

MANU/DE/0752/1999

**Equivalent Citation:** 1999IVAD(Delhi)967, 80(1999)DLT38

**IN THE HIGH COURT OF DELHI**

F.A.O. (OS) No. 139 of 1999

Decided On: 21.05.1999

Appellants:**Allied Nippon Ltd. & Anr.**  
**Vs.**

Respondent: **M/s. Allied Motors**

**Hon'ble Judges/Coram:**

Devinder Gupta, A.C.J and K.S. Gupta, J.

**Counsel:**

For Appellant/Petitioner/plaintiff: Mr. P.N. Lekhi, Senior Advocate with Mr. S.K. Bansal, Adv

For Respondents/Defendant: Mr. Arun Jaitly and Mr. Mukul Rohtagi, Senior Adv., Mr. Maninder Singh and Ms. Pratibha M. Singh, Adv.

**Subject: Intellectual Property Rights**

**Acts/Rules/Orders:**

Code of Civil Procedure, 1908 (CPC) - Section 104, Code of Civil Procedure, 1908 (CPC) - Order XXXIX Rule 1, Code of Civil Procedure, 1908 (CPC) - Order XXXIX Rule 2, Code of Civil Procedure, 1908 (CPC) - Order XLIII Rule 1

**Cases Referred:**

Charles Osenton & Co. v. Jhanaton, 1942 A. C. 130; Printers (Mysore) Private Ltd. v. Pothan Joseph, A. I. R. 1960 S. C. 1156, (SCR 7210); Rajesh Batra v. Grandlay Electronics (India), 1997 IAD (Delhi) 377

**Case Note:**

a) The case discussed an appeal filed against the ex parte order of injunction for restraining the infringement of trademark and trade name 'Allied' for certain automobile parts under Section 29 and 106 of the Trade and Merchandise Marks Act, 1958 – It was held that the appeal against the order of ex parte injunction could be maintained under Rule 1 and 2 of Order 39 of the Civil Procedure Code, 1908, but with a limited scope

b) The case discussed the powers of the Appellate Court to interfere with the exercise of discretion of the Court of first instance under Section 104 and Rule 1(r) of Order 43 of the Civil Procedure Code, 1908 – It was held that the Appellate Court could not interfere with the exercise of discretion of the Court of first instance and substitute the same with its own discretion in case, the discretion of the first Court was shown to have been exercised arbitrarily or capriciously or perversely or it ignored the settled principles of law for grant or refusal of interlocutory injunctions

**JUDGMENT**

**Devinder Gupta, J.**

1. The appellants are the defendants against whom on 30.4.1999 learned Single Judge while issuing summons in the suit granted an ex parte order of injunction restraining them, their employees, officials, representatives, dealer and stockists from infringing trade mark and trade name "allied" in respect of automobile parts excepts brake-linings and clutch facings and further restraining them from using colour scheme, get up, etc. on their cartons and packing material and also from passing off their goods except brake lining and clutch facing as those of the plaintiff.

2. The defendants/appellants instead of approaching the learned Single Judge by moving an application under Order 39, Rule 4 of the Code of Civil Procedure have challenged the order on the ground that no ex parte order of injunction ought to have been granted. It is stated that number of circumstances as have been enumerated in the grounds of appeal, if taken into consideration, are sufficient enough to demonstrate that plaintiff has wilfully concealed material facts and made deliberate mis-statements of facts disentitling it to the grant of injunction.

3. The appeal came up for consideration before us on 10.5.1999 on which date we heard learned Counsel for the appellants as well as the respondent.

4. There is no doubt that appeal against an order granting ex parte injunction would be maintainable under Order XLIII, Rule 1(r) read with section 104 of the Code of Civil Procedure, but the scope of hearing such an appeal on the ratio of decision of a Division Bench of this Court in *Rajesh Batra Vs . Grandlay Electronics (India) MANU/DE/0773/1996 : 1997IAD(Delhi)377* is limited. In the said decision it was held:

"The scope of hearing in such an appeal is limited. Ordinarily the Appellate Court would not take into consideration any new material. The hearing would be confined to finding out whether the original Court was justified or not in granting the ex parte order of injunction on the material available before it.

