

Ritika Private Limited vs Biba Apparels Private Limited on 23 March, 2016

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Bench: Valmiki J.Mehta

* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ CS(OS) No.182/2011
% 23rd March, 2016
RITIKA PRIVATE LIMITED Plaintiff
Through: Ms.Tanvi Misra, Advocate.
versus
BIBA APPARELS PRIVATE LIMITED Defendant
Through: Mr.Jayant K. Mehta, Mohd. Saeed
Hussain, Ms. Roopa Dayal and
Mr.Yash Karan Jain, Advocates.
CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA
To be referred to the Reporter or not? Yes
VALMIKI J. MEHTA, J (ORAL)

IA No. 13045/2011 (under Order VII Rule 11 CPC filed by the defendant) & CS (OS) No.182/2011

1. Though this application is titled under Order VII Rule 11 of the Code of Civil Procedure, 1908 (CPC), counsel for the defendant states that this application actually is under Order XII Rule 6 CPC for dismissing the suit on the admitted facts and legal position, and since the heading of the application will not change the substance, the subject application be treated as an application under Order XII Rule 6 CPC. Ordered accordingly.

2. Plaintiff has filed the present suit claiming copyright in various drawings and sketches which are created by the plaintiff for dresses being sold under the trade name/brand RITU KUMAR. It is pleaded that the drawings and sketches are distinctive, exclusive and identifiable with the brand RITU KUMAR of the plaintiff and the brand enjoys goodwill and reputation. It is pleaded that there is originality in the garment prints and sketches created by the plaintiff for the dresses/garments. It is pleaded that ensembles of the plaintiff are so designed that each component, such as sleeves, front and back panels etc are delineated and are co-ordinated with unique features. The plaintiff is stated to be maintaining digital records of the creation of each drawing and print by giving it identification

code and name which is also shown in the invoices issued by the plaintiff. The claim of the plaintiff with respect to its copyright work is set out in the form of process adopted by the plaintiff as detailed in paras 10, 11 and 12 of the plaint and which paras read as under:-

"10. The initial stage of the Plaintiff's creative process in general may be summarized as follows:

(a) A drawing or sketch is created by Mrs. Ritu Kumar and/or other designers employed by the Plaintiff. The same is an original derivative artistic work.

(b) The drawing is put in digital form and completed on a computer assigning colours. The same is independently a derivative artistic work.

These first stages result in the creation of independent artistic works which can be enjoyed for their own sake or used for various purposes including different garments.

11. The artistic works so created are then suitably adapted for different garments and different parts of garment ensembles, as described below. Each such variation is a further, derivative work, which does not affect the Plaintiff's separate rights in the original.

(a) Screens are prepared for each colour facilitating an initial printing ("swatching") to test the design on different fabrics.

(b) The artistic work so created is then available for use in connection with different products.

(c) According to requirement and market assessment, but artistic work is then customized for use on different garments with appropriate variations.

12. Further, in some cases embroidery of an artistic character is done on each garment individually, by hand or using a machine, by a skilled craftsman. Such garments are works of artistic craftsmanship".

3. Plaintiff claims to be the first owner of the copyright in all the products of the plaintiff's company created from the sketches, drawings, designs etc.

4. Plaintiff also pleads violation of its trade secrets by the defendant inasmuch as defendant is employing erstwhile employees of the plaintiff. The said employees are Ms. Neelam Arora and Ms. Reshu Singhal.

It is stated that these employees are in know of the trade secrets of the plaintiff's work and are revealing these trade secrets to the defendant. The issue with respect to violation of trade secrets of the plaintiff by the defendant is pleaded as per paras 16 and 17 of the plaint and these paras read as under:

"16. Fashion products have a short life, and the Plaintiff's business depends on the Plaintiff's knowledge and understanding of trends and changing tastes, its corporate judgment under Mrs. Ritu Kumar's creative leadership of what will meet with success next season. There is a long gestation period for each product during which the utmost confidentiality has to be maintained within the Plaintiff's organization; surprise innovation is the lifeblood of the Plaintiff's business. Starting with the Plaintiff's skilled market assessment, going through the technical creative process described above, but also including the general conceptualization of each collection of each outfit and of each individual garment and accessory, there is thus a multiplicity of creative inputs which cumulatively reflect the Plaintiff's know how and incorporate valuable trade secrets.

17. It is submitted that such confidentiality is an inherent feature of the industry, without which no fashion enterprise would be viable. Though the confidentiality of the Plaintiff's trade secrets does not depend on contractual agreements, the Plaintiff nevertheless takes due care to ensure that its employees appreciate their confidentiality obligations. The copies of employment agreements filed in these proceedings contain the following conditions which directly and indirectly ensure that confidentiality and exclusivity of the employee's work for the Plaintiff...."

5. The subject suit is filed by the plaintiff claiming the relief of injunction seeking restraint against the defendant from reproducing, printing, publishing, distributing, selling, offering etc of prints or garments which are colourable imitation or substantial reproduction of the plaintiff's prints and garments. Other related reliefs of injunctions and rendition of accounts are also claimed against the defendant.

6. The issue urged on behalf of the defendant for seeking dismissal of the suit is as per the provision of Section 15 (2) of the Indian Copyright Act, 1957 and which provides that once a copyright in a design is applied to an article by an industrial process for more than 50 times, ownership of the copyright ceases because the copyright resulting in creation of the article is capable of being registered under the Designs Act, 2000 but has not been registered by the plaintiff. Section 15 of the Indian Copyright Act, 1957 reads as under:

"Section 15 of the Indian Copyright Act, 1957

15. Special provision regarding copyright in designs registered or capable of being registered under the Designs Act, 2000 (16 of 2000). --

(1) Copyright shall not subsist under this Act in any design which is registered under the Designs Act, 2000 (16 of 2000). (2) Copyright in any design, which is capable of being registered under the Designs Act, 2000 (16 of 2000), but which has not been so registered, shall cease as soon as any article to which the design has been applied has been reproduced more than fifty times by an industrial process by the owner of the copyright, or, with his licence, by any other person."

7. It is also argued on behalf of the defendant that the paragraphs of the plaint with respect to violation of trade secrets as alleged by the plaintiff are no averments as required of a cause of action in law because not only what are the specific trade secrets are not mentioned resulting in the fact that a general order of alleged violation of unspecified trade secrets should not be passed, but also that really the so called trade secrets are nothing but the copyrights claimed by the plaintiff as applied to garments and dresses and that once copyright does not subsist in the plaintiff because of Section 15(2) of the Indian Copyright Act, there does not arise the issue of any violation of trade secrets as is falsely alleged by the plaintiff.

