

(1986) 05 DEL CK 0010

In the Delhi High Court

Case No : Criminal Revision Appeal No. 103 of 1986 and Criminal Miscellaneous (Main) Appeal No. 535 of 1986

Flower Tobacco Company

APPELLANT

Vs

State and Another

RESPONDENT

Date of Decision : 21-05-1986

Acts Referred:

Citation : (1986) 2 ARBLR 121 : (1986) 30 DLT 158

Hon'ble Judges : Gian Chand Jain, J

Bench : Single Bench

Advocate : N.K. Anand, Amarjit Singh, Anoop Singh and Manmohan Singh, for the Appellant;

Judgement

G.C. Jain, J.

(1) This order shall also govern CrI. M(M) 535 of 1986.

(2) The parties to the dispute-Flower Tobacco Company (hereinafter to be referred as the complainant) and Mottahadesh Brothers (hereinafter to be referred as the accused)-are engaged in the business of manufacturing and sale of tobacco for Hukkah. The dispute is in respect of a trade mark "ABBU DALLA/ device of a pot represented in a special and in a particular manner" and copyright in artistic work namely printing on the container used for packing tobacco, with distinctive features of Abbu Dalla having an alleged unique colour combination, lay out and arrangement.

(3) On February 27, 1986 the complainant filed a complaint under Sections 78 and 79 of the Trade & Merchandise Mark Act, 1958 and Sections 63 and 64 of the Copyright (Amendment) Act, against the accused and unknown persons. The complainant claimed that it had adopted the said trade mark in the year 1972 in relation to its goods and had used the trade mark continuously and exclusively in the course of its trade. It had extensive sales amounting to nearly Rs. 1.00 crore per annum and had spent substantial amount on the publicity. These goods had

acquired reputation for quality in the market. The complainant had exclusive right to use the trade mark and was its proprietor by virtue of priority in adoption and use. It was further alleged that in 1978 it applied for the registration of the said trade mark. The accused filed opposition which was, however, deemed to have been abandoned vide order dated 10th July, 1980 and the complainant was granted registration and its legal right to the exclusive use of the trade mark was recognised. It was next averred that the tobacco was being packed by the complainant in a distinctive container having a unique colour combination lay out and arrangement and its copyright was registered under the Copyright Act under registration No. A-21911/78.

(4) The complainant complained that the accused had recently started using the mark in dispute in relation to the goods of its manufacture, export and sale. The accused had also reproduced all the distinctive features of the complainant's container so as to come as close as possible in all respects to the original container of the complainant, and had thus falsified the complainant's trade mark and infringed its copyright, willfully and knowingly in order to deceive the purchasers and to pass off or to enable others to pass off its goods under the falsified trade mark, for the genuine goods of the complainant. It was also alleged that the accused had dispatched a consignment of tobacco under the falsified trade mark packed in the infringing containers for export to Saudi Arabia and the said consignment was lying at the Dry Port of Delhi at Exhibition Grounds, Pragati Maidan, New Delhi.

(5) Along with the complaint the complainant filed an application u/s 93 of the Criminal Procedure Code for issuing a general search warrant for the search of the premises where the offence is being committed and the goods bearing the falsified trade mark were being manufactured, sold, stored and seizure thereof.

(6) Learned Metropolitan Magistrate examined the partner of the complainant firm. On examining the case he issued general search warrants with directions to search the premises where the goods with falsified trade mark were stored and manufactured and to seize the same.

(7) So far as the complaint was concerned, he postponed the issue of the process against the accused and directed an investigation to be made by the police, with further direction to submit the report by May 26, 1986.

