

Rajesh Masrani vs Tahiliani Design Pvt. Ltd. on 28 November, 2008

Equivalent citations: AIR 2009 DELHI 44, 2009 (2) ALL LJ NOC 351, 2009 (2) AJHAR (NOC) 608 (DEL), 2009 AIHC NOC 304, (2009) 39 PTC 21, 2009 (2) ALJ (NOC) 351 (DEL.), 2009 (2) AJHAR (NOC) 606 (DEL.), 2009 (2) AKAR (NOC) 285 (DEL.), 2009 AIHC (NOC) 304 (DEL.)

Author: Manmohan Singh

Bench: A.K. Sikri, Manmohan Singh

* HIGH COURT OF DELHI : NEW DELHI

+ FAO (OS) No.393/2008

Judgment Reserved on : 4th November, 2008

% Judgment pronounced on : 28th November, 2008

Rajesh Masrani ...Appellant
Through : Mr. Manoj Swarup, Adv. with Mr. Akshat
Goel, Adv.

Versus

Tahiliani Design Pvt. Ltd.Respondent
Through : Mr. Pravin Anand, Adv. with Ms.
Divya Arora, Adv.

Coram:

HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE MANMOHAN SINGH

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest? Yes

MANMOHAN SINGH, J.

1. The present appeal has been filed under Order XLIII Rule 1 CPC against the order dated 16th July, 2008 passed by the learned Single Judge of this court allowing the application of the respondent (plaintiff in the suit) under Order XXXIX Rule 1 and 2 CPC for restraining the appellant/defendant

from reproducing, printing, publishing and distributing, selling or offering for sale prints in any form, whatsoever that are colourable imitation or substantial reproduction of the plaintiff's fabric prints including the underlying drawings/sketches thereof and dismissing the application of appellant (defendant in the suit) under Order XXXIX Rule 4 CPC read with Section 151 for vacation of ex-parte injunction order passed by this court on 2nd February, 2007.

2. The Plaintiff-Respondent herein filed a suit CS (OS) No. 183/2007 on 01.02.2007 seeking a decree of permanent injunction, damages and rendition of accounts against the defendant for infringement of the Plaintiff's alleged copyright in the designs allegedly developed by the Plaintiff.

3. The Plaintiff, Tahiliani Design Pvt. Ltd. is a Private Limited Company under the creative leadership of Mr. Tarun Tahiliani. It has a major presence in the fashion industry in India and enjoys a global reputation and has over 80 outlets in 20 countries.

4. In September 2003, he became the first Indian designer to showcase his work at the prestigious Milan Fashion Week. He has been awarded the Moët and Chandon Fashion Tribute 2004 Award for Designer of the Year for India, and was invited to represent India at Hong Kong in October 2004. He was also awarded the F Award 2004 for Best Women's Designer for Couture.

5. It is alleged that the drawings which are made in the course of developing the garments and accessories by the plaintiff are artistic works under Section 2(c)(i) of the Copyright Act, 1957. The patterns printed or embroidered on the fabric are also artistic works in their own right and are developed by the plaintiff. The garments or accessories themselves are works of artistic craftsmanship under Section 2(c)(iii) of the Act, while the patterns printed or embroidered on the fabric are also artistic works in their own right. The Plaintiff does its creative work on computers and claims to be the author under Section 2(d) (vi) of the Copyright Act. The Plaintiff claims to be the first owner of Copyright in all the products of the company under Section 17(c) of the Copyright Act.

6. The plaintiff alleges infringement of copyright by the defendant on the ground that there is a colourable imitation or substantial reproduction of the plaintiff's fabric prints including the underlying drawings/sketches thereof, or of any other of the plaintiff's copyrighted works including works of artistic craftsmanship or other literary or artistic works.

7. The learned single Judge by the impugned order has confirmed the ex parte ad interim injunction granted on 2nd February, 2007. Against this order, the present appeal has been filed on the following contentions by the Defendant.

