

Escorts Const. Equipment Ltd. & Anr. vs Action Const. Equipment P. Ltd. & Anr. on 16 October, 1998

Equivalent citations: AIR 1999 DELHI 73, 1999 (1) ARBI LR 282, 1999 (1) ADDEL 299, (1999) 2 CIVILCOURTC 154, (1999) 1 ARBILR 282, (1999) 77 DLT 276, (1999) 1 CURCC 557

Author: M.S.A. Siddiqui

Bench: M.S.A. Siddiqui

ORDER

M.S.A. Siddiqui, J.

IA No. 2460 and 4638/98

1. The plaintiffs have filed this suit for permanent injunction restraining infringement of copyright of industrial drawings and passing off, damages and for rendition of accounts. Along with the plaint, the plaintiffs have also filed an application under Order 39 rules 1 and 2 CPC seeking an ad interim injunction to restrain the defendants from manufacturing, marketing or otherwise dealing in Pick-N-Carry Hydraulic Self Mobile Cranes, identical or deceptively similar to those of the plaintiffs.

2. According to the plaintiffs, in 1971, the plaintiff No. 2 company, based on 100% know-how, launched its concept and drawings of Pick-N-Carry Hydraulic Self Mobile Cranes and the plaintiffs have been manufacturing and marketing the said cranes since then. The drawings of the crane developed by the plaintiffs were reduced to writing. The employees involved in the making of these industrial drawings and production of the crane were under a contract of secrecy, which strictly prohibited them from giving out by word of mouth or otherwise, particulars or details of manufacturing process, specifications and technical know-how. These industrial drawings, manufacturing process of the crane, names of suppliers of certain parts used in the crane constitute trade secrets of the plaintiffs. By virtue of the provisions of the Copyright Act, the plaintiffs are the exclusive owners of the artistic work consisting of the industrial drawings, shape and get up of the crane and they have also the exclusive right to reproduce or depict in three dimensions the drawings of the said crane. In addition to the industrial drawings of the entire crane, the plaintiffs also claimed copyright in the following key components : (i) The boom and slider assembly, (ii) the lower structure assembly, (iii) the main frame-axle assembly, (iv) the differential housing, (v) the pump coupling, (vi) the pulley block assembly, (vii) gear box housing, (viii) the wheel reduction gear, (ix) the differential, (x) the clutch assembly.

3. According to the plaintiffs, the defendants No. 2 remained under the employment of the plaintiff No. 2 for the period from December 6, 1982 to May 16, 1992. He worked as an Assistant Production and Production Manager for approximately six years and was exposed to the entire production line of the said crane. He also worked as the Purchase Manager for two years and was responsible for procurement of material from suppliers for these cranes. Being at such key position, defendant No.2 had not only easy access to the industrial drawings of the said crane and its component parts but he also became familiar with the entire process and documentation relating to its manufacture and marketing. These jobs were entrusted to the defendant No. 2 under express condition of strict confidentiality. In 1992, the defendant No. 2 left the employment of the plaintiff No. 2. Suddenly in 1995, the plaintiffs discovered that the defendant No. 2 had wrongfully introduced into the market Pick-N-Carry Hydraulic Self Mobile Cranes which is a slavish copy of the plaintiff's crane. It is alleged that the crane produced by the defendants is entirely based on the industrial drawings of the plaintiffs, in which they have copyright. It is further alleged that the defendant No. 2 has not only committed breach of the confidence reposed in him but he pirated the industrial drawings of the plaintiffs with a view to take advantage of the designs of the plaintiffs' crane in the market and have made use of the goodwill and reputation of the plaintiffs, and that the defendant are passing off their cranes as plaintiff' and thus earned under profits to which they were not entitled and, therefore, they are liable to render accounts and pay to the plaintiffs the profits earned by them on the sale of these cranes.

