
(1974) 03 BOM CK 0022
In the Bombay High Court

Laxmikant Vyankatesh Pande

APPELLANT

Vs

Gokuldas Popatlal Sindhi and Another

RESPONDENT

Date of Decision : 29-03-1974

Acts Referred:

Penal Code, 1860 (IPC) — Section 420

Trade and Merchandise Marks Act, 1958 — Section 79

Citation : (1976) CriLJ 381

Hon'ble Judges : Shimpi, J

Bench : Single Bench

Judgement

Shimpi, J.—The applicant complainant has filed this revision application challenging the order confirming the dismissal passed by the Additional Sessions Judge, Akola, in Criminal Revision Application No. 32 of 1973 arising out of an order dated 14-8-1973 passed by the Judicial Magistrate First Class, Akola in Criminal Case No. 2440/73 dismissing the complaint of the complainant.

2. The facts in brief are as under-- The complainant is the Controller of Akola area of Brooke Bond India Limited, a Company incorporated under the Indian Companies Act having its registered office at Calcutta. The Company has got branches all over India. The Company is selling one brand which is known as "Special Hotel Blend." The said tea is wrapped in a packet with a floral design with a rose flower with green leaves and a stem underneath. The details about this wrapper is to be found in paragraph No. 3 of the complaint. The complainant further recited in the complaint that the necessary trade mark of the said wrapper has been duly obtained by the Brooke-Bond India Limited in their own name and accordingly the same is used by them for selling their products stated above. The complainant further asserted that another tea is being sold in wrappers containing identical packets with the only difference in the name, namely, Flower Brand Tea but the wrappers, the floral designs are very much identical to the one which has been got registered by Brooke Bond India Limited. The design used by those sellers also shows a floral design identical to the one used by the complainant's company and on these allegations filed a

complaint u/s 79 of Trade and Merchandise Marks Act, 1958 and u/s 420 of the Indian Penal Code against some unknown persons within the jurisdiction of the Judicial Magistrate First Class Akola. Along with the complaint an application was given u/s 96 of the Criminal P.C. for seizing the packets of the tea wrapped in imitative brand. On receipt of the complaint, the Judicial Magistrate First Class ordered the police to search for whether anybody was selling tea packets as stated in the complaint and has also sent the complaint for enquiry to the police station of Akola. This complaint was filed on 4-5-1973. On the very day or on 5-5-1973 the police seized 72 boxes in the premises of a firm known as "Gemandas Popatlal and Company." The non-applicant No. 1 in this revision application is one Gokuldas who is the partner of this Company. On 5-3-1973 Shri Gokuldas made an application that these boxes were taken possession from his firm. He was selling them as an Agent of some firm from Indore and they should be returned in his custody on passing an order of Supratnama. Accordingly 67 boxes were returned to him and 5. boxes were retained in Court,

3. When the enquiry was in progress before the police, it appears that on 11-5-1973 Gokuldas made an application u/s 203 of the Criminal P.C. for dismissing the complaint. In this application Gokuldas stated that he was the agent for Gold Brand Tea Manufacturer, a partnership firm of Indore for Akola District, He further stated that complainant that is the Controller of Brooke "Bond India Limited was fully aware of this fact that this brand of tea was manufactured by the firm of Indore. He has stated that Brooke Bond India Limited had given a notice to Gokuldas in the year 1962 that the Indore firm had violated provisions of Sections 105 and 106 of the Indian Trade Merchandise Marks Act, 1958. The Indore firm gave a reply and in the year 1967 the Brooke Bond India Limited filed a civil suit in the Court of the District Judge, Indore, for permanent injunction and other necessary reliefs. In that suit a prayer was made by filing an application that temporary injunction be granted against the firm of Indore. That application was not pressed for temporary injunction on certain terms and conditions. It is unnecessary for the disposal of this revision application to enumerate the terms and conditions but it was contended on behalf of Gokuldas that the complainant failed to obtain necessary injunction. Complainant suppressed this fact and filed the complaint one at Akola and the other at Aurangabad against unknown persons. It is further contended that the complainant cannot be allowed to say that the goods which were seized could not be sold in market. There was no sufficient ground for proceeding against anybody including Gokuldas or his firm and the complaint should be therefore, dismissed. Along with this application an application and some documents were produced, namely, the certified copy of the plaint filed by Brooke Bond India Limited as well as the order passed on an application for temporary injunction by Brooke Bond India Limited by the District Judge, Indore.

