
(2015) 07 PAT CK 0040

In the Patna High Court

Case No : Miscellaneous Appeal No. 121 of 2015

Hero Ecotech Limited and Others

APPELLANT

Vs

Hero Cycles Limited and Others

RESPONDENT

Date of Decision : 07-07-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 8, 9
Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 1(c), Order 39 Rule 2, Order 39 Rule 3, Order 39 Rule 4

Citation : (2015) 07 PAT CK 0040

Hon'ble Judges : Shivaji Pandey, J

Bench : Single Bench

Advocate : Y.V. Giri, Senior Advocate, Suraj Samdarshi and Sajal Kumar Sinha, for the Appellant; Bahar U. Barqui, Aditya Narayan Singh, Seraj Ahmad and Dinesh, Advocates for the Respondent

Final Decision : Allowed

Judgement

Shivaji Pandey, J.—In this case, appellants are challenging the order dated 21st March 2015 passed by the District Judge, Patna in Title Suit No. 5031 of 2014 whereby and whereunder he has dismissed the application for vacating the order of interim injunction as provided under Order XXXIX Rule 4 of the Code of Civil Procedure and thereby allowed the continuation of injunction order dated 22nd September 2014 thereby restrained the appellant from using, applying and/or engraving and/or causing to be used, applied/or engraved the registered trade mark "Hero" either by itself or in conjunction or formation with any other word or mark or any deceptive version of the registered trade mark, trading style or trade dress in relation to bicycle or bicycle parts. The appellant No. 2 and respondent No. 2 are agnates belonging to the Munjal Family originally, residing in Pakistan, later on entire family shifted to Amritsar where they started supplying bicycle parts to the local bicycle businessman and after 1947, they shifted to Ludhiana where they expanded their business and in course of time, they became business tycoon of India in manufacturing bicycles and its

components, including motorcycle. In course of period, the family expanded, they decided to go for division of vast conglomerate of companies and business amongst each of the four Munjal families. They entered into an agreement and partitioned Company and area of business. As it appears from the agreement, the whole family has been divided in four family groups. F-1 Family Group was headed by Mr. Vijay Kumar Munjal, F-2 Family Group was headed by Mr. Satyanand Munjal, F-3 Family Group was headed by Brij Mohan Lall Munjal and F-4 Family Group was headed by Om Prakash Munjal.

2. The present dispute is between the Family Group No. 4 led by Om Prakash Munjal and Family Group No. 1 headed by Vijay Kumar Munjal. In the agreement, they have separated their area of business in manufacturing of subjects and services. From the agreement (Annexure-2) it appears, F-1 Family Group was allotted manufacturing of products and service relating to

- a) existing trading business for exports;
- b) import in India of two wheeler electric vehicles and parts thereof and bicycle parts;
- c) Electric/environment friendly vehicles (i.e. non-fuel land vehicles) and their components, and their related infrastructure;
- d) Projects, plants and equipment components in the field of Solar Energy, Wind Energy and other Renewable Energy; and
- e) Medical Products and Lifestyle Care equipment for Hospitals, Rehabilitation and Homes."

3. Trade mark was provided for all categories assigned, such as, Hero Exports, Hero Electric, Hero Eco. and Hero. Clause (d) of 1.1.7 provided that trademark Hero registered or unregistered and used for export of Bicycles and Bicycles parts by F-1 Family Group for all territories, other than USA, Russia, Australia, New Zealand, Japan and European Union (except UK Germany and Turkey) which exclusively are retained by F-4 family Group.

4. Clause 2(viii) provides that only F-4 family Group shall be entitled to engage in Bicycle/Automotive Products and services with the trade mark and name HERO and the other three Family Groups may engage in the business of Bicycle/Automotive Products and Services without using the trade mark and name HERO, with or without prefixes or suffixes it was further agreed that the F-1 Family Group and F-3 Family Group will use different monograms than the monogram being currently used by M/s. Hero Cycle Limited, a company led by the F-4 Family Group.

5. In this manner, they engaged themselves in their respective area of manufacturing of products and services. The cause of dispute for filing the suit before the court below is F-1 Family Group has started manufacturing bicycles and its parts in the name "Hero Ecotech" and entered into market with the Trade

Mark "Kross" with a changed monogram. F-1 Family Group started production and sale in different parts of the country, including Patna (Bihar).

6. In the body of plaint, F-4 Family Group made a complaint that they cannot manufacture and sell bicycle and its parts giving brand name of Hero Ecotech "Kross" which creates deception in the mind of purchasers and on the basis of FIRST INFORMATION REPORT F-4 Family Group have filed suit seeking injunction.