4. The defendants resisted the suit and the application under Order 39 rules 1 and 2 CPC on various grounds. According to the defendants, the plaintiffs are the pirators and not proprietors of the industrial drawings of the Pick-N-Carry Hydraulic Self Mobile Cranes. The plaintiffs' industrial drawings are neither new nor original and more than 30 Indian and foreign companies had been manufacturing and marketings these Mobile Cranes in the same and similar forms, design, shape or configuration prior to 1971. It is alleged that the industrial drawings of the plaintiffs do not contain any characteristics over and above the fundamental form or shape of a Hydraulic self mobile crane. Even so, there is no similarity or resemblance between the cranes manufactured and marketed by the plaintiffs and the defendants. There can thus be no question of deception nor could there be any piracy when the broad and essential features of the two cranes are entirely different. It is also alleged that the crane manufactured and marketed by the plaintiffs is based on the technical know-how and specifications provided by the Hamilton, which is a common and universal design. The plaintiffs were also manufacturing cranes with 15 Tons lifting capacity, which is a copy of Linmach Company of Australia. It is alleged that the crane manufactured by the defendants is different from that of the plaintiffs in respect of substantial features. It is further alleged that the colour scheme, get-up, lay out and shape of the crane are not the subject matter of the copyright. Since the plaintiffs have failed to obtain any patent pertaining to their cranes, the present suit has been filed to harass the defendants by seeking a remedy which is otherwise not available to the plaintiffs under the law. Alternatively, it is pleaded that there is no copyright in the alleged drawings of the plaintiffs and even if such copyright were to exist, the plaintiffs have lost such copyright on account of the fact that more than 3000 reproductions of the crane have been made from such drawings. It is also alleged that prior to the present suit, the plaintiff No. 1 had filed the civil suit No. 382/97 against the defendants in the High Court of Calcutta, which was dismissed as withdrawn. Thereafter they filed the Civil Suit No. 73 of 1997 against the defendants before the Sub Judge,

Jamshedpur, Bihar and this is the third suit which the plaintiffs have instituted against the defendants. Thus, the plaintiffs have abused the process of the Court by instituting these suits and so they are not entitled to any relief against the defendants.

5. Before deciding the plaintiffs' application under Order 39 rules 1 and 2 CPC, it would be appropriate to dispose of the application filed by the defendants for staying trial of the present suit under Section 10 CPC. It is beyond the pale of controversy that the plaintiff No. 1 has also filed the suit No. 73 of 1997 against the defendants seeking issuance of permanent injunction against the defendants, asserting to be a proprietor of a copyright in the industrial drawings in relation to ick-N-Carry Mobile Cranes, which are marketed and sold, alleging infringement of the said copyright on the part of the defendants and the said suit is pending on the file of the Sub Judge I at Jamshedpur (Bihar). Thus, admittedly, the question of infringement of copyright of passing off is involved in both the suits. The defendant has filed this application under Section 10 CPC for stay for the present suit on the ground that the matter in controversy in both the suits is directly and substantially the same. This application has been opposed by the plaintiffs.

6. It is well settled that in order to attract provisions of Section 10 CPC, following conditions must be satisfied:-

- (i) the matter in issue both suits must be substantially the same;
- (ii) the previously instituted suit must be pending in the same Court in which the subsequent suit is brought or in a different court in India having jurisdiction to grant the relief claimed; and
- (iii) both the suits must be between the same parties or their representatives.

7. Learned counsel for the plaintiffs has fairly conceded that the suit No. 73 of 1997 pending at Jamshedpur is a previously instituted suit; the parties in the two suits are the same and the matter in issue in both suits is directly and substantially the same. But he contended that the application under Section 10 CPC did not lie because the defendant has raised an issue of jurisdiction of Jamshedpur Court to entertain the said suit. According to the learned counsel, unless the defendants withdraw the objection with regard to lack of jurisdiction of the Jamshedpur Court to entertain the suit, they cannot invoke the provisions of Section 10 CPC as the competency of the court trying the previously instituted suit is one of the essential conditions for applicability of the Section 10 CPC. I am unable to accept the said submissions of the learned counsel. It is settled law that jurisdiction with reference to the subject matter of a claim depends upon the allegations in the plaint and not upon allegations in the written statement. The question of jurisdiction raised by the defendant is a question that is virtually between the plaintiff and the Court itself. The plaintiff invokes the jurisdiction of the Court and the Court has always jurisdiction to decide for itself whether it has jurisdiction to try the suit before it. It is not the case of the plaintiffs that Jamshedpur Court is not competent to grant the relief claimed in that suit. There is nothing in Section 10 CPC to show or suggest that if an issue of jurisdiction has been raised in a previously instituted suit, the defendant cannot invoke provision of Section 10 CPC unless he withdraws or waives that objection.

