

(1982) 07 GUJ CK 0019
In the Gujarat High Court

Mangalprasad Jethalal Upadhyay

APPELLANT

Vs

Thakkar Ananji Ranchhoddas and Others

RESPONDENT

Date of Decision : 22-07-1982

Acts Referred:

Constitution of India, 1950 — Article 20
Criminal Procedure Code, 1973 (CrPC) — Section 200, 202, 203, 204, 221
Penal Code, 1860 (IPC) — Section 34, 420, 477A
Trade and Merchandise Marks Act, 1958 — Section 78, 79

Citation : (1983) CriLJ 309 : (1982) GLH 1032 : (1982) 2 GLR 607

Hon'ble Judges : A.M. Ahmadi, J

Bench : Single Bench

Judgement

A.M. Ahmadi, J.—The facts leading to the present Revision Application briefly stated are as under:

The petitioner filed a complaint in the Court of the learned Judicial Magistrate, First Class, Bhachau, complaining of the commission of offences punishable under Sections 78 and 79 of the Trade and Merchandise Marks Act, 1958. In that complaint which was lodged on 29th Nov., 1978 the petitioner did not name the accused presumably because at that point of time he was not aware as to who was responsibly for the infringement of his registered trade mark, Messrs Hiralal Parbhuram & Sons are the owners of the trade mark "Hiralal Chhap Yeola Beedi No. 501". The petitioner is an employee as well as a power-of-attorney holder of the said firm owning the trade mark. The allegation in the complaint was that some person was responsible for manufacturing beedies of inferior quality and selling them by affixing labels deceptively similar to the label which was a registered trade mark of the aforesaid firm. On the institution of this complaint the learned Magistrate took cognizance u/s 200 of the Criminal P. C. He then directed an inquiry u/s 202 of the Code and in the course of the said inquiry it appears that a Head Constable Of the Bhachau Police Station directed that the premises alleged to be in the occupation of the respondents Nos. 1 and 2 may be searched in the presence of the agent of the firm owning the trade mark. During

the course of inquiry and search, apart from beedi bundles carrying the labels of "Hiralal Chhap Yeola Beedi No. 501" beedi bundles of two other varieties carrying the labels of "Ganesh Chhap" and "Number 30" beedies were found from the said premises. In respect of the other two varieties of beedies also, it was found that trade marks owned by others (not the present petitioner or his firm) were infringed. In respect of those two infringements the Police Head Constable lodged separate complaints but in respect of the infringement of "Hiralal Chhap Yeola Beedi" a report was submitted to the learned Magistrate in Miscellaneous Criminal Application No. 5 of 1978, wherein order for inquiry was made, for such further action as may be considered appropriate, it appears that on the basis of the complaint filed by the Head Constable in respect of the infringement of "Ganesh Chhap" and "Number Thirty" beedies, separate Criminal Cases Nos. 216 and 217 of 1979 were registered. Both those cases ended in the acquittal of the present respondents Nos. 1 and 2. However, the learned Magistrate did not take any further action after the receipt of the report from the Head Constable in the inquiry directed u/s 202 of the Code in respect of the infringement concerning the registered trade mark- "Hiralal Chhap Yeola Beedi No. 501". In other words, the learned Magistrate did not either dismiss the complaint u/s 203 of the Code after receipt of the said report nor did he issue process as required by Section 204 of the Code. This situation of stalemate forced the petitioner to file another complaint which was registered as Criminal Case No. 394 of 1979 wherein process was issued. It may be mentioned that in this subsequent complaint respondent No. 3 is also shown as a co-accused. Respondent No. 3 was not an accused in Criminal Cases Nos. 216 and 217 of 1979 pertaining to "Ganesh Chhap" and "Number Thirty" beedies which ended in the acquittal of the accused persons. The subsequently instituted complaint (Criminal Case No. 394 of 1979) was ordered to be tried along with Criminal Miscellaneous Application No. 5 of 1978, vide order dated 10th July 1979. It appears that after this order of amalgamation was made by the learned Magistrate, the accused gave an application to the effect that since they were acquitted in the earlier two criminal cases Nos. 216 and 217 of 1979, they could not be tried in respect of the offence referred to in Miscellaneous Criminal Application No. 5 of 1978 and Criminal Case No. 394 of 1979 on the principle of *autrefois acquit* in view of Section 300(1) of the Code, The learned Magistrate upheld this contention and directed the release of accused Nos, 1 and 2 (respondents Nos. 1 and 2 herein) u/s 300(1) of the Code and the stoppage of proceedings against accused No. 3 (respondent No. 3 herein) u/s 258 of the Code. It is against this order passed by the learned Magistrate on 5th October 1979 that the original complainant has filed the present Revision Application.