8. The only issue which is called for decision by this Court is that once the copyrighted works of the plaintiff are applied for making of dresses, and production of which dresses exceeds 50 in number, whether the plaintiff does not lose out in ownership of the copyright works, inasmuch as, the copyright works of the plaintiff are capable of being registered as designs under the Designs Act, but the plaintiff has not secured registrations of the sketeches, drawings, designs etc under the Designs Act.

9. I may at the outset note that it is not the case of the plaintiff in the plaint that plaintiff has not created dresses out of its designs and sketches only upto 50 times, and therefore, this Court proceeds on the basis that designs and sketches have been applied by the plaintiff on the dresses manufactured by the plaintiff and such dresses etc have exceeded 50 in number. Even during the course of arguments, it has not been the case of the plaintiff that the drawings, designs and sketches with respect to the garments and dresses had not been applied by the plaintiff to the garments and dresses only upto 50 times.

10. I may note that learned counsel for the plaintiff who argued the case on behalf of the plaintiff had initially sought an adjournment as it was stated that counsel for the plaintiff Sh. Pravin Anand who has to argue the case had gone abroad, but, the counsel for the defendant has very vehemently opposed the adjournment on the ground that adjournment cannot be granted if a counsel chooses to go abroad once the specific date is fixed in the presence of the counsels for both the parties including the counsel who appeared on the last date when today's date was fixed. In view of the strong opposition by the defendant to the adjournment, I have refused the adjournment, more so because the issue which calls for decision is fully covered by the ratio of a Division Bench judgment of this Court and which binds this Court.

11. Besides referring to Section 15(2) of the Indian Copyright Act for the purposes of the present decision, the definition of design under the Designs Act, 2000 would also have to be seen alongwith Section 4 of the Designs Act. Section 4 of the Designs Act is being referred to inasmuch as some arguments were urged on behalf of the plaintiff by referring to Section

4. Sections 2 (d) and 4 of the Designs Act read as under:

"Section 2(d) of the Designs Act, 2000 2(d). "design" means only the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article whether in two dimensional or three dimensional or in both forms, by any

industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction or anything which is in substance a mere mechanical device, and does not include any trade mark as defined in clause (v) of 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 4 of the Designs Act, 2000

4. Prohibition of registration of certain designs. --A design which--

(a) is not new or original; or

(b) has been disclosed to the public anywhere in India or in any other country by publication in tangible form or by use or in any other way prior to the filing date, or where applicable, the priority date of the application for registration; or

(c) is not significantly distinguishable from known designs or combination of known designs; or

(d) comprises or contains scandalous or obscene matter, shall not be registered"

12. The arguments which have been urged on behalf of the plaintiff are as under:

(i) What is a subject matter of copyright continues to be a subject matter of copyright in the exclusive ownership of the owner of the copyright inspite of the copyright being used for manufacturing of an article for more than 50 times inasmuch as the definition of design by its very language in its last part excludes an artistic work which is the subject matter of a copyright under Section 2(c) of the Indian Copyright Act and once copyright artistic work is excluded from the definition of a design under the Designs Act, Section 15(2) of the Indian Copyright Act does not come into play as the precondition for application of Section 15(2) is that that the copyright work is included as a design under Section 2(d) of the Designs Act. In other words it is sought to be argued that copyright can continue to exist in a sketch or a design of a dress, although the said sketch, drawing or design is capable of being registered as a design inasmuch as the drawing, sketch or design which is the subject matter of Section 2(c) of the Indian Copyright Act is not a design because it is excluded from the definition of design by the last few words and lines as found in the definition of design under the Designs Act. It is, therefore, argued that non-registration under the Designs Act by the plaintiff of its drawings, sketches or design with respect to its garments and dresses will not extinguish the rights of the plaintiff to the copyrights existing in the plaintiff in such works and the defendant is, therefore, liable to be enjoined from

infringing the copyrighted works of the plaintiff.

(ii) Whereas what is the subject matter of the copyright has to be original in view of Section 13(1)(a) of the Indian Copyright Act, because the language of Section 4 of the Designs Act prohibits the registration of a design which is not new/original, consequently, an existing copyrighted artistic work under Section 2(c) of the Indian Copyright Act cannot be the subject matter of registration of design under the Designs Act being excluded from the registration as a design under the Designs Act, thus resulting in inapplicability of Section 15(2) of the Indian Copyright Act. It is argued that a copyright work has to be original whereas a design need not be original or novel and, therefore, this Court should protect original artistic work which is the subject matter of copyright under Section 2(c) of the Indian Copyright Act.

13. Reliance is placed upon the two judgments of Hon ble Division Benches of this Court in the cases of Midas Hygiene Industries Pvt. Ltd.

Vs. Sudhir Bhatia, 225 (2015) DLT 178 (DB) and Rajesh Masrani Vs. Tahiliani Design Pvt. Ltd., 2009 (39) PTC 21 (Del.) and it is argued that these judgments lay down the ratios which support the plaintiff that copyrighted works even if not registered as a design under the Designs Act, though capable of being registered as a design, copyrighted artistic works will continue to have protection as copyrights under the Indian Copyright Act.

14. Ordinarily, the issues which are raised on behalf of the plaintiff would have called for detailed discussion and analysis of various sections of the Indian Copyright Act and the Designs Act alongwith the arguments of the plaintiff, however, this Court need not venture on the same as the issue to be decided in this case is clearly and completely covered against the plaintiff by a judgement of a Division Bench of this Court in the case of Microfibres Inc. Vs. Girdhar & Co. & Anr. 2009 (40) PTC 519 (Del): 2009 SCC Online Del 1647. The very arguments which are urged on behalf of the plaintiff of contending that copyright in a drawing or a sketch will continue even if the same is not registered as a design and an article is produced on the basis of the drawing, sketch or design for more than 50 times by an industrial process or means, has been squarely dealt with against the plaintiff in terms of the following paragraphs of the judgment in Microfibre's case (supra). Though the paragraphs are many, I have no option but to reproduce them as all of them pertain to the ratio laid down in Microfibre's case (supra). These para nos.20 to 33 and 35 to 46 are reproduced below:-

"20. After taking into account the above pleas, we are of the view that Section 2(c) of the Copyright Act defines 'artistic work' to mean a painting, sculpture, a drawing (including a diagram, map, chart or plan), and engraving or photograph, whether or not any such work possesses artistic quality. It also includes a work of architecture and any other artistic craftsmanship. This definition has a very wide connotation as it is not circumscribed by any limitation of the work possessing any artistic quality. Even an abstract work, such as a few lines or curves arbitrarily drawn would qualify as an artistic work. It may be two dimensional or three dimensional. The artistic work may or may not have visual appeal.