8. Lastly, learned counsel for the plaintiffs with some ingenuity has attempted to seek the aid of Order 2 rule 2 CPC for an ancillary argument that in as much as the present suit is not barred under Order 2 rule 2(3) CPC, its trial cannot be stayed under Section 10 CPC. Reliance was placed on the decision of the Apex Court in *Bengal Water Proof Ltd. Vs. Bombay Water Proof Marketing. Co.* 1997 P.T.C. (17), which is an authority for the proposition that an action for passing off is a common law remedy being an action in substance of deceit under the law of torts and every time when a person passes off his goods as those of another he commits the acts of such deceit and in case of continuous cause of action or recurring causes of action, bar of Order 2 rule 2(3) CPC can not be invoked. In the present case, the defendant has not sought stay of trial of the suit on the ground that the same is barred under Order 2 rule 2(3) CPC. It has to be borne in mind that provisions of Section 10 CPC and Order 2 rule 2 CPC operate in different areas and they embrace the fields which are covered by the conditions embodied therein. In my opinion provisions of Order 2 rule 2 CPC do not in any manner circumscribe or limit the operation of Section 10 CPC.

9. As noticed earlier, all the essential conditions for applicability of Section 10 CPC stand satisfied and it is impermissible in this situation to put off consideration of the application under Section 10 CPC till the question of territorial jurisdiction is decided by the Jamshedpur Court.

10. For the foregoing reasons, the application is allowed and the trial of the present suit is stayed under Section 10 CPC till disposal of the suit No. 73/1997 pending on the file of the Sub Judge I, Jamshedpur.

11. As regards the disposal of the plaintiffs application under Order 39 rules 1 and 2 CPC, learned counsel for the defendants has fairly conceded that an order staying a suit under Section 10 CPC does not prevent Court from making interlocutory orders. To the same effect is the law laid down by the Nagpur High Court in *Govardhan Sahaya Vs. Hemraj Singh* AIR 1994 Nag. 335. I am, therefore, of the opinion that the Court has jurisdiction to pass any interlocutory order after staying trial of this Suit under Section 10 CPC.

12. Learned counsel for the defendants, with great ingenuity and persuasiveness, submitted that the plaintiffs have made out no prima facie case at all, in fact, their suit is wholly incompetent.

13. It is well settled that the granting of ad interim injunction is purely within the discretion of the Court but the discretion has to be exercised in accordance with the sound judicial principles. The principles which govern the exercise of the discretion are that the party seeking ad interim injunction should establish that it has a prima facie case, that the balance of convenience requires the grant of an injunction and that the refusal of such injunction would put it to an irreparable injury.

14. The first question to be determined is whether the plaintiffs have made out a prima facie case for grant of ad interim injunction. It needs to be highlighted that prima facie case is not to be confused with prima facie title, which has to be established on evidence at the trial. To establish a prima facie case, the party seeking ad interim injunction should show that there is a credible dispute with respect to a right or title which it seeks to protect and it has a real prospect of succeeding in its claim

at the trial. It is beyond the place of controversy that in 1971, the plaintiff No.2 introduced into the market Pick-N-Carry Hydraulic Self Mobile Crane and the plaintiffs have been manufacturing and marketing the said crane since then. It is also undisputed that the defendant No. 2 remained under employment of the plaintiff No. 2 for the period from December 1982 to May 16, 1992 and that during this period, he worked as Assistant Production Manager and Production Manager and thus he was exposed to the entire production line of the said crane. From these admitted facts, it can safely be inferred that during the employment in the plaintiffs' company, the defendant No. 2 had easy access to the industrial drawings of the said crane and he also became familiar with the entire process and documentation relating to its manufacture. This is also borne out of the list of articles surrendered by the defendant No. 2 to the plaintiffs' company after his resignation. This list has been filed by the defendant No. 2 and the same is at page 819 of Volume No. IV of the paper book.

15. Learned counsel for the plaintiffs submitted that the Pick-N-Carry Mobile Crane manufactured by the defendants is based upon the industrial drawings, technical know-how and specifications imparted by the plaintiffs to the defendant No. 2 under express condition of strict confidentiality. According to the learned counsel, in breach of confidence reposed in the defendant No. 2, he started manufacturing the crane, which is a slavish copy of the plaintiffs' crane and thus the plaintiffs have established a prima facie case for grant of ad interim injunction against the defendants. Strong reliance was placed on a decision of this Court in John Richard Vs. Chemical Process Equipment (P) Ltd. . He has invited my attention to paras No. 21 and 22 of the plaint, which are as under:-

21. "The plaintiffs are so particular about safeguarding their nterests and rights in its drawings and indeed its trade secrets that a specific secrecy clause has been included in the work standing orders of the Second Plaintiffs which have been in force from 1964 onwards. In the secrecy clause it is inter alia stated:

"27 SECRECY

(i) No employee shall during his service with the Company, voluntarily or otherwise engage in any part of India or elsewhere in giving information or advice on matters relating to the activities of the company;

(ii) No employee shall carry with him outside factory premises, books, drawings, photographs, instruments, apparatus, documents and other property belonging to the Company or relating to the Company affairs unless he is authorised by the management to do so.

