
(2001) 08 BOM CK 0055

In the Bombay High Court

Case No : Notice of Motion No. 3554 of 1999 in Suit No. 6556 of 1999

SmithKline Beecham Consumer Healthcare GMBH and Others

APPELLANT

Vs

Hindustan Lever Limited and Another

RESPONDENT

Date of Decision : 02-08-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 1, Order 2 Rule 2, Order 2 Rule 3, 11, 151

Copyright Act, 1957 — Section 40, 58, 62

Citation : (2002) 1 LLJ 453 : (2002) 1 MhLj 453

Hon'ble Judges : D.K. Deshmukh, J

Bench : Single Bench

Advocate : Ravi Kadam, Chander Lall, Vinod Bhagat and Dahlia Sen Oberoi, instructed by G.S. Hegde and V.A. Bhagat, for the Appellant; Virendra Tulzapurkar, H.W. Kane and Virag Tulzapurkar, instructed by Crawford Baley and Co., for the Respondent

Final Decision : Dismissed

Judgement

1. This Notice of Motion is taken out by the plaintiffs. The plaintiffs have filed this suit seeking a decree of perpetual injunction and other reliefs on the allegation that the Defendants have infringed their copyright in the drawing and the mould used for manufacture of the toothbrushes.

2. The facts that are material and relevant for consideration and decision of this Notice of Motion are as under :--

The plaintiff No. 1 in the plaint claims that the plaintiff No. 1 is a German Company having its principal place of business at Hermannstrasse 7, 77815 Buhl, Baden, Germany. The plaintiff No. 1 was formerly known as Lingner + Fischer GmbH, having changed its name to that of the plaintiff No. 1 in 1996. It has at all material times been engaged in a variety of business in the healthcare field, more particularly in the design and sale of toothbrushes. The plaintiff No. 2 is a company registered under the Companies Act 1956, and is the exclusive licensee

in India under the several copyright works. The plaintiff No. 2 advertises, markets and distributes throughout India two models of toothbrush, the AQUAFRESH FLEX and AQUAFRESH FLEX N" DIRECT. These toothbrushes are manufactured for it by Menezes and Schiffer Dental Care Products Ltd. (formerly Menezes Electronics Limited) a Company incorporated under the Indian Companies Act, 1956, having a place of business at 3 rua de Qurem, Panjim, Goa. The plaintiff No. 3 is an English public company having a place of business at New Horizons Court, Brentford, Middleses, TW8 9EP, United kingdom. It is the holding company for the plaintiffs Nos. 1 and 2, all of whose issued shares are ultimately owned by it. It has substantial interest worldwide in the pharmaceutical and healthcare fields. The subject matter of this action is the precision mould sets in which two models of the plaintiffs toothbrushes are manufactured by the process of hot injection moulding of flow able materials. Such handles are thereafter tufted with bristles by a separate manufacturing operation and are subsequently blister packed for sale. Neither of these subsequent operations is relevant to this Action. In making the abovementioned toothbrushes, a mould set is used for each of the two operations, each set comprising an upper and a lower mould each having a specially shaped cavity therein. The combination of the two said specially shaped cavities makes up a single cavity which in use corresponds exactly to the shape of the article moulded. In or about 1988, the plaintiff No. 1 commissioned a new design of plastic toothbrush from one Hans Halm ("Herr Halm"), a German product designer of international repute. Herr Halm's resulting design incorporated certain novel product features including an S shaped (or zig zag) connecting portion between the head and the handle of the toothbrush ("the S-bend"). These features were intended to (and did) imbue the toothbrush with both eye appeal and functional utility. This toothbrush, which is referred to herein as the MARK I model, was first sold in Europe in 1988 and is presently sold in India. In 1993, the plaintiff No. 1 again commissioned Herr Halm to design a plastic toothbrush which retained the S-bent configuration but which possessed a head and handle of different appearance. This he did, the resulting product being referred to herein as the MARK II toothbrush. Later in 1993, the plaintiff No. 3 commissioned Herr Halm to materially alter the appearance of the handle of the MARK II toothbrush and this resulted in what is hereinafter referred to as the MARK III toothbrush. The MARK I, MARK II and MARK III represent an evolution of Herr Halm's design. The MARK I and MARK II differ substantially in appearance. The MARK II and the MARK III differ in the appearance of the handle. Common to all three models is the S-bend configuration. This suit is not however concerned with these (or indeed any) toothbrushes but rather with the moulds in which they are made. In early 1991, working in close collaboration with plaintiff No. 1, and in accordance with Plaintiff No. 1's brief, Halm (assisted by others employed under a contract of service by Studio Halm) produced initial drawings for the new toothbrush. The above drawings were thereafter specifically approved by plaintiff No. 1. These drawings were then used by Boucherie to create two precision pilot moulds. This occurred in about March 1992. The pilot

moulds were made by Roland Beirnaert and Roger van Marcke ("Beirnaert and van Marcke") both being Belgian citizens employed under a contract of service with Plast O Form. The creation of the cavity in the mould was effected by the process of the spark erosion (or EDM) of machined steel blanks using shaped electrodes for this purpose. The actual pilot moulds which they made for the MARK II project no longer exist, having been either lost or destroyed. Sample toothbrushes were produced by Boucherie using these pilot moulds during late 1992 for approval by plaintiff No. 1. In the event, the sample toothbrush handles so produced were approved by plaintiff No. 1 without alteration. Boucherie was thereupon instructed by Schiffer on the direction of plaintiff No. 1 to prepare drawings for the making of production moulds for this toothbrush. By late 1992, drawings for a production mould had been made by Calu. There having been no material change between pilot and production moulds, the cavities in each are identical. Further, toothbrushes ? made using either pilot or production moulds are in all material respects, identical. The drawings for the pilot moulds are the original works of their author Calu, and were produced in the course of and as part of his employment under his aforesaid contract of service. Copyright subsists therein in Belgium. The pilot moulds made according to the abovementioned drawings are the original work of their respective authors Beirnaert and van Marcke and were produced in the course of and as part of their employment under their aforesaid contracts of service. Copyright also subsists therein in Belgium. By virtue of Section 40 of the Copyright Act 1957, the said works also attract copyright protection in India, Belgium being a country specified in both the Schedule (Parts I and II) to the International Copyright Order 1958 (S.R.p. 271 of 21 January 1958) and in the Schedule (Parts I and II) to the International Copyright Order 1991 [SO 657 (E), of SO. September 1991].