(8) On March 3, 1986 the accused moved an application u/s 64(2) of the Copyright Act, 1957 and Sections 451 and 459 of the Criminal Procedure Code for cancelling the order of seizure and allowing the shipment of the goods in question to Jeddah. The case set up in the application was that in the year 1979 it brought out a distinctive packing label consisting of device of coffee pot with words Abbu Dalla in Arabic language. He was using this word Abbu Dalla in respect of its goods being manufactured and exported by it since 1979. Its label was duly registered under the Indian Copyright Act at No. A-25849/79. It was next averred that in September, 1985 it received an order for the supply of

tobacco paste from a Soudi Arabia party, named M/s. Abdul Lateef Mohd. Jameel Sindi Babe Shareef, under the name of Abbu DALLA. In compliance of that order it sent the consignment through its shipping agent, The ownership of the goods had already been passed to the consignee, the foreign buyer. It was also averred that the goods in question were highly sensitive and were likely to be spoiled by fungus after the expiry of 30 days. It was also alleged that the complainant was not the registered owner of the trade mark in question and had obtained the search warrants by making false statements. This application was opposed.

(9) Learned Metropolitan Magistrate held that the application was maintainable u/s 457 of the Criminal Procedure Code. He further found that on the application of the complainant for the grant of registration in respect of the trade mark in question one Amber Tobacco Company, Moradabad filed opposition which was withdrawn by its counsel but on review petition it had been revived and the application of the complainant for the grant of registration was thus still pending. The complainant had concealed these facts. He also found that the goods were of perishable nature. With these findings he directed the release and export of the goods subject to the accused furnishing a bank guarantee in the sum of Rs. 95,520.00 .

(10) Feeling aggrieved the complainant has filed this revision petition. This petition was earlier filed before Addl. Sessions Judge and was with the consent of the parties transferred to this Court. The accused has also filed a petition (Cri. M(M) 535/86) assailing the order of search and seizure and the condition for releasing the goods.

(11) In July, 1978 the complainant made an application for the registration of the trade mark in dispute. Besides the accused some other persons including M/s. Amber Tobacco Company, Moradabad filed oppositions. These oppositions were withdrawn and the complainant's trade mark was registered. M/s. Amber Tobacco Company thereafter moved a review petition alleging that the withdrawal of its opposition was unauthorised and improper. This was allowed and this opposition was revived. In view of these admitted facts Mr. Anup Singh, learned counsel for the accused, contended that the complainant was not the registered owner of the trade mark in question. It obtained the order of seizure by concealing these important facts and the search order was Therefore, liable to be quashed.

(12) On the other hand Mr. N.K. Anand, learned counsel for the complainant, contended that the trade mark in question has not yet been taken off the register. It was rather renewed. The complainant had challenged the order of review in this court and in these circumstances its registration was subsisting and in any case there was no intentional concealment of facts.

(13) I have carefully examined the contentions of the parties. In view of the order reviving the opposition filed by M/s. Amber Tobacco Company, strictly speaking, the registration of the trade mark in favor of the complainant cannot be

considered subsisting. In other words at this stage the complainant was not the registered owner of the trade mark in question.

(14) This is however not the end of the matter. The complainant, as noticed above, had also claimed proprietorship and the exclusive right to use this trade mark by virtue of priority in adoption and use. There was no serious challenge to this claim in the application filed by the accused for the release of the goods. The complainant, Therefore, at this stage, in the absence of any proof to the contrary, was entitled to the protection of its trade mark and to get an order of search and seizure.

(15) Faced with this difficulty Mr. AnupSingh, learned counsel for the accused, urged that the complainant was using this trade mark in respect of exports only and the user in respect of export only was not sufficient for acquiring properly in the trade mark. Reliance was placed by him on *George Banham & Co. and others v. F. Peddaway & Co. Ltd* and the Registrar of Trade Marks 44 R.P.C. 27. This contention, however, cannot be accepted in view of the provisions contained in section 55 of the Trade & Merchandise Marks Act, 1958 which provides that the application in India of trade mark to goods to be exported from India would constitute the use of a trade mark or the purpose of the Trade & Merchandise Marks Act.

