

Neel Electro Techniques And 8 Ors vs Neelkanth Power Solution And Anr on 5 May, 2016

Equivalent citations: AIR 2016 BOMBAY 205, 2016 (4) ABR 345

Author: A.S.Oka

Bench: A.S.Oka, C.V.Bhadang

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appeal391

ssp

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.391 OF 2014 IN
SUIT NO.55 OF 2012

Neel Electro Techniques
and others
vs.

...Appellants

Neelkanth Power Solutions
and others

...Respondents

Dr.Virendra Tulzapurkar, Senior Counsel i/b Kanga &

Co. for the appellants
Dr.Birendra Saraf i/b B.B.Parekh for the respondent

No.1
Mr.Ravi Kadam, Senior Counsel i/b Mahesh Shah for
respondent No.2

CORAM : A.S.OKA, & C.V.BHADANG,JJ.

DATE ON WHICH JUDGMENT IS RESERVED: JANUARY 18, 2016

DATE ON WHICH JUDGMENT IS PRONOUNCED: MAY 5, 2016

(As Bhadang J. is sitting at Bench at Goa, signed Judgment is pronounced by A.S.Oka J. as per Rule 296 (iii) of the Bombay High Court Original Side Rules).

JUDGMENT:

(PER A.S.OKA,J.) 1 As per the order passed by the Hon'ble the Acting Chief Justice, this Appeal has been specially assigned to the Division Bench presided over by one of us (A.S.Oka,J.). By this appeal, the appellants who are the original appellants have taken an exception to the Judgment and Order dated 24 th June 2014 passed by the learned Single Judge on the Notice of Motion No.54 of 2012 in a suit No.55 of 2012.

2 appeal391 2 The appellants filed a suit No.55 of 2012 before the learned Single Judge for injunction restraining the respondents from in any manner directly or indirectly using the mark "Neel" or "Neelkanth" (Exhibits A and S respectively to the plaint) and its domain name www.neelpower.com or any mark, device, logo, lable etc which is similar and/or deceptively similar to the registered mark of the appellant bearing registration no.1075665. Various other reliefs were claimed including the relief of damages. Temporary injunction was claimed by filing the aforesaid Notice of Motion seeking relief of temporary injunction in terms of the final relief.

3 The first appellant-M/s.Neel Electro Techniques is a partnership firm duly registered under the Indian Partnership Act,1932. The second appellant M/s.Neel Controls is also a partnership firm duly registered under the Indian Partnership Act,1932.

It is claimed in the plaint that though the first appellant-firm was established on 11th February 1980 by one Shri Ravindra Gamanlal Mehta (third appellant), initially he was not a partner of the said firm. Initially his mother and real brother Hemant were the partners. The fourth and fifth appellants are the sons of the third appellant- Ravindra. It is alleged that as the first appellant was doing the business solely on expertise and knowledge of the third appellant, till he became the partner of the first appellant, he was paid technical advice fees. The third appellant became a 3 appeal391 partner of the first appellant on 17 th January 1981. It is alleged that after 1981, the partners of the first appellant were changed from time to time. It is claimed that on the date of institution of the suit, the third appellant, fifth appellant and the said Hemant are the partners of the firm having 40%, 20% and 40% shares respectively.

4 It is alleged that the first appellant was formed by the third appellant by investing his own money, efforts and skill. It is stated that the graphical representation of the mark "Neel" was created in or around July 1971 by the third appellant along with the sixth appellant. It is claimed that the sixth appellant is a good artist and has many paintings to his credit. The business of the first appellant is of manufacturing, marketing and selling of Servo Controlled Voltage Stabilisers and Isolation Transformers.

5 The second appellant is also carrying on business from the same place where the first appellant was carrying on the business. The place of both the first and second appellants is in the same building known as "Saphire Arcade", M.G.Road, Ghatkopar (East), Mumbai 400077. The first appellant is carrying on business from the premises No.401 of the said building and the second appellant is carrying on business in the premises No.403 in the said building. The second appellant was formed on 19th April 1984. The business of the second appellant is similar to the business of the first appellant.

4 appeal391 In the second appellant-firm at the time of its formation, the third appellant, the third appellant's wife and said Hemant were partners and on the date of institution of the suit, it is claimed that the third and fourth appellants along with said Hemant were partners having 25%, 25% and 50% shares respectively. It is alleged that the second appellant was allowed to be formed with the trading name "Neel" and that it was allowed by the partners of the first appellant to use the trade mark "Neel". It is alleged that after the formation of the second appellant, it was agreed that existing business of the first appellant would be taken over by the second appellant and that the first appellant will have overall supervision and control over the second appellant. It was agreed that all the business of the first appellant will be done through the second appellant with the trade name "Neel".