If the Appellant Court may concur with the view taken by the original Court then the appeal would be dismissed leaving it open to the appellant to contest the ex parte order of injunction before the original Court. If the Appellant Court may form an opinion that on the material available before original Court, the grant of injunction ex parte cannot be sustained then the appellate Court would set aside the ex parte order of injunction leaving it open to the parties to appear before original Court and have a hearing by-partes on the grant or otherwise of the order of injunction.

If the Appellant Court forms an opinion that on the material available on record of the suit before the original Court an injunction not in the form granted by the original Court but in a different form could only have been granted ex parte then it may substitute its own order in place of the original order (under appeal) leaving it open to the opposite party to contest the issue as to grant of injunction by ex parte before the original Court."

5. Learned Counsel for the appellants took us to the averments made in the plaint, the application under Order 39, Rules 1 and 2, C.P.C. and the documents filed with the plaint and contended that had notice to show cause been given to the appellants, the appellants would have brought to the notice of learned Single Judge the fact of an agreement arrived at between the parties in August, 1994 as also of the notice, which was given for the meeting of the members of Allied Motors Ltd., which was to be held on 30.3.1991 and had these two documents been taken into consideration by the learned Single Judge in all probabilities injunction would not have been issued. The appellants further urged that the plaintiff /respondent in the plaint had made reference to only the agreement for sale of business dated 6.3.1991 and not to the agreement of 1994. The plaintiff relied upon some arrangement, alleged to have been arrived at between the members of family in September, 1998, alleging that use of the word mark "Allied" and "Logo" by appellants stood prohibited from 29.9.1998 but strangely enough there was no material placed on record by the plaintiff in support of the said allegations, as regards family settlement and thus there was no material before learned Single Judge, which would have enabled him to form prima facie opinion of there being a good case for grant of ex parte order of injunction.

6. We have given our consideration thought to the submissions made by learned Counsel for the appellant and have gone through the averments made in the plaint.

7. The suit is based on the allegations that the plaintiff Allied Motors Limited is a company and is one of the leading names in the automobile trade in India. It was incorporated in 1931 with a major holding by Rolls Royce Limited U.K. and Root Limited U.K. The plaintiff was the sole distributor and concessionaire of Rolls Royce and Bentley Cars in India, Burma and Ceylone. After independence, the company was continued to be managed by one Mr. E.E. Birkett till it was sold to the predecessors of the present management. Since the plaintiff has been one of the leading traders in automobiles and automobile parts and held various agency lines for automobiles and automobile parts, various divisions were set up for dealing in different products, one of which was Merchandising Division. The plaintiff's business grew rapidly and "Allied" name and mark became one of the well known names in the Indian Automobile trade. The plaintiff is the registered proprietor of the mark "Allied" and als the owner of copyright in the "Allied" logo. The logo is appearing in the copyright registration and is the exclusive property of the plaintiff. In 1991 an agreement was entered into between the plaintiff and Allied Nippon Limited for the sale of Friction Material Division, which was manufacturing brake linings and clutch facings. The agreement was for sale of business between the plaintiff and defendant No. 1 company and was entered into on 6.3.1991. The plaintiff reproduced some of the terms and conditions of the agreement under which it is stated that the defendant/appellant company continued to use the name "Allied" as also the trade mark "Allied" for brake linings and clutch facings as a permissive user. Plaint further states that no formal license or assignment was entered into between the parties and after this agreement of sale, the proprietor of the trade mark continued to be the plaintiff and the registrations continued to be in the name of the plaintiff.

