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Court : Gujarat

Decided On : Jul-27-2015

Judge : Jayant Patel &Amp; Rajesh H. Shukla

Appeal No. : O.J. Appeal No. 32 of 2015 in Civil Suit No. 2 of 2015 With Civil Application (OJ) No. 446 of 2015

Appellant : Win Plast Ltd.

Respondent : Symphony Ltd.

Judgement :

Oral Judgment:

Rajesh H. Shukla, J.

1. The present O.J. Appeal is directed against the impugned judgment and oder passed in Civil Suit No. 2 of 2015 by this High Court (Coram: S.R. Brahmbhatt, J.) dated 5.5.2015 in a matter under the Designs Act, 2000 regarding the infringement, etc. on the grounds stated in the Memo of the Appeal.

2. It is contended, inter alia, that the interim relief restraining the appellant and respondent Nos. 2 and 3 original defendants from marketing, selling, advertising directly and/or indirectly dealing in air cooler on the ground that it is similar to the registered design of the respondent is contrary to law as well as the material on

record. It is contended that the learned Single Judge has failed to appreciate that the High Court of Gujarat had no jurisdiction to try and entertain the suit under sec. 22 of the Designs Act, 2000 read with sec. 20 of the Civil procedure Code, 1908 as it is a composite suit. It has been contended that the learned single Judge has failed to appreciate that the suit filed on behalf of the plaintiff was on mere apprehension of sale of goods in Ahmedabad which may not be giving rise to the cause of action in Ahmedabad. It has also been specifically contended that the provisions of sec. 62 of the Copyright Act and sec. 134 of the Trade Marks Act could not have been referred to seek any analogy for the purpose of the present suit. It is contended that appellant-original defendants were operating from Mumbai and the territorial jurisdiction therefore lies with the court at Mumbai. It is further contended that the learned Single Judge has failed to appreciate the provisions of the Designs Act, 2000 and has failed to appreciate that the design of the respondent-original plaintiff were not new, unique and are common to the trade and therefore it is hit by the provisions of sec. 4 of the Designs Act. It is contended that presumption can be drawn that the registered design holder had passed the test of sec. 4 for the purpose of registration and therefore the present suit has been filed.

3. Heard learned Sr. Counsel Shri RS Sanjanwala appearing with learned advocate Ms. VD Nanavati for the appellant-original defendant No.1 and learned Sr. Counsel Shri Mihir Thakore appearing with learned advocate Jatin Trivedi for the respondent-original plaintiff.

4. Learned Sr. Counsel Shri Sanjanwala referred to the papers and tried to emphasise that no cause of action can be said to have arisen and the suit is based merely on apprehension and therefore it is not maintainable. He submitted that in any case this court will not have the territorial jurisdiction as the court at Mumbai would have the jurisdiction as the appellant-original defendant has been operating from Mumbai. Learned Sr. Counsel Shri Sanjwanwala submitted that it is a quia-timet action and prima face it has to be established about the jurisdiction.

5. In support of his submission, learned Sr. Counsel Shri Sanjanwala referred to and relied upon the judgment of the Hon'ble Apex Court reported in (2006) 9 SCC

41 in the case of Dhodha House v. S.K. Maingi and emphasised the observations made in the judgment, particularly para 19. He submitted that the cause of action is a bundle of facts which are necessary to be proved. It was submitted that the Trade Marks Act as well as the Copyright Act provide that a suit could be filed by the plaintiff where he carried on his business which is not the case so far as the Designs Act, 2000 is concerned. He, therefore, strenuously submitted that the issue regarding jurisdiction has to be considered on the basis of the provisions of sec. 20 of CPC and no analogy could be drawn from other statues. In support of this submission, referring to the aforesaid judgment in the case of Dodha House v. S.K. Maingi [(2006) 9 SCC 41], he has tried to submit that no composite suit could have been filed in the High Court of Gujarat.

