

**(2010) 10 MAD CK 0197**

**In the Madras High Court**

**Case No : O.S.A. No"s. 132 and 133 of 2010**

Bajaj Auto Ltd. and State of Maharashtra

APPELLANT

Vs

TVS Motor Company Ltd.

RESPONDENT

**Date of Decision : 04-10-2010**

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2  
Evidence Act, 1872 — Section 101  
Negotiable Instruments Act, 1881 (NI) — Section 18  
Patents Act, 1970 — Section 106

**Citation : (2010) 5 LW 454**

**Hon'ble Judges : K.K. Sasidharan, J;Elipse Dharma Rao, J**

**Bench : Division Bench**

**Advocate : T.V. Ramanujam and Nalini Chidambaram, s and A.A. Mohan, for the Appellant; A.L. Somayaji and P.S. Raman, Sr. Counsels and T.K. Bhaskar, for the Respondent**

**Final Decision : Allowed**

## **Judgement**

K.K. Sasidharan, J.

**INTRODUCTORY:**

1. Whether the right to begin as provided under Rule 1 and 2 of Order XVIII of CPC is really a right or is in the nature of a legal obligation of the plaintiff to produce his evidence at the first instance is the substantial question that arises for consideration in these original side appeals.

2. These appeals are directed against the Order dated 10 March 2010 in C.S. No. 979 and C.S. No. 1111/2007 whereby and whereunder the learned Single Judge directed the appellant being the defendant in C.S. No. 979/2007 and the plaintiff in the subsequent suit, to start with the letting in of evidence.

3. The parties are referred to as plaintiff and defendant in accordance with their status before the trial Court in the suit in C.S. No. 979/2007.

The facts:

First suit:

4. The suit in C.S. No. 979/2007 was instituted by the plaintiff against the defendant praying for the following reliefs:

(a) Declaring that the threats held out by the defendant on September 1 and 3, 2007 that the plaintiff is infringing the defendant's patent No. 195904 and the defendant is proposing to take infringement action against plaintiff are unjustified;

(b) Declaring that the plaintiff's product TVS Flame which uses two spark plug with screw-fitted sleeve and three valves does not infringe patent No. 195904 of the defendant;

(c) Granting permanent injunction restraining the defendant by themselves or through their agents, servants, licensees, employees and distributors and anyone claiming through them and/or all those in active concert and participation with them from continuing the issuance of threats that the plaintiff is infringing the defendant's patent No. 195904 and/or that the defendant is contemplating infringement action against the plaintiff or threats of like nature and import, directly or indirectly in any manner including by way of circulars, advertisements and communications, oral or in writing to the plaintiff or any other person and also thereby interfering with the launch and sale of the product TVS Flame.

(d) directing the defendant to compensate the plaintiff a sum of Rs. 1,00,00,000 or such other amount as this Hon'ble Court may determine after the records are produced for the damages sustained on account of the unjustified threats made by the plaintiff;

(e) for an order for costs of the suit in favour of the plaintiff; and

(f) For such further or other relief as this Hon'ble Court may deem fit and proper based on the facts and circumstances of this case.

5. In the plaint in C.S. No. 979/2007, the plaintiff would contend thus:

(a) Plaintiff is a prominent member of the well known TVS Group. Plaintiff has been involved in the manufacture of automobile products and they have secured large number of patents for the products developed by them. The plaintiff had introduced a 125 CC motorbike known as "TVS Flame".

(b) The plaintiff on 30 August 2007, unveiled seven new products including three wheelers in three variants: an electric scooter, a new 110 cc Star City, new 125 CC Motorcycle by name "TVS Flame". The rolling out of 7 new products and the features of those products and more specifically of "TVS Flame" had excited the media and industry and it was well received. TVS Flame is perceived as a vehicle that would satisfy both the class of riders viz., fuel efficient conscientious consumers and power conscientious consumers.

(c) The unveiling of TVS Flame 125 CC bike had the effect of eroding the excitement, hype and interest generated by the defendant's product Bajaj XCD 125 CC planned for launch on 9 September 2007 i.e. after ten days of the unveiling of TVS Flame by the plaintiff. The plaintiff in the meantime made it known to the market that they would soon enter into three wheeler which was hitherto virtually a monopoly of the defendant and the same caused a severe dent in the marketing triumph claimed by the defendant hitherto. The defendant who had planned to launch its 125 Bajaj XCD obviously perceived TVS Flame as a threat to its product. This paved the defendant to indulge in diabolically unethical strategy to tarnish TVS Products, particularly the TVS Flame, even before its launch, with groundless, unjust and unjustified allegation of infringement and threat of action against the alleged infringement so as to gain unfair and illegitimate advantage for its product's proposed to be launched on 9 September 2007.