4. Though this application was given on 11-5-197.3 as I have stated earlier the report of the police was received on 27-5-1973. Thereafter, in the month of July 1973 the complaint appears to have been amended and Gokuldas opponent No.

1 was named as an accused person. The complaint was allowed to be amended. Arguments were heard and on 14-8-1973 the learned Judicial Magistrate First Class taking into consideration the facts disclosed by the documents filed by Gokuldas on 11-5-1973 came to the conclusion that in view of the consent term the present accused could not be said to have committed any offence. In that view he concluded that the complaint did not disclose any offence. Hence he dismissed it u/s 203 of the Criminal P.C. Suffice it to say at this stage that reading his order, it appears to me as an order passed on merit. Feeling aggrieved, complainant filed a revision application. It was heard by the Additional Sessions Judge Akola and it was also dismissed.

5. Thereafter, the present revision application has been filed.

6. Shri Bobde who appears for the complainant submitted that the learned Magistrate should not have allowed Gokuldas who is named as accused in the complaint to have taken part in an enquiry u/s 202 or 203, Cr.P.C. He further submitted that the accused has no right to appear before the process is issued by the Magistrate against him. He urged that the learned Magistrate allowed the accused to appear and further allowed the accused to produce certain documents. " The Magistrate had exceeded his jurisdiction u/s 203, Cr.P.C. and came to an erroneous reasoning by which he dismissed the complaint u/s 203, Cr. P. Code. In support he has relied upon the Supreme Court case reported in Chandra Deo Singh Vs. Prokash Chandra Bose and Another, . I shall deal with it a little later. In reply, Shri Palshikar submits that the complaint originally filed by the complainant was against unknown persons. That complaint could be enquired by the Magistrate or the Magistrate could send it to the police for enquiry. He submitted that Gokuldas was not named in that complaint. Therefore, there was no accusation against Gokuldas and as such Gokuldas could not be said to have taken part in the enquiry as an accused person. He further submitted that certain tea boxes were attached from the firm of which Gokuldas was the partner. As those boxes were attached pursuant to the order of the Magistrate it was necessary for Gokuldas to represent before the Court that those boxes could not be attached. He further submitted that there is no prohibition in Section 202 of the Criminal P.C. that accused persons could not be allowed to take part in the proceeding. Section 202, urges Shri Palshikar, nowhere prohibits that the person named shall not appear and take part during the enquiry directed by the Magistrate. There is no prohibition under that section that the Magistrate cannot look into the material brought to his notice. He further submitted that the Magistrate can suo motu examine any person in order to prove falsehood of the complaint. He further submitted that the observations of the Supreme Court do not apply to the facts of the present case because in that case, the observations are related to the cross-examination of witnesses conducted on behalf of the person accused of an offence. The observations also were restricted as regards the suggestion of an accused person that certain persons be examined as witnesses. He submitted that beyond these above two propositions the Supreme Court Authority does not lay down that accused shall not be allowed to appear

and take part in an enquiry before a process is issued against him.