2. Sub-section (1) of Section 300 of the Code reads as under:

300. (1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different

charge from the one made against him might have been made under Sub-section (1) of Section 221 or for which he might have been convicted under Sub-section (2) thereof.

The learned Magistrate seems to think that a complaint could have been lodged in respect of "Hiralal Chhap Yeola Beedi No. 501" also just as a complaint was lodged in respect of the infringement of the other two trade marks, namely, "Ganesh Chhap" and "Number Thirty" beedies which gave rise to Criminal Cases Nos. 216 and 217 of 1979, He was, therefore, of the view, that a charge could have been framed against the accused under Sub-section (1) of Section 221 of the Code in respect of the infringement of the trade mark in question. He was, therefore, of the opinion that the omission to frame a charge in respect of the trade mark in question which could have been framed against the present respondents Nos. 1 and 2 attracted the provision of Sub-section (1) of Section 300 of the Code. So far as respondent No. 3 is concerned, the learned Magistrate has directed stoppage of proceedings u/s 258 of the Code on the ground that respondent No. 3 is not directly involved nor is there any evidence collected in the course of inquiry against him. He was, therefore, of the opinion that it was not necessary to proceed against respondent No. 3 since, in his view, there was nothing to show his involvement, directly or indirectly, in the commission of the offence in question. In my opinion, the learned magistrate clearly misdirected himself in taking the view that he took on the interpretation of Sub-section (1) of Section 300 of the Code.

3. It is necessary to bear in mind the fact that when a Magistrate directs investigation to be made by the police under Sub-section (1) of Section 202 of the Code without issuing process against the accused (in the instant case the accused was at that stage an unknown person), he takes cognizance of the offence u/s 200 of the Code. The investigation which the police carries out is in pursuance of the order or direction issued by the Magistrate under Sub-section (1) of Section 202 of the Code. This investigation is thought necessary with a view to ascertaining the truth or falsehood of the allegations made in the complaint. If after the receipt of the report from the police the Magistrate comes to the conclusion that there is no sufficient ground for proceeding with the complaint, he shall dismiss the complaint stating in brief the reasons in support of his order. If a complaint is not dismissed u/s 203 of the Code, the Magistrate must, if the case is a summons case, issue summons for the attendance of the accused and if the case is a warrant case, he may issue a warrant or if he thinks fit, a summons against the accused. So far as Miscellaneous Criminal Application No. 5 of 1078 is concerned, it appears that after the learned Magistrate directed investigation under Sub-section (1) of Section 202 of the Code and after the report of the investigating officer was received, he neither dismissed the complaint u/s 203 of the Code nor did he issue process as required by Section 204 of the Code. This resulted in a stalemate and in order to break the stalemate, the petitioner lodged another complaint before the same learned Magistrate which came to be registered as Criminal Case No. 394 of 1979 in

which process appears to have been issued. It was only thereafter that the wheels began to move and an order was passed amalgamating both the cases, namely, Criminal Miscellaneous Application No, 5 of 1978 and Criminal Case No. 394 of 1971). At that stage the accused realised that the proceedings would now proceed against them and, therefore, they made an application u/s 300 of the Code stating that since they were acquitted in Criminal Cases Nos. 216 and 217 of 1979, they could not be prosecuted once again for the commission of the same offence or on the same facts for any other offence for which a different charge from the one made against them could have been made under Sub-section (1) of Section 221 of the Code in the aforesaid two cases,

