

THE HIGH COURT OF ORISSA, CUTTACK

CRLMC NO. 1949 OF 2005

In the matter of an application under Section 482, Code of the Criminal Procedure, 1973.

Managing Director, Prop. Ruchi's Private Ltd.
and another

Petitioners

-Versus-

Sri Sradhananda Jena

Opposite party

For Petitioners - M/s. N.P. Parija, S.K. Rout, A.K.
Mohanty, A.K.Dala and
P.K. Nayak

For opposite party - M/s. A.R. Dash, S. Bose,
Gokulananda Padhi,
G.P.Pattnaik & R.K. Sahoo

P R E S E N T:

THE HONOURABLE DR. JUSTICE D.P. CHOUDHURY

Date of hearing- 19.12.2017 : Date of judgment- 23.02.2018

DR. D.P. CHOUDHURY, J. The petitioners assail the criminal proceeding and order dated 18.7.2005 passed by the learned S.D.J.M., Sadar, Cuttack in 1 C.C. No. 246 of 2001 by filing present petition under Section 482 Cr.P.C.

2. The unfurled story of the complainant is that the complainant is the Executive of the firm Om Oil & Flour Mills and Sri S.K. Sahu is the Managing Director of the Company, which situates at the Industrial Estate under Madhupatna Police Station. The said firm is

registered with RUCHI BRAND, RUCHI for spices required for processing food and food articles. It is registered under the Copyright Act, 1957 (hereinafter called "the Act") vide Registration No. A-49767/89.

3. It is alleged, inter alia, that from 2.6.2001 onwards the petitioners-Managing Director of RUCHI's Pvt. Ltd. and RUCHI's Soya Industry used to sell Palmolive oil, Vanaspati and spices under the complainant's brand RUCHI. After the complainant came to know about sale of its brand by the petitioners-accused persons, it gave notice on 8.6.2001. After receiving notice, no reply was given. Since the Company of the complainant has got Copyright registration in its favour, it has got right under the Act and no Company or firm can use its brand and trade mark 'RUCHI'. The trade mark was valid till 18.1.2005. Since the petitioners' Company used the brand RUCHI as RUCHI's without any consent of the complainant Company, the complainant sustained heavy loss in the business and the customers were not able to distinguish between RUCHI and RUCHI's. Since the accused persons committed piracy in design and violated the provisions of the Act to cheat the customers at large, the complaint was filed before the learned S.D .J.M., Sadar, Cuttack.

4. The learned S.D.J.M., Sadar, Cuttack recorded the initial statement of the complainant under Section 200 Cr.P.C. and examined witnesses under section 202 Cr.P.C. After considering the complaint, initial statement of the complainant and statements of witnesses recorded under section 202 Cr.P.C. the learned Magistrate took cognizance of the

offence under Section 63 of the Act. In pursuance of the summons, the petitioners appeared in the court and were released on bail. After appearance, the petitioners filed a petition about maintainability of the complaint and same remained pending for hearing. Finally on 18.7.2005 the learned S.D.J.M. refused to recall the order of taking cognizance and directed for continuance of the criminal proceeding. Against the said order the present CRLMC has been filed.

SUBMISSIONS:

5. Mr. N.P. Parija, learned counsel for the petitioners submitted that Section 63 of the Act requires that the firm or Company making complaint must have been registered under the Act, so that the Company or its agent can allege about infringement of the provisions of the Act. According to him, in the instant case the complainant has not proved the registration of its Company under the Act. Since one of the ingredients of Section 63 of the Act is not proved, the order of taking cognizance and further proceedings in the criminal case including the impugned order dated 18.7.2005 is non-est in law.

6. Mr. Parija, learned counsel for the petitioners further submitted that under the Trade Mark Act also the complainant has no license of designing the patent. On the other hand the petitioners have got their head office at Mumbai with required registration to sell its product. So, prima facie case is not made out against the petitioners. On the other hand, the learned S.D.J.M. without application of judicial mind to the fact of the case, took cognizance of the offence under Section 63

of the Act and issued summons. It is further contended that the provision of law under the Act being not violated by the petitioners, the entire criminal proceeding should be quashed.

