

## Laxmi Dutt Roop Chand Vs Nankau and Others

**Court:** Allahabad High Court

**Date of Decision:** May 16, 1962

**Acts Referred:** Civil Procedure Code, 1908 (CPC) – Order 30 Rule 1  
Patents and Designs Act, 1911 – Section 2(12), 26(1), 29, 29(1), 63

**Citation:** AIR 1964 All 27

**Hon'ble Judges:** Mithan Lal, J

**Bench:** Single Bench

**Advocate:** J.N. Chaterji and B.C. Ganguli, for the Appellant; M. Asif Ansari, for the Respondent

**Final Decision:** Dismissed

### Judgement

Mithan Lal, J.

This suit was originally filed in the Court of the District Judge Sultanpur u/s 29(1) of the Indian Patents and Designs Act (hereinafter called the Act). Since the defendants raised a counter claim for revocation of the patent, the suit along with the counter claim was

transferred to this Court for decision.

2. The plaintiff is a registered partnership firm dealing in utensils having its office at Durga Devi in Mirzapur City. Luxmi Dutt and Roop Chand are

the two partners of the firm at present. One Mahabir Prasad Vishwakarma of Mirzapur obtained a patent No. 42514 of 1950 under the Act in

respect of the process of manufacture of hollow wares, such as "lotas", "batwas", "degchis", "batlois" etc., under a registration certificate dated the

7th August 1958 issued by the Patent Office, Calcutta. Mahabir Prasad Vishwakarma was thus said to have an exclusive right to manufacture

hollow wares of the former description by the patented process and he was said to have been using the above patented process for the

manufacture of the aforementioned hollow wares.

3. The plaintiff firm alleged that the utility of the process having been ascertained, they at first obtained a licence from the original patentee Mahabir

Prasad Visliwakarma on the terms and conditions given in the agreement dated 2-4-1953 and started manufacturing "lotas", "batwas", "degchis"

etc. after the said licence. On 10-5-1958 the plaintiff firm purchased the abovementioned patent from the original patentee Mahabir Prasad

Vishwakarma on payment of a consideration of Rs. 16,000/-. They thus became the sole proprietor of the patent since the date of the purchase

and have been using it.

An entry of assignment in favour of the plaintiff firm is said to have been made in the registers of the Patent Office and thus the plaintiff became the

proprietor of the patent with the exclusive right of use. The said patent is said to be valid and subsisting and is said to be running 12th year of its

life. The plaintiff further alleged that various publications relating to the patented process and the articles made therefrom were issued through

circulars, market reports, newspapers etc. in order to give it a publicity.

4. The plaintiff's case was that in the last week of July 1960 the three defendants approached the plaintiff or (for ?) a licence to manufacture

utensils with the patented process at village Bandhua in district Sultanpur. A demonstration of the process was given to them at the plaintiff's

workshop and the plaintiff further promised that they will be given every facility in the manufacture of hollow-wares. The defendants did not take

any licence but on the contrary started manufacturing utensils with the patented process stealthily. Sita Ram and Babu Ram of village Bandhua

obtained a licence from the plaintiff on 6th of August 1960. 16 other persons of the same place have also been authorised by the said Sita Ram

Babu Ram, according to the terms of the licence, to use the patented process for manufacture of hollow-wares. The three defendants are said to

have illegally started the manufacture of hollow-wares by infringing the plaintiffs' patent right from September 1960.

After notice to the defendants a criminal complaint was filed against them and the apparatus for manufacture of patent articles are said to have been

seized by the police. In spite of the seizure of the articles and the manufacturing apparatus the defendants are said to have been continuously

infringing the patent by constructing counterfeit of the patent in defiance of Section 29 of the Indian Patents and Designs Act. The defendants were

said to be guilty both of infringing the patent as well as imitating the process and the specifications mentioned in the process for manufacture of

hollow-wares.

The cause of action was said to have arisen in September 1960 and on these allegations the plaintiff claimed (a) a decree for permanent injunction

restraining the defendants, their servants and agents, from infringing the said patent and in particular from making and using the process covered by

the said patent No. 42514 of 1950 and from selling and offering for sale the articles prepared by imitating the patented process; (b) an order for

destruction of the counterfeit devices and the articles manufactured by the defendants; and (c) costs of the suit and any other relief as the Court

may deem fit.

