

(2012) 08 MAD CK 0162

In the Madras High Court

Case No : A. No. 4618 of 2010 in C.S. No. 602 of 2007

Tractors and Farm Equipment Ltd.

APPELLANT

Vs

Standard Combines (Pvt.) Ltd., Tractor Division Standard
Chowk, Barnala-148101 State of Punjab
Standard
Corporation India Ltd., Formerly known as; Standard
Combines Pvt. Ltd., (Tractor Division) Standard Chowk,
Barnala-148101 Punjab Vs Tractors and Farm Equipment Ltd.

RESPONDENT

Date of Decision : 01-08-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11, 151
Copyright Act, 1957 — Section 13, 14(1)(c), 15, 15(2), 19
Designs Act, 1911 — Section 2, 2(d)
Designs Act, 2000 — Section 2, 2(d), 5
Penal Code, 1860 (IPC) — Section 479
Trade and Merchandise Marks Act, 1958 — Section 2, 27

Citation : (2012) 08 MAD CK 0162

Hon'ble Judges : K.B.K. Vasuki, J

Bench : Single Bench

Advocate : T. Narayanan, for the Appellant; T. Narayanan, for the Respondent

Final Decision : Dismissed

Judgement

Hon"ble Ms. Justice K.B.K. Vasuki

1. The defendant has come forward with this application under Order 14 Rule 8 of the Original Side Rules r/w Section 151 CPC to dismiss the suit on the ground that the suit is statutorily barred u/s 15(2) of the Copyright Act. The facts, which led to the institution of the suit and filing of the present application, are as follows:

Both the plaintiff and the defendant are the manufacturer and marketers of tractors, farm equipments and other goods extensively sold both inside and outside India. The plaintiff has been carrying on the business in collaboration with AGCO Corporation of Duluth, Georgia, USA, who is one of the largest

manufacturers, designers and distributors of agricultural equipments in the world under the brand name "MASSEY FERGUSON" and the plaintiff is also authorised by AGCO Corporation to use the trademark, device and copyright in the drawings of "MASSEY FERGUSON" tractors and other proprietary material etc. in India exclusively. While the plaintiff's tractor model is MF 245 DI and MF 1035 DI, the defendant's tractor model is STANDARD 348.

2. According to the plaintiff, the plaintiff has acquired immense reputation and goodwill with regard to its model through unique and distinctiveness of the drawings with exact measurements and specific dimensions, resulting in particular shape and appearance of the plaintiff's tractor its parts and fittings. It is the further case of the plaintiff that the plaintiff's employees, in the course of their employment, have created the drawings relating to every parts with exact specification, and dimensions and the drawings in two dimensions are used for manufacture of tractors in three dimensions and the plaintiff is entitled to use such two dimensional drawings as the proprietor of copyright of artistic work of the above said drawings, which exclusively belong to the plaintiff and the same is sought to be infringed by the defendant by a slavish imitation of the plaintiff's tractors in toto by use of the plaintiff's drawings in two dimensions and its tractors in three dimensions along with part numbers without any manner of right to do so.

3. It is also the further case of the plaintiff that such substantial reproduction of both two and three dimensional drawings for the defendant's tractors would mislead the members of the trade and the customers of the plaintiff, who are mostly the farmers to associate with the defendant's model as that of the plaintiff's model and the same is amounting to misrepresentation and creating confusion and deception about the owner and about the business connection between the plaintiff and the defendant, which is likely to result in irreparable loss and damage to the plaintiff's business, goodwill and reputation. The plaintiff has, by contending so, come forward with the present suit for the reliefs of permanent injunction against the defendant from in any manner infringing the plaintiff's copyright in the artistic work in the drawings for its tractors and from passing off the defendant's tractors, parts and fittings which are identical or deceptively similar to the plaintiff's tractors its parts and fittings and for other consequential reliefs.

