

(2008) 06 BOM CK 0142

In the Bombay High Court

Case No : Notice of Motion No. 3477 of 2005 in Suit No. 3094 of 2005

Indiana Gratings Private Limited and Another

APPELLANT

Vs

Anand Udyog Fabricators Private Limited and Others

RESPONDENT

Date of Decision : 26-06-2008

Acts Referred:

Copyright Act, 1957 — Section 13, 14, 2, 22, 22(1)
Designs Act, 2000 — Section 11
Penal Code, 1860 (IPC) — Section 479
Trade and Merchandise Marks Act, 1958 — Section 2

Citation : (2009) 39 PTC 609

Hon'ble Judges : Roshan Dalvi, J

Bench : Single Bench

Advocate : Veerendra Tulzapurkar, Amit Jamsandekar, Vicky Singh, V. Desai and Sahil Kanuga, instructed by Nishit Desai and Associates, for the Appellant; Ajit Jkhadi, for Defendants 1 to 3 and 8 to 12, M.V. Khatavkar, for Defendants 5 to 7, L.M. Acharya and M. More for Defendants 13 to 18 and M.P.S. Rao, instructed by Little and Co. for Defendant 22, for the Respondent

Judgement

Roshan Dalvi, J.—The Plaintiffs claim to be manufacturers of certain gratings used for industrial purposes. Initially the manufacture of gratings was by traditional handmade technique. After 1997, the Plaintiffs claim to have manufactured the Electro Fold Gratings. For this purpose, they claim to have imported a second hand Electro Fold machine in the assembled form from a European manufacturer. It was not found suitable to Indian conditions and accordingly the Plaintiffs made certain improvements and modifications to those machines through the employees of Plaintiff No. 2. Their work was documented in the form of certain drawings for the manufacture of several parts of the gratings.

2. Under an Agreement dated 12.12.1997 between the Plaintiffs, the artistic work containing in those drawings made by the employees of Plaintiff No. 2 came to be assigned to Plaintiff No. 1.

3. Between 1999 and 2001, the Plaintiffs claim to have created the first indigenous Electro Fold machine on the basis of those drawings. The Plaintiffs have since maintained only two sets of those drawings; one in the possession of Rajkumar Borkar of the Maintenance Department and other with Defendant No. 4 at his office at Jejuri. The contracts of employment with Defendants 5 to 7 are not denied. These contracts contain confidential clause with regard to the drawings. The Plaintiffs claim a copyright in those drawings as artistic work. The Plaintiffs claim that Defendants 1, 2 and 3, who are sister Concerns, through their partners and Directors, Defendants 8 to 12 have infringed the Plaintiffs' copyright in those artistic work contained in the drawings by reproduction of those drawings into finished products which they use for their business.

4. Defendants 4 to 7 were admittedly employees of the Plaintiffs. Defendant 4 has left for Dubai and since not contested that Suit despite service. Defendants 5, 6 and 7 have since resigned and joined Defendants 1 and 2, who are in the same business as the Plaintiffs.

5. Defendants 13 to 23 are various suppliers who have received orders from Defendants 1 and 2, represented by Defendants 5, 6 and 7 and have supplied certain products which are claimed to be products manufactured upon infringement of the Plaintiffs' copyright in their drawings. The Plaintiffs have, therefore, claimed the relief of injunction against the Defendants from infringing their copyright in the drawings mentioned in Exhibit G to the Plaint or making use of or making any copies thereof or making any three dimensional object of machine parts which would be reproduction of the Plaintiffs' drawings or a colourable imitation thereof. The Plaintiffs have also claimed damages in the Suit from the Defendants for infringement of their copyright.

6. The Plaintiffs have 330 drawings on the basis of which they manufacture new Electro Fold welding machine as described in the Plaint. In the Notice of Motion, the Plaintiffs have prayed for a similar relief of injunction and order for delivery of the drawings.

7. The Plaintiffs' claim is based upon the fact that they realized on 19th April 2005 that some of their drawings were missing from the drawers of Defendant 4 where they were kept by him. Defendant 4 has since left the Plaintiffs Company and gone to Dubai. The Plaintiffs learnt that he had caused photocopies of these drawings to be made from time to time. The Plaintiffs have relied upon the Affidavits of two Assistant Managers and their driver in that behalf. The Plaintiffs made inquiries in the market and learnt that Defendant 2 had placed orders with some suppliers for identical parts. These orders were got placed under the signature of Defendant 5, who was earlier the Plaintiffs' employee. Two of such Purchase Orders in the name of Defendant 2 dated 15.3.2005 and 23.3.2005 addressed to a supplier one Sumeet Dhody, marked Exhibit L to the Plaint, are relied upon by the Plaintiffs to show as an example of how Defendants 1 and 2 through their employees who were earlier the Plaintiffs' employees placed orders for parts of the grating machines largely similar to the Plaintiffs' dimensions. The

Plaintiffs" Advocates have labouriously identified their specific drawings under their specific numbers largely similar to the dimensions mentioned in the Purchase Order dated 15.3.2004. The Plaintiffs claim that their Inquiry reflected a far larger theft than was calibrated in one such Purchase Order. The Plaintiffs filed a Criminal Complaint for theft and criminal conspiracy against Defendants 4 to 7 in respect of 128 drawings. Criminal investigation proceeded. 62 copies of the Plaintiffs" drawings came to be recovered by the Police from the factory of Defendant 1, one copy was stated to be seized from Defendant 8 and 10 copies of drawings have been recovered from Defendant 16, a supplier of Defendant 2. These drawings have been kept in a sealed cover in the custody of the Prothonotary and Senior Master, which have been opened by this Court and seen alongside the Plaintiffs" drawings from the other set of drawings of the Plaintiffs produced by them. The recovery of the Plaintiffs" drawings is the largest single circumstance and corroborative evidence of the Plaintiffs" case of theft by Defendants 4 to 7 and the reproduction and user of these drawings by Defendants 1, 2 and 3 in the course of their business upon infringing the copyright therein.