The Defendant No. 1 is a Company registered under the Companies Act 1956, and carries on business inter alia dealers in and/or sellers of toothbrushes. The Defendant No. 2 is an Indian company registered under the Companies Act, 1956 which carries on business inter alia as manufacturers of and/or dealers in and/or sellers of toothbrushes and importers of moulds used for the manufacture of toothbrushes. Prior to the commencement of these proceedings. Defendant No. 1 has offered for sale and has sold in India toothbrushes under, or by reference to, the trade mark PEPSODENT POPULAR. Further by letter to the plaintiffs" then advocates dated August 7, 1999, advocates acting for Defendant No. 1, stated in paragraph 5 thereof, that Defendant No. 2 manufactures PEPSODENT POPULAR toothbrushes for Defendant No. 1 on a "principal to principal basis". In addition, by letter to the plaintiff"s then advocates dated 10 August 1999, advocates acting for another manufacturer of PEPSODENT POPULAR toothbrushes, Unident Brushes Private Limited of 78 Suryakiran Complex, Old Padra Road, Vadodara-390-015 ("Unident") stated the same fact in paragraph 12 thereof. In the premises, as an independent supplier of PEPSODENT POPULAR toothbrushes to the Defendant No. 1, Defendant No. 2 has accordingly at all material times had possession, power, custody and/or control of the moulds used to make the

said toothbrushes. The PEPSODENT POPULAR toothbrush is made of a single plastic moulding and has no rubber grip pad. However, the PEPSODENT POPULAR toothbrush and the Major Component of the MARK II and MARK III toothbrushes are nearly identical, alternatively are substantially similar in both physical dimensions and in appearance. Reference to the drawings reveal in particular a virtual identity in appearance and dimensions between the PEPSODENT POPULAR toothbrush and the Major Component of the MARK HI toothbrush. The PEPSODENT POPULAR toothbrush is manufactured by injection moulding of thermoplastic material. The moulds in which such toothbrushes are made are in two parts and each contain cavities which together are shaped to reproduce (or substantially reproduce) the shape of the PEPSODENT POPULAR toothbrush. The Defendant's moulds were designed by or on behalf of the Defendant No. 1. In Particular, drawings for such moulds were made and moulds were made therefrom by the process of spark erosion for and on behalf of the Defendants or either of them. In the premises, the manufacture of the Defendant's moulds (and/or any pilot mould or moulds antecedent thereto or moulds made to replace those moulds) has been effected or authorised by the Defendant No. 1 or by the Defendant No. 2, alternatively by Defendant No. 1 and Defendant No. 2 acting together. By importing the Defendant's moulds or by manufacturing or authorising the manufacture of the said moulds as alleged in the preceding paragraphs, without me license or consent of the plaintiffs or any of them, the Defendant No. 1 and/or Defendant No. 2 jointly and severally, have infringed the plaintiffs artistic works. In the premises, the Defendant's moulds and each of them are infringing copies of one or more of the plaintiffs copyright works aforesaid. By virtue of Section 58 of the Copyright Act 1957, plaintiffs Nos. 1 and/or 3 have at all material times been the owners of each such infringing copy and are entitled to possession thereof together with any drawing or "plate" used in its making. None of the said infringing copies (or drawings or "plates") being within their possession, custody, authority or control, the plaintiffs or any one of them are entitled to recover possession thereof. In a suit pending before the Hon'ble Delhi High Court, being Suit No. 2515 of 1996, the plaintiffs Nos. 2 and 3 are the plaintiffs. In that action it was alleged that certain of the plaintiff No. 3's registered designs had been infringed and that (inter alia) the PEPSODENT POPULAR tufted toothbrush as sold was being passed off as and for the plaintiffs MARK II toothbrush. The Defendants herein are Defendants in that suit. During the course of as interlocutory hearing in that suit in view of the evidence of prior publication the plaintiff No. 3 abandoned its allegations of registered design infringement and agreed to surrender the registered designs there in issue on the ground that they were invalid because of prior publication. The said designs have subsequently been cancelled. By virtue thereof any consequent relief based upon the registered design also shall not be pressed. For the avoidance of uncertainty it is clarified that the aforementioned suit in Delhi is concerned solely with toothbrushes as sold and not with any allegations of copyright infringement or with any moulds used or intended to be used for the making of toothbrushes.

The plaintiffs submit that they are entitled to an order of permanent injunction restraining the defendants whether acting by their directors, officers, servants or agents or any of them or otherwise howsoever from infringing and/or authorising the infringement of the first and/or third plaintiff's copyright either by importation, manufacturing or authorising the manufacture of further moulds in any or all of the works. The plaintiffs further submit that they are entitled to an order for delivery up to the plaintiffs (or to their representatives) of all moulds in the Defendant's authority, possession, power, custody or control (or that of either of them) which are infringing copies of any or all of the first and/or third plaintiffs copyright works together with all plates used in the making thereof as may be in their respective power, possession, custody or control.

4. The plaintiffs in the Notice of Motion pray for temporary injunction restraining the Defendants from infringing the copyright of the plaintiffs in the drawings and the moulds and also restraining the Defendants from manufacturing any articles from the infringing moulds. They also seek appointment of the receiver.

5. The Notice of Motion is opposed by both the Defendants. They deny that their drawings and moulds are similar or identical to the alleged drawings and moulds of the plaintiffs. They also deny that the plaintiffs have any copyright in the drawings and the moulds. They claim that it is not possible for the plaintiffs to have any copyright in the drawings and the moulds under the Copyright Act. The Defendants have also raised a preliminary objection to the maintainability of the suit, in view of the suit filed by the plaintiffs in the Delhi High Court, which is pending. The Defendants submit that the Defendant No. 1 are a company carrying on business of manufacturing, marketing and selling inter-alia toothbrushes. The Defendant No. 1 have been producing dental care products since 1960. The 1st Defendants earlier marketed tooth pastes bearing the trade marks "SIGNAL" and "CLOSE-UP". The 1st Defendants entered into toothbrush business in the year 1993 by launching toothbrush under the Unilever Plc.'s registered trade mark "CLOSE-UP". Thereafter, different variations of products were introduced from time to time to cater to the needs of the consumers. Encouraged by the success of the "CLOSE-UP" toothbrushes, the 1st Defendants started marketing "PEPSODENT" toothbrushes for the premium segment of the toothbrush market. In 1993-1994, the internal consumer study and market trend as well as consumer perception showed considerable scope for need for a toothbrush that could cater the needs of the general consumer segment. In 1994, the Dental Innovation Centre, a part of the 1st Defendants' Research and Development Department, was requested for creating and developing a new toothbrush design. After the Dental Innovation Centre made a design, the 1st Defendants took search in the Designs Office in order to find out whether any similar design was registered. After receiving a negative report, the 1st Defendants registered a design under No. 168562 on 30th December, 1992. The Dental Innovation Centre developed another version and got the design registered under No. 170583 on 12th January, 1996. It was found that a similar design was registered in the name of Defendant No. 2. The 1st Defendants,