5. The plaintiff's suit is resisted by defendants Nos. 1 and 2 only, Defendant No. 3 has not put in appearance in this case. The contesting

defendants have denied the allegations relating to the alleged patent obtained by Mahabir Prasad Vishwakarma or its transfer in the plaintiff's

favour or the registration of assignment. It has been alleged that the suit instituted by only one partner of the plaintiff firm is not maintainable, that u/s

29 of the Act it is only the patentee who is entitled to sue against any infringement of a patent and not any assignee. The defendants stated that they

have not manufactured any counterfeit articles or any counterfeit devices of the patented process and that the patent claimed by the plaintiff is liable

to revocation because no invention worth patenting has been made, because the patent was obtained in false suggestions or misrepresentations,

because the process of manufacture followed by the defendants is being used in the defendants' family for more than 100 years" and because the

alleged patent does not involve any inventive step. It is neither novel nor of any utility. In a nutshell the defendants claimed revocation of the patent

on the grounds given in Clauses (a) to (i) and (n) of Sub-section (1) of Section 26 of the Act.

The following issues were framed in the case with the consent of the parties' counsel who agreed as given in the order dated 7th of December

1961 that no other issue arises from the pleadings:

1. Whether the plaintiff is the registered proprietor of the patent in suit in respect of manufacturing hollow-ware, according to the process

specified in the patent specifications?

2. (a) Whether the suit instituted by one of the partners of the plaintiff's firm is maintainable?

(b) Is the suit not maintainable because u/s 29 of the Patents and Designs Act only the patentee is entitled to sue against any infringement of the

patent?

3. Whether the defendants have infringed the patent of the plaintiff? If so, its effect?

4. Whether the patent claimed by the plaintiff is liable to revocation on any of the grounds given in Section 26 of the Indian Patents and Designs

Act other than the grounds given in Clauses (j), (k), (l) and (m) of Sub-section (1) of the said section?

5. Whether the counter-claim of the defendants for revocation of the patent is sustainable against an assignee of the original patentee?

6. To what relief, if any, is the plaintiff entitled?

6. FINDINGS: Issue No. 1: The plaintiff has filed the original sale-deed Ex. VIII executed by Mahabir Prasad Vishwakarma in favour of the

plaintiff firm on 10th of May 1958. This document has been proved by Lakshmi Dutt plaintiff as well as an attesting witness Durga Prasad P.W.

On 15th May 1958 an application for entry of the assignment in the registers of patents and designs was made on behalf of the plaintiff firm and an

entry as required by law appears to have been made on 7th of August 1958 as shown by the original notice of entry in the registers of patents and

designs Ex. IX.

7. According to the provisions of Section 63 every person who becomes entitled by assignment, transmission or other operation of law to a patent

or to the copyright in a registered design, may make an application to the Controller to register his title, and the Controller after proof of the title to

his satisfaction shall register him as a proprietor of such patent or design, and shall cause an entry to be made in the prescribed manner in the

register of assignment etc. The procedure for the application is given in Rules 54 to 61 and the form of entry is prescribed in Rule 57. The entry

which has been made in Ex. IX is of the same nature and is in the same form as required by Rule 57.

It further appears from the original sale deed (Ex. VIII) that it had been sent to the Patent and Design Office and the two seals on the face of the

first page, one dated 15th of May 1958 and the other dated 14th of July 1958, go to show that the Controller was satisfied about the title of the

plaintiff and then ordered the entry to be made, obviously after following the procedure given in the rules above-mentioned.

The defendants have not taken any specific plea in the written statement except a mere denial of the plaintiff's right. They have produced no

evidence to rebut the entry of the registration of the assignment in the registers of patents and designs.

One thing, which may be noted in this connection, is that at the time the sale-deed was executed there were three partners in the plaintiff firm, that

is Lakshmi Dutt, Phool Chand and Roop Chand, as entered in the sale-deed, but Phool Chand ceased to be a partner and now the plaintiff firm is

owned by only two partners, Lakshmi Dutt and Roop Chand as proved by the plaintiff and the subsequent registration of the plaintiff firm. The

plaintiff firm has, therefore, fully established that it is the registered proprietor of the patent in suit.

8. Issue No. 2 (a): This plea taken by the defendants is not tenable because the suit has not been instituted by one of the partners of the plaintiff

firm. It is a suit by the firm through Lakshmi Dutt, one of the partners. Such a suit is maintainable in view of the provisions of Order 30, C. P. C. It

may also be noted that the plaintiff is a registered firm as shown by the registration certificate (Ex. 1). There is no plea in the written statement that

the suit is barred by Section 69 of the Partnership Act. The registration certificate coupled with the evidence shows that the suit which has been

filed on behalf of the firm which is the assignee of the patentee is perfectly maintainable.

