

(2014) 09 BOM CK 0084

In the Bombay High Court

Case No : Notice of Motion No. 684 of 2014 in Suit 427 of 2014

Photoquip India Limited

APPELLANT

Vs

Delhi Photo Store

RESPONDENT

Date of Decision : 15-09-2014

Acts Referred:

Companies Act, 1956 — Section 41, 617
Copyright Act, 1957 — Section 13, 13(1)(a), 14, 14(c), 15
Designs Act, 2000 — Section 2(d)
Penal Code, 1860 (IPC) — Section 479
Trade and Merchandise Marks Act, 1958 — Section 2

Citation : (2015) 6 ABR 210 : (2014) 3 MIPR 149 : (2014) 60 PTC 563

Hon'ble Judges : G.S. Patel, J

Bench : Single Bench

Advocate : Veerendra V. Tulzapurkar, Senior Advocate and Amit Jamsandekar, I/b V.A. Associates, Advocate for the Appellant; Neeraj Grover, Vinod Bhagat, I/b G.S. Hegde and V.A. Bhagat, Advocate for the Respondent

Judgement

G.S. Patel, J.—In this copyright infringement action, the Plaintiff seeks by this Notice of Motion an order restraining the Defendants from infringing the Plaintiff's copyright in the artistic works at Exhibits "A" and "B" to the plaint. These are technical drawings, and I will return to them in detail shortly. The Plaintiff also claims copyright in the drawings of the moulds or cast of the Plaintiff's product.

2. The products in question are flash lights used in photography. I would imagine that these are not the kind of things that a novice or a casual user might have, but are used in commercial and studio photography by professionals and perhaps by serious enthusiasts. The Defendants' products, claimed by the Plaintiff to be the infringing items, are, to my mind, indistinguishable from the Plaintiff's. The Defendants have produced no drawings of their own. Their defence, as I understand it, is that there is no subsisting copyright in the Plaintiff's drawings; that the drawings have no artistic value and therefore there can be no copyright

in them; the Plaintiff's drawings cannot be used to make the moulds in which, too, the Plaintiff claims copyright; that it is in fact the Plaintiff who has pirated from the Defendants; and that there is so much uncertainty about whether any copyright could vest in the Plaintiff or, on the Plaintiff's showing, can only vest in its Swiss principals, that no question arises of granting the Plaintiff any sort of injunction.

3. I have heard Dr. Tulzapurkar, learned Senior Counsel for the Plaintiff, and Mr. Neeraj Grover, learned Counsel for the Defendants at considerable length. Having considered their submissions and, with their assistance, the material on record, I found that the Plaintiffs have made out a very strong prima facie case. Irretrievable injury will, I have also found, be caused to the Plaintiff should reliefs be denied, and the balance of convenience demands the grant of the injunctions as sought. My reasons follow.

4. The Plaintiff manufactures, exports and trades in digital studio flashlights and photography accessories, and similar products. It is a company listed on the Bombay and Ahmedabad stock exchanges. It is the exclusive manufacturer, importer and distributor for Elinchrom SA Ltd., a Swiss company ("Elinchrom") since 1986. Among the Elinchrom-branded products are flash lighting systems called the Elinchrom FRX 200, Elinchrom FRX 400 and compact Flash Unit System. These are being manufactured and distributed by the Plaintiff since 2012-13.

5. The 2nd Defendant manufactures photography and videography equipment, including studio flash systems, video lights, camera flash guns, halogen lamps, and so on, all under the trade mark SIMPEX/SIMPEX PRO. The 1st Defendant is the 2nd Defendant's distributor. Both defendants appear to be sister enterprises owned by a common family concern.

6. According to the Plaintiff, in 2007, one of their directors, one Vimal Soni, created machine drawings for manufacturing flash lights for photography. Two more of the Plaintiff's employees were also involved in this. Soni headed the design team, and oversaw and supervised their preparation. He finalized the drawings. Soni and the two other employees, named Manish and Subodh, are the authors of these drawings. Soni was and is a director, and Manish and Subodh were and remain in full time employment of the Plaintiff. The drawings were created by the three in the course of their employment for and on behalf of the Plaintiff, which is the first owner of copyright in these drawings. The Plaintiff claims that the copyright subsists. These drawings are produced at Exhibit "A" to the plaint from pages 31 to 40. An aspect that must needs be noted that even in these drawings, though prepared for the Plaintiff by its employees, Elinchrom's brand and trade mark appears throughout. This will have some significance to one of Mr. Grover's submissions.

7. Soni and his team also prepared drawings for a product carry bag. These drawings were prepared in the same circumstances and at about the same time.

The Plaintiff claims copyright in these drawings too. The drawings for the carry bag are at Exhibit "B" to the plaint.