8. CONTENTIONS OF THE DEFENDANT

a) The plaintiff is not registered under The Designs Act, 2000 which is mandatory for seeking protection under it, thus he has no right to claim protection under the above Act.

b) The plaintiff is also not the registered owner of the copyright, hence, he has no right to claim protection under the Copyright Act, 1957.

c) The plaintiff has no right to claim protection under the Copyright Act as the artistic work for which copyright is alleged to exist is actually 'design' which comes under the purview of the Designs Act, 2000 and since the same are not registered under the Designs Act, the plaintiff is not entitled to protection under the said Act.

d) The textile design do not constitute 'artistic work' within the meaning of Section 2(c)(i) of the Copyright Act, 1957 and is, therefore, not capable of protection. The suit of the plaintiff is liable to be dismissed in view of Section 15 of the Copyright Act, 1957 as no copyright subsist under the said provision of the Act. CONTENTIONS OF THE PLAINTIFF

9. Mr. Praveen Anand, learned counsel for the plaintiff has made the following submissions:-

(a) The protection of the Copyright Act, 1957 was available to the plaintiff in view of the fact that the plaintiff is the author/owner of the copyright in the creative work done by Mr. Tarun Tahiliani for and on behalf of the plaintiff, or by designers employed by the plaintiff-company.

(b) The drawings which are made in the course of developing the garments or accessories are 'artistic work' within the meaning of Section 2(c) (i) of the Copyright Act.

(c) The prints, which are the subject matter of the present suit, belong to the couture line and not more than twenty or possibly fewer copies are made of any single costume.

(d) 'Artistic work' is distinct from 'design' and remains 'artistic work' per se distinct from the 'garment' to which it is applied and, therefore, is covered under the exclusion contained in Section 2(d) of the Designs Act, 2000.

(e) In order to get the protection under the Copyright Act, there is no condition that the copyright must be registered under the Copyright Act, 1957. In case the subject matter of the product is covered within the definition of Section 2 of the Copyright Act which is original artistic work, the case for infringement of copyright is made out within the meaning of Sections 13 and 14 of the Copyright Act.

10. We have heard learned counsel for the parties and have also gone through the relevant pleadings and documents. We feel that the main controversy that arises in the present case is as under:-

a) Whether the pattern made by the plaintiff on the fabric is 'design' or 'artistic work'?

b) Whether the product in question is the subject matter of artistic work within the meaning of Copyright Act, 1957 as alleged by the plaintiff?

c) Whether the copyright subsists in the plaintiff's agreements in view of Section 15 of the Copyright Act, 1957?

d) Whether the registration of the work under the Copyright Act is compulsory or registration is not a condition precedent for maintaining the suit for infringement of copyright.

11. In order to appreciate the contention of the parties and the questions involved in the matter, it is necessary that we deal with certain provisions of the Copyright Act, 1957, Designs Act, 1911 and Designs Act, 2000.

12. Section 15 of the Copyright Act, 1957 which is relevant in the present case deals with the special provision regarding copyright in designs registered or capable of being registered under the Designs Act, 1911 which reads as under:-

"15. Special provision regarding copyright in designs registered or capable of being registered under the 1[***] Designs Act, 1911.--(1) Copyright shall not subsist under this Act in any design which is registered under the 2[***] Designs Act, 1911 (2 of 1911).

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

13. As it is the admitted case of the parties that the plaintiff is not holding any registration under the Designs Act, it is clear that Section 15(1) as referred above is not applicable in the facts and circumstances of the present case. Section 15(2) of the Copyright Act is applicable to the copyright in any design capable of being registered under Designs Act, 1911 but has not been registered and the copyright in the said design cease to exist as soon as any article to which the design has been applied has been reproduced more than 50 times by an industrial process.

14. In the present case as per the averments made by the plaintiff, not more than 20 pieces of any single costume have been produced by the plaintiff due to the fact that the said costume are exclusive and element of this mode of business is very limited and only handful copies are made by the plaintiff. In view of the said submission made by the plaintiff in the pleadings which could not be controverted by the defendant, it appears that the subject matter of the work in dispute does not cease to subsist by Section 15(2) of the Copyright Act, 1957.