6 The sixth appellant is the wife of the third appellant who retired as a partner of the first appellant in the year 2004. It is stated that the seventh appellant is the company incorporated in the year 1990 to conduct sales and services of the clients of "Neel" group at all India level. Some other businesses are also conducted by the seventh appellant. The third appellant is having 60.70% shares in the seventh appellant company and the second respondent who is the wife of Hemant is holding 10.66% shares in the said company. Rest of the shares are registered in the name of the third appellant's mother (Manjula Mehta). It is alleged 5 appeal391 that the seventh appellant is only marketing the products of the second appellant and the products certified by the second appellant.

7 The eighth appellant is a partnership firm formed on 2nd April 1993. The third, fourth and fifth appellants are the partners of the said firm.

The said firm is carrying on business of manufacturing Hi-tech energy saving equipments which were designed and developed by the fourth appellant company. The ninth appellant is a private limited company of which third, fourth and fifth appellants are the share holders. Eighth and ninth appellants were allowed to use the name "Neel". It is alleged that from April 2011, both the eighth and ninth appellants stopped using the mark "Neel" in respect of their product and since then they are no longer used the trade mark "Neel".

8 The first respondent-first respondent is a partnership firm. The said Hemant along with his wife Heena (the second respondent) are the partners of the first respondent having 70% and 30% shares respectively.

9 It is the case of the appellants that the second appellant is the owner of the mark "Neel". It is the case of the appellants that the first respondent has infringed their mark "Neel". The case of the appellants is that the first respondent is passing off its goods as those of the appellants. The appellants are relying upon registration of 6 appeal³⁹¹ their mark "Neel", a list of their products, their sales including export sales, customers' list, turn over, sales network etc to prove registration and extensive reputation acquired by the name "Neel" in the market. The appellants are relying upon a brochure published by the first respondent to show that the respondents are using the mark "Neel" as a part of the trading name and also to market its goods which are similar to the goods of the appellants. It is alleged that it is not only infringement of the mark "Neel" but by claiming common origin and connection with the firms of the appellants, they are passing off their goods as the goods of the appellants and trading upon the goodwill and reputation of the appellants.

10 A reply was filed by the respondents to the Notice of Motion by contending that Hemant Mehta being a partner of the second appellant is entitled to use the mark "Neel". It is contended that the said Hemant is entitled to use the said mark as the second appellant is the registered proprietor of the said mark. It is contended that there is an agreement between the members of the family of the partners in the nature of a family agreement under which the respondents are entitled to use the mark "Neel". It is contended that the respondents are entitled to use the said mark as a part of the trade name and as a trade mark. It is contended that the respondents are using the said mark as a part of the trading name and as a trade mark with the full knowledge and acquiescence of the appellants and 7 appeal³⁹¹ therefore, the appellants are disentitled to raise any objection to use of the said mark by the respondents. It is contended that the suit suffers from delay and laches and that the appellants have suppressed the material facts.

11 By the impugned order, the Notice of Motion was dismissed. The learned Single Judge recorded a prima facie finding that by mutual consent, as a part of the family arrangement, the business and assets of the parties jointly held by them were divided and the third appellant and his brother Hemant were entitled to use the trade mark "Neel" as jointly owned by them. The learned Judge held that the injunction will have to be refused as the use of the mark was licenced and there was an acquiescence.

The learned Judge also held that there was no restriction on the right of the partners to permit concurrent user of the property of the firm including the trade mark.

12 The learned senior counsel for the appellants has taken us through the pleadings, documents on record and the findings recorded by the learned Single Judge. He invited our attention to the Memorandum of Understanding/family settlement relied upon by the respondents. He submitted that the Memorandum of Understanding does not mention that there was a division of the property in trade mark in the ratio of 60% and 40% and in any event, in law, there is no such concept of division of trade mark. He urged that the learned Single Judge could 8 appeal³⁹¹ not have observed