7. The court below vide order dated 22nd September 2014 restrained the appellants from using or applying or engaging or causing to use, apply or engrave the registered trade mark "HERO" either by itself or in conjunction or formation with any other word or marks or any deceptive variant of the registered trade mark "HERO" either as prefix or suffix. The court granted ex parte injunction holding that the F-1 Family Group cannot engage itself in the trade or manufacture of bicycle in the trade mark name using trade mark of F-4 Family Group "Hero" which is exclusively agreed upon by other family members to be trade mark for the purpose of manufacturing and sale of bicycle or automotive bicycle sale. Against the order of injunction, the appellants filed writ petition before this Court being CWJC No. 2456 of 2015, the same was disposed of with liberty to the petitioners to file an appropriate petition before the court below under Order XXXIX Rule 4 CPC for vacating the order of injunction.

8. The appellants filed an application for vacating the order of injunction under Order XXXIX Rule 4 CPC claiming that the respondents have obtained the interim order by suppression of material fact as the first agreement was rationalized/modified/realigned by subsequent agreement between the parties, but the court below rejected the prayer for vacating the order of injunction and proceeded ahead.

9. Counsel for the appellants has submitted that the respondents obtained ex parte injunction order without notice to them, suppressing material facts of realignment of the agreement between F-1 and F-4 Family Group so much so that in terms of earlier agreement, there is no specific bar for the F-1 Family Group for engagement in the business of bicycle and automotive products. But a restriction has been imposed, no family, other than F-4, will use trade mark name "HERO" and its monogram so much so that the trade mark "HERO" registered or unregistered can be used for export of bicycle and bicycle parts by F-1 Family Group for all territories, except USA, Russia, Australia, New Zealand, Japan and European Union (except UK Germany and Turkey). In that situation it will not be proper to say that the appellants are wrongly manufacturing bicycle in the name of Kross without using "Hero" either prefix or suffix but the name of Company is being printed in the package as required under the weight and Measurement Act mandatorily required to print the name of the Company. Printing name of the Company cannot be the trade mark of bicycles so much so that the manufacturing of bicycle is the family business, cannot be restrained its manufacture by F-4 Family Group. In support of his submission, reliance has been placed on Clauses 1.1.7 (b), 2 (viii), 3.5 and 3.6 which are as follows:

"1.1.7(b) the trademark HERO ELECTRIC, registered or unregistered, owned and/or used upon or in relation to or in connection with the electric/environment friendly vehicles (i.e. non fuel land vehicles) and components, and related infrastructure;

2(viii) For avoidance of doubt, each party hereby agree that the only restriction on use of trade mark and name will be for the products and services with the same name, monogram and trademark. For purposes of illustration only F-4 Family Group shall be entitled to engage in Bicycle/Automotive Products and Services with the trade mark and name HERO and the other three Family Group may engage in the business of Bicycle/Automotive Products and Services without using the trade mark and name HERO, with or without prefix or suffixes. It is further agreed that the F-1 Family Group and F-3 Family Group will use different monograms than the monogram being currently used by M/s. Hero Cycles Limited, a company owned by the F-4 Family Group.

3.5 The Parties agree that F-1 Family Group would be entitled to continue using the Entity Name/Firm Name/Company Name HERO EXPORTS, HERO EXPORTS PVT. LTD, HERO ELECTRIC DEVICES PVT. LTD., HERO ECOTECH LIMITED, HERO ECO VEHICLES PVT. LTD., HERO ECO VENTURES PVT. LTD and HERO EXPORTS MIDDLE EAST LIMITED and all other Entity Name/Firm Name/Company Name with prefixing or suffixing HERO EXPORTS or HERO ECO or HERO ELECTRIC. It is further clarified that F1 Family Group can use these names with prefixes or suffixes for creating joint ventures and subsidiary companies, provided the F1 Family Group owns and continues to own a minimum of 26 per cent share capital in each such company.

3.6 The parties agree that F-4 Family Group would be entitled to continue using the Entity Name/Firm Name/Company Name HERO CYCLES LIMITED, HERO MOTGORS LIMITED, HERO FINANCIAL SERVICES LIMITED, HERO GLOBAL DESIGN LIMITED ZF HERO CHASSIS SYSTEMS PVT. LTD AND HERO TRANSMISSION PVT. LTD."

10. Further it has been submitted that the suit itself was not maintainable as Clause 5.6 of the agreement itself provides that any dispute between the parties will be resolved under the Arbitration and Conciliation Act 1996 by the Arbitrator, namely, Mr. Satish Bansal, Senior Partner of Mr. B.D. Bansal and Company and also submitted that venue of arbitration will be at New Delhi.

11. Elaborating his argument he has submitted that if two courts have jurisdiction, party by choice, have chosen particular place of court, in that circumstance, rest court may have a jurisdiction but in a situation of election of particular court, other courts loses its right to entertain the suit or application.

12. In that circumstance, counsel for the appellants submits that the appellants have no prima facie case as the suit itself was not maintainable in view of Arbitration clause and Arbitration and Conciliation Act, 1996. During argument, Junior counsel of the appellants has accepted that before passing the impugned

order, the appellants were using the word "HERO" as before word "Kross".

