

**(1969) 09 CAL CK 0026**

**Calcutta High Court**

**Case No:** Criminal Appeal No. 914 of 1965

Narayan Chandra Ghosh

APPELLANT

Vs

The State

RESPONDENT

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**Date of Decision:** Sept. 15, 1969

**Acts Referred:**

- Criminal Procedure Code, 1898 (CrPC) - Section 203, 227, 259
- Penal Code, 1860 (IPC) - Section 34
- Trade and Merchandise Marks Act, 1958 - Section 2, 78, 79, 88
- Trade Marks Act, 1938 - Section 27(1)

**Citation:** (1970) 2 ILR (Cal) 432

**Hon'ble Judges:** Talukdar, J

**Bench:** Single Bench

**Advocate:** Ashoke Kumar Sen and Shyamsundar Pal, for the Appellant; Anil Chandra Mitra and Amulya Kumar Mukherjee for Complainant and J.M. Banerjee, for State, for the Respondent

**Final Decision:** Allowed

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**Judgement**

Talukdar, J.

This appeal is against an order dated December 9, 1965, passed by Sri A. N. Sinha, Presidency Magistrate, Sixth Court, Calcutta, convicting the accused-Appellants Nos. 1 to 5 u/s 78 read with Section 88 of the Trade and Merchandise Marks Act, 1958 (XLIII of 1958), and sentencing each of them to pay a fine of Rs. 500, in default to undergo S.I. for two months each; and convicting the accused-Appellants Nos. 6 to 9 u/s 78 read with Sections 79 and 88 of Act XLIII of 1958 and sentencing each of them to pay a fine of Rs. 100, in default to undergo S.I. for 15 days each; while acquitting all the accused-Appellants u/s 78 of Act XLIII of 1958 read with Section 34, Indian Penal Code, and the co-accused No. 6, Samir Kumar Acharya, on all the counts of the charges in case No. C/1054 of 1964.

2. The facts leading on to the appeal are short and simple. The accused-Appellants Nos. 1 to 5, who are brothers, are the partners; the co-accused No. 6, who has since been acquitted, is the employee of M/s. Narayan Chandra Ghosh and Brothers; and the accused-Appellants Nos. 7 to 9 are the partners of a printing press named and styled as M/s. A. P. Mukherjee & Sons. The complainant is the manager of M/s. Mrinalini Bidi Company (P.) Ltd. authorised to institute the present proceedings on behalf of the company. The prosecution case, inter alia, is that the said company, which is the successor of Nibaran Chandra Das & Brothers, started business at Aurangabad manufacturing and selling various kinds of bidis of different qualities. In 1942, the partners of the firm, referred to above, formed the present company manufacturing amongst others the "Jugantar Bidi" which is on sale in the market for about 30 years and acquired wide reputation and popularity. The brand has distinctive features in packing, wrapping, labeling, clipping and in the lettering scheme of the labels; and the trade mark of the brand, with those distinctive features, was duly registered in 1943 under the Trade Marks Act, 1940, bearing trade mark No. 14773 dated April 20, 1943, in class 34. The complainant company came to learn in 1963 that bidis with deceptively similar labels and pickings were being sold in the market bearing the brand "Jugavatar Bidi"; that such bidis were being pushed by unscrupulous dealers on illiterate and unwary purchasers; that the Madhusudan Bidi Factory, owned by Narayan Chandra Ghosh and Brothers of Aurangabad, Murshidabad, has been manufacturing the said "Jugavatar Bidi" and selling the same by deceptively imitating the distinctive trade mark of the "Jugantar Bidi"; and that the aforesaid firm had the imitative labels printed from a press named and styled as A. P. Mukherjee & Sons, Calcutta. On September 9, 1963, the complainant company instituted proceedings under the Trade and Merchandise Marks Act, 1958, through its supervisor Sri Amal Kumar Singh, before the learned Additional Chief Presidency Magistrate, Calcutta, being Case No. C/1018 of 1963, and the accused were summoned u/s 78 of the Trade and Merchandise Marks Act, 1958.

