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04-aba-336-21.odt

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

ANTICIPATORY BAIL APPLICATION NO. 336 OF 2021

Piyush Subhashbhai Ranipa

.... Applicant

Versus

The State of Maharashtra

.... Respondent

Mr. Mandar Soman for Applicant.

Mr. Ajay Patil, APP for State/Respondent.

Mr. Aniket Nikam, as *amicus Curiae*.

**CORAM : SARANG V. KOTWAL, J.
DATE : 26th FEBRUARY, 2021**

P.C. :

1. The Applicant is seeking anticipatory bail in connection with C.R.No. 865 of 2020 registered with Mohol Police Station, Solapur, District Solapur, under sections 418, 465, 482, 483, 485, 486, 488 r/w. 34 of the Indian Penal Code (for short 'IPC') and under section 63 of the Copyright Act, 1957. Subsequently section 103 of the Trade Marks Act, 1999 is also applied.

2. The First Information Report (for short 'F.I.R.') is

lodged by one Prakash Gore. He was a Zonal Manager of Jain Irrigation System. His company received complaints that substandard goods in the name of their company were sold in the market. The informant received a secret information that one Eicher truck bearing No.GJ03/BV-9840 was carrying goods in the name of the complainant's company which actually were not genuine goods. That vehicle had started from Gujarat and was going towards Karnataka. On 19/12/2020, at about 4:00p.m. the informant and his associates saw that vehicle. They made inquiries with the driver Jeevan about the goods. He informed that the goods were loaded from Tera-flow company Ribda and he was going to Chadchan. He showed invoices. The invoice mentioned four different HDPE pipes worth Rs.94,485/- . The informant physically saw those goods. He saw that some goods were bearing mark 'Jain HDPE' bearing stamp of CML (Certificate of Manufacturing Licence) 7018761. That stamp was a forged stamp. The goods were being transported and sold using fake trademark and, therefore, he lodged this F.I.R. The investigation was carried out and the goods were seized.

3. A few legal questions arose while deciding this application. Therefore, I have heard Shri. Mandar Soman, learned counsel for the applicant, Shri. Ajay Patil, learned APP for the State. Shri. Aniket Nikam, learned counsel was requested to assist the court for deciding a larger issue as to whether offences punishable upto three years were bailable or non bailable.

4. First point for consideration was whether the offence under section 63 of the Copyright Act and also subsequently applied section 103 of the Trade Marks Act were bailable or non bailable. Shri. Soman invited my attention to the order passed by the learned Magistrate, wherein the co-accused were granted bail on the ground that, section 418 of I.P.C. was bailable and, therefore, bail was granted to the co-accused. Perusal of that order shows that the learned Magistrate has only referred to section 418 of IPC. He has not considered application of section 63 of the Copyright Act and section 103 of the Trade Marks Act. Shri. Soman claimed parity with co-accused in this case. The allegations against the applicant are that, he was manufacturing all these pipes and at his instance the pipes were being transported and sold. The

investigation papers produced by Shri. Patil before me showed photographs of those pipes which bore the aforementioned name and registration number of the trademark of complainant's company. Therefore, the first question which needs to be addressed and decided is to whether the offence punishable under section 63 of the Copyright Act and section 103 of Trade Marks Act are bailable or non bailable.

Section 63 of the Copyright Act reads thus:-

“63 - Offence of infringement of copyright or other rights conferred by this Act --- Any person who knowingly infringes or abets the infringement of-

(a) the copyright in a work, or

(b) any other right conferred by this Act, [except the right conferred by section 53A],

[shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to three years and with fine which shall not be less than fifty thousand rupees but which may extend to two lakh rupees:

Provided that [where the infringement has not been made for gain on the course of trade or business] the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than six months or a fine of less than fifty thousand rupees.]”

