

Neutral Citation Number 2023/DHC/001486

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

*Reserved on: January 10, 2023*

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*Pronounced on: March 01, 2023*

+ **FAO (COMM) 185/2022 & CM APPLs.52334-52335/2022**

**JAIN SHIKANJI PRIVATE LIMITED**

**..... Appellant**

Through: Mr. J. Sai Deepak with Ms. Kangan Roda, Mr. Nitesh Jain, Mr. Sharad Besoya and Mr. Vatsal Chandra, Advocates.

Versus

**SATISH KUMAR JAIN**

**..... Respondent**

Through: Mr. Gaurav Barathi with Ms. Muskan Arora and Mr. Vishal Shrivastava, Advocates.

**CORAM:**

**HON'BLE MR. JUSTICE MANMOHAN**

**HON'BLE MR. JUSTICE SAURABH BANERJEE**

**J U D G M E N T**

**SAURABH BANERJEE, J.**

1. The *three* elements essential for adjudication of trade mark disputes, like the present one, involve '*Name*' (*Jain*), '*Work*' (*Shikanji*) and '*Identity*' (*Jain Shikanji*).

2. Present dispute is *inter-se* 'Jain' family members, who amongst other products, deal in Shikanji under the name and style of *Jain Shikanji*. By virtue of the present appeal, appellant belonging to one 'Jain' family member is calling upon this Court to adjudicate upon the legality of the impugned order whereby it has been restrained from using the trade mark *Jain Shikanji* of respondent, the other 'Jain' family member. The details thereof are elucidated hereinunder.

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3. Appellant (*original defendant*) by this appeal seeks to impugn order dated 05.11.2022 passed by the learned Trial Court whereby an application under *Order XXXIX rules 1 & 2* of The Code of Civil Procedure, 1908<sup>1</sup> of the respondent (*original plaintiff*) has been allowed in his favour and the appellant along with other persons claiming through it have been restrained from selling, offering for sale any goods, advertising or promoting any product under the trade mark *Jain Shikanji/ Jain Shikanji Restaurant* or any other trade mark similar or deceptively similar to the trade mark of the respondent namely *Jain Shikanji* till the disposal of the said suit.

4. Records reveal that the respondent, an individual, claiming himself to be proprietor of the registered trade mark *Jain Shikanji* and running several outlets in different parts of the country under the name and style of *Jain Shikanji* and *Jain Shikanji Restaurant* for selling *shikanji* drink, *shikanji* powder and other food products under the said registered mark, instituted a suit for permanent and mandatory injunction for infringement of trade marks, passing off, dilution of trade marks, unfair competition, damages and delivery up etc. with respect to his trade mark/ logo/ device *Jain Shikanji* and other *Jain Shikanji* formative/ containing marks in addition to other ancillary reliefs<sup>2</sup> against the appellant, a company incorporated under the provisions of the Companies Act, 2013 and engaged in the business of selling and manufacturing similar products as that of the respondent under the trade mark *Jain Shikanji* before the learned Trial Court.

5. As per respondent, the dispute involved herein has a history which started from the father of respondent, Late Sh. Parmatma Sharan Jain<sup>3</sup>, who began by opening a Shikanji Shop under the name and style of *Jain Shikanji*

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<sup>1</sup> Henceforth referred as “*CPC*”

<sup>2</sup> Henceforth referred as “*Suit*”

<sup>3</sup> Henceforth referred as “*late Sh. Jain*”

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at Vikas Nagar Colony, Kadrabad, Delhi-Meerut Road, Modinagar, District Ghaziabad, Uttar Pradesh more than *five decades ago*. With time, the said trade mark *Jain Shikanji* became distinctive of the said late Sh. Jain and his sons, including the respondent and gained immense popularity and goodwill.