8. The prima facie case made out by the Plaintiffs for the grant of injunction for infringement of their copyright in their drawings would be best seen from an illustration of the infringement. Defendant 22 is one such supplier. During the course of investigation of the criminal complaint of the Plaintiffs, Defendant 22 handed over to the Police a copy of the letter addressed by Defendant 2 for a quotation for undertaking job work for deep hole drilling in Copper Plates based upon the handmade sketch annexed thereto. Such sketch is provided to Defendant 22 by Defendant 2. The letter of Defendant 2 enclosed a sketch showing a dimension of the Copper Plates. These were hand drawn showing precise measurements required. Defendant 22 handed over to the Police the said letter and the said sketch during the investigation of the Plaintiffs" criminal complaint. The Plaintiffs" Advocates have shown the Plaintiffs" drawings at page 10 in one of the files in the sealed cover produced before the Court showing identical dimensions in the Plaintiffs" drawings. The larger machine was broken open into separate parts in the drawings of the Plaintiffs. One such drawing denoting part of the larger machine showing the Copper Plates in two separate blocks of identical dimensions was drawn out in the sketch of Defendant 2, for which Defendant 22 had given quotation on 7.5.2005.

9. This exercise conclusively shows how the Plaintiffs" drawings, hitherto drawn by an employee of the Plaintiffs who later served with Defendant 2, used the same dimensions to make sketches for reproduction of the drawings into those parts, being Copper Plates, used as one of the products of the finished goods to be manufactured by Defendants 1 and/or 2.

10. Such illustration is evidenced from Exhibits A and to the Affidavit of Defendant 22. A clear prima facie case not only of theft substantiated by the recovery, but also of infringement of copyright contained in those drawings has

come to be made out by the Plaintiffs.

11. The fact that the Plaintiffs and Defendants 1 and 2 manufactured the same goods in the market is not denied. In fact, it is the case of the Defendants that they are the Plaintiffs' competitors and the Plaintiffs have sought, by an illegal and restrictive trade practice, to seek a monopoly in the market.

12. The fact that Defendants 4 to 7 were the employees of the Plaintiffs under the contracts of employment showed by the Plaintiffs containing, inter alia, the clause of secrecy in respect of the drawings of the Plaintiffs, is also not denied. The fact that Defendants 4 to 7 have since resigned from the Plaintiffs Company is also denied. Defendant 4 has not filed an Affidavit and Defendants 5 to 7 admit that fact whilst showing cause against this Notice of Motion. The fact that Defendants 5 to 7 are employees of Defendants 1 to 3, is also not denied. What is denied is that Defendants 1 and 2 have ever reproduced the Plaintiffs' drawings and caused infringement of any copyright, if any, and Defendants 5 to 7 have stolen or made unauthorised use of any of the Plaintiffs' drawings.

13. The first contention of the Defendants is that the Plaintiffs themselves have no copyright in those drawings because on the Plaintiffs' own showing they are not original works of the Plaintiffs, the Plaintiffs themselves having copied from the second hand European machine admittedly imported by them in disassembled form. It is contended that even if the Plaintiffs' drawings would qualify as an artistic work being a production of their original effort, there has been no infringement by the Defendants by reproduction of those artistic works in their finished products as three dimensional objects from the Plaintiffs' two dimensional drawings.

14. It must first be seen whether the Plaintiffs' drawings constitute a work in which a copyright would subsist. The Plaintiffs claim that the drawings are artistic works within the meaning of Section 2(c) of the Copyright Act, 1957. Section 2(c) reads thus:

2(c) "artistic work" means, (i) a painting, a sculpture, a drawing (including a diagram, map, chart or plan), an engraving or a photograph, whether or not any such work possesses artistic quality;

(ii) ...

(iii) ...

Consequently, it is seen that the drawing, which may be in the form of a diagram, would be artistic work even if it may not appear to be having any artistic quality to a layman. The Plaintiffs' drawings are such.

15. The case of the Plaintiffs is that the machine which they imported from Europe in disassembled form which they were to use for their business of gratings in the place and stead of the earlier traditional handmade gratings, was found not suitable to Indian conditions and hence, they were required to modify

the machine to suit Indian conditions. For that purpose, the employees of Plaintiff No. 2 made certain drawings. These drawings, in modified form, were used by the Plaintiffs for the manufacture of their finished products. The European supplier has had no dispute with the Plaintiffs. It is argued on behalf of the Plaintiffs that the Defendants may also manufacture or supply gratings in the market but without the use of the Plaintiffs' drawings. Since the drawings in the form of diagram without any artistic quality are an artistic work, a copyright can be claimed in them as such artistic work. The Plaintiffs' claim for copyright subsists. The Defendants have not shown any other drawings of any manufacturer, Indian or European, which the Plaintiffs have used. Consequently, so far as the drawings are concerned, the artistic work is original.