4. The suit is filed along with OA. Nos. 830 and 831 of 2007 for the reliefs of temporary injunction against act of infringement of copy right and passing off the defendant's product as that of the plaintiff's tractor. This court originally granted temporary injunction and the temporary injunction was by order dated 28.7.2010 made absolute and the exparte injunction is, by order dated 25.11.2011 made in A. Nos. 4616 and 1417 of 2010 recalled, thereby the original order of interim injunction is restored. Pending disposal of the injunction applications and after completion of pleadings, the defendant has come forward with the present application A. No. 4618 of 2010 under Original Side Rules r/w Section 151 CPC to

dismiss the suit on the ground that the same is statutorily barred u/s 15(2) of the Copyright Act.

5. According to the applicant/defendant, the copyright in two dimensional drawings, in respect of which the suit reliefs claimed is registrable under Designs Act 2000, but not so registered and admittedly, tractors are manufactured and marketed by reproducing such two dimensional drawings for more than 1000 times by industrial process and such reproduction for more than 50 times would, by virtue of limitation prescribed u/s 15(2) of the Copyright Act, render the copyright to cease and there can be no complaint of infringement of copyright and the statutory protection available to the registered design is, thus no longer available to the plaintiff and the design in respect of which the suit reliefs claimed is to be treated as unregistered design and there is no infringement in respect of unregistered design and the suit is thus statutorily barred u/s 15(2) of the Copyright Act. The maintainability of the suit and the suit reliefs is also questioned on yet another ground in the course of argument that no relief of passing off can be claimed for the functional features of the design.

6. The relief sought for herein is seriously opposed by the respondent/plaintiff both legally and factually. The legal objection raised herein is that when correct provision of law applicable to the present relief is Order Rule 11 CPC and when there is express provision of law to such relief, the provision of law u/s 151 CPC cannot be invoked and the application filed u/s 151 CPC is hence not maintainable.

7. On facts, it is vehemently argued on behalf of the respondent/plaintiff that the protection sought for in respect of the drawings in respect of the parts of the tractors by treating such drawings as artistic work is under the relevant provisions of Copyright Act and not as design under the Designs Act, which is applicable only to an article, which possess an appeal to eye and inapplicable to the industrial drawings pertaining to internal parts of the tractors having functional features and not registrable under the Designs Act, as such, the restriction imposed u/s 15(2) of the Copyright Act on reproduction of the same for more than 50 times by industrial process has no relevance with regard to the drawings in question.

8. Both the applicant/defendant and the respondent/plaintiff herein have, for and against the relief sought for in this application, relied on the relevant provisions of law under the Copyright Act and the Designs Act and also cited the following authorities.

9. The authorities cited on the side of the applicant/defendant are :

(i) Microfibres Inc. Vs. Girdhar and Co. and Another,

(ii) Devendra Somabhai Naik Vs. Accurate Transheat Pvt. Ltd.,

(iii) Smithkline Beecham Plc. and Others Vs. Hindustan Lever Limited and Others,

(iv) Umesh Chandra Saxena and Others etc. Vs. Administrator General and Others,

(v) 1998 PTC (18) DHC (Samsonite Corporation v. Vijay Sales) and

(vi) Co-operative House Building Society Ltd. Vs. Municipal Corporation of Delhi,

10. The authorities cited on the side of the plaintiff are:

(i) State of U.P. and Others Vs. Roshan Singh (Dead) by LRs. and Others,

(ii) Escorts Const. Equipment Ltd. and Another Vs. Action Const. Equipment P. Ltd. and Another,

(iii) Puneet Industrial Controls Pvt. Ltd. Vs. Classic Electronics

(iv) unreported judgment of our High Court in OA. Nos. 125 & 126 of 2006 in CS. 117/2006 dated 24.3.2006 (Tractors and Farm Equipment Ltd. v. Vraj Tractor Exports).