9. Issue No. 2 (b): u/s 29 of the Act a suit for infringement of the patent is maintainable by a patentee. The contention of the learned counsel for the

defendants is that the plaintiff in this case is not a patentee and as he is an assignee of the patentee the suit is not covered by the provisions of

Section 29 of the Act. This contention of the learned counsel has no force in view of the definition of the word "patentee". That word has been

defined in Section 2 (12) of the Act as meaning:

The person for the time being entered on the register of patents kept under this Act as the grantee or proprietor of the patent.

It has already been shown from Ex. IX that the plaintiff firm is a registered assignee of the patent and its name has been entered in the register of

patents kept under the Act as the proprietor of the patent by virtue of the assignment dated 10th of May 1958, that is the sale-deed (Ex. VIII). u/s

14 (1) of the Act the life of every patent, during which it shall be deemed to be subsisting, is 16 years from its date. The alleged infringement of the

patent is said to have taken place in Sept. 1960, that is within a period of 16 years. u/s 63 (1) of the Act where a person becomes entitled by an

assignment to a patent and an application for entry of his name in the registers of patents has been made the Controller on satisfaction of the title of

the assignee has to register that assignee as the proprietor of such patent. This has already been done in the case and consequently the plaintiff firm

became a patentee within the meaning of that word as defined in the Act and a suit for infringement of the patent u/s 29 filed by such a registered

assignee is maintainable. The contention of the defendants' learned counsel has, therefore, no force and the suit for infringement of the patent filed

by the plaintiff as an assignee is maintainable.

10. Issues Nos. 3 and 4: Since the question of infringement of the patent is intimately connected with the question of revocation it will be

convenient to dispose of both these issues together. Mahabir Prasad, the original patentee obtained the patent (Ex. X) and the complete

specifications required by Section 4 are given in document Ex. II. It further appears from the copies of the Gazette of India (Exs. III and IV) that

patent No. 42514 was granted after issue of notices as required by law.

11. The invention made by Mahabir Prasad Vishwakarma related to the casting of hollow-ware metallic utensils or the like with neck narrower

than the belly in one piece and making moulds therefore. The object of the invention as recorded in the specification was to avoid the use of costly

clay moulds and other processes called for and use the sand over and over again by using sand moulds made identical to the clay mould. It is

further given in the specification that the old process of casting with the aid of clay moulds was costlier as the clay could not be used over again.

Another thing mentioned is that the digging of the burnt clay from the interior of the casting was difficult under the old process and sometimes the

casting gave way due to bad workmanship. With these objects this invention was made and the detailed description of the process as given in the

Patent is as follows:

The hollow-ware whose diameter circumference of neck is smaller than the belly or the like articles for example as shown in Fig. 1 is bisected

vertically so that the two sections contain almost an equal surface of each part of the hollow-ware except the center of the bottom which goes

common to both. These sections, in order to facilitate the separation of one part of the moulding sand with the other is provided with Auxiliary Fins

(Fig. 2A) and also pins and sockets (Fig. 3B) so that they may be easily clamped together or assembled if desired and may not go out of order or

assembly.

The hollow-ware so bisected and provided with means just is used as pattern for making the mould.

In making mould by the help of this pattern a special mould box as shown in figure 5 and figure 4 or figure 4 (I) is used .....

It may be noted that out of the above details the only thing which tallies with the defendants' manufacture is the vertical bisecting of the hollow-

ware whose neck is smaller than the belly. The auxiliary fins and the pins and sockets which are used in the patented process are not to be found in

the defendants' process.

12. In the patent nine features of the mould box are given as below:

I. Right half and left half of the mould box, 6 and F respectively which can be separated in the direction of the arrow (Fig. 4 and 5).

II. Sockets, guide pins or clamps to assemble or clamp the two parts of the mould box (see M in Fig. 5).

III. Left and right Board to close the two halves of the mould box (H and I in Fig. 4 and 5).

IV. Pouring basin J included in the left half and right half of the mould box.

V. Ramming hole N in the mould box assembly.

VI. Core supporting plate K attachable with the mould box.

VII. Core support attached in the Core supporting plate K (see L in Fig. 4, 4 (i) and 5. front view in section, side view in section and front view of

the mould box respectively).

