

Nippon Sheet Glass Co. Ltd. Vs. Raman Fibre Sciences Private Limited

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Court : Karnataka

Decided On : Feb-11-2011

Judge : V. Jagannathan

Appeal No. : Crl.P.No.4421 of 2010

Appellant : Nippon Sheet Glass Co. Ltd.

Respondent : Raman Fibre Sciences Private Limited

Advocate for Pet/Ap. : For the Petitioner : Sri. Udaya Holla, Senior Counsel for Sri. Cyril Prasad Pais, Advocate. For the Respondent: B.S. Arvind Babu, Advocate.

Judgement :

(This Crl.P. filed U/s. 482 Cr.P.C. praying to set aside the order dt.8.6.2010 and quash the entire proceedings in C.C.No.26218/2010 (PCR No.19685) pending on the file of the VIII Addl. CMM, Bangalore City for the offence P/U/S.500 of the IPC.)

Comparative advertisements have become the order of the day in today's business world due to fierce competitive market. A trader takes out advertisement stating that his product is superior to another's product. Whether such advertisement can be characterized as defamatory in nature so as to attract section 500 of IPC. This is the question that has cropped up for consideration in this matter following the trial court directing issuance of summons to the petitioner

after taking cognizance of the offence punishable under section 500 of the IPC.

2. The backdrop for the aforementioned order of the trial court in short are the following facts:

The petitioner, said to be reputed company incorporated in Japan engaged in the business of sale of battery separators for over 35 years and the respondent is also in the same business and his product is known by the name "Hi-Sep". The respondent issued an advertisement in the Battery Directory and Year Book during November 2008 claiming that his company's products are excellent, whereas that of the petitioner is of poor quality. Thereafter Associated Traders placed an advertisement in the Battery Directory and Year Book giving a comparative chart of various batteries and it was mentioned therein that the SPG batteries are more excellent than Hi-Sep. It is this advertisement that triggered legal notice being issued by the respondent to Associated Traders to the effect that the advertisement placed on 21.1.10, wherein the phrases used were 'Beware and Compare' and 'Beware of False Claims' and 'Check the data before using', were according to the respondents, amounted to disparaging the respondent's product. Notice was therefore issued by the respondent on 10.3.10 to issue a revocation of the concerned advertisement in the following issue of the Battery Directory and Year Book along with an appropriate apology.

3. On behalf of Associated Traders which had taken advertisement as mentioned above, reply was sent to the respondent by Agarwal Associates stating that the advertisement was carried out entirely by the Associated Traders on their own without any instructions by or the knowledge of M/s. Nippon Sheet Glass co. Ltd., Japan (Petitioner company). Therefore, the question of publishing a revocation of the concerned advertisement nor an apology being tendered does not arise.

4. The petitioner also wrote to the respondent's solicitors by way of reply to respondent's notice that, Associated Traders had taken out an advertisement on their own without the involvement of the petitioner company.

5. After all these correspondence between the parties, the respondent lodged a private complaint u/s 200 of IPC before the trial court in P.C.R.No.19685/2010

complaining that the respondent in the complaint i.e., the petitioner herein and Associated Traders have committed the offence punishable under sections 499 and 500 of IPC and sought for issuance of notice to the respondents. Learned Magistrate of the trial court after recording the sworn statement of the complainant and taking note of the reply notice sent, ordered issuance of summons to the 2nd respondent before it for the offence punishable under section 500 of IPC. It is this order of the trial court that is called in question by the petitioner.

6. Learned senior counsel Sri. Uday Holla arguing on behalf of the petitioner company submitted that the advertisement in question was taken out by Associated Traders on their own and the petitioner company had no role to play in that and secondly, on behalf of Associated Traders, reply notice was also sent to the respondent wherein it was clearly indicated that the advertisement in question was taken out by Associated Traders on their own without the involvement of the petitioner company.

7. It is also submitted by the learned senior counsel that the advertisement in question cannot be termed as disparaging so as to attract the offence u/s 500 of IPC more so when comparative advertisements have become almost the lifeline in today's business world for the survival of the traders and therefore the trial court was in error in issuing summons.

8. Yet, another submission made is that, the trial court has wrongly made an observation that there is an admission made by the petitioner in the reply notice sent to the respondent and this itself is an erroneous observation of the trial court.

9. Further submission made is that, had the trial court considered the entire material placed before it, there would not have been any occasion for the trial court to take the view that, in the reply notice the petitioner has made an admission as to the publication. Therefore, the trial court did not apply its mind to the material placed before it and as such, the impugned order cannot be sustained in law. Moreover, the order passed by the trial court is also contrary to the law laid down by the Apex Court and also this court in respect of taking cognizance where allegation made in the complaint is as regards defamation.