4. In order that Section 300(1) may be attracted it must be shown that the accused are being tried for the same offence or on the same facts for any other offence for which a different charge from the one made against them might have been made under Sub-section (1) of Section 221 of the Code or for which they could have been convicted under Sub-section (2) thereof. Now after the petitioner lodged the first complaint No. 5 of 1978, the learned Magistrate in exercise of power conferred upon him by Sub-section (1) of Section 202 of the Code directed an investigation to be made by the police. In pursuance of this direction the Police Head Constable searched the premises alleged to be in the occupation of the accused persons where-from beedi bundles of three varieties carrying three different labels were found. The initial complaint instituted by the petitioner (No. 5 of 1978) was in respect of the alleged infringement of the trade mark owned by his principal bearing the words "Hiralal Chhap Yeola Beedi No. 501". That complaint had nothing to do with the infringement of the other two trade marks, namely, "Ganesh Chhap 501" and "Number Thirty" beedies. It was presumably for this reason that in respect of the latter two brands the police lodged separate complaints which were registered as Criminal Cases Nos. 216 and 217 of 1979. In those two cases the accused could not have been charged for the infringement of the trade mark owned by the petitioner's principal. Section 221(1) provides that if a single act or a series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences. Sub-section (2) of that Section next provides that if in such a case the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of Sub-section (1), he may be convicted of the offence which he is shown to have committed, although he was not charged with it. The Section can be usefully employed if the act or series of acts is of such a nature that a doubt arises as to which of several offences has been committed or where the evidence discloses the commission of an offence other than the one with which the accused is charged for which a charge could have been framed under Sub-section (1) of Section 221 of the Code. In the latter case a conviction could be recorded in the

absence of a specific charge. In the instant case the seizure of different bundles of beedies from the premises in question indicates that the person responsible for manufacturing those beedies was guilty of violating three different registered trade marks. The infringement of each trade mark was a separate and distinct offence u/s 78/7!) of the Trade and Merchandise Marks Act, 1958. That being so, in my opinion, the learned Magistrate was clearly in error in coming to the conclusion that Sub-section (1) of Section 300 of the Code was attracted. In fact, the accused were never tried nor could they have been tried for the infringement of the trade mark belonging to the petitioner's principal in the earlier two cases. Those two cases dealt with distinct and separate offences pertaining to two different trade marks and not the trade mark with which we are presently concerned. In such a situation it could hardly be said that the principle of *autrefois acquit* can be invoked in view of the earlier acquittals in Criminal Cases Nos. 216 and 217 of 1979. I am, therefore, of the opinion that the learned Magistrate was in error in thinking that the case fell within the purview of Sub-section (1) of Section 300 of the Code.

5. Reliance was, however, placed by Mr. Mankad, the learned advocate for respondents Now. 1 and 2 on a decision of the Supreme Court in *Amritlal Ratilal Mehta and Another Vs. State of Gujarat*, . That was a case in which two charges were brought against the two appellants. The first charge was that both of them cheated the Central Excise Department, Baroda, on 21st December, 1965 and in furtherance of their common intention to cheat the Government of excise duty of Rupees 11,450/-, they dishonestly made false declarations and gate passes which were prepared and written by the first appellant and signed by the second appellant. They were, therefore, charged u/s 420/34 of the Penal Code, The second charge was that both of them in furtherance of the said common intention in their capacity as employees of Messrs Jyoti Limited wilfully and with intent to defraud the Central Excise Department, made false entries in the Rate passes as stated above and thereby committed an offence punishable u/s 477-A/34 of the Penal Code. The accused were acquitted on the first count but they were convicted on the second count and sentenced to pay a fine of Rs. 100/- and Rs. 500/- respectively. In appeal the learned Sessions Judge set aside the order of conviction on the second count and acquitted them. The learned Sessions Judge was of the view that the gate passes were prepared under a mistake and not with a criminal intent to defraud the Government of excise duty. The State filed two separate appeals, the first in respect of the acquittal on the first count and the second in respect of the acquittal on the second count by the learned Sessions Judge. The appeal against the order of acquittal u/s 477-A/34 was summarily dismissed on 13th Mar. 1972 by a Division Bench. The appeal against the order of acquittal on the charge u/s 420/34 of the Penal Code was allowed and the two accused persons were sentenced to pay fines of Rs. 300 and Rs. 500 respectively. Against the said judgment of conviction u/s 420/34. I.P.C. special leave of the Supreme Court was obtained. The principal submission made on behalf of the accused was that in view of the finding of fact recorded by the