therefore, acquired by assignment, the said design on the 4th July, 1996. The 1st Defendants launched their product under the brand name "PEPSODENT POPULAR" in July, 1996. The moulds for making the said tooth brush were acquired in November, 1995 from Acumen and Co., Taiwan. Since then, to the knowledge of the plaintiffs, the 1st Defendants have been marketing the Pepsodent Popular toothbrushes. On 7th October, 1996, the Plaintiffs filed a suit against the Defendants in the Delhi High Court" on the basis of infringement of the registered design and passing-off by the Defendants herein. The application for interim was hotly contested. In the course of the hearing of the interim application in the said suit, the plaintiffs gave up their claim on the basis of rear registered designs. The application for interlocutory relief was rejected by the Delhi High Court. An appeal is preferred by the plaintiffs and the same is pending. The plaintiffs object was to prevent the 1st Defendants from-selling "PEPSODENT POPULAR" toothbrushes and as the plaintiffs were not getting any reliefs in the Delhi High Court, the plaintiffs decided to file the present suit in October, 1999 on the ground of alleged infringement of alleged copyright in drawings and moulds. By the present suit, the plaintiffs are attempting to prevent the 1st Defendants from selling "Pepsodent Popular" toothbrushes in an indirect way by seeking possession of the Defendants" moulds. What the plaintiffs could not achieve by filing the first suit, is sought to be achieved by filing the present suit on a claim which is altogether unsustainable in law and facts. On the plaintiff's own showing, apparently they have no grievance against the Defendants selling their toothbrushes. Their grievance is confined to the moulds which are used for manufacturing the Defendant's toothbrushes. What the plaintiffs could not achieve directly is sought to be achieved indirectly by making a claim on the basis of alleged copyright in drawings and moulds, which copyright, in law and of fact, does not exist. After filing the present suit, the plaintiffs filed a suit in the Baroda Court against manufacturer of the "Pepsodent Popular" toothbrushes, namely, Unident Brushes Limited to prevent them from using the moulds for manufacturing "Pepsodent Popular" toothbrushes. The plaintiffs were, at all times, aware that the said moulds belonged to the 1st Defendants. The plaintiffs deliberately omitted to join the 1st Defendants in that suit and raised identical issues in the said Baroda Suit which are raised in this suit. The plaintiffs are filing successive suits one after the other at different places by pleading different grounds in different suits although all the said grounds were available to them and all facts, were within their knowledge, when the first suit was filed in the Delhi High Court. All the suits are filed with the sole object of preventing the 1st Defendants from selling the "Pepsodent Popular" toothbrush. The Plaintiff's attempt is nothing, but an abuse of the process of law. The plaintiffs are attempting to make a claim which in law and fact is unsustainable. The Defendants also claim that the suit is also barred by the provisions of Order II, Rule 2 of the Civil Procedure Code.

6. As the Defendants have raised an objection to the jurisdiction of the Court to entertain the suit, in terms of the provisions of Section 9A of the Civil Procedure

Code, it becomes necessary for me to first frame preliminary issues and decide them. Whether the application for interim relief is to be heard and decided on merits depends on the decision of the preliminary issues. In this view of the matter, following preliminary issues are framed :--

(i) Do the Defendants prove that the institution of this suit amounts to abuse of the process of the Court? if yes, would the Court has jurisdiction to try the suit?

(ii) Do the Defendants prove that the suit is barred by the provisions of Order II, Rule 2 of Civil Procedure Code, in view of the earlier suit filed by the plaintiffs in Delhi High Court, which is pending?

7. I have heard the learned counsel for both sides on these preliminary issues.

8. The learned Counsel appearing for the Defendants submits that the re-assertion of a cause of action is a fraud upon the Court. The reason for this, as a proper rule of evidence, is that two objectives are sought to be achieved. Firstly, the final termination of disputes is in the general interest of the community as a matter of public policy. Secondly, the interest of the individual is to be protected against multiplicity of litigation. A statutory manifestation of this rule is to be found in Section 11 of the Code of Civil Procedure, 1908, whereunder there is a bar to trying any suit in which, the matter directly and substantial in issue has been directly and substantially in issue in a former suit between the same parties, and the former suit has been conclusively decided by a Competent Court. The provisions of Section 11 also bar the adjudication of an issue in subsequent proceedings which issue could have been raised in the earlier proceedings. The idea behind this provision is to prohibit multiplicity of litigation. Another instance of the statutory manifestation of the above principle is to be found in Clause XIV of the Letters Patent which enables a Chartered High Court, which has no jurisdiction to try certain subject matter, to try that subject matter along with any other subject matter over which the Court has jurisdiction. The whole idea behind conferring power on the Court to decide a subject matter over which the Court would ordinarily have no jurisdiction, is to ensure that multiplicity of litigation between the same parties is avoided. Apart from the statutory manifestation of the said principle, the said principle is recognized in judicial decisions from which it can be seen that the Courts refuse to entertain a dispute or a plea which amounts to or is an abuse of the process of law. The Court will not grant relief to a plaintiff if he had adopted previous proceeding in which he could have asked for relief which he is now trying to seek by adopting successive proceeding. The question in such a case is to find out whether it was possible for the plaintiff to claim in the previous proceeding the relief which he is now trying to seek in the successive proceeding. Even if the grounds for reliefs in the subsequent proceeding are different from the grounds for reliefs in the earlier proceedings, if such grounds for reliefs urged in the subsequent proceeding were available to the plaintiff when he initiated the earlier proceedings, the Court will not grant reliefs and will refuse to entertain the subsequent proceeding, in order to prevent multiplicity of proceedings. This principle of abuse of process of law is

applicable even when the principle of *res judicata* does not apply (as when the earlier proceeding has not terminated in a final decision). This principle of abuse of process of law applies, even where there is no final adjudication of an earlier proceeding. It applies to a case of filing an earlier proceeding and avoiding or omitting to include all grounds or all cause of action which had arisen and were available to be urged at the time when the earlier proceeding was adopted. The main purpose behind this principle is to discourage a cantankerous litigant who chooses his grounds or causes of action and selects different Courts for trying them in succession, thereby increasing the burden of litigation. This principle also applies to a case where the causes of action or grounds in the two proceedings are different, but which grounds or cause of action were available at the time when the earlier proceeding was adopted. The underlying principle is that the plaintiff must avail of all grounds for claiming reliefs or include all causes of action at one time so as to avoid aggravating litigation by adopting successive proceedings on a specious plea that the causes of action or grounds of reliefs are different and/or are independent of one another. The learned counsel also relies on the observations of the Supreme Court in its judgment in the case of *State of U.P. Vs. Nawab Hussain*, and also in the case of *P.K. Vijayan Vs. Kamalakshi Amma and Others*, . He also relies on a judgment of a Division Bench of this Court in the case of *M/s. Arte Indiana Vs. M/s. P. Mittulal Lal and Sons*, , the learned counsel further submits that it is the alleged conduct of the Defendants of marketing the toothbrushes which according to the plaintiffs are identical or similar to the toothbrushes, which will give cause of action to the plaintiffs to institute a suit against the Defendants. If the plaintiff is right in submitting that the toothbrushes of the Defendants are identical to the toothbrushes of the plaintiffs, then it is obvious that the mould in which the toothbrushes are manufactured and the drawings on the basis of which the mould is prepared are also identical to the drawings and mould of the plaintiffs. Thus, the cause of action, on the basis of which the Delhi suit was filed entitled the plaintiffs to claim reliefs in the same suit regarding the infringement of the copyright in the drawings and the moulds. As the relief in relation to the infringement of the copyright in drawings and the mould was capable of being claimed in the Delhi suit itself, the present suit is barred by the provisions of Order n, Rule 2 of the Civil Procedure Code. It is submitted that in the Delhi suit, it was possible for the plaintiffs to claim relief of caesura of the Baroda mould, which was in existence at the time, as also an injunction against the Defendants not to manufacture or import similar mould. Thus, it was possible for the plaintiffs to claim relief in the Delhi suit regarding the mould which is the subject matter of the present suit, which has been brought subsequently. It is pointed out that in this suit, a relief is claimed also in relation to the drawings on the basis of which the mould is manufactured. That drawing of the Baroda mould and the Bombay mould is the same. It is submitted that much prior to the filing of the Delhi Suit, the plaintiffs were aware of the drawings of the 1st Defendants and they were also aware that the 1st Defendant are the owner of the mould, from which the toothbrushes which are the subject matter of the Delhi suit were manufactured.

