifying a trade mark Six Sheesh (Six Hooka) by using a mark which is of the same type and deceptively similar to the genuine mark of the complainant used in his trade. The accused is thus guilty of deceptive adoption and fraudulent imitation of get-up and/or

appearance and/or packing and/or false trade description by making and possessing instrument for falsifying trade marks and/or selling goods or possession or exposing for sale of goods falsely marked. He is thus guilty of offence punishable under Section 63 of the Copyright Act, 1957, read with Section 420, I.P.C.

23. In view of the allegations so made in the F.I.R. and having regard to the relevant provisions of the aforesaid Act a prima facie case for an offence punishable under Section 63 of the Act seems to have been made out, which is, undeniably, a cognizable offence. The question whether the complainant is the owner of the alleged copyright, having exclusive right thereto, which seems to be disputed by the accused, is a matter and question of fact to be decided by the Trial Court at the appropriate stage if the investigation ends in submission of charge-sheet which cannot certainly be agitated before and pre-judged by this Court in revision.

24. Realising the difficulty somewhat tardily, the learned Advocate for the petitioner, referring to Sections 44, 45, 72, 73 and 74 of the Act, read with Rules 16, 17 and 27 of the Copyright Rules, 1958 sought to contend that no exclusive right, within the meaning of Section 14 of the Act, could be said to have been acquired unless conferred by the Act upon the owner of the Copyright. And, no exclusive right could be acquired unless an application for registration is finally disposed of in terms of the aforesaid provisions referred to by him. It was thus submitted that no Copyright could be claimed without registration. A decision of a learned single Judge of the Orissa High Court in AIR 1986 Orissa 210, had also been referred to by the learned Advocate for the petitioner in support of the said contention. But to that I would at once note with a minute of dissent that although the Copyright Act under Section 44 provides for registration of a work in which copyright subsists, registration is not necessary to claim copyright. Copyright subsists as soon as the work is created and given a material form. The intention behind the enactment of the section was not to make registration compulsory or mandatory for the purpose of enforcement of copyright. It provided an option. It was, therefore, not obligatory for an author to get the copyright registered under Section 44 for the purpose of acquiring rights conferred by it. The registration only raised a presumption that the person shown is the actual author. The presumption is not conclusive, but where contrary evidence is not forthcoming, it is not necessary to render further proof to show that the copyright vested in the person mentioned in the register. Section 48 of the Copyright Act provides that the registration of copyright shall be prima facie evidence of the particulars entered therein. Documents purporting to be copies of the register certified by the Registrar of Copyright and sealed with the seal of the copyright office shall be admissible in evidence in all courts without further proof or production of the original. If the legislature intended to make the requirement of registration mandatory, the language of Section 44 would have been different. There is no provision in the Act depriving an author of the rights conferred by this Act on account of non-registration of the copyright, as held in *Nav Sahitya Prakash v. Anand Kumar*, ; *Satsang v. Kiron Chandra Mukhopadhyay*, ; *Madhavan v. Nayar*, .

25. It has been held by the Madras High Court in *Manojah Cine Productions v. Sundaresan*, AIR 1976 Mad 22, that the only effect of registration is what is stated in Section 48, namely, that it shall be prima facie evidence of the particulars entered in the register. There is no indication in any of the provisions of the Act, read individually or as a whole, to suggest that registration is a condition

precedent to subsistence of copyright or acquisition of ownership thereof or reliefs for infringement of copyright. The certificate of registration under the Copyright Act will only prima facie show that the particulars mentioned therein are entered in the Copyright Register. The mere fact that something is entered in the Copyright Register does not, as a matter of law, establish that what is registered is in fact and in law copyrightable subject matter. This is so because the sine qua non to the existence of copyright, is the expenditure of skill and labour on any work which originated from its author and unless the original work on which skill and labour has been expended by its author is produced in Court to prima facie show that the work has originated from the author, it cannot be said that there is copyright in the work as held by the Delhi High Court in *Camlin v. National Pencil*, . So also held by the Delhi High Court in *Glaxo v. Samrat Pharmaceuticals*, , that Registration of Copyright does not confer any rights. Copy-right exists whether registration is done or not, and the registration is merely a piece of evidence as to when a certain author started claiming copyright in the artistic or other work. The definition of the word 'author' and Section 17 lay emphasis on the fact that copyright vests in that person who is the original creator of this work. Where it is not possible to be definite as to who was the original creator, the person who got registration earlier is presumed to be the author or original creator of the artistic work.