3. The said employee having since resigned from his service under the complainant company, a prayer was made on behalf of the complainant for continuing the proceedings through another employee. Sri A. K. Roy, Presidency Magistrate, Eleventh Court, Calcutta, to whom the case was transferred, by his order dated December 21, 1964, observed that the offence being not cognizable and not compoundable there was no provision in the Code of Criminal Procedure for substitution, and as no evidence was yet adduced the new complainant might file a fresh complaint before the proper Court, and in that view he discharged all the accused u/s 259 of the Code of Criminal Procedure. The present proceedings, viz. Case No. C/1054 of 1964, were thereafter started on a fresh complaint filed before the learned Additional Chief Presidency Magistrate, Calcutta, on December 26, 1964, by one Nagendra Nath Ghosh on behalf of M/s. Mrinalini Bidi Manufacturing Company (P.) Ltd. and 10 accused persons were summoned u/s 78 of the Trade and

Merchandise Marks Act, 1958- The-defence case, inter alia, is that the accused persons are not guilty ; that the accused company had been selling the brand "Jugavatar Bidi" for the last 6 to 7 years, commanding a large sale, inducing thereby the complainant company to imitate their trade mark by making the packing and labelling etc. similar to that of the accuser's brand, and that ultimately failing in their endeavour to checkmate the popularity of the accuser's brand, instituted the present criminal proceeding to put pressure upon them. The defence of the accused belonging to the printing press is that they did not know of the "Jugantar" brand of bidi and they bona fide carried out the order of their customer in the usual course of business by printing the labels and packages of the "Jugavatar Bidi" without any motive. Eighteen witnesses were examined on behalf of the prosecution and a number of exhibits were proved on behalf of the prosecution as well as the defence. As a result of the trial the learned Presidency Magistrate by his order dated December 9, 1965, acquitted the accused No. 6 out of the 10 accused persons and convicted and sentenced the remaining 9 as mentioned above. The present appeal is against the said order of conviction and sentence.

4. Mr. Ashoke Kumar Sen, counsel (with Mr. Shyamsundar Pal, Advocate) appearing on behalf of the accused-Appellants, made a five-fold submission. The first contention of Mr. Sen relates to a procedural defect purporting to go to the very root of the case, viz. that the order of discharge u/s 259 of the Code of Criminal Procedure barred the institution of the second proceedings on the same facts. Several decisions were cited by the learned Counsel in support of his points and the same would be considered in the proper context. The second contention raised by Mr. Sen also touches procedure, viz. that there has been a mistrial inasmuch as the prosecution case of an alleged falsification of a registered trade mark as pleaded in the petition of complaint, made out in the evidence, incorporated in the charges framed and even referred to, as such, in a major part of the judgment, was changed in the findings ultimately arrived at by the learned Presidency Magistrate into a case of falsification of a mark acquired by long user and used in relation to goods for the purpose of indicating a connection in the course of trade made between the said goods and some persons having the right as proprietor to use the same; and as such, the ultimate order of conviction and sentence has been bad in law and improper. The third and fourth submissions of Mr. Sen relate to the individual accused-Appellants. The third contention of Mr. Sen is that the accused-Appellants Nos. 1 to 5 being partners and not responsible to the company for the conduct of its business at the time of the commission of the offence, the order of their conviction and sentence is bad u/s 88 of the Trade and Merchandise Marks Act, 1958. The fourth contention of Mr. Sen is regarding the accused-Appellants Nos. 6 to 9, who belong to the press, and he submitted that apart from the absence of any mens rea on the part of the said accused who acted bona fide in the usual course of business in carrying out the order placed with them by their customers for printing the labels and packages of the "Jugavatar Bidi" without having any knowledge of the