9. The learned counsel for the plaintiffs, on the other hand, submits that the cause of action for the Delhi Suit and the present suit are different and distinct. He submits that infringement of the rights of the plaintiffs under the Designs Act, by sale of identical or similar toothbrushes, is a separate cause of action, as also passing of the toothbrushes of the Defendants as that of the Plaintiffs is a separate cause of action. He submits that infringement of the copyright of the plaintiffs in the drawings and the mould is also a separate cause of action and therefore this suit is not barred by the provisions of Order II, Rule 2 of the Civil Procedure Code. According to the learned Counsel, Order II, Rule 2 of the CPC obliges him to claim all reliefs arising out of the same cause of action in one suit, but as the reliefs claimed in the present suit arise out of a different cause of action, the suit cannot be said to be barred by the provisions of Order II, Rule 2 of the Civil Procedure Code. The learned Counsel relies on a judgment of the Supreme Court in the case of Bengal Waterproof Ltd. v. Bombay Waterproof 1997 PTC. 17. He submits that when the Delhi suit was filed, the plaintiffs did not know that the drawings and the moulds are owned by the 1st Defendant. He further submits that as the Delhi suit is still pending, the submission made on behalf of the Defendants relying on the provisions of Section 11 of the CPC have no substance. He submits that the question of application of res-judicata arises only when the earlier suit is decided on merits. According to him as the law permits him to institute a separate suit based on a separate cause of action, it cannot be said that filing of such suit amounts to abuse of the process of the Court. He submits that in any case the cause of action for the present suit arose in 1999 when the Bombay mould was imported. Import of an infringing mould gives a fresh cause of action to the plaintiffs, it is submitted that each fresh importation of a mould into India would give rise to fresh cause of action, using a mould to manufacture brushes does not constitute infringement of copyright in the mould. The cause of action under copyright would therefore arise when mould is imported into India and not otherwise. No effective relief in the Delhi suit could have been claimed against the 1st Defendant based on the copyright in the mould. As even the Baroda mould which could be said to exist when the Delhi suit was filed was neither imported into India by the 1st Defendant nor was it owned by the 1st Defendant at that time. That mould was transferred by the Unident to the 1st Defendant in March, 1999, The present suit is based on a fresh cause of action, when in 1998 the 2nd Defendant imported the mould into India.

10. Now it is clear that both the above issues arise because of the institution of the Delhi suit by the plaintiff, therefore, it becomes necessary to examine the Delhi suit in detail. The copies of the record of the Delhi suit have been made available in this suit. That suit has been filed by the plaintiffs, claiming that their registered design of the toothbrushes have been infringed by the Defendants by marketing identical toothbrushes and that the Defendants are marketing toothbrushes which are similar or identical to the toothbrushes of the plaintiff with the intention to pass off their toothbrushes as that of the plaintiffs. The

plaintiffs in paragraph 24(i) of the Delhi suit have stated thus :--

"Sometime in July, 1996, plaintiffs learned that the Defendant No. 1 had started selling and/or offering for sale toothbrushes which were similar in all respects to the toothbrushes of the plaintiff's said designs, particularly, Indian Design No. 167 936 of plaintiff No. 1. The Defendant's toothbrush was being offered for sale in different cities in India, including at Delhi under the brand name "Pepsodent". The said toothbrush of the Defendants also comprises the head, an angular neck portion, the flexible portion of S-shaped folds between the "head" and "handle", said handle being curved such that the toothbrush when viewed in totality is virtually identical to the toothbrush of the plaintiff's said registered design No. 167 936. Photograph of the Plaintiff's and the Defendant's toothbrush is attached hereto as Annexure "Q".

Prayer Clause (c) and (g) of the Delhi Suit read as under :--

(c) A decree of perpetual injunction to restrain the Defendant Nos. 1 and 2, jointly and severally their partners, servants, agents and distributors from passing off their business and goods as those of the plaintiffs by restraint against the Defendants Nos. 1 and 1 jointly and severally, their partners, servants, agents and distributors from manufacturing, selling or offering for sale toothbrushes bearing design which is identical with or deceptively similar to the toothbrush designs being manufactured and marketed by the plaintiffs.

(g) A decree for the Defendant Nos. 1 and 2 to deliver upto the plaintiffs for destruction all toothbrushes bearing the said design or any design deceptively similar thereto manufactured by the Defendants by using or applying the plaintiff's aforesaid registered design and all moulds, dyes and casts and other related materials used for such manufacture and for cancellation/destruction of all labels, stationeries, packets, wrappers, publicity materials etc. displaying the said design in respect of the product of the Defendants;

It emerges from the plaint of the Delhi suit that when the Delhi suit was filed the plaintiffs were aware or had knowledge that (i) the Defendant No. 1 was manufacturing toothbrushes which according to the plaintiffs were identical to their toothbrushes (ii) that the 1st Defendant was using a mould for the purpose of manufacturing these toothbrushes, it follows that, if according to the plaintiffs the toothbrushes were identical the mould in which they were being manufactured was also identical to the mould of the plaintiffs. Apart from this, there is material produced on record to show that the plaintiffs had actual knowledge of the drawings of the mould of the 1st Defendant before the Delhi suit was filed. The defendants have produced on record a copy of an affidavit of Amit Gordia of the Unident Brushes, who manufactures the brushes for the 1st Defendant at Baroda, submitted in the suit at Baroda which is filed by the plaintiffs. In paragraph 17 of that affidavit Amit Gordia has stated thus:

"I say that the plaintiff realised the launch of Pepsodent Popular Toothbrush as early as late April, 1996. I further submit that in order to maintain the business

relationship and prove bona fide, I had provided samples of original drawing of Pepsodent Popular Toothbrush to Schiffer on 3-5-1996 along with a copy of fax send by Dental Innovation Center of Hindustan Lever Limited to M/s. Anion Zahoransky dated 6-11-1995. The copies of the letters dated 3-5-1996 and 6-11-1995 are being filed as Annexure "B" & "C" respectively of this Affidavit. A meeting in this respect took place on 6th and 7th May at the plaintiffs, New Delhi Office. It was agreed that the launch of Pepsodent Popular Toothbrush would be TOLERATED and countered by other marketing measures by the plaintiffs to make Aquafresh launch successful."