16. The Plaintiffs have produced the original drawings in the set with them. The Police have recovered another set of 126 original drawings during investigation of the criminal case of the Plaintiffs. The statement of Defendant 8 in paragraph 3 (v) that the Plaintiffs have not produced their original drawings is incorrect. The Plaintiffs have produced before this Court also the drawing in the form of a hand drawn sketch which shows the alleged copying by the exact dimension shown therein in the letter calling for quotation from Defendant 2. Hence, the statement in paragraph 3(v)(i) of the Affidavit of Defendant 8 that the Plaintiffs cannot complain of infringement unless they have produced the industrial drawing alleged to be copied is also substantiated by the Plaintiffs by producing such copied drawing to be entitled to complain of infringement.

17. The Defendants' denial of infringement of the Plaintiffs' copyright would be required to be seen from what constitutes an infringing copy u/s 2(m) of the Copyright Act and the meaning of copyright u/s 14(c)(i) of the Copyright Act. An infringing copy in relation to an artistic work is a reproduction thereof. A copyright in an artistic work is the reproduction of the work in any material form including depiction in three dimensional of a two dimensional work. In this case, its depiction is in the Defendants' finished products of the Plaintiffs' drawings which makes it an infringing copy. It is the case of the Defendants that the Plaintiffs' drawings are commonplace shapes with dimensions written thereon. These are based on basic principles of engineering mechanics which are known to the public since decades. Many of the manufacturers in the market would produce objects which conform to such drawings. No copyright can be claimed in such simplistic work. An attempt to claim copyright would lead to monopolizing the market which would be an act constituting a restrictive trade practice. Though it may be expected that a drawing with dimensions contained in Exhibit L to the Plaintiffs, seen singularly would indicate to be a three dimensional rod which could be manufactured by any one of that dimension, various drawings of the Plaintiffs taken as a whole for various parts of the machinery which would fit into one another used together do not show commonplace drawings which could have been made by just any one.

18. What is intriguing is that upon the Plaintiffs' case in the Plaintiffs giving the

illustration of a transaction contained in the letters dated 15.3.2005 and 23.3.2005 of Defendant 2 for the Copper Alloys mentioned therein, Defendant 8 in paragraph 24 of his Affidavit in reply has perhaps justifiably stated that "Perusing such an order no one can know that the said goods are ordered for parts which are allegedly identical to the parts of the Plaintiffs' machine." Indeed, that would be so, but the investigation has revealed a lot more. It has, inter alia, revealed, as the other illustrative effort shows, intriguing minute dimensions made out in the Plaintiffs' drawings also shown in the handwritten sketch supplied by Defendant 2 to Defendant 22 as reflected in his letter dated 29.4.2005 addressed to Defendant 22. It would be worth mentioning that the dimensions of the Copper Blocks shown in the sketch are .452 x 210 and 1030, 30 x 25. Neither these dimensions nor the drawings are so commonplace as to be brushed aside for denying the right of copyright upon its infringement.

Defendant 8 has shown how an Austrian machine imported in India in 1958/59 works to full capacity till 2005, 45 years later and is used in Chennai. Similarly a Swiss machine is used in Chennai and Bangalore. The descriptions, specifications and drawings of these machines given by Defendant 2 do not make out any case against the Plaintiffs. They also do not make out a case that the Plaintiffs' finished products are not the first indigenous such products. We are concerned, however, only with the Plaintiffs' products manufactured from the Plaintiffs' drawings by them and the reproduction of their drawings in the Defendants' products, if any. That reproduction is manifest in the aforesaid illustration. It is material to see and understand the Plaintiffs' drawings with their specific identifiable marks alongside the copies recovered from Defendant 1, Defendant 16 etc. The Plaintiffs' drawings bear distinctive numbers showing their abbreviation such as IGPL010212. They show the 1st Plaintiffs' logo as well as the 1st Plaintiffs' complete name with the description of the product along with the legend for the various items in the drawings. They further show engraving of imprint that "the drawing is the property of the Plaintiffs and must be returned on request and is confidential information in connection with the inquiry tendered, ordered or conducted and that it is not to be used for any other purpose or order nor made copied or lent without the Plaintiffs' authority in writing." The list of drawings recovered by the Police shows the Plaintiffs' distinctive drawing number, legend as well as the aforesaid warranty. In some of the drawings, the warranty is erased when the abbreviation remains along side the number. A distinct attempt at copying and suppressing is made. It is sought to be contended on that premise that "No one would come to know" that the sketch made from such a drawing could be relatable to the Plaintiffs' drawing. A reading of the drawings would show that the person with ordinary intelligence would "come to know" that sketches are made from the copies of the Plaintiffs' drawings - copying which was prohibited as mentioned in the drawing itself. Section 13(a) of the Copyright Act would subsist only in an original artistic work. A diagram, which would be a drawing, would be an artistic work. u/s 2(c) a copyright in an artistic work is for reproduction of it in material form such as the

finished products being a three dimensional object from a drawing which is the two dimensional work u/s 14(c) of the Copyright Act.