(iii) No employee shall be permitted to take notes, drawings, or sketches for his own use of any building, plant, process or work of the Company, keep copies of the Company's official papers with him.

(iv) No employee except in the ordinary course of his duties during service shall disclose any secrets, secret information or any other information or matter concerning the operation of the Company which is in the nature of trade or business

secret.

(v) No employee shall, by writing to any person (including a coemployee) or by communication to public papers, journals, pamphlets, or letters, or by speech or discussions at any place, disclose or cause to be disclosed at any time during service, any secrets, trade secrets and/or such information that may be detrimental to the interest of the Company.

(vi) All books, drawings, sketches, photographs and similar papers containing notes or information relating to the Company's business affairs or operations shall always be treated as company's property whether prepared by employee or otherwise."

22. In addition to the Works Standing Order, each employee, by his/her employment contract was bound by a secrecy clause wherein it is clearly stated:

"SECRECY You will not give out by word or mouth or otherwise, particulars or details of manufacturing processes, technical know-how, administration and/or organisational matters pertaining to the Company which may be your personal privilege to know by virtue of being in the employment of the Company."

16. There is no specific denial to the plea raised by the plaintiffs in the said paragraphs of the plaint. By virtue of Order 8 rule 5 CPC, the aforesaid averments in the plaint have to be taken to be admitted by the defendants. Thus, the defendant No. 2, being an employee of the plaintiffs' company, was bound by the aforesaid express condition of secrecy. As noticed earlier, during employment in the plaintiffs' company, the defendant No. 2 had an easy access to the industrial drawings of the Pick-N-Carry Mobile Cranes and he also became familiar with the process and documentation relating to its manufacture. The cumulative effect of the aforesaid circumstances gives rise to an inference, that during the employment, the defendant No. 2 acquired knowledge with regard to the industrial drawings, technical know-how and specifications concerning the Pick-N-Carry Mobile Cranes under express and strict confidentiality. The defendant No. 2 has to rebut the said inference by cogent and convincing evidence. In John Richard's case (supra), the plaintiff was the inventor of the Fodder Production unit. He was the author of the drawings meant for the construction of the said unit. The defendants were manufacturing only the thermal panels. To indigenously manufacture the unit, the plaintiffs contacted the defendants for supply of thermal panels manufactured by them. The plaintiffs supplied the technical know-how, specifications and industrial drawings to the defendants to enable them to precisely match with the unit components. Confidentiality of the said details were stipulated by the agreement between the parties. In breach of the confidence, the defendants started manufacturing the machines, which were based on the drawings supplied to them by the plaintiffs. The plaintiffs filed a suit for permanent injunction and an application for ad interim injunction restraining in-

fringement of copyright of the drawings and passing off. It was held that "infringement of copyright has to be tested on visual appearance of the drawing and the object in question. The purpose, functional utility, efficacy of different parts and components of the object or the material of which

they may be made are irrelevant for the purpose of copyright." In that case ad interim injunction was granted in favour of the plaintiffs on the ground that they have made out a prima facie case of infringement of their copyright and of strict confidentiality under which specifications, drawings and technical know-how about the Fodder Production unit were supplied to the defendants, which they will have to meet at the trial of the suit.

17. In the instant case, the plaintiffs' main contention is that in breach of the confidence reposed in him, defendant No. 2 introduced into the market the crane, which is a substantial reproduction in three dimensional form of the plaintiffs' industrial drawings in which they have copyright. Learned counsel for the plaintiffs has invited my attention to the report of Dr. D.K. Sehgal, Associate Professor of the Department of Applied Mechanics, Indian Institute of Technology, Delhi (at page 24 of Part II of the paper book) and the photographs annexed therewith. According to the learned counsel, a mere look at two cranes shown in the photographs, being mark 'E' of the plaintiffs and mark 'A' of the defendants reveals that all the essential features and general appearance and get up of the two cranes are identical and there is every likelihood of a purchaser or customer to mistake one for the other as there is striking general similarity between the two cranes.

