
(2004) 07 SHI CK 0009
In the High Court Of Himachal Pradesh
Case No : O.M.P. No's. 466 of 2003,

Claridge Moulded Fiber Ltd.	Vs	APPELLANT
Mohan Fiber Products Ltd.		RESPONDENT

Date of Decision : 27-07-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2

Citation : (2004) 2 ShimLC 432

Hon'ble Judges : K.C. Sood, J

Bench : Single Bench

Advocate : K.D. Sood, for the Appellant; Ajay Kumar, for the Respondent

Final Decision : Allowed

Judgement

K.C. Sood, J.—This order will dispose of these petitions arising out of Civil suit No. 60 of 2003.

2. Plaintiff, Claridge Moulded Fibre Limited, is a Company registered under the Companies Act, with its registered Office at Parijit House, 2nd Floor, 1076, Dr. E. Moses Road, Worli, Mumbai. The defendant is also a Company registered under the Companies Act with registered Office at 5861, Modern Complex, Mani Majra, Chandigarh. The Plaintiff Company has laid suit against the Defendant Company for the following reliefs:

(a) That the Defendant by themselves, their servants and agents, representatives, stockists, dealers and all other persons claiming under them or acting in concept with them be restrained by a perpetual order and injunction of this Court from in any manner manufacturing, selling, advertising and/or offering for sale and/ or exposing for sale, without the license of the Plaintiff, the goods viz. the said "apple tray" and/or "fruit tray" as shown in Exhibit "A" (and more particularly as seen in the photographs annexed as Exhibit "E"), hereto or, applying the Plaintiffs registered design or any other design which is a colorable imitation or a substantial reproduction of the Plaintiffs registered design, so as to

infringe the Plaintiffs design No. 190044 in Class 09-03;

(b) That the Defendant by themselves, their servants and agents, representatives, stockists, dealers and all other persons claiming under them or acting in concern with them restrained by a perpetual order and injunction of this Court from in any manner manufacturing, selling, advertising and/or offering for sale and/or exposing for sale, without the license of the Plaintiff, the goods viz. the said "apple tray" and/or "fruit tray" as shown in Exhibit "A" (and more particularly as seen in the photographs annexed as Exhibit "E") hereto or, applying the Plaintiffs registered design or any other design which is a colorable imitations or a substantial reproduction of the Plaintiffs registered design, so as to pass off its impugned goods bearing the said design as and for those of the Plaintiff or in any way connected with the Plaintiff;

(c) That the Defendant be ordered and decreed to pay to the Plaintiff a sum of Rs. 10,00,000/- (Rupees Ten Lakh only) as and by way of damages, or in the alternative, the Defendants be ordered and decreed to render a true and faithful account of all the profits earned by them by using the impugned design and the Defendant be further ordered and decreed to pay to the Plaintiff, such amount being found due on such account being taken;

(d) That the Defendant by themselves, their servants and agents, representatives, stockists, dealers and all other persons claiming under them or acting in concern with them be ordered and decreed to deliver to the Plaintiff for destruction all the products bearing or having the impugned design and all dyes, moulds, product catalogues, price list, papers, articles and things including all other things which are or may be intended to be used in the manufacture of and/or advertising of the Defendant's product in relation to the registered design of the Plaintiff".

3. The case of the Plaintiff Company is :

4. The Plaintiff Company is engaged in the business of manufacture and production of material of various activities, including fruit packaging and boxes. The Plaintiff Company was incorporated as "Van Leer Moulded Fibers Private Limited" on or about February 24, 1998. However, on March 31, 2003, the name of the Company was changed to its present name and style, i.e. "Cladridge Moulded Fibre Private Limited" and a fresh certificate of incorporation was issued by the Registrar of Companies at Mumbai. The Defendant Company also engaged in the business of manufacture and production of packaging material for fruit packing and boxes. In September, 2002, the Plaintiff Company got a design prepared which was of novel shape, configuration and ornamentation of a "tray" in which apples and/or fruits could be kept and packed. This design was registered under the provisions of the Designs Act, 2000 under No. 190044 in class 09-03 on September 25, 2002. The registration of such design, pleads Plaintiff Company, is valid and subsisting.

