

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CRIMINAL APPLICATION NO. 694 of 2014

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE J. C. DOSHI

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

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MIHIR SURENDRABHAI SHAH
Versus
STATE OF GUJARAT & 2 other(s)

Appearance:

MR SACHIN D VASAVADA(3342) for the Applicant(s) No. 1

MR SAMRAT N MEHTA(3949) for the Applicant(s) No. 1

MR APURVA A DAVE(3777) for the Respondent(s) No. 2

MS ASMITA PATEL, APP for the Respondent(s) No. 1

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CORAM:**HONOURABLE MR. JUSTICE J. C. DOSHI**

Date : 31/07/2023

ORAL JUDGMENT

1. Rule. Learned advocate Mr. Apurva Dave waives service of rule for respondent no.2 and learned APP Ms. Asmita Patel waives service of rule for respondent no.1 and respondent no.3.

2. With the consent of learned advocates for the parties, the matter is taken up for final hearing.

3. Heard learned advocate Mr. Sachin Vasavada for the applicant, learned advocate Mr. Apurva Dave for respondent no.2 and learned APP for respondent no.1 – State and respondent no.3.

4. This petition is filed under section 482 of the Cr.P.C. witnessing following reliefs :-

“(A) Your Lordships may be pleased to admit and allow the present petition.

(B) Your Lordships may be pleased to quash and set aside the FIR registered as Crime Register No.3432 of 2013 at Anexure A and further pleased to quash and set aside the charge sheet dated 23.01.2014 which is filed in pending Criminal Case No.96 of 2014 at Court of Metropolitan Magistrate alongwith the Criminal Case No.305 of 2013.

(C) Pending admission and final hearing of the present petition, Your Lordships may be pleased to stay the pending criminal proceedings being Criminal Case No.96 of 2014 and further be pleased to stay the FIR registered as Crime Register No.3432 of 2013 dated 25.11.2013 and further proceedings on the basis of the said FIR.”

5. Stated briefly, the facts of the case are as under :-

5.1. That the petitioner is carrying out business of selling auto parts in Ahmedabad City in the name and style of Rushab Automobiles. One Sanjay Kumar Verma having claimed that he is officer of IPR Vigilance India Company and has contract with

various companies to file FIR. On 25.11.2013, he received tip that Rushab Automobiles, owner of the petitioner / accused is selling duplicate part of Hyundai motor company. Upon receipt of such tip, complainant approached CID (Crime), Gandhinagar and produced certain evidence. Consequent thereto shop of the petitioner was raided by the police along with the complainant. It was found that spare parts of Hyundai motor company at the shop were duplicate. On completion of raid, FIR being C.R.No.3432 of 2013 was registered with Naranpura Police Station, Ahmedabad for the offence under sections 101, 102, 103, 104, 105 of the Trade Mark Act, 1999 (in short '**the Act**'). Investigation was completed and charge sheet is also filed. Criminal Case No.96 of 2014, therefore, is pending before the learned Metropolitan Magistrate Court along with Criminal Case No.305 of 2013.

6. Learned advocate Mr. Sachin Vasavada would submit two fold submissions. Firstly, he would submit that prior to filing of FIR under section 103 and 104 of the Act, in view of section 115(4) of the Act read with Rule 110 of the Trade Mark Rules, it is mandatory upon the Investigating Officer to obtain opinion of the Registrar for infringement of Trade Mark about infringement of the trade mark. The investigating officer has not obtained the opinion. Hence, there is breach of statutory provision. He would further submit that bare reading of the FIR does not indicate that selling of duplicate spare parts of Hyundai Motor Company would fall within offence of section 101 to 105 of the Act. He would bring to the notice order dated 27.06.2023 passed by the Co-ordinate Bench in Special Criminal Application No.693 of 2014 between Atulbhai Rasikbhai Dudhwala v/s. State of

Gujarat. The said Special Criminal Application was filed to quash FIR being C.R.No.3042 of 2013 and Criminal Case No.305 of 2013 arising out of said FIR. Vide order dated 27.06.2023, Co-ordinate Bench allowed the petition and quashed and set aside the FIR. Upon such submissions, learned advocate Mr. Vasavada submits that on the face of FIR, it is absurd and improbable and not in consonance with the provisions of law and allowing proceeding under said FIR would be abuse of process of law. Thus, he submits to allow this petition.

7. Jointly, learned advocate Mr. Apurava Dave for the original complainant and learned APP Mr. Asmita Patel for the State would submit that defence raised by the petitioner in the present petition can be profoundly tested during trial. They would submit that investigation in the offence is already completed and Criminal Case is registered against the petitioner which is pending for trial before the concerned Court. Therefore, they would submit that FIR may not be quashed at threshold. Upon such submissions, they would submit to dismiss this petition.

8. At the outset, if we read FIR, it indicates that complainant claims himself as Officer of IPR (Vigilance) and further claims that he has authority to lodge complaint on behalf of IPR (Vigilance) for lodging offence of selling duplicate auto parts. Perusal of the FIR along with charge sheet papers, nothing discloses to indicate that complainant was authorized to file complaint on behalf of Hyundai Motor Company or on behalf of IPR (Vigilance). Investigation does not disclose that there was contract between IPR (Vigilance) and Hyundai Motor Company which permits complainant to search for selling of duplicate auto

parts and lodging complaint. In absence of appropriate authorization, FIR must fail.