Sessions Judge so far as the charge u/s 477A/34 is concerned which has become final as a result of the summary dismissal of the appeal by a Division Bench of the High Court, the charge u/s 420/34 could not be sustained and must automatically fail. The Supreme Court did not agree with the reason of the learned single Judge of the High Court that acquittal on the charge u/s 477A/34 was not a bar to a conviction u/s 420/34 as the ingredients of the two offences were different. The Supreme Court pointed out. that it was not a question as to whether the ingredients of the offences were .separate because the question at issue was really about the binding force of a finding of fact finally determined in an earlier stage of the case. The Supreme Court emphasised that the question was not whether the ingredients were the same but whether the facts alleged and required to be proved in the particular case to establish the offences are basically the same. According to the Supreme Court the two charges clearly show that the essential allegation required to be proved for both the charges was whether the gate-passes were made dishonestly (for 8 -120/34) and with intent to defraud (for Section 477A/34) and the finding that the gate-passes were made inadvertently and negligently was destructive of both the charges. It is to the said set of circumstances that the Supreme Court came to the conclusion that the finding of fact to the effect that the gate-passes were made in-advertently and negligently but not wilfully or with intent to defraud, which had led to the acquittal of the accused on the charge u/s 477A/34, must operate for the benefit of the accused and lead to their acquittal on the charge u/s 420/34 also. Belying on this judgment, Mr. Mankad strenuously urged that in the earlier two cases the Court had come to the conclusion that the prosecution had failed to prove that the premises from which the beedi bundles were found belonged to or were in the occupation of the respondents Nos. 1 and 2 or either of them. He submitted that this finding of fact recorded in the earlier two proceedings must enure to the benefit of respondents Nos. 1 and 2 herein in view of the language of Sub-section (1) of Section 300 of the Code as interpreted by the Supreme Court in the decision relied upon. I am afraid I cannot accede to this submission made by Mr. Mankad for the simple reason that the decision on which he relies can have no application to the facts of the present case. In the case before the Supreme Court, out of a single incident two charges were framed against the accused persons. Out of those two charges, one was held proved and the other was held, not proved. The very foundation on which the other was found not proved destroyed the foundation or basis for the second count. In other words, the finding of fact would be self-contradictory if the accused is acquitted on the first count and convicted on the other count. The Section incorporates the well-known common law principle based on the maxim *nemo debet bis vexari pro eadem cause* which finds a mention in Article 20(2) of the Constitution. The plea of *autrefois acquit* statutorily recognised by this Section can arise when a person is sought to be tried again for the same offence or on the same facts for a different offence for which a charge could have been framed u/s 221(1) or for which he could have been convicted u/s 221(2). Here the offence is not the same because the trade mark infringed is different from those which were the subject matter of

earlier proceedings. The accused could not have been charged for the infringement of the trade mark in question in the previous proceedings nor could a conviction be recorded in those proceedings for its infringement. The facts of the case before the Supreme Court were wholly different. There the finding of fact relied upon was recorded in the same proceeding on the evidence tendered in that case. On that very same evidence two contradictory findings of fact could not be allowed to stand. It may be that in the present case part of the evidence may be the same as recorded in the earlier proceedings but that is not sufficient to attract Section 300(1) of the Code. To my mind, therefore, the facts being different the decision of the Supreme Court on which reliance is placed cannot apply. Therefore, the impugned order against respondents Nos, 1 and 2 cannot be sustained.

6. The order in so far as accused No. 3 (respondent No. 3) is concerned is passed u/s 258 of the Code on the ground that there is no evidence to show his direct involvement in the commission of the crime in question. In the instant case the proceedings have been initiated on a complaint having been filed before the learned Magistrate. The learned Magistrate has already taken cognizance of the offence. Therefore, this is not a case where it can be said that proceedings have been instituted otherwise than on a complaint. In fact, no evidence has been led before the learned Magistrate in either of the two pending matters. Besides, the power u/s 258 of the Code to stop the proceedings at any stage must be exercised sparingly and only if exceptional circumstances appear. If there is no evidence against the accused, he can be discharged/acquitted, as the case may be, depending on the stage to which the proceedings have reached. I am, therefore, of the opinion that there was no justification for passing the impugned order u/s 258 of the Code.

7. In the result, this Revision Application succeeds. The impugned order passed by the learned trial Magistrate is set aside and the learned Magistrate is directed to proceed ahead from the stage which was reached and to dispose of both the complaints pending before him at an early date in accordance with law. The rule is made absolute accordingly.