10. The decisions cited by the learned senior counsel to support the aforesaid arguments are the ones which are reported in ILR Karnataka 2005 960, 1985 (1) Kar.LJ 223, 1996 (6) SCC 263, AIR 1992 SC 1815, 2008 (8) SCC 77, 2008 (5) SCC 248, 2008 (11) SCC 520, AIR 1998 SC 128, ILR 1991 Karnataka 2163, 1995 (5) SCC 139, 2006 (32) PTC 307, 1989 (4) SCC 630 (Para 9), AIR 2008 SC 1731 (Head Note) and 2010 Cri.L.J. 3963 (Kar) (Head Note-B).

11. On the other hand, learned counsel Sri. Aravind Babu submitted that, no fault can be found with the order of the trial court because the advertisements that were given in the Battery Directory and Year Book itself I self explanatory and it is possible to draw the inference from the advertisement that the advertisement taken out was a disparaging and defamatory in character and therefore the product of the respondent has been shown in low esteem in the advertisement and therefore the trial court committed no error in issuing summons to the petitioner.

12. Learned counsel for the respondent also referred to the exchange of notices between the respondent on the one side and the two accused before the trial court on the other and referring to the reply notice sent by Associated traders through Agarwal Associates, submission made is that, publication of the advertisement has been admitted in the reply notice and as such, the trial court was justified in taking note of the said contents of the reply notice.

13. Learned counsel for the respondent also pointed out that in the advertisement in question the logo of the petitioner company is also found and therefore it is obvious that the petitioner also was a party to the said advertisement and without the petitioner's Knowledge it was not possible to put the logo of the petitioner company in the advertisement. Under these circumstances, it cannot be said that the petitioner company is totally unaware of the advertisement taken out by Associated Traders. As such, the impugned order of the trial court calls for no interference.

14. Learned counsel for the respondent also argued that, if at all petitioner is aggrieved, the petitioner company has every opportunity to argue the contention now raised, before the trial court and seek for discharge.

15. In support of the above submission, learned counsel placed reliance on the Apex Court decision reported in AIR 2002 S.C. 2653 and also on another decision reported in AIR 1957 S.C. 857 and latter decision was cited to contend that, even though the petitioner company is incorporated in Japan, there is no bar to proceed against the said company if the offence is committed within India. Therefore, submission made is that the petition be dismissed.

16. In the light of the aforesaid contentions put forward, whether the trial court was justified in issuing summons to the petitioner is the point for consideration.

17. The portion of the advertisement that has given rise to the private complaint being lodged by the respondent reads as under:

NIPPON SHEET GLASS CO. LTD., JAPAN

BATTERY SEPARATOR DIVISION

“BEWARE and COMPARE”

All White Separators Are Not SPG

SPG Separator is over

35 year Proven Technology

Beware of False Claims

CHECK THE DATA BEFORE USING....

18. It has to be mentioned that the respondent herein also had taken out an advertisement earlier wherein comparative figures were given in respect of the respondent's product i.e. Hi-Sep and petitioner's product known as SPG and two others viz., PV and PE. In the advertisement that has now been questioned, the comparative figures are given in respect of the petitioner's product SPG and that of the respondent i.e. Hi-Sep. No doubt, in the said advertisement there are expression like 'Beware and Compare' and 'Beware of False Claims' and 'Check the data before using'. Nevertheless, a look at the legal notices exchanged

between the parties reveal the following.

19. The respondent brought to the notice of the 2nd accused in the trial court i.e. Associated Traders that the publication of the aforesaid advertisement was disparaging and defamatory in nature and seeks to denigrate the respondent's trade mark and product.

20. In the reply notice sent on behalf of Associated Traders by M/s. Agarwal Associates dated 15.3.2010 at para.2 of the notice it was stated thus:

“at the very outset, our clients wish to make it clear that M/s. Nippon Sheet Glass Co. Ltd., Japan, whom too you have sent the notice, are neither involved nor in any manner concerned with the subject matter of your notice, since the advertisement placed in the Battery Directory and Year Book (Vol.25, No.1) published on 21st January 2010, was placed by us entirely on our own to promote our products, without any instructions by or knowledge of M/s. Nippon Sheet Glass Co. Ltd., Japan. Your alleged grievance, if any, as stated in your notice under reply, is thus exclusively against us and not against Nippon Sheet Glass Co. Ltd., Japan. Accordingly we are replying to your notice only on our own behalf as the Japanese Nippon Sheet Glass Co. Ltd., does not come into the picture and had no role to play in the matter.”