18. Learned counsel for the plaintiffs has also invited my attention to the Parts Catalogue of the two cranes containing individual drawings of the various key components. He has also invited my attention to the annexures B-1, B-2, B-3, B-4, B-5, B-6, B-7, B-8, B-9, B-10, B-11, B-12, B-13 and B-14 in support of his contention that the drawings of key components of the plaintiffs' crane have been blatantly copied by the defendants. On the other hand, learned counsel for the defendants contended that the Parts Catalogue of the plaintiff No. 1 has been intentionally abridged in the present suit and even Parts Catalogue of the parties, if compared with each other, would demonstrate that the defendants have not copied the alleged drawings of the plaintiffs' crane. He further contended that the high percentage of components are in fact bought out from the same manufacturers, and hence, Parts Catalogue of those parts have to be same. At this stage of the suit, it would not be appropriate to record any finding of the alleged infringement of copyright on the basis of the parts catalogue of the cranes manufactured by the parties. The issue involved in this case has to be decided on the basis of industrial drawings of the said cranes.

19. Learned counsel for the defendants contended that plaintiffs' concept or design of Pick-N-Carry Hydraulic Self Mobile Crane is neither new nor original and more than 30 foreign and Indian companies had been manufacturing and marketing these cranes in the same or similar forms, design, shape or configuration since 1960. He has invited my attention to various catalogues of these cranes, which are at pages 124, 125, 126, 141, 142, 148, 149, 150, 155 to 159 of the Volume IV of the paper book. According to the learned counsel, there is neither novelty nor originality or speciality in the design of the plaintiffs' crane. It is a common and universal design. Even so, there is no similarity or resemblance between the cranes manufactured and marketed by the plaintiffs and the defendants. The user of the crane, who is literate, knows that he is buying and is not likely to be deceived by any stray similarity. Learned counsel further contended that the plaintiffs are themselves pirators of the design of the said crane and so they cannot be treated to be the proprietors of any valid copyright and are not entitled to bring any action against the defendants for infringement thereof or passing off. Alternatively, he contended that according to the plaintiffs' own

showing they had purchased the technology from Hamilton and this fact alone destroys the plaintiffs' claim regarding ownership of the copyright of the industrial drawings of the crane in question.

20. Challenging the report of Dr. Sehgal (at page 24 of the Part II of the paper book) learned counsel submitted that Dr. Sehgal was not an expert on the subject and further the comparative study conducted by him is wholly based on irrelevant factors. To counter the said report, defendants have filed the affidavit of Shri S.K. Bhattacharya, who opined that the crane manufactured by the defendants bears no visual similarity with Pick-N-Carry Cranes of other manufactures. Thus there is oath against oath. At this stage of the suit, it would not be appropriate to try to resolve conflicts of evidence on affidavits as to facts on which the claims of either party may ultimately depend or to decide difficult questions of law which call for detailed arguments and mature considerations. These are matters to be dealt with at the trial.

21. It is undisputed that the plaintiffs had also instituted a suit against the defendants in the Calcutta High Court, which was subsequently dismissed as withdrawn. Learned counsel for the defendants submitted that in that suit it was averred in the plaint that the plaintiffs are registered owners of the design of the crane in question but, for reasons best known to the plaintiffs, this plea has now been abandoned by the plaintiffs. It is clarified in para No. 9 of the replication filed by the plaintiffs that it was inadvertently mentioned in the plaint before the Calcutta High Court that the plaintiffs' design was registered and this fact was clarified in the pleadings before the Division Bench of the said Court. At this juncture, learned counsel for the defendants contended that the plaintiffs are neither originator nor author of the alleged industrial drawings. The drawings could have been registered under the Designs Act but they were not so registered. Consequently, the plaintiffs are not entitled to any statutory protection in respect of the alleged drawings. Learned counsel for the plaintiffs submitted that the plaintiff's case is not based upon the Designs Act, 1911 but their specific case is that they are owners of artistic work, consisting of the industrial drawings, shape and get-up of the crane in question and none of the works in which they are claiming their rights are capable of being registered under the Designs Act.

22. In Section 2(5) of the Designs Act, 1911, the word "design" is defined as meaning features of shape and configuration, pattern or ornament which appeal to and are judged solely by the eye. Learned counsel for the plaintiffs contended that the expression 'design' used in section 2(5) does not include a method or principle of construction or features of shape or configuration which are decided solely by the function which the article to be made in that shape or configuration has to perform. Reliance was placed on the case of AMP Vs. Utilux Proprietary Ltd. (1972) RPC 103 in support of the said contention. In that case, the question arose whether a strip of electrical terminals used to facilitate the assembly of electrical apparatus was capable of being registered as 'design' within the meaning of Section 1(3) of the Registered Designs Act, 1949. Section 1(3) reads as under:

(3) "In the Act the expression 'design means features of shape, configuration, pattern or ornament applied to any article by any industrial process or means being features which in the finished article appeal to and are judged solely by the eye, but does not include a method or principle of construction or features of shape or configuration

which are dictated solely by the function which the article to be made in that shape or configuration has to perform."

