

MANU/DE/0070/2003

Equivalent Citation: 2003IIAD(Delhi)351, 103(2003)DLT321, 2003(26)PTC349(Del), 2003(2)RAJ86

IN THE HIGH COURT OF DELHI

IA No. 8312/02 in S. No. 1434/02

Decided On: 21.02.2003

Appellants: **AGA Medical Corporation**
Vs.

Respondent: **Mr. Faisal Kapadi and Anr.**

Hon'ble Judges/Coram:

R.C. Jain, J.

Counsel:

For Appellant/Petitioner/plaintiff: Arun Jaitley, Sr. Adv., Pratibha M. Singh, Anubha and Sharad Vadera, Advs

For Respondents/Defendant: Chetan Sharma, Sr. Adv. for defendant No. 1, R.K. Anand, Sr. Adv., V. Shekhar, Anuj Narain and Prashant Sharma, Advs. for defendant No. 2

Subject: Intellectual Property Rights

Acts/Rules/Orders:

Copyright Act, 1957 - Section 2, Copyright Act, 1957 - Section 13, Copyright Act, 1957 - Section 14, Copyright Act, 1957 - Section 15, Copyright Act, 1957 - Section 15(2), Copyright Act, 1957 - Section 61; Designs Act, 1911; Patents Act; Trade and Merchandise Marks Act, 1958 - Section 2(1); Indian Penal Code 1860, (IPC) - Section 479; Designs Rules, 2001; Code of Civil Procedure (CPC) - Section 151, Code of Civil Procedure (CPC) - Order 39 Rule 1, Code of Civil Procedure (CPC) - Order 39 Rule 2

Disposition:

Application dismissed

Case Note:

Intellectual Property Rights – passing off – Sections 2, 13, 14, 15, 15 (2) and 61 of Copyright Act, 1957, Design Act, 1911, Patent Act and Section 2 (1) of Trade and Merchandise Marks Act, 1958 – action against passing off – nothing to prove subsisting copyright in favor of plaintiff – no prima facie evidence of violation of plaintiff's copyright – nothing to prove goods dealt by defendant are identical or deceptively similar to that of plaintiff – plaintiff not entitled to ad interim injunction.

JUDGMENT

R.C. Jain, J.

1. The above-named plaintiff has moved this application under Order 39 Rule 1 & 2 read with Section 151 CPC seeking an ad-interim injunction restraining the defendants, their officers, servants, agents, promoters, dealers, distributors and any one acting for and on their behalf from (i) manufacturing, selling, offering for sale any of the Occlusion devices including the Blockaid Devices which are a three-dimensional reproduction of the drawings of the plaintiff's Amplatzer products/devices thereby Constituting infringement of the plaintiff's copyright in the said drawings (ii) restraining the defendants from using the impugned brochures or any other material/brochures which are a substantial reproduction or a colourable imitation of the plaintiff's brochures thereby Constituting infringement of copyright in the said brochures, and (iii) selling, offering for sale any of the Occlusion devices which resemble the plaintiff's devices in any manner and from making any representations that it or its products are in any way connected with the plaintiff, thereby Constituting acts of passing of and unfair competition.

2. The germane facts leading to the filing of the present application are that the plaintiff has filed a suit for permanent injunction restraining infringement of copyright, passing of rendition of accounts, delivery up etc. against the defendants with the averments and allegations that it is a company existing under the laws of the United States having its Office at 682, Mendelssohn, Avenue, Golder Valley MN. 55427 and Mr. Krishan Lal Vadehra is the constituted attorney of the plaintiff company and has signed and verified the plaint for and on