8. In September 2007, the Plaintiff commenced manufacture of a pilot mould cast from these drawings. From these moulds, flash units with the trade mark "elinchrom FRX 200" and "elinchrom FRX 400" are now being manufactured by the Plaintiff. The Plaintiff claim that copyright subsists in the moulds or casts manufactured by them from the drawings as well. The Plaintiff uses the marks "elinchrom FRX 200" and "elinchrom FRX 400" in India for and on behalf of Elinchrom, under a license or arrangement with it. These marks are owned by Elinchrom and are exclusively licensed to the Plaintiff. Part of the arrangement between the Plaintiff and Elinchrom is that the Plaintiff has, in consideration of being licensed to use the elinchrom marks, allowed Elinchrom to use the Plaintiff's subsisting copyright in the machine drawings, the mould or cast and the carry bag outside India.

9. Exhibits "C", "D" and "E" respectively to the plaint are photographs of the elinchrom FRX 400 flashlight product, the carry bag and a printed brochure. A sales statement for the FRX 200 and FRX 400 standard kits for 2012-13 is at Exhibit "F", and it shows aggregate sales for that year alone of over Rs. 8.10 crores. These products are sold overseas under the brand "elinchrom BRX 200" and "elinchrom BRX 400"; the product is the same as that in the drawings of which the Plaintiff claims to have copyright.

10. Between 9th and 12th January 2014, the All India Photography and Trade Industry Association hosted a consumer electronics and imaging fair at the NSE Grounds, Goregaon, Mumbai. The Plaintiff participated. It sent out invitations. At the exhibition, the Plaintiff learned that the Defendants were selling flash lights under the trade marks SIMPEX PRO FX 400 and SIMPEX PRO FX 200. They contend that these are the offending and infringing products. The Defendants have reproduced the Plaintiff's artistic works of the product and the packaging and the copyright in the moulds. Three-dimensional realizations have been created from the two-dimensional drawings. On 12th January 2014, the Plaintiff purchased the Defendants' SIMPEX PRO FX 400 and SIMPEX PRO FX 200 products (a sales invoice is annexed).

11. The Plaintiff claims that the Defendants' products, shown at Exhibit "I" to the plaint, are an exact replica of the Plaintiff's product, identical in every aspect and detail. Every single one of the features of the Plaintiff's products have been copied and used by the Defendants in their infringing products. The Defendants, the Plaintiff claims, have reverse engineered the Plaintiff's products and, working backward, have then prepared identical drawings and then the mould or cast from which the offending products are manufactured. All the Plaintiff's rights u/s 14 of the Copyright Act, 1957 have been infringed. The Defendants' products are, the Plaintiff says, inferior and sub-standard.

12. Exhibits J-1 to J-10 are photographs of the two products set side by side.

These are astounding. There is no difference at all between the two products: in side view, rear view, top view, the rear panel buttons and their positioning and labelling; all of it is identical. Even the carry bag is exactly the same. The slipcase at Exhibit J10 shows that the Defendants have called their item "Portraitlite" in italics with the mark Simpex beneath. The Plaintiff's product is "Portraitlite", also in a sans-serif font, with the elinchrom mark beneath.

13. The Plaintiff commissioned the services of Saaiamrut & Associates, Chartered Engineers, and one Saagar Vagal, a Chartered Engineer, to compare the rival products. The report is at Exhibit "K" to the plaint. It is unambiguous. Vagal compared both products and examined the Plaintiff's drawings. In his letter of 12th April 2014, he certified that the dimensions, shape and size of the rival products are identical. The only difference seems to be a marginally greater height to the Defendants' product, 99.5 mm to the Plaintiff's products' 90 mm. In all other items of comparison, there is no difference at all.

14. This suit was filed on 15th April 2014. With the suit, the Plaintiff filed the present Notice of Motion, and immediately moved for ex-parte ad-interim reliefs. By a reasoned order dated 16th April 2014, Mr. Justice Kathawalla granted ex-parte ad-interim reliefs inter alia granting the injunctions sought and also appointing the Court Receiver, with a direction to search the Defendants' premises and seize all offending materials relating to the Defendants' rival products (as shown in Exhibit "I" to the plaint).

15. On 6th May 2014, the Defendants' application for vacating the ad-interim order was heard for some time. By that time, the Court Receiver had executed his commission under the 16th April 2014 and had submitted a report. The Defendants had not produced any drawings (a position that obtains even today). They had not even responded to the Court Receiver's report. They merely filed an Affidavit dated 3rd May 2014 saying that no case had been made out by the Plaintiff, and to which the Plaintiff had filed a counter. At that hearing, certain photographs were produced by the Plaintiff. These were said to have been taken in the Defendants' premises. They showed the Plaintiff's products lying dismantled. The Plaintiff contended that this established the Plaintiff's case of reverse engineering. Counsel for the Defendants said that he did not have copies of these photographs and that the Plaintiff was not authorised to take any such photographs in the first place. Since the Court Receiver's representative had, in his report, said that he, too, had taken photographs, Mr. Justice Kathawalla asked for those. The Court Receiver's representative produced his camera in court. It had the digital photographs taken during his site visit to the Defendants' premises. He, too, had photographs of the Plaintiff's products lying dismantled in the Defendant's premises. The Court Receiver's representative was directed to take prints of his photographs and give copies to both sides. The matter was then stood over to 8th May 2014, when it was adjourned by consent to 16th May 2014.