(d) The news of the announcement of launch of TVS Flame and other products were broadcast on TV Channels on 30 August 2007 and it was also published in the newspapers on the next day. Immediately on 1 September 2007, the defendant put its high officials on television channels to accuse, allege and threaten that DTSi technology has been patented by defendant and that the said engine format has been copied by the plaintiff. The officials of the defendant further threatened that the construction of the engine of TVS Flame was very close to one to one copying. The statement made it clear that there is potential for legal course and that is how the defendant is proceeding. The representatives of the defendant also threatened that the defendant would not let the bike go under production with that engine. The statement containing threat was given wide publication throughout India in the electronic and print media.

(e) The defendant's accusation of infringement and threat to act against the plaintiff for infringement made through its officials and representatives on 1 September 2007 over popular TV Channels, which were carried in the print on the next day had disturbing and demoralizing effect on the customers of the plaintiff, the employees, investors and other stake holders and generally it had adverse and damaging effect on the brand value of the plaintiff's future products under launch, particularly the TVS Flame. Therefore, the plaintiff issued a statement on 2 September 2007 calling upon the defendant to withdraw the threat and the libelous statements made by it or to face action for damages.

(f) The defendant on 3 September 2007 issued a statement indicating their use of twin spark technology. The threat of infringement issued by the defendant on 1 September 2007 which was impliedly admitted by the defendant on September 3, 2007 as groundless, falls within the scope of Section 106 of the Patents Act, 1970. Once the fact of threat is established, plaintiff is entitled to move the Court u/s 106 of the Patent Act against the threat of infringement action issued by the defendant.

(g) The plaintiff endeavored to establish beyond all doubts that the defendant

has threatened them with infringement of its patent. The plaintiff was therefore, justified by submitting relevant materials to show that they have not infringed the patent of the defendant in question.

(h) Accordingly, the plaintiff prayed for a decree of declaration of non-infringement, groundless threat and consequential injunction, besides payment of compensation.

6. The suit in O.S. No. 979/2007 was resisted by the defendant by filing detailed written statement. The material contentions as found in the written statement reads thus:

(a) The defendant is a reputed business house engaged in the manufacture of automobile products.

(b) The declaratory relief sought for by the plaintiff does not come under the purview of Section 106 of the Patents Act. To grant a declaratory relief as to non-infringement, the plaintiff ought to have complied with the procedures contemplated under the Act viz., plaintiff should have applied in writing to the defendant for a written acknowledgment to the effect of the declaration claimed and furnished to the defendant with full particulars in writing of its products in question and the defendant had refused or neglected to give such an acknowledgment. Since there was total non compliance with the statutory requirements, no declaration could be granted in favour of the plaintiff.

(c) The statements made were only to assert the exclusive rights vested in the defendant by virtue of patent registration 195904 and the right to take legal action for misuse. It was not a threat within the meaning of Section 106 of the Patents Act.

(d) The present suit is barred by Order 2 Rule 2 of CPC. Plaintiff has already filed a Suit bearing No. 3132/2007 before the Bombay High Court on the basis of the very same alleged press statement and on identical cause of action. Since the plaintiff has omitted to sue for the reliefs claimed herein and no leave under Order 2 Rule 2 CPC has been obtained, they are prevented from filing the present suit for the omitted reliefs.

(e) The plaintiff has enclosed several newspaper reports. But the defendant is not aware which particular reference is constituted as threat. Defendant has not admitted the said press releases and the statements attributed to them and put the plaintiff to strict proof thereof.

(f) The defendant has conducted preliminary examination of the plaintiff's engine in TVS Flame. The said examination has revealed that insofar as the third valve is concerned, it has no role to play in Indian Driving Cycle conditions. The result of the test conducted by the defendant through an independent testing agency of international repute viz., TUV Rheinland, also corroborated their contention that the plaintiff has infringed their patent 195904. Therefore, assuming that the defendant issued a threat as alleged, it was not a meaningless

threat. Defendant has every right to safeguard its statutory rights over the patent 195904 which was granted under the Statute. As per Section 105 of Patents Act, to institute a proceeding, proviso (a) and (b) have to be complied with. Since the plaintiff has not complied with those pre conditions before filing a suit for declaration of non-infringement, they are precluded from questioning the validity of the defendant's patent. Accordingly, the defendant prayed for dismissal of the suit.