6. Learned Sr. Counsel Shri Sanjanwala, therefore, submitted that the suit for infringement of the design could lie only at Mumbai as the defendants are operating from Mumbai and therefore as per the provisions of CPC such an action would lie only at the court at Mumbai, particularly when there is a composite suit. He strenuously submitted that in a suit for infringement and not for mere passing-off when it is a combined and composite suit, the court at Mumbai alone will have the jurisdiction. He has also referred to and relied upon the judgment of the High Court of Delhi reported in AIR 1981 Delhi 95 in the case of M/s. B. Chawla and Sons v. M/s. Bright Auto Industries, and submitted that the question which would arise is whether the registered design is new or original or not. He emphasised that much would depend on the design having been imitated or not with or without modification. Learned Sr. Counsel Shri Sanjanwala therefore submitted that when an application before the Controller is already pending, the same may be decided, but till then as the appellant original defendant is also a registered owner, the design or the mark could not have been restrained from using the said design or mark for the purpose of manufacture and sale of the air cooler for the business. He has referred to relied upon the judgment of the Delhi High Court reported in 2013 (55) PTC 1 (Del) in the case of Micolube India Limited v. Rakesh Kumar Trading as Saurabh Industries and Others (minority view). He also referred to the papers and tried to submit that in order to decide about the piracy of the registered design, one has to consider whether the design is distinguished from already available in the market and the configuration of the design with the shape and the basic

functional features have to be considered. It was strenuously submitted that such an issue about the novelty or the test of novelty has to be decided with reference to the trained eye of an expert. He emphasised that the learned Judge has committed an error in observing that the test of novelty has to be decided on the touchstone of common eye rather than the test of trained eye or eye of an expert.

7. Learned Sr. Counsel Shri Sanjanwala also submitted that from the averments in the plaint it has not been made out about the cause of action inasmuch as it is merely on apprehension and such a suit could not have been filed on mere apprehension. He submitted that as it is a quia-timet action there has to be some material and whatever has been produced with regard to the appointment of a dealer as well as the sale elsewhere by itself would not be sufficient to justify the suit on apprehension. He submitted that the agent has been appointed by the appellant original defendant in respect of other goods also and therefore it would not be a ground for conferment of jurisdiction at Ahmedabad.

8. Learned Sr. Counsel Shri Mihir Thakore for the respondent No.1- original plaintiff referred to the background of facts contending that it is required to be appreciated that it is a quia-timet action, meaning thereby, such a suit is filed on mere apprehension or anticipation of infringement to prevent the damage. He emphasised that the suit was filed on 9.3.2015 on apprehension that the appellant original defendants are about to launch the product in the market. Learned Sr. Counsel Shri Thakore referred to the papers and submitted that the vouchers are produced with regard to the delivery of such product (air cooler) at different places and the pamphlet which has been circulated in the market in Ahmedabad is also produced. He also submitted that the agent is already appointed and it is a strong ground for quia-timet action when it has been compared with the invoices for the sale at Bhopal, Nagpur and other places. Learned Sr. Counsel Shri Thakore submitted that admittedly the plaintiff is the registered owner of the design prior in point of time and as a registered owner of the design or mark it is entitled to maintain the suit for infringement as well as passing-off. He, therefore, submitted that in a quia-timet action a composite suit could be maintained.

9. In support of his contention, learned Sr. Counsel Shri Thakore has referred to and relied upon the judgment of the Hon'ble Apex Court reported in 1990 Supp. 1 SCC 727 in the case of Wander Limited v. Antox India Private Limited and emphasised the observations in para 14. quoting Justice Gajendragadkar:

"The appeals before the division bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial courts exercise of discretion. After referring to these principles Gajendragadkar, J. in Printers (Mysore) Private Ltd. V/s. Pothan Joseph: (SCR 721

"... These principles are well established, but as has been observed by Viscount Simon in Charles Osenton and Co. V/s. Jhanaton '... the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case.;"

He also referred to and relied upon the judgment of the Hon'ble Apex Court in the case of Laxmikant V. Patel v. Chetanbhai Shah and anr., reported in AIR 2002 SC 275.

10. He, therefore, submitted that the suit would be maintainable in such matter when there is a real apprehension about the infringement and passing-off.