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

(i) To reproduce the work in any material form including depiction in three dimensions of a two dimensional work or in two dimensions of a three dimensional work;

(ii) To communicate the work to the public;

(iii) To issue copies of the work to the public not being copies already in circulation.

(iv) To include the work in any cinematograph film;

(v) To make any adaptation of the work;

(vi) To do in relation to an adaptation of the work any of the acts specified in relation to the work in sub-clauses (i) to (iv)

22. Therefore, it is the exclusive right of the holder of a Copyright in an original artistic work to reproduce the work in any material form.

For example, a drawing of an imaginary futuristic automobile, which is an original artistic work, may be reproduced in the three- dimensional material form using an element, such as a metal sheet. When the copyright holder of an original artistic work reproduces the same in another material form, he may, or may not do so by employing an industrial process or means which may be manual, mechanical or chemical, separate or combined, on an article. If the reproduction of the original artistic work is done by employing an industrial process, as aforesaid, on an article, and the same results in a finished article which appeals to the eye as adjudged solely by the eye, then the features of shape, configuration, pattern, ornament or composition of lines or colours applied to the article by the industrial process constitutes a 'design' , within the meaning of this expression as defined under the Designs Act.

23. There is, therefore, a clear distinction between an original artistic work, and the design derived from it for industrial application on an article. This position is clarified by the use of the expression 'only' before the words 'the features of shape, configuration, pattern, ornament or composition of lines or colours' in the definition of 'design' in the Designs Act. Therefore, the original artistic work, which may have inspired the creation of a design, is not merely the feature of shape, configuration, pattern, ornament or composition of lines or colours which are created to apply to an article by an industrial process. The original artistic work is something different from the design. Secondly, the definition of 'design' expressly excludes, inter alia, any artistic work defined in Section 2(c) of the Copyright act, 1957.

24. It needs to be emphasized that it is not necessary that in every case a design has to be preceded by an artistic work upon which it is founded. A craftsman may create a design without first creating

a basic artistic work. This may best be illustrated by a weaver who may straightaway create a design while weaving a shawl, which product could be created even without the basic artistic work.

25. Whether or not a design is preceded by an original artistic work, a design would, in its own right qualify to be termed as an artistic work within the meaning of Section 2(c) of the Copyright Act. This is so because the expression „artistic work“ as defined in Section 2(c) of the Copyright Act bears a wide definition to mean 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. However, the design may or may not enjoy a copyright protection under the Copyright Act, depending on whether it is an „original artistic work“ or not.

26. The expression 'copyright in any design' used in Section 15(2) means the copyright as understood under the Copyright Act, and not under the Designs Act. This is evident from the expression 'copyright shall not subsist under this Act... ..' used in Sub-section (1) of Section 15. However, copyright in an artistic work subsists provided it is an original artistic work. Therefore, there can be no claim for Copyright under the Copyright Act in an artistic work which does not have the quality of possessing originality. The holder of a copy of an original artistic work cannot claim copyright protection. Therefore, to be entitled to protection under the Copyright Act, the design should have originality. That is not to say that if the design is not entitled to copyright protection under the Copyright Act, on account of it not possessing originality vis-à-vis the original artistic work, the design does not require, or cannot be granted registration under the Designs Act for it to be entitled to protection under the Designs Act.

27. Under the Designs Act, a copyright has a different connotation from a copyright under the Copyright Act. Under the Designs Act, copyright means the exclusive right to apply the design to any article in any class in which the design is registered.

28. The issue with regard to the extent of, and the conditions for the copyright protection to such an artistic work, as an artistic work under the Copyright Act, which is a design registered or capable of registration under the Designs Act, is what is dealt with, by Section 15 of the Copyright Act. Once the distinction between the original artistic work and the design derived from it, and the distinction between Copyright in an original artistic work under the Copyright Act, and a copyright in a design under the Designs Act is appreciated, the meaning and purport of Section 15 of the Copyright Act becomes clear.

29. Section 15 of the Copyright Act is in two parts. The first part i.e. Sub-section (1) states that copyright shall not subsist under the Copyright Act in any design which is registered under the Designs Act. Consequently once the design is created and got registered under the Designs Act, whether or not the design is eventually applied to an article by an industrial process, the design loses its protection as an artistic work under the Copyright Act. Therefore, subject to whatever rights that are available under the Designs Act, the registered design holder cannot claim protection or complain of copyright infringement in respect of the registered Design under the Copyright Act.

30. Sub-section (2) of Section 15 deals with the situation where the design, which is capable of being registered under the Designs Act, is not so registered. It provides that copyright in such a design shall cease as soon as any article 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 licence, by any other person. It is clear to us that the Parliament in Section 15 of the Copyright Act was dealing with the aspect of copyright in a registered/registrable design, as understood in the Copyright Act and not the Designs Act. Else, there was no need to deal with this aspect in the Copyright Act. The same would have been dealt with under the Designs Act. Therefore, the law tolerates only a limited industrial, or shall we say commercial, exploitation of the original artistic work by the application/reproduction of the said work in any other form or reproduction of copies thereof in exercise of the rights under Section 14(c)(1) and 14(c)(iii) of the Copyright Act. Beyond the specified limit, if the design derived from the original artistic work is exploited (i.e. if the design is applied more than 50 times by an industrial process on an article) the copyright in the design ceases unless it is registered under the Designs Act.

31. We are also of the view that it is not correct on behalf of the appellant to urge that the intention of the creation of the work determines the Intellectual Property Rights contained therein, and not whether such work fell within the classification of 'Designs' under the Designs Act or the Copyright Act. The Designs Act nowhere stipulates the intention of the creator of the work as a determinative criteria and the exhaustive definition given not only in the Designs Act but indeed the Copyright Act clearly rules out such interpretation as suggested by Shri Raju Ramachandran. In fact, the appropriate occasion to evaluate the registrability of a design would arise when the artistic work is translated into an object having features of shapes, configuration, pattern, ornament or composition of lines or colors whether two dimensional or three dimensional by employing an industrial process. Significantly, the appellant themselves have registered their product under the Designs Act in U.K. Furthermore, as submitted by the appellant, even if there is very little variation between the original artistic work and the design which is industrially applied to an article to produce a product, nevertheless, such a design can claim registration under the Designs Act, provided such registration was sought. The interpretation suggested by the appellant would clearly afford not only the design protection in case of registered works but also in addition, the copyright protection to the works which were industrially produced, which interpretation does not reflect the legislative intent.