13. Counsel for the appellants submitted that Kumar Cycle Store is neither a necessary nor proper party but has been arrayed as respondent for the purpose of creating artificial cause of action in the Patna court. In this view of the matter, the Court should ignore the artificial and hold that artificial party has been impleaded with a view to avoid arbitration.

14. Counsel for the respondents has submitted that the appellants are not only using trade name "HERO" in contradistinction, not only in package but also in the body of the bicycle. He has further alleged that the brand name "HERO" is also being used in the advertisement which compelled the respondents to approach this Court.

15. Counsel for the respondents submitted that in terms of agreement for manufacturing the bicycle, F-4 Family Group has only been authorized to use brand name of "HERO" and its monogram but certain exceptions have been given to F-1 Family to manufacture and sell under the same trade mark and monogram for export purpose, except certain countries mentioned in the agreement. In terms of the agreement, the appellants are not authorized to even print name of "HERO KROSS" which creates deception in the mind of purchasers thinking about some connection with the original Hero Company.

16. He has further submitted that after the order of injunction, he has complied the direction of the court as provided under Order XXXIX Rule 3 CPC and the appellants have not made out any case of suppression or fraud while obtaining the order of injunction. He has further submitted that he has not filed any written statement as provided under order VIII CPC so much so he has never raised any objection of continuation of a proceeding invoking to the clause of resolution of dispute through Arbitrator.

17. He has further submitted that the court below in terms of Order XXXIX Rules 1 and 2 CPC passed the interim order of injunction and it cannot be said that it is wrong exercise of power by the District Court.

18. In support of his contention he has placed reliance on Clauses 1.1.6, 1.1.7 and 118, sub-clause 2, 3.5 and 3.6. He has further submitted that the 2nd agreement i.e. realignment does not any way affect curtail, modify the earlier agreement. He has further submitted that the Hon"ble Supreme Court had an occasion to test the issue of injunction under the Trade Mark Act provided guidelines or yardsticks in support of his contention, relied on

Municipal Corpn. Allahabad and Another Vs. Harsh Tandon and Another, (2007) 6 SCC 419

Laxmikant V. Patel Vs. Chetanbhat Shah and Another, AIR 2002 SC 275 : (2002) 110 CompCas 518 : (2001) 10 JT 285 : (2001) 8 SCALE 350 : (2002) 3 SCC 65 : (2002) 1 UJ 379 : (2001) AIRSCW 4989 : (2001) 8 Supreme 558

Mahendra and Mahendra Paper Mills Ltd. Vs. Mahindra and Mahindra Ltd., (2001) 9 AD 472 : AIR 2002 SC 117 : (2001) 9 JT 525 : (2001) 8 SCALE 174 : (2002) 2 SCC 147 : (2001) AIRSCW 4679 : (2001) 8 Supreme 443 ."

19. He has further submitted that they have not raised objection about continuation of proceeding, in terms of Section 8 of the Arbitration Act 1996, presumably he has lost his chance or will be deemed to have acquiesced or waived the right seeking arbitration provided under the agreement.

20. Counsel for the respondents has submitted that there is no allegation of false statement made and in the plaint or in the application for interim injunction nor any material has been produced to show that any false statement has been made by the respondents. He has further submitted that the appellants in the bicycle are using trade name "Kross" in the body but they use the name of the Company manufacture of Hero Ecotech that creates deception in the mind of purchasers but in the order of the court below, the court has recorded about using trade name "Hero Kross" which has been accepted by the respondents, is an error or records.

21. Further counsel for the respondents has also submitted that the lower court has also considered the objection raised by the appellants about jurisdiction where it has been stated that the issue of jurisdiction has already been dealt with in previous order.

22. Counsel for the respondents further submitted that in terms of the agreement of 2010, the area of operation of manufacturing has been defined and deliberated and they were not required to encroach upon the area of business of other family. Clause 1.1.6 of the 2010 agreement provides, F-1 Family may use the word "HERO" in suffix but parties were required to restrict their operation within the bounds mentioned therein. It has further been submitted that sub-clause (c) of Clause 1.1.7 of the 2010 agreement provides that Hero Ecotech as per the term of agreement will use as trade name to business relating to projects, plants and equipment, components in the field of Solar Energy, Wind Energy and other renewable Energy and Medical Products and Lifestyle Care equipments for Hospitals, Rehabilitation and Homes. And in terms of clause 1.1.7 of 2010 agreement, F-1 Family, appellants are not entitled to manufacture bicycle using the trade name "HERO". He has further submitted that he cannot use the word "HERO" either as prefix or as suffix in the trade name as well as also cannot use Company name in the product. He has further submitted that in the application for vacating the order of injunction he has taken three grounds in Para-3 as (a), (b) and (c) and none of the grounds mentions about false statement and also not on maintainability of suit on the ground of arbitration clause in 2010 agreement. He has further submitted that the appellants are not claiming the right to manufacture the bicycle on the basis of 2010 agreement, rather the claim is based on realignment agreement of 2011 which does not incorporate the clause of arbitration.