23. `Approving the statement of law in Kestos Vs. Kempal (1936) 53 RPC, that "a mere mechanical devise is a shape in which all the features are dictated solely by the function or functions which the article has to perform", it was held that all the features of the terminal's shape are "dictated by' in the sense of being attributable to or caused or prompted by the terminal's function of forming an electrical connection between the two electric conductors, the tab and the wire. Therefore, the respondents' design fails to comply with the negative statutory requirement mentioned in Section 1(3), i.e., the `design' does not include features of shape or configuration which are dictated solely by the function which the article to be made in that shape or configuration has to perform. Consequently, the said electrical terminal was held unregistrable under the Registered Designs Act, 1949 because a potential customer would decide to buy it solely for its utility and not because of any attraction in its shape.

24. Section 2(5) of the Designs Act, 1911, defines the expression 'design' as under:

2(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 (trade mark as defined in Cl. (v) of sub-section (1) of Sec. 2 of the Trade and Merchandise Marks Act, 1958 (43 of 1958), or property mark as defined in Sec. 479 of the Indian Patent Code;"

25. The aforesaid definition makes it amply clear that the primary object of the Act is to protect shape not function, or functional shape. In the case of AMP Vs. Utilux Proprietary Ltd (supra) it was held that expression 'design' does not include a method or principle of construction or features or shape or configuration which are dictated solely by the function which the article to be made in that shape or configuration has to perform.

26. The tenor of the plaint shows that in addition to the drawings of depicting the entire crane, the plaintiffs also claimed copyright in the following key components of the cranes:-

- (i) the boom and slider assembly
- (ii) the lower structure assembly
- (iii) the main frame-axle assembly
- (iv) the differential housing
- (v) the pump coupling

(vi) the pulley block assembly

(vii) gear box housing

(viii) the wheel reduction gear

(ix) the differential

(x) the clutch assembly

27. The aforesaid parts of the crane are made in a particular shape so as to interrelate with others mechanically. These parts of the crane are not made to appeal to the eye but solely to make the crane work or function. Most of the key components or parts, unseen in the crane for which they were required, had only to pass the test of being able to perform their function. They would be judged by performance and not by appearance. Conse-

quently, the aforesaid key components or parts are incapable of being registered as designs under the Designs Act, 1911. Therefore, the decision in *Samsonite Corporation Vs. Vijay Sales* 1998 IV A.D. (Delhi) 129 cited by the learned counsel for the defendants does not govern a case like in hand.

28. As stated earlier, the plaintiffs' main contention is that the crane manufactured by the defendants is a substantial reproduction in three dimensional forms of the drawings of the plaintiffs' crane in which they have copyright. Needless to say that the industrial drawings are produced by skilled draughtsmen. Some of the drawings incorporate standard parts such as an engine or a gear box in common use, but even in those drawings there are ample knowledge, labour, judgment and skill. The drawings used in the design of the crane were reproduction of the original artistic work. Those copies of the drawings were, in turn, used to manufacture the parts of the crane. Those parts manufactured are again reproductions of the original artistic works. A reproduction of an artistic work includes a version produced by converting the work into three dimensional form. Such drawings are capable of being infringed by copying of a three dimensional article.

29. Learned counsel for the defendants contended that the plaintiffs have not produced the original drawings before the Court and in absence of these drawings it cannot be held that the plaintiffs have made out a prima facie case for infringement of copyright. He further submitted that the alleged industrial drawings annexed to the plaint, being Annexures B-1 (pages 29-30), B-2 (pages 33, 34), B-3 (page -37), B-4 (pages 40), B-5 (pages 42, 43), B-6 (pages 45 and 46), B-7 (page 49), B-8 (page 51), B-9 (page 53), B-10 (pages 55, 56, 57), B-11 (pages 60-61), B-12 (page 64), B-13 (page 66) B-14 (pages 68. 69), are in fact sketches of the parts catalogue of the plaintiffs' crane and are not the industrial drawings as such over which the alleged copyright is being claimed. He also submitted that various components or parts mentioned in the parts catalogue are procured from specialised manufacturers and assembled for the purpose of mobile cranes. The plaintiffs, instead of producing the industrial drawings are relying upon the parts catalogue over which they cannot have any copyright. It is worth mentioning that in para 23 of the plaint, the plaintiffs have sought leave of the Court to produce these drawings at a later stage of the proceedings. Para No. 23 of the plaint is as