32. A perusal of the Copyright Act and the Designs Act and indeed the Preamble and the Statement of Objects and Reasons of the Designs Act makes it clear that the legislative intent was to grant a higher protection to pure original artistic works such as paintings, sculptures etc and lesser period of protection to design activity commercial in nature. The period of copyright would be the author's life span plus 60 years. However, the legislature has allocated a lesser time span for the protection available to a registered design as only being 15 years. Thus, commerce and art have been treated differently by the Legislature and any activity which is commercial in nature has been granted lesser period of protection. On the other hand, pure artistic works per se have been granted a longer protection.

33. The Statement of Objects and Reasons of the Designs Act, 2000 reads as follows:

"Since the enactment of the Designs Act, 1911 considerable progress has been made in the field of science and technology. The legal system of the protection of industrial designs requires to be made more efficient in order to ensure effective protection to registered designs. It is also required to promote design activity in order to promote the design element in an article of production. The proposed Designs Bill is essentially aimed to balance these interests. It is also intended to ensure that the law does not unnecessarily extent protection beyond what is necessary to create the required incentive for design activity while removing impediments to the free use of available designs."

The legislative intent is, thus, clear that the protection accorded to a work which is commercial in nature is lesser than and not to be equated with the protection granted to a work of pure art.

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35. However, there can be no quarrel with the plea of Shri Ramachandran that the operation of Section 15(2) of the Copyright Act does not exclude from the ambit of Copyright protection either the original 'artistic work' upon which the design is based or the design which by itself is an artistic work. 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 under Section 2(c) of the Copyright Act, 1957 and would be entitled to the full period of copyright protection. This is also evident from the definition of the design under Section 2(d) of the Designs Act. This, in our view, in fact is a factor which would go against the appellants in construing the nature of protection to be given to the original artistic work such as a painting, as contrasted with the applied artistic work that is the design, which in the present case does not mean the intermediary medium such as a mould, engraving devised/produced only to enable industrial application of the painting to produce the furnishing products of the appellant. Thus, while the original painting would indeed be entitled to the copyright protection, the commercial/industrial manifestation of such paintings such as the design derived from and founded upon the original painting for the purpose of industrial production of furnishings 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 in case of a registered design.

36. This clearly shows that the legislature intended that even if the artistic work such as a painting has been used as the basis for designing an industrially produced object for commerce, such as the furnishing in the present case, nevertheless the original painting would indeed enjoy full copyright protection, while the result of the industrial application of such painting, namely, the design used in the industrial production of the ultimate product shall enjoy lesser period of protection as stipulated under the Designs Act provided it is registered as a design under the Designs Act. Thus, we are of the view that an original artistic work initially acquires protection under the Copyright Act as an „artistic work or else the protection under the Designs Act qua the product created from the artistic work when industrially applied.

37. Dr. Abhishek Manu Singhvi, the learned Senior Counsel appearing for the respondent in FAO (OS) No. 447/2008 had submitted, and in our view rightly so that the object of the two legislations was to prevent long term usage by the person who was commercially exploiting something and yet wanting to claim an exclusive monopoly through longer period of copyright protection afforded to an artistic work. Section 15 of the Copyright Act demonstrates the legislative intention of integrating the Copyright and Designs Acts and any other interpretation would, as rightly submitted by Dr. Singhvi, render the registration under the Designs Act as meaningless as a design proponent will always get a longer period of copyright protection under the Copyright Act. In our view, the above plea would make a registration under the Designs Act meaningless, which the legislature could have never intended. In fact, the plea of Dr. Singhvi that a design which has been granted the protection under the Designs Act cannot be granted protection under the Copyright Act is correct and this is evident from Section 15(1) of the Act.

38. Thus, while it is not open to the respondent to reproduce such paintings per se, which formed the basis of the design that was applied to the fabric, nevertheless, such protection qua the design imprinted on the product through industrial application is available only under the Designs Act, provided there is a registration. This is precisely why the legislature not only limited the protection by mandating that the copyright shall cease under the Copyright Act in a registered design, but in addition, also deprived copyright protection to designs capable of being registered under the Designs Act, but not so registered, as soon as the concerned design had been applied more than 50 times by industrial process by the owner of the copyright or his licensee. This clearly indicates that the legislature intended to provide industrial and commercial application of an artistic work for commerce lesser protection.

39. Shri Arun Jaitley, the learned Senior Counsel appearing for the appellant in FAO (OS) No. 326/2007 titled as Dart Industries Inc. and Anr. v. Techno Plast and Ors. had only made submissions in the present appeal in respect of Section 15 of the Copyright Act to the extent it could affect the appeal filed by his clients. He had advanced a very attractive argument as to the three stages of processes leading to the eventual designed product. He submitted that the first stage is of the preparation of drawing or artistic work which leads to the production of mould/engraving which is the second stage and such mould/engraving leads to the final commercially marketable product, which is the third stage. He has also submitted that the products of the respondent were made by the process of reverse engineering starting from the final product leading to the second stage of creating a moulding, and from it a final drawing. His plea was based upon the premises that the mould and the drawing of the appellant are copyright protectable under the Copyright Act and cannot be or are incapable of forming part of the design registration regime. It is submitted that the product of the respondent involves the copying of the mould/drawing of the appellant.

40. While the argument is very attractive but nevertheless it is not legally sustainable because such a plea would enlarge the monopoly in industrial design from the current maximum time of 15 years to the longer period available under the Copyright Act. While the original drawings of the appellant could be entitled to copyright protection under the Copyright Act as artistic works, the designs derived therefrom as moulds which are used for industrial application of the design on the articles would not qualify for protection as artistic works under the Copyright Act except in accordance with

Section 15(2) of the Copyright Act. It is not the case of the appellant Microfibres or even that of Mr. Jaitley, s clients that the design applied on the fabric (in the case of Microfibres) or the plastic (in the case of Mattel Inc.) has not been applied for more than 50 times. There designs have been used more than 50 times. The learned Single Judge in paragraph 51 of the impugned judgment held as follows:

"The plea of the plaintiff is also sought to be negated on the issue of definition of a „design under Section 2(d) of the Designs Act, 2000 whereby an „artistic work as defined in Clause (c) of Section 2 of the Copyright Act has been specifically excluded. The submission was, thus, advanced that this would have the effect of rendering the law of designs redundant for the simple reason that each design registered thereunder would be able to trace its origin to a diagram, chart, drawing, etc. and, thus, cease to be governed by the Designs Act. The legislative intent could not have been this because the law of designs is based on the same principle as applicable to other monopolies and to fuel industrial innovativeness by granting limited time-limit to the monopolies and allow others to make use of them after they have passed into the public domain. Thus, the plea of the plaintiff, if accepted, would be anti-competitive and would throttle and stagnate the industry.