23. He has further submitted that there is no denial of the fact that they have not appointed the dealer for sale the bicycle so much so that they are not using "Hero" in the advertisement which is not permissible in law. He has further submitted that when the appellants take a plea that the suit is not maintainable and the same should be referred to Arbitration as per clause of the agreement in terms of Section 8 Arbitration Act, he was required to take the plea in the written statement as well as was required to file a separate application making a prayer for referring to the Arbitration. In absence of such application and plea, it will be treated, the appellants have waived their right about the non-maintainability of the suit and once they have waived, now they cannot turn around and raise the grievance that there is a clause in the agreement about Arbitration.

24. He has further submitted that in terms of Section 8 of the Arbitration Act 1996, the appellants were required to take this plea in their first appearance and in stead of taking such plea in this proceeding as they have filed the writ petition so much so no such defense or plea has been taken when they have filed the application for vacating the order of injunction.

"Reliance has been placed on

AIR 2000 SC 1986 (P. Anand Gajapathi Raju and others v. P.V.G. Raju (died) and others).

(2001)5 SCC 532 (Boozallen and Hamilton Inc. v. SBI Home Finance Limited and others)

Magma Leasing Limited Vs. NEPC Micon Limited and Another, AIR 1998 Cal 94

AIR 2002 Bombay 9 (Garden Finance Ltd. V. Prakash Inds. Ltd. And another). (Para-9)

Ramakrishna Theatre Limited Vs. General Investments and Commercial Corporation Limited, AIR 2003 Kar 502 : (2004) 1 ARBLR 430 : (2003) ILR (Kar) 3463 : (2004) 1 KarLJ 611 : (2003) 4 KCCR 2780

2004(3) RAJ 233 (Mad) (Kee Engineers Represented by its Partner Mr. V. Venkateshwaran and another v. Vijaylakshmi Jayaraman and others) (Para-17)

National Insurance Company Limited Vs. Padma Tobacco Company, AIR 2005 AP 124 : (2004) 3 ALD 13 : (2004) 3 ALT 54 : (2004) 2 ARBLR 345 : (2005) 2 BC 459

2006(2) RAJ 146 (Raj) (Mahesh Kumar v. Rajasthan State Road Transport Corporation, Jodhpur) Para-5.

IR 2007(NOC) 1715 (Cal)(DB) (Bihar Sanchar Nigam Ltd. and others v. BMW Industries Limited and others).

Brigadier Man Mohan Sharma, FRGS (Retd.) Vs. Lt. Gen. Depinder Singh, (2008) 4 ARBLR 533 : (2008) 15 SCALE 409 : (2009) 2 SCC 600 .

2009(2) RAJ 413 (Mad) (Ceebros Property Development Pvt. Ltd. and others v. Vanisri and another) Para-15)

2010(5) RJ 332 (Bom) (Global Trade Finance Ltgd. V. Sudarshan Overseas Ltd. And others) Para-8.

2010(5) RAJ 642 (Bom) (Sever Trent Water Purification, INC v Chloro Controls India Private Ltd. and others) Para-12,16).

2011(2) Arb. LR 382 (Delhi) (Ari Jethani v. Daehsan Trading (India) Pvt. Ltd. And others).

2008(1) Arb. LR 102 (Calcutta) (Saha and Gupta Enterprise v. Indian Oil Corporation Ltd. And others).

2002(2) Arb. LR 497 (Gauhati) (Paradise Hotel and Restaurant v. Airport Authority of India and others) Para-15."

25. In reply counsel for the appellants submitted that under Order XXXIX Rule 3 CPC prescribes in the matter of ex parte injunction order, the Court may pass order but must give proper reason, not the reason in ipse dixit. The court below has not recorded any finding of balance of convenience and also of irreparable loss which cannot be compensated in terms of money, further submitted that for granting injunction order, the court was required to examine and arrive to a finding on three counts, namely,

"a) Prima facie case;

b) balance of convenience; and

c) irreparable loss.

26. If plaintiff fails to satisfy any of the three grounds, the court cannot pass interim order of injunction in favour of plaintiff. Reliance has been placed on

" Dalpat Kumar and Another Vs. Prahlad Singh and Others, AIR 1993 SC 276 : (1991) 6 JT 502 : (1991) 2 SCALE 1431 : (1992) 1 SCC 719 : (1991) 3 SCR 472 Supp

Best Sellers Retail (India) Pvt. Ltd. Vs. Aditya Birla Nuvo Ltd. and Others, AIR 2012 SC 2448 : (2012) 4 RCR(Civil) 857 : (2012) 5 SCALE 437 : (2012) 6 SCC 792 : (2012) AIRSCW 3200 ."

