

Vishvajeet Sharma and anr. Vs. State and anr.

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Court : Delhi

Decided On : Sep-11-2009

Reported in : 2009(41)PTC484(Del)

Judge : S. Muralidhar, J.

Acts : [Copyright Act, 1957](#) - Sections 2, 15, 15(2) and 63; [Designs Act, 2000](#) - Sections 2 and 2(1); [Trade Marks Act, 1999](#) - Sections 27, 103 and 104; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 156(3) and 482; [Constitution of India](#) - Article 226

Appeal No. : Crl.M.C. No. 3650 of 2006 and Crl.M.A. 5869/06 and 4130/2007

Appellant : Vishvajeet Sharma and anr.

Respondent : State and anr.

Advocate for Def. : Pawan Bahl, APP,; H.P. Singh and; Rohit Minocha, Advs.

Advocate for Pet/Ap. : Shailen Bhatia; Neeraj Chaudhari an; Zeba Tarannum Khan, Advs

Disposition : Appeal allowed

Judgement :

S. Muralidhar, J.

1. This petition under Section 482 of the Code of Criminal Procedure 1973 ('Cr PC.') seeks the quashing of the Complaint No. 55/1/ 2005 (titled Spaceage Multi Products Pvt. Ltd. v. Darshan Singh and Ors.) and FIR No. 52 of 2006 dated 12th January 2006 registered at Police Station (PS) Saraswati Vihar under Section 63 of the Copyright Act and all proceedings consequent thereto.

2. The background to the filing of this petition is that the Petitioners are partners of the firm M/s. Deemark Healthcare having its office at New Delhi. The firm deals with the various healthcare products such as exercisers and walkers. It is stated that the Petitioners adopted the trade marks with the word 'Walker'. Their main trade mark is DEEMARK and the word 'Walker' is stated to be descriptive and generic for the walking exercise machines as it is to convey an idea that the use of the machine is a substitute for walking.

3. It is further stated that two notices dated 17th August 2005 and 14th December 2005 were issued by the lawyers of Respondent No. 2 M/s. Spaceage Multi Products (P) Limited having its office at Kolkata to the Petitioner No. 2 Mr. Darshan Singh. A copy of the second notice dated 14th December 2005 has been enclosed. It was claimed by Respondent No. 2 in the said notice that they were the sole owners of the trademarks 'Morning Walker, Easy Walker, Walker, and Morning Walker (Label)' and that they were also proprietors of the artistic work in 'Morning Walker'. It was stated therein that the Respondents had applied for registration of the trademark 'Morning Walker' in Classes 10 and 28 and the applications were pending. The particulars of the copyright registration No. A-70290/ 2005 dated 27th April 2005 were given. It was alleged by Respondent No. 2 that Petitioner No. 2 had copied the main feature of its get-up and/or artistic work by offering for sale the product 'Home Walker' and that this also constituted infringement of the copyright registration of Respondent No. 2. The said notice called upon the Petitioner No. 2 to immediately cease using the mark 'Home Walker' which was deceptively similar to the trademark 'Morning Walker. and/or 'Walker' and/or any mark having prefix or suffix 'Walker' in respect of Classes 10 and 28 goods including health oxygen equipments of all kinds.

4. In their reply dated 22nd December 2005, the Petitioners. lawyers pointed out that the marks 'Walker.', 'Morning', 'Easy' or any combination thereof described the nature of the article which was meant for the walking exercise at home or any other place and therefore were incapable of being registered as trade marks. Further the words were common to the trade. It was further contended that the registration of the copyright in 'Morning Walker' was also not a work of original art and the same was liable to be rectified. While it was not denied that Petitioner No. 2 Darshan Singh was selling walkers under the trade mark 'Home Walker' it was claimed that Petitioner No. 2 had adopted the said mark honestly and bonafide. Any infringement of the trademark or copyright of the Respondent No. 2 was denied. It was also denied that the product of Respondent No. 2 was an original work of art protected under the Copyright Act 1957.