8. It is further alleged in the plaint that in September, 1998 there was a separation between the family members, who controlled the two companies. As a consequence, the entire share holding of Allied Nippon Limited, which was held by the plaintiff was sold to M/s. Allied Inter Trade Company Pvt. Ltd. and M/s. Talwar Impex Pvt. Ltd. The user of the "Allied" mark and logo by the appellants/defendants stood prohibited from 29.9.1998. It is alleged that the defendant do not have any right to continue the use of the trade mark "Allied" of which the plaintiff is the sole owner/proprietor. The continued use by the defendant of the mark and logo "Allied" is likely to cause enormous confusion among the industry and the public. After narrating the details of the goodwill and reputation of mark and logo "Allied", the plaintiff has highlighted the alleged acts of

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infringement stating the cause of action arose in September, 1998, when the share holding of the defendants company was sold by the plaintiff and the permissive use came to an automatic end. On the allegation aforementioned, decree has been prayed for injunction restraining the defendants from using the trade-mark "Allied" or any other deceptively similar mark in any manner whatsoever in relation to any automobile parts amounting to infringement of the plaintiff's registered trade mark "Allied", from using the "Allied" logo or any other logo, which is a substantial reproduction or a colourable imitation of the plaintiff's logo. The plaintiff has filed with the court, numerous documents along with copy of agreement and notice.

9. No doubt as regard the family arrangement, no document has been filed with the court, but, learned Single Judge on the basis of the other material on record including the averments made and supplied on affidavit proceeded to pass a speaking order stating therein in nutshell the case of the plaintiff and also making reference to the alleged separation between the family members in September, 1998 and then proceeded to observe that on a consideration of the averment made in the plaint, the application filed under Order 39, Rules 1 and 2, C. P. C. and the documents on record, he was satisfied that a case for grant of ex parte ad interim order of injunction has been made out by the plaintiff and that the delay involved in issue of notice to the defendants will defeat the object of the injunction sought by the plaintiff and accordingly proceeded to grant injunction but not in the same terms in which the plaintiff had prayed for. It is worthwhile to note that the defendant stands prohibited from using trade mark and trade name "Allied" in respect of automobile parts except brake linings and clutch facings. The plaintiff has sought prohibitory order qua the excepted items also. The manner in which learned Single Judge has proceeded to pass the impugned order, suggests that the learned Single Judge was cautious enough and duly took into consideration the requirements of law and appears to have fully acquainted himself with the case set up by the plaintiff supported on material available before him. On the facts, as alleged in the plaint, it cannot be said that it is a case which calls for interference by us in appeal when scope of appeal is limited as held in Rajesh Batra's case (supra).

10. It is a settled proposition in law that 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 has ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. 11. The Supreme Court in Wander Ltd. Vs. Antox India Pvt. Ltd. 1990 S.C.C. 727, on the scope and nature of appeals against orders where discretion has been exercised by the Court of first instance held that the Appellate Court would normally be not 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 different conclusion. The judgment of the Supreme Court in Printers (Mysore) Private Ltd. Vs. Pothan Joseph, MANU/SC/0001/1960 : [1960]3SCR713 was referred to, which in turn had approved the principles enunciated in Charles Osenton & Co. Vs. Jhanaton 1942 A. C. 130. That para the judgment in wander's case (supra) reads:

"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 reasonable 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 Gajendragadker, J. in Printers (Mysore) Private Ltd. Vs. Pothan Joseph SCR 7210."

"These principles are well established, but as has been observed by Viscount Simon L.C. in Charles Osenton & Co. Vs. Johnston (1942) A. C. 130" at p. 138" 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 ."

12. Learned Single Judge on the basis of material before it has exercised discretion. The view taken by learned Single Judge is only a prima facie view, which on the material before him was a possible view. The mere fact that while hearing appeal, we might be persuaded to take a different view, which might be another possible view will not be a ground for interference in the exercise of discretion of learned Single Judge. In appeal we cannot look into the case, which the appellant might set up as a defense to the plaintiff's prayer at the stage when the defendants/appellants will appear before learned Single Judge and oppose the application on merits. It is not shown to us that on the facts alleged by the plaintiff that discretion has been exercised arbitrarily or capriciously or perversely or that the learned Single Judge has ignored the well settled principles of law governing grant or refusal of interlocutory injunctions.

13. Consequently, finding no merit in the appeal, we dismiss the same making it clear that observations made

manupatra by us will not affect the merits of the case and when the defendants/appellants will move an application seeking vacation of the ex parte order of injunction, the same will be duly considered on merits uninfluenced by the observations made by us in this order.

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