"jugantar" brand, they are also outside the ambit of Section 79 of the Trade and Merchandise Marks Act, 1958, which enjoins that the accused must sell or expose for sale or be in possession for sale etc. "any goods or things to which any false trade mark or false trade description is applied" and not merely possess any false trade mark. The fifth and last submission of Mr. Sen relates to the merits of the case, viz. that the offences charged have not been established by the evidence on record. Mr. Anil Chandra Mitra, counsel (with Mr. Amulya Kumar Mukherjee, Advocate), permitted by the Court to appear on behalf of the complainant, joined issue. He contended in the first instance that there was no bar in law to the institution of the present proceedings because of the earlier order of discharge of the accused-appellants passed u/s 259 of the Code of Criminal Procedure. Mr. Mitra next submitted that there had been no mistrial as alleged or at all because the findings ultimately arrived at by the learned Presidency Magistrate did not result in a distinct change in the prosecution case as made originally and that the objections taken in this behalf by Mr. Sen were more technical than real inasmuch as, in any event, no prejudice had been caused to the accused-Appellants. As regards the third contention raised by Mr. Sen relating to the accused-Appellants Nos. 1 to 5, who are partners, Mr. Mitra submits that they cannot avoid their responsibilities because the evidence on record establishes that they are responsible to the company for the conduct of its business at the time of the alleged offence. -Mr. Mitra next contends that on a proper interpretation of the provisions of Section 79 of Act XLIII of 1958, the accused-Appellants Nos. 6 to 9, who belong to the printing press, cannot escape with impunity. The fifth and the last submission of Mr. Mitra is that the evidence on record clearly establishes the offences charged and the order of conviction and sentence, which is broad-based on an appraisal of the said evidence, both oral and documentary, is a proper and legal order. Mr. J. M. Banerjee, Advocate appearing on behalf of the State, opposed the appeal and adopted the submissions made on behalf of the complainant by Mr. A. C. Mitra, counsel. Mr. Banerjee further submitted that the view taken by the learned Presidency Magistrate on a consideration of the evidence on record was a reasonable view and the order of conviction and sentence passed by him was sustainable in law and on merits.

5. Having heard the learned Counsel appearing on behalf of the respective parties and on going through the evidence on record, both oral and documentary, I will now proceed to determine the first point raised by Mr. Sen relating to procedure. Mr. Sen has submitted that the order of discharge passed on December 21, 1964, by the learned Magistrate u/s 259 of the Code of Criminal Procedure in Case No. C/1018 of 1963, constitutes a bar to the institution of the second complaint on the self-same facts on December 29, 1964, forming the basis of the present proceedings, in Case No. C/1054 of 1964. In this context Mr. Sen contended that the case originally was filed by one Amal Kumar Singh on behalf of M/s. Mrinalini Bidi Manufacturing Company (P.) Ltd. and summons were issued u/s 78 of the Trade and Merchandise Marks Act, 1958, against the accused persons. The complainant