(Emphasis supplied)"

In our view the learned Single Judge has felicitously summed up the legislative intent that limited monopoly should be granted to fuel industrial inventiveness in the field of commerce. We fully approve and reiterate the aforesaid view.

41. As rightly submitted by Shri Rajender Kumar, the learned Counsel for the respondent No. 2 in the present appeal, the interpretations canvassed by the appellant would, render the design legislation otiose, because every registered design would then be able to trace its origin to a chart, drawing, diagram etc. and consequently also claim copyright protection under the Copyright Act in addition to the protection as a registered design under the Designs Act.

42. Shri Prashanto Chandra Sen, the learned Counsel appearing on behalf of the respondent No. 1, contended that the difference between a design and an artistic work lies in the applicability of the former to an article as evident from the decision in Con Planck Ltd. case 1923 KB 804, wherein it was held that the fundamental distinction between a design and a simple artistic work lies in the applicability of the former to some other article. In our view, the interpretation suggested by Shri Jaitley would result in every industrial tracing, drawing or mould which may not be an original artistic work within the meaning of Section 2(c) read with Section 13 of the Copyright Act, and which lead to the designed product, being afforded protection under the Copyright Act as an original artistic work and also being at the same time industrially and commercially exploitable by being applied to marketable articles by claiming protection under the Designs Act, 2000.

In the case of Interlego (1988) RPC 343, the following position of law was laid down:

"The definition of „design in Section 1(3) of the Act of 1949 is hardly a model of Parliamentary draughtsmanship and this is by no means the first case in which its meaning and application have been called in question. In approaching the question of construction there has to be borne in mind that the purpose of the Act, as appears both from its terms and its legislative history, is to protect novel designs devised to be „applied to (or, in other words, to govern the shape and construction of) particular articles to be manufactured and marketed commercially. It is not to protect principles of operation or inventions which, if protected at all, ought to be made the subject-matter of a patent. Nor is it to prevent the copying of the direct product of original artistic effort in producing a drawing. Indeed the whole purpose of a design is that it shall not stand on its own as an artistic work but shall be copied by embodiment in a commercially produced artifact. Thus, the primary concern is what the finished article is to look like and not with what it does and the monopoly provided for the proprietor is effected by according not, as in the case of ordinary copyright, a right to prevent direct reproduction of the image registered as the design but the right, over a much more limited period, to prevent the manufacture and sale of articles of a design not substantially different from the registered design.

The emphasis therefore is upon the visual image conveyed by the manufactured article."

Thus, in the case of *Pugh v. Riley* 1912 RPC 196 the general principle was laid down that any application for registration must be accompanied by a representation of the design which ought to be in the nature of a drawing or a tracing, by means of which the suggestion constituting the design may be imparted to others. A person looking at the drawing must be able to form a mental picture of the shape, configuration, pattern or ornament of the article to which the design has been applied. Further, in the case of *Interlego* (supra) it was laid down that the purpose of design is not to protect the principles of operations or inventions which, if protected at all, must be made the subject matter of the patent. This process of operation or invention such as a moulding/engraving could at best be granted patent protection and thus, Mr. Jaitley,, s plea that such intermediary process be granted copyright protection cannot be accepted. Thus, what is granted is a right, over a lesser period, to prevent the manufacture and sale of articles of a design not substantially different from those industrially produced by the application of the registered design. The emphasis therefore, is upon the visual image conveyed by the manufactured article and thus the above judgment of *Interlego* (supra) also supports the case of the respondent, that the intermediary process of creation of a design from an original artistic work cannot be afforded protection under the Copyright Act if it crosses the lakshman rekha of having been applied more than 50 times industrially to produce an article.

43. Undoubtedly, it is true as contended by Shri Jaitley that the artistic work defined under Section 2(c) of the Copyright Act need not possess artistic quality. His plea about the copyright protection available to moulding/engraving/drawing is postulated on the above premise. Nevertheless, we cannot lose sight of the fact that the design, based upon a moulding or an engraving derived from the original artistic work, which is used for industrial application on an article and which evolves

during any process intermediate to the reproduction of the finally designed article, would not qualify as an artistic work. The case of *Dover LD* (supra) clearly requires the exercise of intellectual activity so as to originate some novel application and thus, this principle cannot be applied to a mould, or an engraving i.e. the intermediates which are mere derivatives of the original artistic work. In the case of *Pugh v. Riley* (supra) also it was held that a design is preceded by a drawing or tracing which incorporates the design to be imparted to produce the designed article and upon being applied to an article become incapable of being registered as a design.

Thus, the interpretation as suggested by the appellant would have the effect of rendering the design legislation in India redundant as every design could have its origin to an intermediate product such as a engraving, mould, diagram etc. It is also anti-competitive and stagnates innovativeness beside in effect negating the legislative intent of giving lesser protection of 15 years to a „design under the Designs Act as compared to the larger protection of 60 years to an „artistic work under the Copyright Act.

44. We cannot accede to the plea of Shri Sanjay Jain that the intention of creating an artistic work would determine as to which enactment applies. The artist's intent at the time of creation of the artistic work is indecipherable at the best of times. Artists are governed more often than not by their emotions and moods and whatever be the intention at the time of the creation of the artistic work cannot, in our view, determine the nature of protection available to the artistic work. Indeed such a plea of Shri Ramachandran has already been rejected by us, as the stupendous and commercial success of a particular artistic work may spur on the artist to permit commercial utilization and exploitation of such a work of Art. To this extent, we agree with Mr. Praveen Anand that an intention of creation is difficult to ascertain and cannot form the basis of determining the rights. Thus, even if the original painting was intended to be created only as a work of art, a latter intention may transform it by its industrial application into a commercially viable object. To this extent, we agree with the plea of Shri Sanjay Jain that once the artistic work, by industrial application transforms into a commercially marketable artifact its design falls within the domain of the Designs 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.

