

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

%

Date of Decision: 28th October, 2022

+

FAO-IPD 10/2021 & CM APPL. 12717-18/2019

M/S BALAR MARKETING PVT. LTD.

.... Appellant

Through: Mr. Anirudh Bakhru, Mr. Samrat,
Mr. S.K. Bansal, Mr. Ajay Amitabh Suman,
Mr. Rishi Bansal, Mr. Kamal Naresh, Mr. Aditya
Rajesh and Mr. Aviral Srivastava, Advocates.

versus

M/S KUNDAN CABLE INDIA

..... Respondent

Through: Mr. M.K. Miglani, Advocate.

+

FAO-IPD 11/2021 & CM APPL. 12554-55/2019

M/S BALAR MARKETING PVT. LTD.

..... Appellant

Through: Mr. Anirudh Bakhru, Mr. Samrat,
Mr. S.K. Bansal, Mr. Ajay Amitabh Suman,
Mr. Rishi Bansal, Mr. Kamal Naresh, Mr. Aditya
Rajesh and Mr. Aviral Srivastava, Advocates.

versus

M/S KUNDAN CABLES (INDIA) PVT. LTD.

..... Respondent

Through: Mr. M.K. Miglani, Advocate.

+

FAO-IPD 12/2021 & CM APPL. 12715-16/2019

M/S BALAR MARKETING PVT. LTD.

..... Appellant

Through: Mr. Anirudh Bakhru, Mr. Samrat,
Mr. S.K. Bansal, Mr. Ajay Amitabh Suman,
Mr. Rishi Bansal, Mr. Kamal Naresh, Mr. Aditya
Rajesh and Mr. Aviral Srivastava, Advocates.

versus

M/S KUNDAN CABLE INDIA Respondent
Through: Mr. M.K. Miglani, Advocate.

+ FAO-IPD 13/2021 & CM APPL. 12719-21/2019

M/S BALAR MARKETING PVT. LTD. Appellant
Through: Mr. Anirudh Bakhru, Mr. Samrat,
Mr. S.K. Bansal, Mr. Ajay Amitabh Suman,
Mr. Rishi Bansal, Mr. Kamal Naresh, Mr. Aditya
Rajesh and Mr. Aviral Srivastava, Advocates.

versus

M/S KUNDAN CABLES (INDIA) PVT. LTD. Respondent
Through: Mr. M.K. Miglani, Advocate.

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

JUDGEMENT

JYOTI SINGH, J.

1. Present Appeals have been filed by the Appellant assailing the common order dated 30.11.2018 passed by learned Trial Court in suits bearing TM Nos. 70/2010, 71/2010, 72/2010 and 73/2010 and counter-claim bearing TM No. 7/2015. On account of the similitude of facts and common questions of law as well as the fact that the impugned order is a common order, the appeals are being decided by a common judgment.

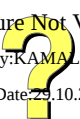
2. The learned Trial Court has *vide* the impugned order dated 30.11.2018, dismissed the interim injunction applications filed by the Appellant under Order 39 Rules 1 and 2, CPC, 1908. Respondent herein is the Plaintiff in TM No.70/2010 while Appellant herein is the Plaintiff in the

remaining three suits before the Trial Court. Parties are hereinafter referred to as per their litigating status before this Court.

3. As per the averments in the appeals, Appellant is engaged in the business of manufacturing and marketing of wide range of electrical goods including electrical accessories, switches, wires and cables, electric irons, etc. under the trademarks KUNDAN and KUNDAN CAB (label). Respondent is engaged in the business of manufacturing all types of high-class electrical P.V.C. wires and cables under the trademarks KUNDAN and KUNDAN CABLE (label).

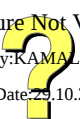
4. Litigation between the parties is stated to have originated when Appellant filed a complaint under Sections 78 and 79 of the Trade and Merchandise Marks Act, 1958 against an unknown person on 14.01.1994. Subsequently on 05.03.1994, impugned goods under the impugned trademark were seized from M/s Madras Cable Agencies, alleged distributor of the Respondent. As a counterblast, Respondent filed a suit before this Court for permanent injunction and thereafter, Appellant filed three suits against the Respondent as well as a counter-claim in the suit filed by the Respondent, each of which are subject matters of the present appeals.