6. Respondent claimed that after the demise of said late Sh. Jain in 1991, he along with his four other surviving brothers systematically devised a manner to carry forward the said business under the name and style of *Jain Shikanji*. Resultantly, over a period of time, the said trade mark *Jain Shikanji* acquired a secondary meaning. The respondent also opened several outlets under the name and style of *Jain Shikanji* from time to time after obtaining requisite food licenses, which are being renewed from time to time and also after obtaining registrations for the trade mark *Jain Shikanji* from time to time with appropriate statutory tax authority, which are also being paid from time to time.

7. Respondent claimed to have filed several applications for registration of the mark *Jain Shikanji* in Class 29, 32, 35, 42 amongst other classes claiming user since 14.06.1996 from 26.05.2008 onwards and as few such registrations are valid and subsisting in its name, it has the exclusive right to use the same in respect of goods or services for which they are registered.

8. Respondent claimed to have learnt in the second week of September 2021 that since its incorporation on 13.11.2019, the appellant commenced carrying on the similar business of manufacturing, selling, producing, importing, exporting, distributing, trading, supplying, running, managing and dealing in making of *shikanji* masala, soda snacks and in all kinds of food, food products, dairy products, bakery and confectionery products under its trade mark *Jain Shikanji*. Claiming the said usage by appellant in

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the same line of business as respondent was to show an association with the respondent as it was without any permission, license or authorization from him, respondent instituted the suit against appellant before the learned Trial Court.

9. Appellant, upon service admitted its registration/ incorporation under The Companies Act, 2013 on 13.11.2019 and claimed that as Mr. Anubhav Jain, Promoter-Director of appellant belonged to the family of late Sh. Banarsi Das Jain who started the business under the name and style of *Jain Shikanji* in 1937 and further as the said Promoter-Director of appellant was the son of Sh. Pradeep Kumar Jain (*a son of brother of late Sh. Jain*) and Mrs. Beena Jain<sup>4</sup>, who were already using the said trade mark *Jain Shikanji*, appellant was well within its rights to use the said trade mark *Jain Shikanji* as well. Also, as per appellant 'Jain' being the surname of family of the Promoter-Director of appellant, it was free to use the said trade mark *Jain Shikanji* for the purposes of carrying on the lawful business.

10. Further, appellant referring to two earlier suits, being Suit No. 309/2008 before the learned Civil Judge, Ghaziabad, Uttar Pradesh and Suit No. 06/2008 before the learned District Judge, Ghaziabad, Uttar Pradesh instituted after withdrawal of Suit No. 309/2008 by the respondent against the parents of the Promoter-Director of appellant questioned the very maintainability of the suit, especially during the pendency of Suit No. 06/2008. Additionally, as per appellant though vide an order dated 01.11.2008 passed in Suit No. 06/2008, the parents of the Promoter-Director of appellant were restrained from using the trade mark *Jain Shikanji*, however, the said order was subsequently modified vide order dated 29.04.2011 by the Hon'ble High Court of Judicature at Allahabad in

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<sup>4</sup> Henceforth collectively referred as "*parents*"



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an appeal preferred by the parents of the Promoter-Director of appellant wherein it was held that “... ..the order dated 1<sup>st</sup> November 2008 of the Court below on 6-C application is modified to the extent that the said order shall remain in operation so far as in respect of business at Modinagar is concerned. The application for grant of temporary injunction is rejected with regard to the business of the defendants at Ghaziabad subject to the condition stipulated above i.e., filing the returns.”. To sum up, as per appellant, the parents of the Promoter-Director of appellant were entitled to carry on the business under the name and style of *Jain Shikanji* and the newly instituted suit was not maintainable.

11. The appellant thence, referring to a legal notice dated 15.04.1999 issued by one Sh. Swadesh Kumar Jain (*brother of respondent*) to Sh. Pradeep Kumar Jain (*father of Promoter-Director of appellant*) and the reply thereto by the said Sh. Pradeep Kumar Jain on 21.04.1999 (both were not disclosed by respondent in the plaint filed before the learned Trial Court) questioned the conduct of the respondent and once again the maintainability of the suit contending that the respondent was well aware of the business of the parents of the Promoter-Director of appellant since before.

