

M/s. Sable Waghire & Company and Others

Vs

The Union of India and Others

Writ Petitions Nos. 37 and 38 of 1970

(K. K. Mathew, V. R. Krishna Iyer, P. K. Goswami JJ)

21.03.1975

JUDGMENT

GOSWAMI, J. -

1. The Petitioners Nos. 2 to 5 in Writ Petition No. 37 of 1970 are the sole partners of petitioner No. 1 which is a registered partnership firm (brief the firm) carrying on the business of manufacturing, marketing and selling bidis under pictorial representation and the trade name "Chhatrapati Shivaji Bidi". The firm is the sole proprietor of the Registered Trade Mark No. 12549 in respect of the pictorial representation of the picture of "Chhatrapati Shivaji" and of the Registered Trade Mark No. 12550 in respect of the trade name "Chhatrapati Shivaji" registered in the Registry of Trade Marks, Bombay. The petitioner in Writ Petition No. 38 of 1970 supporting the petitioners in writ Petition No. 37 of 1970 has submitted the additional petition claiming the same reliefs. In fact the petitioner in Writ Petition No. 38 of 1970 (briefly the company) has also been impleaded as respondent No. 4 in Writ Petition No. 37 of 1970.

2. According to the petitioners the business of manufacturing bidis according to special formulae and processes and of marketing and selling them under the pictorial representation of "Chhatrapati Shivaji" and under trade name "Chhatra Shivaji" was first started in about the year 1928 by one Raghunath Ramchandra Sable, the father of petitioners Nos. 2 and 4. It is stated that Raghunath Ramchandra Sable adopted the said pictorial representation and the said trade name in response to a call of the then popular leaders to adopt the name of Chhatrapati Shivaji in relation to all articles designed for public use or consumption with a view to popularise and keep before the public eye the image of the national hero, Chhatrapati Shivaji. By a declaration dated November 25, 1938, filed with the Registrar of Assurances at Bombay, petitioner No. 2 obtained protection for the user of the said trade name as the exclusive proprietor thereof. In due course under an agreement dated June 29, 1967, the firm while retaining exclusive proprietary rights in respect of the Registered Trade Marks Nos. 12549 and 12550 gave exclusive right of user thereof to the company for valuable consideration. It is said that the bidi business developed on a very vast and extensive scale and the sale of bidis marketed and sold under the pictorial representation of "Chhatrapati Shivaji" and the words "Chhatrapati Shivaji" associated therewith came to over Rs. 2 crores. The business also spread to different States.

3. Troubled started when by a Notification No. SO/1020 dated March 16, 1968, issued by the Central Government under Section 8 of the Emblems and Names (Prevention of Improper Use) Act, 1950 (briefly the Act) and published in the Gazette of India on March 23, 1968, in item No. 9A in the Schedule to the Act after the words "pictorial representation of", the words "Chhatrapati Shivaji Maharaj or" were inserted. We have, therefore, to turn our attention to the Act.

4. The long title of the Act is the Emblems and Names (Prevention of Improper Use) Act, 1950. The preamble shows that it is "an Act to prevent the improper use of certain emblems and names for professional and commercial purposes". The Act extends to the whole of India and also applies to citizens of India outside India. It was brought into force from September 1, 1950. Section 3 which is most important section reads as under :

3. Prohibition of improper use of certain emblems and names. - Notwithstanding anything contained in any law for the time being in force, no person shall, except in such cases and under such conditions as may be prescribed by the Central Government, use or continue to use, for the purpose of any trade, business, calling or profession, or in the title of any patent, or in any trade mark or design, any name or emblem specified in the Schedule or any colourable imitation thereof without the previous permission of the Central Government or of such officer of Government as may be authorised in this behalf by the Central Government.

5. Section 4 prohibits registration of certain companies, etc. and is as follows :

4(1). Notwithstanding anything contained in any law for the time being in force, no competent authority shall, -

(a) register any company, firm or other body of persons which bears any name, or

(b) register a trade mark or design which bears any emblem or name, or

(c) grant a patent in respect of any invention which bears a title containing any emblem or name; if use of such name or emblem is in contravention of Section 3.

2. If any question arises before a competent authority whether any emblem is an emblem specified in the Schedule or a colourable imitation thereof, the competent authority may refer the question to the Central Government, and the decision of the Central Government thereon shall be final.

6. Section 5 which imposes penalty for contravention of Section 3 of the Act runs as follows :

5. Any person who contravenes the provisions of Section 3 shall be punishable with fine which may extend to five hundred rupees.

7. Section 8 reads as under :

8. Power of the Central Government to amend the Schedule. - The Central Government may, by notification in the Official Gazette, add to or alter the Schedule, and any such addition or alteration shall have effect as if it had been made by this Act.