Section 103 of the Trade Marks Act reads thus:-

“103 - Penalty for applying false trade marks, trade descriptions, etc. –
Any person who--

- (a) falsifies any trade mark; or
- (b) falsely applies to goods or services any trade mark; or
- (c) makes, disposes of, or has in his possession, any die, block, machine, plate or other instrument for the purpose of falsifying or of being used for falsifying, a trade mark; or
- (d) applies any false trade description to goods or services; or
- (e) applies to any goods to which an indication of the country or place in which they were made or produced or the name and address of the manufacturer or person for whom the goods are manufactured is required to be applied under section 139, a false indication of such country, place, name or address; or
- (f) tampers with, alters or effaces an indication of origin which has been applied to any goods to which it is required to be applied under section 139; or
- (g) causes any of the things above-mentioned in this section to be done, shall, unless he proves that he acted, without intent to defraud, be punishable with imprisonment for a term which shall not be less than six months but which may extend to three years and with fine which shall not be less than fifty thousand rupees but which may extend to two lakh rupees:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a

sentence of imprisonment for a term of less than six months or a fine of less than fifty thousand rupees.”

It can be seen that, in both these sections sentence of imprisonment extending upto three years can be imposed. The question raised by Shri. Soman is, whether the offence in which sentence of imprisonment upto three years can be imposed; falls within third category of Part II of Schedule I of Cr.p.c. or it falls within second category of that Part. Therefore, that question needs to be answered first. For that purpose I have heard all the learned counsel.

5. Shri. Soman submitted that the schedule of Cr.p.c. does refer to other laws and can be used to decide whether the offences in Statutes other than Indian Penal Code are bailable or non bailable. He submitted that the schedule of Cr.p.c. can be applied to other Acts, keeping in mind object and reasons of that particular Act. He submitted that, looking at the scheme of Copyright Act and Trade Marks Act, it shows that the offences are bailable.

6. As against this, Shri. Nikam and Shri. Patil submitted that, this issue is no more *res-integra* and different courts

including a Division bench of this court have held that the offences in which punishment can extend upto 3 years are non bailable offences.

7. I have considered their submissions in that behalf. Shri. Patil and Shri. Nikam both have relied on a few judgments.

8. First of these was a judgment of single Judge of this court passed in the case of **Ramrao Marotrao Budruk Vs. The State of Maharashtra and another reported in 1994 SCC OnLine Bom 407**. In that case the court was deciding whether section 2 of the Prevention of Insults to National Honour Act, 1971 makes offence under that Act; bailable or non bailable. In that context, paragraph Nos.3 and 8 of that Judgment are important. Those two paragraphs are reproduced as follows:-

“3. Section 2 of the Prevention of Insults to National Honour Act, 1971 (hereinafter referred to as ‘the Act’ for the sake of brevity) runs thus:

“whoever in any public place or in any other place within public view burns, mutilates, or otherwise brings into contempt (whether by words, either spoken or written, or by acts) the Indian National Flag or the Constitution of India or any part thereof,

shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both.

.....

.....

8. Section 2 of the Act empowers the Court to sentence an accused upto 3 years and it is a maximum sentence but permissible. Therefore, it makes no difference by the fact that the imprisonment for such an offence can also be less than 3 years. To put in figures, for an offence under section 2 of the Act, the imprisonment for 2 years and 365 days can be inflicted or ever less than that. As such, it would be an offence punishable with imprisonment for 3 years which would make it as a non bailable one. If the punishment is upto 2 years and 364 days it would be an offence punishable with imprisonment for less than 3 years so as to make it a bailable one under category No.3 of the said classification. If the offence therefore, falls within the corners of category No.2 of the said classification, an application under section 438, Cr.P.C. for a relief anticipatory bail would be maintainable as the offence would be a non bailable one. The learned 2nd Additional Sessions Judge,

therefore, committed an error in treating the offence under section 2 of the Act as a bailable one.”