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behalf of the plaintiff under the power of attorney dated 19.6.2002. The plaintiff claims to be a pioneer in the development and manufacture of trans-catheter technologies having being founded in the year 1995 with the sole aim of manufacturing and selling various devices which could be implanted into the human body, specially in relation to patients who suffer from cardiac problems. The devices have been invented by the plaintiff company after constant and untiring research. The various devices which are manufactured and sold by the plaintiff are (a) Amplatzer Septal Occluder (b) Amplatzer Muscular Occluder (c) Amplatzer Duct Occluder (d) Amplatzer PFO Occluder under the trade name "AMPLATZER". Some of these devices as - Percutaneous Catheter Directed Intravascular Occlusion Devices and Percutaneous Catheter Directed Occlusion devices are patented in US vide patent Nos.5,725,552 and 5,846,261 respectively. It is stated that the plaintiff is also the owner of the drawings of the product which are the original artistic work of the plaintiff within the meaning of Copyright Act 1957 and the plaintiff has registered its brochures in the United States Copyright Office vide registration dated 10.7.2002 and the same enjoys reciprocal protection in India in view of the international Copyright Order, 1999.

3. It is further averred by the plaintiff that it is selling its products including the said devices in various countries of the world and has started selling the same in India ever since January 1998 and the devices are being used in all leading hospitals of India which include CMC Vellore, AIIMS, GB Pant, Escorts Heart Institute, Batra Hospital, Manipal Hospital, Jayadeva institute of Cardiology, Bangalore, Appollo Hospital etc. and claims that the plaintiff owns the following rights which are protectable under the statutes and under the common laws in India:-

- (a) Copyright in the brochures
- (b) Copyright in the drawing of the various devices.
- (c) Common law rights in the products.

4. It is alleged that the plaintiff has recently learnt that the defendant is engaged in the manufacture/sale of occlusion devices which are known as Blockaid Septal Occluder, Blockaid Duct Occluder and Blockaid Muscular Occluder. The defendant No. 1 being a partner/proprietor of plaintiff but its exact constitution is not known to the plaintiff. It is alleged that the brochures used by the defendant reveal an alarming situation inasmuch as they are a complete copy of the plaintiff's brochures inasmuch as the photographs of the plaintiff's brochures have been copied from the plaintiff's products and even the entire literature in the brochures has been copied which made two sets of brochures virtually identical. Various features in sets of brochures have been detailed in the plaint in order to show the similarity between the two. It is the case of the plaintiff that the use of the identical brochures by the defendant and manufacture and sale of a similar products which are based on the drawings, is nothing but a three dimensional reproduction of the plaintiff's drawings constitutes infringement of copyright of plaintiff. Besides the defendant is also passing off its products as that of the plaintiff or that which are originated or connected with the plaintiff which act of the defendant constitutes misrepresentation in the course of trade to doctors and hospitals with mala fide intention of causing confusion and, Therefore, are illegal and unlawful. It is also averred that the devices of the plaintiff are of very superior quality and extremely expensive, cost of each device being between 45,000/- to 90,000/- while the product of the defendants are stated to be of very inferior quality endangering the life and public health of the citizens who might use them. Accordingly the plaintiff is claiming permanent injunction for all those reliefs as in the application for interim injunction besides claiming a decree for damages of Rs.20,50,800/-, rendition of accounts as also the delivering up of all infringement devices infringing products, drawings, brochures, packing material etc.

5. The suit is being contested by the defendant and a written statement has been filed thereby raising preliminary objections about the maintainability of the suit without any cause of action in favor of the plaintiff against the defendant; this court having no territorial jurisdiction to entertain and try the present suit and the plaintiff having not approached the court with clean hands and have come out with concocted averments and concealment of material information and in any case the defendants have not infringed any of the copyright of the plaintiff as claimed in his devices. It is, however, not denied that the defendant is engaged in importing and marketing its products in India. It is denied that the devices have been invented by the plaintiff after a long and constant research or they have monopoly to manufacture and sell the same and on the other hand it is pleaded that such devices are manufactured by various manufacturers through out the world including by one M/s Shanghai Shape Memory Alloy Company Ltd. , China. It is also denied that the defendant has copied the brochures or the pictures of the products of the plaintiff in their brochures rather the brochures alleged to belong and used by the defendant are disowned as that of the defendant and it is pleaded that defendant is using altogether different brochures for publicity and marketing of its products. It is also denied that so called drawings of the plaintiff are artistic work within the meaning of Section 2(c) of the Copyrights Act 1957 and on the other hand it is pleaded that as per the plaintiff's own showing copyright, if any, they had in such drawings had ceased to exist by virtue of Section 15 of the Copyrights Act, such work of the plaintiff being capable of registration under the Designs Act. It is denied that products of the defendant are in any way inferior to that of the plaintiff or the result of a three dimensional reproduction of the plaintiff's work. Similarly the allegations about the defendant trying to pass off its products as the products of the plaintiff is denied. The averments made in the application under Order 39 Rule 1 and 2 that the plaintiff has any prima facie case entitling him in the grant of ad-interim injunction are also denied.