45. Learned Counsel Shri Praveen Anand, appearing on behalf of the appellant in FAO (OS) No. 447/2008 has contended that there is a vital difference between the subject matter of copyright and design protection. In our view, while this plea is sustainable, nevertheless, it cannot be ignored that different kinds of protection for an artistic work, and the design founded upon the artistic work which is industrially and commercially exploited, has been intended by the Legislature. He has further submitted that what stands extinguished under Section 15 of the Copyright Act is the copyright in the design itself as applied to an article and not the copyright in the artistic work itself. There is no quarrel with this proposition. However, that does not advance the case of the appellant. We do hold that in the original work of art, copyright would exist and the author/holder would continue enjoying the longer protection granted under the Copyright Act in respect of the original artistic work. Thus, for instance a famous painting will continue to enjoy the protection available to an artistic work under the Copyright Act. A design created from such a painting for the purpose of industrial application on an article so as to produce an article which has features of shape, or

configuration or pattern or ornament or composition of lines or colours and which appeals to the eye would also be entitled design protection in terms of the provisions of the Designs Act. Therefore, if the design is registered under the Designs Act, the Design would lose its copyright protection under the Copyright Act but not the original painting. If it is a design registrable under the Designs Act but has not so been registered, the Design would continue to enjoy copyright protection under the Act so long as the threshold limit of its application on an article by an industrial process for more than 50 times is reached. But once that limit is crossed, it would lose its copyright protection under the Copyright Act. This interpretation, in our view, would harmonize the Copyright and the Designs Act in accordance with the legislative intent.

46. We thus summarize our findings as follows:

- a. The definition of „artistic work“ has a very wide connotation as it is not circumscribed by any limitation of the work possessing any artistic quality. Even an abstract work, such as a few lines or curves arbitrarily drawn would qualify as an artistic work. It may be two dimensional or three dimensional. The artistic work may or may not have visual appeal.
- b. The rights to which a holder of an original artistic work is entitled are enumerated in Section 14(c) of the Copyright act. c. It is the exclusive right of the holder of a Copyright in an original artistic work to reproduce the work in any material form. For example, a drawing of an imaginary futuristic automobile, which is an original artistic work, may be reproduced in the three-dimensional material form using an element, such as a metal sheet.
- d. The design protection in case of registered works under the Designs Act cannot be extended to include the copyright protection to the works which were industrially produced.
- e. A perusal of the Copyright Act and the Designs Act and indeed the Preamble and the Statement of Objects and Reasons of the Designs Act makes it clear that the legislative intent was to grant a higher protection to pure original artistic works such as paintings, sculptures etc and lesser protection to design activity which is commercial in nature. The legislative intent is, thus, clear that the protection accorded to a work which is commercial in nature is lesser than and not to be equated with the protection granted to a work of pure art.
- f. The original paintings/artistic works which may be used to industrially produce the designed article would continue to fall within the meaning of the artistic work defined under Section 2(c) of the Copyright Act, 1957 and would be entitled to the full period of copyright protection as evident from the definition of the design under Section 2(d) of the Designs Act. However, the intention of producing the artistic work is not relevant.

g. This is precisely why the legislature not only limited the protection by mandating that the copyright shall cease under the Copyright Act in a registered design but in addition, also deprived copyright protection to designs capable of being registered under the Designs Act, but not so registered, as soon as the concerned design had been applied more than 50 times by industrial process by the owner of the copyright or his licensee. h. In the original work of art, copyright would exist and the author/holder would continue enjoying the longer protection granted under the Copyright Act in respect of the original artistic work per se.

i. If the design is registered under the Designs Act, the Design would lose its copyright protection under the Copyright Act. If it is a design registrable under the Designs Act but has not so been registered, the Design would continue to enjoy copyright protection under the Act so long as the threshold limit of its application on an article by an industrial process for more than 50 times is reached. But once that limit is crossed, it would lose its copyright protection under the Copyright Act. This interpretation would harmonize the Copyright and the Designs Act in accordance with the legislative intent."

(emphasis added by me).

15. The underlined and emphasised portions of the above paragraphs leave no manner of doubt that it has been held by the Hon ble Division Bench of this Court, and which is binding upon this Court, that once a drawing, a sketch or a design is used for creation of dresses, then, once the dresses cross 50 numbers, no copyright can subsist in the drawing and sketch under the Indian Copyright Act because of the language of Section 15(2) of the Indian Copyright Act. The Hon ble Division Bench of this Court in Microfibre's case (supra) has noted that the legislature intended to give lesser period of protection to a copyright when from the copyright a design is created which is applied for commercial purposes. The Hon ble Division Bench has also clearly observed that if the interpretation as is sought to be urged by the plaintiff in this case, and which was also urged on behalf of the plaintiff in that case is accepted, then registrations of designs would be rendered meaningless (vide paras 37 & 41). The Division Bench in para 42 of its judgment has also observed that the interpretation as is canvassed on behalf of the plaintiff in the present case, and which is also canvassed in that case of entitlement of protection under the Indian Copyright Act even if the design is not registered under the Designs Act, would lead to a design under the Designs Act being given protection of copyright even under the Indian Copyright Act as an original artistic work resulting in rights being enforced simultaneously under the Indian Copyright Act and the Designs Act which was not the intention of the legislature. In para 43 of the judgment, the Division Bench has clearly observed that an interpretation to give protection under the Indian Copyright Act although the drawing, sketch or design is to be registered under the Designs Act would result in the Designs Act being redundant because every design for its origin would have an intermediate product such as engraving or mould or diagram.

The same aspect is reiterated in para 45 of the judgment in Microfibre's case (supra) clearly holding that if the design is not registered under the Designs Act, the design will lose its copyright protection

under the Indian Copyright Act and the copyright will subsist only till the threshold limit of application of a copyright to an article by an industrial process is upto 50 times in number and once that limit is crossed, the design loses protection as a copyrighted work under the Indian Copyright Act. This is finally so stated in para 46 (i) of the judgment by observing that the interpretation given in the Microfibre's case (supra) would harmonize the Indian Copyright Act and the Designs Act in accordance with the legislative intent.

16. In view of the categorical ratio in Microfibre's case (supra), it is not permissible for the plaintiff to reargue the case noting that the same counsel who appears for the plaintiff in the present case had unsuccessfully argued the same aspects before the Division Bench in Microfibre's case (supra).