It is clear from the above quoted statement that the plaintiffs had with them the drawings of the toothbrushes of the 1st Defendant before the filing of the Delhi suit. It is these drawings in relation to which a claim of copyright is made in this suit by the plaintiffs and it is these drawings which are used to prepare the mould for manufacturing the toothbrushes. It is the mould which is the subject matter of this suit. The plaintiffs have filed an affidavit sworn by P. N. Haridas on 19-9-1997 in the Delhi suit. Haridas has made following statement in his affidavit :

" In response to paragraph No. 12, I say that the Defendant No. 1 with deceit acquired the mould in question and illegally started using/authorising its use, for manufacture of the impugned toothbrushes. I say that the copyright in the mould vests exclusively with the plaintiffs for whose exclusive use the mould was developed and produced from the drawings/blue prints of the plaintiffs. The defendants are not at all entitled to be in possession of the moulds in question and they deserve to be ordered to hand over the mould(s) to the Plaintiffs."

The above quoted statement shows that the plaintiffs, when the Delhi suit was filed were clearly aware of the mould as also the drawings in relation to which copyright is claimed in this suit. It goes without saying that for the purpose deciding these preliminary issues, I have to assume that the plaintiffs have copyright in the drawing and the mould. It is clear that at the time when the Delhi suit was filed the plaintiffs were aware that their copyright in the drawing and the mould were infringed. It needs to be observed here that, it is not disputed by the Defendants that at the time when the Delhi suit was filed the Baroda mould was already imported and the Bombay mould which is me subject matter of this suit was yet to be imported and that the Bombay mould was imported some time in 1998-1999.

11. In this background, it is to be considered as to what are the reliefs that the plaintiffs could have claimed in the Delhi suit on the allegation that their copyright in drawing and the mould has been infringed. Firstly, the plaintiffs could have claimed a decree for the caesura of the infringing mould (this relief is claimed by the plaintiffs in this suit as also in the Delhi suit) and secondly, they could have claimed a decree of perpetual injunction restraining the 1st Defendant from importing anymore moulds (a relief to this effect has been prayed for in this suit). Had such a relief been claimed as a final relief, the plaintiffs could have, in

the Delhi suit claimed a temporary injunction restraining the 1st Defendant from importing any more moulds. There is no dispute before me that reliefs claimed in this suit could have been, in view of the provisions of Section 62 of the Copyright Act, claimed by the plaintiffs in a suit filed in the Delhi High Court. Though there was some debate before me, on the question as to whether the 1st Defendant is the owner of the Baroda and Bombay mould, to my mind, it is clear from the affidavits of Gordia of the Unident, sole Defendant in the Baroda suit and the 2nd Defendant that both moulds were manufactured on the basis of the drawing supplied by the 1st Defendant and that they were imported by Gordia and the 2nd Defendant so as to take up manufacturer of the toothbrush for the 1st Defendant, thus the importing of the mould was for and on behalf of the 1st defendant. The 2nd Defendant and Gordia of the Unident in importing the moulds were acting on behalf of the 1st Defendant.

12. Thus, it can be said that, had the plaintiffs claimed all the reliefs, which was possible for them to claim, on the basis of the facts which were within their knowledge when the Delhi suit was filed, it would not have been necessary for the plaintiffs to institute either the Baroda suit or this suit. Now the question, in this background, to be considered is whether the fact that the plaintiffs could have claimed these reliefs in the Delhi suit bars them from instituting this suit or whether, the law obliges them to claim all the reliefs to which, according to them, they were entitled to claim in the Delhi suit and their failure to do so bars them from claiming those reliefs, which were left out in the Delhi suit, in this suit.

13. The provision of the CPC relevant in this regard are contained in Sections 9, 11, 151 and Order II, Rules 1 and 2. Section 9 of the CPC lays down that the Civil Courts have jurisdiction to try all suits of a civil nature except those cognizance of which either is expressly barred or is barred by necessary implication. Section 9 reads as under :--

"Courts to try all civil suits unless barred : The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

Then comes Section 11, which incorporates the principle of res judicata. It lays down that the Court shall not try any suit in which the matter directly and substantially in issue could have been made a ground of attack or defence in a formerly instituted suit between the same parties. Provisions of Section 11 of the CPC relevant for the purpose of this order read as under :--

Res judicata. No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation VI -- Where persons litigate bona fide in respect of a public right or

of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

It is no doubt true that provisions of Section 11 of the CPC operate only if the former suit has been finally decided. However, the provisions clearly show that if a plaintiff leaves out any matter from his previous suit, which he could have made a ground of attack, then he can not raise that ground in a subsequent suit. Therefore, it appears to be the scheme of the CPC that a plaintiff should raise all the grounds available to him on the subject in dispute in his first suit. In my opinion, for the consideration of this aspect of the matter, provisions of Order II, Rule 1 are relevant. They read as under :--

Frame of suit :-- Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them.

It is clear from the provisions of Order II, Rule 1 of the CPC that it obliges a plaintiff to frame his suit in such a manner that a final decision can be rendered by the Court in that suit on the subject in dispute. It goes without saying that if a particular ground is not within the knowledge of the plaintiff, though it is on the same subject, when the suit is filed, no fault can be found with the plaintiff, therefore, phrase "as far as practicable" has been used by Order II, Rule 1 of the Civil Procedure Code. But it can definitely be said that, the provisions of Order II, Rule 1 of the CPC oblige a plaintiff to raise in his suit all the grounds available to him, on the subject in dispute, which he was capable of raising when the suit was filed. It is further clear from the provisions of Order II, Rule 1 of the CPC that this duty has been cast on the plaintiff to prevent further litigation on that subject, between the parties. In my opinion, with the same object the provisions of Section 11, explanation IV of the CPC have been enacted. Therefore, in my opinion, the provisions of Section 11 explanation IV and Order II, Rule 1 are in furtherance of the same scheme i.e. to prevent repeated litigation between the same parties on the same subject. It is further to be noted here that Rule 1 of Order II uses the phrase "subject in dispute" and not the phrase "cause of action" which is used in Rule 2 of Order II of the Civil Procedure Code, similarly Section 11 of the CPC uses the phrase "matter which might or ought to have been a ground of attack". It thus appears that, though there are several causes of action available to a plaintiff, if all the causes of action are relating to the subject in dispute, then Order II, Rule 1 obliges the plaintiff to include all those causes of action in one suit, if it is practicable for the plaintiff to do so. Now, if a plaintiff disregards the mandate of Order II, Rule 1 and institutes a suit leaving out some grounds available to him on the subject in dispute and subsequently institutes a suit on the grounds which were left out from the earlier suit, then in case the earlier suit has already been finally decided then Section 11 of the CPC will bar the subsequently instituted suit, but, in case the previously instituted suit is still pending then, in my opinion, the provisions of Section 9 of the CPC would

bar such a suit. Institution of a suit contrary to the scheme of the Civil Procedure Code, in my opinion, has to be said to be barred by necessary implication. In my opinion, it cannot be said that the Civil Courts have the jurisdiction to try the suits, institution of which is contrary to the scheme of the Civil Procedure Code, which discourages repeated litigation on the same subject, between the same parties.