12. After hearing the parties and taking due note of all the contentions, specifically the defenses raised by appellant and the documents on record, learned Trial Court vide the impugned order restrained the appellant, along with other persons claiming through it, from selling, offering for sale any goods, advertising or promoting any product under the trade mark *Jain Shikanji/ Jain Shikanji Restaurant* or any other trade mark similar or deceptively similar to the trade mark of the respondent namely *Jain Shikanji* till the disposal of the said suit.

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13. Hence the challenge in the form of present appeal wherein the learned counsel for appellant contended that there is a 'family aspect' involved in the present litigation on two counts, *firstly* as the Promoter-Director of appellant belonged to the family of late Sh. Banarsi Das Jain, the original founder of the business under the name and style/ using the trade mark *Jain Shikanji* and *secondly* as his own parents were using the said trade mark *Jain Shikanji* to the knowledge of the respondent, appellant was well and truly entitled to use the trade mark *Jain Shikanji*.

14. Learned counsel for appellant then contended that both *Jain* and *Shikanji* being generic words, nobody, much less the respondent, can acquire any exclusive right in either of them or in the combination thereof and thus appellant cannot be restrained from using the said trade mark *Jain Shikanji* to carry on business by the respondent.

15. Learned counsel for appellant thence, relying upon several trade mark applications filed before the Trade Mark Registry by both respondent and appellant in different classes for the same trade mark *Jain Shikanji*, contended that as the appellant was the prior applicant of such applications and sought registration thereof prior to the respondent, it had a better right in and to the trade mark *Jain Shikanji*.

16. Learned counsel for appellant, in wake of pendency of Suit No. 06/2008 and the order dated 29.04.2011 passed by the Hon'ble High Court of judicature at Allahabad, contended that being the registered proprietor of the trade mark *Jain Shikanji*, respondent had already acquiesced for a continuous period of five years in instituting the suit as he was well aware of the use of trade mark *Jain Shikanji* by the parents of the Promoter-Director of appellant. As such, relying upon *Section 33* of the Trade Marks

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Act, 1999<sup>5</sup> the respondent was no longer entitled to either apply for a declaration of the said registered trade mark *Jain Shikanji* being invalid or to oppose the use of the same in relation to the goods or services for which it has been so used by appellant.

17. Learned counsel for appellant, then relying upon *Section 17* of the TM Act and placing reliance upon *Sanjha Chulha vs. Sanjha Chulha & Ors.*<sup>6</sup> contended that registration of the device mark *Jain Shikanji* in favour of respondent does not grant exclusive right to him to use any part of the said mark and thus registration of the device mark *Jain Shikanji* in his favour does not give any right to him over the word mark *Jain Shikanji*.

18. Learned counsel for appellant lastly, upon drawing the attention of this Court to paragraph 28 of the impugned order, contended that in any event as the trade dress comprising of the colour scheme, design, font etc. of the trade mark *Jain Shikanji* of appellant is totally different from that of respondent, there was no violation of any of the Intellectual Property Rights by appellant.

19. *Per Contra* learned counsel for respondent contended that though appellant claims to be hailing from the family of late Sh. Jain, however, the same is immaterial as neither the appellant nor the parents of the Promoter-Director of appellant were ever associated with the business of the said late Sh. Jain at any stage since beginning. This was substantiated by submitting that evidently no document or evidence in support thereof was filed before the learned Trial Court by appellant.

20. Learned counsel for respondent then submitted that both Suit No. 309/2008 and Suit No. 06.2008 were instituted by respondent against the parents of the Promoter-Director of appellant and not the appellant. Further,

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<sup>5</sup> Henceforth referred as “TM Act”

<sup>6</sup> 2022 SCC OnLine Del 3616

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in any event the appellant company was formed much later and was non-existing at the time of institution of the said suits. Thus, the appellant was neither a party in the said suits nor involved therein at any stage.