5. It is the case of the Plaintiff that the tray in question was designed by the

Plaintiff keeping in view the shape of apples and /or fruits that require to be transported from the orchards to various markets. This apple tray, repeats Plaintiff Company, has original shape, configuration and ornamentation and was introduced in the market in October, 2002. The tray has acquired reputation and good will in the market. The apple trays of the design in question have been sold throughout the Country since 2002. The plaintiff company, it is alleged, has spent large sums of money on promotion and publicizing the apple tray in question by way of advertisements. This tray, it is emphasized, is unique, distinctive in design and is exclusively identified with the Plaintiff Company. The Plaintiff enjoys "enviable reputation and goodwill in the aforesaid registered design".

6. It is the further case of the Plaintiff Company that it alone is entitled to apply the registered design to the "apple tray" under the Designs Act and any unauthorized use by the Defendant is infringement of the plaintiff's proprietary rights. According to the Plaintiff Company, in June, 2003, the plaintiff came across "apple tray" manufactured by the Defendant and found that the defendant has applied the same design to its apple tray by slavishly copying the design of the apple tray of the Plaintiff. The Defendant, according to the Plaintiff Company, appears to be engaged in the manufacture and making its apple tray in a design and shape in exact replica and an identical copy of the reputed and registered design of the Plaintiff Company. In fact, pleads Plaintiff Company, the defendant Company has "bodily lifted and pirated" the registered design of the Plaintiff. This has deliberately been done by the Defendant to encash on the goodwill and reputation acquired by the Plaintiff in the registered design.

7. The Advocates of the Plaintiff Company by notice dated June 25, 2003 called upon the Defendant Company to cease and desist from producing and/or offering for sale the apple tray being manufactured by the Defendant Company which has same shape, configuration and ornamentation as that of the Plaintiff. The Plaintiff Company was also called upon to cease and desist from infringing the design registered under the Registration No. 190044 and passing off the apple tray manufactured by the Defendant as that of the Plaintiff. The defendant company was also called upon to surrender to the Plaintiff all the finished packing materials, dyes and moulds having shape, configuration and ornamentation of the design registered under the Design No. 190044 under clause 09-03 for destruction.

8. The Defendant resists the suit. Allegations are controverted in the written statement filed on behalf of the Defendant Company. Preliminary objection as to the maintainability of the suit, absence of enforceable legal right, joinder of necessary parties, i.e. Controller of Patents and Designs Kolkatta are raised. Defendant pleads that Plaintiff Company has not approached this Court with "clean hands and clear heart". The plaintiffs are guilty of suppression and concealment of relevant material facts and for this reason alone, the Plaintiff Company is liable to be non-suited.

9. According to the Defendant Company the plaintiff Company has deliberately concealed the fact of proceedings initiated by the Defendant Company before the Controller of Patents and Designs Kolkatta u/s 19 of the Designs Act, 2000 for the cancellation of the registered Design No. 190044 dated September 25, 2003 under clause 09-03 in respect of the "tray" obtained by M/s Van Leer Moulded Fibre India Limited. Such design, pleads Defendant Company, was got registered by misrepresentation of facts to the Competent Authority. Cancellation proceedings were initiated by the Company on December 12, 2003 and the Plaintiff then filed an application for extension of three months time to file their counter statement but in the meanwhile, by abusing the process of the Court, filed the present suit in this Court to scuttle or influence the proceedings for cancellation of the design pending before the Controller of Patents and Design, Kolkatta.

10. On merits, the Defendant Company controverts the allegations. It is denied that the Plaintiff Company is the successor of M/s Van Leer Moulded Fibre India Limited, the alleged owner of registered Design No. 190044 dated September 25, 2002. The Plaintiff Company has no locus standi to file the present suit. It is pleaded that the Plaintiff Company, without admitting it to be the proprietor of the design in question, did not file any application nor took any proceedings u/s 30 of the Designs Act on the basis of assignment or transmission or other transfer by operation of law. Therefore, the Plaintiff company is not entitled to file the present suit. The case of the Defendant is that the defendant Company "Mohan Fibre Products Limited" was incorporated on October 16, 1987 and came to production on February 6, 1990. This unit was promoted by Mr. Tapishwar Kumar and Krishan Kumar in collaboration with Punjab State Industrial Development Corporation Limited, a Company owned by the Punjab Government. The defendant Company is manufacturing and selling fruit trays of the same shape and/or size and configuration since the year 1990.

11. The defendant Company obtained machinery for manufacturing similar and identical trays from M/s Keyes Fiber Company U.S.A., a group company of Van Leer Packaging Products having its operation in Holland, U.S.A and Europe. The defendant Company pleads that it is in possession of original catalogue as well as sample of the imported Apple Trays which were established prior to the manufacturing of design No. 190044 and there is no originality and novelty in respect of this design. The defendant Company is manufacturing 13 types of moulded pulp packaging apple trays of same design, shape, configuration and ornamentation though having different sizes of pockets in each tray. These trays are known by sizes 80A, 80B, 100, 113A, 113B, 125, 138A, 138B, 150, 163A, 163B, 175, 200. The defendant Company denies that it has infringed any registered design of the Plaintiff Company as claimed by it.