17. Reliance placed by the plaintiff upon the judgment in the case of Midas Hygiene Industries Pvt. Ltd.(supra) is clearly misconceived as the judgment in the case of Midas Hygiene Industries Pvt. Ltd. (supra) dealt with the application of a copyright work to a carton or a packaging and accordingly observations were made. Midas Hygiene Industries Pvt. Ltd.

(supra) was not a case of application of a copyright work by creating an article more than 50 times by an industrial process or means. For the sake of completeness let me refer to para 25 of this judgment in the case of Midas Hygiene Industries Pvt. Ltd. (supra) which is being relied upon by the plaintiff and which para 25 reads as under:

"25. The label is clearly both a trademark, as it indicates the brand and the origin (i.e. the manufacturer or producer) as well as a copyright, as it contains a combination of colours and stylized lettering, set in red colour, with the image of a cockroach. The expression "LAXMAN REKHA" and the other one, "KRAZY LINES" are at least in combination with the colour scheme and get up, trade-marks; hence they are labels and clearly excluded from the definition of "designs".

Furthermore, the respondent nowhere asserts that there are novel or new elements in the shape or configuration of the packaging which deserve design protection. By virtue of Section 4 (c) design registration is refused if the work is "not significantly distinguishable from known designs or combination of known designs..." It is not shown how the packaging or label upon it, in this case is so unique or novel as to distinguish it from known designs. The object of the Designs Act is to confer protection to novel and unique designs. If every object based upon some drawing were afforded design registration, soon, objects of common utility- vessels, containers, furniture items, etc. could not be replicated. Therefore, it is held that apart from the fact that the work in the present case was copyrighted as an artistic work and thus stood excluded from the definition of design- as well as the fact that it was a trademark label, it is also held that it cannot also qualify for design registration- the sole condition for operation of Section 15 (2). The respondent had urged that the artistic work does not qualify for registration because it is not original or creative. However, there is no discussion on the issue by the Board."

18. I do not find anything in para 25 in Midas Hygiene Industries Pvt. Ltd.'s case (supra) to support the arguments urged on behalf of the plaintiff in the present case of a protection under the Indian

Copyright Act to continue although the copyright is capable of being registered as a design under the Designs Act but not registered and the copyrighted drawings, sketches or designs having applied to produce an article more than 50 times in number by an industrial process or means.

19. It is very relevant to note that the observations which are made by a court in a judgment have necessarily to be related to the facts of the case and the ratio of a case cannot be dehors the facts of the case as held by the Constitution Bench judgment of the Supreme Court in the case of Padma Sundara Rao (Dead) and Others Vs. State of T.N. and Others, (2002) 3 SCC 533. Para 9 of this judgment is relevant and which reads as under:-

"9. Courts should not place reliance on decisions without discussion as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in *Herrington v. British Railways, Board*. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases."

(underlining added)

20. Therefore, observations made by the Division Bench in the case of Midas Hygiene Industries Pvt. Ltd. (supra) were in the facts of that case of applying copyright work as it is to a carton or a packaging, and such observations therefore cannot be read with respect to copyright continuing to exist although from the copyrighted work articles are manufactured by an industrial process or means more than 50 times in number.

21. The judgment in the case of Rajesh Masrani (supra) is also not applicable for the same reason that the facts of the said case were different and again the ratio of the Constitution Bench case in Padma Sundara Rao (Dead) and Others (supra) is reiterated that the issue of interpretation of Section 15(2) of the Indian Copyright Act never came up in Rajesh Masrani's case (supra) as the admitted position in that case was that the limit of 50 number of articles produced from the copyright work was not crossed. The Division Bench in Rajesh Masrani's case (supra) in paras 27 and 28 distinguished the judgment of a learned Single Judge of this Court in the case of Micro Fibre Inc Vs. Girdhar & Co., 2006 (32) PTC 157, and which ultimately went up in appeal and was decided by the Division Bench in Microfibre's case (supra) of 2009. These paras 27 and 28 of the Division Bench in Rajesh Masrani's case (supra) distinguish the observations of the said case from the issue in the case before the Division Bench in Microfibre's case (supra) (and in this case), and these paras 27 and 28 of Rajesh Masrani's case (supra) read as under:

"27. We may mention that in support of his plea, the learned Counsel for the Defendant has strongly relied upon the judgment of this court in the case of Micro Fibre Inc v. Girdhar and Co. 2006 (32) PTC 157. He referred various paras of the said judgment, particularly Paras 62 and 72 said judgments which are reproduced as under:

"62. In order for the work of the plaintiff to qualify as an 'artistic work', it must fall within the definition of Sub- section (c) of Section 2 of the Copyright Act. A reading of the said provision would show that attempt of the plaintiff can only be to bring it within the concept of 'painting'. The comparison with the painting of M.F. Hussain would be otiose as the work in question, in the present case, is not a piece of art by itself in the form of a painting. There is no doubt that labour has been put and there is some innovativeness applied to put a particular configuration in place. Such configuration is of the motifs and designs which by themselves would not be original. The originality is being claimed on the basis of the arrangement made. What cannot be lost sight of is the very object with which such arrangements or works had been made. The object is to put them to industrial use. An industrial process has to be done to apply the work or configuration to the textile. It is not something which has to be framed and put on the wall or would have any utility by itself. The two important aspects are the object with which it is made (which is industrial) and its inability to stand by itself as a piece of art. In fact, it has no independent existence of itself.

72. The conspectus of the aforesaid shows that what the plaintiff was actually required to do was to register the designs which the plaintiff has failed to do. The designs are older and, thus, would have been registrable under the Designs Act of 1911. The plaintiff failed to register the designs. Insofar as the Designs Act of 2000 is concerned, the plaintiff has also admittedly not registered the designs under the said Act. It has already been discussed above that these designs were capable of registration under the earlier and the current Designs Acts. In fact, the Registrar of Designs had confirmed vide letter dated 19.07.2002 that the fabric designs continued to be registered under the Designs Act of 2000. The plaintiff had even initiated criminal proceedings where certain reports were filed by the investigative agency saying that the offences were really under the Designs Act and not under the Copyright Act. However, it is not necessary to dwell greater in respect of that matter. It would suffice to say that the patterns and designs of the plaintiff were capable of registration both under the old Act and the new Act and the plaintiff failed to do so with the result that the protection is not available to the plaintiff which would have arisen if they had been so registered. The said issues are answered accordingly."