that under the Memorandum of Understanding, even the trade mark was also a divisible asset. He urged that the trade mark was admittedly in the name of the second appellant and even after the execution of the Memorandum of family settlement, the mark was renewed in the name of the second appellant. He pointed out that Shri Hemant Mehta was claiming an independent right of proprietorship in the mark. He submitted that obviously the said Hemant Mehta knew that he cannot claim any right under the Memorandum of Understanding in respect of the said mark and therefore, he sought permission to use the name "Neelkanth" after the execution of Memorandum of Understanding. He urged that the finding that the third appellant and Hemant were entitled to carry on separate business using the mark "Neel" jointly owned by them is completely erroneous. He submitted by pointing out several documents that the appellants have repeatedly objected to the use of the mark "Neel" by said Hemant Mehta. He urged that there is absolutely nothing on record to show that any consent was granted to the said Hemant to use the mark "Neel" or to the respondents. He urged that the finding of the learned Judge is that the acquiescence in the facts of the case is sufficient to deny any interim relief to the appellants who claim as registered proprietors of the trade mark is completely contrary to the settled law. He relied upon the decision of the Apex Court in the case of Gujarat Bottling Co. Limited and others vs. Coca 9 appeal³⁹¹ Cola Company and others¹ and in particular paragraph 13 thereof. He submitted that licensing of trade mark is governed by common law and is permissible provided a connection in the course of trade consistent with the definition of trade mark continues to exist between the goods and the proprietor of the trade mark.

13 The learned senior counsel appearing for the appellants criticized on the finding of the learned Judge on the issue of acquiescence. He relied upon the decision of the Chancery Division in the case of Willmott Vs. Barber². Applying the test laid down in the said decision, he urged that there cannot be a plea of acquiescence. He relied upon the decision of the Apex Court in the case of M/s.Power Control Appliances and others Vs. Sumeet Machines Private Limited³ and in particular what is held in paragraph 41 of the said decision. He submitted that there can be only one mark, one source and one sole proprietor and it cannot have two origins. He urged that the joint proprietors must use the trade mark jointly for the benefit of all and it cannot be used in competition with each other. As far as the plea of delay and laches is concerned, he relied upon the decision of the Apex Court in the case of Arundhati Mishra (Smt.) vs. Sri Ram Charitra Pandey⁴. He submitted that on one hand the respondents are claiming right in the trade mark and on the other 1 (1995) 5 SCC 545 2 Chancery Division (Vol.xv) 96 3 (1994) 2 SCC 448 4 (1994) 2 SCC 29 10 appeal³⁹¹ hand they are relying upon the consent or a licence. He submitted that such mutually destructive pleas cannot be permitted. For that purpose, he relied upon the decision of the Apex Court in the case of Steel Authority of India Limited Vs. Union of India and others⁵. He submitted that as the second appellant is admittedly the owner of the mark, in absence of even prima facie evidence of acquiescence, injunction must follow as the respondents cannot use the said mark. He submitted that the appellants did not dispute the contents of the e-mail of Hemant of February 2011 as the Mediators advised them not to respond as it would have precipitated the matter. He submitted that the decision of the learned Single Judge is erroneous on law as well as facts.

14 The learned senior counsel for the respondents has tendered across the bar a compilation containing documents on record of the suit. He invited our attention to the terms and conditions of the Memorandum of Understanding. He invited our attention to various documents on record. He