21. The petitioner company replied to the respondent's notice by addressing a letter to M/s. J. Sagar Associates which had issued notice on behalf of respondent company and in reply notice the petitioner company has stated thus:

“The advertisement was placed in the Battery Directory and Year Book (Vol.25, No.1) by M/s. Associated Traders, Aggarwal Plaza, 353, III Floor, Plot No.17, District Centre Manglam Place, Sector 3; Rohini, Delhi 110 085 (who are also in receipt of your notice, and replying to your notice through their advocates) entirely on their own sales promotion and our logo and company name were used in the advertisement without our involvement.”

22. Whether in the face of such material placed before the trial court, could the trial court have taken cognizance and issue summons is the question now requires to

be answered and this takes us to the position in law.

23. The Apex Court in the case of Punjab National Bank Vs. Surendra Prasad Sinha (AIR 1992 S.C. 1815) dealing with scope of section 482 Cr.P.C and issuance of summons by the trial court, had observed thus at para.5:

“5. It is also salutary to note that judicial process should not be an instrument of oppression or needless harassment. The complaint was laid impleading the Chairman, the Managing Director of the Bank by name and a host of officers. There lies responsibility and duty on the Magistracy to find whether the concerned accused should be legally responsible for the offence charged for. Only on satisfying that the law casts liability or creates offence against the juristic person or the persons impleaded then only process would be issued. At that stage the Court would be circumspect and judicious in exercising discretion and should take all the relevant facts and circumstances into consideration before issuing process lest it would be an instrument in the hands of the private complaint as vendetta to harass the persons needlessly. Vindication of majesty of justice and maintenance of law and order in the society are the prime objects of criminal justice but it would not be the means to wreak personal vengeance.”

24. In State of Haryana Vs Bhajan Lal (1992 SCC (Cri) 426) the Apex Court had laid down the categories of cases which would give scope for exercising the power u/s 482 of Cr.P.C. and the said categories are as under:

“(1) 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.

(2) where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) 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.

(4) Where the allegations in the FIR do not constitute a cognizable offence but constitute only a cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can even reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the Act concerned (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or Act concerned, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fides and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.”

25. In *M/s. Pepsi Foods Limited Vs Special Judicial Magistrate* (1998 S.C. 128) the Apex Court while referring to the aspect of summoning of an accused in a criminal case had this to say:

“28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of

recording of preliminary evidence before summoning of the accused. Magistrate has to carefully scrutinize the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused.

No doubt the Magistrate can discharge the accused at any stage of the trial if he considers the charge to be groundless, but that does not mean that the accused cannot approach the High Court u/s 482 of Code or Art.227 of the Constitution to have the proceeding quashed against him when the complaint does not make out any case against him and still he must undergo the agony of a criminal trial.”

26. As regards the businessmen taking out commercial advertisement is concerned, in the case of Tata Press Limited Vs Mahanagar Telephone Nigam Limited and others ((1995) 5 S.C.C. 139 the Apex Court dealing with the case of Tata Press Limited engaging in publication of Tata Press Yellow Pages, observed that, a commercial advertisement is a form of speech and “Commercial speech” is a part of the freedom of speech and expression guarantee under Article 19(1)(a) of the Constitution and went on to hold thus in paragraphs 20 and 23:

“Advertising is considered to be the cornerstone of our economic system. Low prices for consumers are dependent upon mass production, mass production is dependent upon volume sales, and volume sales are dependent upon advertising. Apart from the lifeline of the free economy in a democratic country, advertising can be viewed as the lifeblood of free media, paying most of the costs and thus making the media widely available. For a democratic press the advertising ‘subsidy’ is crucial. Without advertising, the resources available for expenditure on the ‘news’ would decline, which may lead to an erosion of quality and quantity. The cost of the ‘news’ to the public would increase, thereby restricting its ‘democratic’ availability.

Advertising as a ‘commercial speech’ has two facts. Advertising which is no more than a commercial transaction is nonetheless dissemination of information regarding the product advertised. Public at large is benefited by the information made available through the advertisement. In a democratic economy free flow of

commercial information is indispensable. There cannot be honest and economical marketing by the public at large without being educated by the information disseminated through advertisements. The economic system in a democracy would be handicapped without there being freedom of “commercial speech” Therefore, any restraint or curtailment of advertisements would affect the fundamental right under Article 19(1)(a) on the aspects of propagation, publication and circulation.”