12. The case of the Defendant Company is, M/s Van Leer Moulded Fiber India Limited got the alleged design number 190044 dated September 25, 2002 registered with Controller of Patents and Designs, Kolkata by deliberately

concealing and suppressing the material and relevant facts. The said Company was well aware of the fact that similar/identical apple trays made of paper pulp were in publication and manufacture since long. M/s Van Leer Packaging Products is operating in Holland, U.S.A and Europe was producing similar trays and supplied the machinery for the manufacture of such trays of the shape and configuration to the one under design number 190044 to various manufacturers throughout the world. There is no originality, novelty or innovation or ornamentation involved in the design element of the trays manufactured by the Plaintiff company. According to the defendant Company, the design of the tray in question is neither new nor original or novel as the apple trays of the same type, nature, shape and configuration were in existence and widely manufactured and in circulation prior to September, 2002.

13. This apart, according to the defendant Company, the tray covered by design number 190044 does not fall within the category of design as defined u/s 2(d) of the Designs Act, 2000. This design has been in vogue for long and there is no special feature or shape as configuration involved in the production of such trays covered under Design No. 190044. The apple trays with different sizes of pockets are manufactured for different sizes of apples. The design in question, according to the defendant Company, was not registerable u/s 4 of the Designs Act for the reason that it was not a new or original design and has been in publication, circulation or vogue prior to September, 2002. This design, maintains the defendant Company, is not significantly distinguishable from known designs or combination which were already in vogue and circulation. It is the further case of the defendant Company that apple trays are manufactured from waste paper by making pulp from the paper and then through mechanical process the apple trays are produced. No colour is added to the manufacturing of apple trays. The apple trays manufactured by the plaintiff under design Number 190044 do not carry any embossing or marking or declaration regarding the registration of the design. The trays manufactured by the defendant carry on it initials of the replying defendant Company with the words "MFPU which are engraved in the apple trays. The trays manufactured by the plaintiff Company carries the initial "GC.

14. Defendant pleads that there are 15 to 20 small scale industrial units which are engaged in the production and manufacture of identical paper pulp moulded apple trays of the same size, design and configuration. On an average, there is demand of about nine crore paper pulp moulded apple trays of various sizes in Himachal Pradesh. Such demand, in case of bumper crop increases and in case of failure of crop, it drops. Demand depends upon the vagaries of weather.

15. It is denied that the defendant Company has copied design of apple tray manufactured by the Plaintiff. It is denied that the trays manufactured by the defendant are in any way colorable imitation of the plaintiff's design or there is any infringement of the copy right of the Plaintiff. The plaintiff, it is pleaded, is not entitled to any injunction more so when there is no novelty or originality

involved in the design in question which is a common place design. The jurisdiction of this Court to try the suit is disputed.

16. The Plaintiff along with the suit, filed an application under Order 39 rules 1 and 2 read with Section 151 of the CPC seeking to restrain the defendant Company by itself, its servants and agents, representatives, stockists, dealers and all other persons claiming under them or acting in concert with them in any manner from manufacturing, selling, advertising, offering for sale and/or exposing for sale without the license of the Plaintiff the apple trays as manufactured by the defendant Company. The Plaintiff Company, pending hearing and final disposal of the suit prays for ad-interim injunction against the defendant Company in the following terms:

(i) That defendant by themselves, their servants and agents, representatives, stockists, dealers and all other persons claiming under them or acting in concert with them be restrained by an order and injunction of this Court from in any manner manufacturing, selling, advertising and/or offering for sale and/or exposing for sale, without the license of the plaintiff, the goods viz; the said "apple tray" and/or "fruit tray" as shown in Exhibit "A" (more particularly as seen in the photographs annexed as Exhibit "E") or applying the Plaintiffs registered design or any other design which is a colourable imitation or a substantial reproduction of the plaintiffs registered design, so as to infringe the plaintiffs design No. 190044 in class 09-03 "or pass off its impugned goods bearing the said design as and for those of plaintiff.

17. On January 5, 2004, notice of the application was issued to the defendant Company and in ad-interim, the defendants were directed to maintain true and faithful accounts of the fruit trays manufactured by the company and also that of the sale. The defendants were also directed not to manufacture the tray (s), of the same colour as that of the colour of the plaintiff.