VIII. Ramming hole N in the core supporting plate K, slightly smaller in diameter than N.

IX. Clamps or means M to clamp one part of the mould box with the other if so desired.

13. According to the evidence produced in the case, the mould box is known as darja while the two bisected portions of the hollow-ware used in

casting are known as "farmas". The shape of the "darja" given in the specification is almost square. The plaintiff is using darjas (filed in Court)

which have two lateral sides and the side of the ramming hole almost equal; but the side of the pouring basin is not flat. The darjas which have been

seized from the defendants' place have a straight base in which the two lateral sides do not exist, but only a semicircular frame with pouring basin.

14. The system of clamping the two parts In the defendants' darja is absolutely different from the plaintiffs. There are no guide pins or sockets in

the defendants' darja, as exist in plaintiff's Darjas, clamps are also of a different type.

15. Right and left sides of the two halves of the mould box have iron boards in the plaintiff's darja while the defendants use wooden planks which

are fixed to the iron darja by nuts and bolts.

16. The plaintiff has a core attached to the core supporting plate; but the core (which has been described in the plaintiffs evidence as a neel by the

plaintiff, and by other P.Ws. as mathani) is absolutely missing in the defendants' darja.

17. The process further describes the making of sand moulds for the bisected part of the hollow-ware. Though the initial process demonstrated by

the defendants in Court for filling sand in the darja is almost identical with the process of the plaintiff, yet there being no core or mathani in the

defendants' darja the subsequent process given in the description for fixing the core with the supporting plate inside the mould is absolutely missing

from the defendants' mould box. According to the patented process the making of the central core with the aid of core supporting plate is an

essential ingredient in the plaintiff's process; but there is nothing like it in the process demonstrated by the defendants with the aid of the mould

box. In the process adopted by the defendants for manufacture of hollow-wares a sort of a solid sand model of the inner side of the hollow is

formed in the defendants' process while in the plaintiff's patented process there is the core embedded inside. The description in the Patent and

figure 9 go to show that "the core moulded in the said core making box with the core support may be adopted in such a manner as to leave equal

space all round the mould cavity". Such moulds are then filled with molten metal through the pouring basin whereby the metal runs around the core

forming the casting in one piece.

18. The above comparison of the process of manufacture patented by Mahabir Prasad with the process of manufacture carried on by the

defendants shows that there are some material differences as pointed out above not only in the shape of the darja or the mould box but also there

is a complete absence of the core or Mathani In the defendants" process.

19. There are as many as 20 claims mentioned in the Patent. Claim No. 1 contains the description given above and the difference between the

plaintiff"s claim and the defendants" claim is the same as described above. The main difference lies in the shape of the mould box and the

preparation of the sand mould of the cavity of the hollow-ware with core inside in the plaintiff"s process and without core in the defendants"

process. There is a dispute between the parties whether the defendants do or do not use a core in the preparation of the hollow-wares. This point

will be dealt with at a later stage.

20. Claim No. 2, which relates to the drying of the mould by heating for some time, is absolutely absent in the manufacturing system adopted by

the plaintiff as well as the system by which the defendants are manufacturing the utensils.

21. Claim No. 3 relates to the mould box, sockets and guide pins, the difference in respect of which has already been pointed out between the

plaintiff"s mould box and the defendants" mould box.

22. Claim No. 4 relates to the central core formed on core support in the plaintiff"s process. But it is absent in the defendants" process.

23. Out of the other claims given in the Patent some of them are missing even in the plaintiffs process, while almost all of them are not to be found

in the defendants" manufacturing process.

24. The first question is whether the defendants have infringed the Patent of the plaintiff by adopting the same or similar process or by imitating

plaintiff"s process of manufacture.

The plaintiff"s case is that in the last week of July 1960 the defendants came to their shop and learnt the process of manufacture on the pretext of

getting a licence and then stealthily adopted that process Infringing the patent right. The defendants" case, on the other hand, is that utensils with the

aid of darjas which have been signed by the Vakil Commissioner appointed by the District judge, Sultanpur, are being prepared by them for the

last 25 or 26 years, that is much before the patent obtained by Mahabir Prasad Vishwakarma. Both parties entered into evidence.

On behalf of the plaintiff Lakshmi Dutt plaintiff, Durga Prasad (P. W. 2), Chinta Man (P. W. 3) and Ram Lakhan (P. W. 4) were examined, while

on behalf of the defendants Nankau defendant and Ram Swarup Lohar were examined on the question of infringement. Lakshmi Dutt plaintiff has

not at all been able to inspire confidence by his statement. According to him, the core which is attached to an iron plate in the plaintiff"s darja and

which this witness called neel (which is incorrect as shown by the other witness and is in fact called a mathani) is an essential part of the plaintiffs

process. To an answer put by the Court he stated that if neel is not used and mere paste or earth is filled inside the hollow-ware, no hollow ware

can be prepared. He admitted that this was an essential part of the plaintiff's process and this admission was also made by another witness, P. W.