Learned Sr. Counsel Shri Thakore submitted that quia-timet action is for providing such remedy and therefore it cannot be said in a given set of facts that it is on mere apprehension but rather it is an indication about the possible misuse by the appellant original defendants when they were contemplating launching of the product. He submitted that the appellant-defendant has never contended that it is not contemplating to market such product in Gujarat and therefore it cannot be said that it is merely on apprehension. He also submitted that since it has not been actually marketed in Gujarat or Ahmedabad would not make any difference as it is a quia-timet action which is providing for such action on apprehension. He submitted that reasonable apprehension is made out. He referred to the plaint and the averments in the plaint to support his contention about the jurisdiction. Learned Sr. Counsel Shri Thakore submitted that the cause of action for quia-timet action is in anticipation of the launching of the product or apprehension of the infringement and it need not be shown that there is actual marketing and sale of the product. He emphasised the observation,

"The other aspect of the matter is that a threat of selling the offending goods in Delhi would in itself confer jurisdiction in the courts in Delhi to entertain a suit claiming an injunction in respect thereof. Whether the threat perception is justified or not is another matter which has to be considered and decided upon in the application filed by the plaintiff ... "

Learned Sr. Counsel Shri Thakore submitted that this judgment has considered the Dhodha House judgment with regard to the actual cause of action and real apprehension.

11. In support of his contention, he has referred to and relied upon the judgment of the Delhi High Court reported in 2006 (32) PTC 301 (Del.) in the case of Pfizer Products, Inc. v. Rajesh Chopra and ors. Similarly, he has referred to and relied upon the judgment of the Hon'ble Apex Court in Dhodha House (supra) and submitted that the apprehension that the goods will be marketed in Ahmedabad itself is sufficient. He submitted that the fact that pamphlets have been distributed, the delivery of the goods in another place had started and the distributor is appointed can be said to be a reasonable apprehension. Learned Sr. Counsel Shri

Thakore emphasised the observations in para 29 which has been quoted and emphasised,

".....Furthermore, when an injunction is sought, it is not necessary that the threat should have become a reality before the injunction (sic) may be granted and it can even be sought for a threat that is still to materialise."

He, therefore, submitted that the cause of action for a quia-timet action has been justified.

12. Similarly, for territorial jurisdiction he emphasised that may be the statutory provision in other statues like Trade Marks Act and Copyright Act providing for filing of the suit where the plaintiff is operating may not be there in the Designs Act, 2000. However, he emphasised that even as per sec. 20 of CPC the cause of action or part of cause of action can be said to have arisen within the jurisdiction of this court which would suffice to maintain the suit. Learned Sr. Counsel Shri Thakore therefore submitted that when there is sufficient averment and the material showing reasonable apprehension about launching of the product, the suit could be maintained.

13. Learned Sr. Counsel Shri Thakore has also referred to and relied upon the Bombay High Court judgment reported in 2014 (0) AIJ-MH 167728 in the case of Whirlpool of India Ltd. v. Videocon Industries Ltd. and pointedly referred to the observations made in para 15, 16, 17, 22, 28, 32 and 34. He referred to the observations in this judgment particularly para 18, 16 and 21 and tried to submit that the court has considered with reference to the language used in the Designs Act, 2000 and the expression "any other statutes" like the Trade Marks Act and has clearly observed that the expression "any person" makes it clear that it should be given a plain and natural meaning to include even the registered proprietor. Learned Sr. Counsel Shri Thakore therefore submitted that even if the appellant-defendant No. 1 is a registered proprietor when the language used in the statute Designs Act, 2000 provides "any person" it would include even the registered owner of the design or the mark subsequently in point of time. He has also referred to and relied upon the judgment reported in AIR 2014 Calcutta 122 in the case of Kent R-o Systems Ltd. v. Sandeep Agarwal.

14. Learned Sr. Counsel Shri Thakore has also referred to the judgment reported in 2013 (55) PTC (Del.) in the case of Micolube India Ltd. v. Rakesh Kumar Trading as Saurabh Industries and ors. both the majority and minority view referred to by learned Sr. Counsel Shri Sanjanwala.