14. The Supreme Court has considered this aspect of the matter in its judgment in the case of *State of U.P. Vs. Nawab Hussain*, . In paragraph 4 of the judgment of the Supreme Court observes thus :-

"But it may be that the same set of facts may give rise to two or more causes of action. If in such a case a person is allowed to choose and sue upon one cause of action at one time and to reserve the other for subsequent litigation that would aggravate the burden of litigation. Courts have therefore treated such a course of action as an abuse of its process."

The observations of the Supreme Court in its judgment in the case of *P.K. Vijayan Vs. Kamalakshi Amma and Others*, found in paragraph 13 are also pertinent. They read as under :--

"The tenant is expected to raise all the pleas available under the statute at the relevant time. It is a sheer abuse of the process of the Court to raise at each successive stages different pleas to protract the proceedings or to drive the party to multiplicity of proceedings. It would be fair and just than the parties to raise all available relevant pleas in the suits or the proceedings when the action is initiated and the omission thereof does constitute constructive *res judicata* to prevent raising of the same at a later point of time. Thereby it must be deemed that they are waived."

15. It is clear from the judgments of the Supreme Court, referred to above, that the conduct of a litigant of not including all the grounds available to him on the subject in dispute in one suit and instituting several suits against the same parties on the same subject in dispute has been termed by the Supreme Court as abuse of the process of the Court. Indeed, if a litigant is permitted to adopt such a course of action, he may institute such subsequent suits not necessarily, in the same Court, but in different States at different times. This opens the possibility of different Courts, all of competent jurisdiction, rendering contradictory decisions on the same subject in dispute between the same parties, and when all these Courts are of equal authority and are part of the one legal system it will definitely bring the administration of justice in disrepute. It is further to be seen that if such a course of action is permitted, then nothing prevents a litigant from instituting one suit on the same subject, raising some of the grounds, in one Court taking his chance at getting an interim order from that Court, and in case of his failure to get an interim order instituting another; suit on the same subject, but on the grounds, which were left out from the first suit, in some other Court, and again making an attempt to get an interim order. There is no point in

denying that with the final decision of the suits taking years, securing an interim order has become, an all important aspect of the litigation. But if a litigant is permitted to move from one Court to another Court of equal jurisdiction, in search of an interim order, when the litigation is on the same subject and between the same parties, then in my opinion, it will bring the entire legal system in disrepute apart from subjecting the Defendant to harassment. Therefore, in my opinion, the institution of such a suit, on the grounds, left out from the earlier suit, though they could have been raised in the earlier suit, amounts to abuse of the process of the Court. Section 151 of the CPC reads as under :--

Saving of inherent powers of Court :-- Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

Perusal of the provisions of the Section 151 of the CPC shows that the Court has inherent power to make such orders as may be necessary to prevent abuse of the process of the Court. This power of :the Court is a power coupled with a duty. Therefore, it becomes the duty of the Court to make an order which may be necessary for preventing an abuse of the process of the Court. In other words, the Civil Courts do not have the jurisdiction to try the suits, institution of which amounts to abuse of the process of the Court. Thus, the scheme of the CPC bars the jurisdiction of the Civil Courts, to try the suits, institution of which amounts to abuse of the process of the Court.

16. At this juncture, it becomes necessary to consider, the provisions of Order II, Rules 2 and 3 of Civil Procedure Code. They read as under :--

Order II, Rule 2. Suit to include the whole claim. -- (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim. Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several relief?s - A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Order II, Rule 3. Joinder of causes of action. -- (1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit;

(2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject matters at the date of instituting the suit.

Perusal of Rule 2 of Order II shows that it obliges a plaintiff to include his whole claim, which he is entitled to make in respect of a cause of action, it also provides for the consequence of the plaintiff's failure to do so. A comparison of the provisions of Rule 1 and Rule 2 of Order II shows that, so far the present purpose is concerned, there are two marked difference; (i) Rule 1 uses the phrase "subject in dispute", whereas Rule 2 uses the phrase "cause of action" and (ii) Rule 2 provides that failure of a plaintiff to abide by the mandate of Rule 2 results in the plaintiff being debarred from instituting a fresh suit for that claim, however Rule 1 does not provide for the consequence that will result from non-compliance. It is now a settled law that a provision of statute which creates a duty and also provides for the consequence that is to ensue for non-performance of the duty, the provision is considered mandatory and strict compliance is insisted upon. On the other hand, if a statute casts a duty, but does not provide for the consequence for failure, then the provision is to be considered directory, of which substantial compliance is sufficient. However, a requirement of a statute which is directory, cannot be disregarded totally. Thus, in case a plaintiff leaves out from a suit some reliefs which arise from the same cause of action and institutes a fresh suit claiming those reliefs, then in such a case, the only enquiry that the Court will have to make is as to whether the reliefs claimed in the subsequent suit arise out of the same cause of action on which the former suit is instituted and on finding that it is so, the Court has no option but to dismiss the subsequently instituted suit, though, the plaintiff might have left out the reliefs, because of a bona fide mistake. On the other hand, in the case where Rule 1 applies, because the Rule is directory, the Court will have to examine whether, the failure of the plaintiff to include the ground on the subject in dispute was because of bona fide mistake, whether the institution of the fresh suit on the same subject in dispute has either resulted or is likely to result in abuse of the process of the Court, in causing harassment or grave prejudice to the Defendants etc. and in case the Court finds in favour of the plaintiff on these points, then Court will be justified in entertaining the fresh suit though the plaintiff has committed breach of the provision of Rule 1 Order II of the Civil Procedure Code. It is further to be seen that Rule 3 of Order II permits the plaintiff to join several causes of action against the same Defendant. In the present case, the only explanation given by the plaintiffs for not raising the grounds in relation to their copyright in the drawing and the mould in the Delhi suit, is that infringement of their copyright in the drawing and the mould in separate cause of action and therefore they are entitled to institute this suit and the Baroda suit.