9. Similar view was expressed by another single Judge of this court in the case of ***State of Maharashtra Vs. Shri. Suresh Ganpatrao Kenjale reported in 1995 CriLJ 2478.*** The relevant paragraph No.3 in that judgment is reproduced as follows:-

“3. The Sessions Judge, Bhandara, while rejecting the application for police custody observed that for the offence under S. 7 of the P.C. Act the imprisonment prescribed is not less than six months but that may extend to five years, and for the offence under S. 13(1)(d) r/w S. 13(2) of the P.C. Act the minimum imprisonment is one year and it may extend to seven years, and thus concluded that the said offences are punishable with imprisonment for less than three years and therefore, they are bailable offences and the police custody remand cannot be ordered. The reasoning given by the Sessions Judge on its face appears to be fallacious. He has not properly construed the punishment prescribed under S. 7 as well as under S. 13(1)(d) r/w 13(2) of the Prevention of Corruption Act and in the light of Schedule-II of

the Code of Criminal Procedure, 1973 making classification of offences against other laws. For the offence under S. 7 of the P.C. Act, it is provided that the said offence shall be punishable with imprisonment, which shall not be less than six months, which may extend to five years and shall also be liable to fine. This means that the maximum punishment for an offence under S. 7 of the P.C. Act is five years. Similarly for the offence under S. 13(1)(d) of the P.C. Act, it is provided that the said offence shall be punishable under Sub-section (2) of S. 13 with imprisonment upto seven years. In the Second Schedule of the Code of Criminal Procedure, 1973 making classification of offences against other laws, it is provided that the offences which are punishable with imprisonment for three year and upwards, but not more than seven years, are non-bailable. By no stretch of imagination can it be said that the offences under Ss. 7 and 13(1)(d)r/w. S. 13(2) of the P.C. Act are not punishable with imprisonment of three years and upwards but not more than seven years. While construing whether an offence is bailable or non-bailable it is not the minimum sentence which can be awarded under the law, is required to be seen

but the maximum sentence which can be awarded under the law has to be seen and the maximum sentence awardable under S.7 of the P.C. Act is five years and for the offence under S. 13(1)(d) as is provided in S. 13(2) is seven years and, therefore, both the offences are non-bailable and the Sessions Judge was not justified in holding that the said offences are bailable.

10. A Division Bench of this court also had an occasion to deal with this issue in the case of ***Mahesh Shivram Puthran V The Commissioner of Police, Thane, Dist. Thane and others; reported in 2011 SCC OnLine Bom 389.*** In that case the court was considering whether offences under sections 43 and 52 of the M.R.T.P Act, 1966 were cognizable or non cognizable. In that context, the division bench referred to sub section 2 of section 4 and section 5 of Cr.p.c. The relevant discussion can be found in paragraph Nos.12 and 13, which are as follows:-

12. The Act, by itself, does not provide whether the said offence is cognizable or bailable. For that, we have to refer to Section 4 of the Criminal Procedure Code. The same reads thus:

“4. Trial of offences under the Penal Code, 1860 and other laws.

(1) All offences under the Penal Code, 1860 shall be Investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into trying or otherwise dealing with such offences." (emphasis supplied)

Sub-section (1) refers to offences under the Penal Code, 1860. This provision has no application to the case on hand. However, sub-section (2) refers to all offences under any other law which would include the offences punishable under the said Act of 1966. In other words, offences under the provisions of the Act of 1966 can be investigated, enquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, enquiring into, trying or otherwise dealing with

such offences. We have already alluded to the provisions of the Act of 1966, which provide for mechanism to institute prosecution for offences punishable under the said Act and Rules made thereunder. Accordingly, the said provisions would prevail, being special enactment.

13. Besides, it may be useful to refer to Section 5 of the Code, which reads thus:-

"Saving. – Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred or any special form of procedure prescribed by any other law for the time being in force." (emphasis supplied)

In Paragraph 14 the Division Bench recorded it's conclusion thus:

“As the maximum punishment provided in terms of Section 52 of the Act, which has been applied to the case on hand, being up to three years, at best, the second category of cases specified in Part II of Schedule I would be attracted. It would necessarily follow that the offence under Section 52 of the Act is a cognizable and non-bailable offence.”