pointed out that the factual findings which are recorded by the learned Single Judge in paragraph 11 of the impugned order are supported by the documents on record. He pointed out that Hemant continues to be the partner having 40% share in the first appellant along with third and fourth appellants. He pointed out that Hemant continues to be a partner in the second appellant with 50% share along with the third 5 (2006) 12 SCC 233 11 appeal³⁹¹ and fourth appellants. He pointed out that in the seventh appellant company, the share holding is of the third appellant, the mother of the third appellant and the second respondent who is the wife of the said Hemant. He invited our attention to Memorandum of Understanding dated 26th August 2009. It is pointed out that the third appellant executed the same on behalf of his family members namely fourth, fifth and sixth appellants and Hemant signed on behalf of the second respondent (his wife) and Janhavi (his daughter). He pointed out that under the said memorandum, broad guidelines were framed for the division of the family assets including even the intellectual property. He submitted that excluded assets were specifically mentioned therein which do not include intellectual property. He submitted that the assets were divided on 60:40 basis between the group of third appellant and the group of his brother Hemant. He pointed out that both third appellant and Hemant acted upon the said Memorandum of Understanding. He pointed out the details of the manner in which the Memorandum was acted upon. He pointed out that the first respondent-firm was set up by Hemant with the consent of third appellant and in fact, the third appellant and the second respondent along with late Gamanlal signed the no objection letter in favour of the first respondent to carry on business in the name of Neelkanth Power Solutions. He pointed out that the said Hemant also granted NOC on behalf of the first appellant to the third appellant to carry on business from the premises bearing G-31, 32 and 12 appeal³⁹¹ 148 of the Raja Industrial Estate at Mulund (West) in the name of the eighth appellant. He invited our attention to the correspondence between the parties. He stated that the said Hemant has invoked arbitration clause under the said Memorandum of Understanding and the petitions have been filed by him under sections 9 and 11 of the Arbitration and Conciliation Act, 1996. The learned senior counsel relied upon the decision of the Court of Appeal in the case of *Habib Bank Limited vs. Habib Bank A.G. Zurich*⁶. He submitted that the Court of Appeal held that even if the appellants had established a *prima facie* case, their claim can be defeated by reason of acquiescence, laches and estoppel. He also relied upon the decision of the Apex Court in the case of *Kale and others Vs. Deputy Director of Consolidation and others*⁷. He submitted that the parties to the family arrangement who have benefitted thereunder are bound by the same and after taking the benefit thereunder cannot assail it. He relied upon the decision of the Apex Court in the case of *Hari Shankar Singhanian and others Vs. Gaur Hari Singhanian and others*⁸. By relying upon the said decision, he urged that the family arrangement has to be treated differently from any other commercial settlement. Lastly, he invited our attention to a decision of the Division Bench of Delhi High Court in the case of *Jaininder Jain and 7 (1976) 3 SCC 119 8 AIR 2008 SC 2488 13 appeal³⁹¹ others vs. Arihant Jain and others*⁹. He would therefore urge that no interference is called for with discretionary interim order passed by the learned Single Judge.

15 We have given careful consideration to the submissions. There appears to be no dispute that the second appellant is the registered proprietor of the mark "Neel". In the second appellant-firm, the said Hemant has 50% share and the third and fourth appellants have together 50% share. Even in the first appellant partnership firm, Hemant has 40% share and third and fourth appellants are having total 60% shares. The third appellant and Hemant are real brothers who represent two

groups consisting of their respective family members. The seventh, eighth and ninth appellants are associate firms and/or companies of the first and second appellants. Substantial shares/share holding of the said appellants companies is with the group of third appellant. The first respondent-firm is of Hemant and his wife-second respondent. It is alleged in the plaint that from April 2001, the eighth and ninth appellants were using the mark 'Neel' and they stopped user thereof from April 2011.

16 The case of the appellants is the first respondent has infringed their mark 'Neel' and is passing off its goods as those of the appellants. The appellants are relying upon list of their products, their sales including export, sales, their 9 2009 (41) PTC 492 (Del.) 14 appeal³⁹¹ list of customers and list of distributors to prove the extensive reputation acquired by the name 'Neel' in the market. Reliance is placed on the broucher published by the first respondent to show that the respondents are using the mark as their trading name and also to market the goods which are similar to those of the appellants. It is alleged that the respondents are claiming a common origin and connection with the firms/companies of the third appellant and are actually passing of their goods as those of the appellants. The allegation is that respondents are trading upon the reputation and goodwill of the appellants.

17 Notice of Motion for injunction taken out by the appellants is contested by the respondents by contending that Hemant being a partner of the second appellant which is the proprietor of the mark 'Neel' is entitled to use the same. Secondly, it is contended that the Memorandum of Understanding between the two groups show that the respondents are entitled to use the mark 'Neel'. Thirdly, it is contended that the respondents have been using the mark 'Neel' as a part of their trading name and as a trade mark with the full knowledge of the appellants and that the appellants have acquiesced to the use of the said mark by the respondents. It is contended that by virtue of principle of estoppel the appellants are precluded from raising an objection to the use of the mark by the respondents. It is contended that the appellants have not approached this Court with clean hands and even 15 appeal³⁹¹ otherwise due to delay and laches, they are disentitled to claim any equitable relief. One of the contentions raised by the respondents was that Hemant being a partner of the second appellant which is the proprietor of the registered trade mark 'Neel' is entitled to use the mark as he can claim to be a joint proprietor thereof. The learned Single Judge has rightly rejected the said contention based on the decision of the Apex Court in the case of M/s.Power Control Appliances and others vs. Sumeet Machines Private Limited. The law is well settled that in relation to a trade mark, there can be only one source and one proprietor.