17. Insofar as the present case is concerned, the plaintiffs instituted the Delhi suit, because the 1st Defendant started marketing its toothbrushes, which according to the plaintiffs, were similar or identical to their toothbrushes. They

filed the Delhi suit because as a result of the conduct of the 1st Defendant their business interest was jeopardised. Thus the subject in dispute in Delhi suit was the toothbrushes of the 1st Defendant and the object to be achieved by the plaintiffs by filing the Delhi suit was to prevent the 1st Defendant from marketing those toothbrushes. Now, it is to be seen, as to which were the grounds which could have been raised by the plaintiff, in the Delhi suit, so as to afford final decision on the subject in dispute, on the basis of the facts which can be said to be within the knowledge of the plaintiffs, from the material on the record of this suit. The plaintiffs have said in the Delhi suit that because the toothbrushes of the 1st Defendant are identical to their toothbrushes, the 1st Defendant is passing off his toothbrushes as that of the Defendants, therefore, they are entitled to relief on that ground, and that the 1st Defendant by marketing the toothbrushes has violated the rights of the plaintiffs under the Designs Act. It is also clear from the record, that before the Delhi suit was filed, the plaintiffs had the drawings used by the 1st Defendant, therefore, it is safe to assume that if the drawing of the 1st Defendant infringed the copyright of the plaintiffs in the drawing (which claim they are making in the suit) they could have raised that ground in the Delhi suit as the subject of the drawing in the toothbrush which is the subject in dispute in Delhi suit. Further it is clear from the material on record that the plaintiffs knew before they filed the Delhi suit that the Unident of Baroda is manufacturing the toothbrushes in question for the 1st Defendant from a mould. If according to the plaintiffs, the toothbrushes of the 1st Defendant are identical to their toothbrushes, it is obvious that the mould which is used for manufacturing those toothbrushes must also be identical to the mould of the plaintiffs. The plaintiffs at that time also knew that the Baroda mould has been imported into India from Taiwan. Therefore, the ground that import of the identical mould in India infringes the copyright of the plaintiffs in their mould (which ground they are raising in this suit) could also have been raised by the plaintiffs in the Delhi suit, because this ground also related to the subject in dispute in the Delhi suit. As pointed out above, relief in relation to the mould has in fact been claimed in the Delhi suit. Apart from claiming relief in relation to the Baroda mould in the Delhi suit, the plaintiffs could have raised grounds, in the Delhi suit for preventing the import of any more mould (like the Bombay mould) by 1st Defendant into India, because the purpose behind requiring a plaintiff to raise all the ground on the subject in dispute, is to prevent further litigation on the subject in dispute. Thus, in terms of the provisions of Order II, Rule 1 of the CPC the plaintiffs were bound to raise the grounds raised by them in this suit in the Delhi suit. It appears from the conduct of the plaintiffs in instituting the Delhi suit disregarding mandate of Order II, Rule 1 of the CPC and the subsequent conduct that they intended to indulge in multiple litigation. From the material produced on record, it is clear that the plaintiffs knew when the Delhi suit was filed, that the Unident of Baroda is manufacturing the toothbrushes for the 1st Defendant, still the Unident Baroda is not joined as a Defendant in the Delhi suit. Subsequently, a suit is filed by the plaintiffs at Baroda, making a grievance about infringement of the copyright in the mould, but to that suit 1st Defendant in this

suit is not joined as a Defendant, though in the affidavit dated 19-9-1997, filed in the Delhi suit the plaintiffs say that the Baroda mould, to which the Baroda suit relates, is owned by the 1st Defendant. The Delhi suit was filed in 1996, an application for temporary injunction against the 1st Defendant was filed during the course of hearing, the plaintiffs had to give up their claim under the Designs Act. It appears that, it is only, after the doubt arose about the possibility of the plaintiffs getting an interim order in the Delhi suit, that the present suit was filed in October, 1999. Though, ultimately, the Delhi High Court rejected the application for interim relief in November, 1999. In this suit, also this Notice of Motion is taken out, where interim reliefs are sought which have the effect, if granted, to stop the manufacturer of the toothbrushes of the 1st Defendant. After filing the present suit, the Baroda suit has been filed, to which 1st Defendant is not joined as a Defendant. In the Baroda suit also an application for interim relief has been filed. Apart from these three suits, the plaintiffs have also filed suits in the Calcutta High Court. Thus, the apprehension expressed by the Supreme Court in its judgment in Nawab Husein case about the consequence which may ensue if a plaintiff is allowed not to include all available grounds in one suit have actually come true in this case.

18. Insofar as the aspect of this suit being barred by the provisions of Order II, Rule 2 of the CPC is concerned, Rule 2 of Order II obliges the plaintiff to include in one suit all the claims to which he may be entitled arising out of the same cause of action. It, therefore, becomes necessary to consider what does the term "cause of action" mean. Though the term has been used in several provisions of the Code, it has not been defined by the Code. Black's Law Dictionary defines term "Cause" and "cause of action" as under :--

"Cause" -- Each separate antecedent of an event. Something that precedes and brings about an effect or a result. A reason for an action or condition. A ground of a legal action. An agent that brings, something about. That which in some manner is accountable for condition that brings about an effect or that produces a cause for the resultant action or state;

"Cause of action". -- The fact or facts which give a person a right to judicial relief. The legal effect of an occurrence in terms of redress to a party to the occurrence. A situation or state of facts which would entitle party to sustain action and give him right to seek a judicial remedy in his behalf. Thompson v. Zurich Ins. Co., D. C. Minn 309 F. Supp. 1178. Fact, or a state of facts, to which law sought to be enforced against a person or thing applies. Facts which give rise to one or more relations of right-duty between two or more persons. Failure to perform legal obligation to do, or refrain from performance of some act. Matter for which action may be maintained. Unlawful violation or invasion of right. The right which a party has to institute a judicial proceeding.

It can be said that the fact which gives a person a right to judicial relief constitutes cause of action. The Supreme Court has considered the question as what constitutes cause of action in its judgment in the case of A.B.C. Laminart

Pvt. Ltd. and Another Vs. A.P. Agencies, Salem, and has observed thus in paragraph 12 of the judgment :

"A cause of action means every fact, which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the Defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right used on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove such facts, but every fact necessary for the plaintiff to prove to enable him to obtain a decree. Everything which if not proved would give the defendant a right to immediate judgment must be part of the cause of action. But it has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff."

It thus, appears that facts, which taken with the law applicable, give the plaintiffs right to relief constitute a cause of action and the act of the Defendant which makes it necessary for the plaintiff to institute the suit is also part of the cause of action. Now looking at the Delhi suit, from this point of view, it is clear that the act of the 1st Defendant which made it necessary for the plaintiffs to institute the suit was that the 1st Defendant, according to me plaintiffs, was marketing toothbrushes which were in the opinion of the plaintiffs similar or identical to the toothbrushes of the plaintiffs. The principal relief that the plaintiffs were seeking was an order restraining the 1st Defendant from marketing those toothbrushes. The facts that are stated in the Delhi suit in nutshell are that the plaintiffs are manufacturing and selling toothbrushes, the design of the toothbrush is registered under the Designs Act, that the Defendants are manufacturing and marketing identical toothbrushes. The law that is invoked is the Designs Act, for urging that the conduct of the Defendants infringes their registered designs and the common law for urging that as the Defendants are passing off their toothbrushes as that of the plaintiffs and therefore the plaintiffs are entitled to an order of injunction. The provisions of Order II, Rule 2 oblige a plaintiff to include the whole of the claim which he is entitled to make in respect of the cause of action. Therefore, the plaintiffs ought to have included their claim that for manufacturing the toothbrushes in question the Defendants have imported a mould which is identical to their mould and that the mould has been prepared using a drawing which is identical to the drawing of the plaintiffs. On the basis of these facts, the plaintiffs should have claimed the relief of ceasure of the offending mould (this relief is actually claimed in the Delhi suit) and an order restraining the Defendants from importing any other similar moulds. It thus appears that the facts that are pleaded and the reliefs that are claimed in this suit should have been claimed by the plaintiffs in the Delhi suit, therefore, this suit would be barred by the provisions of Order II, Rule 2 of the Code. The learned counsel for the plaintiffs disputes this position and submits that, this may