7. In order to appreciate these contentions, it is necessary first to examine the provisions of the Criminal P. C relating to the institution of the complaint and the steps taken by the Magistrate before he issues the process. Chapter XVI deals with "Complaints to Magistrate" and in Chapter XVI, Sections 200 to 203 are dealt with. Section 200, Cr.P.C. refers to "examination of complainant". A Magistrate taking cognizance of an offence on complaint shall at once examine the complainant and the witnesses present, if any, upon oath and the substance of the examinations shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate. It is unnecessary for me to reproduce the other provisos of Section 200. Suffice it to say that part one of Section 200, Cr.P.C. clearly lays down that when a complaint is filed and its cognizance is taken by the Magistrate relating to an offence stated in the complaint then he shall at once examine the complainant. If the witnesses are present, he may examine them and the substance of the examination has to be reduced to writing. Section 201, Cr. P. G. deals with "procedure by Magistrate not competent to take cognizance of the "case", Here that section is not relevant for the purpose of the present revision application. Section 202, Cr. P. G. runs as under:

Any Magistrate, on receipt of a, complaint of an offence of which he is authorised to take cognizance, or which has been transferred to him u/s 192, may, if he thinks fit, for reasons to be recorded in writing, postpone the issue of process for compelling the attendance of the person complained against, and either inquire into the case himself or, if he is a Magistrate other than a Magistrate of the third class, direct an inquiry or investigation to be made by any Magistrate subordinate to him, or by a police-officer, or by such other person as he thinks fit, for the purpose of ascertaining the truth or falsehood of the complaint.

The proviso and the other sub-sections are not material for our purpose. I have referred to Section 200. It deals with recording the evidence of the complainant and if the" Magistrate is satisfied as regards the allegations made in the complaint he may immediately issue a process and then provisions of Section 204 would come into play which are part of Chapter XVII. But the Magistrate on examination of the complaint may not issue a process, may postpone the issue of the process and may either enquire into the case himself or get an enquiry done by a police officer. The rest of the other provisions of Section 202, Cr.P.C. are not material for our purpose. In the instant case immediately after the complaint against an unknown person was filed the Magistrate had passed an order directing the police officer to enquire and submit the report of his enquiry for taking further steps by the Magistrate. Section 203, Cr.P.C. is material for our purpose. It runs as under:

The Magistrate before whom a complaint is made or to whom it has been transferred, may dismiss the complaint it after considering the statement on oath (if any) of the complainant, and the witnesses and the result of the investigation

or inquiry (if any) u/s 202, there is in his judgment no sufficient ground for proceeding. In such cases he shall briefly record his reasons for so doing.

Section 203, therefore, lays down that the Magistrate before whom a complaint is made may dismiss it after considering the statement on oath of the complainant. The statement on oath is recorded u/s 200, if the witnesses are present along with the complainant and if they are examined, their statements may be also considered or the result of enquiry, if any under Sec, 202, Cr. P. G. The Magistrate has to consider if he has sent the complaint for enquiry to the police or he has himself decided to make an enquiry and after considering these results, it in his judgment he finds that no sufficient ground is there for proceeding then he shall dismiss the complaint. While dismissing the complaint he must briefly record the reasons why he has dismissed the complaint. In the instant case, we find that the Magistrate has given reasons why in his judgment there are no sufficient grounds for proceeding but the Magistrate has considered the application (Exh. 18) of the accused together with the documents filed by the accused persons. The question for determination is whether the Magistrate can look into those documents for arriving at a conclusion that there is in his judgment no sufficient ground for proceed" ing.

8. Shri Palshikar has drawn my attention to the authorities of our High Court. One is reported in re Virbhan Bhagaji (AIR 1928 Bom 290) :29 Cri LJ 975). It is a Division Bench Judgment. The headnote runs as under-

What is ordinarily contemplated by Section 202, Criminal Procedure Code, is merely a preliminary examination of the complainant and his witnesses; or such of them as a Magistrate deems fit to examine in the absence of the accused, but that section is not limited to an inquiry of that kind; and if the Magistrate deems it desirable for the purpose of his inquiry to give the accused an opportunity of appearing before him and stating what he has to say about the accusation by issuing a notice to him and even accepts and considers documentary evidence which the accused produces, ha is not thereby committing an illegality.

The facts from this head-note emerge are that there is no specific prohibition to the Magistrate for issuing a notice and calling upon the accused to remain present before him and giving an opportunity to produce certain documents. In the instant case w find that the Magistrate has not called Gokuldas the accused in this case by a notice before him. The observations also go to show that an enquiry was conducted by the Magistrate u/s 202 of the Criminal P.C. That is also not a case in this revision application because I have already stated that the Magistrate had sent the papers for enquiry to the police" officer. Under such circumstances, " in my opinion, these observations are not applicable t the facts of the present case.