27. He has further submitted that the respondents have all the time during argument raised the plea that the appellants being defendants there could not substantiate the fraud played by them or any material brought to the court to substantiate the fraud actuated and as such appellants do not deserve any relief from this Court is a misconstrued and misconceived argument. He has further submitted that the it is well known principle of law plaintiff will succeed on their own strength not on the weakness of the respondents. They themselves failed to satisfy all the three ingredients mentioned above. Reliance has been placed on

Bhau Ram Vs. Janak Singh and Others, AIR 2012 SC 3023 : (2012) 4 CTC 675 : (2012) 7 JT 216 : (2013) 169 PLR 152 : (2012) 4 RCR(Civil) 571 : (2012) 6 SCALE 530 : (2012) 8 SCC 701 : (2012) AIRSCW 4627 : (2012) 5 Supreme 17 .

28. He has further submitted that the appellants are manufacturing cycle with trade name "KROSS" not using "HERO" either as prefix or suffix but are printing name of the Company as "Hero Ecotech" which is the name of the Company engaged in manufacturing bicycle is no way violation of agreement. He has further submitted that there is stipulation in the agreement prohibiting the use of the trade name, there is no inhibition to use the name of the Company in product and has drawn attention to Para-9 and 17 of the plaint as well as submitted that in Annexure-10 the part of supplementary affidavit shows that the respondents themselves have communicated that the use of name of manufacturing company on the product is not a trade mark and also pointed out that Annexure-11 is the formant showing the trade mark "KROSS" which is quite different and distinct to "HERO", cannot be said to create any deception in the mind of purchasers. He has also drawn attention to the monogram of Hero bicycle vis-?-vis "KROSS" and submitted that both the trade marks and monogram are quite different and distinct do not have any resemblance from any angle so as to create deception in the mind of purchasers.

29. Counsel for the appellants has placed reliance on Para-9 and 10 of the Reply of petition under Order XXXIX Rules 1 and 2 CPC (Annexure-5) where said that trade mark "Hero" exclusively vests with plaintiff and said trade mark can only be used by defendant-appellants as corporate name, that too not for bicycle is false and incorrect. He has further submitted that in Para-10 of the reply he has submitted that the appellants are manufacturing bicycle under the brand "KROSS" and has also applied for trade mark for registration of the said brand. For compliance of statutory obligation, has specifically mentioned the name of manufacturer is specified on the package. In Para-16 reply petition appellant is selling bicycle under the trade name "KROSS" through the Company Hero Ecotech Ltd. which is not in violation of agreement specifying the name of manufacturer on the product does not amount to trade mark use, further he has submitted that in the 2nd number of Para-20 of the plaint (Annexure-1), the plaintiff-respondents have made prayer for granting injunction pending disposal of arbitration to protect their right and interest in entirety and, as such, the question of filing any objection for referring the matter to the Arbitrator does not arise, as if the application has been filed under Section 9 of the Arbitration Act 1996.

30. The present case relates to grant of interim injunction for which the plaintiff is required to satisfy three primary ingredients namely, (i) Prima facie case; (b) balance of convenience; and (c) irreparable loss have to be satisfied. If plaintiff would fail to satisfy any of the three items, in that event, plaintiff would not be entitled to the relief of injunction.

31. While considering the question of balance of convenience, the court has to

study and examine comparative hardship of mischief in between plaintiff and respondent. This Court consolidated the aforesaid proposition, placed reliance on Dalpat Kumar and Another Vs. Prahlad Singh and Others, AIR 1993 SC 276 : (1991) 6 JT 502 : (1991) 2 SCALE 1431 : (1992) 1 SCC 719 : (1991) 3 SCR 472 Supp It will be apt to quote Para-4 and 5 of the judgment which are as follows:

"4. Order 39 Rule 1(c) provides that temporary injunction may be granted where, in any suit, it is proved by the affidavit or otherwise, that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit, the court may by order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing ... or dispossession of the plaintiff or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit as the court thinks fit until the disposal of the suit or until further orders. Pursuant to the recommendation of the Law Commission clause (c) was brought on statute by Section 86(i)(b) of the Amending Act 104 of 1976 with effect from February 1, 1977. Earlier thereto there was no express power except the inherent power under Section 151 CPC to grant ad interim injunction against dispossession. Rule 1 primarily concerned with the preservation of the property in dispute till legal rights are adjudicated. Injunction is a judicial process by which a party is required to do or to refrain from doing any particular act. It is in the nature of preventive relief to a litigant to prevent future possible injury. In other words, the court, on exercise of the power of granting ad interim injunction, is to preserve the subject matter of the suit in the status quo for the time being. It is settled law that the grant of injunction is a discretionary relief. The exercise thereof is subject to the court satisfying that (1) there is a serious disputed question to be tried in the suit and that an act, on the facts before the court, there is probability of his being entitled to the relief asked for by the plaintiff/defendant; (2) the court's interference is necessary to protect the party from the species of injury. In other words, irreparable injury or damage would ensue before the legal right would be established at trial; and (3) that the comparative hardship or mischief or inconvenience which is likely to occur from withholding the injunction will be greater than that would be likely to arise from granting it.