19. Dr. Veerendra Tulzapurkar, on behalf of the Plaintiffs, showed that what is original literary work came to be considered in the case of University of London Press, Limited v. Tutorial Press, Limited 1916 (2) CD 601. The case related to publication of examination papers for matriculation examination of January 1916. The Plaintiff published the papers for that examination. In the same month, the Defendant issued a publication in which 16 out of 42 papers were included. These papers were taken from the copies of the examination papers supplied by the students. The Defendant also published answers to the questions of some of the papers along with some criticism on the setting of papers. It was held that the term "original work" did not mean or include an expression of original or inventive thought. Since the Copyright Act is not concerned with originality of ideas but with the expression of thoughts, hence the work must not be copied from another work but must originate from the author. The questions set in the papers were thought out by the Plaintiff's Professors, they made notes or memoranda for future questions and drew on those notes for the purposes of the questions which they set. Consequently, the papers were originated from themselves and hence, were original works within the meaning of the Copyright Act. The Defendant copied the original questions. Hence, they copied the expression of the Plaintiffs and not their idea.

20. The Plaintiffs, in this case, may have taken the idea of the European manufacturer. Though the Plaintiffs' idea is the same - manufacturing the same finished products - the Plaintiffs' expression is in their drawings. Though the idea of the European manufacturer could be copied by the Plaintiffs and modified to suit their requirements, the actual expression in the thought documented in the drawings could not then be copied and carried a copyright.

21. In the case of Dorling v. Honnor 1964 RPC 160171, copyright was held subsisting in a kit or a list of parts for making a boat, as the shape of the boat was purely functional and being not registrable as a design was entitled to protection from being copied.

The case of Merchant Adventurers Ltd. v. M. Grew & Co. Ltd. 1973 RPC 1 was for protection of copyright in engineering drawings of electric light fittings. Some drawings were made by the Plaintiffs' employees and some by an outside designer. The Plaintiffs were held to be owners in equity of the copyright therein. It was held that in an action for infringement of copyright the Plaintiffs must establish : (a) that there is work in which copyright can subsist, (b) that copyright does subsist in such work, (c) that the Plaintiffs own the copyright and (d) that such copyright has been infringed.

22. It was held that diagram of sections of the machines were drawings made by qualified persons (their employees). Further, the copyright in them was violated by reproduction in 3 Dimensional (3D) form as light fittings and their sale.

Hence, they qualified for copyright. Infringement was held from a look at the 2 products - with great similarity in their shapes. It was urged that no sectional drawings could ever be infringed by a complete 3D object constructed from those sections. Negating that contention, and drawing from the infringement of the figure in the Popeye case, which shall be dealt with presently, it was observed that several sectional drawings are so simple that "any reasonably intelligent person can visualise what they represent in 3D form" and other drawings, both sectioned and otherwise are extremely difficult to understand and "which many nonexperts would get little or nothing out of at all." The cylindrical and square fittings with clean sidelines produced by the form of snap on joints were held to be similar in the products of both the parties and hence, the Plaintiffs' copyright in the drawings was held to have been infringed.

23. This case was followed in the case of *British Northrop Limited and Ors. v. Texteam Blackburn Limited and Anr.* (1974) 3 RPC 57. This was a case of a Plaintiffs Company manufacturing looms and weaving machinery. The Defendants sold spare parts of such machinery. Certain employees of the Plaintiffs later joined the Defendants to manufacture their spare parts. The Defendants contended that there was no copyright in the Plaintiffs' drawings because they were not of original authorship or publication and some of the drawings were too simple to constitute an original artistic work and some of them were merely variants of earlier drawings. In that case, the Plaintiffs claimed copyright in the specifications and spare lists. The Defendants were alleged to be using the numbers and names of the Plaintiffs' list in the Defendants' price list. A copy of the Defendants' list was even sent abroad. Parts of that list were ordered from that list. The delisting specifications comprised in the loom identified by their separate numbers. [Such as NLM 5494 (N)]. The purchasers copied out the list of requirements and sent them to the Defendants. The Defendants compiled the quotations using the numbers and the names and sent the quotations to the foreign party. From these quotations, the Defendants compiled their loom list. It was held that the Defendants had infringed the Plaintiffs' copyright.

In this case, the copies of the drawings recovered by the Police show the distinctive identifiable numbers and the legend of the Plaintiffs with or without their name being erased and also show the precise dimensions in the copies which are xerox copies exhibiting how the Plaintiffs' specifications and dimensions, complete with their drawings, have not only been thieved but later sought to be used for ordering parts of the machinery from various suppliers from whom they have been recovered. This case is on all fours the facts of the case of *British Northrop* (supra) relating to the drawings together with the specifications and the list of the parts of the machinery (in that case, loom). This case has been followed in the case of *L.B. (Plastics) Limited v. Swish Products Limited* (1979) RPC 551 in which the House of Lords confirmed the judgment of the Trial Judge of Chancery Division, holding that the Plaintiffs had a copyright in their production of drawings which when reproduced in three dimensional by way of the finished products infringed their copyright. That was a case of certain

drawers manufactured by the Plaintiffs distinctive specifications. The Plaintiffs manufactured plastic knockdown drawer system called Sheerglide. The drawers were fitted into carcasses manufactured by the Plaintiffs. The Defendants produced the designs called Swish designs. A number of features present in the Swish designs were also present in certain earlier Defendants' designs. They were interchangeable with the Plaintiffs Sheerglide drawers. The Defendants contended that only the Plaintiffs' idea of Sheerglide design was reproduced. The House of Lords laid down a twin test to determine the infringement thus:

(i) There was a striking general similarity between the Plaintiffs and the Defendants' drawers with proof of access to the Plaintiffs' productions.