11. Heard the rival submissions made on both sides.

12. The only legal objection raised by the respondent/plaintiff is that the application is not maintainable by invoking the inherent power of this court u/s 151 CPC, when there is express provision or law available under Order 7 Rule 11 CPC for rejection of the plaint State of U.P. and Others Vs. Roshan Singh (Dead) by LRs. and Others, . Though such legal contention raised on the side of the respondent is well settled, it is equally well laid down that an action under Order 7 Rule 11 CPC does not await any application by any party as the rule does not indicate anywhere that the power is to be exercised only upon an application that too to be filed at any particular stage but the duty is cast upon the court to reject the plaint if the circumstances indicated under Order 7 Rule 11 CPC were existing and the power of the court cannot be curtailed in any manner simply because the court had proceeded to some extent without application of mind on this point Umesh Chandra Saxena and Others etc. Vs. Administrator General and Others, Further, the wrong provision of law quoted will not render the application to be automatically dismissed. That being so, the objection regarding invoking of wrong provision of law for the present application is negated.

13. On facts, the maintainability of the suit relief is sought to be questioned by the defendant on the ground that the drawings in question claiming to be an artistic work, as defined under the Copyrights Act are industrial drawings and are covered u/s 2(d) of the Designs Act and are registrable u/s 5 of the Designs Act but not so registered, as such, the drawings in question, which are treated as blue print for the tractor parts and its fittings having been reproduced by the industrial process for the manufacture of tractors in thousands in numbers and marketed both inside and outside India extensively the statutory protection available under the Copyright Act to such drawings cease to be in force by virtue of the limitation prescribed u/s 15(2) of the Copyrights Act.

14. The other contention raised on the side of the applicant/defendant is that no relief of passing off can be claimed for the functional feature of the design, as such, both the reliefs claiming statutory protection for the so called act of infringement of copyright of the drawings and against passing off action are not maintainable and the plaintiff's plaint is hence liable to be rejected u/s 15(2) of the Copyright Act in respect of act of infringement by virtue of statutory bar and for want of cause of action in respect of passing off action.

15. The contention so raised is seriously opposed by the respondent/plaintiff by stoutly denying the applicability of the provisions of the Designs Act to the industrial drawings in question for the right to exclusive use of the same, the reliefs are claimed. According to the respondent/plaintiff, the industrial drawings of the plaintiff have the statutory protection under the Copyright Act and not under the Designs Act and as the protection sought for herein is for the functional nature of the internal and external parts of the tractor manufactured by using the industrial drawings, the same falls outside the definition of the designs under the Designs Act and it is not registerable under the Designs Act.

16. It is also vehemently argued on the side of the respondent/plaintiff that the tractor produced by the defendant STANDARD 348 model is in toto imitation of the plaintiff's tractor Model MF245 D1 with same part numbers and at times with same trade name TAFE embarrassed in some of its parts and as the customers of the plaintiff comprised mostly of farmers and villagers, they are likely to be misled as if the defendant's tractor is associated with the plaintiff or at-least in some manner connected with the plaintiff amounting to act of passing off. It is also contended that the suit reliefs in respect of infringement of copyright and the act of passing off are claimed one under relevant statute and other under common law respectively, which are distinct and different and the issues raised herein involve mixed question of law and facts and are to be decided on merits on appreciation of facts and evidence, after full fledged trial and no ground is available to reject the plaint without trial.

17. Before going into the relief sought for on facts and on merits, the first principle of law to be borne in mind is that while disposing an application under Order 7 Rule 11 CPC for rejection of plaint, the relief can be decided only on the basis of the plaint averments, without addition or subtraction. The Supreme Court, in the judgment reported in C. Natrajan Vs. Ashim Bai and Another, while considering the same, reiterated the law earlier laid down that the application for rejection of the plaint can be filed if the allegations made in the plaint even if given face value and taken to be correct in their entirety appear to be barred by any law and the only averments made in the plaint as a whole without addition or subtraction are relevant and at that stage, the court would not be entitled to consider the case of the defence raised in the written statement. The Supreme Court has further held that not only the averments raised in the plaint should be looked into, but also the plaint should be read in a meaningful manner to find out the real dispute behind the suit Exphar SA and Another Vs. Eupharma

Laboratories Ltd. and Another, and Begum Sabiha Sultan Vs. Nawab Mohd. Mansur Ali Khan and Others, .