5. As per the chronology of dates and events set out in the appeals, suit bearing TM No. 70/2010 was filed by the Respondent on 14.04.1994 before this Court, under Sections 105 and 106 of the Trade and Merchandise Marks Act, 1958, seeking relief of permanent injunction against the use of trademark KUNDAN/KUNDAN CAB in relation to electric wires, P.V.C. cables and allied goods, amounting to passing off. On 30.04.2002, plaint was amended and finally, the suit was transferred to the Trial Court.



6. On 08.09.1994, Appellant filed a suit under Sections 51, 55 and 62 of the Copyright Act, 1957 before this Court, seeking permanent injunction restraining the Respondent from infringing the copyright of the Plaintiff in the artistic work in 'KUNDAN CAB' (label), used in relation to electrical wires and cables as well as passing off. This suit was also transferred to the Trial Court and re-numbered as TM No. 71/2010. On 20.06.1995, second suit was filed by the Appellant against M/s Kundan Cables (India), seeking permanent injunction against the Respondent from directly or indirectly using the trademark KUNDAN/KUNDAN CABLES and KUNDANCAB as well as damages in the sum of Rs.5,00,500/-, which was transferred to the Trial Court and re-numbered as TM No. 73/2010. Third suit was filed by the Appellant on 24.11.2006 under Section 55 of the Copyright Act, 1957 in this Court against M/s Kundan Cable (India) Private Limited, seeking permanent injunction from using the impugned trademark/trade name KUNDAN/ M/S KUNDAN CABLES (INDIA) PVT. LTD. or any other trademark/tradename identical with or deceptively similar to Appellant's trademark KUNDAN/KUNDAN CAB registered under No.507445 in Class 09 as well as from infringement of copyright in the labels KUNDAN/KUNDAN CAB and passing off. The suit was transferred to the Trial Court and re-numbered as TM No. 72/2010. In the suit filed by the Respondent, i.e., TM No. 70/2010, Appellant filed a counter-claim on 09.04.1995, which was amended on 03.09.1998. The same was separately registered and re-numbered as TM No. 7/2015.

7. Facts to the extent relevant for adjudication of the present appeals and as averred therein are that the Appellant honestly, *bonafidely* and in the course of trade adopted the trademark KUNDAN in 1975 in respect of wide



range of electrical goods, such as, fuse units, wires and cables, etc. and has been continuously using the same since then. Appellant claims ownership and proprietorship of the trademark KUNDAN from the year 1975 on the basis of a Deed of Assignment dated 01.05.1998, executed by Smt. Promila Sehgal, proprietor of M/s Atul Cable Company, who had adopted the said trademark in the year 1975. It is averred that Appellant acquired the trademarks KUNDAN and KUNDAN CAB alongwith the goodwill from its predecessor M/s Aipiai Electric Company, under a Deed of Assignment dated 17.02.1993. The predecessor had adopted the trademark in the year 1980 in respect of electrical accessories and fittings and the trademark was registered in its favour under No. 507445 in Class 09. In view of the assignment, necessary amendments were recorded in the Trade Marks Registry and registration certificate was issued in favour of the Appellant. On this basis, Appellant claims adoption of the trademark from the year 1980.

8. Additionally, it is averred that Appellant has also filed applications for registration of its trademarks KUNDAN and KUNDAN CAB under Nos.566441 in Class 09 and 389177 in Class 07, which are pending at various stages. One Sh. Lakha Ram Sharma has initiated opposition proceedings against applications No.597389 in Class 09, 597390 in Class 11 and 597391 in Class 07, which were rejected *vide* order dated 24.03.2004 by the Registrar of Trade Marks and against which the appeal was filed in IPAB, Chennai. It is stated that Appellant employs a unique lettering style and colour combination in KUNDAN CAB (label) which is the original artistic work in which the Appellant has a copyright duly registered under the Copyright Act, 1957.