(ii) The Defendants had not provided any alternative to copying.

24. In our case, the illustration of Copper plates shows not only similarity but identical dimensions. The Plaintiffs' former employees are presently Defendants' employees. The case of theft coupled with recovery of the drawings show access to the Plaintiffs' drawings by the Defendants.

25. The Defendants have neither relied upon nor produced their own drawings. It was held in the case of *L.B. (Plastics) Limited v. Swish Products Limited* (1979) RPC 551 (Per Lord Wilberforce, J.) that once the similarity was shown between the Plaintiffs' drawings and the Defendants' object (in this case, the Plaintiffs' drawings and the Defendants' sketch itself), the next step was to consider whether this inference could be displaced by evidence from the Defendants showing how in fact they had arrived at their designs and had not done so by copying. Since the Defendants have not relied upon or produced any of their drawings, the case made out by the Plaintiffs of copying by showing some dimensions must be accepted. The Plaintiffs' drawings would be wholly lacking in artistic quality. They are engineering drawings. They are intended to be put to use in manufacture, rather than made to admire or enjoy. They having nothing to do with fine Art. Hence, the drawing for the construction of a boat came to be held as artistic work in *Dorling v. Honnor* 1964 RPC 160 (supra) and drawings of looms, including drawings of simple character came to be held as artistic work in *British Northrop* (supra) and the drawings for drawers came to be granted similar protection as artistic work in *L.B. (Plastics)* (supra). Since the object of the Copyright Act is to stop one's skill and labour from being used by another for profitable exploitation, the engineering draughtsmen were held as much included as architectural draughtsmen [Per Lord Wilberforce, J. in *L.B. (Plastics)*].

26. Originality refers not to ideas but to "author's own work" [Per Lord Wilberforce, J. in *L.B. (Plastics)*]. Since skill and labour are needed to put together the idea, some material form in the published work is protected by copyright. Hence, what is needed is knowledge, labour, judgment or skill in the work. Consequently, some commonplace entries in a diary were refused copyright, since they were only taken to be a compilation of earlier data which did not constitute the original work. (*G.A. Cramp & Sons Ltd. v. F. Smythson*

Ltd.) Consequently, the test of original work laid down in L.B. (Plastics)"s case is dependent upon whether sufficient skill, labour or talent has gone into it to merit protection under the Act. It is held to be a question of degree.

27. The judgment went further. It held that even if the drawings were taken from a preexisting model in 3D and the drawings were taken from that model and compiled, they would qualify as original works since they were not a copy of those drawings. This was because, it was observed, that the making of the drawing was skilled business involving hours of labour, although the end result may be seen as relatively simple. In laying down the test to be applied for considering whether a drawing has been copied so as to constitute an infringement of the copyright in the writing, aside from a direct comparison between an object of drawing, it was observed : "I also think that it would be wrong to disregard written matter on the drawing." (Per Whiteford, J.).

28. It is impossible to disregard the specific dimensions in the sketch supplied by Defendant 2 to Defendant 22 which is identical to the drawings of the Plaintiffs shown from the file containing the drawings recovered by the Police. In that case also, the legend at bottom of the drawing and the quotations on the left hand of the drawing showing the sizes of diameters and thickness were considered.

29. The judgment of Wilberforce, J., which came to be set aside in the Appeal Court, was restored in the House of Lords [in the case of L.B. (Plastics) (supra)] holding that the copyright subsisted in the drawings of the Plaintiffs . The aspect of the drawings was given up before the House of Lords. It was argued on behalf of L.B. (Plastics) relying on *Ladbroke (Football) Ltd. v. William Hill (Football) Limited* (1964) 1 W.L.R. 273 as follows:

...that quality is more important than quantity in assessing whether a part of a work is substantial; "original" in copyright does not mean that a work is necessarily novel, but it originates with the author i.e. depends on own skill, judgment and labour.

...The basis of copyright is that a defendant should not appropriate the property of another : that property is the skill, judgment and labour which goes into a work.

...You may not take the property of another. You may not take his skill, labour and judgment.

...The Act does not distinguish between idea and form.

...It is no part of copyright law to categorise skill and labour into concept, idea, detail and form. What is worth copying is *prima facie* worth protecting.

30. In the case of *Escorts Construction Equipment Ltd. and Ors. v. Action Construction Equipment Pvt. Ltd. and Anr.* AIR 1999 Delhi 73, the Defendants' cranes were substantial reproduction in 3D form of the Plaintiffs drawings of the Plaintiffs' cranes in which had copyright. In that case also the Plaintiffs'

employees had left their job to join the Defendant Company .The confidentiality relationship between the Plaintiffs and the Defendant Company was shown resulting in Defendants' access to the Plaintiffs' drawings. It was held that the Plaintiffs' copyright was infringed. There was a secrecy clause in the contract between the Plaintiffs and Defendant 2, who was the Plaintiffs' employee. The access which Defendant 2 had to the Plaintiffs' drawings as the Plaintiffs' employee was, therefore, held undisputed. Such access gave rise to an inference that he had acquired knowledge with regard to the industrial drawings, technical knowhow and specifications concerning the cranes manufactured by the Plaintiffs. Since the cranes of the Defendants were visually similar in appearance to cranes of the Plaintiffs, an inference of infringement of copyright was drawn. The catalogue of the two cranes showed individual drawings of the various key components. It was held that the Defendants' cranes were substantial reproduction in 3D of the Plaintiffs' industrial drawings. It was observed that a mere look at the two cranes shown in the photographs produced by the Plaintiffs showed that all essential features, general appearance and getup of the cranes were identical, such that customer would mistake one for the other.