subsequently defaulted to appear and an application was filed through Sri Nagendra Nath Ghosh, branch manager of the company, submitting that the said Amal Kumar Singh having left the company was no longer available to the company and, accordingly, the case may be allowed to be proceeded with through the said applicant. The learned Magistrate, however, by his order dated December 23, 1964, rejected the said prayer and held that the complainant should file a fresh complaint for taking cognizance, and in that view he discharged all the accused u/s 259 of the Code of Criminal Procedure. A fresh petition of complaint dated December 26, 1964, was thereafter filed. The learned Additional Chief Presidency Magistrate examined the complainant on S A. on December 29, 1964, and issued summons against the accused persons u/s 78 of the Trade and Merchandise Marks Act, 1958. Mr. Sen contended that the entertainment of the second complaint on the self-same facts was bad in law and that the order of conviction and sentence passed therein had been unwarranted, untenable and without jurisdiction. He relied, in this context, on the principles laid down in the case of (i) Pramatha Nath Talukdar (In Cr. App. No. 75 of 61) and (ii) [Pramatha Nath Taluqdar Vs. Saroj Ranjan Sarkar](#), (in both appeals). From a perusal of the order-sheet of the case, however, it would become abundantly clear that the learned Presidency Magistrate, Eleventh Court, Calcutta, while discharging the accused u/s 259 of the Code of Criminal Procedure on December 21, 1964, did not apply his mind to the merits of the case and consider the same in any way whatsoever. There is, accordingly, no bar in law to the filing of the second complaint. Mr. Sen relied on the observations of the majority decision of Mr. Justice J. L. Kapur and Mr. Justice M. Hidayatullah (as his Lordship then was) in the case of Pramatha Nath. Talukdar and Ors. (Supra ), viz. that an order of dismissal u/s 203, Code of Criminal Procedure, is, however, no bar to the entertainment of a second complaint on the same facts, but it will be entertained only in exceptional circumstances, e.g., where the previous order was passed on an incomplete record or a misunderstanding of the nature of the complaint or it was manifestly absurd, unjust or foolish or where new facts which could not, with reasonable diligence have been brought on record in the previous proceedings, have been adduced and submitted that as the facts disclosed in the second complaint were not only within the knowledge of the complainant on the previous occasion but were the same as incorporated in the petition of complaint, forming the basis of the earlier case, the present case did not come within the exceptional circumstances referred to in the majority decision and, as such, should be quashed. Mr. Mitra joined issue and submitted that Mr. Sen's contention was not ultimately warranted by the principles laid down by the Supreme Court in the aforesaid case. He relied on the observations in the majority decision that--Under Section 203, Criminal Procedure Code, the judgment which the Magistrate has to form, must be based on the statements of the complainant and of his witnesses and the result of the investigation or enquiry if any. He must apply his mind to the materials and form his judgment whether or not there is sufficient ground for proceeding. (Page 899) I agree with the submissions of Mr. Mitra. Mr. Sen's contention overlooks the first part of the observations of their

Lordships of the Supreme Court, viz., that in order to bar a second proceeding the Magistrate concerned "must apply his mind to the materials to form his judgment as to whether or not there are sufficient grounds for proceedings." In the present case, it is abundantly clear that there has been no such application of the mind to the facts of the case by the learned Presidency Magistrate when he passed the order of discharge u/s 259 of the Code of Criminal Procedure on December 21, 1964, and that he merely gave effect to the prayer made on behalf of the complainant, arising out of the difficulties in producing the complainant, who had since left service. The learned Magistrate might not have proceeded under s, 259 of the Code of Criminal Procedure, but that is a different matter altogether. I, accordingly, hold that the earlier order of discharge passed on December 21, 1964, u/s 259 of the Code of Criminal Procedure, would not constitute a bar to the institution of the present proceedings on the self-same facts on December 29, 1964. The first submission made by Mr. Sen relating to procedure, accordingly, fails.