5. It appears that even before the second notice dated 14th December 2005 was sent by the lawyers of Respondent No. 2 to the Petitioner No. 2, Respondent No. 2 had on 31st October 2005 filed Complaint Case No. 55/1/2005 in the court of the learned Additional Chief Metropolitan Magistrate ('ACMM.'). An application under Section 156(3) Cr PC was also filed. In the complaint it was mentioned that a letter had been written to the DCP Crime Branch EOW Cell on 22nd October 2005 but no action had been taken. An order was passed by the ACMM on 31st October 2005 directing the DCP Crime EOW Cell to conduct an investigation and submit a report to the court by 15th February 2006. Thereafter FIR No. 52 of 2006 dated 12th January 2006 was registered at PS Saraswati Vihar. After investigation, a charge sheet was filed in the court of the learned ACMM on 4th December 2006. Cognisance of the offence under Section 63 Copyright Act was taken. Petitioner No. 2 was arrested on that date. Later, by an order dated 23rd January 2006 he was granted bail. Thereafter, this petition was filed praying that the FIR and the preceding criminal complaint be quashed.

6. When this petition was heard on 28th September 2006 it was submitted by learned Counsel for the State that after investigation the Police was contemplating filing a cancellation report. In view of the said statement, learned Counsel sought for the petitioner sought permission to withdraw the petition and it was dismissed as withdrawn. However despite making the above statement, the Investigating

Officer ('IO') of the case filed a charge sheet in the court of learned ACMM on 1st December 2006 stating therein that use of the name/word 'Easy Walker' by the Petitioners constituted a copyright violation and that 'the description of equipment as level prints on body is also deceptively similar of (sic to) the infringed Easy Walker Exercise machine. Hence the offence under Section 63 of the Copyright Act ('CR Act') is attracted.'

7. In view of the above development, the Petitioners sought revival of the main petition Crl M C No. 3650 of 2006 by filing Crl M A No. 4129 of 2007. Along with the said application filed on 14th April 2007, the Petitioners also filed an application Crl M A No. 4130 of 2007 seeking to challenge the charge sheet. The ground urged was that the charge sheet was based on the alleged copyright work which does not qualify to be an artistic work. No copyright registration could have been granted to Respondent No.2. In the alternative, it was urged that if the said work was granted registration, then such registration ceased to exist by operation of Section 15(2) of the [Copyright Act, 1957](#). It was submitted that the design of the product alleged to have been infringed by the Respondent No. 2 is really a subject matter of the [Designs Act, 2000](#) in view of Section 2(1)(d) of that statute. It was pointed out that the Petitioners had in any event applied for cancellation of the copyright registration in favour of the Respondent No. 2.

8. By an order 10th January 2008 Crl M A No. 4129 of 2007 was allowed and Crl M C No. 3650 of 2006 was restored to file. As regards Crl M A No. 4130 of 2007 by the same order a last opportunity was given to the Respondent No. 2 to file a reply. It may be mentioned that against the order dated 10th January 2008 the Respondent No. 2 filed Special Leave Petition (Crl) No. 1834 of 2008 in the Supreme Court. By an order dated 1st December 2008 the said SLP was dismissed.

9. It is submitted by Mr. Shailen Bhatia, learned Counsel appearing for the Petitioners that a perusal of the complaint on the basis of which the FIR was registered would go to show that the essential grievance of the Respondent No. 2 is about the infringement of the design for which registration had been granted to Respondent No. 2. The complaint was, therefore, not of infringement of a trade

mark or copyright. The charge sheet too was only for the infringement of copyright. It is submitted that the Petitioner has already filed objections to the registration of the copyright since no copyright registration ought to have been granted. It is submitted that a perusal of the charge sheet shows that the IO had compared the products of the parties although such products by themselves were not covered under the Copyright Act. The charge sheet had thus made a fundamental error about the applicability of the Copyright Act 1957. If the complaint was read as a whole the provisions of Designs Act 2000 alone stood attracted and that statute did not prescribe any offence. It is accordingly prayed that the FIR should be quashed.

10. Mr. Pawan Bahl, learned Additional Public Prosecutor ('APP') appearing for the State, raised a preliminary objection as to the maintainability of the present petition. He placed reliance upon the judgment of the Supreme Court in *Hamida v. Rashid @ Rasheed* (2008) 1 SCC 474, *Som Mittal v. Government of Karnataka* : (2008) 3 SCC 574 and *Central Bureau of Investigation v. K.M. Sharan* : (2008) 4 SCC 471 to contend that the Petitioners have an efficacious alternative remedy before the trial court at the stage of charge. On merits it is submitted that the grounds urged in this petition can well be examined by the trial court and no ground is made out for interference under Section 482 Cr PC.