7. Mr. A.R. Dash, learned counsel for the sole opp. party submitted that RUCHI Company is represented by the complainant. It has its headquarter at Bhubaneswar and used to process the food products in the name and style as “RUCHI”. It has got registration under the Act.

8. Mr. Dash, learned counsel for the opp. party further submitted that the petitioners having imitated the trademark of the RUCHI Company, started selling its products under the brand “RUCHI’s” without consent or assignment of the present opp. Party. The witnesses examined by the complainant clearly state about infringement of Copyright Act by the petitioners. After going through the complaint, initial statement of the complainant and the statement of the witnesses recorded under Section 202 Cr.P.C., the learned Magistrate has applied its mind and took cognizance of the offence under Section 63 of the Act and issued process. So, the order of taking cognizance and issuance of process cannot be questioned.

DISCUSSIONS:

9. Section 63 of the Copyright Act states as follows:-

“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, 1[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 1[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.”

10. The aforesaid provision clearly maintains that there must be copyright in a work or any other right conferred by the Act before claiming any criminal action against the offender. The word “copyright” has not been defined under Chapter-I of the Act, but Section 14 has states about the meaning of “copyright” in the following manner:-

“14. Meaning of copyright.—For the purposes of this Act, “copyright” means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely:—

(a) in the case of a literary, dramatic or musical work, not being a computer programme,—

- (i) to reproduce the work in any material form including the storing of it in any medium by electronic means;
- (ii) to issue copies of the work to the public not being copies already in circulation;
- (iii) to perform the work in public, or communicate it to the public;
- (iv) to make any cinematograph film or sound recording in respect of the work;
- (v) to make any translation of the work;
- (vi) to make any adaptation of the work;
- (vii) to do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clauses (i) to (vi);

(b) in the case of a computer programme,—

- (i) to do any of the acts specified in clause (a);
- [(ii) to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme:

Provided that such commercial rental does not apply in respect of computer programmes where the programme itself is not the essential object of the rental.]

- (c) in the case of an artistic work,—
 - (i) to reproduce the work in any material form including-
 - (A) the storing of it in any medium by electronic or other means; or
 - (B) depiction in three-dimensions of a two-dimensional work;
 - or
 - (C) depiction in two-dimensions of a three-dimensional work;
 - (ii) to communicate the work to the public;
 - (iii) to issue copies of the work to the public not being copies already in circulation;
 - (iv) to include the work in any cinematograph film;
 - (v) to make any adaptation of the work;
 - (vi) to do in relation to an adaptation of the work any of the acts specified in relation to the work in sub-clauses (i) to (iv);
 - (d) in the case of a cinematograph film,—
 - (i) to make a copy of the film including-
 - (A) a photograph of any image forming part thereof;
 - or
 - (B) Storing of it in any medium by electronic or other means;
 - (ii) to sell or give on commercial rental or offer for sale or for such rental, any copy of the film];
 - (iii) to communicate the film to the public;
 - (e) in the case of a sound recording,—
 - (i) to make any other sound recording embodying it [including storing of it in any medium by electronic or other means];
 - (ii) to sell or give on commercial rental or offer for sale or for such rental, any copy of the sound recording;]
 - (iii) to communicate the sound recording to the public.
- Explanation.— For the purposes of this section, a copy which has been sold once shall be deemed to be a copy already in circulation.]”

11. The aforesaid provision makes it clear that the exclusive right under the Act as specified in above (a), (b), (c), (d) and (e) lies with the copyright holder wholly. Similarly, Section 17 of the Act states that the author of the work shall be the first owner of the copyright thereunder. It has got proviso which is inclusive to the work of an author. The owner of the copyright has been defined in Section 54 of the Act in the following manner:-

“54. Definition.—For the purposes of this Chapter, unless the context otherwise requires, the expression “owner of copyright” shall include—

- (a) an exclusive licensee;

(b) in the case of anonymous or pseudonymous literary, dramatic, musical or artistic work, the publisher of the work, until the identity of the author or, in the case of an anonymous work of joint authorship, or a work of joint authorship published under names all of which are pseudonyms, the identity of any of the authors, is disclosed publicly by the author and the publisher or is otherwise to the satisfaction of the Copyright Board by that author or his legal representatives.”