6. The second contention raised by Mr. Sen is a material one, relating also to procedure, and is that there has been a mistrial inasmuch as the prosecution case of an alleged falsification of a registered trade mark as alleged in the petition of complaint, disclosed in the evidence adduced, forming the subject-matter of the charges framed and even referred to, as such, in a major part of the judgment, has been changed, in the findings ultimately arrived at by the learned Presidency Magistrate, into a case of falsification of a mark acquired by long user and used in relation to goods for the purpose of indicating a connection in the course of trade made between the said goods and some persons having the right as proprietor to use the same vitiating thereby the ultimate order of conviction and sentence. In support of his contention. Mr. Sen referred to paras. 2, 4, 8 and 10 of the petition of complaint wherein the basis of the prosecution has been disclosed to be the falsification of a registered trade mark of the "Jugantar Bidi" which has been duly registered in 1943 under the Trade Marks Act, 1940, being trade mark No. 14773 dated April 20, 1943, in class 34. The charges framed in the case also refer to the same position, viz. that the accused, without consent of the proprietor of the trade mark of the "Jugantar Bidi", marked Ex. 16, falsified the said trade mark by making marks, Exs. II, IV, V. and VI, and also falsely applied to their records, viz. bidis marked Ex. XI, the trade mark marked Exs. VIII and VIII/I committing thereby offences punishable u/s 78 read with Section 88 of the Trade and Merchandise Marks Act, 1958. It was also stated in the charges that in furtherance of the common intention of all by falsifying the said registered trade mark (Ex. 16), the accused had committed the criminal acts mentioned in the two charges referred to before thereby committing an offence punishable u/s 78 of Act XLIII of 1958 read with Section 34, Indian Penal Code. The evidence adduced in the case, according to Mr. Sen, is also a pointer to the same. In this context, he pinpointed the statements of P.W. 15, Nagendra Nath Ghosh, the manager of M/s. Mrinalini Bidi Manufacturing Company (P.) Ltd. P.W. 15 stated that◆

This trade mark is registered. Exhibits 16 and 17 are the certificate of registration of trade marks and renewal certificate.

The witness further stated that◆

The trade mark label as affixed to Exs. 16 and 17 are curved. The label in Ex. 11/A is straight. The label of Ex. XI/A is straight. Our trade mark number is 14773. The body label is Ex. XI/A Judgavatar Bibi bears No. 2340. The label of Ex. II/A bears number 3240. The labels as registered under 16/17 do not bear the number 3240.

Mr. Sen further submitted that the brunt of the evidence relates to the registered trade mark. In the body of V the judgment also the learned Presidency Magistrate made repeated and specific references to the arguments advanced at the trial on the footing of a purported falsification of the registered trade mark by the accused-Appellants and a major part of the judgment indicates the same. Ultimately, however, the learned trying Magistrate found that the accused-Appellants were guilty under Sections 78 and 79 read with Section 88 of the Trade and Merchandise Marks Act, 1958, for a falsification of a mark acquired by long user and convicted and sentenced them accordingly. Mr. Mitra, the learned Counsel appearing on behalf of the complainant, contended that although there was reference to the falsification of the registered trade mark in the petition of complaint, the evidence, the charge and in several parts of the judgment, the provisions of Sections 78 and 79 of the Trade and Merchandise Marks Act, 1958, enjoin a penalty for the falsification of both registered trade marks and marks acquired by long user in relation to goods; and consequently there has been no prejudice to the accused-Appellants to meet the prosecution case resulting in a mistrial. In support of his contention, Mr. Mitra referred to the definition of a "trade mark" in Section 2(l)(v) of Act XLIII of 1958. It is difficult for me to agree with the aforesaid submission of Mr. Mitra in the facts and circumstances of the present "case and I uphold the contention made in this behalf by Mr. Sen. The prosecution is certainly at liberty to proceed either on a charge of falsification\* of a registered trade mark or the falsification of a mark acquired by long user and the provisions of the Act for penalizing the same may also be the same. But, the point at issue is whether the prosecution having opted out clearly and categorically for the offence of falsification of a registered trade mark and having incorporated the same in the evidence and in the charge, could switch back to an offence of falsification of any mark used in relation to the goods concerned acquired by long user in course of the same trial. The point further is that, if the prosecution cannot do so, whether the learned trying Magistrate holding the trial can do the same while delivering the judgment. The analogy of Section 227 of the Code of Criminal Procedure will not hold good in this case as the judgment has been pronounced. It cannot be overlooked that in a criminal trial the rights of the accused to meet the prosecution case without let or hindrance cannot be overemphasized, and if there be any prejudice caused to him in that context, the trial becomes a mistrial vitiating the ultimate order of conviction