9. It is further averred that the trademarks KUNDAN and KUNDAN CAB have become distinctive and are associated exclusively with the Appellant for the electrical goods etc. and the Appellant enjoys immense reputation in the trademarks, which is evident from the sales figures furnished in the appeals, in respect of sales by both the predecessors. It is also averred that Appellant has expended enormous amounts of money on publicity and advertisement of the goods under the said trademarks. Appellant is thus a holder of vested rights, both under statutory and common law and any unauthorised use of the trademarks by a third party amounts to infringement and passing off of not only for goods for which the trademarks are registered but also for allied and cognate goods.

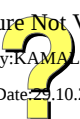
10. The grievance of the Appellant before the Trial Court and as re-stated in the present appeals is that Appellant is a prior adopter and user of the trademarks on the basis of the two Assignment Deeds, one executed by M/s Aipiai Electric Company and another executed by Smt. Promila Sehgal and the user dates back to 1975. Respondent admittedly filed a trademark application for registration of the trademark KUNDAN on 13.05.1993 on a 'proposed to be used' basis. Being a prior user of the trademark KUNDAN from the year 1975, Appellant was entitled to the grant of interim injunction by the Trial Court. However, by the impugned order, applications under Order 39 Rules 1 and 2, CPC, 1908 have been illegally and arbitrarily dismissed by the Trial Court, constraining the Appellant to approach this Court.

11. Contentions raised on behalf of the Appellant can be summarised as follows:-

- a) Trial Court failed to appreciate that on the basis of the Assignment Deed dated 01.05.1998, executed by Smt. Promila Sehgal, the user of the Appellant dates back to the year 1975, since it is a settled law that once a trademark is assigned, all rights vested in the Assignor, including the date of adoption and user stand transferred to the Assignee. There was sufficient evidence on record before the Trial Court to show user of the trademarks by the two Assignors and the Trial Court erred in not considering the voluminous documents which included bills and invoices for the relevant period;
- b) Respondent has admittedly filed the trademark application in 1993 on a 'proposed to be used' basis and also filed a letter on record dated 23.04.1993, addressed to the Assistant Collector, Central Excise, which indicates that it was engaged in the business of unbranded products at the relevant time. Appellant had filed several trademark applications on various dates between 1982 to 17.05.1993, which are prior to the user date claimed by the Respondent in its trademark application. Several bills and invoices reflecting the user by the predecessors of the Appellant as well as advertisements of the trademarks KUNDAN and KUNDAN CABLE were placed on record, which were enough to establish a *prima facie* case that the Appellant was a prior user compared to the Respondent;

- c) Appellant on account of its prior user and prior registration has exclusive rights to the trademarks KUNDAN/KUNDAN CAB. The impugned trademarks used by the Respondent, i.e. KUNDAN CABLE/KUNDAN are phonetically and visually identical/deceptively similar to Appellant's trademarks and the competing goods being similar/allied and cognate, likelihood of confusion amongst the consumers is inevitable. In view of the judgment of the Supreme Court in *Kaviraj Pandit Durga Dutt Sharma v. Navaratna Pharmaceutical Laboratories*, (1965) 1 SCR 737, *K.R. Chinna Krishna Chettiar v. Shri Ambal and Co., Madras and Another*, (1969) 2 SCC 1311 and *Ruston & Hornsby Ltd. v. Zamindara Engineering Co.*, (1969) 2 SCC 727, the Trial Court erred in not granting interim injunction in favour of the Appellant. Respondent's contention that the Appellant is estopped from claiming user from 1975 premised on the Assignment Deed executed by Smt. Promila Sehgal, on account of having questioned the veracity of the documents showing her user, in an earlier litigation between the Appellant and Smt. Promila Sehgal, is completely misconceived. The issue of the documents being unreliable or suspect was never adjudicated in the earlier litigation between her and the parties herein and even in the present proceedings, Respondent has been unable to point out any inconsistency in any document relied upon by the Appellant to claim user from 1975, including the invoices pertaining to sale transactions by Smt. Promila Sehgal;