18. For better appreciation of scope of enquiry under Order 7 Rule 11 CPC, the observation of the Supreme Court in the Judgment in Popat and Kotecha Property Vs. State Bank of India Staff Association, are extracted hereunder:

13. Before dealing with the factual scenario, the spectrum of Order 7 Rule 11 in the legal ambit needs to be noted.

14. In Saleem Bhai v. State of Maharashtra it was held with reference to Order 7 Rule 11 of the Code that the relevant facts which need to be looked into for deciding an application, thereunder are the averments in the plaint. The trial court can exercise the power at any stage of the suit before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under clauses (a) and (d) of Order 7 Rule 11 of the Code, the averments in the plaint are the germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage.....

16. The trial court must remember that if on a meaningful and not formal reading of the plaint it is manifestly vexatious and meritless in the sense of not disclosing a clear right to sue, it should exercise the power under Order 7 Rule 11 of the Code taking care to see that the ground mentioned therein is fulfilled.....

17. It is trite law that not any particular plea has to be considered, and the whole plaint has to be read. As was observed by this Court in Roop Lal Sathi v. Nachhattar Singh Gill only a part of the plaint cannot be rejected and if no cause of action is disclosed, the plaint as a whole must be rejected.

18. In Raptakos Brett & Co. Ltd. v. Ganesh Property it was observed that the averments in the plaint as a whole have to be seen to find out Whether clause (d) of Rule 11 of Order 7 was applicable.

19. There cannot be any compartmentalisation, dissection, segregation and inversions of the language of various paragraphs in the plaint. If Such a course is adopted it would run counter to the cardinal canon of interpretation according to which a pleading has to be read as a whole to ascertain its true import. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words or change of its apparent grammatical sense. The intention of the party concerned is to be gathered primarily from the tenor and terms of his pleadings taken as a whole. At the same time it should be borne in mind that no pedantic approach Should be adopted to defeat justice on hair-splitting technicalities.

20. Keeping in view the aforesaid principles the reliefs sought for in the suit as

quoted supra have to be considered. The; real object of Order 7 Rule 11 of the Code is to keep out of courts irresponsible law suits.....

19. In this case, the plaint is proceeded on the basis that the industrial drawings, in respect of which the suit reliefs Claimed are used for manufacture of both external and internet parts of the tractor and the same contain exact specification and dimension for each: part and adhering to strict standards of quality control and the plaintiff's employees have created the drawings in such a manner by having fine; tuning of some of the parts. The plaintiff has in para 7 at page 3 of its plaint furnished the particulars of such parts of the tractors for manufacturing and fillings of which the individual drawings in question are used by individual process as follows:

- a. Hydraulic pump assembly
- b. Valve Chamber
- c. Camshaft
- d. fork
- e. High Low coupler (part of gear box)
- f. Gear main Shaft
- g. Epicyclic carrier unit
- h. Ring gear
- i. Rear axle device-gear
- j. Pedal
- k. Clutch-Pedal
- l. Transfer cap-lift cover
- m. Differential case
- n. Clutch release cover fork
- o. Front cover hydraulics
- p. Lift cover
- q. PTO shaft
- r. Hydraulic arm
- s. Brake: drum
- t. Hub front axle and
- u. Fork first and reverse gear

20. The respective contentions raised on both sides can be well appreciated only

in the light of the relevant provisions of law under Copyright Act and Designs Act, which are extracted hereunder:

The Copyright Act

Section 2(c)-"artistic work" means-

- (i) a painting, a sculpture, a drawing (including a diagram, map, chart or plan), a engraving or a photograph, whether or not any such work possesses artistic quality; (ii) an [work of architecture]; and
- (iii) any other work of artistic craftsmanship;

Section 14(1)(c)-in the case of an artistic work,-

- (i) to reproduce the work in any material from 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 or the work any of the acts specified in relation to the work in sub-clauses (i) to (iv);

Section 15(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 copy/right or, with his licence, by any other person.