8. Section 9 empowers the Central Government to make rules to carry out the purposes of the Act. Originally the Schedule attached to the Act had only three items, namely, -

(1) The name, emblem or official seal of the United Nations Organisation;

(2) The name, emblem or official seal of the World Health Organisation; and

(3) The Indian National Flag.

But by various notifications of the Central Government in the course of several years the Schedule now contains 17 items of which we are now concerned only with item No. 9A which as amended by impugned Notification dated March 16, 1968, stands as under :

9A. The name or pictorial representation of Chhatrapati Shivaji Maharaj or Mahatma Gandhi or the Prime Minister of India (except the pictorial use thereof on calendars where only the name of the manufacturers and printers of the calendars are given and the calendars are not used for advertising goods.)

It is, therefore, clear that under Section 3 read with the Section as amended the petitioned will not be able to use for the purpose of their trade or business the particular trade marks containing the name or emblem of Chhatrapati Shivaji.

9. The petitioners represented to the Government of India in the Commerce Department about the hardship caused to them and requested for extension of time upto March 31, 1972, for continuing to use the said trade marks. The Government allowed the petitioners time to use the existing trade marks with the name and the pictorial representation Chhatrapati Shivaji till May 31, 1969. After the expiry of the aforesaid date no further extension of time was granted.

10. The Joint Registrar of Trade Marks (Respondent No. 3) by Notice No. PR/2951 dated October 16, 1969, informed the firm that the use and registration of the name and the pictorial representation of "Chhatrapati Shivaji Maharaj" is prohibited by virtue of Sections 3 and 4 of the impugned Act and the registered of the aforesaid Trade Marks Nos. 12549 and 12550 offended the provisions of Section 11 of the Trade Merchandise Marks Act, 1958, read with Section 32(b) of the said Act and, therefore, proposed to rectify the Register by expunging therefrom the said trade marks under Section 56(4) of the said Act. The Registrar called upon the firm to submit objections if any. The petitioners applied for extension of time to show cause before the Registrar and ultimately moved these writ applications challenging the constitutional validity of the Act and in particular of Sections 3, 4 and 8 of the Act as well as of the Notification of the Central Government dated March 16, 1968. They have also prayed for quashing the Notice of the Registrar dated October 16, 1969. A rule nisi was obtained on March 2, 1970, with interim stay preventing the Government from enforcing the provisions of the Act.

11. Mr. Bal, learned Counsel for the petitioners, submits that the Act is void for want of legislative competence of the Parliament. According to him the subject-matter of the legislation relates to "trade and commerce" and, therefore, falls squarely within entry No. 26 of List II of the Seventh Schedule to the Constitution. Hence the Parliament is not competent to make the law in question. On the other hand, the learned Solicitor General, contends that the pith and substance of the legislation as gathered from the preamble, the marginal note of Section 3 and the illustrations furnished by the Schedule is the preservation of sanctity of the names and emblems of international and national entities, and not "Trade and commerce within the State". Hence the residuary entry No. 97 of List I will be attracted. Alternatively, he submits the legislation is closer to entry No. 49 "Patents, inventions, designs, copyright, trade marks and merchandise marks" in List No. I of the Seventh Schedule.

12. In considering the question of competency of legislation and, for the matter of that, in interpreting the entries in the Lists of the Seventh Schedule a broad and liberal approach has been a

well-settled rule of the Court. The subject-matter of the legislation is also to be gathered from the totality of the provisions of the Act read with the preamble and Schedule. So read it is clear that the Act does not concern itself directly or even substantially with trade or commerce.

13. Entry No. 49 of List I may well supply the coverage for the Union legislative field so far as the Act is concerned. Trade marks, designs and merchandise marks may legitimately take in matters relating to their abuses and improper uses. Even otherwise the residuary entry No. 97 of List I is of wide amplitude to take care of the particular subject-matter of legislation, namely, prevention of improper use of certain emblems and names for professional and/or commercial purposes. The objection on the score of legislative incompetency of Parliament is, therefore, devoid of merit.

14. Next attack is upon Sections 3, 4 and 8 of the Act. It is contended that Sections 3, 4 and 8 confer unguided, uncanalised and arbitrary power on the Central Government the exercise of which is capable of leading to discrimination and imposition of unreasonable restrictions on the fundamental rights of the citizens under Articles 14 and 19(1)(f) and (g) of the Constitution. It is emphasised that there is no guideline in the Act for exercise of power. There is, therefore, the vice of excessive delegation of legislative power, says Counsel.