Ram Lakhan, who stated that neel or mathani was an essential part of the plaintiff's process. It was he who stated that what was described as a

neel till before his statement was in fact a mathani and that neel only mean the earthen paste or sand which is filled inside the hollow ware. If it is a

fact that mathani is an essential part and the defendants are not using the mathani in the manufacturing process, then it would be a legitimate

inference to draw that the defendants have not completely copied out or imitated the plaintiff's process of manufacture and one essential part of it,

which according to the patent itself reduces the time in the manufacture of utensils, is missing from the defendants' process of manufacture.

The statement of Nankau defendant that he has not been using any mathani which is described as a core in the patent is fully supported on his

behalf by Ram Swarup D. W. who is the maker of the defendants' darjas. It however appears to me that the plaintiff's evidence and the statement

of Lakshmi Dutt that no utensils can at all be prepared without the mathani appears to be incorrect.

After the defendant gave a demonstration of the making of the mould from his darja the parties at first agreed that a Commissioner should go to the

defendant's house and see if the defendant was able to manufacture a hollow ware without the aid of the mathani and if the Commissioner found

that a hollow ware could be prepared without the aid of the mathani then it may be found that there was no infringement of the plaintiff's patent. At

the time this statement was given the defendant was still busy with the preparation of the clay mould which had not been taken out of the darja. As

soon as he took out the clay mould and placed it on the table the plaintiff thought that he would lose the case on his own statement and so he

realised from the statement previously made by him and said that he would not agree that a Commissioner should go and see if the defendant was

able to make a utensil without the aid of the mathani or core. Obviously this means that the plaintiff's statement that no utensils could be prepared

without the aid of the mathani was incorrect and he realised from his statement when he found that the defendant would be able to prepare a

hollow ware without the aid of mathani. In spite of the falsity of the plaintiff's evidence that no utensils could be prepared without the aid of

mathani, one thing which remains evident from the patent as well as the plaintiff's evidence is that in the plaintiff's process the use of mathani or

core is essential while it is not so according to the defendants. Another question of fact which arises is whether the defendant has at all been using

mathani.

25. It appears from paragraph 41 of the written statement in which the process of manufacture has been described by the defendant, that a

removable central mathani is used. Several darjas were seized by the Commissioner but no mathani appears to have been recovered because it is

not contained in the darjas filed in Court. An affidavit has been filed on behalf of the plaintiff to show that the police when it seized darjas from the

defendant's place in connection with the criminal case also seized some loose mathanis. Having regard to the averments made in the written

statement and also the evidence produced in the case it does appear that the defendant has been manufacturing hollow wares utensils with the aid

of darjas, in the preparation of some of the hollow-wares he appears to have been using loose mathanis but in preparation of others he has not

been using such a mathani. On behalf of the defendant Ram Swarup D. W. 2 was examined whose statement appeared to me to be natural and

answers to questions were given by him straightway and the demeanour of the witness convinced me that he prepared the first darja for Asharfi

Lal, father of the defendant some 26 or 27 years ago because he wanted the witness to contrive some easier method for preparation of hollow-

wares. His statement further shows that he never prepared any mathani and for whomsoever he prepared darjas, which according to the witness

have been prepared by him for a number of persons after Asharfi Lal got the first darja prepared, he never prepared a mathani.

Mathani is not only an essential part, as stated by the plaintiff and his witnesses, but it is the use of this part which avoided the use of costly clay

moulds; it avoided digging of burnt clay from inside the mould and the sand could be used over and over again. If Mathani is not used these three

objects, which are the main objects of the invention, remain unfulfilled and so the preparation of utensils with the aid of mere darjas cannot at all be

called an infringement of the patent. According to all the witnesses of the plaintiff except Shital Prasad P. W. 5 hollow-wares, which were

prepared at Bandhua before this invention, always had a joint.

This evidence was led in order to show that one of the advantages of the invention was that there was no joint and a utensil as a whole was

prepared with the aid of a darja. This evidence again appears to be incorrect because Shital Prasad admitted in clear terms that batuas with joints

were never prepared in Bandhua at any time.