Second suit:

7. Defendant in C.S. No. 979/2007 filed a suit in C.S. No. 1111/2007 against the plaintiff with the following prayer:

(a) permanent injunction restraining the defendant, its directors, officers, servants, agents, assigns, successors-in-business, legal representatives or anyone claiming through or under it from in any manner infringing the plaintiff's patent No. 195904 and/or from using the technology/invention described in the said patent No. 195904 and/or manufacturing, marketing, selling, offering for sale or exporting 2/3 wheelers, including the proposed 125 cc Flame motorcycle containing an internal combustion engine or any internal combustion engine or product which infringes the plaintiff's patent No. 195904.

(b) a preliminary decree be passed in favour of the plaintiff directing the defendant to render accounts of profits made by sale or offering for sale/export of 125 cc FLAME motorcycle or any other motorcycle of 100 cc to 125 cc range with twin spark plug technology infringing plaintiff's patent No. 195904.

(c) the defendant be ordered and decreed to pay the plaintiff sum of Rs. 10,50,000/- as damages for infringement of patent No. 195904.

(d) That defendant be ordered and decreed to deliver up to the plaintiff, for destruction all the infringing copies and articles including vehicles containing engines that infringe the plaintiff's patent.

8. The contentions taken by the defendant in their written statement in C.S. No. 979/2007 were reproduced in the plaint in C.S. No. 1111/2007.

9. The averments in the plaint in C.S. No. 979/2007 constitutes the defence in C.S. No. 1111/2007.

10. Since the pleadings were completed, the learned Single Judge framed issues in both the suits as per order dated 24 November 2009.

11. When the suit was ripe for trial, the learned Single Judge took up the preliminary issue as to who should let in evidence first. Arguments were advanced on both sides as to who should lead evidence at the first instance. After hearing both the parties, the learned Single Judge opined that the infringement being the central theme in both the suits and even though the first suit proceeds on the validity of patent, to arrive at a proper decision, defendant has to start with letting in of the evidence. Feeling aggrieved by this decision, the

defendant has filed these two appeals.

Submissions:

12. The learned Senior Counsel for the defendant would submit thus:

(a) The suit in C.S. No. 979/2007 being a suit regarding groundless threat, the plaintiff had to lead evidence first, unless the defendant admits the issuance of threat. Since the defendant has categorically denied the issuance of threat, the plaintiff has to lead evidence at the first instance.

(b) The plaintiff had also sought for a declaration of non-fringement. In a suit for declaration, evidence has to be adduced on the part of the plaintiff and the question of defendant adducing evidence comes only at a later point of time. Therefore, the learned Single Judge was not justified in directing the defendant to lead evidence first.

(c) The direction given by the learned Single Judge was contrary to the scheme of civil jurisprudence.

(d) The burden of proving the validity of the patent is always on the persons who allege such invalidity. Therefore, the plaintiff was duty bound to prove by adducing evidence at the first instance.

(e) The issues framed by the learned Single Judge gives a clear indication that the plaintiff has to set out evidence first.

(f) The plaintiff has raised several issues and even contested the very patent obtained by the defendant. Therefore, the burden of proof and the onus is heavily on the plaintiff and in such circumstances, the learned Single Judge was not correct in directing the defendant to lead evidence without asking the plaintiff to lead primary evidence.

(g) The plaintiff has made a categorical assertion in the plaint that they would prove the groundless threat and non-infringement of patent by adducing evidence. Therefore, they should have been called upon to produce evidence in support of their contentions.

(h) The order passed by the learned Single Judge directing the defendant to lead evidence first was against law and the scheme of CPC and it caused serious prejudice to the defendant and as such, the original side appeal under Clause 15 of the Letters Patent was clearly maintainable.

13. The learned Counsel for the plaintiff contended thus:

(a) The order challenged in this appeal was not a judgment within the meaning of Clause 15 of the Letters Patent and as such, the very appeal was not maintainable.

(b) It is true that in the plaint in C.S. No. 979/2007, plaintiff has undertaken the task of proving the groundless threat as well as non-infringement. However, that

does not mean that the burden never shifted to the defendant to prove their case in view of the subsequent suit filed by them in C.S. No. 1111/2007.

(c) The learned Judge has not directed the defendant in C.S. No. 979/2007 to lead evidence first. The direction was to the plaintiff in C.S. No. 1111/2007 to open their case. Therefore, it cannot be said that the defendant in the suit was made to produce their evidence without directing the plaintiff to begin.

Discussion:

14. The plaintiff has filed a comprehensive suit in C.S. No. 979/2007 in the month of October 2007. The suit was one for declaration and consequential injunction. The plaintiff has also claimed damages.