15. Now the question arises as to whether the work in question is covered within the meaning of Section 2(c) of the Copyright Act or whether it is a 'design', or capable of being a design, within the meaning of Designs Act, 2000. To deal with this issue, we may refer to certain definitions in Designs Act and Copyright Act.

16. Section 2(1) (5) of Designs Act, 1911 and Section 2(d) of the Designs Act, 2000 reads as under:-

"Section 2 Definitions :

(5) "design" means only the features of shape, configuration, pattern or ornament applied to any article 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 2[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)"

"Section 2 Definitions:

(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 an 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 or property mark as defined in Section 479 of the Indian Penal Code or any artistic work as defined in clause (c) of Section 2 of the Copyright Act, 1957."

17. As mentioned earlier, under Section 15(2) of the Copyright Act, in case the copyright in any design which is capable of being registered under the Designs Act, 1911 but which has not been so registered, shall cease to exist as soon as any article to which the design has been applied has been reproduced more than 50 times by an industrial process. The definition of 'Design' in the Designs Act, 1911 is different from the definition of 'Design' in the Designs Act, 2000. Section 2(d) of the Designs Act, 2000 does not include any 'artistic work' as defined in clause (c) of Section 2 of the Copyright Act. It is clear from the meaning of the design under the Designs Act, 2000 that the artistic work as defined in Section 2(c) of the Copyright Act, 1957 is excluded if any party is able to bring his case within the framework of Section 2(c) of the Copyright Act, 1957 while claiming a copyright, then the suit for infringement of copyright is maintainable. Section 2(c) of the Copyright Act, 1957 reads as under:-

Section 2. Interpretation

(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) a work of architecture; and

(iii) any other work of artistic craftsmanship;

18. In the present case, the plaintiff has made a specific statement in Paras 3 to 5 of the plaint to the effect that the garments in question are original artistic work and are covered under Section 2(c)(i) and Section 2(c)(iii) of the Copyright Act. Paras 3 to 5 of the plaint are reproduced below:-

"3. The Plaintiff's business depends on the continuous introduction, under Mr. Tarun Tahiliani's creative leadership, of new apparel of a high quality, which is distinctive of the Studio, is exclusive to it, and also reflects and innovates the changing current trends in fashion. This is an extremely competitive business and, further, since its products enjoy only a transient marketability, success in this business requires continuous and sustained creativity, producing new and innovative products to meet the changing requirements of the market.

The effective protection of its intellectual property is central to the viability of such a business in the contemporary environment. Drawings, which are artistic works under Section 2(c) (i) of the Copyright Act, 1957 (hereinafter referred to as the "Act") are made in the course of developing both the garments or accessories as such and of patterns for printing and/or embroidering on the fabric used. The garments or accessories themselves are works of artistic craftsmanship under Section 2(c)(iii) of the Act, while the patterns printed or embroidered on the fabric are artistic works in their own right.

The Plaintiff also brings out catalogues, which are composite literary and artistic works and are, in addition, compilations of works protected as literary works under Section 2(o) of the Act. The Plaintiff does its creative work on computers or is the author, under Section 2(d)(vi) of the Act, of any portion of its work that may be described as computer-generated.

4. All the Plaintiff's creative work is done either by Mr. Tarun Tahiliani, for and on behalf of the Plaintiff Company, or on the basis of his concept, guidance, and detailed instructions and executed under his close supervision throughout the process. He is assisted by designers who are employed by the Plaintiff Company under contracts of service, and whose main function is to execute and complete the concepts that he creates; the contracts of service of two employees who assisted in the creation of the works which are the subject of the present suit, are filed in the present proceedings.

The Plaintiff Company is thus the first owner of copyright in all the products of the company, either as the corporate author thereof or, in the case of work identifiably done by employees under contracts of service, under Section 17(c) of the Act."

