

Brundaban Sahu vs B. Rajendra Subudhi on 30 September, 1985

Equivalent citations: AIR1986ORI210, AIR 1986 ORISSA 210, (1986) 1 CRI LC 210, (1986) 2 CRI LC 72, (1986) 2 ORISSA LR 555, 1985 (2) ORISSALR 555

Author: G.B. Patnaik

Bench: G.B. Patnaik

ORDER

G.B. Patnaik, J.

1. The petitioner has invoked the inherent jurisdiction of this Court to quash the cognizance taken by the learned Chief Judicial Magistrate, Phulbani in I.C.C. No. 48 of 84 against the petitioner for the offence under Section 63 of the Copyright Act, 1957 and under Sections 78 and 79 of the Trade and Merchandise Marks Act, 1958. The opposite party filed a complaint alleging that the petitioner is trading in 'Khara Masala' using similar wrapper as that of the complainant and thereby has committed the offence for which cognizance has been taken. On receipt of the said complaint and on examining the complainant, the learned Magistrate came to the conclusion that a prima facie case under Section 63 of the Copyright Act and under Sections 78 and 79 of the Trade and Merchandise Marks Act has been established and, therefore, took cognizance summoning the accused to appear before him by 17th July, 1984.

2. Mr. Das, the learned counsel for the petitioner submits that the averments made in the complaint petition as well as the initial statement of the complainant taken in entirety do not make out the offence for which the cognizance has been taken and, therefore, this Court should quash the cognizance in exercise of the inherent jurisdiction.

Mr. Patra, the learned counsel for the opposite party on the other hand submits that the allegations do not make out an offence and it would be a matter of evidence and, therefore, the proceedings should not be quashed at this stage.

3. I would first examine the contention regarding the Copyright Act. Under Section 63 of the said Act, infringement or abetting the infringement of the copyright in a work or any other right conferred by the said Act is punishable. Section 51 of the said Act reads : --

"When copyright infringed -- 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 Copyright under this Act or in contravention of the conditions 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

(ii) permits for profit any place to be used for the performance of the work in public where such performance constitutes an infringement of the copyright in the work unless he was not aware and had no reasonable ground for believing that such performance would be an infringement of copyright, or

(b) when any person--

(i) makes for sale or hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire, or

(ii) distributes either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright, or

(iii) by way of trade exhibits in public, or

(iv) imports into India, any infringing copies of the work.

Explanation-- For the purposes of this section, the reproduction of a literary, dramatic, musical or artistic work in the form of a cinematograph film shall be deemed to be an "infringing copy" :

Provided nothing in Sub-clause (iv) shall apply to the import of two copies of any work, other than a cinematograph film or record, for the private and domestic use of the importer."

Chapter X of the Act deals with registration of Copyright. Section 44 contained in the said Chapter provides for keeping of a register in the prescribed form at the Copyright office to be called as the Register of Copyright. Section 45 deals with the entries to be made in that register when necessary application in the prescribed form along with the prescribed fee is made to the Registrar of Copyrights. Section 47 is the provision which makes the Register of Copyrights and indexes thereof open for inspection. Section 48 is the provision which says that the register of Copyrights is the prima facie evidence of the particulars entered therein. One would, therefore, to have the copyright in any work must make out an application and get the same registered with the Registrar of Copyrights in accordance with the provisions of Chapter X of the Act. There has not been a whisper either in the complaint petition or in the initial statement that the complainant did register his wrapper or label with the Registrar of Copyrights and, therefore, the basic requirement to have a copyright on the wrapper or label has not been established. Section 16 of the Act stipulates that no

person shall be entitled to copyright or any similar right in any work, whether published or unpublished, otherwise than under and in accordance with the provisions of this Act or of any other law for the time being in force. The complaint petition nor the initial statement of the complainant recorded by the Magistrate fulfils the aforesaid requirement. In that view of the matter, the conclusion is irresistible that the complainant has failed to make out a prima facie case even if the entire allegations in the complaint petition are taken into consideration together with the initial statement deposed to by him, in relation to any existence of his copyright and infringement thereof by the accused-petitioner and consequently the learned Magistrate committed gross error in taking cognizance of the said offence obviously not being aware of the relevant provisions of the Copyright Act. In my opinion, there has been gross miscarriage of justice and, therefore, this Court should interfere in exercise of its inherent jurisdiction to quash the said cognizance.

4. Coming now to the offence under the Trade and Merchandise Marks Act, 1958, Section 78 is the penal provision for applying false trade marks and Section 79 is penal provision for selling goods to which a false trade mark of false trade description is applied. Chapter II of the said Act deals with the Register and conditions for registration and Chapter III of the Act deals with procedure for registration and duration of registration. Section 29 of the Act defines what is an infringement of trade mark and Section 31 is the provision which says that registration is the prima facie evidence of a valid trade mark. The complainant who complains of infringement of his trade mark in respect of any article by somebody else must first establish that he has a registered trade mark with the Registrar of the Trade Marks. There has been no such averment in the complaint petition or in the initial statement of the complainant and, therefore, the complainant has not been able to establish the necessary pre-conditions which would attract the provisions of Sections 78 and 79 of the Trade and Merchandise Marks Act, 1958. In that view of the matter, the cognizance taken by the learned Magistrate must be held to be invalid. Mr. Patra, the learned counsel for the opposite party placed before me the averments in the complaint petition wherein the complainant has averred that he has registered his Masala business in the Industrial Department bearing some number and further that the complainant is a Sales Tax assessee. I am afraid those averments do not satisfy the requirements of the Trade and Merchandise Marks Act. Thus the allegations in the complaint petition do not satisfy the requirements of the Trade and Merchandise Marks Act so as to constitute a violation of the provisions thereof by the accused-petitioner, Mr. Das for the petitioner is wholly justified in making the submission that the cognizance taken by the learned Magistrate for the offence under Sections 78 and 79 of the Trade and Merchandise Marks Act, 1958 is void. Accordingly in my opinion, to avoid gross miscarriage of justice, the cognizance taken by the learned Chief Judicial Magistrate on that score must be set aside.

5. In the ultimate result, therefore, I would set aside the order of the learned Chief Judicial Magistrate, Phulbani D/-13-7-84 taking cognizance in I. C. C. 48/84 and quash the said criminal proceedings.

This criminal miscellaneous case is accordingly allowed.