- d) it is a settled law that in order to defeat Appellant's registrations, heavy onus lies on the Respondent to show a credible and substantial user prior to the registration of the Appellant, which it has failed to discharge. Reliance was placed on the judgment in ***Pioneer Nuts and Bolts Pvt. Ltd. v. M/s Goodwill Enterprises, 2009 SCC OnLine Del 2851***, for the said proposition; and
- e) drawing a comparative between the trademark applications/registrations of rival trademarks between the parties, a tabular chart was filed by the Appellant. It was brought out that Appellant's registered trademark KUNDAN (word *per se*) under no. 507445 was registered in Class 09 on 23.03.1989 for electrical goods, etc. claiming user from 01.04.1982, whereas Respondent's trademark KUNDAN is registered in Class 09 for all kinds of electrical cables only on 13.05.1993 on a 'proposed to be used' basis. Appellant applied for registration of the trademark KUNDAN CAB (label) in Class 09 for electric accessories and fittings etc. on 29.01.1992 and the trademark is registered. Although initially, user claim was from 01.04.1982, however, an amendment was filed on 15.04.1994 to amend the user from 1980, which was allowed by the Registrar of the Trade Marks and the mark was published in the Trade Mark Journal on 01.04.1989 with the amendment. Other applications for KUNDAN/KUNDAN CAB (label) for different goods in Classes 07 and 09 are pending at various stages. Insofar as copyright registrations are concerned, Appellant's KUNDAN CAB is registered, while Respondent has not even claimed copyright in any work.



12. Arguments in opposition, canvassed by learned counsel appearing on behalf of the Respondent, are captured as follows:-

- a) this Court ought not to interfere in the impugned order, following the dicta of the Supreme Court in *Wander Ltd. and Another v. Antox India P. Ltd., 1990 Supp SCC 727*, wherein the Supreme Court has held that unless the discretion exercised by the Court of first instance is arbitrary, perverse or capricious or the Court has ignored the settled principle of law regulating grant or refusal of interlocutory injunctions, the Appellate Court will not interfere in the exercise of such discretion;
- b) the entire emphasis of the argument of the Appellant is based on the registrations of its trademarks, which is beyond the scope of the appeal. Perusal of the pleadings in the appeals would show that no ground has been urged that the Trial Court did not consider the registrations of the trademarks of the Appellant and in fact, the Appellant did not even make any submissions qua its registrations before the Trial Court. Respondent's plea of invalidity of registrations of the Appellant has been found to be tenable before the Trial Court and an issue as to invalidity has been framed. Respondent has also filed cancellation petitions and the suit qua infringement has been stayed;
- c) present case is not a case of a third-party use of a registered trademark. The parties to the *lis* were in relationship of purchase and sale much prior to the litigation, through the Appellant's predecessor;

- d) Respondent has erroneously mentioned 'proposed to be used' in the application for registration of the trademark, in face of voluminous evidence of its use much prior to the said year. Law provides two courses of action in such circumstances viz: amending the user or filing a fresh application. Respondent has chosen the latter path and has filed a fresh application, which is pending. Respondent is the prior user of the trademark KUNDAN since January, 1981, which is apparent from the Delhi Sales Tax Registration Certificate dated 12.06.1981, CST Registration Certificate dated 17.01.1981 and Excise Code Certificate dated 06.01.1981. Appellant does not dispute that its predecessor was purchasing goods from the Respondent from the year 1981 to 1992.
- e) Appellant is mischievously seeking to pre-date the user by relying on Assignment Deeds from M/s Aipiai Electric Company and Smt. Promila Sehgal, respectively, with a sole purpose of defeating the user claim of the Respondent from 1981, which is contrary to its own applications for registrations. Veracity of the documents of Smt. Promila Sehgal is yet to be examined by any judicial authority. Appellant had itself claimed that the said documents were unreliable in an earlier litigation between the Appellant, Respondent and Smt. Promila Sehgal.
- f) Appellant has concealed from this Court that against the rejection of the Respondent's opposition to Appellant's application No.389177 for registration of trademark KUNDAN CAB by the Registrar of Trade Marks, Respondent had filed an appeal before

the IPAB and after hearing the parties, *vide* order dated 13.07.2013, the IPAB set aside the order and remanded the matter back for fresh hearing. Challenge to the said order by the Appellant in WP(C) 1078 of 2014 before this Court was unsuccessful and the matter is currently pending before the Registrar; and