18. The defendant company filed a petition (OMP No.40 of 2004) under order 39 Rule 4 read with Section 151 of the CPC for vacation of the ad-interim orders on the ground that the Plaintiff Company obtained ex parte order from this Court by suppressing and concealing the material facts namely that proceedings for the cancellation of the registration of the disputed design are pending with the Registrar of Patents and Design Kolkata since August, 2003 and the plaintiff company did not file any reply to the application of the defendant Company seeking cancellation of the design and sought time till March 13, 2004 for filing reply to the application. The plaintiff company also did not disclose to this Court that there were about 15 to 20 small scale units which were also manufacturing and producing similar and identical apple trays of the same size, style and configuration as allegedly covered by design number 190044 dated September 25, 2002. The plaintiff Company also failed to disclose that defendant and other units including the plaintiff are manufacturing about thirteen types of different paper pulp moulded apple trays having different sizes of pockets in each tray to accommodate different sizes of apple and such apple trays are in manufacture,

production, vogue and circulation in India for the last about 20 years. The vacation of ex parte order was also prayed on the other grounds pleaded in the written statement.

19. The defendant Company simultaneously filed reply to the application of the Plaintiff under Order 39 rules 1 and 2, C.P.C. of which rule was issued.

20. I heard Mr. K.D. Sood, learned Counsel for the applicant and Mr. Ajay Kumar learned Counsel for the defendant Company.

21. Grant of temporary injunction indisputably will depend upon a prima facie case, balance of convenience, comparative hardship and irreparable loss.

22. The first contention of Mr. Ajay Kumar, learned Counsel for the Defendant-respondent is that Plaintiff Company is not owner of the original design. He submits that this design was admittedly registered by "Van Leer Moulded Fibers India Limited" on September, 25, 2002 in Class 09-03 under design Number 190044 as is apparent from Exhibit "A" of the documents of the plaintiff annexed with the plaint. The suit is laid by "Claridge Moulded Fiber Limited" and therefore, the Plaintiff Company cannot be said to be the owner of the design.

23. Mr. Kapil Dev, learned Counsel for the Plaintiff Company counters that though this design was registered by and in the name of "Van Leer Moulded Fibers India Limited" on September 25, 2002 but the Plaintiff Company being Successor Company of "Van Leer Moulded Fibers India Limited" is the owner of the design and entitled to maintain the suit.

24. The certificate of registration of design in the name of "Van Leer Moulded Fibers India Limited" was issued by the Controller of Patents and Designs Kolkatta on September 25, 2002. A perusal of the certificate shows that Design No. 190044 in class 09-03 in its application to "tray" was registered in the name of "Van Leer Moulded Fiber India Limited". This company was incorporated in India on February 24, 1998. Consent for change in the name of the Company from "Van Leer Moulded Fibre India Limited" to "Van Leer Moulded Fiber India Private Limited" was obtained from the Assistant Registrar of Companies in 2002. Fresh certificate of incorporation was obtained on March 31, 2003 from the Assistant Registrar of the Companies Mumbai in the name of "CLARIDGE MOULDED FIBER PRIVATE LIMITED" u/s 21/22 of the Companies Act. Thus the name of Van Leer Moulded Fiber India Limited was changed to Claridge Moulded Fibre Private Limited on March 31, 2003. The name of the Company once again was changed to "CLARIDGE MOULDED FIBRE LIMITED" on April 4, 2003 u/s 23 of the Companies Act.

25. Section 30 of the Designs Act stipulates that where a person becomes entitled by assignment transmission or other operation of law to a Copyright in a registered design, he has to make an application, in the prescribed form, to the Controller to register his title and it is only when change is made in the Register in the name of such person that he becomes entitled to claim ownership of the

design. Section 30 of the Designs Act reads:

(1) "30. Entry of assignment and transmissions in registers.?(1) Where a person becomes entitled by assignments, transmission or other operation of law to the copyright in a registered design, he may make an application in the prescribed form to the Controller to register his title, and the Controller shall, on receipt of such application and on proof of title to his satisfaction, register him as the proprietor of such design, and shall cause an entry to be made in the prescribed manner in the register of the assignment, transmission or other instrument affecting the title.

(2) Where any person becomes entitled as mortgagee, licensee or otherwise to any interest in a registered design, he may make an application in the prescribed form to the Controller to register his title, and the Controller shall, on receipt of such application and on proof of title to his satisfaction, cause notice of the interest to be entered in the prescribed manner in the register of designs, with particulars of the instrument, if any, creating such interest.