15. Learned Sr. Counsel Shri Thakore also submitted that the submission with regard to ISI mark of the design by appellant original defendant has nothing to do with the shape and configuration of the design and its reference to the standard quality. He submitted that one may have the ISI mark or may not have, but for the purpose of design the issue regarding infringement or piracy it will not have much relevance. Learned Sr. Counsel Shri Thakore also referred to the judgment of House of Lords reported in [1972] RPC 103 in the case of Amp Inc. v. Utilux Pty. Ltd. and pointedly referred to the observations at p. 118 and emphasised,

"I agree that the eye in question is the eye of the customer on a visual test. The customers for terminals of the receptacle and tab variety are electricians and those concerned with electric wiring. I do not think it impossible that an electrician looking at the respondents' terminal would say that is appealed to his eye. He might say that it looked to him a cleaner and stronger type of terminal than any of the others which were shown to us. He might say that looking at it, it appeared to him the most useful for his purpose. I therefore think that the designs of the terminals registered by the respondents satisfy the first part of the definition of design, and if that stood alone, the registrations would be valid."

16. He therefore submitted that the contention that there is no novelty in the mark or design of the plaintiff and it has nothing to do with the basic functional features or colour are required to be judged solely by eye. He submitted that such a design or features of the shape or configuration are required to be considered on the basis of the appeal they make to the eye and it cannot be decided in any case in the present suit at this stage as the court is required to consider only the aspect of interim relief for injunction which has been granted. He has also referred to the judgment of the Hon'ble Division Bench (Coram: Jayant Patel and Mohinder Pal, JJ.) in O.J. Appeal No.41 of 2012 in Civil Suit No. 4 of 2012 and referred to the observations in para 9. Therefore, it was submitted that the present appeal may

not be entertained.

17. In rejoinder, learned Sr. Counsel Shri Sanjanwala referred to the plaint and submitted that the averments in the plaint would be relevant for the purpose of territorial jurisdiction. He tried to submit that the averments are made about circulation of pamphlet on the basis of which the jurisdiction is sought to be made. However, he submitted that the original plaintiff has not stated about the source of the information. He also submitted that as it is a composite suit and as the original defendants are operating at Mumbai, the court at Mumbai alone will have the jurisdiction. He referred to the affidavit-cum-objection to the injunction application filed in the Civil Suit and emphasised about the preliminary objections. Learned Sr. Counsel Shri Sanjanwala also submitted that as the original plaintiff has failed to describe any novelty in shape or configuration of their air cooler the suit would not be maintainable. He emphasised that configuration of plaintiff's air cooler is nothing but a basic functional feature of any air cooler available in the world and no right could be claimed. He submitted that the appellant-original defendant has also applied for registration of the design of the air cooler and is the genuine originator and the registered proprietor of the design of the above-referred model of air cooler. He tried to emphasise that the Controller General of Patents, Design and Trade Mark has granted certificate of registration of the design of the aforesaid air cooler in favour of the original defendant which is produced at p. 307.

18. Learned Sr. Counsel Shri Sanjanwala submitted that as the suit is filed for both infringement and passing off which is a composite suit on the basis of the apprehension, whether such a suit could be maintained. He emphasised that mere probability of infringement without any prima facie material to establish such apprehension would not be maintainable. He referred to the judgment of the Delhi High Court reported in AIR 1981 Delhi 95 and pointedly referred to the observations. He therefore submitted that the interim relief may be vacated. Learned Sr. Counsel Shri Sanjanwala also referred to the Indian Standard regarding Air Coolers (Desert Coolers) - Specification placed on record and submitted that appellant-original defendant is having such mark.

19. In view of these rival submissions, it is required to be considered whether the present appeal could be entertained.

20. The two points which have been emphasised by learned Sr. Counsel Shri Sanjanwala are with regard to territorial jurisdiction as well as maintainability of the suit and he has emphasised on the aspect of territorial jurisdiction.