15. The defendant filed their written statement in the said suit on 16 December 2007. The defendant denied the allegation made by the plaintiff with respect to issuance of groundless threat and their plea that the product TVS Flame 125 CC has nothing to do with the patent No. 195904. Subsequently, the defendant filed the suit in C.S. No. 1111/2007. Their prayer was to grant a decree of permanent injunction restraining the defendant or anyone from infringing their patent 195904 and for a preliminary decree directing the respondent to render accounts of profits made by sale or offering for sale/export of 125 CC Flame, by infringing their patent and to pay damages for such infringement. The said suit was filed on 16 December 2007.

16. The plaintiff filed a detailed written statement in C.S. No. 1111/2007 on 18 September 2009. In the said written statement, the plaintiff disputed the contention that they have infringed the patent No. 195904 obtained by the defendant. They have also attempted to demonstrate that the threat made by the defendant was groundless in nature.

The issues:

17. The learned Single Judge on the basis of the respective pleadings, framed the following issues in C.S. No. 979/2007 and 1111/2007.

C.S. No. 979/2007

1. Whether this Court has got territorial jurisdiction to try this suit and whether the plaintiff has got any cause of action as prayed for by the plaintiff and more so, whether part cause of action has arisen within the jurisdiction of this Court ?
2. Whether the defendant has issued the press release on 01.09.2007 and 03.09.2007 and whether the same would constitute a threat ? And if so groundless threat ?
3. Whether the present suit is barred by the provisions of Order 2 Rule 2 CPC in view of the earlier suit filed in Bombay High Court in Suit No. 3132/2007 ?
4. Whether the plaintiff is entitled to seek an injunction restraining the defendant from issuing a threat of infringement as prayed in the prayer even after the

defendant has filed the suit for infringement being C.S. No. 1111/2007 against the plaintiff herein ?

5. Whether the suit has become infructuous as claimed by the defendant in para 4.1 of the written statement ?

6. Whether the plaintiff proves that the plaintiff's product TVS Flame does not infringe the defendant's patent ?

7. Whether the plaintiff is entitled to a declaration as prayed for in prayer (a) and (b) of the plaint ?

8. Whether the suit has been properly valued on the ground of damages ? If so, whether the Court fee has been properly paid ?

9. Whether the plaintiff is entitled to relief of damages ?

10. Whether the plaintiff is entitled to the reliefs claimed by them ?

C.S. No. 1111/2007

1. Whether the defendant has infringed the plaintiff's patent No. 195904 ?

2. Whether the defendant is entitled to question the validity of the plaintiff's patent No. 195904 ?

3. If the answer to (2) is in the affirmative, whether the defendant proves that the plaintiff's patent No. 195904 is invalid/not patentable in view of US Honda patent No. 4534322 read with 678/MUM/2001 and 82/MUM/2001 ?

4. Whether the plaintiff is entitled to permanent injunction as prayed for ?

5. Whether the use of twin spark plugs in an engine delimited by the bore size of 45 mm to 70 mm impart inventive step particularly in the light of Honda Patent 4534322 ?

6. Whether the burning of lean air fuel mixture can be regarded as an element (constructional feature) of the produced claimed in the suit patent?

7. Whether the plaintiff is entitled to damages as prayed for or otherwise ?

8. Whether the plaintiff is entitled to any of the relief prayed for in the above suit ?

18. The core issue to be decided in these appeals relate to the question as to who should lead the evidence first.

19. The plaintiff in their suit in C.S. No. 979/2007, contended that the burden of proof of the defendant in the suit equals its burden in a properly constituted suit for infringement, yet, they have taken upon themselves the burden of establishing that there is no infringement by them of the defendant's patent in issue. The plaintiff has also stated that the course adopted by them to prove that there is no infringement is legally permitted as the plaintiff has the choice of

leaving it to the defendant to prove that they have infringed the rights of the defendant or to prove its case that it has not infringed. Plaintiff has opted to follow the latter course of proving non-infringement.

20. In the plaint, it was further contended that the issue as to whether the plaintiff has infringed the defendant's patent being a fact in issue in the present proceedings, they have endeavoured to marshal all the relevant materials to establish that it has not infringed the patent of the defendant. It was also their case that structure of a suit u/s 106 is that if the defendant pleaded justification for threat and also counter-claims for relief against infringement, the procedure to be followed is that of a normal infringement action. It was in that factual and legal premises, plaintiff has adopted the dubious task of proving that the threat was groundless and that they were entitled for a declaration of non-infringement.

21. Section 105 of the Patents Act, 1970 empowers the Court to make a declaration as to non-infringement. Before issuing a declaration under the said provision, Court should be satisfied that the plaintiff has complied with the requirements (a) and (b) of Section 105.