11. Mr. H.P. Singh, learned Counsel appearing for the Respondent No. 2 submits that it was plain that by using the words 'Easy Walker', the Petitioners were violating the copyright as well as the trademark for which the Respondent No. 2 had validly been granted registration. It is sought to be contended that the Complainant uses its artistic work in various products as a label and therefore, Section 15 of the Copyright Act is not attracted. It is stated that as on 26th June 2003 the Complainant had further got registration of its literature in respect of 'Morning Walker'. In the reply to the application for urging additional grounds it is urged that an injunction has been issued by the City Civil Court, Calcutta in Title Suit No. 50 of 2007 restraining the Petitioners from using the trade mark 'Morning Walker', Walker, Home Walker and yet the Petitioners continue to violate the said order. It is pointed out that the label prints on the body of the infringed goods state 'Easy Exerciser - Curve Oxygen Oscillation Physical Equipment' whereas the

packaging box states that 'Easy Exercise Easy Walker Curve Oxygenal Oscillation Physical Equipment.' Therefore the affixing of the mark 'Easy Walker' on the packaging alone demonstrated the mala fide intention of the Petitioners. It was apparent and that they were trying to misrepresent the infringed goods as that of Respondent No. 2.

12. This Court first would like to deal with the preliminary objection raised by the State as to the maintainability of the present petition on the ground that an efficacious alternative remedy is available to the Petitioners. While the judgments relied upon by Mr. Bahl, learned APP for the State, no doubt state that this Court should, in exercise of its power under Section 482 Cr PC, ordinarily be circumspect in interfering with any criminal proceedings after the filing of a charge sheet, this is not an inflexible proposition. It was observed in *Madhav Rao Jiwajirao Scindia v. Sambhajirao Chandrajirao Angre* : (1988) 1 SCC 692 that the Court should also 'take into consideration any subject features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the court cannot be utilized for any oblique purpose and where in the opinion of the Court chances of an ultimate conviction is bleak and therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue.' In *State of Haryana v. Bhajan Lal* : 1992 Supp (1) SCC 335 while summarizing the principles laid down in the various judgments of the Supreme Court till then, the grounds on which it was held that the High Court would be justified in exercising its power under Section 482 Cr PC were 'where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused' and '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.' As regards the interference by the Court even after filing of the charge sheet was concerned, in *CBI v. K.M. Sharma* : 2008 (4) SCC 471 the Supreme Court observed that according to the settled legal proposition, the High Court ought to have critically examined 'whether the allegations made in the FIR and the charge sheet taken on their face value and accepted in their entirety would prima facie constitute an offence for making

out a case against the accused.' In *Neelam Mahajan Singh v. Commissioner of Police* : 53 (1994) DLT 389 (DB) it was held by this Court that there is no restriction or limitation in the exercise of the power of the High Court to issue a prerogative writ under Article 226 of the [Constitution of India](#) to interfere even after a charge sheet was filed although the said power had to be exercised with circumspection.

13. The settled position appears to be that the decision whether or not to exercise the power under Section 482 Cr PC in the instant case to quash the FIR and the charge sheet would require examination of the FIR and the charge sheet as a whole in order to determine whether even a prima facie case for the offence under Section 63 of the Copyright Act is made out.

14. In the complaint filed by the Respondent No. 2, which has been substantially reproduced in the charge sheet, it is claimed that the complainant has 'obtained copyright in the original artistic work and type comprising in the get up, style and shape. It has acquired all rights attached to the said artistic work including a device and has exclusive right to use or reproduce the said original artistic work comprising the get up as well as style with the copyright registration No. A-70290/2005 dated 27.04.05.' Under Section 2(c) of the Copyright Act 1957, 'an artistic work can be a painting, a sculpture, a drawing, an engraving or a photograph, whether or not any such work possess artistic quality' and also 'work of architecture' and 'any other work of artistic craftsmanship'. It is possible that an artistic work can be commercially exploited.

15. The design of a product can also be an artistic work. Under Section 2(d) of the Designs Act 2000 'design means only the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article whether in two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical....