11. Recently, a Division Bench of the Rajasthan High Court has also taken a similar view in the case of *Nathu Ram S/o Purna Ram Versus The State of Rajasthan reported in D. B. Cri. Ref. No.1/2020*. A specific question for reference posed before the division bench of Rajasthan High Court was as follows:-

“What would be the nature of an offence (whether cognizable or non-cognizable) for which imprisonment “may extend to three years” is provided and no stipulation is made in the statute regarding it being cognizable or non-cognizable.”

After discussion the division bench answered the reference in paragraph No.25 which reads thus:-

“**25.** Accordingly, the reference is answered in terms that unless otherwise provided under the relevant statute, the offences under the laws other than IPC punishable with imprisonment to the extent of three years, shall fall within the classification II of offences classified under Part II of First Schedule and thus, shall be cognizable and non-bailable.”

12. The question, whether the offence is bailable or not has to be seen in the light of definition of bailable offence provided under section 2(a) of the Cr.p.c. which reads thus:

“2. Definitions.....

(a) “bailable offence” means an offence which is shown as bailable in the First Schedule, or which is made bailable by any other law for the time being in force; and “non bailable offence” means any other offence;”

13. Thus, the next relevant sections would be sub section 2 of section 4 and section 5 of the Cr.p.c. as they are referred to by the Division Bench of this court in the case of **Mahesh Shivram Puthran (supra)**. Part II of the Schedule-I reads thus:-

II – CLASSIFICATION OF OFFENCES AGAINST OTHER LAWS

Offence	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
If punishable with death, imprisonment for life, or imprisonment for more than 7 years.	Cognizable	Non-bailable	Court of Session.

If punishable with imprisonment for 3 years and upwards but not more than 7 years.	Cognizable	Non-bailable	Magistrate of the first class.
If punishable with imprisonment for less than 3 years or with fine only.	Non-cognizable	Bailable	Any Magistrate.

14. Bare reading of this Part II of the Schedule -I of Cr.p.c. shows that, if the offences in the other laws are punishable with imprisonment for three years and upwards then the offences are cognizable and non bailable. Wherever it is possible to impose the punishment extending to three years, this category would apply, because in such offences it is possible to impose sentence of exact three years. In such cases offences would be non-bailable.

15. Therefore, first question raised before me is answered that the offences under section 63 of the Copyright Act and section 103 of Trade Marks Act are non bailable in nature and, therefore, since these sections are applied here, the application for anticipatory bail is maintainable.

16. Coming back to the facts of this case, the allegations

against the present applicant are already mentioned herein above. Shri. Soman submitted that, sub section 4 of section 115 of the Trade Marks Act, 1999 prohibits investigation by any other officer below the rank of Deputy Superintendent of Police. He also relied on the same provision and submitted that the police officer before making any search and seizure had to obtain opinion of the Registrar on the facts involved in the offence relating to Trade mark and shall abide by the opinion so obtained. Sub section 4 of section 115 of Trade Marks Act reads thus:-

115. Cognizance of certain offences and the powers of police officer for search and seizure

(4) Any police officer not below the rank of deputy superintendent of police or equivalent, may, if he is satisfied that any of the offences referred to in sub-section (3) has been, is being, or is likely to be, committed, search and seize without warrant the goods, die, block, machine, plate, other instruments or things involved in committing the offence, wherever found, and all the articles so seized shall, as soon as practicable, be produced before a Judicial Magistrate of the first class or Metropolitan Magistrate, as the case may be:

Provided that the police officer, before making any search and seizure, shall obtain the opinion of the Registrar on facts involved in the offence relating to trade mark and shall abide by the opinion so obtained.