22. Section 106 of the Patents Act, permits the Court to give relief in case of groundless threat or infringement. The said provision also gives an indication that it is open to the Court to grant a declaration that threats are unjustifiable and a consequential injunction, besides award of damages.

23. The plaintiff has claimed a decree of non-infringement of patent and produced materials which according to them would prove that their product TVS 125 CC Flame was in no way infringing the patent 195904 of the defendant. They have also referred to various statements issued by the defendant to prove that there was in fact a threat and it was a groundless threat. The claim that the product introduced by the plaintiff has nothing to do with the patent obtained by the defendant was specifically contested by the defendant. The defendant also denied the threat, as according to them they were in the process of protecting their product and the so called statements were all made in that limited context.

The concept of "Right to begin"

24. The issues raised in these appeals revolve around the interpretation of Order 18 Rule 1 and 2 CPC.

25. Order 18(1) of CPC deals with hearing of the suit and examination of witnesses. The provision reads thus:

1. Right to begin The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin.

26. The provisions of Order 18 CPC indicates the normal method of production of

evidence and the arguments by either parties.

27. The term "right to begin" is not merely a right. It is rather a duty or legal obligation. It is so because the plaintiff has to win or lose the case on the basis of his own case and not on the weakness of the defendant's case.

28. Order 18 Rule 1 CPC is concerned not only with the production of evidence. It is a composite provision dealing with the right to begin a case in general. This includes the production of evidence as well as addressing the Court by oral arguments. Though Order 18 Rule 1 CPC provides in general about the right to begin, Rule 2 of Order 18 deals with opening the case and production of evidence. A combined reading of Rules 1 and 2 of Order 18 CPC would show that the person who got a right to begin must lead evidence first. As per the statutory scheme, the plaintiff is given the right to begin the case. This right would not give the plaintiff a further right to compel the defendant to produce his evidence at the first instance. The question of defendant beginning the case would arise only in cases wherein the defendant admits the facts alleged in the plaint and contends that either on point of law or on some additional facts alleged by him, the plaintiff is not entitled to any part of the relief which he seeks. It is only in such circumstances, the defendant gets the right to begin. Therefore, the "right", as defined in Rule 1 of Order 18 would not really be a "right" and is essentially a legal obligation to prove the case.

29. There are exceptions to this Rule like the case relating to promissory notes. In a suit on promissory notes, if the defendant admits execution, the burden would shift to him to prove the discharge. Section 18 of the Negotiable Instruments Act provides that until the contrary is proved, the Court shall presume that every negotiable instrument or debt was made or drawn as shown in the document. In such cases, the burden is on the opposite party to lead evidence that the negotiable instrument was made without consideration.

30. Hearing of the suit and the trial of the suit are totally two different concepts. Trial would commence the very moment the suit is instituted. "Trial of the suit", therefore, is a comprehensive term. The trial would commence after the filing of suit and it would end with the disposal of the suit. The hearing of the suit is part of the trial process. Hearing relates to examination of witnesses, their cross examination as well as arguments by the counsel. Therefore, hearing is a continuous process not confined to producing and recording evidence. It is therefore, essentially a composite process. The right to begin as mentioned in Rule 1 of Order 18 CPC has to be treated as opening the case, production of evidence followed by arguments. In normal course, the plaintiff has to open the case and he should lead evidence to begin with.

31. In Anil Rishi Vs. Gurbaksh Singh, , the Supreme Court held that the burden of proving the fact rests on the party who asserts the affirmative and not on the party who denies it. The observation reads thus:

8. The initial burden of proof would be on the plaintiff in view of Section 101 of

the Evidence Act, which reads as under:

101. Burden of proof.

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

9. In terms of the said provision, the burden of proving the fact rests on the party who substantially asserts the affirmative issues and not the party who denies it. The said rule may not be universal in its application and there may be an exception thereto. The learned trial court and the High Court proceeded on the basis that the defendant was in a dominating position and there had been a fiduciary relationship between the parties. The appellant in his written statement denied and disputed the said averments made in the plaint.

10. Pleading is not evidence, far less proof. Issues are raised on the basis of the pleadings. The defendant-appellant having not admitted or acknowledged the fiduciary relationship between the parties, indisputably, the relationship between the parties itself would be an issue. The suit will fail if both the parties do not adduce any evidence, in view of Section 102 of the Evidence Act. Thus, ordinarily, the burden of proof would be on the party who asserts the affirmative of the issue and it rests, after evidence is gone into, upon the party against whom, at the time the question arises, judgment would be given, if no further evidence were to be adduced by either side.