Therefore, the case made out by the respondents on the basis of the claim of Hemant being a joint proprietor is rightly negated by the learned Single Judge.

18 One of the main contentions raised by the respondents is based on the Memorandum of Understanding. We have perused the Memorandum of Understanding which is dated 26th August 2009. Prima facie, there seems to be no real dispute about the execution of the said Document by and between the third appellant and said Hemant on behalf of their respective branches. The said Memorandum of Understanding runs only into four paragraphs which reads thus:

"1 We both the brothers, Shri Ravindra G. Mehta, Age 55 & Shri Hemant G. Mehta Age 50, residing at Ghatkopar, along with our wives, 16 appeal391 children & heirs with names as follows, agree to share all our family assets, in the ratio of 60:40, namely 60% for Shri Ravindra G. Mehta & 40% for Shri Hemant G. Mehta. This is irrespective of the names of the family members holding it, or companies, firms or individuals held in any form movable or immovable fixed or liquid held at present, till date. We the signatories are empowered and duly authorized by our family members to do so.

2 The divisible assets does not include our places of present residence where we are residing at Riddhi & Siddhi Apartments at Tilak Road, Ghatkopar and whatever the assets belonging to our parents, Shri Gamanlal V. Mehta and Smt. Manjula G. Mehta. The jewellery of ourselves, wives and daughters or daughter in laws is also excluded from the divisible assets. The property jointly held at grace infinity, Wadala and bungalow No.5 at Lonawalla are excluded and belongs to individuals as per agreement.

3 The assets includes shares in our family business, firms, partnership business, companies, bank deposits, investments in premises and properties, bonds, securities, share certificates, precious metals if any, liquid cash at hand or anything of similar 17 appeal391 nature.

4 In case of any dispute at a later date, we agree to solve it through mutual discussions or through Arbitrations and will not go to any Court of Law."

(emphasis added) 19 On plain reading of the said Memorandum of Understanding, prima facie, it is apparent that the assets subject matter of the said Memorandum of Understanding include intellectual property. The assets which were excluded have been specifically mentioned. The intellectual property is not included in the items which have been specifically excluded. Prima facie, the parties to the appeal are bound by the said memorandum which also deals with the intellectual property. The learned Single Judge in paragraph 9 discussed in what manner the effect can be given to the said Memorandum so far as it relates to trade mark. The relevant part of the finding recorded by the learned Single Judge in its order dated 24th June 2014 in paragraph 9 reads thus:

"9...Prima facie there is no reason, therefore, to believe that the trade mark "Neel" is not part of the divisible property to be shared in the 60:40 ratio.

Dr. Tulzapurkar argues that the trademark is not a divisible property by its very nature and that what the sharing thereof meant was that the firm would continue to hold it but would be so organized that the brothers would 18 appeal391 have 60:40 shares in the firm. There is nothing on record to establish this. The trade mark is a property of the firm and will definitely have to figure in the valuation of the firm. Even if it is not capable of being divided in specie, the division contemplated by the family arrangement is possible in theory and there may be various ways in which this

could be achieved. It may be that the firm will be reconstituted and held in the ratio or it may be that the firm or the trade mark may continue to be held by one individual and the other may be compensated for his share in some other manner in cash or kind. It may be that the trade mark may be held by a firm (held in turn in the ratio by the parties) and both brothers may have the right to make use of the trade mark by permitted user or licence. One can conceive of several devices in which the provision for division of assets with respect to the trade mark can be given effect to just as the other species of assets of the family can be actually divided by putting in place various legal arrangements. Actual sharing/division is accomplished by devising appropriate legal methods and executing appropriate legal documents for the same."

20 We concur with the prima facie observations made by the learned Single Judge.

19 appeal391 21 There is material on record to show that the parties acted upon the Memorandum. We have perused the additional compilation of documents produced by the respondents. The third appellant, second respondent and late Gamanlal (father of the third appellant and Hemant) on 1st December 2010 signed a letter/certificate inter alia giving no objection for obtaining permission from the Mumbai Municipal Corporation and from various Authorities such as State Sales Tax, Central Sales Tax etc to the first respondent-firm to carry on business in the name of Neelkanth Power Solution. On 4th February 2011, the first respondent placed an order for doing a labour job with the second appellant. The second appellant raised a tax invoice dated 4th February 2011 on the first respondent. The labour job was in respect of the transformers. The name of the first respondent- Neelkanth Power Solutions appears on it. On 15 th February 2011, Hemant addressed a e-mail to the third appellant recording factual position of the firms/companies as well as family arrangements between him and the third appellant. By the said e- mail, he requested the third appellant to complete separation without harming progress and with protection of interest of each other about the mark 'Neel'. In the said e-mail, addressed by Hemant to the third appellant, it is stated thus:

"Regarding the use of the word NEEL, as trade mark/ House mark/ Logo it was decided that both of us can and will make use of it and none of the proprietors of the mark would 20 appeal391 have any objection to the use of it and the two family concerns will start building its reputation in their own way and progress and conduct their respective business in their own way and protect the family unity at any cost."