9. On the submission that first informant has no authority to file FIR on behalf of Hyduai Motor Company, learned advocate for the complainant as well as learned APP have no say. The charge sheet papers does not disclose that the first informant was authorized to file complaint under the provisions of the Act. It was sought to be submitted that in view of bar contained in section 115(4) of the Act read with Rule 110 of the Trade Mark Rules, would not permit registration of FIR for the offence punishable under sections 103 to 105 of the Act without obtaining opinion from the Registrar for infringement of Trade Mark. Charge sheet papers does not disclose that such opinion has been obtained by the first informant / complainant. It does not disclose that Registrar for infringement of Trade Mark has opined that spare parts which are sold at shop of the accused were infringing provision of sections 103 to 105 of the Act. In simple words, opinion which is mandatory is missing. Further it is sought to be submitted that provision of the Act, more particularly, section 115 of the Act mandates that investigation of the offence has to be carried out by the officer of rank of DSP or officer of equivalent rank. It is submitted that investigation has been carried out by PSI who is below rank of DSP. In that way, statutory provision is breached and benefit of such breach should be given to the accused. Perusal of section 101 and 102 of the Act describes meaning of applying trade marks and trade descriptions of some other or falsifying and falsely applying trade marks of some other. Sections 103 to 105 of the Act describes penalty for such offences. Since it is submitted that in view of

bar contained in section 115(4) of the Act, in absence of opinion obtained from Registrar for infringement of trade mark, no FIR can be lodged and no search or seizure can be made. Let refer section 115 of the Act, 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 subsection (1) of Section 107, a Court shall take cognizance of an offence on the basis of a certificate issued by the Registrar in respect of any goods or services in respect of which it is not in fact registered.

(2) No court inferior to that of 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 subsection (3) has been, is being, or is likely to be, committed, search and seize without warrants of 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 trademark and shall abide by the opinion so obtained.

(5) Any person having any 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.”

10. Rule 110 of the Trade Mark Rules is in relation with section 115 of the Trade Mark Act. Rule 110 of the Trade Mark Act reads as under :-

“110. Opinion of the Registrar under section 115(4) :-

(1) Where a matter has been referred to the Registrar for his opinion under proviso to sub-section (4) of section 115 such opinion shall be forwarded under a sealed cover within seven working days of the receipt of such written intimation to the referring authority and the Registrar shall ensure complete confidentiality in the matter so referred.

(2) The opinion under this rule shall be given by the Registrar or an officer specially authorised for this purpose under sub-section (2) of section 3 and the name of the

designated officer shall be published in the journal.”

11. Provisio to section 115(4) of the Act is clear and unambiguous. Undeniably, the police officer who on the complaint has searched that accused is applying trade mark and trade description of complaint or falsifying and falsely apply trade mark of the complaint is required to take opinion of the Registrar for infringement of Trade Mark prior to search and seizure. Rule 110 also spells the same. In the present case, FIR does not disclose obtaining opinion of the Registrar.

12. Learned APP or learned advocate for the complainant are not in position to explain lacuna. It is clear case that mandatory provisions are breached in registering FIR. The complainant has failed to establish that he has authority to file complaint. He cannot give opinion that accused is applying trade mark / trade description or falsifying and falsely applying trade mark of complaint without taking opinion of the Registrar for infringement of trade mark. The circumstances, spells that there is clear breach of statutory provision.

13. Another submission in the case is that it is only police officer not below the rank of DSP or equivalent can investigate the offence. Charge sheet papers in the present case indicates that investigation has been carried by Mr. J.P.Agarvat, PSI, Naranpura Police Station, Ahmedabad. Once again statutory provision of law is breached. Thus such submission also merits.

14. In the case of **Anil Kumar v/s. State of Punjab [2012 (51) PTC 159 (P& H)]** in para 10 it is held as under :-

“(10) As per sub-clause (4) of Section 115 of the Trademarks Act, 1999, no police officer below the rank of Deputy Superintendent of Police can search and seize goods regarding offence under Sections 103, 104 and 105. Secondly, as per the proviso, the said police officer will have to obtain opinion of the Registrar on facts involved in the offence relating to Trademarks Act, 1999 and shall abide by the opinion before such search and seizure is carried out. In the present case, admittedly the search and seizure had been done by the Sub Inspector without taking any opinion from the Registrar. Hence, the proceedings are vitiated. The word “shall” in the proviso is indication of the fact that the provision is indeed mandatory. Moreover, the said offences could have only been investigated by the Officer not below the rank of Deputy Superintendent of Police.”

15. Reasons spells herein above indicates that parameters set out in the case of **State of Haryana v/s Bhajan Lal [AIR 1992 SC 604]** and **Som Mittal v/s. State of Karnataka [(2008) 3 SCC 574]** are attracted and applicable for quashing of FIR and also consequent proceedings arising out of said FIR. Parameters which are stated in the said decisions can be stated as under :-

“(1) Where the allegations made in the First Information Report or the complaint, even if they are taken at their fact value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(3) Where, the allegations in the F.I.R do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a magistrate as contemplated under Section 155 (2) of the Code.

(4) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.”

16. Above parameters are applicable to the facts of the present case. In wake of above reasons, the petition is allowed. FIR being C.R.No.3432 of 2013 registered with Naranpura Police Station as well as Criminal Case No.96 of 2014 arising out of said FIR and all consequential proceedings arising out of the said FIR are hereby quashed and set aside. Rule is made absolute.

SATISH

(J. C. DOSH,J)