Designs Act

Section 2-Definition-In this Act, unless there is anything repugnant in the subject or context

(c) "copyright" means the exclusive right to apply a design to any article in any class in which the design is registered.

(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 combine, which in the finished article appeal to and are judged solely by the eye; but does not: include any mode or principle of construction of 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).

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

(d) that the design is not registrable under this Act, or

(e) that is not a design as defined under clause (d) of section 2.

21. As already referred to the copyright in an industrial design is governed by the Designs Act 2000. If a design is registered under that act, it is not eligible for protection under the Copyright Act. In the case of a design which is capable of being registered under the Designs Act, but not so registered, Copyright will subsist under the Copyright Act, but it will cease to exist as soon as any article to which the design has been applied has been reproduced more than 50 times by an industrial process by owner of the copyright or with his license by any other person. It would therefore follow that those industrial designs which are not registrable under the Designs Act get protection under the Copyright Act provided it comes within the Scope of Section 33 of the Act as original artistic works.

22. In this case, the factors to be appreciated are (i) whether the industrial drawings in question are artistic works as defined u/s 2; (ii) whether copyright subsists in the same as provided u/s 13 of the Copyright Act; (iii) whether the same falls within the definition of designs u/s 2(d) of the Designs Act and is registrable under the Designs Act; (iv) whether the statutory protection available to industrial drawings in question is under Copyright or Designs Act; and (v) whether Section-15(2) of the Copyright Act is applicable to the Design in question.

23. Both the plaintiff and the defendant have produced the following authorities in support of their respective contentions to whether copyright subsists in industrial drawings in question or not. The authorities cited on the side of the plaintiff are (i) Puneet Industrial Controls Pvt. Ltd. Vs. Classic Electronics and (ii) Co-operative House Building Society Ltd. Vs. Municipal Corporation of Delhi, . Whereas, the authorities cited on the side of the defendant is 2009 (40) PTC 519 (Delhi Division Bench) (Microfibers Inc. v. Girdhar& Co. and another).

24. In Puneet Industrial Controls Private Limited case, the suit is filed for injunction against the act of infringement of copyright and against disclosure of confidential proprietary information, which the defendant therein obtained during his association with the plaintiff. The copyright is claimed in respect of design, layout and unique electrical/electronic circuits and drawing/photographs in

respect of electronic goods manufactured, which according to the plaintiff therein, constitutes "artistic work" within the meaning of Section 2(c)(i) of the Copyright Act, 1957. One of the grounds on which the defendant opposed the relief is that the designs claimed by the plaintiff were capable of Registration under the Designs Act 1911 and the same have not been registered and therefore they cannot claim any copyright, as such, there is no infringement of artistic or literary work as thousands of electronic articles have already been manufactured and any such right the plaintiff had the same does not survive any more.

25. The Delhi High Court, having found that the plaintiffs are the author of the artistic or literary work and those industrial drawings are engineering drawings and are reproduced for manufacturing commercial articles on the basis of such drawings and that the second defendant started the business much later and that the drawings and photographs showing the products of the plaintiffs and the defendants are identical and deceptively similar, arrived at a conclusion that, the drawings constitute "artistic work" within the meaning of Section 2(c)(i) of the Copyright Act and copyright Act subsists in the same and the same is not registrable under the Designs Act and there is striking imitation of the plaintiffs' product by the defendant and the plaintiffs have thus made out prima facie case and granted order of injunction against act of infringement and passing off.

26. In John Richard Brady and Others Vs. Chemical Process Equipments P. Ltd. and Another, the copyright is claimed in an improved Fodder Production Unit (FPU) invented by one John Richard Brady, who is an American National and is a mechanical Engineer by profession. The technical details of FPU are contained in catalogues which, illustrate it by technical drawings and other specifications. The drawings in question are the original artistic work and Brady is the owner of the Copyright in the Drawings with the exclusive right to publish and reproduce the drawings whether two dimensionally or three dimensionally. The act of infringement is committed by the defendant by Wrongfully converting and misappropriating the know-how information, drawings, designs and specifications disclosed to them under strict confidentiality and the copyright of the owner, by name Brady, is infringed by making the machine in three dimensional from two dimensional artistic work of the plaintiffs drawings of FPU.