(Emphasis added) 22 In respect of the order placed by the first respondent with the second appellant on 4th February 2011, the tax-invoice was raised by the second appellant in the name of the first respondent for labour charges for winding assembly and testing of 175 KVA isolation transformers. This document shows the knowledge of the appellants in February 2011 of the fact that the the respondents were using the mark and were carrying on the same business as that of the appellants. No action was taken by the appellants and on the contrary, they acted upon the order placed by the respondents. This conduct is very material in the context of the grant of discretionary relief of temporary injunction. This apart from the fact that the third appellant did not dispute what is stated in the aforesaid e-mail by giving a reply. The learned senior counsel for the appellants tried

to explain that the third appellant was advised by the Mediators not to make a communication to the said Hemant which would have an effect of precipitating the matter. However, the learned Single Judge found that after the said e- mail, the third appellant had addressed communications to the said Hemant taking positions 21 appeal391 in the matter of disputes. Therefore, the learned Single Judge has discarded the explanation given by the appellants and has disbelieved the affidavits of the Mediators.

23 The learned counsel for the appellants has made submissions on legal position regarding the common law licence. The said contention is dealt with by the learned Single Judge in paragraph 13 which reads thus:

"13 Dr.Tulzapurkar, however, submitted that any case of a common law licence where there is no connection in the course of the trade between the goods and the proprietor of the trade mark, or in other words, where the licensing results in destroying the distinctiveness of the mark or causing confusion or deception among the public, cannot be countenanced by the court. No doubt there is some substance in this submission. After all it is of essence that there ought to be a connection in the course of trade, which is consistent with the definition of trade mark, between the goods and the proprietor of the mark. But this question really assumes importance from the point of view of consequences of the absence of such connection."

24 Thereafter, a view is taken by the learned Single Judge that if acquiescence by the registered 22 appeal391 proprietor is prima facie established, interim injunction prayed by the proprietor can be refused.

25 Prima facie finding recorded by the learned Single Judge is that the first respondent-firm was set up with the consent of the third appellant and that the first respondent has been using the trade name 'Neelkanth' and has been using the mark 'Neel' at least from December 2010 to the knowledge of the appellants. There was no protest made by appellants. On the contrary the second appellant accepted and acted upon the orders placed by the first respondent. The learned Single Judge on the basis of the material which was discussed earlier found that the appellants have acquiesced to the use of the mark by the first respondent. The learned Judge has rightly observed that it means that the second appellant is willing to put its reputation behind the goods marketed by both the first respondent and the eighth appellants. Thus, in short, prima facie finding of the learned Single Judge is that the appellants have acquiesced to the use of the trade mark by the first respondent. The relief of interim injunction was refused by the learned Judge in the suit of the year 2012 by observing that for considerably long time, the suit remained pending without there being any ad-interim relief. Following the principles laid down by the Court of Appeal in the case of Habib Bank, the learned Single Judge declined to grant relief of temporary injunction on the basis of the acquiescence, laches and delay. Thus, the interim 23 appeal391 relief is denied not only on the basis of the acquiescence, but on the ground of delay and laches.

26 In this appeal, we are dealing with the appeal against the order refusing interim relief. Interim relief was sought under Rules 1 and 2 of Order XXXIX of the Code of Civil Procedure, 1908 which is

always discretionary. The present appeal is against an interim order of discretionary nature. In any event we find no perversity in the impugned order. No interference is called for with the impugned interim order.

27 Hence, there is no merit in the appeal. We must however make it clear that the observations made by the learned Single Judge and observations made by us in the Judgment are only for a limited purpose of deciding the issue of grant of interim injunction.

All contentions of the parties on merits of the appeal will remain expressly open.

28 Hence, we pass the following order.

. Appeal is dismissed with no order as to costs.

(C . V . BHADANG , J .)

(A . S . OKA , J .)