31. It may be mentioned that our case goes much further. There is little use of matching the Plaintiffs' drawings with the Defendants' product. The recovery of the stolen copies of the Plaintiffs' drawings shows not only similarity, but identical dimensions in the Defendants' sketches.

32. It is observed in paragraph 28 in the judgment of Escorts Construction Equipment (*supra*), that the industrial drawings of the cranes were produced by skilled draughtsmen, having knowledge, labour, judgment and skill. The copies of the drawings were used to manufacture parts of the cranes. Those parts manufactured were reproduction of the original artistic work. The copyright in such drawings is capable of being infringed by the production of the 3D articles. This case was similar to the case of Grates & Control Engineering Ltd. and Anr. v. Honey Control System Ltd. 1992 FSR 245260 which was also relied upon by Dr. Tulzapurkar. The Plaintiffs' claimed copyright in drawings of three radiator valves. When there was no similarity found between what was alleged as a copy or a reproduction of the original and the original itself, copyright was held not to be infringed.

33. In the further case of John Richard Brady and Others Vs. Chemical Process Equipments P. Ltd. and Another, , drawings of Fodder production units were claimed to be of the authorship of the Plaintiffs and were to serve as blue print for the construction of the unit. The Defendants were manufacturing thermal panels. The Plaintiffs required thermal panels to match their units. They supplied technical material, specifications and drawings to the Defendants to enable them to precisely match the thermal panels produced by the Defendants to the unit components of the Plaintiffs. Confidentiality of the details were stipulated in the Agreement between the parties. In breach of the confidence, the Defendants manufactured the machine which was substantial imitation of the Plaintiffs'

drawings. Similarities between the Plaintiffs' drawings and the Defendants' machine were observed. Access to the Plaintiffs' drawings was inferred. Infringement of the Plaintiffs' copyright was thereupon made out. It was held that infringement could be tested on a visual appearance of the drawings and the objects. A striking general similarity, which was obvious to the eye, was to be made out. In that case, the Plaintiffs gave the Defendants not only the specifications but also the drawings. It was held that it was "just the situation in which the Courts must enforce the general rules of equity and restrain breach of confidence". This was held also in the earlier English cases. The Defendants were, therefore, restrained from abusing the knowhow, specifications, drawings and other technical information regarding the Plaintiffs' unit entrusted to them under express condition of strict confidentiality which, it was observed, the Defendants had "apparently used as a "springboard" to jump into the business field to the detriment of the plaintiffs." When a case of theft is made out it will be a more apt situation in which the infringement of copyright would be required to be restrained.

34. In the case of Hindustan Lever Limited Vs. Nirma Private Limited, Ahmedabad, relied upon by Dr. Tulzapurkar, a label on a carton of the Plaintiffs, which was largely similar to the label later used by the Defendants and which caused a general expression to the unwary purchaser that the Defendants' product was of the Plaintiffs also merited an injunction for infringement of copyright in the label.

35. A feeble attempt has been made during the argument on behalf of the Defendants, contending that the Plaintiffs' drawings do not carry a copyright as they are drawings of industrial design registrable under the Designs Act, 2000 and they having not been registered, though registrable, the Plaintiffs cannot maintain an action for infringement of the design. A design, as defined in Section 2(d) of the Designs Act, reads thus:

2(d) "design" means only the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article whether in two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction or anything which is in substance a mere mechanical device, and does not include any trade mark as defined in Clause (v) of subsection (1) of Section 2 of the Trade and Merchandise Act, 1958 (43 of 1958) or property mark as defined in Section 479 of the Indian Penal Code (45 of 1860) or any artistic work as defined in Clause (c) of Section 2 of the Copyright Act, 1957 (1 of 1957).

A reading of the definition shows that it relates to the final shape, pattern, etc. of an article, whether in the drawings or in the object, provided that the finished article shown in the design must be appealing (have eye appeal). It specifically excludes a mere mechanical device or an artistic work under the Copyright Act.

Aside from the specific exclusion of the artistic work which is a diagram by way of a drawing u/s 2(c)(i) of the copyright Act, the definition of design also excludes a mere functional mechanism which would be a product reflecting a mere functional utility as against the final product being appealing to eye.

36. It would be flattering to call the Plaintiffs' design appealing to the eye. It has been held, as will be presently shown, the appeal is the appeal to the eye of a customer. The Plaintiffs' drawings, in this case, which showed geometrical diagrams do not reflect any finished products, let alone an appealing finished product. The drawings taken singularly do not even show a final part of a product. Hence, the Plaintiffs have as many as 330 drawings for manufacture of their finished products. The drawings, which do not reflect finished articles, let alone appealing finished articles, but serve a mere functional purpose, therefore, does not even fall within the definition of the term "design".

37. If the Plaintiffs' drawings do not qualify as design under the Designs Act, they are not registrable as such. Consequently, the copyright in registered designs, which is available to the designs of the final product u/s 11 of the Designs Act, could not be available to the Plaintiffs.

38. Several judgments relating to drawings of the designs of finished products, which make them registrable under the Designs Act, would be required to be considered.