Therefore, when the artistic work in question pertains essentially to the get-up, shape and style, then the appropriate course to adopt for the author of such design is to obtain a registration in the design under the Designs Act 2000. Under Section 15(2) of the Copyright Act the copyright in any design which is registered

under the Designs Act 2000 shall not subsist under the Copyright Act. That provision further states that in the event that the copyright in any design has been registered under the Designs Act and not under the Copyright Act, then such copyright in the design 'shall cease as soon as any article to which the design has been applied has been reproduced more than fifty times by an industrial process by the owner of the copyright, or, with his licence, by any other person.

16. Recently in *Microfibres Inc. v. Girdhar & Co.* 2009 (40) PTC 519 (Del)(DB) it was explained by the Division Bench of this Court that 'if the design is registered under the Designs Act, the design would lose its copyright protection under the Copyright Act. If it is a design registrable under the Designs Act but has not so been registered, the design would continue to enjoy copyright protection under the Act so long as the threshold limit of its application on an article by an industrial process for more than 50 times is reached. But once that limit is crossed, it would lose its copyright protection under the Copyright Act.

17. The Respondent No. 2 clearly understood the distinction between the registration of the design and the registration of copyright. In its notice dated 28th September 2005 issued to one R.K. Gupta, M/s. Sriram International, it complained of the passing off of its trademark and design by R.K.Gupta in respect of 'Morning Walker'. The details of the four design registrations of Respondent No. 2 were set out in the notice. These were Registration No. 175740 dated 10th February 1998, No. 179799 dated 28th June 1999, No. 186019 dated 13th July 2001 and No. 190291 dated 25th October 2002. Therefore, it is plain that the Respondent No. 2 held registration for the design in the product marketed by it, long before it obtained a copyright registration.

18. There are four separate copyright registrations in favour of Respondent No.2 in respect of its products. The copyright registration No. 70290/2005 dated 27th April 2005 shows that the title of the work is indicated as 'Morning Walker' and the class and description of the work is shown as 'artistic.' It is plain that the copyright is in respect of the artistic work in the device a photograph of which with the body print of the label 'Morning Walker' has been enclosed. Apart from the above copyright registration, there are registration Nos. 125895 dated 16th February 2006 (in the

literary work in 'Morning Walker' in English and Hindi), No. A-75688 dated 16th February 2006, for the artistic work in 'Person doing exercise with machine label' (of which a photograph has been enclosed) and No. A- 75643 dated 13th February 2006 for the artistic work in the label 'Morning Walker. a copy of which is enclosed with the certificate. Therefore, as on the date of the letter dated 22nd October 2005 made to the DCP Crime Branch EOW Cell, and on the date of the complaint dated 31st October to the learned ACMM, the Respondent No. 2 had only the first mentioned copyright registration i.e. A-70290/2005 dated 27th April 2005. The other three copyright registrations were granted later and in fact do not find mention even in the charge sheet filed on 4th December 2006.

19. What is significant is that the complaint made to the learned ACMM, which has formed the basis of the FIR, makes no mention of the registrations held by the Respondent No. 2 under the Designs Act. This was also not mentioned in the notice dated 14th December 2005 issued by the lawyers of Respondent No. 2 to Petitioner No. 2. In the complaint it was mentioned that the complainant had 'recently come across some certain wholesale sellers and retailers in the city of Delhi supplying spurious/counterfeited/pirated copies of the complainant's artistic work including reproduction of the device in material form and use of identical/deceptively similar trademarks, thereby infringing the complainant's copy right and trade mark.' In para 10 of the complaint it was alleged that the Petitioner No. 2 was marketing counterfeit products 'made of low quality and design as well as cheap compared to the sale price of the complainant in order to completely defraud the customers.' That the principal grievance of Respondent No. 2 was about the infringement of the design is also apparent from para 12 where it was stated: 'In addition, the illegal reproduction of the complainant's copy right in the original artistic work comprising the get up, layout of the unique style including the device in the various material form known by the accused persons...amount to infringement.'. In para 17 of the complaint, it was stated that 'the accused persons have knowingly reproduced in material form the complainant's artistic work and infringed the copyright of the complainant for gain in the course of their trade and business without any authority/assignment from the complainant and as such have committed the offence under the provisions of Copyright Act.' The complaint which was essentially about violation of the complainant's registered design was made to

appear as if the infringements were of its trademarks and copyright. This perhaps was on account of the fact that the Designs Act 2000 contains no provision for prosecuting an infringer of a registered design.