5. Therefore, the burden is on the plaintiff by evidence aliunde by affidavit or otherwise that there is "a prima facie case" in his favour which needs adjudication at the trial. The existence of the prima facie right and infringement of the enjoyment of his property or the right is a condition for the grant of temporary injunction. Prima facie case is not to be confused with prima facie title which has to be established, on evidence at the trial. Only prima facie case is a substantial question raised, bona fide, which needs investigation and a decision on merits. Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The Court further has to satisfy that non-interference by the Court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction

and he needs protection from the consequences of apprehended injury or dispossession.

Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely one that cannot be adequately compensated by way of damages. The third condition also is that "the balance of convenience" must be in favour of granting injunction. The Court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that which is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the Court considers that pending the suit, the subject matter should be maintained in status quo, an injunction would be issued. Thus the Court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit."

32. This proposition has been reiterated in *Best Sellers Retail (India) Pvt. Ltd. Vs. Aditya Birla Nuvo Ltd. and Others*, AIR 2012 SC 2448 : (2012) 4 RCR(Civil) 857 : (2012) 5 SCALE 437 : (2012) 6 SCC 792 : (2012) AIRSCW 3200 It will be appropriate to quote Para - 26, 30 and 36 of the judgment.

33. It has been held by this Court in *Kishoresinh Ratansinh Jadeja v. Maruti Corpn 2* that it is well established that while passing an interim order of injunction under Order 39 Rules 1 and 2 CPC, the Court is required to consider:

"(i) whether there is a prima facie case in favour of the plaintiff;

(ii) whether the balance of convenience is in favour of passing the order of injunction;

and

(iii) whether the plaintiff will suffer irreparable injury if an order of injunction would not be passed as prayed for.

Hence, we only have to consider whether these well-settled principles relating to grant of temporary injunction have been kept in mind by the trial court and the High Court.

30. In *Dalpat Kumar v. Prahlad Singh 7* this Court held: (SCC p. 721, para 5)

"5. ... Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The Court further has to satisfy that non-interference by the Court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely, one that cannot be adequately compensated by way of

damages."

36. To quote the words of Alderson, B. in *Attorney General v. Hallett* 8 : (ER p. 1321)

"... I take the meaning of irreparable injury to be that which, if not prevented by injunction, cannot be afterwards compensated by any decree which the court can pronounce in the result of the cause."

34. It is also well settled principle of law the plaintiff has to succeed on his own strength and not on the weakness of defendants/other side. This proposition is lucid from Para-10 of the judgment in *Ramchandra Sakharam Mahajan Vs. Damodar Trimbak Tanksale (D) and Others*, AIR 2007 SC 2577 : (2007) 9 JT 439 : (2007) 9 SCALE 28 : (2007) 6 SCC 737 : (2007) 8 SCR 178 : (2007) AIRSCW 4583 , which is as follows:

"Para-10: The suit is for recovery of possession on the strength of title. Obviously, the burden is on the plaintiff to establish that title set up by the plaintiff, the Court is also entitled to consider the rival title set up by defence or the failure of the defendants to establish the title set up by them, would not enable the plaintiff to a decree. There cannot be any demur to these propositions."

35. The present case relates to violation of agreement and deceptive use of trade mark. For the purpose of this case, it has to be understood the plaintiffs and defendants are close agnates and they shifted to India from Pakistan, engaged in the manufacturing of bicycle but after some time, they became tycoon in the business world of manufacturing bicycle and motor cycle, later on and have also diversified their business in different areas. Four branches constitute as four group of families. The dispute is in between Vijay Kumar Munjal, F-1 family and Om Prakash Munjal, F-4 family. To understand their business and manufacturing were grouped in four classified area mentioned in clause 1.1.6 and 1.1.7 of the 2010 agreement. F-1 family has basically assigned trading business for export and import of two wheeler electric vehicle and parts thereof bicycle parts.

36. It is relevant to quote clauses 1.1.6 and 1.1.7 of the 2010 agreement which are as follows:

"1.1.6 "F-1 Family Group Product and Services" means:

- a) existing trading business for exports;
- b) import in India of two wheeler electric vehicles and parts thereof and bicycle parts;
- c) electric/environment friendly vehicles (i.e. non-fuel land vehicles) and their components, and their related infrastructure;
- d) projects, plants and equipment components in the field of Solar Energy, Wind Energy and other Renewable Energy, and

e) Medical Products and Lifestyle Care equipment for Hospitals, Rehabilitation and Homes.

