

Bombay High Court reignites debate on nature of intellectual property offences: offences are non-bailable and cognizable

LexOrbis provide an overview on non-bailable and cognizable IP offenses with reference to recent cases.

In a recent decision in the case of *Piyush Subhashbhai Ranipa v State of Maharashtra* [Appl No. 336 of 2021], Bombay High Court clarified questions surrounding the nature of offences under intellectual property statutes. While deciding on the maintainability of an anticipatory bail application filed in connection with a case registered for selling substandard goods bearing fake trademarks, the court went on to decide a larger issue as to whether offences punishable up to three years, under laws other than Indian Penal Code, are non bailable.

As regards the circumstances leading up to the criminal complaint against the Applicant; it was filed by the zonal officer of Jain Irrigation System, a pipe manufacturing company, after he caught the consignment of pipes bearing a fake trademark of the company. The Applicant was charged with the offences under Section 63 of Copyright Act (intentional infringement or abetment to infringement of copyright), 103 of Trademarks Act (counterfeiting) and relevant provisions of

Indian Penal Code. It was alleged that the Applicant was the manufacturer of the fake goods which were being marketed / sold at his instance.

To decide the maintainability of anticipatory bail application, the question for the court to address was whether offences under Section 63 of Copyright Act and Section 103 of Trademarks Act are non-bailable and cognizable. Court answered this question in affirmative. To understand this finding and full context of the issues; we will start by taking a close look at the applicable law, starting with the definition of 'bailable offence' under Criminal Procedure Code (CrPC), which says:

"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".

Part II of First Schedule of CrPC classifies offences against laws other than Indian Penal Code, into three categories, Item II and III whereof are relevant here. Item II provides that all offences

which are punishable with imprisonment for three years and upwards but not more than seven years, are cognizable and non-bailable. Item III, on the other hand, makes the offences punishable with imprisonment for less than three years or with fine only, non-cognizable and bailable.

Both Section 63 of Copyright Act and Section 103 of Trademarks Act prescribe a minimum imprisonment of six months which may extend to three years. Conjoint reading of these provisions and First Schedule of CrPC, leads to varying interpretations. Core ambiguity lies in the question whether an offence for which the maximum permissible imprisonment is three years would fall under Item II or III. This confusion is not limited to intellectual property statutes. There are many more which contain provisions embodying similar language i.e., "imprisonment extending to three years". The last two decades have seen conflicting judgements originating from various courts in India, thereby failing to lay down a single guiding principle to remove the ambiguity.

Around 25 years back, the decision in the case of *State of Maharashtra v. Shri. Suresh Ganpatrao Kenjale 1995CriLJ2478* offered some guidance on the issue. While addressing a question if offences under Prevention of Corruption Act are



Section 103 of Trademarks Act prescribe a minimum imprisonment of six months.



bailable or not, court held, "while construing whether an offence is bailable or nonbailable 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".

Kerala High Court followed the similar interpretation, in the case *Abdul Sathar v. Nodal Officer, Anti Piracy Cell [AIR2007Ker212]*, to hold that the offence under section 63 falls within





It is yet to be seen if other High Courts follow the same interpretation.



Item II as the maximum term of punishment prescribed therein is three years, Guwahati High Court took the same view in the case of *Jitendra Pratap Singh vs State of Assam*, (2004)2GLR271.

Delhi High Court, however, held otherwise in *Govt of NCT Delhi v Naresh Garg*, 2011(46)PTC114(Del). Throwing some light on the legislative intent, the court observed "It would be fruitful to refer to the provision of Section 64 of the Act which empowers a police officer not below the rank of Sub-Inspector to seize the infringing copies of any work. If the offence had been cognizable and non-bailable, there was no necessity to specifically authorize the police officer with the power of seizure".

Last year, with a view to put an end to all confusion; Rajasthan High Court placed the following question for resolution by a larger bench, in the case of *Nathu Ram v State Ref.No.1/2020*.

"What would be the nature of an offence for which imprisonment "may extend to three years" is provided and no stipulation is made in the statute regarding it being cognizable/non-cognizable?"

The court held 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".

The court reached this finding after interpreting the classification under Part II of First Schedule with reference to the one provided under Part I thereof. In this context, following para of the judgment is relevant:

"If the classification of the offences in Part II of

First Schedule is construed with reference to the context *vis-a-vis* the classification under Part I of the First Schedule, the expression 'for three years' occurring in classification II under Part II of First Schedule has to be construed to include the offences punishable with imprisonment for a term to the extent of three years. Thus, for determination of nature of offence, the maximum punishment that may be awarded for particular offence, is relevant and not the minimum sentence".

Bombay High Court has principally relied upon the above interpretation of Rajasthan High Court to hold that offences under section 63 of Copyright Act and 103 of the Trademarks Act are non-bailable and cognizable.

Though Bombay High Court attempted to resolve the issue by appointing an amicus curie and penning down a detailed judgement, however, it is yet to be seen if other High Courts follow the same interpretation, or if the divergent views continue to flow in, keeping the statutory ambiguity alive. It is important to decide the question, though, because nature of the offence decides the rights of the parties and the entire procedure followed in its adjudication including the process of investigation. It is often debated that CrPC should be amended to supply an explanation, however, statutory amendment is a long drawn and complicated process. It makes more sense for the apex court to confirm the position. Clarification could be issued with respect to the meaning of "imprisonment extending to 3 years" in light of the First Schedule of CrPC, for all courts to follow the uniform interpretation. In the alternative, contextual reading of each statute in question could help. For example, the fact that a court inferior to a metropolitan magistrate or a judicial magistrate of first class has no power to try an offence under Copyright Act, is enough indication of legislative intent to make the offences under Copyright Act cognizable.

Contact

LexOrbis

709/ 710, Tolstoy House, 15-17, Tolstoy Marg,
New Delhi – 110 001, India

Tel: +91 11 2371 6565

Fax: +91 11 2371 6556

www.lexorbis.com