and sentence. Having given the matter my anxious consideration I hold that there has been a strange metamorphosis in the case and the findings ultimately arrived at by the learned Presidency Magistrate convicting and sentencing the accused-appellants are based on a footing that is clearly distinct from that on which the prosecution itself had proceeded originally. This sudden change in the basis of the prosecution is" indeed an ill-wind that blows nobody any good and the resultant, order of conviction and sentence stands vitiated. In this connection a reference may be made to the case of *Re Ferodo Ltd.* application (1945) 2 All E.R. 95. The case was u/s 27(1) of the Trade Marks Act, 1938, wherein the applicants Ferodo Ltd. applied for registration of their trade mark consisting of the invented word "Ferodo" as a defensive trade mark in respect, of all goods comprised in class 5 (pharmaceutical substance etc.) and class 34 (tobacco, smokers' articles and matches). Evershed J. observed:

In reaching a conclusion on this matter it is obvious that the nature of the goods "in respect of which" the trade mark "is registered and used" is an important factor, for, generally speaking, the more special in character those goods are and the more limited their market, the less likely will be the inference required by the Sub-section to be drawn in relation to goods of a very different kind. I agree with the said observations and hold that the ingredients" of an offence of falsification of trade mark are not the same as those of one of falsification of a mark acquired by long user. The sine qua non of one are not necessarily the sine qua non of the other and, accordingly, when evidence is led on the clear and categorical footing of the falsification of a registered trade mark, the ultimate finding of the Court that there has been a falsification of a mark acquired by long user, is bad in law and improper, converting the trial into a mistrial.

7. The point at issue may also be approached from another standpoint, viz. the standpoint of due process of law. In the well-known case of *Taylor v. Taylor* (1876) 1 Ch.D. 426 (431) Jessel M.R. observed:

When a statutory power is conferred for the first time upon a Court, and the mode of exercising it is pointed out, it means that no other mode is to be adopted....

The said principles were approved of and applied by their Lordships of the Judicial Committee in the case of *Nazir Ahmed v. The King Emperor* 63 LA. 372 (381, 382). Lord Roche, delivering the judgment of the Judicial Committee, observed:

The rule which applies is a different and not less well-recognized rule, viz. that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all., Other methods of performance are necessarily forbidden.

In a later decision the Supreme Court again reiterated the said principles when in the case of [State of Uttar Pradesh Vs. Singhara Singh and Others](#), A. K. Sarkar J. (as his Lordship then was) delivering the judgment of the Court observed:

The rule adopted in *Taylor v. Taylor*, (1876) 1 Ch.D. 426, is well-recognised and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power is to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted.

A (reference in this connection may also be made to the case of *Ed Tumey, Plaintiff in Error v. State of Ohio, Defendant in Error* 273 U.S. Supreme Court Reps. 510 wherein Chief Justice Taft pin-pointed "the requirement of due process of law in judicial procedure" and condemned every procedure which denies the accused such due process of law. I respectfully agree with the said observations and I hold that the trial has been held not in due process of law and the resultant order of conviction and sentence is bad and improper. The second contention of Mr. Sen, accordingly, succeeds.

8. In view of my findings arrived at on the second point referred to above relating to mistrial, it is not necessary for me to decide the other three points raised by Mr. Sen. I only make it clear that I make no observation as to the relative merits of the respective cases.

9. In the result, I allow the appeal, set aside the order dated December 9, 1965, passed by Sri A. M. Sinha, Presidency Magistrate, Sixth Court, Calcutta, convicting the accused-Appellants Nos. 1 to 5 u/s 78 read with Section 88 of the Trade and Merchandise Marks Act, 1958, and sentencing them to pay a fine of Rs. 500 each, in default, to undergo S.I. for 2 months each and convicting the accused-Appellants Nos. 6 to 9 u/s 78 read with Sections 79 and 88 of the same Act and sentencing them to pay a fine of Rs. 100 each, in default, to undergo S.I. for 15 days each, in Case No. C/1504/64 and I direct that the fines, if paid, are to be refunded.