21. Learned counsel for respondent then drew our attention to the order dated 29.04.2011 (quoted hereinabove) whereby the Hon'ble High Court of judicature at Allahabad in the appeal filed by the parents of the Promoter-Director of appellant had merely modified the order dated 01.11.2008 passed by the learned District Judge, Ghaziabad by allowing them to use the said trade mark *Jain Shikanji* from a particular shop at Ghaziabad only and directed that the same was subject to their filing of quarterly sales returns. Based thereon, it was pointed out that the said order had neither been modified nor varied whereafter it was submitted that as the parents of the Promoter-Director of appellant never filed any quarterly returns in compliance thereof, the earlier order dated 01.11.2008 passed by the learned District Judge, Ghaziabad stood revived. Thus, the parents of the Promoter-Director of appellant were precluded from carrying out any business under the name and style of *Jain Shikanji* beyond the precincts of a particular shop in Ghaziabad, which of course included the appellant or anyone belonging to their family. As such, in principle and even otherwise, the appellant could not have carried out any business under the name and style of *Jain Shikanji* as it could not take benefit of either late Sh. Jain or the parents of the Promoter-Director of appellant as it was of no avail to it.

22. Learned counsel for respondent then contended that it is immaterial if the device/ label marks of the parties are different as the ultimate test is *likelihood of confusion* and in any event case of the respondent rests on the wrongful use of trade mark *Jain Shikanji* per se.



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23. Learned counsel for respondent lastly contended that the respondent had validly obtained registration for the trade mark *Jain Shikanji* in different classes and as the appellant has no connection with the said trade mark *Jain Shikanji* and/ or its originator, it can neither use nor apply for registration of the same

24. Having heard learned counsel for the parties at length and after pondering over various judgments cited by them and having perused the plethora of documents filed by appellant, we proceed to deal with the aforesaid contentions raised by the parties.

25. However, prior to moving ahead, it is relevant to mention that after the final conclusion of the rejoinder arguments by learned counsel for appellant, in response to a query made by this Court, *admitted* that most of the documents referred to and relied upon by him during the course of arguments, based whereon most of the arguments emanate, were either fresh/ new documents filed along with the appeal paper book without seeking any permission for bringing them on record<sup>7</sup> before this Court despite the application qua them still pending before the learned Trial Court or they were either fresh/ new documents filed along with a subsequent application under *Order XLI rule 27* of the CPC filed after a considerable delay of few months<sup>8</sup> for seeking permission from this Court. The appellant has thus filed two sets of fresh/ new documents before this Court which were *admittedly* never forming a part of the record before the learned Trial Court.

26. First set of documents filed by appellant along with the appeal without seeking any permission or leave of this Court cannot be taken into consideration as they being fresh documents were never forming a part of

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<sup>7</sup> Henceforth referred as “*first set*”

<sup>8</sup> Henceforth referred as “*second set*”

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the record before the learned Trial Court. Therefore, all arguments addressed qua them are negated and cannot/ need not be adjudicated by this Court.

27. Qua the second set of documents, though the appellant has filed an application under *Order XLI rule 27* of the CPC seeking permission to bring on record few additional documents, however, no arguments qua the said application were ever addressed by the learned counsel for appellant at any stage. Moreover, and in any event, the said documents were themselves never forming a part of the record before the learned Trial Court as the application under *Order XI rule 12* of the CPC of the appellant qua them was pending when the present appeal was preferred by the appellant. Thus, the said documents and all arguments addressed qua them are also negated and cannot/ need not be considered and/ or adjudicated by this Court. Even otherwise, the provisions of *Order XLI rule 27* of the CPC are stringent and an application can only be allowed on certain restrictive grounds as it is an exception to the general rule with a view to enable a party only in exceptional circumstances, whence such a case at the Appellate stage is made out by the party, such party has to satisfy the Court that despite exercising proper due diligence the said documents were not within its knowledge, power and/ or possession any time before.