5. The process from creation to execution of an artwork on a finished garment at the Plaintiff's studio comprises the following steps:

(a) First the pattern is created on the computer by Mr. Tarun Tahiliani and/or other designers employed by the Plaintiff.

This stage continues till the finalisation of the pattern to make it print-worthy.

(b) Secondly the "print" is sent for "swatching" i.e. preliminary printing in actual size.

(c) The third stage commences with the evaluation of the swatches. If the results are not satisfactory, changes are made which are tested on further swatches. The team then "freezes" the final, satisfactory outcome, and a master file is generated.

(d) Fourthly, after further processing, samples are made for the purpose of showing to buyers. It is on the basis of these samples that orders are taken.

(e) The fifth stage involves the making of production files, which are sent on DVD to the Production Department which in turn send them to a specialized printer.

(f) In the sixth stage, the specialized printer reproduces the final print on the fabric.

19. There is no specific denial by the defendant in the written statement filed by him except in Para 3 where it is urged that the work in question is not covered under Section 2(c)(iii) of the Copyright Act and the said fabric are designs which are registered under the Designs Act, 1911 or under the new Designs Act of 2000.

20. Before coming to the rival contentions of the parties, let us examine the factual position in the matter for infringement of copyright. The plaintiff has given comprehensive detail for infringement of copyright of their work in paras 13 to 15 of the plaint. The said paras of the plaint read as under :

"13. Photographs of the sample swatches of the Plaintiff's prints and the infringing swatches of the Defendant's prints are filed in these proceedings, together with computer printouts of the original prints collated from the Plaintiff's digital collection along with the infringing prints as obtained from the Defendant's DVD.

The sample swatches/ prints filed in the present proceedings are marked T-1, T-2, T-3, T-4, T-5 and T-6 contain the Plaintiff's original works, while those marked M-1, M-2, M-3, M-4, M-5 and M-6 contain the Defendant's infringing works. Of these T-1, T-2, T-3 and T-6 which are coded within the Plaintiff's organization as KSJ, KLJ,

KMJ and KLG have been created by Kunal Dass, a designer employed by the Plaintiff and the copyright in the same is assigned to the Plaintiff by virtue of the said employment contract. The artwork numbered as T-4 and T-5 have been created by Tanvi Kedia and are coded in the Plaintiff's organization as TZG and TLG respectively. The copyright in the same is assigned to the Plaintiff by virtue of the said employment contract. The latter swatches were handed over by the printer Mr. Siddharth Jain to the Plaintiff, who also forwarded the Defendants' DVD containing the infringing prints to the Plaintiffs and a copy was made of the same. Individual instances of reproduction of the Plaintiff's work, in the case of the artistic works contained in these swatches, are described below:

Plaintiff's work titled KSJ from the Defendant's work Autumn Winter 2006-07 (Filed in the present proceedings collection (Filed in the present under as M-1) proceedings under as T-1) An Indo-western print An Indo-western print characterized by the prominent characterized by the prominent use of the colours pinkish-orange use of the colours pinkish-orange and yellow. and yellow with some visible smudging/running of colour.

The central motif is a glittering The central motif is a glittering diamond/ stone necklace with a diamond necklace with a large large fiery-red ruby pendant in an fiery-red ruby pendant in an assymetrical shape in the centre assymetrical shape in the centre and flanked by two smaller rubies and flanked by two smaller rubies on either side. The three rubies on either side. The three rubies give off a unique impression of give off a unique impression of flowing into each other. flowing into each other. Another string of diamond/ Another string of diamond/ stones follows the one on top, stones follows the one on top, encircling a Mughal miniature encircling a Mughal Miniature painig in an oval, stone-studded painig in an oval, stone-studded fame, followed by a central pear- frame, followed by a central pear-shaped motif encircling a kundan shaped motif encircling a kundan centerpiece and culminating in a centerpiece and culminating in a ruby and stone teardrop. ruby and stone teardrop. The second string of stones forms The second string of stones forms the line of demarcation for the the line of demarcation for the two colours with the top one- two colours with the top one- quarter comprising a self- quarter comprising a self- embossed yellow and the bottom embossed yellow and the bottom three-quarters comprising three-quarters comprising symmetrical vertical columns of symmetrical vertical columns of an overall orangish-pink hue. an overall orangish-pink hue. The columns in the bottom three- The columns in the bottom three- quarters contain intricate quarters contain intricate patterns of interwoven Indian patterns of interwoven Indian floral motifs that are repeated in floral motifs that are repeated in a four-column symmetry. a four-column symmetry. The overall impression is that of a The overall impression is that of uniquely different image with a an identical, poorly disguised and number of intricately woven poorly executed copy with no elements fused together with a attempt at originality; with the creative flair and resulting in an sole intent of reaping the fruits of overall print that is part-