under:-

23. "At all material times the drawings have been regarded by the Plaintiff as confidential and the same has been conveyed to all its employees, including the Defendants herein. In addition to the product and would drawings, the production methods, names of suppliers etc. constitutes a trade secret of the plaintiff. This information is kept at secure sites to which there is restricted access. The drawings etc. are always stored, transported and used under secure conditions. The Plaintiffs crave leave of this Hon'ble Court to file the original drawings at a later stage, in a sealed cover, in the present proceedings."

30. Viewing the aforesaid averments in para No.23 of the plaint no adverse inference could be drawn against the plaintiffs for non-production of the drawings at this stage. It is worth mentioning that the plaintiffs have filed a copy of the affidavit filed by the defendant No. 2 before the Calcutta High Court and the same is at page 381 of part III of the paper book. It is stated in para No. 15 of the affidavit (at page 399 of part III of the paper book) that the plaintiffs drawings are in the custody of the authorised officers of Escorts Ltd. Thus, the defendant No. 2 has himself admitted existence of the plaintiffs' drawings in respect of the mobile crane in question. Learned counsel for the defendants submitted that industrial drawings in respect of a Pick-N-Carry Mobile Crane would run into thousand of pages and cannot be copied or moved out of the office without the knowledge of the person who is in custody thereof. After acceptance of the defendant No. 2's resignation, no complaint was made by the plaintiffs till institution of the first suit that any drawings were removed or stolen by him. According to the learned counsel, this circumstance knocks the bottom out of the plaintiffs' case that the alleged industrial drawings were stolen by the defendant No. 2. Learned counsel for the plaintiffs has invited my attention to various documents and parts catalogues to show similarities between the two cranes. On the other hand, learned counsel for the defendants has attempted to show that there are some functional and visual difference between these machines. He further submitted that unless there is complete evidence before the Court by which the two cranes could be compared, the alleged infringement of copyright cannot be detected. Reliance was placed on an order dated 25-3-1997 of this Court in Memtec Ltd. Vs. Lunarmech (IA No. 3254/95; 4569/95 in Suit No. 910/95). No doubt, this is an important issue in this case, which has to be dealt with at the trial. In view of the aforesaid rival contentions of the parties, the inference is inescapable that the controversy raised in the suit clearly shows that there is a serious question to be tried.

31. Learned counsel for the defendants also submitted that many Pick-N-Carry Mobile Cranes are closely similar. Firstly because they must conform to the measurements and requirements of the rules framed under the Motor Vehicles Act. Secondly, because of the number of standard and common form parts, including engines and gear boxes and the like, which are incorporated in the design. According to the learned counsel, drawings of these key components or parts of the crane are in public domain. It is difficult to understand how closely two Pick-N-Carry Mobile Cranes manufactured by different companies would have resembled if copies of the same drawing had not been used in their design and construction.

32. It is worth mentioning that the plaintiffs have prima facie established the existence of a confidential relationship between the plaintiff No. 2 and the defendant No. 2 by reason of the later's employment there. Plaintiffs have strongly relied upon the undisputed access that the defendant No. 2 had to their drawings etc. and also to the production unit of the crane in question. Admittedly, the defendant No. 2 left the job in 1992 and introduced the Pick-N-Carry Mobile Crane to the market in 1995. It is stated in para 10 of the written statement:

10. "The cranes being manufactured by the Defendants are based upon prior and earlier knowledge prior to the date when the Plaintiffs claim to have manufactured their cranes. The said knowledge was and continued to be available in books, studies, magazines as well as on the basis of the Defendant No. 2's own personal experience."

33. Bearing in mind the averments contained in para No. 10 of the written statement, the past confidential relationship between the plaintiffs No. 2 and the defendant No. 2, the defendant No. 2's undisputed access to the plaintiff's drawings and the rapidity with which the defendants have produced the crane in question, the plaintiffs' contention that the defendants have copied their industrial drawings does not appear to be frivolous or vexatious. Thus, the present suit involves serious questions to be tried and particularly relating to the plea of infringement of copyright of the industrial drawings owned by the plaintiffs. Viewing these circumstances, the inference is inescapable that the plaintiffs have established a prima facie case of infringement of copyright and passing off to which the defendants have to answer. There is yet another staggering circumstance against the defendants. Admittedly, the plaintiffs have also instituted the Civil Suit No. 73 of 1997 against the defendants at Jamshedpur (Bihar) and in that suit an ad interim injunction was granted against the defendants. The defendants unsuccessfully challenged the said injunction order before the High Court of Patna. Copy of the order dated 27.2.98 passed by the High Court of Patna is at page 1 of part III of the paper book. The said shows that the order of the trial court was upheld on the basis of an undertaking furnished by the defendant No. 2. Plaintiffs have filed a copy of the said undertaking. (page 455 of part III of the paper book). Para No. 3 of the said undertaking is as under:-