6. It may be noticed at the outset that though a prayer was made on behalf of the plaintiff for the grant of an ex-parte ad-interim injunction, but this Court had declined to grant one. Similarly prayer for appointment of Local Commissioner to visit the premises of the defendant and search and seize the offending articles was also declined. Aggrieved by the said order, the plaintiff filed an appeal being FAO (OS) 289/02 which was partly allowed by the Division Bench of this Court and Ms. Maneesha Dhir and Ms. Hima Kohli, Advocates were appointed as Local Commissioner respectively for Mumbai and Delhi. It was directed that the ex-parte order of injunction granted in the FAO (OS) shall remain in operation till the disposal of the application under Order 39 Rule 1 and 2. The said order of Division Bench was challenged by the defendant in SLP No. 20598/02 before the Supreme Court which was disposed of by the Supreme Court by an order dated 15.11.02 observing as under:-

" Leave Granted.

We have heard the parties at length. The Division Bench has disposed of an appeal, against the refusal of an ad-interim order, without issuance of any notice. The Division Bench has granted ex-parte order of injunction.

We are informed that the matter is pending before the Single Judge and is now adjourned to 28th November, 2002. The order regarding appointment of Commissioner has already itself worked out as the Commissioner has visited and submitted his report.

In view of the dispute, it is appropriate that at this stage there shall be no ad-interim injunction. We, Therefore, set aside the order of injunction.

We request the Trial Court to dispose of interim application for injunction on 28th November, 2002 or as early thereafter as possible. The Trial Court shall decide the case, uninfluenced by any observation, in the orders passed by the Division Bench, or by us.

Out of the samples taken by the Commissioner, two numbers of each sample and brochure to be kept with the Registrar of the High Court.

The appeal is disposed of accordingly. There shall be no order as to costs."

7. Before I proceed to deal with the present application, it is pertinent to note that the Local Commissioners after executing the Commission have filed their reports Along with two brochures and products of the defendant seized by her from the premises of the defendant. The brochures so seized appear to be substantially and materially different than the impugned brochures relied upon by the plaintiff. In fact the learned counsel for the defendant during the course of hearing categorically disowned the said impugned brochures filed by the plaintiff Along with the suit and allegedly being used by the defendant as not belonging to or used by the defendant for publicity and marketing of their products. In this regard, the learned counsel for the plaintiff submitted that after the institution of the suit and on becoming aware of the plaintiff's action, the defendant might have discontinued the use of the earlier impugned brochures and switched over to new brochures. It is the case of the plaintiff that even the new brochures are similar and identical to that of the plaintiff's brochures in many respects amounting to infringement of the plaintiff's copyright therein.

8. I have heard Mr. Arun Jaitley, Sr. Advocate, representing the plaintiff-applicant, Mr. Chetan Sharma, Sr. Advocate, representing defendant No. 1 and Mr. R. K. Anand, Sr. Advocate representing defendant No. 2 and have given my anxious consideration to their respective submissions.