the Plaintiff's creative labour. asymmetrical and fanciful and part-systematic and orderly; but wholly new.

14. Similarly, the swatch numbered T-2 (filed in the present proceedings), which is a print of the Plaintiff's KLG Spring Summer 2006 Collection, contains a very distinctive polychromatic floral combination with more than two dozen different blossoms and buds of different sizes, shapes and colours, which identifiably represent different floral species.

These are mostly in a cluster which extends upwards on the left and hangs downwards, tail-like, on the right. There is a large white daisy in the centre. There are three unattached flowers on the lower left side and one (to the left of the tail) on lower right rise of the work. Another very distinctive features of this work is the incorporation in it of precious stones, which are shown as if they were part of the flower. There are clusters of these, like peas in a pod or simply as an ornament on the petals of flowers, at the upper left and lower right sides of the cluster. In addition, pearls set like acorns lie on each petal of the central white daisy.

The cluster of flowers described above is set in a cream- coloured lace background with a self-embossed floral pattern. It is submitted that the swatch marked M-2 (filed in the present proceedings) which is the Defendant's work, is an slavish reproduction of the Plaintiff's artistic work on the swatch marked T-2, described above, in all its distinctive details and even its colours, against a lace-like background which, again, is brazenly reproduced. This reproduction by the Defendant is far too exact to have been created independently. Further, the difference in scale and size--the Defendant's is larger--in such an exact reproduction shows that the Defendant had obtained access to the Plaintiff's work in digital form.

15. The third swatch containing the Plaintiff's work is marked T-

3. This is a print of the Plaintiff's work titled KMJ from the its Autumn Winter 2006 Collection. This is a grey-black print on a white background, which uses floral and paisley motifs that are suggestive of Mughal inspiration. The heavy grey shading on one side fades sharply across the work, leaving about half of it pure black-and-white. The extracts from the Plaintiff's Look Book indicate the various colour options for the same print that are available to the consumer.

This same work is copied in the prints contained in the swatch marked M-3."

21. Here again, it is pertinent to mention that the defendant has not made any specific denial of the said averment made by the plaintiff pertaining to the allegation of infringement of copyright mentioned. He has only made the following statement to the said paras :

"13-15. That the contents of paras 13 to 15 of the plaint are wrong and hence denied. It is denied that the designs as referred as T-1 to T-6 are the original designs of the Plaintiff or that the said designs are registered under the Designs Act, 2000.

Plaintiff has dwelled extensively into comparison of two samples without establishment of his rights and without showing as to which right has been infringed."

22. From the above said averments, it is clear that there is hardly any denial made by the defendant of alleged infringement of copyright by him and it appears that it is a flagrant case of piracy of copyrights. The concept of copyright has been dealt by the Bombay High Court in the case of *Burroughs Wellcome (India) Ltd. Vs. Uni-sole Pvt. Ltd. and Another*; 1999 PTC Vol. 19 p 188 in the following words :