1.1.7 "F-1 Family Group Trade Marks" means,

a) the trademark HERO EXPORTS, registered or unregistered owned and/or used upon or in relation to or in connection with the trading business of M/s. Hero Exports for Exports relating to sale, marketing of its trading items other than those items covered in clause 1.1.7 (d) below, and import in India of two wheeler electric vehicles and parts thereof and bicycle parts.

b) the trademark HERO ELECTRIC registered or unregistered owned and/or used upon or in relation to or in connection with the electric/environment friendly vehicles (i.e. non fuel land vehicles) and components and related infrastructure;

c) the trade mark ERO Eco registered or unregistered, owned and/or used upon or in relation to or in connection with the business relating to projects, plants and equipment, components in the field of Solar Energy Wind Energy and other Renewable Energy and Medical Products and lifestyle care equipment for Hospitals, Rehabilitation and Homes and

d) the trade mark HERO registered or unregistered and used for export of Bicycle and Bicycle parts by F-1 Family Group for all territories, other than USA, Russia, Australia, New Zealand, Japan and European Union (except U.K., Germany and Turkey) which exclusively are retained by F-4 Family Group."

37. Sub-clause (c) and (d) of Clause 1.1.7 are very important for the purpose of deciding the issue of interim injunction as the plaintiff-respondents have laid the claim "Hero Ecotech Ltd" could have engaged itself in the project, plant and equipment components in the field of solar energy, wind energy and other Renewal energy, medical products and Lifestyle Care equipments for hospitals, rehabilitation and home but sub-clause (d) provides that F-1 family has been prohibited to use the HERO trade mark inside India but for export of bicycle and parts except USA Russia, Australia, New Zealand, Japan and European Union except U.K., Germany and Turkey) which exclusively are retained by F-4 Family Group has been authorized. Clause 2 (1) provides that F-4 Family Group has exclusive right of ownership and use over Bicycle/Automotive Trademarks.

38. To understand the real controversy of the two families, it will be relevant to quote Clause 2(viii) of the agreement which is as follows:

"2(viii) For avoidance of doubt, each party hereby agree that the only restriction on use of trade mark and name will be for the products and services with the same name, monogram and trademark. For purposes of illustration only F-4 Family Group shall be entitled to engage in Bicycle/Automotive Products and Services with the trade mark and name HERO and the other three Family Group may engage in the business of Bicycle/Automotive Products and Services without using the trade mark and name HERO, with or without prefix or suffixes. It is further agreed that the F-1 Family Group and F-3 Family Group will use different

monograms than the monogram being currently used by M/s. Hero Cycles Limited, a company owned by the F-4 Family Group"

39. On perusal of Clause 2(viii), this Court will have to find out the "area of prohibition" and "area of permission". It is specifically stated that the area of prohibition and restriction that has been provided is the use the name, trade mark and monogram of other family group on the product and service with the same name, monogram and trade mark and by way of illustration, it has been provided that F-4 Family Group shall be entitled to engage in Bicycle/Automotive products and services with the trade mark and name HERO and its monogram. So it denotes F-4 Family Group, the trade mark "HERO" related to the bicycle, cannot be used by other family group engaged in manufacturing of bicycle. In clause 2(viii) it also provides that other three family groups may engage in the business of bicycle and automotive products and services without using the trade mark and name "HERO", without prefix and suffix. From the recital it is clear that other family members have been allowed to engage in manufacturing of cycle and cycle parts but the prohibition is that they cannot use trade mark and trade name "HERO" either in prefix or suffix. There is no prohibition for production of cycle by the F-1 Family Group but the prohibition is only that no Family Group will use the trade mark and trade name "HERO" nor its monogram. This is the area of controversy for the purpose of deciding interim relief.

40. To understand the controversy, it is to see the nature of complaint made by the respondents in the complaint. In Para-17 of the plaint has been made that the defendants-appellants using the trade name Hero Ecotech Ltd. in relation to and in connection with bicycle and bicycle product. Hero Ecotech Ltd., to the understanding of this Court, is not the trade name but it is the name of the Company. Para 17(ii) of the petition, complaint has been made that the defendant No. 3 has launched new range of bicycles in India under the brand "KROSS" and defendant s are also widely advertising the same on their websites www.heroelectric.in and www.krossbikes.in. In Para 17(iii) it has been mentioned that the defendant No. 3 has created the website www.krossbikes.in on 3rd October 2012 through which they are marketing and promoting their bicycles under the brand "KROSS" in India. Perusal of the website www.krissbikes.in reveals that Hero Eco group is marketing and promoting the business with the brand "KROSS" in India. In Para-18 it has been mentioned that defendants follow practice of incorporating their trade name Hero Ecotech Ltd. on the bicycles. Unauthorized by manufactured by them contrary to the agreed terms and conditions of the TMA. Further use of the trade name "HERO ECOTECH LIMITED" on the packaging of the unauthorizedly manufactured bicycles also amounts to use as a part of the trade dress which is contrary to the terms of agreement.

41. In Para-19 it has been claimed that trade mark HERO in respect of bicycles and bicycles parts, falling under Class-12 of the International Classification of goods and services and has several registrations subsisting before the Trade Marks Registry. Complaint has been made that they have been wrongly using

"HERO" on the package of the bicycles. In Para-20 they have made a complaint that the defendants launching their bicycle range in India under the trade name "HERO Ecotech Ltd.