11. The fact that the defendant was in a dominant position must, thus, be proved by the plaintiff at the first instance.

32. Burden of proof vis-a-vis onus of proof: Burden of proof generally lies on a party who asserts a particular fact. In other words, it would be on a party whose suit would fail, if no evidence was let in. Onus of proof by a party would cease the moment opposite party admits the transaction. Burden of proof on the pleadings of a party, never shifts to the other party. The initial burden of proving a particular fact is always on the party who asserts it. When he produces evidence in support of his statement, onus would shift on the opposite party to adduce rebutting evidence to meet the case made out by the other party. In civil cases, onus of proof is never fixed permanently, but it would fluctuate very frequently.

33. In *Addagada Raghavamma and Another Vs. Addagada Chenchamma and Another*, , the Supreme Court indicated the distinction between "burden of proof" and the "onus of proof":

12. ... There is an essential distinction between burden of proof and onus of proof: burden of proof lies upon the person who has to prove a fact and it never

shifts, but the onus of proof shifts. The burden of proof in the present case undoubtedly lies upon the plaintiff to establish the factum of adoption and that of partition. The said circumstances do not alter the incidence of the burden of proof. Such considerations, having regard to the circumstances of a particular case, may shift the onus of proof. Such a shifting of onus is a continuous process in the evaluation of evidence.

34. There is nothing in the Patents Act to indicate that in case a suit for declaration of non-infringement was filed, the burden is on the defendant to lead evidence to show that there was infringement. Therefore, primarily, it is the responsibility of the plaintiff to produce evidence in support of his case.

35. In Anil Rishi's case cited supra, the Supreme Court observed that the right to begin follows onus probandi. The relevant paragraph reads thus: There is another aspect of the matter which should be borne in mind. A distinction exists between burden of proof and onus of proof. The right to begin follows onus probandi. It assumes importance in the early stage of a case. The question of onus of proof has greater force, where the question is, which party is to begin. Burden of proof is used in three ways: (i) to indicate the duty of bringing forward evidence in support of a proposition at the beginning or later; (ii) to make that of establishing a proposition as against all counter-evidence; and (iii) an indiscriminate use in which it may mean either or both of the others. The elementary rule in Section 101 is inflexible. In terms of Section 102 the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same.

36. When there are two suits and the claims in both the suits are inextricably inter linked, the Trial Court would be justified in ordering a joint trial. In case joint trial is ordered, it would be open to the Trial Court to pass a discretionary order as to the suit in which evidence should be taken first. The normal practice is to open the case by the plaintiff.

37. In State Bank of India Vs. Ranjan Chemicals Ltd. and Another, , the Supreme Court indicated the circumstances wherein a joint trial could be ordered:

10. A joint trial can be ordered by the court if it appears to it that some common question of law or fact arises in both proceedings or that the right to relief claimed in them are in respect of or arise out of the same transaction or series of transactions or that for some other reason it is desirable to make an order for joint trial. Where the plaintiff in one action is the same person as the defendant in another action, if one action can be ordered to stand as a counterclaim in the consolidated action, a joint trial can be ordered. An order for joint trial is considered to be useful in that, it will save the expenses of two attendances by the counsel and witnesses and the trial Judge will be enabled to try the two actions at the same time and take common evidence in respect of both the claims. If therefore the claim made by the Company can be tried as a

counterclaim by the Debt Recovery Tribunal, the court can order joint trial on the basis of the above considerations. It does not appear to be necessary that all the questions or issues that arise should be common to both actions before a joint trial can be ordered. It will be sufficient if some of the issues are common and some of the evidence to be let in is also common, especially when the two actions arise out of the same transaction or series of transactions.

11. A joint trial is ordered when a court finds that the ordering of such a trial, would avoid separate overlapping evidence being taken in the two causes put in suit and it will be more convenient to try them together in the interests of the parties and in the interests of an effective trial of the causes. This power inheres in the court as an inherent power.

38. The issues framed by the Trial Court also gives an idea as on whom the burden of proof lies. Issue Nos. 1 and 3 in C.S. No. 979/2007 had to be proved by the plaintiff. Defendant has taken up a preliminary objection that the plaintiff has already filed a suit before the Bombay High Court with respect to the very same issue and as such, it was not open to them to file another suit on the basis of the very same cause of action before this Court.