27. It is held in para 13 of the said judgment that the drawings in which the plaintiffs claim copyright were meant to serve as the blue print for the construction of a three dimensional article of functional or utilitarian value, viz., FPU and such drawings are capable of being infringed by copying of a three dimensional article and there was a striking general similarity between the defendants machine and the drawings of the plaintiffs being obvious to the eye and in such circumstances, the inference is unescapable that the plaintiffs have established prima facie case of act of infringement of Copyright which the defendants have to answer. The Delhi High Court having found so granted an order of interim injunction restraining the defendants from manufacturing, selling

offering for sale, advertising directly or indirectly dealing with the machines that are substantial limitation and reproduction of the drawings of the plaintiff FPU or from using in any other manner whatsoever the know-how specification drawings and other technical information about FPU disclosed to them by the plaintiffs.

28. In the case dealt with by Delhi High. Court reported in Escorts Const. Equipment Ltd. and Another Vs. Action Const. Equipment P. Ltd. and Another, the cranes manufactured by the defendants are alleged to be substantial reproduction in three dimensional form of the drawings of the plaintiff crane in which they have copyright. The Delhi High Court, having accepted the plaintiff's, case, granted injunction against the defendant by restraining them from manufacturing, selling or offering for sale of the said cranes based on the drawings, supplied to them by the plaintiff, as the same amounts to an act of infringement. It is held by the Delhi High Court in para 28 of its judgment that the drawings used in the design of the crane were reproduction of the original artistic work and those copies of the drawings were intorn used to manufacture the parts of the crane and those parts manufactured are again reproductions of the original artistic works, which includes a version produced by converting the work into three dimensional form as such, such drawings are capable of being infringed by copyright of a three dimensional article.

29. At this juncture, the learned counsel for the defendant would, by drawing the; attention of this court to the definition clause u/s 2 the Designs Act 1911 and the enhanced definition of designs under the Designs Act of 2000, submit that composition of lines or colours applied was not defined as design under Designs Act 1911, Whereas, the expression "design" under Designs Act 2000 includes 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; and the same brings such work within the definition of "design" as such the industrial drawings in question fall within the definition of the design u/s 2 of the Designs. Act 2000 and is hence capable of being registered under the Designs Act but not so registered. Hence, no copyright can be claimed in respect of such industrial designs under the Copyright Act. it is further argued that the principles laid down in the Authorities cited on the side of the plaintiff are not applicable to the facts of: the present case, as it dealt with engineer drawings prior to 2000 enactment and the enhanced definition under 2000 Act renders the principles laid down in the earlier judgements inapplicable to the industrial drawings, which are designs under the provisions of Design Act 2000.

30. The learned counsel for the defendant has also cited the authority of the Delhi High Court reported in 2009 (40) PTC 519 (Delhi Division Bench) (Microfibers Inc. v. Girdhar & Co. and another) to fortify his contention that once the artistic work, by industrial application transforms into a commercially

marketable article its design falls within the domain of the Design Act and the protection to the design founded upon the artistic work is limited by section 15 of the Copyright Act and the provisions of the Designs Act. However, the Division Bench of the same Delhi High Court in para 35 of its judgment, observed that it cannot be disputed that 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 in the same paragraph, the Delhi High Court available to distinguish between the copyright protection available to original painting and the design derived from and founded upon original painting for the purpose of industrial production of furnishings and observed the design derived from original painting would only be covered by the limitations placed in Section 15 of the Copyright Act and would get protection if registered as a design under the: Designs Act but would enjoy lesser period of protection.