- g) Trial Court's reasoning in declining interim injunction on the ground that the very purpose of seeking interim injunction is urgency of relief which is lost, where for a quarter of a Century, parties have been conducting business under the trademark KUNDAN in the absence of a restraint order, cannot be faulted with. Even today, in the present appeals, Appellant is unable to show any confusion amongst the customers or irreparable harm or injury in the last three decades and the balance of convenience also does not lie in favour of the Appellant for grant of ad-interim injunction at this stage, when the suit has proceeded to trial.

13. I have heard learned counsels for the parties and examined their respective contentions.

14. It needs to be noted that during the course of hearing, an issue had arisen with respect to the maintainability of the present appeals before this Court and arguments were addressed by both sides on this aspect. Contention on behalf of the Appellant was that the original suits were filed by the Appellant as ordinary civil suits, with valuation of Rs. 6 lakhs and below, much prior to the enactment of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015

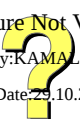
(hereinafter referred to as ‘2015 Act’) and were tried as ordinary non-commercial suits. On coming into effect of the 2015 Act on 23.10.2015, in view of the definition of the ‘commercial disputes’ under Section 2(c)(xvii), all IPR disputes were ‘commercial disputes’ and under Section 2(i), the ‘specified value’ was Rs. 1 crore. The 2015 Act was amended by the Amending Act 28 of 2018 w.e.f. 03.05.2018 and the ‘specified value’ was reduced to Rs. 3 lakhs from Rs. 1 crore. By virtue of the provisions of Section 19 of the Amended Act (hereinafter referred to as ‘2018 Act’), provisions of the Act are prospective and shall apply only to cases raising commercial disputes, filed on or after 03.05.2018. This position of law has been affirmed by the Division Bench of this Court in ***Satyanarain Khandelwal v. Prem Arora, 2022 SCC OnLine Del 2142***, where the Court has held that the 2018 Amendment shall apply to commercial disputes raised on or after 03.05.2018. As per Section 15 of the 2018 Act, all suits and applications relating to commercial disputes of the required specified value pending in any Civil Court, for which a Commercial Court has been constituted, shall be transferred to such Commercial Court. From a harmonious interpretation of Sections 15 and 19 of the 2018 Act, the only conclusion that can be drawn is that Section 15 of the 2018 Act will be applicable to suits filed after the cut-off date of the applicability of the amendment, i.e. 03.05.2018. In the instant case, the suits were instituted prior to the enactment of the 2015 Act. The suits, from which the present Appeals arise, were tried as non-commercial suits even after the enactment of the 2015 Act, as the specified value was less than Rs. 1 crore. Provisions of 2018 Act, being inapplicable, Section 13(1A) which provides for an

Appeal before the Commercial Appellate Division of this Court, would not apply and the present Appeals will lie before this Court.

15. *Per contra*, questioning the maintainability of the Appeals, learned counsel for the Respondent submitted that the impugned order was passed on 30.11.2018, after the 2015 Act had come into operation. *Vide* Notification dated 07.07.2018, all District Judges/Additional District Judges were designated as Commercial Courts and the impugned order would thus be an order emanating from a Commercial Court. Section 13(1) of the Act, prior to its amendment provided that any person aggrieved by the decision of the Commercial Court or Commercial Division of a High Court may appeal to the Commercial Appellate Division of that High Court within a period of 60 days from the date of the judgment or the order. After amendment, Section 13(1A) provides that any person aggrieved by the judgment or order of a Commercial Court at the level of District Judge exercising original civil jurisdiction may appeal to the Commercial Appellate Division of that High Court within a period of 60 days from the date of the judgment or order. Respondent does not dispute that 2018 Act shall apply to suits filed on or after 03.05.2018, however, even in the regime that prevailed prior to enactment of the 2015 Act, appeals from orders of District Judges would lie to the High Court and would be heard by the Single Judge. With the enactment of 2015 Act, the right of appeal has remained intact and only the Forum has changed from the Single Judge to the Division Bench. Therefore, the present appeals will lie before the Commercial Appellate Division of this Court, irrespective of whether the 2015 Act or the 2018 Act applies.