(3) For the purposes of sub-section (1) or sub-section (2), an assignment of a design or of a share in a design, a mortgage, license or the creation of any other interest in a design shall not be valid unless the same were in writing and the agreement between the parties concerned is reduced to the form of an instrument embodying all the terms and conditions governing their rights and obligation and the application for registration of the title under such instrument is filed in the prescribed manner with the Controller within six months from the execution of the instrument or within such further period not exceeding six months in the aggregate as the Controller on the application made in the prescribed manner allows:

Provided that the instrument shall, on entry of its particulars in the register under sub-section (1) or sub-section (2), have the effect from the date of its execution.

(4) The person registered as the proprietor of a design shall, subject to the provisions of this Act and to any rights appearing from the register to be vested in any other person, have power absolutely to assign, grant licenses as to, or otherwise deal with, the design and to give effectual receipts for any consideration for any such assignment, license or dealing:

Provided that any equities in respect of the design may be enforced in like manner as in respect of any other movable property.

(5) Except in the case of an application made u/s 31, a document or instrument in respect of which no entry has been made in the register in accordance with the provisions of sub-sections (1) and (2) shall not be admitted in evidence in any Court in proof of the title to copyright in a design or, to any interest therein, unless the Court for reasons so be recorded in writing, otherwise directs." (emphasis given).

26. A reading of sub-sections (1) and (3) of Section 30 shows that when ownership of registered design is claimed by a successor person or company, either by assignment or by transmission or by operation of law, such assignment, transmission or by operation of law of the copyright to a design has to be registered with the Controller of Designs within six months from the date of execution of instrument, assignment or transmission of the copyright in the registered design to successor person. The period of six months is limited under sub-section (3) of Section 30. Sub-section (5) clearly provides that a document or instrument in respect of which no entry has been made in the register in accordance with the provisions of sub-sections (1) and (2) shall not be admitted in evidence in any Court in proof of the title to copyright in a design or to any interest therein unless the Court for reasons to be recorded in writing otherwise directs.

27. Now in the present case, admittedly, the design was registered, as noticed earlier, in the name of Van Leer Moulded Fibers India Limited which by operation of law, in view of the change in the name of the Company was acquired by the successor plaintiff company. However, such change by the plaintiff company was not registered with the Controller of Designs in terms of sub-section (1) to Section 30 and therefore, the certificate of registration on which the plaintiff claim is based, the design in question cannot be, *prima facie*, read in evidence in view of the provisions of subsection (5) of Section 30 of the Designs Act. The plaintiff Company, in this view of the matter does not have a "*prima facie*" case.

28. This apart, the case of the defendant company is that the defendant Company is manufacturing and selling fruit trays of the same shape, configuration etc., from the year 1990. Defendant Company obtained machinery for manufacturing similar and identical trays from M/s Keyes Fiber Company USA, a group company of Van Leer Packaging Products. It is the assertion of the defendant company that in the circumstances, there is no originality or novelty in respect of design Number 190044 registered on September 25, 2002. Defendant Company specifically states that it manufactures 13 types of apple trays, including the tray in question with different size pockets in each tray.

29. Perusal of the documents annexed with the plaint and written statement show that in the year 1986. Hartmann Engineering had given quotation for Hatmann Equipment for moulded pulp factory to Punjab State Industrial Development Corporation. It further shows that moulded pulp trays were being manufactured and machinery was available for the manufacture of such trays with different pocket sizes at least in the year 1986. The design of the tray reflected in quotation at page 31 of the plaintiffs documents reflects, *prima facie*, the same configuration, ornamentation and shape of the design of tray as claimed by the plaintiff in its registered design. The defendant company has also filed copies of some invoices showing that apple trays were being supplied by the Company even in the year 1990.

30. Sub-section (3) of Section 22 in Chapter 5 pertaining to legal proceedings

stipulates that in any suit or legal proceedings regarding infringement of registered design, every ground on which the registration of a design is liable to be cancelled u/s 19 of the Designs Act would be available as a ground of defense. Section reads:

19. Cancellation of registration.?(1) Any person interested may present a petition for the cancellation of the registration of a design at any time after the registration of the design, to the Controller on any of the following grounds, namely:

- (a) That the design has been previously registered in India; or
- (b) That it has been published in India or in any other country prior to the date of registration; or
- (c) That the design is not a new or original design; or
- (d) That the design is not registerable under this Act; or
- (e) That it is not a design as defined under clause (d) of Section 2.