21. As it transpires, the respondent-original plaintiff has admittedly filed the suit as a quia-timet action for necessary interim relief/protection on the ground of apprehension that the appellant-original defendant is likely to launch its product air cooler. The submissions made by learned Sr. Counsel Shri Sanjanwala regarding territorial jurisdiction with reference to the provisions of CPC as well as special provisions like the Designs Act or Trade Marks Act are required to be considered. Though there may not be any specific provision like under the Trade Marks Act, 1988 where the suit could be filed where the plaintiff is operating and therefore in order to consider the issue regarding jurisdiction sec. 20 of the CPC may have to be considered. It is well-settled that the court will have jurisdiction where the cause of action or part of the cause of action has arisen. The appellant-original defendant may be operating or having the manufacture of the air cooler within the territorial jurisdiction of Mumbai, but when they are launching the product and marketing in Ahmedabad, Gujarat, part of the cause of action can be said to have arisen for the purpose of both infringement as well as passing off or piracy. (emphasis supplied)

22. The submissions which have been made with much emphasis on the observations made by the Hon'ble Apex Court in the judgment in the case of Dhodha House (supra) have to be read in background and context of the facts in a given case. As observed in para 19 referred to by learned Sr. Counsel Shri Sanjanwala, the cause of action is a bundle of facts which are required to be established in a given case. Then, referring to the provisions of sec. 20 of CPC the Hon'ble Apex Court has clearly quoted and mentioned about sec. 20(c)

"the cause of action, wholly or in part, arises."

The Explanation further provides that 'any cause of action arising at any place where it has also a subordinate office, at such place', meaning thereby, any

activity for the business.

23. A useful reference can also be made to the judgment of the Delhi High Court in a judgment reported in 2006 (32) PTC 301 in the case of Pfizer Products, Inc. v. Rajesh Chopra and ors. which has considered the judgment in the case of Dhodha House (supra) and it is still observed that the threat perception is justified for the application for injunction under O.39 R. 1 and 2.

24. In the facts of the case, admittedly, the appellant-original defendant had been marketing the product for which some vouchers or invoices are placed that it has launched the product at Bhopal and other places. Therefore, the apprehension that it is likely to be launched in Ahmedabad, Gujarat, coupled with the fact that there is a distributer appointed, sufficiently justify the apprehension for quia-timet action. It is well-accepted that for the purpose of quia-timet action it is not necessary that there should be an actual piracy or infringement. In this very judgment, referring to the Division Bench of the Bombay High Court, it has been quoted,

".....Section 20 of the Code of Civil Procedure shows that a suit like the present can be filed wherever the cause of action wholly or partly arises. The plaintiff has prayed for an injunction regarding a threatened breach of a registered trade mark. The learned Single Judge held that the Delhi Court does not have jurisdiction on the ground of any sale having been made in Delhi, but does have jurisdiction on account of the advertisement having appeared in the Trade Marks Journal. The real point which gives the court jurisdiction is not the place where the advertisement has appeared, but the fact that the trade mark is sought for sale in Delhi amongst other places. Furthermore, when an injunction is sought, it is not necessary that the threat should have become a reality before the injunction (sic may be granted) and it can even be sought for a threat that is still to materialise."

25. Thus, it is not the actual marketing or launching of the product or sale of the product, but reasonable apprehension for the infringement or piracy or passing off which would be sufficient.

26. It is required to be mentioned at this stage that in the provisions of different laws for the intellectual property rights like Copyright Act or Trade Marks Act, there may be slight difference in the provisions. However, as it is well accepted that a design on a wrapper or design of a product may be registered under the Designs Act with corresponding registration under the Copyright Act also. Therefore, there may be an overlapping between the remedies under different statutes and therefore when the same category of product with piracy or imitation suggesting infringement of the design or copyright or trade mark, as the case may be, is apprehended, quai-timet action could be brought in and it will be with reference to the cause of action like sale of the goods or launching of the product within the territorial jurisdiction of a particular court. A useful reference can also be made as to when a party can be said to have "carrying on business" at a certain place. Therefore, considering the provisions of CPC the suit would be maintainable in the court and the observations and finding given by the learned Single Judge could not be said to be erroneous.