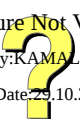
16. It is undisputed that the suits from which these Appeals arise, were filed as ordinary civil suits before this Court with valuation of Rs. 6 lakhs and below. They were subsequently transferred to the Trial Court due to the revised pecuniary jurisdiction and re-numbered. Even after the enactment of the 2015 Act, on account of the specified value under Section 2(1)(i) of the said Act being Rs. 1 crore, the suits were tried as non-commercial suits. Under the 2018 Act, the specified value has reduced to Rs. 3 lakhs, however, the amendment being prospective, by virtue of Section 19 of the 2018 Act and as held by the Division Bench of this Court in *Satyanarain Khandelwal (Supra)*, the suits are being tried as non-commercial suits and Section 13(1) and 13(1A) are inapplicable.

17. Reliance was placed by the Respondent on the judgment of this Court in *Delhi Tourism and Transportation Development Corporation v. Swadeshi Civil Infrastructure Pvt. Ltd. (FAO 232/2020)*. In my view, the said judgment would not inure to the benefit of the Respondent, as in the said case, the Court was *in seisin* of the legal question as to whether under provisions of Section 13(1A) of the 2015 Act, appeals arising out of orders or judgments passed by a Commercial Court at the level of District Judge exercising Original Civil jurisdiction are to be heard by a Single Judge of this Court or should be placed before the Division Bench. After analysing the Legislative scheme of the 2015 Act, as it stands post the 2018 Amendment, the Court held that appeals arising out of orders/judgments passed by a Commercial Court at the level of District Judge (including Additional District Judge) exercising Original Civil jurisdiction are to be listed before Commercial Appellate Division Bench of this Court, which are designated Division Benches and not a Single Judge.



18. As aforementioned, since the 2018 Act is inapplicable to the present suits, the said judgment which deals with the interpretation and applicability of Section 13(1A), would not apply to the suits in question. This Court thus rejects the contention of the Respondent and holds that the present appeals are maintainable before this Court.

19. Coming to the merits of the case, I have perused the impugned order dated 30.11.2018 passed by the Trial Court. Having noted the facts of each suit separately and the arguments as well as the judgments relied upon by the respective parties, the learned Trial Court has dismissed the applications under Order 39 Rules 1 and 2 CPC filed by the Appellant. The Trial Court has observed that *prima facie*, parties would have to establish prior user, as registration of the mark would be inconsequential if a party can show that it was using the mark prior to the registration of the opponent party. Trial Court has declined to grant interim injunction in favour of the Appellant on the grounds that: (a) there is inconsistency in the stand taken by the Appellant inasmuch in the initial pleadings, user of the trademarks was claimed since 01.04.1982, which was thereafter sought to be rectified to January, 1980 by filing TM-16, belying common sense as to why the change was brought about after filing of the suit; (b) Appellant has not filed any contemporaneous documents with the application to support use of the mark KUNDAN since 1980; (c) Appellant's user claim from 1975, premised on an Assignment Deed executed by Smt. Promila Sehgal cannot be entertained in view of a categorical stand taken by the Appellant in an earlier litigation that the documents filed by Smt. Promila Sehgal were unreliable; and (d) purpose of injunction is to provide immediate and urgent relief, which is lost in the present case since despite a quarter of century having elapsed,



there has been no restraint order and both parties are carrying on business under the mark KUNDAN. In respect of the Respondent, Trial Court has noted that while the pleadings reflect that the user claim dates back to January, 1981, the day the firm was registered, Respondent filed an application only in 1993 seeking registration of the mark KUNDAN on a 'proposed to be used' basis. Respondent was thus either not serious of its trademark or the mark had not obtained requisite reputation over the years until 1993 and that even the letter written to the Assistant Collector, Excise shows that Respondent was manufacturing unbranded goods till 1993.