16. On 16th May 2014, Mr. Justice Kathawalla passed a further order. He noted

all these facts and the substance of the previous order of 16th April 2014. He then recorded that at that hearing, the Defendants alleged that the photographs on the Court Receiver's representative's camera were actually taken by the Plaintiff's representative since the Court Receiver's representative was at the time, about 3:10 pm, busy preparing his report and could not possibly have taken these photographs. The allegation was that the Plaintiff had smuggled in its own products, disassembled, photographed them in the Defendants' premises and attempted to foist a wholly false case on the Defendants. Kathawalla, J queried the Court Receiver's representative, who said in response that after inspecting the second and first floors of the Defendants' premises (in that sequence), and taking photographs on those floors, he returned to the ground floor where he found the dismantled products of the Plaintiff. He took photographs of these, and then proceeded to write up his report, one that he completed in the next fifteen or twenty minutes. He was categorical in his statement to Mr. Justice Kathawalla that the Plaintiff's representatives did not carry any of their own products with them at the time of the site visit.

17. By this time, the Defendants had prints of the photographs taken by the Court Receiver's representative. These were given to the Defendants on 6th/7th May 2014. No affidavit was filed setting out the case attempted to be argued on 16th May 2014, though ten days had since passed. Kathawalla, J saw no reason not to accept the Court Receiver's representative's photographs. He found, as a matter of fact, that it was established that the Plaintiff's products were in a dismantled condition in the Defendants' premises at the time of the Court Receiver's representative's site visit and that this was entirely uncontroverted. Concluding *prima facie* that the Plaintiff's case of reverse engineering was established, Kathawalla, J refused to vacate the ad-interim order. The Notice of Motion was then placed for final hearing.

18. The Defendants appealed. By an order dated 26th June 2014 the appeal was disposed of with certain directions for filing further affidavits, and the Notice of Motion was directed to be placed for hearing and final disposal. Mr. Justice Kathawalla's findings were not disturbed.

19. Dr. Tulzapurkar's first submission is that the copyright claimed subsists in the Plaintiff by virtue of Sections 13 and 17 of the Copyright Act, 1957 ("the Copyright Act"):

Section 13--Works in which copyright subsists

(1) Subject to the provisions of this section and the other provisions of this Act, copyright shall subsist throughout India in the following classes of works, that is to say,--

- (a) original literary, dramatic, musical and artistic works;
- (b) cinematograph films; and
- (c) sound recording,

(2) Copyright shall not subsist in any work specified in sub-section (1), other than a work to which the provisions of section 40 or section 41 apply, unless,--

(i) in the case of a published work, the work is first published in India, or where the work is first published outside India, the author is at the date of such publication, or in a case where the author was dead at that date, was at the time of his death, a citizen of India;

(ii) in the case of an unpublished work other than work of architecture, the author is at the date of the making of the work a citizen of India or domiciled in India; and

(iii) in the case of work of architecture, the work is located in India.

Explanation.--In the case of a work of joint authorship, the conditions conferring copyright specified in this sub-section shall be satisfied by all the authors of the work.

(3) Copyright shall not subsist--

(a) in any cinematograph film if a substantial part of the film is an infringement of the copyright in any other work;

(b) in any sound recording made in respect of a literary, dramatic or musical work, if in making the sound recording, copyright in such work has been infringed.

(4) The copyright in a cinematograph film or a sound recording shall not affect the separate copyright in any work in respect of which or a substantial part of which, the film, or, as the case may be, the sound recording is made.

(5) In the case of work of architecture, copyright shall subsist only in the artistic character and design and shall not extend to processes or methods of construction.

Section 17--First owner of copyright

Subject to the provisions of this Act, the author of a work shall be the owner of the copyright therein:

Provided that--

(a) in the case of a literary, dramatic or artistic work made by the author in the course of his employment by the proprietor of a newspaper, magazine or similar periodical under a contract of service or apprenticeship, for the purpose of publication in a newspaper, magazine or similar periodical, the said proprietor shall, in the absence of any agreement to the contrary, be the first owner of the copyright in the work in so far as the copyright relates to the publication of the work in any newspaper, magazine or similar periodical, or to the reproduction of the work for the purpose of its being so published, but in all other respects the author shall be the first owner of the copyright in the work;

(b) subject to the provisions of clause (a), in the case of a photograph taken, or a painting or portrait drawn, or an engraving or a cinematograph film made, for valuable consideration at the instance of any person, such person shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein;

(c) in the case of a work made in the course of the author's employment under a contract of service or apprenticeship, to which clause (a) or clause (b) does not apply, the employer shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein;

(cc) in case of any address or speech delivered in public, the person who has delivered such address or speech or if such person has delivered such address or speech on behalf of any other person, such other person shall be the first owner of the copyright therein notwithstanding that the person who delivers such address or speech, or, as the case may be, the person on whose behalf such address or speech is delivered, is employed by any other person who arranges such address or speech or on whose behalf or premises such address or speech is delivered;

(d) in the case of a Government work, Government shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein;

(dd) in the case of a work made or first published by or under the direction or control of any public undertaking, such public undertaking shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein;

Explanation.--For the purposes of this clause and section 28A, "public undertaking" means--

(i) an undertaking owned or controlled by Government; or

(ii) a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956); or

(iii) a body corporate established by or under any Central, Provincial or State Act;

(e) in the case of a work to which the provisions of section 41 apply, the international organisation concerned shall be the first owner of the copyright therein.