39. In paragraph 58 of the plaint, the plaintiff has stated that by its statement the defendant has threatened them and also defamed the plaintiff and the TVS group and as such, they are entitled to compensation from the defendant for the damages caused by their groundless threats. It was further stated that the plaintiff has been exposed to two kinds of damages, namely damages to its reputation and also the reputation of TVS Group and damage to its new product TVS Flame and its launch programme. The plaintiff has also stated that along with their holding Company, M/s. Sundaram Clayton Ltd. they have filed a suit before the High Court of Bombay for the damage caused to the reputation of TVS Group and to the plaintiff as a corporate by the libelous and defamatory allegations.

40. The institution of the earlier suit before the Bombay High Court on the basis of the very same cause of action made the defendant to take up a contention that the subsequent suit was barred under Order 2 Rule 2 CPC.

41. The specific contention taken by the defendant about the maintainability of the subsequent suit made the learned Judge to frame the following issue:

3. Whether the present suit is barred by the provisions of order 2 Rule 2 CPC in view of the earlier suit filed in Bombay High Court in Suit No. 3132/2007 ?

42. Order 2 Rule 2 rest on the principle that the opposite party should not be vexed twice on the basis of a single cause of action. Sub Rule (1) of Order 2 provides that every suit shall include the whole of the claim in respect of the particular cause of action. Rule 2(2) deals with relinquishment of part of claim. Similarly, sub Rule (3) of Rule 2 contains a legal bar to institute a second suit on the basis of the very same cause of action without the leave of the Court. The

usual test for ascertaining as to whether the later suit is maintainable on account of the earlier suit is to find out the cause of action in both the suits and in case the bunch of facts constituting the cause of action were the same in both the suits, the subsequent suit has to be axed at the threshold.

43. Since the plaintiff has admitted the earlier suit, it was their duty to establish that the first suit was on the basis of a different cause of action and as such, there was no legal bar in filing a second suit. This issue goes to the root of the matter and as such, the burden is on the plaintiff to provide materials to substantiate their contention that the cause of action for filing a second suit was altogether different. In spite of such burden of proof on the plaintiff to sustain the very suit, the learned Single Judge has shifted the burden and called upon the defendant to begin the case. Instead of directing the plaintiff to produce positive evidence to decree their suit, the learned Judge has directed the defendant to prove the negative. This really caused prejudice to the defendant.

44. The other issues framed in the suit in C.S. No. 979/2007 also gives an indication that the burden of proof is heavily on the plaintiff. In fact, the plaint contains a statement that the plaintiff has taken up the task of proving their contention that there was no infringement of the patent obtained by the defendant. Therefore, in a suit of this nature, the responsibility is heavy on the plaintiff to prove the plaint averments. The plaintiff has also indicated that they have got all the materials to prove their contentions. The suit in C.S. No. 979/2007 was prior in point of time also. Incidentally, it is to be mentioned that in case the defendant has not filed the subsequent suit in C.S. No. 1111/2007, plaintiff was bound to prove their case and there was no necessity to decide the preliminary point as to who should begin first.

45. The learned Senior Counsel for the plaintiff contended that the decision of the trial Judge was only to take up the subsequent suit first and it will be followed by recording the evidence of the plaintiff in C.S. No. 979/2007.

46. We have summoned the order sheet maintained by the learned Single Judge. There is nothing indicated in the Court records either to show that joint trial was ordered or a decision was taken by the learned Single Judge to take up the suit in C.S. No. 1111/2007 at the first instance. In fact, the learned Single Judge initially observed that the normal procedure is that the plaintiff should begin first and the first suit should be taken up at the first instance. After saying so, there was no further indication in the order about the special circumstances found in the subject case to justify the departure from the normal rule so as to direct the defendant to begin the case. It is true that the learned Single Judge has stated that the claim made in the two suits are inter-linked. However, the fact remains that the defendant was armed with a patent and it was only the plaintiff who made a prayer for declaration of non-infringement.

47. When the plaintiff seeks a decree of non-infringement, the question of burden of proof comes into play. The moot question in such a case is as to who

would fail in case no evidence is let in. The plaintiff has taken up the task of proving their contention that their TVS 125 CC Flame does not infringe the patent obtained by the defendant. Plaintiff has no case that the defendant was guilty of infringement of their patent.

48. The right to begin as provided under Order 18 Rule 1 CPC has to be considered in the light of Section 101 and 103 of Patent Act.

49. The suit filed by the defendant in C.S. No. 1111/2007 was in the nature of a counter claim. In fact, even according to the plaintiff, in case the defendant institutes a suit later, it would only be a suit with a counter claim.

50. The plaintiff was consistent in their case that their product has nothing to do with the patent obtained by the defendant. This only made them to incorporate the term "for declaration" in terms of Section 105 of the Patents Act. By directing the defendant to begin first, the learned Single Judge has virtually directed the defendant to prove that the product launched by the plaintiff does infringe their patent No. 195904.