9. It is a well settled legal principle that in order to entitle him to the grant of an ad interim injunction, a party must establish a prima facie case. Besides it must show that the balance of convenience lies in its favor and he is likely to suffer irreparable loss or injury which cannot be compensated in terms of money if such injunction is not granted. The facts and circumstances of this case present an interesting and if I may say so a somewhat complex question about the interpretation and applicability of the provisions of the Copyright Act, 1957, the Designs Act and the Patents Act. As noticed in the earlier part of this order, the plaintiff's case is that it has the subsisting copyright not only in the brochures published by it but in the drawings also which form part of the registered patent of the plaintiff in the United States as also in the devices manufactured and sold by it because the drawings are the original artistic work within the meaning of Section 2(c) of the Copyright Act, 1957 and are entitled to protection therein by virtue of Section 13 and the plaintiff has exclusive right under Section 14(c) of the said Act. In other words, the contention of the plaintiff is that there is infringement of their copyright in their brochures, drawings and various devices produced by them. On the other hand, contention of the defendants is that the drawings referred to by the plaintiff and in respect to which copyright is claimed, are not artistic work within the meaning of Section 2(c) of the Copyright Act because the said drawings cannot be said to be the work of an artist engaged in the vocation of art or painting but the said drawings is the work of a scientist or engineer or technical expert engaged by the plaintiff and, Therefore, Section 14(c) of the Copyright Act would have no application to the said drawings because the drawings have been created by the scientist of the plaintiff as a preliminary for the purpose of creating a product which would amount to design within the meaning of Designs Act rather than covered under the Copyright Act. In the alternative, the submission is that the said drawing/design in two dimensional form having been applied for producing the product in material shape in three dimensional form, after its reproduction more than 50 times

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by an industrial process, no copyright in the said drawing/design would subsist with the owner because the same would be deemed to have extinguished by virtue of the operation of Section 15 of the Copyright Act, 1957.

10. To appreciate the respective contentions, it is necessary to glance through the relevant provisions of Section 2(c), Section 14(c), Section 15 of the Copyright Act and Section 2(d) of the Designs Act. The said Sections are reproduced below for the facility of reference:-

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

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

"Section 14. Meaning of copyright---For the purposes of this Act, "copyright" means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely:-

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

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

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

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

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

- (i) to make any other sound recording embodying it;
- (ii) to sell or give on hire, or offer for sale or hire, any copy of the sound recording, regardless of whether such copy has been sold or given on hire on earlier occasions;
- (iii) to communicate the sound recording to the public.

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

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

(1) Copyright shall not subsist under this Act in any design which is registered under the Designs Act, 1911 (2 of 1911).

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

"Section 2 of Designs Act"

"2. Definitions.---In this Act, unless there is anything repugnant in the subject or context,---

(d) "design" means only the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article whether in two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual, mechanical or Chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction or anything which is in substance a mere mechanical device, and does not include any trade mark as defined in clause (v) of sub-section (1) of section 2 of the Trade and Merchandise Marks Act, 1958 (43 of 1958) or property mark as defined in section 479 of the Indian Penal Code (45 of 1860) or any artistic work as defined in clause (c) of section 2 of the Copyright Act, 1957 (14 of 1957);

11. On the face of the above legal provisions, the first question is as to whether the drawings and brochures of the plaintiff can be said to be the artistic work within the meaning of Section 2(c) of the Copyright Act. The contention of the defendant that only those drawings which are prepared by an artist alone will fall within the meaning and ambit of the 'artistic work' and no drawing prepared by any other person, viz. a scientist or any other technical expert will fall within the ambit of artistic work, is liable to be rejected because as per the definition of artistic work, a drawing includes a diagram, map, chart or plan. A diagram, map, chart or plan are not necessarily the work of an artist but they are usually prepared by different technical hands well versed in such job. For instance, plans and maps are generally prepared by architects and draftsmen and not by an artist. An artist Of course may prepare a painting, a sculpture and a drawing as well. This Court, Therefore, has no hesitation in holding that the drawings and brochures of the plaintiff are artistic work within the meaning of Section 2(c) and the plaintiff has a copyright in the same within the meaning of Section 14.