20. The Plaintiff is, Dr. Tulzapurkar submits, the first owner of copyright in the drawings and the resultant moulds; and the drawings are "artistic works" within the meaning of Section 13(1)(a). The defence on affidavit is that the Plaintiff is not entitled to protection because of the provisions of Section 15(2) of the Copyright Act:

15. Special provision regarding copyright in designs registered or capable of being registered under the Designs Act, 1911.--

(1) Copyright shall not subsist under this Act in any design which is registered

under the Designs Act, 1911 (2 of 1911).

(2) Copyright in any design, which is capable of being registered under the Designs Act, 1911 (2 of 1911), but which has not been so registered, shall cease as soon as any article to which the design has been applied has been reproduced more than fifty times by an industrial process by the owner of the copyright, or, with his licence, by any other person.

(Emphasis supplied)

21. The Defendants' submission, as I understand it, is that the Plaintiff's copyright artistic works are "designs" within the meaning of the Designs Act, 2000. They are therefore registrable under that Act. Even if not so registered, if they have been used more than fifty times, which they no doubt have, by an industrial process, and there is no doubt about the process either, there is no subsisting copyright. The words "article" and "design" are defined in the Designs Act thus:

2. Definitions

In this Act, unless there is anything repugnant in the subject or context,--

(a) "article" means any article of manufacture and any substance, artificial, or partly artificial and partly natural; and includes any part of an article capable of being made and sold separately;

(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 sub-section (1) of section 2 of the Trade and Merchandise Marks 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 (14 of 1957);

(Emphasis supplied)

22. Dr. Tulzapurkar submits that there is no substance in this defence. Section 14 of the Copyright Act puts the matter in perspective:

14. Meaning of Copyright.--

For the purposes of this Act, "copyright" means the exclusive right subject to the provisions of this Act, to do or authorize the doing of any of the following acts in respect of a work or any substantial part thereof, namely:--

(a) in the case of a literary, dramatic or musical work, not being a computer programme,--

- (i) to reproduce the work in any material form including the storing of it in any medium by electronic means;
- (ii) to issue copies of the work to the public not being copies already in circulation;
- (iii) to perform the work in public, or communicate it to the public;
- (iv) to make any cinematograph film or sound recording in respect of the work;
- (v) to make any translation of the work;
- (vi) to make any adaptation of the work;
- (vii) to do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clauses (i) to (vi);

(b) in the case of a computer programme,--

- (i) to do any of the acts specified in clause (a);
- (ii) to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme:

Provided that such commercial rental does not apply in respect of computer programmes where the programme itself is not the essential object of the rental.

(c) in the case of an artistic work,--

- (i) to reproduce the work in any material form including depiction in three dimensions of a two dimensional work or in two dimensions of a three dimensional work;
- (ii) to communicate the work to the public;
- (iii) to issue copies of the work to the public not being copies already in circulation;
- (iv) to include the work in any cinematograph film;
- (v) to make any adaptation of the work;
- (vi) to do in relation to an adaptation of the work any of the acts specified in relation to the work in sub-clauses (i) to (iv);

(d) in the case of a cinematograph film,--

- (i) to make a copy of the film including a photograph of any image forming part thereof;
- (ii) to sell or give on hire or offer for sale or hire, any copy of the film, regardless of whether such copy has been sold or given on hire on earlier occasions;
- (iii) to communicate the film to the public;

(e) in the case of a sound recording,--

(i) to make any other sound recording embodying it;

(ii) to sell or give on hire, or offer for sale or hire, any copy of the sound recording, regardless of whether such copy has been sold or given on hire on earlier occasions;

(iii) to communicate the sound recording to the public.

Explanation.--For the purposes of this section, a copy which has been sold once shall be deemed to be a copy already in circulation.

23. Dr. Tulzapurkar points that very submission was made before a learned single Judge of this Court in *Hindustan Lever Limited Vs. Nirma Private Limited*, Ahmedabad, There, the Court found no merit in the contention. It was held that a "design", as defined in the Designs Act, is an integral part of the article manufactured, unlike, say, a trade mark. In that case, the label to be affixed on a carton to be used as a container for the goods was not, and could not ever be, the Court held, a "design" within the meaning of the Designs Act. Section 15(2) of the Copyright Act has no application in such cases.