If the defendant is preparing batuas, pateelis, degchis or such other hollow-wares with the aid of darjas but without the use of the mathani it cannot

be called either an infringement of the patent or even an imitation of it for the following reasons: (1) hollow-wares without joints such as batuas were

always prepared in Bandhua before the invention; (2) the system adopted by the defendant does not avoid the use of costly clay; (3) the clay

mould inside the hollow-wares requires digging in the same manner as the old process with the aid of earthen mould required; and (4) perhaps the

sand or clay dug from inside the hollow-ware cannot be used over and over again in the defendant's process. Having regard to the dissimilarities in

the process of manufacture with the aid of a darja between the plaintiff's patented process and the process used by the defendant as well as other

differences already pointed out, it cannot be said that the process of manufacture of hollow-wares without the aid of the mathani carried out by the

defendant is at all an infringement or even an imitation of the plaintiff's process. It may further be stated, though it is not necessary in view of the

different processes, that a counter claim of the defendant in this behalf must be upheld because if the invention is taken for the manufacture or

hollow-wares merely with the aid of darjas it cannot be called to be an invention at all at the date of the patent nor did it by itself involve any

inventive step having regard to what was known and was in use prior to the date of patent.

26. The next question which arises in the case is whether the process of the defendant's manufacture of hollow-wares with the use of some sort of

mathani is or is not an infringement of the plaintiff's process and if it is an infringement whether the counter claim of the defendant in this behalf has

or has not been established. The determination of this question has become a little difficult because the plaintiff took no steps to get the mathanis

from the criminal court. An application, which was made in this behalf, was made on 2nd of May 1952 before the evidence was closed on that

day. Even if the darjas and mathani had been sent for from the criminal Court at that stage they would have remained unproved as stated in the

order. If the plaintiff really wanted that the mathanis seized from the defendant's place and filed in the criminal Court be before this Court, the same

should have been summoned at an earlier stage in order to show in what form that mathani was, how it was used and whether its shape or its use

constituted an infringement of the plaintiff's patent. In spite of the admission in the written statement and in spite of the fact that a mathani was or

some Mathanis were recovered from the defendant's place by the police, it cannot be said that, the mere use of mathani in the manufacture of

hollow-wares can amount to an infringement of the plaintiff's patent.

There is a complete denial on behalf of the defendant of the use of the mathani while according to the patented process mathani plays an important

role in saving the cost and time. It is also admitted that jointless batuas were being prepared in Bandhua from a very long time. It seems difficult to

hold without seeing the mathani itself or without knowing how that mathani is used in the manufacture of hollow-wares by the defendant that its

mere use amounts to an infringement of the plaintiff's patent. While it is the duty of the Court to see that infringement of any patented process is not

made, a greater duty is cast on the plaintiff to prove that the process of manufacture adopted by the defendant and which is the subject-matter of

the claim amounts to an infringement of the patent or is such an imitation as to amount to an infringement. Mere use of a darja without a mathani has

been held to be no infringement and not even an imitation on the evidence in the case and since the mathani is not before the Court nor has it been

proved by the plaintiff that the use of such a mathani as has been recovered from the defendant's place would amount to an Infringement the Court

is left thinking as to whether something like the mathani recovered from the defendant's place would or would not amount to an infringement. A

case should not ordinarily be decided on the burden of proof when the parties have entered into evidence but some times an exception has to be

made having regard to the nature of the suit and particularly plaintiff's own ignorance about the essentials of this patent. In view of the admitted

facts in this case and in view of the fact that manufacture of hollow-wares such as batuas, lotas, pateelis, degchis and the like is a cottage industry

of Mirzapur and the adjoining districts, it was for the plaintiff to establish that the process of manufacture adopted by the defendant with the aid of

a loose mathani is an infringement of the patent. This has not been done and so I am not prepared to hold on the evidence produced in the case

that even the use of a loose mathani would amount to any infringement of the plaintiff's process of manufacture.

27. As regards the case of revocation of the patent or a counter claim set up by the defendant stress has been laid on Clauses (d), (e), (f), (g) and

(h) of Sub-section (1) of Section 26. The contention of the learned counsel for the defendant is that the invention was not a manner of new

manufacture on the date of patent, that the invention does not involve any inventive step having regard to what was known or used prior to the date

of patent, that the invention is of no utility, that the complete specification does not sufficiently and fairly describe and ascertain the nature of the

invention and the manner in which the invention is to be performed and that the complete specification does not sufficiently and clearly ascertain the

scope of the invention claimed.