20. Having examined the impugned order, this Court finds no reason to interfere with the same. First and foremost, learned counsel for the Respondent is right in his submission that the scope of interference by an Appellate Court is extremely limited. Law on this point has been succinctly elucidated by the Supreme Court in *Wander Ltd. (supra)* and relevant para is as follows:-

“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 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 Court's exercise of discretion. After referring to these principles Gajendragadkar, J. in Printers (Mysore) Private Ltd. v. Pothan Joseph [(1960) 3 SCR 713 : AIR 1960 SC 1156] : (SCR 721)

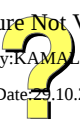
“... These principles are well established, but as has been observed by Viscount Simon in Charles Osenton & Co. v. Jhanaton [1942 AC 130] ‘...the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that 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.”

21. Therefore, if the discretion has been exercised by the Trial Court in a judicious manner, this Court would not interfere and substitute its own view unless the discretion is shown to have been exercised arbitrarily, capriciously or peevishly or where the Court has ignored the settled principles of law regulating the grant or refusal of interlocutory injunctions. Keeping this binding dicta in the backdrop, when the impugned order is tested, no infirmity can be found with the exercise of discretion by the Trial Court.

22. It bears repetition to state that the Trial Court has first analyzed the trinity principle of grant of interlocutory injunctions and then gone on to examine if the Appellant had set out a *prima facie* case, balance of convenience and irreparable loss and injury which cannot be monetarily compensated. Reliance has been placed on the judgment of this Court in

International Hotel Limited v. NDMC, AIR 2011 Delhi 425, where the three principles have been culled out. Trial Court has also rightly referred to the principle of law that ‘prior user’ is superior to registration in the trademark. From a reading of the impugned order as well as the arguments canvassed before this Court, it is evident that there are disputed questions of fact relating to the claim of user by the respective parties and many developments have taken place during the pendency of the suit. Be it ingeminated that the suits have proceeded to the stage of trial qua the relief of passing off, as apprised by the learned counsel for the Respondent during the course of hearing. The time-honoured trinity principle of *prima facie* case, balance of convenience and irreparable harm and injury for grant of interlocutory injunctions is for determination of urgent reliefs sought by parties to the *lis*. Admittedly, no interim restraint orders were passed in the suits and nearly 3 decades have passed during which much water has flown and both parties are using the trademark KUNDAN for their respective businesses. In my view, Appellant has failed to make out a case of such a threshold which requires this Court to interfere and change the position obtaining between the parties for several years. The disputed questions raised before the Trial Court would be aptly tested at the trial, where both parties shall have the opportunity to prove their case by leading evidence. Respondent has admittedly filed an application in 1993 on ‘proposed to be used’ basis and thus, whether or not it was selling the goods under the impugned trademark from 1981, as claimed, would be a matter of trial. Similarly, the change in stance of the Appellant with respect to the amendment of user from 1982 to 1980, post the filing of the suit and the rights flowing under the Assignment Deed executed by Smt. Promila



Sehgal, including alleged user from 1975 as well as other issues would have to be established by cogent evidence during the trial, as rightly held by the Trial Court. This Court finds no cogent reason to interfere with the impugned order at this stage when the matter is set for trial *qua* passing off.

23. In view of the aforesaid, all the four appeals are dismissed, along with pending applications. However, considering the fact that the suits have been pending for several years, the Trial Court is requested to expedite the trial *qua* the relief of passing off, wherever sought by the parties. Parties are also at liberty to take recourse to appropriate remedies for expediting the connected proceedings relating to cancellation/rectification/opposition pending in the respective Forums, so that depending on the outcome of the said proceedings, the present suits can be decided *qua* the relief of infringement of trademarks.

24. It is made clear that this Court has not expressed any opinion on the merits of the suits and observations made in this judgement shall have no bearing on the adjudication by the learned Trial Court.

JYOTI SINGH, J

OCTOBER 28, 2022/rk/shivam