
(1990) 10 GUJ CK 0008
In the Gujarat High Court

Shankerbhai Mathurbhai Patel and Another	APPELLANT
Vs	
Ramanlal Vrajlal Patel and Another	RESPONDENT

Date of Decision : 10-10-1990

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 202, 202, 202(b)
Trade and Merchandise Marks Act, 1958 — Section 78, 78, 79

Citation : (1991) 1 GLR 387

Hon'ble Judges : V.H. Bhairavia, J

Bench : Single Bench

Judgement

V.H. Bhairavia, J.—This Revision Application is preferred by the petitioner-original accused against the order passed by the learned J.M.F.C., Borsad dated 2-5-1983 on application Exh. 16 and 18 in Cri. Case No. 1985 of 1982. A complaint was filed by the respondent against the present petitioner for an offence punishable under Sections 78 and 79 of the Trade and Merchandise Marks Act, 1958 in the Court of Judicial Magistrate, Borsad. On receiving this complaint, the learned Magistrate ordered to send this complaint for enquiry u/s 202 and sought the report from the police. The offence is alleged to have been committed by the petitioner under Sections 78 and 79 of the Trade and Merchandise Marks Act, 1958 alleging that the petitioner had used a new trade mark "Jaswant Chhap Special Telephone Bidi", which trade mark belonged to the complainant alone and it is registered under the Trade Mark Registry in the name of the complainant. The petitioner is also dealing in bidi business and he being the rival in the bidi business, the filing of this complaint was necessitated. The petitioner-accused submitted an application to the learned Magistrate Exh. 16 contending that the Court has no jurisdiction to send the complaint for enquiry u/s 202 without examining the complainant and his witnesses in support of the complaint.

2. In the original complaint, the learned Magistrate passed an order on 10-4-1981 which reads as under:

Heard the learned Advocate Shri R.K. Shah for the complaint. This complaint is

ordered to be sent in inquiry as per the provisions of Section 202 of the Code of Criminal Procedure to the P.S.I. Ankлав. P.S.I. Ankлав is directed to hold the inquiry of this complaint by himself and he is also directed to submit his report within ten days. He is also directed to seize the M.M. as stated in the complaint.

The preliminary objections taken by the petitioner in applications Exh. 16 and 18 has been overruled and on receiving the report of the police, the learned Magistrate issued process against the petitioner-accused.

Learned Counsel Mrs. Ghosh for the petitioner challenged that said process and contended that the learned Magistrate has violated the mandatory provision of Section 202(b) of, the Criminal Procedure Code. Section 202(b) reads as under

Any Magistrate on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him u/s 192, may, if he thinks fit, postpone the issue of process against the accused, and either enquire into the case himself or direct an investigation to be made by a Police Officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding.

Provided that no such direction shall be made:

(b) where the complaint has not been made by a Court unless the complainant and the witnesses present (if any) have been examined on oath u/s 200.

3. Learned Counsel further submitted that the learned Magistrate's order to make inquiry into the alleged offence u/s 202(b) without examining the complainant is in violation of the provisions of Section 202(b). An inquiry required to be carried out by police u/s 202 is to be ordered after the complainant is examined. This complaint is filed by a private person, and therefore, it is obligatory for the Magistrate to learn Counsel relied on the judgment in the case of Deena Nath Acharya Vs. Daitari Charan Patra and Others, wherein it is held that the Magistrate has jurisdiction to direct an investigation to be made by a Police Officer for the purpose of deciding whether or not there is sufficient ground for proceeding provided that no such direction for investigation shall be made unless the complainant and his witnesses present in Court have been examined on oath u/s 200. The exception is only where the complaint has been made by a Court. The learned Counsel for the petitioner has also relied on several other authorities including Rajindra Nath Mahato Vs. T. Ganguly, Dy. Superintendent and Another, Lalu Kamumal Vs. The State, and 1949 Cri. LJ 554 (Dharmendra Nath Shastri v. Rex Through Sheoraj Singh). The principle laid down in the first authority referred to hereinabove is well settled law on this point. A plain reading of Section 202 read with Section 202(b) makes it very clear that the Judicial Magistrate before directing inquiry ought to have examined the complainant and his witnesses, if any. Admittedly, in this case, complainant was not examined. In view of this settled legal position, the learned Magistrate has no jurisdiction to direct the police to make inquiry u/s 202 and the process issued on receiving the report from the police is also without

jurisdiction. Therefore, the order passed on Exh. 16 and 18 over-ruling the preliminary objection of the petitioner is required to be set aside and the process issued on complaint is also required to be quashed and set aside.

4. The respondent-complainant appeared through his Advocate Mr. R.K. Shah. The matter has been placed on the final hearing Board on 20th September at serial No. D-35, Despite that Advocate for the respondent has not remained present. The learned Counsel for the petitioner was also kept waiting for a pretty long time by the Court since 9th October, 1990 but the learned Advocate for the respondent has not turned up. Therefore, this matter being old, it could not be delayed waiting for the Advocate and hence heard in the absence of the learned Advocate for the respondent and decided on merits.

In the result, this Revision Application is allowed. Process issued on complaint is quashed and set aside. Rule made absolute.