31. In the present case, as the copyright is claimed in respect of original drawings as far as industrial drawings in question are: concerned, the fact that the same are being used by industrial process for manufacture of internal and external parts, of the tractor, cannot be disputed. In that event it is treated as blue print of the tractor parts and can be brought within the definition of artistic work u/s 2(c) and copyright shall exist on the same to reproduce the work in any material form including depiction in three dimensional or two dimensional work or in both two and three dimensional work and the same enjoy full protection under the Copyright Act and the principle laid down in the Authority cited by the defendant thus supports the stand taken by the plaintiff.

32. The next aspect to be considered herein is as to whether the industrial drawings reproduced for manufacturing the tractor are aesthetic or functional in nature. It is specifically stated in the plaint that the dimensions of the plaintiffs are unique to the plaintiff's tractors and the sum total of the parts with specific dimensions result in the shape and external appearance of the tractor and the plaintiff's tractor has hundreds of Parts and these parts are manufactured according to the plaintiff's drawings specifications and by adhering to strict standards of quality control. The defendant has, even in the written argument, specifically admitted that no copyright protection under the Designs Act is available to any artistic work, which are functional in nature. It is not in dispute that: the industrial drawings in question are with exact specification and dimensions resulting in shape and design, as such, the protection claimed herein is in respect of the drawings used for reproducing internal and external parts of the tractors and its fittings. The pictures relating to tractor model and its parts of both the plaintiff and defendant would definitely show that the defendant has copied each and every part of the plaintiff's tractor and has made a slavish imitation of the plaintiff's tractor in toto, which would be judged not only by appearance, but also by performance, as such the relief claimed is both in respect of aesthetic and functional features.

33. Even otherwise, as rightly, argued by the learned counsel for the plaintiff, whether the particular parts or particular shape of the products is functional or aesthetic or to some extent aesthetic having functional are controversy in issue to be decided, based on dominant purpose as to whether the features are functional or otherwise. The Delhi High court, in the judgment reported in 2000 PTC 83 (Delhi High Court) (Smithkline Beechan Plc. & others v. Hindustan Lever Limited and others held that the court is to look into the dominant purpose for deciding as to whether the features are functional or utilitarian or not. It is also serious question to be considered herein that whether the original drawing in question has protection under the Copyright Act or registrable under the Designs Act and enjoys only lesser protection by virtue of the limitation prescribed u/s 15(2) of the Copyright Act.

34. The other ground Seriously contested herein is that no remedy for passing off action is maintainable in respect of Designs. In my considered view, the same need not be gone into at this stage as the statutory protection claimed for copyright and the relief sought for against passing off under common law right are distinct and different rights arising from two different situations. The Delhi High Court has, in the judgment reported in 2000 PTC 83 (Delhi High Court) case held that even in the absence of a similar provision to that of the provisions of Section 27 in the Trademark and Merchandise mark Act, the right of passing off would be available to a case of design, as such passing off action is also available to case of design and such right could be enforced provided the same is available in accordance with law even in a case of design for otherwise a latitude would be given to a manufacturer to misrepresent and to deceive unwary customers by manufacturing and selling its products as that of products of some other manufacturer or seller. It is further held in the same judgment that the rights under the registered design are set out in the Designs Act, itself, whereas the law of passing off is carved out under the registered design are therefore both the rights are distinct and different.

35. Thus, the present suit as discussed above involves serious dispute of mixed question of facts and law regarding the plea of infringement the design owned by the plaintiff and the same con not be decided, without framing specific issues and without adducing evidence during trial and the same can be decided only on the basis of the evidence so adduced. Further, there are divergent views expressed in law on the issues raised herein, as such, the defendant cannot be permitted to say that the plaint averments do not constitute any cause of action or the plaint reliefs do not lie under the statute. Under such circumstances the provision of law under Order 7 Rule 11 CPC cannot invoked for rejection of the plaint in a narrow campus and the applicant is hence disentitled to get any relief as sought for herein. In the result, the application is dismissed. Considering the stage of the Suit the trial of the suit shall be expedited.