For this purpose reliance has been placed on the case of Indian Vacuum Brake Co., Ltd. Vs. E.S. Luard, Vidya Prakash v. Shah Charan Singh

AIR 1943 Lah 247, Gopi Lal v. Lakhpai Rai AIR 1923 PC 103 and Lallubhai Chakubhai Jariwala Vs. Chimanlal Chunilal and Co.,

On the other side reliance has been placed upon the cases of AIR 1931 279 (Privy Council) , The Bombay Agarwal Co. Akola v. Ramchand

Diwanchand AIR 1953 Nag 154 and AIR 1925 652 (Oudh)

28. A perusal of all these authorities will go to show that the question of infringement of a patent is a mixed question of law and fact. The

infringement of a patent may be done in a number of ways, one of which is by using the patent or any colourable imitation thereof in the

manufacture of patented articles. It has also been observed in some of these authorities that the infringement may not be of the complete whole of

the process but it may be only in part but in the latter case what is necessary is that the protection which is sought for, for such part is material or is

totally new. In the present case hollow-ware is admittedly being manufactured in Bandhua (where the defendants reside) from times immemorial.

In such a case what the plaintiff had to prove was that an improvement had been made on something which was already known by a new

combination of different parts. He had further to prove that the patented combination, that is of darjas, mathanis and the sand or clay or paste

whatever it is called, was one in which the component parts were so combined as to produce a new result in a better or some expeditious or some

economical manner. If it is so the combination may afford a good subject-matter for a patent. A mere collection of two or more things, however,

without some exercise of the inventive faculty in combining them is not a subject-matter for a patent.

In the present case the plaintiff was put a question about the components of the patent and about the particular features of the invention but he was

not able to say anything more than stating that the patented process saved time and was economical. There are three or four important components

of this process, the iron darjas, a fixed mathani to a frame and the clay with which the mould is prepared. In the process adopted by the defendant

the mathani is absolutely missing and even if he had a loose mathani it cannot be called a mathani of the type patented by the plaintiff's

predecessor. The shape of the darja is materially different. The very object of using the earth over and over again or the very object of avoiding

digging of the clay after a utensil is prepared is not achieved in the defendants process.

In the case of Indian Vacuum Brake Co., Ltd. Vs. E.S. Luard, it was held by a single Judge of the Calcutta High Court that the term "utility" used

in the Act has been used in a special sense. Mere usefulness is not sufficient to support the patent. Patent for making in one piece articles which

were formerly prepared in two or more pieces could not be called to be a valid patent. In the case of Vidya Prakash AIR 1943 Lah 247 (supra)

the Lahore High Court held that the points which are to be considered in the case of an infringement of a patent are whether the invention had

utility, whether it was or was not a new invention and whether the invention was properly described in the specification. In the present case none of

these applies.

In Privy Council case of Gopi Lal AIR 1923 PC 103 (Supra) it was held that "the claim for improvement No. 1 was invalid for want of novelty.

When Banslochan had been prepared from a long time before there was no novelty in certain respects and so the patent was invalid. Can it at all

be said in the present case when jointless batuas were prepared from times immemorial at Bandhua that preparation of such batuas with the aid of

different iron frames was an infringement? To my mind it is not so.

In the case of Lallubhai Chakubhai Jariwala Vs. Chimanlal Chunilal and Co., a learned single Judge of the Bombay High Court held that two

features necessary to the validity of a patent are novelty and utility but the real test is in the novelty of the invention. It has been discussed at p. 108

that if a process has been patented in anticipation of the prior public knowledge it would not be valid. The ingredient of novelty would be one thing

on which the patent could be upheld. This test also does not apply in the present case because jointless batuas were being prepared from before at

Bandhua and so it cannot be said that the plaintiff's process of preparing hollow-wares without a joint with the aid of "darjas" was at all a novelty.

29. In the case of AIR 1931 279 (Privy Council) their Lordships of the Privy Council observed at p. 284 that the "patentee must define the nature

of the invention and disclose a process which produced a result to be aimed at. If the patentee claims protection for a process for producing a

result and that result cannot be produced by the process ..... consideration for the patent fails" and the protection which is purchased by the

promise of results cannot survive. It has already been shown earlier that some of the claims put forward by the patentee do not tally I will not go to

the extent of saying that the consideration of the patent fails wholly but if variation is made in the original patented process and the patented process

is not followed it cannot at all be said that complete and full results were achieved from the patented claims.

In the case of Bombay Agarwal Co AIR 1953 Nag 154 (supra), a Division Bench of the Nagpur High Court considered the case from various

aspects and it was held that in cases of patents the Court must see whether there was novelty in the process, whether the subject-matter of patent

is proper and whether there is utility. By the subject-matter of patent was meant the exact advance upon the existing knowledge which the patentee

claims. It further held that the patent can be defeated if it is not "a new manufacture or improvement thereby indicating that qua manufacture it was

being indulged in by others prior to the date of the patent." In the present case both these things are missing. That Court further observed that

invention is finding out something which has not been found by other people. This again is missing in the present case because the preparation of a

jointless hollow-ware very well known to the people of Bandhua.