12. The next question to be considered is if the said copyright of the plaintiff is in respect of any design which is capable of being registered under the Designs Act, 1911 but which has not been so registered or will it cease to exist as soon as the devices to which the design has been applied, has been reproduced more than 50 times by an industrial process, by the owner of the copyright or with his license or by any other person within the meaning of Section 15(2) of the Copyright Act. Learned counsel for the defendant has vehemently urged that the devices of the plaintiff produced on the basis of the drawings are capable of registration under class 24 of Schedule III of the Designs Rules, 2001 which reads as under:-

"CLASS 24

Medical and laboratory equipment

Note.---The term "medical equipment" covers also surgical, dental and veterinary equipment.

24-01 Apparatus equipment for doctors, hospitals and laboratories

24-02 Medical instruments, instruments and tools for laboratory use

Note.---Includes only hand-operated instruments.

24-03 Prosthetic articles

24-04 Materials for pressing wounds, nursing and medical care

24-99 Miscellaneous"

According to the counsel, the devices are covered under the heading 24-03 "Prosthetic Articles". In support of his contention that the copyright in the said design is capable of registration within the meaning of Section 15(2) of the Copyright Act, learned counsel for the defendant has placed reliance upon the decision of this Court in the case of Samsonite Corporation & Anr. vs . Vijay Sales & Ors., MANU/DE/0045/1998 : 73(1998)DLT732 . In the said case, this Court has more fully dealt with the question and has held as under:-

"It is a basic principle of interpretation of statutes that when two enactments deal with the same subject and the provisions are in pari materia, they have to be interpreted harmoniously. Here the position is, the Copyright Act which is later in point of time would impliedly incorporate into that Act the provisions of the Designs Act. The plaintiffs confine themselves to the provisions of the Copyright Act, 1957 and would assert copyright in the drawings while the second defendant would rely upon the provisions of the Designs Act and Section 15 of the Copyright Act to show that what is relied upon by the plaintiffs is a design and the claim of the plaintiffs would come within the mischief of Section 15 of the Copyright Act."

"In the new Encyclopedia Britannica Vol.4, 15th Edition, (Design) the meaning of design is given as, the process of developing plans or scheme of actions; more particularly, a design may be the development plan or scheme whether kept in mind or set forth as a drawing or model. The execution of a plan is not, properly, designing, except in so far as the plan may continue to develop in order to meet originally unanticipated requirements. The end result is not a design but it is reasonable to speak of a design, that is, of the antecedents plan or scheme discoverable in it. A plan or scheme as the pattern for the making a product indicates primarily an inter-relation of parts intended to produce a coherent and the effective whole, originally plan with four limiting factors in mind:

- (1) The capacities of the materials employed;
- (2) The influence of methods adopting these materials to their work;
- (3) The imfigments of parts within the whole;

and the affect of the whole on this who may see it, use it, or become involved in it."

"Drawing.---In English, to draw means literally to trace or delineate, implying that a drawing is an image represented purely in line and Therefore monochromatic. In this sense, drawing is closely related to writing, since both involve graphic notation and significant linear configurations; indeed, the tools of drawing and writing have generally been identical. In other languages, however, the word for drawing --- disegno (Italian) dessin (French) --- includes the concept of design in a broader sense, the full range of visual composition."

"Drawing, Engineering, the representation of the ideas of the architect, designer, and engineer through a standard graphic language of lines, geometric shapes, and symbols. Because the draftsman uses a number of mechanical instruments in engineering drawing, it is often called mechanical drawing. Engineering drawings are used mostly to communicate the ideas of the architect, designer, and engineer to the manufacturer and assembler, but they are also used in illustrations for the layman, in engineering drawing there are two fundamental methods of shape representation; pictorial and orthographic."

13. Mr. Jaitley contended that the said authority has no application to the facts of the present case as it was apparently dealing with a case relating to the Designs Act and on that strength it was held that the provisions of Section 15 applied and the owner of the designs could not claim any copyright because the same was capable of registration under Section 15. This Court on a consideration of the matter and more particularly the meaning of copyright and the definition of 'design' in the Designs Act is, prima facie, of the view that the plaintiff does not have a subsisting copyright under the Copyright Act, firstly; because it is capable of being registered under the Designs Act though it has not been so registered and secondly; as per the plaintiff's own showing, the devices to which the drawings have been applied, has been reproduced more than 50 times by an industrial process by the plaintiff.