28. Appellant's application under *Order XLI rule 27* of the CPC cannot be allowed as no arguments were addressed qua it and being without any plausible explanation and/ or reasoning of their non-filing before the learned Trial Court despite prior knowledge thereof. Alas, the said application is bereft of any substance. Not to mention that the said application has been filed subsequently, only after initiation of the present appeal before us. As this Court cannot look into fresh documents which

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were neither produced before the learned Trial Court nor which find any reference in the impugned order, they and arguments qua them cannot be considered. It is noteworthy, that surprisingly the said application makes no mention of the first set of documents filed by the appellant along with the appeal.

29. Based on the two sets of documents, appellant can neither be permitted of canvassing a case beyond the purview permissible by pleading new grounds and raising new pleas not forming a part of the records before the learned Trial Court nor can be allowed to fill in the blanks to carve out something which was missing with a view to fill up the lacuna or improve upon the existing facts from that which was before the learned Trial Court. An appeal under *Order XLIII rule 1(r)* of the CPC is to be and can be only considered on the basis of material/ documents produced and forming a part of the record before the learned Trial Court. A duty is cast upon a party like appellant while approaching the Appellate forum to confine its case to what it was before the Court below and not to put forth a fresh case by urging fresh points on the basis of fresh documents for the first time which were neither urged as they were never forming a part of the record before the learned Trial Court.

30. Now coming to the contention of the appellant that both *Jain* and *Shikanji* are two common generic words which on combination cannot be used as a trade mark and thus cannot acquire distinctiveness. According to us, the same is meritless as the very same appellant has itself, *admittedly* but wrongly adopted, used and also applied the said trade mark *Jain Shikanji* as a part of its trade name and repeatedly applied for registration and withdrawn applications in different classes from time to time. This shows that the appellant itself identified and recognized the very same *Jain*

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*Shikanji* as a trade mark and also the brand value attached to it. Otherwise, why else would the appellant itself proceed to apply for registration of a generic expression *Jain Shikanji* (on which it has a doubt of being a trade mark). It does not lie in the mouth of the same appellant to contend that the said trade mark *Jain Shikanji* is descriptive or that the respondent does not or cannot have any claim thereto as the same is contrary to its own claims. The said contention is thus turned down.

31. Besides that, today it is a matter of common knowledge that mark(s) such as **INDIA TODAY, UNDER ARMOUR, HEAD & SHOULDERS, TECH MOON, STUDIO MOSAIC, BLACK BULL, AMERICAN EAGLE, AMERICAN AIRLINES, AGARWAL PACKERS & MOVERS, HOLIDAY INN, STUDIO DEPOT, FAIR & LOVELY, VICTORIA SECRET, RED BULL** etc. which, though, are a combination of two separate generic words as one singular mark, very much exist and have been adopted and used all across the globe. Such trade mark(s), after acquiring distinctiveness and upon gaining goodwill are recognized to have built a reputation to qualify as a *well-known mark* amongst the public at large. Needless to say, such trade mark(s) are most certainly capable of being applied for and being registered.

32. Thus, the words '*Jain*' and '*Shikanji*' separately are commonly used words but once joined/ used together 'singularly' are distinctive and unique capable of being a mark in itself. The said trade mark *Jain Shikanji* of the respondent, since its registration in different classes has not yet been removed. Glaringly and *admittedly*, the appellant had never raised any (counter) claims of any kind in relation to the said trade mark *Jain Shikanji* against respondent before the learned Trial Court. The position is the same till now.



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33. Surprisingly, though learned counsel for appellant has made tall claims of *Jain Shikanji* being a family mark as the Promoter-Director of appellant is said to derive his rights from the originator of the said trade mark *Jain Shikanji* from his forefathers and also his own parents, yet no documents qua either were never filed, much less, produced before the learned Trial Court. So much so, the surviving parents of the Promoter-Director of appellant neither supported the appellant nor filed any supportive documents thereof. This casts a shadow of serious doubt upon the claims of appellant. No such document was filed before the learned Trial Court and even if filed could not have come to the aid of the appellant as parents of the Promoter-Director of appellant were bound by the order dated 29.04.2011 passed by the Hon'ble High Court of judicature at Allahabad and order dated 01.11.2008 passed by the learned District Judge, Ghaziabad, Uttar Pradesh as noted hereinbefore.