"8. Copyright it is a form of intellectual property. With advancement in technology it is very easy to copy. The basic test in actions based on the infringement of the copyright is that if a thing fetches a price, it can always be copied and therefore, it needs adequate protection. It is well settled that although under the Copyright Act 1957, there is a provision of registration, under Section 44 of the Act. It is not in doubt that the said procedure is an enabling provision and registration is not compulsory for the purpose of enforcing copyright. Section 44 of the Act provides for registration of work in which copyright exists but in order to claim copyright registration is not necessary. This is because registration is only to raise a presumption that the person shown in the certificate of registration is the author. This presumption is not conclusive, but no further proof is necessary unless there is a proof rebutting the contents of the said certificate. Under Section 48 of the Registration Act therefore, the act of registration is *ex- facie prima facie* evidence of the particulars incorporated in the certificate. There is no provision under the Act which deprives the author of his rights on account of non-registration of the copyright. There is nothing in the Act to suggest that the registration is condition precedent to the subsistence of the copyright or acquisition of copyrights or ownership thereof or for reliefs of infringement of copyrights. The *sine-qua-non* of existence of a copyright is expenditure of skill, labour and capital on any work expended by a person/author and unless the original work is produced in Court to *prima facie* show that the work has originated from author, no relief can be granted.

In other words, copyright exists even without it being registered for the purposes of its enforcement. The nature of copyright is also meant to be borne in mind. It subsists in any material form in which ideas are translated. Copyright is an incorporeal right. It does not lie in any idea, but it lies in the expression in which the idea is expressed. The work of an author therefore becomes the subject matter of the copyright. In essence the copyright is a negative right of preventing copying of physical material in the field of art, literature etc. Once an idea is written down, the writing becomes the subject matter of copy right. With globalisation and advancement of technology, even computer programmes come within the copyright. Any work conveying a particular information comes within the subject matter of a copyright and it needs protection. Even a catalogue of items manufactured by a manufacturer can come within the subject matter of copyright. Even a decoration or an artistic work on a carton or a

contained of goods can become the subject matter of copyright....."

23. In the case of Anglo-Dutch, Colour & Varnish Works Private Limited Vs. India Trading House; AIR1977 Delhi 41 it was held as under:

"I cannot see why other manufacturers should want to adopt the applicants' colour arrangements here except for the improper motive of trying to benefit from the latter's established goodwill." In this judgment, Garham, J. relied on the observations of Harman Lord Justice in the Court of Appeal in the case of F. Hoffmann-La Roche & Company A. G. and Another v. D.D.S.A. Pharmaceuticals Limited : (1972) R.P.C. 1(4). It is worthwhile to quote the words of Harman Lord Justice at page 20 : "Goods of a particular get-up just as much proclaim their origin as if they had a particular name attached to them, and it is well known that when goods are sold with a particular get-up for long enough to be recognised by the public as goods of a particular manufacturer it does not matter whether you know who the manufacturer is."

24. In the case of F. Hoffmann-La Roche & Company A.G. and another v. D.D.S.A. Pharmaceuticals Limited 1972 R.P.C. 1; it was held that:-

"The public are concerned with trade origin. Their confidence is built up in what they have already had. They want the same again. They may recognize the same again from the get-up where this is distinctive. The same again includes the fact that the product is from the same origin as they have already had."

25. In another case Tavener Rutledge Ltd. v. Specters Ltd. RPC 1959 (84); it was observed at para 15 that:-

".....It seems to me, going backwards in the order of the claims, that the Plaintiffs must succeed on the ground of infringement of copyright. The Plaintiffs' design was an artistic work within the meaning of the Copyright Act and it has been copied, there is no doubt about it at all. The small differences that have been introduced on behalf of the Defendants do not make any substantial difference: substantially, in the words of Sec. 49 of the Copyright Act, 1956, the Plaintiffs' work has been reproduced on behalf of the Defendants and, therefore, it seems to be quite plain that there has been an infringement of the Plaintiffs' copyright in their picture, which is quite an artistic picture within its limitations, and the Plaintiffs are entitled to succeed on that ground."

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 provisions of Section 15(2) is not applicable.

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 vs. Girdhar & Co. reported in 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 uphoisery 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.