27. One more facet of the submissions with regard to novelty or originality which are sought to be raised has also been considered and the emphasis given on the judgment of Delhi High Court reported in AIR 1981 Delhi 95 in the case of M/s. B. Chawla and Sons v. M/s. Bright Auto Industries is also required to be considered with reference to the criteria which are required to be applied in a given set of facts and the statutory provisions. It is evident that whether it is a new and original design or there is any imitation, the criteria has to be appeal to the eye. While interpreting the statutory provision with reference to the word "novel" or "original" the design must be either substantially novel or substantially original having regard to the nature and the character of the subject-matter to which it is applied or the product for which it is designed. Therefore, it has to be decided on the basis of the material in a given set of facts. In a judgment of the House of Lords reported in [1972] R.P.C. 103 in the case of Amp Incorporated v. Utilux Proprietary Limited it has been observed,

"For the purposes of this appeal the relevant parts of this definition are what may be called (following Lord Avonside in Harvey (G.A.) and Co. (London) Ltd. v. Secure Fittings Ltd. [1966] R.P.C. 515) the positive part being features which in

the finished article appeal to and are judged solely "by the eye" and the negative part "but does not include..... features of shape or configuration which are dictated solely by the function which the article to be made in that shape or configuration has to perform."

28. The Hon'ble Apex Court in a judgment reported in AIR 2002 SC 275 in the case of Laxmikant V. Patel v. Chetanbhai Shah and anr. Has discussed on this aspect and it has been observed that the likelihood of injury which would be caused to the plaintiff in future and commencement of the business before institution of the suit would not make any difference.

29. Similarly, the judgment of the Delhi High Court in the case of Micolube India Ltd. v. Rakesh Kumar Trading as Saurabh Industries and ors. [2013 (55) PTC 1 (Del.) relied upon by both the sides requires a closer scrutiny particularly with reference to the statutory provision like the Design Act, 2000 which has also referred to the Statement of Objects and Reasons of the Design Act 2000 which have been quoted,

"In order to appreciate the object of introduction of the new Designs Act of 2000, various proceedings were referred to by learned counsel for the defendants. The Statement of Objects and Reasons of The Designs Bill, 1999 provided that the intent was to ensure that the law does not unnecessarily extend protection beyond what is necessary to create the require incentive for design activity while removing impediments to the very use of available designs. The definition of 'design' has bee amplified to incorporate therein the composition of line and colours so as to avoid overlapping with the Copyright Act regarding definition of 'design' in respect of 'artistic work'....."

A reference has been made to the discussion and one is required to consider the underlying legislative policy of the Act like Designs Act where it strikes a balance between the limited monopoly right under such an Act and at the same time providing some kind of protection from the infringement of the proprietary rights during the validity period. The judgment of the minority view as well as majority view referred to are in fact considering the scheme of the Act with the underlying object.

30. One more aspect which has been emphasised by learned Sr. Counsel Shri Sanjanwala requires consideration that as the appellant-defendant has also registered the design with the authority and having the certificate for registration of a design would be entitled to use the same and therefore no complaint for infringement could be made and the injunction could not have been granted. However, it is required to be considered with reference to the statutory provisions of laws like the Designs Act or the Trade Marks Act etc. The appellant-defendant having registration of the design may claim a right qua the world at large but the plaintiff having the design registered prior in point of time could maintain such suit and the appellant-defendant cannot raise a contention about the registration of his design qua such prior registration. Therefore, the right or the contentions which are sought to be based on registration of the design could be available qua others, but it will not be available qua the prior registration of a design by the other party like the respondent-plaintiff herein. Again, the issue regarding the cancellation is pending before the authority which could be considered on the basis of scrutiny of material. Therefore, it would be appropriate for this court to decline further elaboration on the issue leaving it to the authority for appropriate decision.