34. In any event, appellant's reliance upon the earlier two suits instituted by the respondent against the parents of the Promoter-Director of appellant is of no assistance as the said suits were never instituted against the appellant and it was/ is not a party therein as the appellant was incorporated only on 13.11.2019 and both suits were instituted against the parents of the Promoter-Director of appellant much prior thereto.

35. Appellant cannot avail the benefit of *Section 33* of the TM Act as no such contention was raised by the appellant before the learned Trial Court, the same is futile for purposes of the present appeal as the same cannot be gone into at the Appellate stage by this Court. Even otherwise, the appellant could not have acquired the use of the trade mark *Jain Shikanji* from any of its predecessor/ entity and it is a matter of fact that the respondent instituted the suit against appellant before the learned Trial Court well before the

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period of lapse of five years since the registration/ incorporation of the appellant company. Thus, the contention of appellant qua applicability of *Section 33* of the TM Act is belied.

36. Regarding the contentions of appellant qua *Section 17* of the TM Act, once again as no such contention was raised by the appellant before the learned Trial Court the same is futile for purposes of the present appeal as the same cannot be gone into at the Appellate stage by this Court. In view thereof, reliance placed upon *Sanjha Chulha (supra)* is misplaced.

37. Qua the relevancy of date of filing of an application seeking registration of a trade mark before the Trade Mark Registry, once again as no such contention was raised by the appellant before the learned Trial Court the same is futile for purposes of the present appeal as the same cannot be gone into at the Appellate stage by this Court. Even otherwise, in view of this Court the same is irrelevant, especially for the purposes of the present dispute as what is important is the ‘user’, the ‘claim of usage’ and the evidence adduced therewith, based whereon the subsequent registration has been granted in favor of the respondent. The same is further not material as admittedly the appellant placed reliance on its applications for registration of the trade mark *Jain Shikanji* and *Jain Shikanji Restaurants*, which though filed prior to the application of the respondent, however, were subsequently withdrawn by it.

38. Moreover, the contention of the learned counsel of appellant with respect to colour scheme and the design, font etc. of the trade dress of appellant is totally different is irrelevant as the trade mark in issue was *Jain Shikanji* and not the colour scheme, design, font etc.

39. Lastly, qua the maintainability of the present appeal it is trite that an Appellate forum has a very limited role to play while exercising jurisdiction

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under *Order XLIII rule 1(r)* of the CPC. Unless and until, the impugned order before the Appellate forum has been passed without exercising proper discretion or the Appellate forum finds some arbitrariness, perversity, or capriciousness in the impugned order or the same is against the enshrined principles of law, the scope of interference by the Appellate forum is extremely minimal. At the end of the day what is appealed under *Order XLIII rule 1(r)* of the CPC is an interim order, i.e., an initial finding arrived by the Court based upon the basic three tests of considering whether there was a prima-facie case in whose favor the balance of convenience lay and who would suffer the irreparable harm, loss, and injury. All such factors are very different when it comes to an appeal challenging the final order/ judgment which is passed after going through a proper trial and threadbare adjudication of all the facts before the Court.

40. As appellant in the present appeal, in addition to filing fresh documents (which have already been dealt hereinbefore), has tried to agitate and rely upon averments and pleadings beyond pleadings before the learned Trial Court, the same cannot be considered for adjudication under *Order XLIII rule 1(r)* of the CPC. Generally, no party like the appellant can be allowed to improve/ built upon its case, much less at an Appellate stage as the proceedings before the Appellate forum of subsequent instance are nothing but an extension/ continuation of the earlier proceedings before the original Court of first instance. Appellate forum is not to discharge the functions of a Court of first instance as the ambit of an appeal before it is not as vast as it is before the Court below, merely because a different view is possible from the plausible view taken by the Court of first instance below. Under normal circumstances, save and except as enumerated hereinabove, the Appellate forum certainly cannot and in fact should not

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rehear similar arguments before it. Likewise, the Appellate forum is not to substitute its view for a possible/ plausible view which in its opinion is or can be otherwise to what has been held by the learned Trial Court. Considering the above, not every order impugned before the Appellate forum is to be or can be set aside just because the Appellate forum has another or different view.