24. This is also the view of another learned single Judge of this Court in *Indiana Gratings Private Limited and Another Vs. Anand Udyog Fabricators Private Limited and Others*, a decision of some consequence on this issue. Mrs. Justice Dalvi in *Indiana Gratings* followed *Nirma*, and, in the case before her, rejected an identical argument. The facts in *Indiana Gratings* are sufficiently similar to those in the present case to make that a binding precedent that cannot be distinguished (on facts) from the case at hand. The controversy there was about an indigenous electro-fold machine created on the basis of drawings the plaintiffs prepared. The plaintiffs claimed copyright in these drawings as artistic works. The defendants stood accused of infringing that copyright in those artistic works, i.e., the drawings, by reproducing those drawings in finished products of their own. The defendants' drawings were recovered and found to be identical to those of the plaintiffs. There, as here, the defendants did not produce their own drawings; the difference being that the drawings were prepared by an erstwhile employee of the plaintiffs who then went to work for the 2nd defendant and prepared identical drawings for them as well. Before Mrs. Dalvi, J, too, an argument was made that there was no copyright in these drawings as they were "designs" that lent themselves to registration under the Designs Act, being drawings of industrial design. Describing this as a feeble attempt, again not very different from the case before me, Mrs. Justice Dalvi then went on to consider a very considerable body of precedent, including decisions from England.¹

25. What is that to which Section 15(2) refers? It speaks only of a "design", and not an "artistic work". It has no application to the latter, but only to the former. Section 2(d) of the Designs Act makes this plain, for it excludes from the definition of design all "artistic works". Therefore, the Defendants' argument

must necessarily be that the Plaintiff's drawings are not artistic works at all, but are designs. Following the *Interlego* decision, Mrs. Justice Dalvi held in *Indiana Gratings* that to be registrable under the Designs Act (even if not actually registered), the shape or configuration of the whole article is to be considered, for it is this of which a commercial monopoly is sought. The design and the article must, of necessity, be taken as a whole. If there is a part of it that is functional, that stands excluded from the definition of a design. The exclusionary intent extends only to that which has no appeal but describes or portrays purely functional features. If it does, it is not a "design". It may then enjoy copyright as an "artistic work". This inclusion under the Copyright Act is not to be confused, as regrettably Mr. Grover does, with the question of "visual appeal" for the purposes of the Designs Act. As in *Indiana Gratings*, the present Plaintiff's drawings are skilled diagrams that do not reflect any finished products, let alone a finished product of any "visual" or aesthetic appeal. They only serve a functional purpose. They are not, therefore, designs. The Plaintiff claims no copyright in the *elinchrom FRX 200/elinchrom FRX 400* flash lights themselves. It claims copyright in drawings, not in articles. The drawings are artistic works, capable of copyright protection. The articles - the flashlights themselves - are not. It is not, I think, possible to conflate these two. Similarly, the moulds or casts have no appeal whatever. They are purely functional. It matters not that, according to a particular viewer, they have no "artistic" worth. Lacking any appeal, they are not designs; they, too, are only artistic works.

26. What Mr. Grover contends is that the drawings and the moulds, in which too the Plaintiff claims copyright, are "intermediaries" in the making of the final product. That is a submission without discernible direction; it takes us nowhere. A man may fashion a tangible thing from a sketch, even a doodle. That does not rob the sketch of copyright protection. Mr. Grover's attempts to distance himself from *Nirma*, by saying that was a case of label, not an article, and from *Indiana Gratings*, saying that was a case of theft by an ex-employee are unpersuasive. *Indiana Gratings*, in particular, seems to be on all fours in its statement of the law, and at no great remove on facts. Indeed that was a case of theft, and this is a case of reverse engineering, a sophisticated form of stealing. A distinction such as Mr. Grover seeks cannot be drawn only on the basis of the degree or extent of illegality.

27. Mr. Grover's next submission that the drawings are not such as can be used to make a mould, essential to the manufacturing process, is not one that commends itself either. These are technical and engineering men. They can, from drawings, take the next necessary steps in production; and if, as they have done here, they should choose to dismantle a competitor's product and work backward from there, it is, I would imagine, no very difficult thing to prepare a mould. There is no limit to what a person may do with a physical object: he may use it to create something else entirely, or he may take it apart to see how it is made, and how each of its constituent parts are made, and then draw up plans for making more such parts and objects himself, something the Defendants

appear, *prima facie*, to have done. What can be done with an artefact cannot dictate whether a representation of an idea of that idea, one perhaps with no appeal, is or is not an artistic work. The very definition of "design" tells us this: A design is, and is 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." Are the drawings or moulds "applied" to the finished products? Are they "features of shape, configuration, pattern, ornament or composition of lines or colours"? The "features of shape, configuration, pattern, ornament or composition" are aspects of the objects themselves. There is no copyright in the approximately rectangular shape of the flash lights, or the manner in which they are configured. There is a copyright in the initial mechanical or geometric drawings. A design also does not include any mode or principle of construction, and if the drawings describe this mode or this principle, they are, by definition, not designs, and not capable of registration as designs. The fact that it is impossible for the Defendants to reproduce the articles without reverse engineering them and preparing illicit drawings does not put the Plaintiff's drawings outside the protection of the Copyright Act.