be the situation in relation to the Baroda mould, which was already imported when the Delhi suit was filed and therefore reliefs on the basis of the right of the plaintiffs under the Copyright Act could have been claimed by them in relation to the Baroda mould, but the Bombay mould has admittedly been imported subsequently in the year 1998-1999, therefore this suit which relates to the rights of the plaintiffs under the Copyright Act which have been infringed by the plaintiffs by importing the Bombay mould, cannot be said to be barred by the provisions of Order II, Rule 2 of the Civil Procedure Code. According to him, cause of action for this suit arose when the Bombay mould was imported and not when the Delhi suit was filed. He submits that this suit cannot be said to be barred by the provisions of Order II, Rule 2 of the Civil Procedure Code, only because, in the Delhi suit relief could have been claimed by the plaintiffs for preventing import of similar moulds including the Bombay mould. He further submits that cause of action for infringement of right of the plaintiffs under the Copyright Act is recurring and continuous cause of action. In support of these submissions, the learned counsel for the plaintiffs relies on a judgment of the Supreme Court in the case of Bengal Waterproof Ltd. v. Bombay Waterproof Mnfg. Co. 1997 PTC 17. Perusal of the judgment of the Supreme Court in the case shows that the plaintiff in that case was owner of a trade mark bearing the word "Duck Back". In 1980, he filed a suit alleging that its registered trade mark was infringed by the Defendant. However, that suit was dismissed in 1982. It appears from the judgment of the Supreme Court that the suit was dismissed, because the prayer clause of the suit was defective and not on merits. After dismissal of the suit the plaintiff filed second suit, in this suit the plaintiff did not make any grievance about infringement of the trade mark, passing off and damages in relation to the period before 1980 when the first suit was filed. In this background in paragraph 11 of the judgment the Supreme Court has observed as under :--

"It is now well settled that an action for passing off is a common law remedy being an action in substance of deceit under the Law of Torts. Wherever and whenever fresh deceitful act is committed the person deceived would naturally have a fresh cause of action in his favour. Thus every time when a person passes off his goods as those of another he commits the act of such deceit. Similarly whenever and wherever a person commits breach of a registered trademark of another he commits a recurring act of breach or infringement of such trade mark giving a recurring and fresh cause of action at each time of such infringement to the party aggrieved. It is difficult to agree how in such a case when in historical past earlier suit was disposed of as technically not maintainable in absence of proper reliefs, for all times, to come in future defendant of such a suit should be armed with a licence to go on committing fresh acts of infringement and passing off with impunity without being subjected to any legal action against such future acts."

It is clear that the argument that in the first suit the plaintiff ought to have claimed an order for preventing infringement of his trademark and passing off in

future by the Defendant and his failure to make that claim in the first suit debars him from instituting a fresh suit for the infringement and passing off after the filing of the first suit, was not advanced before the Supreme Court in that case, therefore, it has not been considered by the Supreme Court. It appears, that these observations have been made by the Supreme Court in peculiar facts of that case. In that case, the first suit was already dismissed, when the second suit was filed, therefore, it was not open to the plaintiff to seek appropriate amendments in the first suit and ventilate his grievance. The first suit was not dismissed on merits, but because of a defect in the prayer clause of the suit. So far as the merits of the case of the plaintiff in that case are concerned, the High Court, had recorded findings in favour of the plaintiff and the defendant had accepted those findings and had not filed any cross objection in the appeal before the Supreme Court. In this situation, the Supreme Court has made the above quoted observations, so that the plaintiff who had made out a case on merits should not be made to suffer for all the time in future, because of an error of technical nature, in the first suit. In the present case, as the Delhi suit is still pending, it is open to the plaintiffs to seek suitable amendments in that suit to include the claim made in the present suit. In my opinion, therefore, the learned counsel is not justified in relying on the observations of the Supreme Court in the case of Bengal Waterproof, as also in view of the observations of the Supreme Court in its judgment in Nawab Husein case quoted above, which is a judgment of a larger Bench of the Supreme Court.

19. Thus, this suit is barred because of the provisions of Order II, Rule 1 and Rule 2 of the Civil Procedure Code. Rule 1 operates in a wider field than Rule 2, therefore, every case that is covered by Rule 2 would necessarily be covered by Rule 1, however, as observed above, if the case is not covered by Rule 2, and is covered by Rule 1 before holding that the suit is barred, the Court will have to hold an enquiry to find out whether the plaintiff was prevented from including the grounds in the first suit for any valid reasons as also whether the failure of the plaintiff to include the grounds in the first suit has either actually resulted or is likely to result in abuse of the process of the Court. In the present case, even if it is assumed that only the provisions of Rule 1 are attracted and not Rule 2, then also, it has to be held that this Court has no jurisdiction to take cognizance of the suit because the plaintiff has not even attempted to put forth any valid reason for not including the grounds included in this suit in the Delhi suit. I find that the plaintiffs had omitted to include those grounds in the Delhi suit, so that they could file different suits in different Court and make an attempt to get an interim order in their favour. In these circumstances, therefore, in my opinion, institution of this suit amounts to abuse of the process of the Court and therefore, it is not only competent for this Court not to entertain this suit, but it is the duty of this Court to decline to entertain the suit.

20. As observed above, the scheme of the Code appears to be that all the reliefs to which the plaintiff is entitled on the basis of the facts relevant within the knowledge of the plaintiff and the law applicable, should be claimed by the

plaintiff in the first suit that he files. The need for insisting on this has become acute in the present situation. Institution of every suit must precede due deliberation and consideration of the facts and the law applicable. No litigation can be launched casually, because institution of each suit adds to the burden of the system, which is already overburdened. Therefore, in the present situation, it has become necessary for the Courts to come down heavily when the Court finds that a litigant has launched a litigation with an intention to indulge in multiple litigations in different Courts in order to take chance of getting interim reliefs in different Courts.

21. Both the issues framed above are therefore answered accordingly in favour of the Defendant and the suit is dismissed. The plaintiffs shall pay costs of the suit to the Defendants. It is, however, clarified that this order shall not come in the way of the plaintiffs making an application for permission to amend the Delhi suit, so as to include the grounds raised in this suit in the Delhi suit.

22. In this view of the matter Notice of Motion is disposed of.

23. Parties to act on simple copy of the order duly authenticated by the Associate/Personal Secretary of the Court as a true copy.

24. Suit dismissed.