15. Let us, therefore, have a background of the promulgation of the Act. The Statement of Objects and Reasons will make the position clear and may be quoted in extenso :

The General Assembly of the United Nations Organisation recommended in 1946 that members of the United Nations should take necessary legislative or other appropriate measures to prevent the use, without proper authority, and in particular for commercial purposes, of the emblem, the official seal and the name of the United Nations and of the abbreviations of that name. A similar recommendation has since been received also from the World Health Organisation for prevention of the use of its name (and abbreviations), emblem and official seal. Instances have also come to light of the use in India (and abroad) of the Indian National Flag and emblem and of the names or pictorial representations of Mahatma Gandhi and other national leaders, for commercial and trade purposes and in a manner likely to offend the sentiments of the people. The Provisions of the Indian Trade Marks Act, 1889, and the Indian Companies Act, 1913, are not adequate to prevent these abuses, The Bill seeks to prevent the improper use of these names, emblems, etc., for the purpose of trade, business, calling, profession, patent or design, and to impose a penalty for misuse of emblems, etc., specified in the Schedule and empowers the Central Government to make additions and amendments in the Schedule as and when necessary.

16. 'What is in a name' may not always be innocent. Logically proper names are not connotative but have often gathered a content, a halo, around them sometimes or for all times to come. National or international significance gets attached to certain names or institutions over the years or ages and then they belong to the nation or to all nations. Human sentiments and often a deep sense of religiosity pervade through and provide a sacred mantle as it were to the nomenclature. In order to arouse national sentiments everywhere invocation of "Chhatrapati Shivaji" in manifold ways in the era of struggle for independence of our country is now, by turn of history, replaced by an ardent worship of the proud heritage by a grateful nation. Law reflecting the national consciousness, therefore, forbids ordinary commercial use of the sacred name by individuals in their own interest as opposed to national interest.

17. We take it that the scheme disclosed in the provisions of the Act read with the preamble, and the Objects and Reasons make it clear that there was imperative necessity for regulating the use of certain emblems and names. The fact that only improper use of the names and emblems is prohibited itself provides guidance. The original entries in the Schedule would also point to the nature and character of the names, emblems and entities. It is not possible for the Parliament to envisage the possibility of improper use of all names and emblems as time goes on. Nor is it possible to enumerate in the Schedule an exhaustive list of all the names, emblems and entities. Section 8, therefore, makes provision for empowering the Central Government to add to or alter the Schedule. In the nature of things, there is no abdication of legislative function by Parliament in delegating its power under Section 8 in favour of the Central Government which will be the appropriate authority to consider from time to time as to the items to be included in or omitted from the nook and corner of the entire country. There is, therefore, no excessive delegation of legislative power by Parliament in favour of the Central Government. From the Objects and Reasons, the preamble and the provisions of the Act with the built-in-limitations in Section 3 taken with the Schedule, a policy is clearly discernible and there is sufficient guidance therein to enable the Central Government to exercise its power under the Act. The relevant matters mentioned above are sufficiently informative of the policy of the law to rob the efficacy of an argument on the score of scantiness in the Act. The impugned Notification dated March 16, 1968 of the Central Government under Section 8 cannot, therefore, be invalid. The objection on the score of Article 14 is of no avail.

18. There is also no merit in the contention that Sections 3 and 4 violate the provisions of Article 19(1)(f) and (g) of the Constitution. The petitioners' right to trade in bidis is not at all interfered with by the legislation. Section 3 in terms provides for enabling the affected persons to adjust their business or affairs inasmuch as the Central Government can permit some time to alter emblems, designs, etc. to carry on with their trade. Indeed in the present case the petitioners on their own application obtained an extension of time presumably under Section 3 of Act and, therefore, cannot complain on that score. There is built-in safeguard in Section 3 itself for mitigating any hardship to persons or any rigour of the law. The provisions are accordingly regulatory in nature and even, if at all, impose only reasonable restrictions on the exercise of the petitioners' right under Article 19(1)(f) and (g). Section 4 is a consequential provision and validly co-exists with Section 3.

19. It is also contended by the petitioners that no rules have been framed under Section 9 of the Act which make the same unworkable. We are not impressed by this argument. From the scheme and machinery of the Act there is nothing to indicate that absence of rules will make the Act unworkable. The submission is devoid of substance.

20. Lastly it was submitted that the Notification under Section 8 was not published in the name of the President and was issued by the Under Secretary who was not authorised to do so. The Notification is not an executive order but is a piece of subordinate legislation made by the Central Government under Section 8 of the Act. It was duly published in the Gazette of India over the signature of the Under Secretary who was authorised for the purpose. The question of violation of Article 77 does not arise.

21. Since the Act and the impugned provisions are constitutionally valid, objection of the Notice of the Joint Registrar dated October 16, 1969, is also of no avail.

22. In the result the petitions are dismissed but there will be no order as to costs.

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