28. The consequences of what Mr. Grover suggests are grave. By his reasoning, it is entirely possible for anyone to take the concept "drawings" for a high-end automobile, for instance, and to start production of it. We are not here concerned with designs registered under the Designs Act, which enjoy their own level of protection. We are concerned here with the loss of all copyright protection u/s 15(2) of the Copyright Act. The statutory intent is clear: if the matter sought to be protected is a "design", properly so called, it must be registered under the Designs Act, and enjoys protection under that Act, not the Copyright Act. If the matter is (a) capable of such registration under the Designs Act, but (b) has not been so registered, and (c) the design is "applied" to any "article", and (d) the article has been reproduced more than 50 times by an industrial process, all copyright ceases. By Mr. Grover's reasoning, it is entirely possible, given that human ingenuity is boundless, to take a concept drawing or a sketch and work forward from there to produce something that looks like the original, and then to claim that no copyright subsists in the original concept sketch or drawing. It is also possible to take apart the finished product and, working backward, return to the starting point of a sketch and make the same claim. This is not the statutory intent. It cannot be.

29. It is, I think, a mistake to confuse "artistic work" under the Copyright Act with a more colloquial understanding of what constitutes "art". Courts are not arbiters of aesthetics or aesthetic values. Carl Andre's installation of common fireplace bricks at the Tate Modern in 1972 was said to be a sculpture. Whether or not it was "art" is beside the point. In and of itself, it was capable of copyright protection in the form in which it was presented. This is true, too, of Richard

Long's "Red Slate Circle" installation at the Guggenheim Museum from 1980. But a pile of slate slabs and stones, and bricks at a construction site are not the subject of copyright. The physical artefacts are the same, but in one they are arranged and presented in a special format as the expression of an idea, and in the other they are not; they are simply left there to be used in the construction or building or finishing of a structure.

30. It is not necessary either that to receive copyright protection an artistic work should have a plenitude of detail as we see in the paintings of Rembrandt, Gericault, Vermeer, Rousseau or any number of other painters. The most minimal representation or expression may suffice: the sketch in no more than three lines, a single stroke each that is unmistakably Mahatma Gandhi, for instance. Should this sketch be used in the production of a three-dimensional figurine or a bust of Gandhiji, and a hundred, or a thousand, such objects be produced, would that mean that the sketch itself stands without copyright protection? I do not think this can possibly be; yet this is the implication of what Mr. Grover suggests. "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." *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.*, (1964) 1 W.L.R. 273

31. In *King Features Syndicate, Inc., & Anr. v. O & M Kleeman Ltd.*, (1941) AC 417 the Court said:

"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."

(Emphasis supplied)

32. In *Interlego AG v. Tyco Industries Inc. & Ors.*, 1988 RPC 343 : [1989] AC 217 : [1988] 3 WLR 678 the Privy Council said:

"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."

(Emphasis supplied)

What is registrable as a design is, and is only:

"[...] 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."

(Emphasis supplied)

33. Mr. Grover relies on a decision of a Division Bench of the Delhi High Court in *Microfibres Inc. Vs. Girdhar and Co. and Another*, His submission is that the Plaintiff's drawings, since they lead to the production of an industrial article, and have no "artistic" merit, as in matter that a man may want to hang on his wall, the drawings enjoy no copyright. Microfibres says no such thing. To the contrary: the Delhi High Court followed the view in *Interlego*. It must be remembered that the appeal before the Delhi High Court was from the view taken by the learned single Judge that it is only a "painting" that enjoys copyright protection as a work of art. This finding was in terms negated, when the Division Bench in appeal agreed with the submission that an "artistic work" under the Copyright Act need not possess any artistic quality. The Delhi High Court's Division Bench attempted a harmonization the provisions of the two Acts thus:

"45. Learned Counsel Shri Praveen Anand, appearing on behalf of the appellant in FAO (OS) No. 447/2008 has contended that there is a vital difference between the subject matter of copyright and design protection. In our view, while this plea is sustainable, nevertheless, it cannot be ignored that different kinds of protection for an artistic work, and the design founded upon the artistic work which is industrially and commercially exploited, has been intended by the Legislature. He has further submitted that what stands extinguished u/s 15 of the Copyright Act is the copyright in the design itself as applied to an article and not the copyright in the artistic work itself. There is no quarrel with this proposition. However, that does not advance the case of the appellant. We do hold that in the original work of art, copyright would exist and the author/holder would continue enjoying the longer protection granted under the Copyright Act in respect of the original artistic work. Thus, for instance a famous painting will continue to enjoy the protection available to an artistic work under the Copyright Act. A design created from such a painting for the purpose of industrial application on an article so as to produce an article which has features of shape, or configuration or pattern or ornament or composition of lines or colours and which appeals to the eye would also be entitled design protection in terms of the provisions of the Designs Act. Therefore, if the design is registered under the Designs Act, the Design would lose its copyright protection under the Copyright Act but not the original painting. If it is a design registrable under the Designs Act but has not so been registered, the Design would continue to enjoy copyright protection under the Act so long as the threshold limit of its application on an article by an industrial process for more than 50 times is reached. But once that limit is crossed, it would lose its copyright protection under the Copyright Act. This interpretation, in our view, would harmonize the Copyright and the Designs Act in accordance with the legislative intent.