9. Shri Palshikar also drew my attention to the observations of Patna High Court reported in Ram Saran Singh v. Mohammad Jan Khan AIR 1926 Pat 34 : 26 Cri LJ 1394. The relevant headnote on which reliance is placed runs as under:-

It is certainly not a correct procedure to defer the issue of process and order an enquiry without recording reasons. It is also as a rule undesirable that the enquiry should be prolonged by cross-examination and arguments inter partes, the reason being that if this is necessary it is obviously advisable to follow the procedure of a trial and for that purpose to issue process at once. At the same time if a Magistrate having the duty of making an enquiry u/s 202 can make his enquiry more fully by having the accused in Court, there is no reason either in common sense or in law why the accused should not be called to the enquiry.

The first part of the head-note is not helpful to the submissions made by Shri Palshikar but is helpful to the complainant to show that cross-examination or arguments should not be allowed in an enquiry u/s 202. The latter part also is not applicable because the headnote says that there is no prohibition if the Magistrate directs the accused to remain present at the time of the enquiry. I have already stated that the Magistrate has not conducted personally any enquiry u/s 202, Cr.P.C. Therefore, this case also does not apply to the facts of the present case.

10. Shri Palshikar also drew my attention to a third case of our High Court in Hiralal Gulabchand Shah Vs. Keshavlal Parekh and Others, . The head-note runs as under:-

A Magistrate holding an inquiry u/s 202 cannot possibly allow either the accused or his advocate to cross-examine the complainant or any of his witnesses who may have been examined by him in his discretion for the purpose of ascertaining the truth or otherwise of the complaint. It may be open to the Magistrate to take the assistance of the accused or his advocate in himself putting the questions to the complainant and his witnesses who may be examined by him. But that would certainly be quite a different thing from the cross-examination by the accused or his advocate which would cover a much larger field than the one available to the Magistrate whose enquiry would be limited only to ascertaining the truth or falsity of the complaint and does not extend to determination of the guilt of the accused person. Where the Magistrate allows the accused the right to cross-examine the complainant which right the accused could only have after the commencement of the trial it is not a small error which can be cured u/s 537. Section 537 is not an omnibus section which can cure any sort of defect in the proceedings of a criminal case. It cannot possibly cure the exercise of powers not vested in the Magistrate while disposing of cases. It cannot cure doing something which is repugnant to the aim and object of a particular provision of law- These kinds of defect cannot possibly be cured by the provisions of Section 537.

These observations are eloquent and do not support the submission canvassed before me by Shri Palshikar. What Shri Palshikar stated is that it may be open to the Magistrate to take the assistance of the accused or his advocate in himself putting the questions to the complainant or his witnesses who may be examined by him. The observations of the Supreme Court go to show that in such an enquiry before the process is issued accused can only appear in person or

through an advocate but cannot take part in the proceeding. Probably, the observations of the Supreme Court may not have been brought to the notice of the learned Judge and as I have stated earlier on facts, this case is distinguishable from the facts of the present case and, therefore, not applicable,

11. Shri Mor, the Assistant Government Pleader submitted that reading Section 202, Cr.P.C. the Magistrate is not precluded in securing the presence of the accused for finding out the truth or falsity of the complaint. If the accused is to produce the same documents at the trial then there should be no prohibition if they are produced at the earlier stage of the enquiry to show that those documents would go a long way to show that there was no justification for the complainant to file a complaint. The submissions of Shri Mor are answered in the words of the Supreme Court and, therefore, I need not add anything beyond repeating the observations of the Court. The Supreme Court in Chandra Deo Singh Vs. Prokash Chandra Bose and Another, in placitum (b) observed as under--

For determining the question whether any process is to be issued or not, what the Magistrate has to be satisfied (about) is whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction can be determined only at the trial and not at the stage of enquiry. As stated in Sub-section (1), of Section 202 itself, the object of the enquiry is to ascertain the truth or falsehood of the complaint, but the Magistrate making the enquiry has to do this only with reference to the intrinsic quality of the statements made before him at the enquiry which would naturally mean the complaint itself, the statement on oath made by the complainant and the statements made before him by persons examined at the instance of the complainant.