42. To understand the dispute, Para-20(iii) of the petition is relevant where specific complaint has been made that several persons of public, customers, dealers as well as local bicycle traders, have been misguided purchased defendants' bicycles under the brand "KROSS". So from the plaint it appears that the plaintiffs suggested that F-1 Family, they are using the word "KROSS" as well as "Hero Ecotech Ltd" projecting themselves as being associated or having connection with plaintiff respondents.

43. During the argument, lady junior counsel came who came from Delhi in open Court submitted that the appellants before passing the interim order was using "HERO KROSS" in the bicycle but after the injunction they are not using the same but Mr. Bahar U. Barqui and Mr. Seraj Ahmad, appearing for the respondents having come from Delhi in specific terms submitted that the complaint of plaintiff F-4 Family is that F-1 defendant-appellant Company has been using, printing in the cycle as well as in the package the word manufacturing by HERO ECOTECH. F-1 Family was using the trade name "KROSS", the Court has examined "Kross" which is at Annexure-11. At Annexure-11/A, the brand name, trade mark and monogram of F-4 Family has been depicted. The trade mark and trade name which is printed on the bicycle is in two circles. Small circle is "H" printed and in between the small circle and big circle it has printed in circular manner "HERO CYCLES PRIVATE LTD." and that circle is supported by stands and attached with two semicircles with the word "HERO", whereas Annexure-11 shows the trade mark and trade name. "KROSS" and half circle with converging arrow is the trade mark. So this Court feels that the trade mark and trade name of both the families are quite different and distinct having no resemblance from any corner creating deception in the mind of purchaser. Prohibition is that the F-4 Family cannot use the word "HERO" with the word "KROSS" either as prefix or as suffix. Kross is not the prohibited area but the prohibited area is "HERO" cannot be used either in prefix or suffix.

44. The court below has granted injunction and thereafter refused to vacate the same, committed an error of record as in Para-5 in the impugned order, the cause of refusing to vacate the injunction is the use of HERO KROSS in the bicycle as a matter of record as accepted by the counsel for the respondents that only "Kross" is being printed in the cycle and so much so also printed "Manufactured by Ecotech Ltd.". In the application for vacating the order of injunction. The defendants are appellants have taken a plea that the plaintiffs obtained the interim injunction by suppressing the material facts, as was claimed that after 2010 agreement, F-1 Family and F-4 Family entered into another agreement as realignment of agreement 2011 and realignment agreement modifies certain clauses. Counsel for the appellants could not point out that by 2011 agreement any clause of 2010 agreement has any way been modified or

deleted or in any manner truncated. So the claim of defendant-appellants that by suppression of material fact the order of interim injunction was obtained is far from truth but the ground to refuse to vacate the injunction, there the trial court has assigned the grounds as follows:

"The defendants have admitted that they were making bicycle with the trade mark KROSS prefix of "HERO" in their petition filed under Order XXXIX Rule 4 CPC. There they are apparently violating the terms of agreement" which is an error of record so much so admission of the counsel for the respondents makes the matter clear that appellants are using any printing in bicycle "KROSS" as well printing Hero Ecotech Ltd."

45. Defendant-appellants have been using the "Manufactured by Ecotech Ltd" in the body of the bicycle as well as on the pack age. Now the question would arise whether F-4 Family can be prohibited to print the name of company in the product and its package. What has been prohibited in the agreement, the parties will not use the name "HERO" in prefix and suffix in the trade mark with respect to manufacturing of bicycles which has been assigned to F-4 Family. The agreement does not show that F-I Family cannot use the name of its Company as the bicycles are manufactured by HERO ECOTECH LTD which is the name of the Company.

46. Counsel for the appellants pointed out that Respondents vide Annexure-10 through Authorized Signatory of Hero Cycle Ltd. addressed to Mr. Ashoka Goyal, Hero Electric Ltd., Ludhiana, in the said reply it has been specifically stated indicating the name of manufacturer on the product is not "trade mark" usage. Trade mark, trade name and monogram of appellant are quite different and distinct cannot be said it creates in any deception and confusion in any manner to purchaser but it is made it clear, appellant cannot use Hero in prefix or in suffix with trade mark name KROSS.

47. In view of the aforesaid discussion, this Court is of the view that Plaintiff-Respondents have failed to satisfy all three ingredients for granting injunction.

48. This Court is of the view that the court below has not properly and with sound reason exercised power in granting injunction as well as refusing to vacate the order of injunction and, accordingly, the order dated 21/3/2015 is set aside and the injunction is vacated. This Court is not examining other issues, such as, territorial jurisdiction, as well as jurisdiction of Arbitration Tribunal under the Arbitration Act, 1996 though the parties have raised the points during argument. This Court is also not deciding the maintainability of suit on the ground of artificial cause of action with the sole purpose of creating the cause of action within the territorial jurisdiction of the civil court.

49. Parties are at liberty to raise all points during trial.

50. This petition is allowed with the aforesaid observation.