41. The Appellate forum is to entertain and then adjudicate upon an appeal only whence the appellant is able to make out a plausible case on any of the above grounds for correcting the error in the impugned order instead of de-novo looking into a new issue/ question of law or fact which never existed before the learned Trial Court. All the aforesaid draws to the conclusion that a party like the appellant herein cannot be allowed to set up a new/ separate case at an appellate stage. The aforesaid view has long since been laid down by the Apex Court in *Wander Ltd. & Anr. vs. Antox India P. Ltd.*<sup>9</sup> and very recently reaffirmed by the Apex Court in *Shyam Sel and Power Limited & Anr. vs. Shyam Steel Industries Limited*<sup>10</sup> wherein it has been held as under: -

*“33. We ask a question to ourselves that, in an appeal against the order of a Single Judge, if the Division Bench of the High Court is not required to evaluate the question as to whether the discretion exercised by the trial court was right or wrong, what else is it required to do. We are unable to trace the source of the duty of the Appellate forum which makes it bound to pass a suitable interim order pending the trial of the suit.*

*34. The Division Bench of the High Court further observes that for doing so, it has to put itself in a position as if it was moved to pass an interim order in the suit. At the cost of repetition, we reiterate that if the approach of the Division Bench of the High Court is to be upheld, then there would be no necessity to have the trial courts at all. Thereafter, the Division Bench of the High Court observes that the case was different from Wander Ltd. (supra). The Division Bench of*

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<sup>9</sup> 1990 (Supp) SCC 727

<sup>10</sup> 2022 SCC OnLine SC 313



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*the High Court stops at that. It does not even take the trouble to observe as to how the scope of the appeal before it was different from the scope as defined by this Court in Wander Ltd. (supra). In a line thereafter, the Division Bench of the High Court observes that prima facie case on facts theoretically is in favour of the appellant therein (plaintiff) and thereafter, passes various directions including the injunction. Though, in fact, it allows the appeal in entirety by allowing an application under Order XXXIX Rules 1 and 2 CPC pendente lite the suit, it graciously observes in the ultimate para that it was only modifying the order dated 2<sup>nd</sup> April 2019 passed by the learned Single Judge.*

*35. The learned Judges of the Division Bench of the High Court have taken pains to make a mention of the judgment of this Court in the case of Wander Ltd. (supra). This judgment has been guiding the Appellate forums in the country for decades while exercising their Appellate jurisdiction considering the correctness of the discretion and jurisdiction exercised by the trial courts for grant or refusal of interlocutory injunctions. In the said case, the learned Single Judge had refused an order of temporary injunction in favour of the plaintiff who was claiming to be a registered proprietor of the registered trade mark. The Division Bench of the High Court had reversed the order passed by the learned Single Judge and granted interim injunction. Reversing the order of the Division Bench of the High Court and maintaining the order of the learned Single Judge, this Court observed thus:*

*“14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the Appellate forum 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 forum 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 forum 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 forum 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)*

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*“... These principles are well established, but as has been observed by Viscount Simon in Charles Osenton & Co. v. Jhanaton [1942] A.C. 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.”*

42. Discernment of an appeal at the appellate stage in view of the settled position of law qua *Order XLI rule 1(r)* of the CPC leads us to conclude that the appellant has been unable to make out a case for interference by this Court. Hence, taking into consideration the overall factual and legal aspects involved herein and the overall conduct of appellant, this Court, finds no merit in the present appeal.

43. Accordingly, for the afore-going reasons, the present appeal along with all the applications, if any, is dismissed with no order as to costs and leaving the parties to bear their own costs.

**SAURABH BANERJEE, J.**

**MANMOHAN, J.**

**MARCH, 01, 2023**

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