The Supreme Court has further observed as under in Placitum (a):--

The entire scheme of Ch. XVI of the Code of Criminal Procedure shows that an accused person does not come into the picture at all till process is issued. This does not mean that he is precluded from being present when an enquiry is held by a Magistrate. He may remain present either in person or through a counsel or agent with a view to be informed of what is going on. But since the very question for consideration being whether he should be called upon to face an accusation, he has no right to take part in the proceedings nor has the Magistrate any jurisdiction to permit him to do so. It would follow from this, therefore, that it would not be open to the Magistrate to put any question to witness at the instance of the person named as accused but against whom process has not been issued; nor can he examine any witnesses at the instance of such a person. Of course, the Magistrate himself is free to put such questions to the witness produced before him by the complainant as he may think proper in the interests of justice. But beyond that, he cannot go.

Therefore, it would go to show that the only right a person accused in the complaint has before the process is issued is to remain present when the enquiry

is being held by the Magistrate either personally or through an advocate but he cannot take part or he cannot be allowed to take part in the enquiry. The Supreme Court has observed while interpreting Section 203, Cr.P.C. as follows - Placitum (c) runs as under:-.

Since the object of an enquiry u/s 202 is to ascertain whether the allegations made in the complaint are intrinsically true, the Magistrate acting u/s 203 has to satisfy himself that there is sufficient ground for proceeding. In order to come to the conclusion, he is entitled to consider the evidence taken by him or recorded in an enquiry u/s 202, or statements made in an investigation under that section, as the case may be. He is not entitled to rely upon any material besides this. Where there is prima facie evidence, even though an accused may have a defence that the offence is committed by some other person or persons, the matter has to be left to be decided by the appropriate forum at the appropriate stage and issue of process cannot be refused.

In the instant case what the Magistrate has done is that he has allowed Gokuldas to produce certain documents which are not relevant and which are not warranted by Section 203, Criminal P.C. The Magistrate is entitled u/s 203 to consider whether to issue process or dismiss the complaint. He is entitled to consider the evidence taken by him or recorded in an enquiry u/s 202, Cr.P.C. In the instant case it is clear that the Magistrate has allowed Gokuldas to produce the papers of a civil suit which was then pending between the principals of the parties and on that extraneous consideration came to the conclusion as if he was deciding the case on merit probably u/s 253 of the Criminal P.C. In my opinion, the learned Magistrate has acted in excess of jurisdiction in dismissing the complaint by looking into extraneous material. He considered the question on merit as if he was conducting a trial. Prima facie the material disclosed by the complaint may not be necessarily to warrant a conviction but only it must show that a process can be issued and the accused is answerable for the charge made in the complaint. This should have been considered by the learned Magistrate and if there was no such material in the complaint then it could be said that the Magistrate was justified in observing that there were no sufficient reasons for proceeding with the complaint. I have already stated and I need not repeat it that the Magistrate did not consider the complaint at all, did not consider the statement of the complainant recorded on oath by him as well as the result of enquiry but considered other documents which were produced by the accused and which were not relevant for the purpose of deciding the question whether to issue process or not u/s 203, Cr.P.C. and which were extraneous material not falling within the scope of enquiry u/s 203, Cr.P.C. In that view I hold that the order of the Magistrate is in excess of his jurisdiction and is an illegal order and cannot be sustained. Hence it is set aside. The order of the Additional Sessions Judge also suffers from the same infirmity which also requires to be set aside. Both the orders are set aside. The Magistrate after receipt of the papers will pass orders on the complaint according to the provisions of the Criminal P.C. in the light of the observations made in this revision application.