

Present:
Mr. Justice Soumendra Sarker
and
Mr. Justice Md. Ruhul Quddus

Criminal Misc. Case No.2109 of 1998

Shyzuddin and others
... Petitioners

-Versus-

Md. Babul Gorapi and another
... Opposite Parties

No one appears for the petitioner

Mr. Gazi Md. Mamunur Rashid, A.A.G.
õ for the State-opposite party

Judgment on 2.4.2012

Md. Ruhul Quddus, J:

This Rule at the instance of the accused-petitioners was issued on an application under section 561A of the Code of Criminal Procedure for quashment of the proceedings in C. R. Case No.215 of 1997 under sections 482 and 483 of the Penal Code that was pending before the Magistrate of first class, Munshiganj.

Opposite Party No.1 Md. Babul Gorapi filed a petition of complaint on 12.10.1997 before the Magistrate of first class, Court No.2, Munshiganj against the petitioners alleging, *inter alia*, that he was a businessman and inventor of reinforced cement concrete pillar of a particular design. He got the design registered under the Patent and Design Act, 1991. The petitioners being businessmen of same trade produced same type of pillars counterfeiting the design invented and

registered by him and were selling the same to the detriment of his reputation and goodwill. He asked them to stop it showing his registration, but they did not.

The Magistrate examined the complainant, took cognizance of offence under sections 481, 482 and 483 of the Code and issued process against the petitioners. They surrendered before the Magistrate on 5.11.1997 and obtained bail. Subsequently the case was transferred to Mrs. Nandita Das, Magistrate of first class for trial and therefrom it was transferred again to Mr. A. K. M. Aminul Islam, Magistrate of first class for hearing and disposal.

The petitioners filed an application for their discharge from the case stating that the design used by them and that of the complainant were not same. The Magistrate heard the application, rejected the same and framed charge against the petitioners under sections 482 and 483 of the Code by order dated 19.3.1998. In that event, the petitioners moved in this Court with the present miscellaneous case for quashment of the proceedings and obtained the Rule with an order of stay.

The case has been appearing in the cause list since 23.3.2012 with name of the Advocates for petitioners. Today it is taken up for hearing, but no one for the petitioners appears. In view of its long pendency, we take it up for disposal and allow the Assistant Attorney General to make his submissions.

Mr. Gazi Md. Mamunur Rashid, learned Assistant Attorney General appearing for the State-opposite party submits that the petition of complaint clearly discloses the offence of illegal use of design registered by the complainant, which is definitely a criminal offence. The

Court on examining him took cognizance of offence against the petitioners and subsequently framed charge against them. Whether the petitioners used the same design being a question of fact can only be decided in trial. At this stage there is no scope for quashment of the proceedings.

We have considered the submission advanced by learned Assistant Attorney General and gone through the petition of complaint, wherein the petitioners have taken the grounds that the allegation of infringement of design is a civil dispute and does not constitute any criminal offence. The complainant has remedy in a suit for perpetual injunction or that for damages, if any.

To arrive at a correct decision whether the allegations made in the complaint constitute any criminal offence particularly any offence under sections 482 and 483 of the Penal Code, it would be better to reproduce the relevant provisions of laws and arrive at a decision thereon.

The charge has been framed under sections 482 and 483 of the Penal Code, which run as follows:

“482. Whoever uses any false trade mark or any false property mark shall, unless he proves that he acted without intent to defraud, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

“483. Whoever counterfeits any trade mark or property mark used by any other person shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.”

The definitions of the words *trade mark* and *property mark* have been given in sections 478 and 479 of the Code, which run as follows:

“478. A mark used for denoting that goods are the manufacture or merchandise of a particular person is called a trade mark, and for the purposes of this Code the expression “trade mark” includes any trade mark which is registered in the register of trade marks kept under the Patents, Designs and Trade Marks Act, 1883, and any trade marks which, either with or without registration, is protected by law in any British possession or Foreign State to which the provisions of the one hundred and third section of the Patents, Designs and Trade Marks Act, 1883, are under Order-in-Council, for the time being applicable.

“479. A mark used for denoting that moveable property belongs to a particular person is called a property mark.”

For a clear understanding whether illegal use of design or its infringement can be considered as an offence under the above quoted penal sections, it needs to examine the provisions of the Patent and Design Act, 1911, section 2 (5) of which defines *design* as under:

“2(5). “Design” means only the features of shape, configuration, pattern or ornament applied to any article by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction or anything which is in substance a mere mechanical device, and does not include any trade mark as defined in section 478, or property mark as defined in section 479 of the Penal Code.” (emphasis supplied)

It appears from the above quoted definition clause of the Patent and Design Act that the word *design* does not include any *trade mark* or *property mark* as defined under sections 478 and 479 respectively under the Penal Code. In that view of the matter, the charges against the petitioners appear to have been wrongly framed. But for that reason the proceedings cannot be quashed. If the charge is framed under wrong section of law, it may be altered at any point of time during trial.

Now the question to reply is whether the allegations of production of the pillars by using the design registered by the complainant and selling it to the buyers constitute any criminal offence. In this regard it would be helpful to examine the definition of *cheating* as defined under section 415 of the Penal Code with the relevant illustrations. It runs as follows:

“415. Cheating - Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to ‘cheat’.

Illustrations

(a)...

“(b) A, by putting a counterfeit mark on an article, intentionally deceives Z, into a belief that this article was made by a certain celebrated manufacturer, and thus dishonestly induces Z to buy and pay for the article. A cheats. (emphasis supplied)

“(c) A, by exhibiting to Z a false sample of an article, intentionally deceives Z into believing that the article corresponds with the sample, and thereby dishonestly induces Z to buy and pay for the article. A cheats.” (emphasis supplied)

In the present case the allegations made against the petitioners are that they had produced pillars deceptively similar to that of the complainant, were selling the same to the buyers and thereby were deceiving them to believe that those were pipes produced by the complainant. In view of the illustrations (b) and (c) as quoted above, a question still remains to be seen, whether there are ingredients of offence under section 415 of the Penal Code. The trial Court is fully competent to determine it after taking evidence. So, it cannot be said outright that the complaint does not disclose any criminal offence. The defense plea as taken in the application for discharge that the design used by the accused-petitioners and that of the complainant are not same, is a question of fact, which can also be determined in trial.

In view of the above, we do not find any substance in the Rule. Accordingly the Rule is discharged. The stay granted at the time of issuance of Rule is vacated.

Communicate a copy of the judgment.

Soumendra Sarker, J:

I agree.