3. I say, that the appellants would not assemble or manufacture Pick-N-Carry Cranes at Jamshedpur only from accessories patented by the Plaintiffs/Respondent till the disposal of the Title Suit No. 73 of 1997 pending in the Court of Sub-Judge-I at Jamshedpur. I say that appellants would however, not be under any restraint in any other way in the rest of the Country or elsewhere regarding their Pick-N-Carry Cranes, and this is without prejudice to all right of the appellants and I say that the effect and scope of the said suit is limited to the territorial jurisdiction of Jamshedpur Court only. I say, that the application under Order 39 Rules 1 and 2 of the Code of Civil Procedure 1908 filed by the Plaintiff/Respondent in the above suit would accordingly be disposed off by an order in terms of this undertaking. I say that hence only in such circumstances, and subject to, and without prejudice to the rights and actions adopted by the Appellants in the Transfer Petition filed by them before the Hon'ble Supreme Court of India at New Delhi Being Transfer Petition (CIVIL) No. 509 of 1997, this affidavit of undertaking is given."

34. On a careful perusal of the said undertaking it appears that there is an implied admission on behalf of the defendant No. 2 that certain assessories of the plaintiffs' crane have become distinctive of their goods to the extent that the trading public associates their goods exclusively with the given design or get up. Although no final opinion can be expressed at this stage on the merits of the plaintiffs' case, but the plaintiffs have made out a prima facie case of infringement of their copyright and passing off which the defendants will have to meet at the trial.

35. Next question to be considered is whether the balance of convenience lies in favour of granting or refusing the ad interim injunction that is sought. Learned counsel for the defendants urged that if the interim injunction is granted against the defendants, it would ultimately lead to closing down the defendants' factory with the possibility of throwing all the employees out of employment. He further submitted that in the absence of an interim injection, the plaintiffs are not likely to suffer any irreparable injury as they could be adequately compensated by an award of damages in the event of their success in the action. Strong reliance was sought to be placed on a decision of this Court in Niky Tasha (P) Ltd. Vs. Faridabad Gas Gadgets (P) Ltd. . On the other hand, learned counsel for the plaintiffs contended that the cranes are, in substance, infringing reproductions of the plaintiff's industrial drawings and the defendants by stealing a march based on infringement, received benefits and inflicted loss to the plaintiffs which are difficult to compensate and difficult to assess in the normal course. The case of Niky Tasha (supra) is distinguishable on facts in as much as the interim injunction was refused on the ground that the plaintiffs had failed to make out a prima facie case for the grant of any interim relief. Therefore, the said authority does not help the defendants. It has to be borne in mind that commercial exigencies require that copyright/patent laws should be viewed in the context of giving protection and exclusive rights for the purpose of encouraging inventive activities and investments in research and development. Moreover, the underlying philosophy of the copyright/patent system is that if rights of copyright owners are adequately protected, it will give a fillip to new inventions and the inventions will be followed by innovations and investments for the commercial working of the inventions, thereby leading to the industrial progress of the country. It is, therefore, imperative that the rights of copyright owners are adequately protected. In my opinion, balance of convenience lies in favour of grant of ad interim injunction to the plaintiffs and unless the defendants are restrained by grant of ad interim injunction, irreparable injury or loss which cannot be estimated in terms of money, will be caused to the plaintiffs.

36. For the foregoing reason, the application under Order 39 rules 1 and 2 CPC is allowed and the defendants are hereby restrained from manufacturing, selling or offering for sale of the Pick-N-Carry Mobile Cranes that are substantial imitation or reproduction of the industrial drawings of the plaintiffs or from using in nay other manner whatsoever the technical knowhow, specifications or drawings of the plaintiffs till disposal of the suit. Before I part with this order, I would like to make it clear that any observation made herein shall not be construed as expression of opinion on merits of the controversy between the parties and nothing stated herein shall affect the rights of the parties that are being agitated in the suit.