39. In the case of King Features Syndicate, Incorporated, and Anr. and O. And M. Kleeman, Limited (1941) A.C. 417, certain dolls and toys representing the figure known as "Popeye, the Sailor" were held to have been manufactured and sold without the consent of the owners who had registered the figure as a design. Consequently, reproduction in 3 Dimensional form of the original work was held to be a copy of the registered design. The Plaintiffs, in that case, held copyright in the sketches of the comic figure. It granted licences to a certain British Firm to sell dolls, toys and brooches featuring the figure of "Popeye". The Defendants sought to sell the "Popeye" dolls. It was held that the Defendants' dolls and brooches were reproduction in material form of the Plaintiffs' original artistic work because though they were not copied from any sketches of the Plaintiffs, they were reproduction of the original work itself. It was held that the sketches did not contain any shape, pattern, etc, which could be appealing to an eye and hence, could not fall within the term "design" and, therefore, would constitute infringement of the Plaintiffs' copyright. The licences of the Plaintiffs had reproduced the figure from the sketches in material form and that figure was copied to make the Defendants' toys. Since the figure did not represent the design, it constituted infringement of copyright. The House of Lords considered whether or not the figure of "Popeye" on the brooches reproduced any substantial part of drawings.

The copy was not a complete reproduction of the sketch. Hence, it was held that the Court must examine the degree of resemblance. It was observed "....It is

impossible to lay down any useful test of what constitutes a copy or a colourable imitation of such a work." In the case of *West v. Francis*, it was observed that it should be "so near to the original as to give to every person seeing it "the idea created by the original". " Those remarks were made in reference to Fine Arts Copyright Act, 1862. They were held applicable to the case of the copy of the sketches into an article of sale of such dolls, toys and brooches.

40. With regard to whether it would be a registrable design or a copyright in an artistic work, it was held that:

It is evident that the inventor of a design intended to be used as a model or pattern to be multiplied by an industrial process must almost inevitably make a drawing or print which is an artistic work within the meaning of the Copyright Act, 1911, and clearly such a drawing or print in some cases may be a design capable of registration under the Act of 1907. On the other hand, an industrial object, whether in two or three dimensions, may well be an infringement of the artistic copyright in the preliminary drawings or prints made by the author or in the design registered under s. 49 of the Act of 1907.

41. It can, therefore, be seen that a drawing of an industrial product, which could be multiplied by an industrial process, would not be a design under the Designs Act but a copyright as an artistic work. Hence, it was further observed : "....It is not, in my opinion, open to doubt that the main object of Section 22 was to prevent such a result, and to leave the author of a design capable of registration, if he intended to use it industrially, with no more than the rights which the Act of 1907 gave him."

42. If the drawing of an industrial product is not a design and not registered as such, it would not enjoy the monopoly that is conferred under the Act but only the right to prevent its infringement conferred under the Copyright Act. Consequently, a design would be embodied in a sketch illustrative of a model which would be multiplied, or the model itself i.e. the finished article. If that is not so, it would not be required to be registered as a design. The Plaintiffs' drawings not being of a final product, capable of being manufactured again and again, would not qualify as design.

43. *King Features'*s case (supra), popularly known as the *Popeye* case, was for an alleged infringement of copyright in artistic work. Certain dolls and brooches were reproduced from the Plaintiffs' artistic work having been copied from the reproduction in material form of Plaintiffs' sketches and drawings of a figure of a pirate. The Defendants did not take a licence from the Plaintiffs to publish this figure as their product. The Defendants contended that the Plaintiffs' sketches were Designs capable of being registered under the Patents and Designs Acts 1907 to 1932.

44. It was held that the products were not embodiment in concrete form. The sketches contained no features of shape...applied to an article. Hence, they were an abstract idea for which the Patents and Designs Act offered no protection. In

appeal the judgment was reversed and suit dismissed.

45. Section 22(1) of the Copyright Act was considered under which Copyright Act did not apply to Designs capable of being registered which were not used as models or patterns to be multiplied by an industrial process.

46. Hence, the Copyright could not apply to any design of any shape of an appealing article which would be multiplied by any industrial process. But if the drawings were not of any article, they would be designs.

47. In the case of *AMP Incorporated v. Utilux Proprietary Limited* (In the House of Lords) 1971 FSR 572, the Plaintiffs claimed infringement of two registered designs in electric terminals, consisting of a receptacle, a transition portion and a connecting channel specifically manufactured for use in washing machines of a certain customer. The function of the terminals was the sole cause for the choice of their shape; not eye appeal. The shape was chosen only to make the article work. Neither the purpose, nor the result of the product was to appeal to the eye, but to "do the job". The design had no shape, feature or configuration which appealed to the eye. The shape was "applied" by an industrial process. It was to make the end product more useful. It was observed that no manufacturer who wanted to buy terminals to use as components would be influenced by their appearance; he would only be influenced by their suitability of use which he proposed to make of them. Hence, drawing from the observation of Lord Porter in the case of *Stenor Ltd. v. Whitesides (Clitheroe) Ltd.* (1948) A.C. 107128, the object of the section was considered by Lord Reid (page 579). "...Primarily the object of the Act is to protect shape not function, and not to protect functional shape." Hence, the electrical terminals had features only "to serve a mechanical object and it was a mechanical device and nothing else." Consequently, for "the performance of the duty it was required to perform: and the designer only thought of "practical efficiency" and in fact produced a design which did not appeal to the eye, and which had no embellishments the design was held invalid under the Registered Designs Act, 1949.