12. Thus, the above provision and other provisions under the Act make it clear that the owner of the copyright having registered first has got remedies by instituting criminal prosecution or civil suit. It is also reported in **A.I.R. 1986 Orissa 210; (Brundaban Sahu v. B. Rajendra Subudhi)**, wherein this Court has held that where the complainant has not registered the wrapper or label with the Registrar of Copyright, a prima facie case in relation to existence of copyright and infringement thereof could not be made out. This plea also has been taken by the learned counsel for the petitioners, but the learned counsel for the complainant has stated that the complainant has already got registration with Registrar of Copyright. However, it is clear that the infringement of copyright can only be liable if the first owner of the copyright or the assignee alleging about violation of copyright of the work or any other right conferred by the Act except of course right conferred under Section 53(A) of the Act.

13. The complaint shows that the complainant-Company has got the right under Registration No. A-49767/89 and brand RUCHI is published in 1976. It is basically selling and manufacturing food product including spices in the name and style as “RUCHI”. But the complainant came to know that the consumer purchased Palmolive oil, Vanaspati and spices with the complainant’s brand, but same was of RUCHI’s. Since the complainant is the sole owner of the copyright and exclusive owner of the trademark “RUCHI”, another brand

RUCHI's has allegedly violated the copyright of the complainant. This fact is also stated by the complainant in his initial statement. P.W.1 was examined under Section 202 Cr.P.C. supporting the complaint and complainant to the effect that it has got RUCHI product, but found that RUCHI product were manufactured by another Company of Indore, for which he reported the matter to the complainant. From the L.C.R. it appears that the copyright work of the complainant has been registered in 1989 under the aforesaid registration number. So, it cannot be said that there is no registration of the copyright by the complainant. The order of taking cognizance passed by the learned S.D.J.M., Sadar, Cuttack says in the following manner:-

“Order dated 16.1.2002

Perused the Compl. Petition, initial statement & Statement recorded u/s.202 Cr.P.C. I find prima facie case u/s.63 Copy Right Act. Cog. Is taken thereof. Issue summons fixing 16.2.2002. Requisites be filed within 3 days hence. ”

14. The aforesaid order of taking cognizance shows that the learned Magistrate has gone through the complaint, statement of the complainant and statement of witnesses recorded under Section 202 Cr.P.C. and after applying judicial mind, took cognizance of the offence under Section 63 of the Copyright Act. That order has not been challenged in this case. However, the matter proceeded and finally the petitioners after appearance before the court below challenged the order of taking cognizance in the same court, where on 18.7.2005 the learned Magistrate with detailed reasoning rejected the petition. On perusal of the said order, it appears that the learned Magistrate refused to review his own order of taking cognizance as it has no power to recall the order of taking cognizance although such power is available with this Court. The reasoning of the learned S.D.J.M., Sadar, Cuttack is quite correct and in consonance with the provision of law.

15. The only contention of the learned counsel for the petitioners that the complainant has no registration number of the copyright has been negated in the aforesaid paragraph. Since the order of taking cognizance of the subsequent proceeding including the impugned order are correct and legal, there is no reason to quash the criminal proceeding and the impugned order. There is no bar for the petitioners to challenge the registration certificate or any other material that are available against them during trial of the case. Hence, the criminal case under Section 63 of the Act is to continue against the petitioners.

16. In the result the CRLMC being devoid of merit stands dismissed. Since it is a matter of the year 2001, the learned S.D.J.M., Sadar, Cuttack is directed to proceed with the case on day to day basis and dispose of the same in accordance with law within a period of three months from the date of receipt of this order. Learned trial court is directed not to be influenced with the observation made hereinabove, but to dispose of the case on the basis of the materials placed before it.

The interim order passed stands vacated.

Registry is directed to communicate this order along with the L.C.R. to the court below immediately by special messenger.

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Dr. D.P. Choudhury, J