46. We thus summarize our findings as follows:

(a) The definition of "artistic work" has a very wide connotation as it is not circumscribed by any limitation of the work possessing any artistic quality. Even an abstract work, such as a few lines or curves arbitrarily drawn would qualify as an artistic work. It may be two dimensional or three dimensional. The artistic work may or may not have visual appeal.

(b) The rights to which a holder of an original artistic work is entitled are enumerated in Section 14(c) of the Copyright act.

(c) It is the exclusive right of the holder of a Copyright in an original artistic work to reproduce the work in any material form. For example, a drawing of an imaginary futuristic automobile, which is an original artistic work, may be reproduced in the three-dimensional material form using an element, such as a metal sheet.

(d) The design protection in case of registered works under the Designs Act cannot be extended to include the copyright protection to the works which were industrially produced.

(e) A perusal of the Copyright Act and the Designs Act and indeed the Preamble and the Statement of Objects and Reasons of the Designs Act makes it clear that the legislative intent was to grant a higher protection to pure original artistic works such as paintings, sculptures etc and lesser protection to design activity which is commercial in nature. The legislative intent is, thus, clear that the protection accorded to a work which is commercial in nature is lesser than and not to be equated with the protection granted to a work of pure Artistic.

(f) The original paintings/artistic works which may be used to industrially produce the designed article would continue to fall within the meaning of the artistic work defined u/s 2(c) of the Copyright Act, 1957 and would be entitled to the full period of copyright protection as evident from the definition of the design u/s 2(d) of the Designs Act. However, the intention of producing the artistic work is not relevant.

(g) This is precisely why the legislature not only limited the protection by mandating that the copyright shall cease under the Copyright Act in a registered design but in addition, also deprived copyright protection to designs capable of being registered under the Designs Act, but not so registered, as soon as the concerned design had been applied more than 50 times by industrial process by the owner of the copyright or his licensee.

(h) In the original work of art, copyright would exist and the author/holder would continue enjoying the longer protection granted under the Copyright Act in respect of the original artistic work per se.

(i) If the design is registered under the Designs Act, the Design would lose its copyright protection under the Copyright Act. If it is a design registrable under the Designs Act but has not so been registered, the Design would continue to enjoy copyright protection under the Act so long as the threshold limit of its

application on an article by an industrial process for more than 50 times is reached. But once that limit is crossed, it would lose its copyright protection under the Copyright Act. This interpretation would harmonize the Copyright and the Designs Act in accordance with the legislative intent.

(Emphasis supplied)

34. It is thus clear that a design produced from an artistic work is very different from the artistic work itself. I do not see how this decision can possibly assist Mr. Grover. It does not support the proposition he canvasses, which is that the Plaintiff's drawings are not artistic works at all, but purely designs. This is precisely the submission negated in *Indiana Gratings* and *Microfibres* both. By an extension of Mr. Grover's reasoning, a sketch of a novel automobile or an airplane would not enjoy copyright protection if 50 articles derived or inspired by that sketch and passing through a "design" phase were finally produced. This is entirely incorrect.

35. Mr. Grover then relied on the decision of a learned single Judge of the Delhi High Court in *M/s. Jagdamba Impex Vs. M/s. Tristar Products Private Ltd.*, That case is entirely distinct from the one at hand. The teeth-cutting machine for making combs was found to be based on the very industrial drawings in which the plaintiffs asserted copyright. Moreover, and with the greatest respect, the attention of the learned single Judge was not drawn to *Microfibres* or to any of the cases discussed in it, though that decision bound the learned single Judge, or to the very many English decisions. *Indiana Gratings* was not considered either. I do not think I am bound by the *Jagadamba Impex* decision, even assuming it has any application to the present case, and I have the gravest misgivings about its universal applicability. Equally inapposite is the decision of another learned single Judge of the Delhi High Court in *Polymer Papers Ltd. Vs. Mr. Gurmit Singh and Others*, A very large number of reliefs were sought by the plaintiffs, who alleged that the defendants were hijacking their entire business. One of the reliefs sought was to restrain the defendants from using the plaintiffs' drawings etc. It was established that the plaintiffs in that case were themselves guilty of reverse engineering, in that they took apart certain products and then made production drawings based on that. This was the only context in which an issue arose under the Copyright Act and the Designs Act. Far from assisting Mr. Grover, this decision harms his cause.

