

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO. 643 OF 2016
IN
NOTICE OF MOTION NO. 711 OF 2016
IN
SUIT NO. 186 OF 2015**

Manish M. Turakhia and anr. .. Appellants
V/s.
Neerav N. Turakhia .. Respondent.

Dr. Birendra Saraf a/w. Puja Kshirsagar i/b K.R. Parekh for the Appellants.

Ms Kadambari Surve for the Respondent.

**CORAM: DR. MANJULA CHELLUR, C.J. &
M.S.SONAK, J.**

DATE : 30 NOVEMBER 2016.

P.C.

1] This appeal is directed against the order dated 12 August 2016 by which the learned Single Judge has declined the appellants (original plaintiffs) an injunction to restrain the respondent from using the word “*Turakhia*” whilst describing its business as *Turakhia Vision Care*.

2] Dr. Birendra Saraf, learned counsel for the appellants, submits that the appellants undertake business as opticians in the name and style of '*Turakhia Opticians*' at Vile Parle. He submits that the appellants have obtained registration of the word *Turakhia* as a word mark under Class 9 on 26 February 2007 with regard to optical goods and contact lenses. He submits that even

the respondent had applied for registration in respect of the same name, but the same is not granted to the respondent. Relying upon the provisions of Section 35 of the Trade Marks Act 1999, Mr. Saraf submits that the appellants had made out a *prima-facie* case and further, balance of convenience was also on the side of the appellants. Mr. Saraf submits that there are no *bona fides* involved in the defence raised by the respondent and therefore, injunction as prayed for, was required to be granted in the facts and circumstances of the present case.

3] Ms Kadambari Surve, learned counsel for the respondent, submits that Turakhia is in fact, the family name or surname of the respondent. The respondent undertakes business at Kandivali, which is at some distance from the place of business of the appellants and further, there is absolutely no similarity between the lettering styles, placement and logo adopted by the respondent, whilst describing its business as *Turakhia Vision Care*. Ms Surve submits that '*Turakhia*' is a common surname in Gujarathi community and grave and irreparable prejudice will occasion the respondent, if injunction as prayed for is granted. Ms Surve submits that the appellants have failed to make out any *prima-facie* case sufficient for grant of injunction.

4] Having heard learned counsel for the parties and considered their submissions, we are satisfied that the appellants have not made out any case to warrant interference with the impugned order, by which the learned Single Judge has declined

to exercise discretion in favour of the appellants.

5] In this case, the material on record at least *prima-facie* establishes that the use of the word 'Turakhia' by the respondent is *bona fide* and further, there is hardly any real possibility that the customers are deceived or confused, on account of use of such word by the respondent. The appellants function under the name and style of 'Turakhia Opticians' at Vile Parle, whereas, the respondent, whose actual surname is Turakhia, functions under the name and style of 'Turakhia Vision Care' at Kandivali, which is at some distance from Vile Parle. The impugned order notes that the appellants, whilst describing themselves, use the primary colour background of blue, whereas the respondent uses red or orange. The lettering style, placement and logo are entirely different from that use by the appellants. Even geographically, the places of business are at some distance away from each other. This material is sufficient to come to the conclusion that the appellants have failed to make out a *prima-faice* case.

6] Besides, as observed in the impugned order, the appellants have failed to produce any material on record with regard to details of sale evidencing use or reputation to some substantial degree. The appellants have failed to produce any invoices, statements of Chartered Accountant or for that matter, even a tabulation authenticated by themselves. There is also no dispute that surname of the respondent is Turakhia and at least *prima-facie* therefore, it cannot be said that the use of said word

by the respondent lacks any *bona fides*. These were sufficient grounds to decline injunction.

7] Further, this appeal is against an interim order. The scope of such appeal is quite limited. The Hon'ble Supreme Court, in *Wander Ltd. & Anr. vs. Antox India P. Ltd.*¹, has observed thus:

“9. Usually, the prayer for grant of an interlocutory injunction is at a stage when the existence of the legal right asserted by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. The court, at this stage, acts on certain well settled principles of administration of this form of interlocutory remedy which is both temporary and discretionary. The object of the interlocutory injunction, it is stated

“...is to protect the plaintiff against injury by violation of his rights for which he could not adequately be compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and determine where the "balance of convenience lies".

The interlocutory remedy is intended to preserve in status quo, the rights of parties which may appear on a prima facie. The court also, in restraining a defendant from exercising what he considers his legal right but what the plaintiff would like to be prevented, puts into the scales, as a relevant consideration whether the defendant has yet to

1 1990 (Supp) SCC 727

commence his enterprise or whether he has already been doing so in which latter case considerations somewhat different from those that apply to a case where the defendant is yet to commence his enterprise, are attracted.

14. 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 the 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 court's exercise of discretion. After referring to these principles Gajendragadkar, J. in *Printers (Mysore) Private Ltd. V. Potha Joseph*: (SCR 721)

“... These principles are well established, but as has been observed by Viscount Simon in *Charles Osenton & Co. v. Jhanaton* (1942 AC 130) ‘...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’.

The appellate judgment does not seem to defer to this principle.”

(Emphasis supplied)

8] The aforesaid position has been reiterated by the Supreme Court in the case of ***Mohd. Mehtab Khan & Ors. vs. Khushnuma Ibrahim Khan & Ors.***² (paragraphs 20 to 22).

9] We are satisfied that the appellants in the present case have failed to make out a *prima-facie* case and further establish that balance of convenience was on their side. Besides, applying the principles set out in *Wander Ltd. (supra)* and *Mohd. Mehtab Khan (supra)*, we are satisfied that the impugned order is not vitiated by any jurisdictional error, error of principle or for that matter perversity or unreasonableness. Accordingly, there is no case made out to interfere with the impugned order.

10] This appeal is accordingly, dismissed. There shall be no order as to costs.

(CHIEF JUSTICE)

(M.S.SONAK, J.)

² (2013) 9 SCC 221