17. Shri. Soman in support of his contention relied on the judgment of division bench of this court in the case of ***Anant s/o. Tukaram Teke & Ors. Vs. The State of Maharashtra & Anr., decided by the Aurangabad Bench of this court in Criminal Application NO.1471 of 2013.***

In that case, according to Shri. Soman, the division bench had held that the provision of sub section 4 of section 115 of the Act are mandatory in nature. He submitted that, in the present case the opinion of the Registrar is not obtained.

18. Learned APP, on the other hand, submitted that, this is not a case where the accused had tried to use a trademark which was similar in nature to the one registered in favour of the informant's company, but they had actually used the same trademark with the same number which was allotted to the first informant. He submitted that the applicant does not have any

authority to manufacture such goods and pass them off as the goods manufactured by the informant's company. He submitted that the accused have attempted to sell their own products in the market whose standard is questionable. The consumers were led to believe that the products were manufactured by the informant's company.

19. I have considered these submissions. The Judgment of **Anant Teke (supra)** relied on by Shri. Soman will have to be read in the light of the facts mentioned in that case. The informant's case therein was that the accused were in the similar business as that of the informant i.e. business of selling tea packets. The pack of the tea which accused was selling was deceptively similar to the pack of the complainant. In that case the Deputy Superintendent of Police of Beed visited factory of the accused and took action based on the information that the accused were preparing their packets in their factory situated at MIDC. After that, the police inspector of Beed raided some shop premises and seized tea packets of the accused. The Police Inspector seized the machinery of the accused and Deputy Superintendent of Police had sent a letter to the

Registrar of Trade Marks seeking opinion under section 115(4) of the Act. The division bench found fault with this procedure. It was held in paragraphs 18 and 23 that, in the relevant facts and the provisions of the Copyright Act and Trade Marks Act, the court needed to go with the presumption that the compliance of provision of section 115 of the Act was mandatory. In paragraph 26 of the Judgment it was mentioned that, there was a certificate in favour of the accused under Copyright Act and due to such certificate, act of the accused, in these circumstances, did not amount to any offence under sections 102 to 104 and 105 of the Trade Marks Act, 1999.

This is a distinguishing feature in this case. The applicant has not claimed that he has any certificate registered under the Copyright Act mentioning the informant's product and trademark registration number. Therefore, benefit of section 110(b) of the Trade Marks Act is not available to the applicant in this case. In the present case, there was no question of seeking opinion of the Registrar for Trademarks because, accused in this case had not used a mark where there was a possibility of

similarity but they had gone ahead and used the very same trademark with the very same number under which the trademark was registered in favour of the informant's company. Moreover, at the time of registration of F.I.R. the goods in question were already taken in custody. It was not a result of a fresh search and seizure after that. Therefore, the observations in the case of **Anant Teke (supra)** are not applicable to the present case.

20. In this case whether there is infringement of Copyright Act attracting punishment under section 63 of the Act; is a matter of investigation, but certainly there appears to be infringement of the trademark registered in the name of the informant's company. Therefore, commission of offence punishable under section 103 of the Trade Marks Act is clearly made out. The accused have falsely applied the informant's trademark to their own products and have attempted to sell those products. Thus, the act of the accused also amounts to offence under section 420 r/w. 511 of the IPC. By their act, the public were induced or an attempt was made to induce the public to buy these products under the impression that they were manufactured by the informant's company.

21. In the present case, there is also a statement of co-accused which shows active involvement of the present applicant and it was mentioned that the goods were given by the applicant and they were manufactured at his unit. In this view of the matter, custodial interrogation of the applicant is necessary. No relief of anticipatory bail can be granted.

22. The application is rejected.

23. Before parting with the order, it is necessary to record appreciation for the assistance rendered by all the learned counsel.

(SARANG V. KOTWAL, J.)

24. At this stage, Shri. Soman submitted that, the interim relief granted earlier be continued for a period of two weeks. However, considering that already few months have passed and investigation needs to progress further, such request is rejected.

(SARANG V. KOTWAL, J.)