Maintainability of Appeal:

51. The plaintiff has raised a preliminary objection with respect to the maintainability of the appeal. According to the plaintiff, the order impugned in the appeal was not in the nature of a judgment and as such, the defendant was not entitled to file an appeal under Clause 15 of the Letters Patent.

52. The general principle is that the plaintiff should win or lose his case on the basis of the case set up by him. The defendant got a right to insist that he should not be compelled to disclose his evidence first as otherwise the plaintiff would tune his case accordingly. Therefore, the defendant was right in insisting that the plaintiff should prove his case first before calling upon him to adduce evidence. When there is a deviation from the normal rule, naturally, it would result in injustice. Such injustice would give a cause of action to file an appeal.

53. The other question is as to whether the grievance could be corrected at a later point of time in the same proceedings or in the related appeal.

54. The issue as to who should begin first and the decision given one way or the other, cannot be corrected at a later point of time. The prejudice caused to a party cannot be corrected even in appeal otherwise than by a direction to record fresh evidence. The defendant has not come to the Court at the first instance. It was only the plaintiff who originally filed the suit at Bombay and later, before this Court. The fact that the defendant has also filed a suit at a later point of time would not absolve the plaintiff from their legal obligation to adduce evidence in support of their case by opening their case at the first instance. Since the defendant has got a reasonable right to expect that he would be asked to disclose his evidence, only after opening the case by the plaintiff, any order which would change normal course would give a cause of action to the defendant to file an appeal invoking Clause 15 of the Letters Patent.

55. In *Shah Babulal Khimji Vs. Jayaben D. Kania and Another*, , the Supreme Court considered the circumstances wherein an appeal under Clause 15 of the Letters Patent could be filed. The observation reads thus:

115. Thus, in other words every interlocutory order cannot be regarded as a judgment but only those orders would be judgments which decide matters of moment or affect vital and valuable rights of the parties and which work serious injustice to the party concerned. Similarly, orders passed by the trial Judge deciding question of admissibility or relevancy of a document also cannot be treated as judgments because the grievance on this score can be corrected by the appellate court in appeal against the final judgment.

(emphasis supplied)

56. Therefore, we are of the considered view that any order passed by the trial Judge which would affect the valuable rights of the parties or which would result in causing substantial prejudice or injustice to a party and which cannot be corrected at a later point of time in the original proceeding or in appeal against the final judgment and decree should be construed as a judgment within the meaning of Clause 15 of the Letters Patent, thereby enabling the aggrieved party to file an appeal.

57. The suit filed by the plaintiff was not one for injunction alone. It was a comprehensive suit for declaration and that too for a decree of non-infringement. The plaintiff has also claimed damages against the defendant. Since the plaintiff has sought the relief of non-infringement, naturally, they were required to lead their evidence first.

58. The primary burden was on the plaintiff to prove their case. It is true that the defendant has subsequently filed a suit praying for a decree of injunction based on their patent. When the plaintiff has taken a substantial contention that their new product has nothing to do with the patent obtained by the defendant, it was for the plaintiff to produce materials so as to enable the Court to grant a decree in their favour. The fact that the defendant has filed a subsequent suit would not absolve the plaintiff from proving their plaint averments. In fact, the learned Judge has stated that the very issue relates to infringement. It was only the plaintiff who has come to the Court at the first instance with an action that the threat originated from the defendant, was a groundless threat, and that their product has nothing to do with the patent obtained by the defendant. Therefore, the plaintiff should have been directed to lead evidence at the first instance. In case the defendant wants to get a decree as prayed for in C.S. No. 1111/2007 they have to show that the vehicle manufactured by the plaintiff under the brand name TVS Flame was an infringement of their patent. Therefore, the burden lies on both the parties to prove their respective contentions. However, we are concerned only with the limited issue as to who should begin first. Since the suit filed by the plaintiff was a suit for declaration, consequential injunction and damages and in the absence of an order for joint trial, the learned Single Judge

should have directed the plaintiff to lead evidence at the first instance. The direction to the defendant to begin was therefore, contrary to the scheme of civil jurisprudence. Hence, we are constrained to set aside the order passed by the learned Single Judge.

Disposition:

59. In the result, these appeals are allowed and the common fair and decretal order dated 10 March 2010 in C.S. Nos. 979/1997 and 1111/2007 are set aside. The plaintiff is directed to produce their evidence at the first instance. No costs.

60. The learned Judge is requested to decide the suit on merits and as per law, uninfluenced by the observations made in this judgment, as those observations were made only for deciding the limited issue as to who should begin first.