28. The above said case, in our view, is on an entirely different footing from the present case for the following reasons:

a) In the present case, as per the pleadings, the work in question has not been reproduced more than 50 times by an industrial process by the plaintiff. In the case of Micro Fibre (supra), the court has specifically noticed and highlighted in Para 62 of the said judgment, the fact that the intent of creating the design in question was to put them into industrial use and the production of the said work had occurred more than 50 times as mentioned in Para 73 of the said judgment.

b) The court has also noticed in Para 47 of the said judgment that the subject matter of the work in dispute are floral design which are applied upon fabric used for upholstery through the industrial process and the plaintiff has registered the subject matter of the work of design in United Kingdom and the said certificates of registration have also been placed on record.

c) In Para 72 of the judgment, it was further held that the plaintiff failed to register the designs which were capable of being registered under the Designs Act, therefore, the protection of copyright in the design was not available to the plaintiff.

In the present case all the above said aspects are absent and, therefore, the said judgment is not applicable to the facts and circumstances of the present case. Moreover as we have already come to the conclusion that the subject matter comes under Section 2(c) of the Copyright Act, this judgment does not help the case of the appellant."

22. Learned counsel for the plaintiff placed strong reliance upon para 26 of the judgment in Rajesh Masrani's case (supra) in support of the plaintiff's arguments and this para 26 reads as under:

"26. We are, therefore, of the opinion that the plaintiffs' work is entitled for protection under Section 2(c) of the Copyright Act and is an original artistic work. Since the work is an 'artistic work' which is not covered under Section 2(d) of the Designs Act, 2000, it is not capable of being registered under the Designs Act and the provision of Section 15(2) is not applicable."

23. The aforesaid para 26 of the judgment in Rajesh Masrani's case (supra) holds and proceeds on the basis that the copyright work which is the subject matter of the Indian Copyright Act being an artistic work is not covered under the Designs Act because it is not capable of being registered under the Designs Act resulting in Section 15(2) of the Indian Copyright Act being not applicable. It is however noted that these observations were made in the facts of that case which are different from the facts in Microfibre's case (supra) and which points of distinction have been stated by the Division Bench itself in Rajesh Masrani's case (supra) in para 28 which has been reproduced above. Plaintiff cannot therefore derive any benefit of para 26 of the judgment in Rajesh Masrani's case (supra).

24(i) At this stage, I would like to refer to the argument urged on behalf of the plaintiff that copyright work is excluded by the definition of designs and therefore once a copyright cannot be registered as a design by virtue of definition of design under the Designs Act, hence, the copyright will have an independent protection than the subject matter of design under the Designs Act. What is essentially sought to be argued is that since a copyright artistic work is excluded from the definition of a design, therefore, a copyright work does not fall within the scope of the design and hence does not fall within the scope of Section 15(2) of the Indian Copyright Act.

(ii) This argument urged on behalf of the plaintiff is misconceived for the reason that Section 15 (2) of the Indian Copyright Act uses the expression "capable of being registered" i.e it is capable though

not actually so registrable as a design because of the definition of design under the Designs Act excluding copyrighted artistic work. Legislature has consciously used the words "capable of being registered" meaning thereby the possibility of a copyrighted sketch or drawing or artistic work being also capable of being registered as a design though excluded from the definition of design. The legislature deliberately used the word capable in Section 15(2) of the Indian Copyright Act. Therefore, it is not necessary that a drawing or a sketch or a design must fall within the definition of design under the Designs Act and only then can it be said that it will fall under Section 15(2) of the Indian Copyright Act, inasmuch as, such an argument overlooks the expression "capable of being registered" deliberately so used under Section 15(2) of the Indian Copyright Act.

25. Finally, I would like to note that counsel for the plaintiff sought to argue that there are judgments of foreign courts and there are judgments of other High Courts which take different views than the view taken in Microfibre's case (supra), however, there is no need for me even to refer to such judgments, inasmuch as, I am bound by the ratio given by the Division Bench of this Court and I cannot decide a case in violation of a ratio of the judgment of the Division Bench of this Court. Thus, arguments accordingly sought to be urged cannot be raised before this Court and can only be raised before a Bench larger than the Division Bench of this Court inasmuch as decision in Microfibre's case (supra) is a decision of a Division Bench of this Court.

26. Lastly, I may note that in the facts of the present case it is not as if the copyright work in itself is reprinted so to say on the dresses which are created by the defendant. If the facts were that from the copyrighted works of the plaintiff prints were created and such prints which have protection under the copyright work are as it is lifted and printed upon the dresses of the defendant, may be in such a case without saying so finally on this aspect, an issue of violation of the copyright of the work of the plaintiff under Indian Copyright Act may have arisen. However, in the facts of the present case the defendant is creating dresses or creating articles by an industrial means and process by application of the design or drawing or sketch and the defendant is not as it is affixing a print taken from the copyrighted work of the plaintiff as a print on a dress created by the defendant. Issue in the present case therefore will not be a violation of a copyright of the plaintiff under the Indian Copyright Act.

27. So far as the issue of violation of trade secrets is concerned, it is noted that firstly paras 16 and 17 of the plaint are far too general to make out such a case and for passing an order as to so called trade secrets which are being not specifically talked of and pleaded by the plaintiff. If an injunction order is sought with respect to trade secrets then such specific trade secrets have to be mentioned and as to how those trade secrets are in the ownership of the plaintiff, and only thereafter the court can consider the grant of any injunction order on the basis of specified trade secrets and it cannot be that a general order can be passed that there is presumed to be a trade secret of the plaintiff and the defendant to be enjoined with respect to that unspecified trade secret which is not described in the plaint, and with respect to which thus no specific injunction order qua specific trade secret can be passed.

As a matter of abundant caution during the course of arguments I put it to the counsel for the plaintiff as to what are the trade secrets which the plaintiff has and to which counsel for the plaintiff argued that they are the same sketches, drawings and designs in which copyright is claimed by the

plaintiff and which are taken away by the erstwhile employees of the plaintiff and used by the defendant. Therefore really the issue once again is nothing but of application of Section 15(2) of the Indian Copyright Act and not with respect to any trade secret dehors the provisions of the Indian Copyright Act and the Designs Act.

28. In view of the above, it is found that the present suit is barred by Section 15(2) of the Indian Copyright Act read with the ratio of the Division Bench of this Court in the case of Microfibres (supra), and therefore, the suit is dismissed, leaving the parties to bear their own costs.

MARCH 23, 2016
neelam/godara

VALMIKI J. MEHTA, J