36. On facts, Mr. Grover points to a pamphlet at Exhibit "A" to the Defendants' Affidavit in Reply dated 3rd May 2014. This shows a device in vivid red, and is claimed to be of 2006. I do not see how this helps the Defendants. The product is materially and visually different. This is followed by the Defendants' calendar of 2007, one that shows their SIMPEX PRO FRX 200 product. It is impossible to say from this whether this article is of the Defendants' own design or not. Had it been, there should have been no difficulty in the Defendants producing their own drawings of that time or earlier. Curious indeed it is that despite every opportunity afforded, this is the one thing from which the Defendants have shied

away. To say then, as Mr. Grover does, that the Plaintiff "stole" from the Defendants is an argument that holds no water.

37. Mr. Grover also attempts to draw some mileage out of the fact that between Exhibit "A" to the plaint and Exhibit "B" to the Plaintiff's affidavit dated 6th May 2014, both supposedly the same drawing, there is a difference in that the latter document has a comparative table in the top right hand corner showing the difference between the rival drawings. I believe this misses the point. But for this table, the drawings are identical, and both are said to be the Plaintiffs. The table itself is evidently later superimposed, because it only reproduces in abbreviated form the findings of the Plaintiff's consultants, the Chartered Engineers they engaged to make a report. I do not see how pointing out such nice distinctions can assist a party who chooses to withhold the best evidence and does not place before the court that which it was its bounden duty to do.

38. Mr. Grover then points to the Plaintiff's own brochure Exhibit "A" to its Affidavit in Rejoinder dated 7th May 2014. This document has the term "Swiss Design" on the pages that show the product in question, says Mr. Grover; and it is a document of 2011. Therefore, it must follow, he submits, that the copyright, if any, vests in Elinchrom, not the Plaintiff. This is clutching at straws. The Plaintiff may well have used that expression to underscore its association with an internationally renowned company in the field. There is nothing so very wrong with that. But nowhere does this document claim that the copyright in the drawings was with Elinchrom and not the Plaintiff. The Plaintiff has not hidden its association with Elinchrom. To the contrary: it has explained it, and in an entirely satisfactory fashion.

39. Finally, Mr. Grover debunks the invoice produced by the Plaintiff as evidence of it having purchased the Defendants' rival product at the Mumbai photo fair in 2014. I regret that Mr. Grover's submission is much too elliptical, at least for my mind. Is the suggestion that the Plaintiff did not buy the Defendants' product when it says it did? What possible difference might that make? The suggestion cannot possibly be that the Defendants have nothing to do with the item in question. They do, very much indeed; hence this contest, and it appears not to be in doubt that the Plaintiff and the Defendants are the two major concerns who deal in these products.

40. As to the balance of convenience, the submission is that the Defendants' business is at a standstill. On instructions, Mr. Grover offers to maintain accounts and file them in Court. The Defendants cannot possibly be compensated for their loss, he submits. I am unable to accept this, and I find it hard to believe that the entirety of the Defendants' business was based on the sales of these two items. Even if that is so, in itself it is no reason to allow an infringement that is so blatant and so obvious to continue. Dr. Tulzapurkar is correct in pointing out that all that the Defendants have produced, as I have noted, is a photograph. No drawings are presented, even though it is the drawings and the moulds that are the subject matter of this action.

41. I must return to what transpired at the ad-interim stage. The Court Receiver's representative's report is unambiguous. So is the finding of Mr. Justice Kathawalla on 16th May 2014, undisturbed in appeal. Everything points to the Defendants having reverse engineered the Plaintiff's products. The rival products are virtually identical, but for the one marginal difference in a single dimension. There seems to be no manner of doubt that the Defendants have with them illicit drawings that infringe the Plaintiff's copyright, and that these infringing drawings have been prepared by reverse engineering the Plaintiff's products. There is no valid explanation for the presence of the Plaintiff's products in a disassembled state in the Defendants' premises. The explanation has already been once disbelieved. I cannot and will not revisit that again.

42. The Plaintiffs have made out a more than sufficient prima facie case and have demonstrated that the balance of convenience is in their favour and the prejudice and harm likely to result if reliefs are denied. The Notice of Motion must succeed.

43. The Notice of Motion is made absolute in terms of prayer clauses (a)(i), (a)(ii) and (b), which are reproduced in the annexure to this order. There will be no order as to costs.

1 King Features Syndicate, Inc., & Anr. v. O & M Kleeman Ltd., (1941) AC 417, regarding sketches of Popeye the Sailor used to reproduce a toy figure; AMP Inc. v. Utilux Proprietary Ltd. (HL), 1971 FSR 572; Stenor Ltd. v. Whitesides (Clitheroe) Ltd., (1948) AC 107; Allibert S.A. v. O'Connor, 1981 FSR 613; Interlego AG v. Tyco Industries Inc. & Ors., 1988 RPC 343 : [1989] AC 217 : [1988] 3 WLR 678 regarding the plastic building blocks of Lego's toys.