The learned counsel for the plaintiff relied upon certain observations in paragraphs 50 and 51 and contended that a patent should not be defeated

after a long lapse of time when the challenge is based on oral testimony which is hard to check. This may be true, but in all such cases the subject-

matter must be of utility and there must be novelty. If it would be so the Court would uphold the patent rather than defeat it. To my mind there was

no novelty in the process because as found from the evidence jointless hollow-wares were being prepared in Bandhua from times immemorial and

for the last 25-26 years "darjas" were also used. On utility the only allegation is that it saves time and money, but now it is done has not been

proved. It may also be stated here that the plaintiff tried to prove by his deposition and the statement of Durga Prasad that the defendant had come

to the plaintiff's shop to learn the process in order to get a license and then imitated the process, but it is difficult to believe this and I feel no

hesitation in saying that the plaintiff has not been straightforward in his statement while Durga Prasad is a person who is working at the plaintiff's

shop. It cannot be accepted that he works for one hour or so daily regularly at the plaintiff's shop yet he does not get any remuneration for it.

The plaintiff also produced two witnesses in rebuttal Sitla Prasad and Babu Ram to show that preparation of hollow-wares at Bandhua with the aid

of darjas is being done for the last about two years. I am not at all impressed by their statements or the plaintiff's evidence as a whole. Every

witness appears to have stated untruth in order to support the plaintiff's case. As stated earlier the statement of Ram Swarup D. W. is more

convincing and it has to be accepted that hollow-wares are being prepared at Bandhua with the aid of darjas for the last about 25 or 26 years.

Other persons from neighbouring places, who got darjas prepared from Ram Swarup D.W. are also doing the same. This will take away the

ingredient of novelty as also utility.

In the case of AIR 1925 652 (Oudh) there was an infringement of the plaintiffs patent. There was also nothing to show that the process was being

used from before and that there was also some sort of camouflage in infringing the plaintiff's process. The question of novelty and utility also did

not arise in that case and the case was decided on the question whether a useless appendage which was used was intended to serve as a screen to

or a mere device to hide an actual infringement and it having been found so the infringement of the patent was upheld. This authority does not in any

way help the plaintiff's case. On the facts and circumstances of the case as revealed in the evidence it has to be held that the counter claim set up

by the defendant has been established, that the invention on the date of the patent was not a manner of new manufacture nor did it involve any

inventive step having regard to what was publicly known, and that the invention could not be called of much utility.

30. The learned counsel for the defendant also contended that the specifications given do not sufficiently and fairly describe the nature of the

invention nor do they ascertain the scope of the invention. In this connection he has made a reference to the statement of the plaintiff in cross-

examination wherein he stated that he did not know what are the nine features of the patented process. This cannot be taken to mean that the

specifications given do not sufficiently and fairly describe the nature of the invention. It can only imply that the plaintiff himself is not adhering to the

patented process or the claim which has been set up by Mahabir Prasad Vishwakarma in the patent is not being followed by the plaintiff. It has

already been pointed out as to how the darjas used by the defendant are dissimilar to the one which were patented and how the process of

manufacture is also different. It has also been pointed out that there was nothing novel in the patent and the patent is also not of any utility. Having

regard to the existing process of manufacture in Bandhua at the time the patent was taken out and the material variations in the process of

manufacture adopted by the defendant it cannot be held that the defendant has infringed or imitated the plaintiff's process of manufacture in the

manufacture of hollow-ware utensils even with the aid of mathani. The counter claim set up by the defendant under Clauses (b), (e) and (f) of Sub-

section (1) of Section 26 has also been established.

31. Issue No. 5 : The learned counsel for the plaintiff has not been able to substantiate his argument that the defendant's claim of revocation of the

patent is not maintainable against an assignee of the original patentee. According to the definition of the patentee given in the Act "every person

who is for the time being entered on the register of patents as the grantee or the proprietor of the patent" is a patentee. It has already been shown

that the plaintiff is a registered assignee on behalf of Mahabir Prasad Vishwakarma and his name is entered on the register of patents. He is

proprietor of the patent and so the claim of revocation is maintainable against him.

Issue No. 6: In view of the above findings the suit fails.

32. ORDER : The suit is dismissed with costs. The interim injunction is vacated.