

vai

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.51 OF 2016
WITH
CIVIL APPLICATION NO.62 OF 2016

Nemichand L. Poddar & Ors.	...Appellants
V/s.	
Nirmangold Structures Pvt. Ltd.	...Respondent

Dr.Virendra Tulzapurkar, Senior Counsel with Mr.Vinod Bhagat and
Dhiren Karania i/b G.S. Hegde with V.A. Bhagat for the Appellants.

Mr.Hiren Kamod i/b Mr.Mahesh Mahadut for the Respondent.

CORAM : R.D. DHANUKA, J.
DATE : 1ST FEBRUARY, 2016.

P.C. :-

1. By this appeal from order, the appellants have challenged the impugned order dated 19th September, 2015 passed by the learned District Judge disposing of the application Exhibit-5 however, without granting interim relief in favour of the appellants.
2. A perusal of the order passed by the learned District Judge clearly indicates that interim relief is not granted merely on the ground that the defendant shall bring suitable order from Intellectual Property Appellate Board on or before 31st December, 2015. It is not in dispute that there was a stay of the suit filed by the appellants. The

respondent filed fresh application for stay of the suit before the Intellectual Property Appellate Board which application is pending.

3. Dr.Tulzapurkar, learned senior counsel for the appellants invited my attention to section 124(5) of the Trade Marks Act, 1999, which provides that the stay of the suit under section 124 shall not preclude the Court from making any interlocutory order (including any order granting an injunction, directing the account to be kept, appointing a receiver or attaching any property), during the period of the stay of the suit.

4. A perusal of the order clearly indicates that the the impugned order is *ex-facie* in violation of section 124(5) of the Trade Marks Act, 1999. The learned District Judge has not decided the application for injunction filed by the appellants on merits at all.

5. Learned counsel appearing for the respondent states that the observations made by the learned District Judge shall be construed as if the learned District Judge has dismissed the application of the appellants on merits for grant of injunction. A perusal of the order passed by the learned District Judge clearly indicates that the application at Exhibit-5 for grant of interim injunction has not considered on merits at all. The learned District Judge in my view, has totally mixed up the reliefs sought in the application at Exhibit-5 with the application filed by the defendant

before the Intellectual Property Appellate Board for rectification of the trade mark. There is thus no merits in the submissions of the learned counsel for the respondent.

6. In my view, since the order passed by the learned District Judge is contrary to section 124(5) of the Trade Marks Act, 1999, it would be appropriate if the impugned order passed by the learned District Judge on 19th September, 2015 is set aside, application at Exhibit-5 is restored to file and remanded back for disposal on merits.

7. I therefore, pass the following order :-

i). The impugned order dated 19th September, 2015 is set aside. The application at Exhibit-5 is restored to file.

ii). The learned District Judge shall decide the application at Exhibit-5 on merits and shall consider whether the appellants have made out any case for grant of any interim reliefs as prayed in the application at Exhibit-5 or not on its own merits. It is made clear that the learned District Judge shall decide the matter afresh without being influenced by the observations made in the impugned order dated 19th September, 2015 and irrespective of the fact that the application made by the respondent for rectification of the trade mark is pending before the Intellectual Property Appellate Board and also irrespective of the fact that the application made by the defendant for stay of the suit is pending before the Intellectual Property Appellate

Board.

iii). The learned District Judge shall decide the application at Exhibit-5 within three months from today.

8. In view of the disposal of the appeal from order, the civil application does not survive and is accordingly disposed of. No order as to costs.

(R.D. DHANUKA, J.)