14. The main thrust of the plaintiff's argument is that by the process of 'reverse engineering', the defendant has copied the three dimensional product 'occlusion device' by converting them into a two dimensional product which are same or similar to the two dimensional drawings of the plaintiff and thereafter by a process of 'reverse engineering' converted their two dimensional drawings into three dimensional product. In this connection, support is sought from para No. 16.26 at page 228 of the P. Narayanan's book -"Law of Copyright and Industrial Designs", Third Edition. In the said paragraph, "reverse engineering" is referred to or mean stripping down and dismantling of a machine, making sketches of the relevant parts and recording dimensions making working drawing from such sketches, plus the dimensions, and then making the machine from such working drawings. A machine has been defined in Law Lexicon, the Encyclopedia law dictionary by P. Ramanatha Iyer at page 1156 to include every mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result. In the Webster's dictionary, the term has been defined as the construction more or less complex consisting of a combination of moving parts or simple mechanical elements such as wheels, levers etc. with their support and connecting framework calculating to constitute a prime mover or to receive force and motion from a prime mover or from another machine and transmit modify and apply them to the production of some desired mechanical effect or work. The device referred to in the suit cannot be said to be machine and, Therefore, the theory of reverse engineering has no application. Besides, there is no allegation that the defendant while creating its product has stripped the product of the plaintiff and produced them thereafter. Such a question can only be examined

15. Irrespective of the above, the important question for consideration is as to whether the defendant has infringed the copyright of the plaintiff in the said brochures, drawings and various products mentioned above by copying the same. The answer to this question certainly involves and dependent on the comparison of the brochures, drawings and products of the plaintiff with that of the defendant.

16. So far as the brochures are concerned, three brochures at pages 20 to 25 belong to the plaintiff and that at pages 79 to 84 belong to the defendant which are stated to be identical to the brochures of the plaintiff. However, the defendant had denied that the brochures placed at pages 79 to 84 belong to them and on the other hand, they have claimed that their brochures are quite different and are similar to those which were recovered by the Local Commissioner and which she has filed as annexures to her report. In view of the plea now set up by the defendant, it is no longer necessary to go into the question if the brochures of the defendant as at placed at pages 79 to 84 are identical or deceptively similar to the brochures of the plaintiff. It may, however, be observed that even those brochures cannot be said to be identical though there may be certain similarities in the two set of brochures. The brochures of the plaintiff are in different design and colour scheme and clearly and prominently bear out the name 'AMPLATZER' while that of the defendant are in a different colour scheme and bear the words 'BLOCKAID'. The plaintiff's brochures prominently exhibits the name 'AGA Medical Corporation and the address as 682, Mendeissohn Avenue, Golden Valley, MN 55427 USA while that placed at pages 79 to 84 and seized from the defendant's premises, give the address as under:-

"Globe Bio - Medicals
C/2, Juhu Apartments,
Near S.N.D.T. College
Juhu, Mumbai-400 049,
India."

17. It is no doubt true that several other details like intended use, description and closure protocol are identical in the two sets of brochures. However, comparing the plaintiff's brochures with the brochures annexed with the report of the Local Commissioner, it would be seen that they are not only different in the colour scheme and get up but also do not contain the identical details regarding description, intended use, closure protocol etc. as contained in the brochures of the plaintiff. Mr. Arun Jaitley, learned senior counsel for the plaintiff has invited the attention of this Court to various device sizes and recommended sheath put in the chart in these brochures as also the use of the words 'ASD', 'PDA' and 'CAT NO.' and urged that there are identical with that of the plaintiff. It is true that such descriptions are common in the brochures of the plaintiff and the defendant but in the opinion of the Court, it cannot be said that the defendant or manufacturer of the occluder devices had copied the same from the brochures or drawings of the plaintiff. Such details/description only denote the name of the disease, i.e. 'ASD' stands for 'Atrial Septal Defects', 'PDA' stands for 'Patent Ductus Arteriosus' and 'CAT No.' denotes various sizes of the devices. There can be no artistic work or copyright in the name and size of a particular disease and device used for correcting the said disease. The name of the disease and size/Cat No. have to be common in all such products manufactured by different manufacturers.