(16) Section 457(1) of the Criminal Procedure Code reads as under :

"457. Procedure by police upon seizure of property (1) Whenever the seizure of property by any police officer is reported to a Magistrate under the provisions of this Code, and such property is not produced before a Criminal Court during an inquiry or trial, the Magistrate may make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained, respecting the custody and production of such property."

(17) Those provisions empower the Magistrate to make such order as he thinks fit respecting the disposal of the seized property or the delivery of the said property to the persons entitled to the possession thereof. The expression "entitled to the possession" would normally mean a lawful or rightful title to the property. In the present case, according to the accused's own allegations, in its application, the ownership of the goods had already passed to the consignee, i.e. M/s. Abdul Lateef Mohd. Jameel Sindi Babe Sareef, Jeddah.

(18) Section 66 of the Copyright Act, 1957 provides that "the court trying any offence under this Act, may, whether the alleged offender is convicted or not, order that all copies of the work or all plates in the possession of the alleged offender, which appear to it to be infringing copies, or plates for the purpose of making infringing copies, be delivered up to the owner of the copyright." In view of these provisions, if on trial it was held that the accused had infringed the copyright of the complainant, the containers containing the tobacco were liable to be delivered to the complainant. In this situation at this stage there was no

question of releasing the goods and allowing the accused to export the same.

(19) Again the matter was still under investigation. Seized property would be required to prove the offence alleged to have been committed by the accused. The release of the property at this stage, in my opinion, was likely to prejudice the course of justice at the time of trial in case the accused were summoned. The goods, Therefore, could not be released at this stage.

(20) Learned Metropolitan Magistrate has not only released the goods but also allowed its export for which purpose the same were lying at the Dry Port of Delhi. If ultimately it was found that the complainant was the owner of the trade mark and the accused has falsified the same and also infringed the copyright of the complainant allowing the export would in a way amount to abetting the commission of the offence, which could not be done.

(21) Tobacco in question was meant for smoking in Hukkah and not for chewing. The accused in its application for release of the goods had pleaded that the goods were liable to be spoiled by fungus after the expiry of 30 days. Learned Metropolitan Magistrate asked the parties to file affidavits in this behalf. In the affidavit filed by Sarwat Hassan, partner of the accused firm, it was stated that tobacco in question if kept in India for 30 days from the date of preparation would become useless. He further stated that the maximum time it could be retained in India was 60 days. Abdul Musawir, partner of the complainant firm, on the other hand stated that tobacco in question could be utilised for a period of three years. There was no Justification for preferring the version of the accused to that of the complainant. According to the accused's allegation in its application the goods were banded over to Custom Authorities on February 24, 1986. They must have been manufactured prior to that date. Sixty days period has since expired. Moreover in case of perishable goods the learned Metropolitan Magistrate could order the sale thereof. There was no question of allowing the export.

(22) Mr. Anup Singh also contended that the application for release of the goods was competent u/s 451 and not Section 457, Cr. P.C. This contention cannot be accepted. Section 451 applies in a case where property is produced before any criminal court during any inquiry or trial. The present case was at the investigation stage. Therefore it cannot be said that the goods had been produced during inquiry or trial. (See Ramchetsing Arjunsing Vs. Deoji Kalyanji, . In any case nothing much turns on this contention.

(23) For the reasons recorded above learned Metropolitan Magistrate was in error in ordering the release of the goods and allowing its export. The order was illegal and liable to be set aside.

(24) I consequently accept the revision petition filed by the complainant, set aside the impugned order and instead dismiss the application of the accused. The question of the release of the goods would be decided at the time of disposing the main complaint. Learned Metropolitan Magistrate is directed to

decided the case expeditiously and on day-to-day basis. He would dispose it within three months today, if possible. Liberty to the accused to make an application for the sale of the goods in case the matter was not decided within three months.

(25) The petition filed by the accused (Cri. M.(M) 535/86) stands dismissed. The trial court record be sent back immediately.