48. Further, it was held at page 582 by Lord Morris that the eye appeal meant that in the finished product, the appealing features "must at least be noticeable". So that the product would be judged "by their performance and not by appearance."

49. Similarly in the case of *Allibert S.A. v. O'Connor* 1981 FSR 613, it was held that drawings of fish boxes, which were delivered solely for functional purpose, could not be validly registered under the Patents and Designs Act, 1919.

50. The case of *AMP Incorporated v. Utilux Proprietary Limited* (supra) was considered and explained in the appeal from the application of *P. Ferrero and C.S. p A's Application*, 1978 RPC 473. It was seen that the "appeal" should be in the finished article though they can be judged alter. Hence, a chocolate egg designed to have two layers, inner and outer, in contrasting shades or colours, being chocolate exterior and a white interior was allowed to be registered as a

design though some of the features of the finished article were not visible at the time of sale or until the egg was broken or opened. The test of design considered in that judgment was that features (of 2 layers in that case) or patterns (of colour in that case) were present in the finished article, though they could be seen (for appeal to the eye) only when the finished article was broken.

51. *Interelego v. Tyco* 1988 RPC 343 following *AMP Incorporated v. Utilux Proprietary Limited* (supra) was the case of design and drawings of Lego's toys - The plastic building blocks manufactured and marketed by Legos Toys was sought to be copied and marketed. It was held that there could not be any copyright in any artistic work if it constituted a registrable design and was used as a model to be multiplied by any industrial process. However, the drawings of the toys were not designs because they were configuration wholly dictated by functional requirements. Hence, they were held as original artistic works in which copyright subsisted. In that case, the object of Designs Act - and the definition of Design was considered at page 353. To protect novel designs of articles to be manufactured and marketed commercially and not to protect principles of operation or inventions (which would be patentable) or to prevent copying of the original artistic effort in the drawing (which would have a copyright). "Indeed the whole purpose of a design is that it shall not stand on its own as an artistic work but shall be copied by embodiment in a commercially produced artifact."

Thus, the primary aspect is to see what the finished article looked like and gave the monopoly right to the manufacturer and seller of the articles of a design not substantially different from the registered design. In the Designs Act, therefore, the emphasis is on "the visual image conveyed by the manufactured article."

52. It was observed thus:

The starting point remains the same as it always was - visual appearance. Nothing is to qualify as a design at all unless it has "features...which appeal to and are judged solely by the eye.

It was also observed:

Lego's draughtman had in mind not simply the functional efficiency of the brick, although that was clearly of primary importance, but its visual appearance. In the light of this and having regard to the very nature of the finished article under consideration, their Lordships conclude that the first and positive part of the definition is satisfied in the instant case.

...the question raised by the second and negative part of the definition falls to be answered. Given that the overall design has eye appeal, are there any features of that overall design which are not solely dictated by the function which the article in that shape has to perform?

And further observed:

The features which stand out on a casual inspection are, of course, the knobs on

the upper surface of the article and the tubes within the skirt. Quite clearly those are not embellishments added to the basic brick shape for the primary purpose of ornamentation. They serve a functional purpose - that of interlocking and holding the bricks together - and it is difficult to conceive of any other purpose which they serve which is not purely functional.

Hence, the test was:

Is the whole shape or configuration for which registration was sought (and, in fact, achieved) a shape dictated solely by the function of interlocking and holding together?

53. In *Interlego's* case (*supra*), this case, the Plaintiffs had earlier drawings; they made minor modifications; they registered the products and designs and enjoyed a monopoly. They claimed copyright. Their articles (toy blocks) were held to have functional characteristics but also appeal. Hence, the Plaintiffs' Suit and Appeal were dismissed.

Therefore, a purely functional feature is excluded from registration under the Designs Act, 2000.

Alternatively, it could mean that any design which includes any feature which is dictated solely by function is to be excluded from registration. Or, finally, it could mean that a design which, *ex hypothesi*, has eye appeal will be excluded from registration only if every feature of it is one which is dictated solely by function.

Therefore, what is to be registered under the Designs Act, 2000 is:

...the shape or configuration of the whole article in respect of which there is to be a commercial monopoly. That necessarily involves taking the design and the article as a whole. Thus, the effective choice must be between excluding the whole shape or configuration from registration because there is a part of it that is purely functional.

Therefore, the intention is to exclude:

...a "mere" mechanical device, that is to say, an article fulfilling a mechanical function and nothing more is not registrable as a design.

54. A look at the various drawings of the Plaintiffs in this case would unmistakably show no appeal and only mechanical devices and machine parts to perform specified functions. The Plaintiffs' drawings are, therefore, not design they are contended to be. They are artistic works within the meaning of Section 2(c) of the Copyright Act, 1957 and their theft, copying, and subsequent use upon purchase of parts of similar products from the suppliers of the Defendants 1 to 3 constitute infringement u/s 2(m) of the Plaintiffs' copyright u/s 14(c)(1) of the Copyright Act, 1957.

55. The Defendants are, therefore, restrained from using the Plaintiffs' drawings mentioned in Exhibit G to the Plaint and thereby infringing their copyright in their

drawings or making any 3 Dimensional objects of machine parts which would be reproduction of the Plaintiffs' Drawings.

56. The Notice of Motion is disposed of accordingly. No order as to costs.