18. Now, coming to the various drawings in respect of which copyright is claimed by the plaintiff, it may be observed at the very outset that the plaintiff has not filed the drawings of the defendant which is stated to have been copied by the defendant resulting into the infringement of copyright of the plaintiff. Mr. Arun Jaitley has vehemently urged that the two dimensional drawings prepared by the plaintiff is the original work of the plaintiff and the defendant must have copied these drawings for creating the three dimensional work in the material form or by first preparing the drawings of the three dimensional work of the plaintiff, i.e. the devices itself before producing their own products/device in material form. It is also urged that the very fact that the defendants have failed to produce its own drawings will show that they have stolen/copied the drawings of the plaintiff and an adverse presumption is liable to be drawn against them and it must be presumed that no research of any kind was undertaken by the defendant and no drawings were prepared by them and they have simply copied the drawings and products of the plaintiff. As against this, contention of Mr. R.K. Anand is that the defendant is not the manufacturer of the devices and he is simply an importer and supplier of the devices in India and, Therefore, he is not possessed of the said drawings which must be in power and possession of the manufacturer who has not been made a party to the present suit. Yet another argument is that there is no question of copying any drawings because the products of the defendant are different than the products of the plaintiff. The product of the plaintiff being produced and marketed under the brand name of 'AMPLATZER' while that of the defendant being produced and marketed under the name of 'BLOCKAID'. That there is no question of any confusion or deception being practiced because the products of the defendant are their own creation and very prominently described as the product of 'BLOCKAID' which is so prominently displayed not only on the brochures but also on the packings of the products. The users of these products are not a laymen but the medical experts and it should not be difficult for them to immediately differentiate and distinguish between the products of the plaintiff and the defendant. It is also argued that the plaintiff has filed this suit simply to monopolies over the entire sale and profit on the sale of such devices in India on account of the higher price at which they are selling the products as the products of the defendant are much cheaper and are of better quality than that of the plaintiff and the plaintiff apprehends that the defendant may not steal a march over them and capture the market in India.

manupatra 19. Mr. Arun Jaitley, learned senior counsel for the plaintiff also submitted that the products of the defendant are inferior in quality and not up to the international medical standards and that is why the defendant is selling them at cheaper rate and if he is allowed to market these products in India, it will be hazardous to the health of the general public. In this way, both sides claim their products to be superior and they filed certain certificates from certain hospitals to the above effect. This Court, while considering an interlocutory application, is not supposed to go into the question as to whether the product of the plaintiff or the defendant are superior or inferior or whether the defendant's products may prove hazardous as this will be beyond the scope of present suit. This aspect of the matter is clearly within the domain of the concerned authorities of the Government entrusted with the task of regulating the production, sale and utilization of such products. For the purpose of this application or for that reason the suit itself, the Court would confine its enquiry as to whether the various devices being marketed by the defendant are identical or deceptively similar to that of the plaintiff and whether the manufacture of these devices had infringed the copyright of the plaintiff in its brochures, drawings and products. After a thorough examination of the entire material placed on record, it is not possible to hold that either the brochures or the devices being marketed by the defendant are identical or deceptively similar to that of the plaintiff.