29. It is well settled that a little difference in the facts or even one additional fact will make a lot of difference in the precedential value of a design (UP State Electricity Board vs. Puran Chand Chandra Pandey & Ors (2007(11) SCC 92).

30. The learned Judge of the trial court has also relied upon the quotation regarding the classic words of Lord Denning in support of the submission made by learned counsel for the plaintiff which is reproduced as under:-

"In the classic words of Lord Denning :-

Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."

31. Last issue which needs to be considered by us is whether registration is compulsory for claiming protection under Copyright Act or not.

OUR ANSWER IS : REGISTRATION OF COPYRIGHT IS NOT COMPULSORY

32. Learned counsel for the plaintiff has relied upon a number of judgments to support his submission that the registration of copyright is not compulsory under the Copyright Act in order to maintain a suit for infringement of copyright.

33. A person has an inherent copyright in an original composition or compilation without the necessity of its registration. [Satsang and another vs. Kiron Chandra Mukhopadhyay and ors; AIR 1972 Calcutta 533 (V 59 C 114)]. Registration of the work under the Act is not compulsory and registration is not a condition precedent for maintaining a suit for damages for infringement of copyright. The safest test to determine whether or not there has been a violation of copyright is to find out if the reader, spectator or viewer after having read or seen both the works can get an impression that the impugned work or film is an imitation of the other. In the instant case, no prudent man who has seen the film and read the novel Alayazhi will come with an impression that the former is an imitation of the latter. (R. Madhavan vs. S.K. Nayar; AIR 1988 Kerala 39). Registration of such right under Sec. 44 of the Act is not a condition precedent for availing the remedy, such as suing for an injunction restraining infringement of the right, damages and for accounting. Provision for registration under Section 44 is not mandatory but only intended to provide for prima facie proof of the particulars regarding the right as stated in Section 48. (Nav Sahitya Prakash and ors. v. Anand Kumar and Ors.; AIR 1981 Allahabad 200).

34. It is settled law that registration of the work is not compulsory and is not a condition precedent for maintaining a suit for damages for infringement of Copyright. The plea of the plaintiff that to claim protection under Copyright Act, registration is compulsory is, therefore, untenable.

35. The learned Single Judge, while confirming the order, has specifically come to the conclusion that after having gone through the pleadings and documents, the plaintiff has made out a prima facie case for confirmation of the ex parte injunction. The learned Single Judge in continuation of the said ex parte order has held that during the pendency of the suit, the defendant is capable of causing irreparable loss to the plaintiff by unabatedly copying the creative work of the plaintiff.

36. Even otherwise, the scope and extent of the power enjoyed by the Appellate Court in interfering with a detailed order passed in exercise of discretion by the learned Trial Judge are limited and the circumstances in which the discretion exercised by the learned Single Judge require consideration have been discussed by the Apex Court in the case of Wander Ltd. vs. Antox India Pvt. Ltd.; 1990 (Suppl.) SCC 727 at page 733 wherein the Apex Court has held that in an appeal against the exercise of discretion by the learned Single Judge, the Appellate Court will not interfere with the exercise of discretion by the first Court except under some limited circumstances. The relevant observation of the Apex Court is extracted as under:

"14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the Appellate Court will not interfere with the exercise of discretion of the Court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the Court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the Court below if the one reached by that Court was reasonably possible on the material. The Appellate Court would normally not be justified in interfering with the exercise of

discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the facts that the Appellate Court would have taken a different view may not justify interference with the trial court's exercise of discretion."

37. We make it clear that any observation made herein shall be treated as tentative in nature and shall not constitute any expression of final opinion on the issues involved in Appellant's suit and shall have no bearing on the final merit of case and submissions of the parties in the suit.

38. As we are not inclined to interfere with the impugned order passed by the learned Single Judge, the appeal is hereby dismissed.

No costs.

MANMOHAN SINGH, J.

November 28, 2008
sa/nn

A.K. SIKRI, J.