27. The High Court of Delhi in the case of Godrej Sara Lee Limited Vs Reckitt Benckiser (I) Limited (2006 (32) PTC 307) considered the development of law on the Comparative Advertisement in the country and observed at paras 9 and 13 thus:

“9. Development of law on the Comparative Advertisement in this country, is a recent phenomenon though abundance of judgment of the courts in England and United States of America are available. Comparative advertising is advertisement where a party advertises his goods or services by comparing them with goods and services of another party. This is generally done by either projecting that the advertiser’s product is of some or superior quality to that of the compared product or by denigrating the quality of the compared product. There is an underlying assumption that the comparative advertising benefits the consumer as the consumer comes to know of the two products and their comparative features/merits. New or unknown brands benefit most from comparative advertising because of the potential for transfer of the intangible values associated with the compared brand with or to the new brand. Comparative advertising has become more widespread, particularly in fiercely competitive markets.

13. I may state at the outset that the cardinal principle is that the advertiser has right to boast of its technological superiority in comparison with product of the competitor. He can declare that his goods are better than that of his competitor. However, while doing so, he cannot disparage the goods of the competitor. Therefore, if the advertising is an insinuating campaign against the competitor’s product such a negative campaigning is not permissible. The advertiser, therefore, may highlight the positive features of his product and can even claim that his

product is better than his competitors. Such a statement may be untrue. But while doing so, he is not permitted to project that his competitor's goods are bad."

28. Whether a person entrusted with the business alone is responsible for the conduct of business or all the partners on the ground of vicarious liability was considered by the Apex Court in the case of *Sham Sunder and other Vs State of Haryana* ((1989) 4 S.C.C. 630) and it was observed at para.9 thus:

"But we are concerned with a criminal liability under penal provision and not a civil liability. The penal provision must be strictly construed in the first place. Secondly, there is no vicarious liability in criminal law unless the statute takes that also within its fold. Section 10 does not provide for such liability. It does not make all the partners liable for the offence whether they do business or not."

29. The Madras High Court in a case reported in AIR 1938 Madras 128 dealing with the High Court's inherent jurisdiction to pass necessary orders to prevent abuse of the process of any Court, speaking in the context of the business world, had observed thus:

"In the world of business, things are often done which are betrayals of confidence and deceptions which arouse moral indignation, but are nevertheless civil wrongs which can be righted by Civil Courts and are not crimes which can be punished by a Criminal Court. Not every immoral act is criminal and it is an abuse of the process of a Court to attempt to create a new crime in order to compel men to conform to a high standard of probity in business dealings or to force them to execute their promises. And therefore the High Court, to prevent specious and spiteful criminal prosecutions for actions which, though strictly dishonourable, yet do not amount to crimes, has jurisdiction to interfere."

30. The aforesaid position in law both as regards scope of section 482 of Cr.P.C. and the likelihood of attracting the offence of defamation in respect of comparative advertisements read in conjunction with the material placed in this case go to show that the Associated Traders had categorically admitted in its reply notice to the respondent that the advertisement in question was taken out by the Associated Traders on its own and the petitioner company had nothing to do with that.

Learned Magistrate while passing the impugned order lost sight of all these materials and nowhere in the reply notice the petitioner company stated that the publication was taken out at its instance. When such is the picture that can be drawn from the material placed before the trial court, the trial court could not have ignored all these materials and gone on to observe to the contrary that the petitioner has admitted the publication. No doubt, the publication was admitted by Associated Traders as having been put on its own and the petitioner company had no role to play in that. Nevertheless, the trial court went on to issue the process without considering all these materials.

31. This court in the case of S.P. Bobati and others Vs Mahadev Virupaxappa Latti (ILR 2005 KAR 960) has held while dealing with Section 482 of Cr.P.C., where quashing of a criminal proceedings was sought, that it is the duty of the court to quash the proceedings in order to prevent abuse of process of court when a prima facie case is not made out for an offence. It was further held that, issue of process was justified only when a prima facie case is made out for the offences alleged and not otherwise.

32. Learned trial judge did not apply his mind to the materials placed before him and also did not take note of the position in law as regards issuance of process to an accused in a criminal case. Therefore, having regard to the responsibility cast on the Magistrate to find out as to whether a concerned accused should be legally held responsible for the offences charged, merely issuing the summons on the basis of the complaint and sworn statement without looking to the facts and circumstances, without taking into account all the relevant factors, is in my opinion, a serious error committed by the trial court and therefore I am of the view that the impugned order of issuing summons to the petitioner is liable to be set aside for the aforementioned reasons.

33. The petition is therefore allowed and the impugned order of the learned Magistrate taking cognizance and issuing process to the petitioner in C.C.No.26218/2010 (PCR No. 19685/2010) on the file of the VIII Addl. C.M.M., Bangalore city, stands quashed.

34. Learned counsel for the respondent is at liberty to take back the records which he had produced.

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