20. Mr. Chetan Sharma, learned senior counsel for defendant No. 1 has raised a question about the maintainability of the present suit on the ground that the author of the said drawings has not been made a party to the present proceedings as required under Section 61 of the Copyright Act. This argument is based on the submission that as per the plaintiff's own showing, they are merely assigns of the copyright and not the owner of the copyright claimed by them. In the view of this Court, Section 61 has no application in the present case because it applies only in cases of a licensee filing a suit and not to a suit filed by the assignee. Assignment constitutes complete transfer of right whereas in license there is only a limited transfer of rights limited by the terms of the license. Even otherwise, it is the case of the plaintiff that the plaintiff is the owner of the copyright under Section 17 because the work in which the copyright is claimed, has been produced by the authors/employees in the course of their employment with the plaintiff and, Therefore, the plaintiff is the first owner of the copyright. The patents in respect of the drawings and products registered under the Copyright Law of United States are also in the name of the plaintiff. Therefore, I see no merits in the contention of the learned counsel for defendant No. 1.

21. Mr. Arun Jaitley, learned counsel for the plaintiff has next submitted that the defendant is guilty of concealment of material facts/mis-representation inasmuch as in the first instance an attempt was made to show that the defendant has applied for the registration of patent which clearly mean that he is the manufacturer of the product and when he was cornered, he came out with the plea that he is simply the importer and supplier of the said devices in India and not a manufacturer. It is no doubt true that the defendant had not come to the Court with clean hands but this by itself, in the view of the Court, will not entitle the plaintiff for the grant of interlocutory relief, in the absence of his proving a prima facie case in its favor.

22. Learned counsel for the parties have relied upon a number of decisions of the Supreme Court and this Court on the question as to when an interim injunction should be granted or refused in a suit for permanent injunction to restrain the defendants from infringing the copyright of the plaintiff. The cases referred to are John Richard Brady and Ors. vs . Chemical Process Equipments P. Ltd. And Anr., MANU/DE/0586/1987 : AIR1987Delhi372 , Puneet Industrial Controls Pvt. Ltd. vs. Classic Electronics, 1997 (17) PTC 161, Escorts Construction Equipment Ltd. & Anr. vs. Action Construction Equipment Pvt. Ltd. & Anr., 1999 PTC 36 and Cadila Health Care Ltd. vs . Cadila Pharmaceuticals Ltd., MANU/SC/0199/2001 : [2001]2SCR743 . All those decisions are based on the facts and circumstances obtaining in those cases. It is only the principle laid down in these cases which has to be applied and the principle being that a party would be entitled to relief under Order 39 Rules 1 & 2 provided it satisfies the Court that it has a prima facie case; that balance of convenience is in his favor and that irreparable loss and injury would be caused to him if interim relief is not granted. The aforesaid three phrases are not rhetoric phrases but elastic words to meet a wide range of situation in given set of facts and circumstances. The burden is always on the plaintiff/applicant to satisfy the Court that a prima facie case exists in his favor. The Court must further satisfy itself that non-interference by the Court would result in irreparable injury to a party seeking relief. Irreparable injury means that the injury must be a material one, on that the Court cannot adequately compensate by way of damages. The Court is expected to exercise sound judicial discretion to find out the amount of substantial mischief or injury which is likely to be caused to one party if injunction is refused and compare it with mischief or injury that is likely to be caused to the other party if the injunction is granted.

23. Thus, having considered the matter in its entirety and from different angles, this Court is of the opinion that the plaintiff has not been able to establish a prima facie case and to show that they have subsisting copyright in the brochures, drawings and various devices manufactured by them or that the brochures and devices imported and marketed by the defendant in India, are identical or deceptively similar to that of the plaintiff or that they are trying to pass off their products as that of the plaintiff. The plaintiff has not been able to show that there is any infringement of their copyright in these products. Prima facie, it does not appear that the defendants have committed infringement of the copyright in the plaintiff's drawings and products. Balance of convenience also does not lie in favor of the plaintiff because the defendants cannot be deprived of their right to import and market a product which is not identical to that being manufactured and marketed by the plaintiff in India.

manupatra 24. In the result, I hold that the plaintiff is not entitled to ad interim injunction. The application is accordingly dismissed. Needless to mention that the findings and observations made in this order are tentative in nature based on a prima facie view of the matter and will not affect the merits of the case at subsequent stages.

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