26. I find nothing to differ from the views so taken in the aforesaid decisions by the different High Courts. The Indian Copyright Act, 1914 did not make any provision for Registration of Copyrights. The provision for Registration of Copyright has been made in Sections 44 and 45 of the Copyright Act, 1957. The object behind the enactment of Section 44 of the said Act was not to make registration compulsory or mandatory for the purpose of enforcement of copyright. An option was only provided thereunder. It is, therefore, not obligatory for- an author to get the copyright registered under Section 44 of the said Act for the purpose of acquiring rights conferred by it. As already indicated above, registration only raises a presumption that the person whose name is entered in the Register of Copyrights under Section 45 of the Act is the actual author. Section 48 of the aforesaid Act provides, as already indicated above, that the registration of copyright shall be prima facie evidence of the particulars entered therein and shall be admissible in evidence in all Courts without further proof for production of the originals. If the legislature intended to make the requirement of registration mandatory, the language of Section 44 would invariably have been different. The same could have been on the lines of Section 69 of the Partnership Act. But there is no provision in the Act depriving an author of the rights conferred by the aforesaid Act on account of non-registration of the copyright.

27. Section 13 of the Copyright Act deals with the works in which copyright subsists. Section 17 lays down that the author of a work shall be the first owner of the copyright, subject to the provisions of the Act. There is nothing in either of the two sections which provided for registration of copyright as a condition precedent for acquiring a right in it. Section 51 of the Act lists the various grounds on which the copyright in a work shall be deemed to be infringed. Section 55 provides the remedies for infringement of copyright. A plain reading of the aforesaid two sections would as well clearly indicate that there is nothing in the said provisions which make registration compulsory for availing the remedy provided for therein, as held by learned single Judge of the Andhra Pradesh High Court in *Muppala Ranganayakamma v. Smt. K. Ramalaxmi*, 1986 Cri LJ 522.

28. In view of the discussions above, there could clearly be no mistaking that under the Copyright Act an author acquires a copyright in his work regardless of registration, and non-registration thereof does not disable him of a copyright for bringing action for infringement thereof. To reiterate, registration is not a pre-requisite for acquisition of a copyright. That being so, the complainant in the relevant proceedings is entitled to initiate criminal proceedings against the petitioner-accused on the allegations made in the F.I.R. and establish his case. The impugned order dated 22-4-1994 passed by the learned Additional Chief Metropolitan Magistrate, Calcutta, directing the O/C, Enforcement Branch, to investigate the case under Section 156(3) of the Code, treating the petition of complaint to be the F.I.R., on the basis of the allegations made therein, does not, therefore, seem to suffer from any incorrectness, illegality or impropriety calling for interference of this Court in revision. There is nothing to quash the relevant criminal proceedings and the investigation in connection therewith as such. The decision referred to by the learned advocate for the petitioner in *State of Haryana v. Ch. Bhajanlal*, , and *State of West Bengal v. Swapan Kumar*, would be of little avail to him when a case for an alleged offence punishable under Section 63 of the Copyright Act appears to have been prima facie made out from the allegations made in the F.I.R., as they are.

29. In the result, the criminal revision be dismissed. The stay granted by the order dated 7-6-1994 be vacated. Since the relevant criminal proceedings/ investigation had remained stayed for more than a year in view of the stay granted herein, the learned Magistrate and the Investigating Agency shall expedite the same. The learned Magistrate shall ensure that the Investigating Agency concludes the investigation of the relevant case without undue delay. The learned Magistrate himself shall also seek to dispose of the relevant proceedings, after the conclusion of the investigation, as early as possible, preferably within a period of six months therefrom.

30. Let a copy of this order be forthwith sent down to the Court below for strict compliance by all concerned.

31. A prayer for stay of the operation of this judgment and order is made on behalf of the petitioner-accused, which is rejected for the reasons amply and appealingly made clear in the body of the judgment.