2. An appeal shall lie from any order of the Controller under this Section to the High Court, and the Controller may at any time refer any such petition to the High Court and the High Court shall decide any petition so referred.

(Emphasis given)

31. A reading of clause (b) of Section 19 shows that if a design has been published in India or in any other Country prior to the date of registration, then such registration of the design is liable to be cancelled at the instance of any person interested in such design by the Controller of Designs.

32. Sheet-I of the Certificate of registration of the design, clearly mentions that novelty of the design is in the shape, configuration and ornamentation of tray as illustrated in the sheet. It also declares that no claim is made, in view of the registration, in respect of any mechanical or other action of the mechanism or in respect of any mode or principle of construction of article. The configuration and ornamentation of the tray in question is similar to the apple trays which were being manufactured in the year 1986. The quotation for Hartmann equipments is annexed with sheets of design, configuration and shape of the apple tray which apparently are same and similar to the registered design of the tray (at page-31 of the plaintiffs documents). For this reason too, the plaintiff is not entitled to interim relief under order 39 rules 1 and 2, C.P.C.

33. As is evident from the documents of the defendant Company, the defendant company is manufacturing similar trays, with different pocket sizes, by the machinery they purchased from Keyes Fiber Company U.S.A. The plaintiff has not challenged the manufacture of other trays even though they are of similar shape, configuration and ornamentation but having different pocket sizes. This was noticed by the Court on visual inspection of the trays being manufactured by the

defendant and the photographs of the front and back view of the trays with different sizes. The plaintiff Company confined its challenge only to size 200 of the tray being manufactured by the defendant Company which also shows that prima facie there was no novelty in the tray in question of which the copyright was obtained by the plaintiff Company.

34. There is yet another reason which dis-entitles the Plaintiff Company to interim relief. The Plaintiff Company has not approached the Court with clean hands. There is no dispute that the Defendant Company had approached the Controller of Designs on August 4, 2003 for the cancellation of the registration of the design number 190044 of the tray in question on the grounds that this design has been published both in India and in various other Countries prior to the registration and the design is not a new or original design and that the claimant of the design had deliberately concealed true facts to obtain wrongful registration of the design. Such registration is invalid and liable to be cancelled. The Plaintiff Company instead of defending the case before the Controller of Designs filed the present suit on 30.12.2003 well aware that the design in question was under challenge before the Controller of Designs. It is so because the Plaintiff company by a letter dated December 12, 2003, through its attorney, prayed for grant of three months extension of time under rule 29(9) to file counter statement. In other words, when the suit was laid by the Plaintiff Company, it was well aware of the proceedings initiated by the defendant Company for the cancellation of the design. There is not a whisper in the plaint about these proceedings. The clarification sought to be given by the Plaintiff company in its replication is that the application filed by the defendant u/s 19 of the Designs Act was sent by the Controller of Patent and Designs to their former attorney and the said petition was sent very late to the Plaintiff company by the erstwhile attorney of the plaintiff company and that nondisclosure of the said fact is not intentional or willful. The plaintiff Company however is silent as to on what date exactly they received the copy of the petition for cancellation of the design, filed by the Defendant Company. As noticed earlier, the plaint was filed on 30th of December, 2003 by which date, the plaintiff company was well aware of the proceedings for the cancellation of the design pending against them before the Controller of Patent and Designs Kolkatta as is apparent from their own document, a letter dated December 12, 2003 for extension of three months time to file counter statement.

35. Interim relief under order 39 Rules 1 and 2, C.P.C. is an equity relief in the discretion of the Court. The Plaintiff, I hardly need to emphasis, must approach the Court with clean hands and must disclose all facts for and against him in order to claim the discretionary relief of injunction. If the plaintiff fails to disclose any material fact, he would not be entitled to the discretionary relief of interim injunction.

36. For the reasons recorded above, the plaintiff has neither a prima facie case nor is entitled to discretionary relief under order 39 rules 1 and 2 of the CPC

being guilty of suppressing material facts from the Court.

In result, the application of the defendant for the vacation of the ad interim orders dated 5.1.2004 (CMP No. 40 of 2004) is allowed and the application of the Plaintiff under order 39 rules 1 and 2 C.P.C. is dismissed.

Orders dated 5.1.2004 shall stands vacated.

Observations made herein above are limited for the purpose of these applications and will not be construed to be any reflection on the merits of the case.

OMPNo. 75 of 2004.

Allowed. OMP No. 105 of 2004.

Allowed.