20. Although the complaint as also against the infringement of the trademark of the Respondent No. 2, it was noticed by the IO in the charge sheet that as of the date of filing of the complaint, the complainant's trademark registration applications were pending. Therefore, in terms of Section 27 of the Trade Marks Act 1999 no action could be initiated against the Petitioner No. 2 for infringement of the unregistered trade mark. Therefore, the IO correctly came to the conclusion that the offence under Section 103/104 of the Trade Marks Act was not attracted in this case. The IO then proceeded to compare the products 'Easy Walker' of the Petitioners with that 'Morning Walker' of Respondent No. 2 and concluded that 'the name/word 'Easy Walker' constituted a copyright violation on part of the Petitioners'. It was further concluded that 'the description of equipment as level prints on body is also deceptively similar of the infringed Easy Walker Exerciser machine.'

21. The conclusion arrived at by the IO in the charge sheet that there was a violation of Copyright Act (after comparing of the two products) was obviously under a misconception of the law. The product of the Petitioners is not 'Easy Walker' but 'Home Walker'. As on the date of the complaint the complainant had a copyright registration only in respect of the artistic work in the 'Morning Walker'. The IO appears not to have considered either Section 15(2) of the Copyright Act or the relevant provisions of the [Designs Act, 2000](#) or the fact that the Respondent No. 2 in fact holds the registration of the design in respect of its products. Respondent No. 2 admittedly held four registrations under the Designs Act in respect of the product in question even as of that date. Under Section 15(2) of the Copyright Act, a copyright granted in respect of a product for which a registration has been granted under the Designs Act, would cease as soon as any article to which the design has been applied has been reproduced more than fifty times by an industrial process by the owner of the copyright. There can be no manner of doubt that the product of Respondent No. 2 has been reproduced more than 50 times. Therefore, any copyright in such design would cease by operation of law.

The present case appears to be squarely covered by the observations of the Division Bench of this Court in *Microfibres Inc. v. Girdhar & Co.* that: 'once the artistic work, by industrial application transforms into a commercially marketable artefact, its design falls within the domain of the Designs Act and the protection to the design founded upon the artistic work is limited by Section 15 of the Copyright Act and the provisions of the Designs Act.' Merely because the Designs Act does not contain any provision for prosecuting an infringer, resort cannot be had to Section 63 of the Copyright Act particularly where the complainant holds registration for the design and has exploited it by reproducing the product more than 50 times.

22. In the considered view of this Court, the FIR and chargesheet when examined as a whole do not even prima facie make out a case for violation of the Copyright Act 1957. In other words, the offence under Section 63 of the Copyright Act is not even prima facie attracted. Since this was the only offence for which the chargesheet was filed against the Petitioners, the resultant criminal proceedings cannot be allowed to continue.

23. Before concluding it requires to be noticed that at the time when the complaint was filed, the Respondent No. 2 had not obtained registrations in respect of its trademarks. That was the reason why in terms of Section 27 of the Trade Marks Act no charge sheet was filed for an offence under that Act. After the filing of the complaint the Respondent No. 2 claims to have obtained registrations for its trademarks and three further copyright registrations. Therefore, for any act of infringement after the date of the chargesheet, not forming part of the FIR No. 52 of 2006, it would be open to the Respondent No. 2 to seek appropriate remedies available to it in law.

24. For the aforementioned reasons, the Complaint No. 55/1/ 2005 (titled *Spaceage Multi Products Pvt. Ltd. v. Darshan Singh and Ors.*) and FIR No. 52 of 2006 dated 12th January 2006 arising therefrom registered at PS Saraswati Vihar, New Delhi and all proceedings consequent thereto including the charge sheet dated 4th December 2006 are hereby quashed. Crl.M.C. No. 3650 of 2006 and Crl.M.A. 4130/2007 are allowed. Crl.M.A. No.5869/06 is disposed of.

25. A certified copy of this order be sent to the concerned MM forthwith.

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