31. In this background a useful reference can be made to the observations made by the Bombay High Court in a judgment in the case of Whirlpool of India Ltd. v. Videocon Industries Ltd. [2014 (o) AIJ-MH167728. The Bombay High Court has considered this very issue and it has been discussed with reference to the scheme of the Act that such an argument cannot be sustained in background of the legislative scheme that where the property is the same the registration can be granted of the same design in relation to the article in the same clause and referring to sec. 22 of the Designs Act it has specifically made the observations in para 14 to 18 r/w para 21. The Bombay High Court in this judgment has specifically emphasised the word used in sec. 22(1) which provide "any person", meaning thereby any person who is the registered proprietor and it has been specifically stated that such subsequent registered proprietor could not be as explained above in the first place apply for registration in view of previous registration of the first registered proprietor and in any event could not successfully set up his own subsequent registration in defence to an action by the first registered proprietor under Sec. 22. Further, the High Court, referring to the

language employed in other statute like the Trade Marks Act, has discussed at length in para 21 that in the Trade Marks Act the legislature has used the expression "a person who, not being a registered proprietor..." Again, same expression has been made in Sec. 29 of the Trade Marks Act, 1958.

32. Thus, it clearly reflects the intention of the legislature and it has been provided that had the legislature intended while enacting sec. 22 of the Designs Act would not have used the expression or word "any person" (which is of a very wide scope). Further, as rightly emphasised, it could not have in that event added the same words for limiting the expression and could have inserted words "not being the registered proprietor."

33. Thus, considering the underlying scheme of the Act and the legislative intent, it is evident that the action for infringement could lie against any person, whether it be a registered proprietor or not. It may not be out of place to mention here that in a statute like the Trade Marks Act there is a specific provision for this aspect providing for the inter-se rights and the obligations or limitations thereof which may not have been provided in the Designs Act, 2000 as the language employed in sec. 22 of the Designs Act is wide enough by providing 'any person' which takes care of such mutual rights and obligations vis-a-vis the prior registration and the right of the registered proprietor and the proprietor of the subsequent registration of the design.

34. Therefore, having regard to the scheme of the Act which has been considered and explained both by the Delhi High Court as well as Bombay High Court as discussed above, and also having regard to the two judgments of the Delhi High Court, both majority view and minority view, reported in the case of Micolube India Ltd. (supra), this Court is of the view that the order passed by the learned Single Judge cannot be said to be erroneous. Therefore, considering the catena of judicial pronouncements with regard to the scope of interfering with the discretionary order and the grant of injunction, it cannot be said that the impugned order passed by the learned Single Judge calls for any interference.

35. A useful reference can also be made to the judgment reported in 1990 Supp. 1 SCC 727 in the case of Wander Limited v. Antox India Private Limited, relied upon

by learned Sr. Counsel Shri Thakore.

36. Further, the approach while considering the application for injunction or exercise of discretion has to be regarding balancing the two conflicting rights or obligations. One more aspect which is considered is comparative hardship. Further, while considering the provisions of the statute like Designs Act or such laws for the intellectual property rights, the legislature has itself balanced such right of creating monopoly over a limited period and providing for the business consideration. However, by judicial interpretation it has been well accepted that if such registered proprietor or the owner of the mark, whether it is under the Trade Marks Act or it is under the Designs Act, prima facie establishes infringement of the mark, the injunction would follow.

37. A useful reference can be made to the judgment of Hon'ble Apex Court reported in AIR 1965 SC 980 in the case of Kaviraj Pandit Durga Dutt Sharma v. Navratna Pharmaceutical Laboratories regarding the provisions of the Trade Marks Act. Though it is with reference to the Trade Marks Act, on analogy, the same principle would apply when the infringement of the mark under the Designs Act is also complained of.

38. In view of the aforesaid discussion and observations, the present appeal cannot be entertained and it deserves to be dismissed and accordingly stands dismissed. However, it is observed that the court/learned Single Judge shall be at the liberty to take independent view on the basis of material on record at the time of final disposal of suit without being influenced by any observations made in the present order.

39. In view of dismissal of the appeal, Civil Application No. 446 of 2015 filed in this Appeal would not survive and the same is also disposed of.