

(2009) 11 MAD CK 0208

Madras High Court

Case No: A. No"s. 5833 to 5835 of 2009 and O.A. No"s. 948 to 950 of 2009 in C.S. No. 803 of 2009

Kartar Agro Industries

APPELLANT

Vs

Vishal Agricultural Works

RESPONDENT

Date of Decision: Nov. 25, 2009

Citation: (2010) 42 PTC 721

Hon'ble Judges: G. Rajasuria, J

Bench: Single Bench

Judgement

@JUDGMENTTAG-ORDER

G. Rajasuria, J.

Compendiously and concisely, the relevant facts absolutely necessary and germane for the disposal of these applications would run thus:

The Plaintiff filed the suit seeking the following reliefs:

to grant a permanent injunction, restraining the Defendants, by their men, agents, successors in business, assigns, representatives or any person claiming through or under them from in any manner infringing the Plaintiffs copyright in the artistic work in the drawing for its Combines by substantially reproducing the said artistic works either in 2 dimensions or in 3 dimension by manufacturing, selling, offering for sale or dealing with Combine Combines, parts and fittings or in whatever name called or in any other manner whatsoever;

to grant a permanent injunction restraining the Defendants, by their men, agents, successors in business, assigns, representatives or any person claiming through or under them from in any manner passing off or enabling others to pass off their Combines, parts and fittings, which are identical and deceptively similar to the Plaintiff's Combines in any other manner whatsoever;

granting a permanent injunction, restraining the Defendants, by their men, agents, successors in business, assigns, representations or any person claiming through or under them from in any manner infringing the registered designs of the Plaintiff under No. 212482, 212807 and 212900 in Class 15-03 and 216315 and 216315 and 216316 in class 15-09;

the Defendants be ordered to pay to the Plaintiff a sum of Rs. 20,05,000/- by way of damages;

the Defendants be directed to surrender to the Plaintiff for destruction, catalogues, drawings, any print material etc., with any reference whatsoever to the Plaintiff or its combines and the products manufactured thereon;

for costs.

2. The same Plaintiff filed the following applications with the prayers as under:

O.A. No. 948 of 2009 has been filed to get an order of interim injunction, restraining the Respondents, by their men, agents, successors in business, assigns, representatives or any person claiming through or under them from in any manner infringing the applicants copyright in the artistic work in the drawings for its Combines by substantially reproducing the said artistic works either in 2 dimensions or in 3 dimension by manufacturing, selling, offering for sale or dealing with Combine Combines, parts and fittings or in whatever name called or in a any other manner whatsoever;

O.A. No. 949 of 2009 has been filed to get an order of interim injunction, restraining the Respondents, by their men, agents, successors in business, assigns, representatives or any person claiming through or under them from in any manner passing off or enabling others to pass off their combines, parts and fittings, which are identical and deceptively similar to the applicants Combines in any other manner whatsoever;

O.A. No. 950 of 2009 has been filed to get an order of interim injunction, restraining the Respondents, by their men, agents, successors in business, assigns, representatives or any person claiming through or under them from in any manner infringing the registered designs of the applicant under No. 212482, 212807 and 212900 in Class 15-03 and 216315 and 216315 and 216316 in Class 15-09.

3. Common counter affidavit has been filed by R1/D1, challenging and impugning the averments/allegations in the affidavit accompanying the applications as well as in the plaint. The first Defendant also filed three applications with the prayers as under:

A. No. 5833 of 2009 has been filed to vacate the interim order dated 11.09.2009 passed in O.A. No. 948 of 2009 in C.S. No. 803 of 2009 and to consequently dismiss application with costs;

A. No. 5834 of 2009 has been filed to vacate the interim order dated 11.09.2009 passed in O.A. No. 949 of 2009 in C.S. No. 803 of 2009 and to consequently dismiss application with costs;

A. No. 5835 of 2009 has been filed to vacate the interim order dated 11.09.2009 passed in O.A. No. 950 of 2009 in C.S. No. 803 of 2009 and to consequently dismiss application with costs;

4. Heard both sides.

5. The gist and kernel, the nitty gritty of the arguments of the Learned Counsel for the Plaintiff would run thus:

(1) The Plaintiff is a registered Company manufacturing "Harvester" under the name and style of "Rubber Track Combine Harvester" and it got registered as many as five designs in respect of the said harvester as under:

Sl No.	TITLE OF THE DESIGN	DESIGN NUMBER AND DATE	REGISTRATION DATE
(a)	Harvester	212482 in Class 15-03	dtd 14.09.2007
(b)	Straw Walker for use in track Harvester Combine	212807 in Class 15-03	dtd 14.09.2007
(c)	Peg Tooth threshing Cylinder for use in Track Harvester Combine	212900 in Class 15-03	dtd 11.10.2007
(d)	Gear for use in track Harvester	216315 in Class 15-09	dtd 14.05.2008
(e)	Gear body for use in track Harvester Combine	216316 in Class 15-09	dtd 14.05.2008

(2) The Plaintiff claims copy right in the following parts of the Plaintiffs product - Combine:

(a)Thresher

(b) Chassis

(c) Driving Assembly System

(d) Lever bod

(e) Cutter bar front worm

The Plaintiff has got copy right over the five drawings relating to the aforesaid five apparatuses which are used in the said harvest machine.

(3) The first Defendant's Company by name "Vishal Agricultural Works" is an organisation manufacturing similar harvest machine and they are having a Branch Office in Tamil Nadu and they passed off the harvester machine of the Plaintiff as though it is theirs, by indulging in deceptive manufacture of the said apparatus and also by violating the copy rights as well as the design rights set out supra.

Accordingly, the Defendants should be enjoined from manufacturing.

6. Whereas, by way of torpedoing and pulverising the arguments as put forth on the side of the Plaintiff, the learned Senior Counsel for the Defendants would set out and put forth the following:

(1) this Court has got no jurisdiction to entertain the suit itself and consequently to grant any injunction. Challenging the jurisdiction of this Court, a separate application has been filed.

(2) The Plaintiff has not come forward with clean hands for the reason that they have not yet disclosed the alleged drawings over which the copy right is claimed by them in paragraph 9 of the plaint.

(3) Relating to item (a) harvester, referred to supra, so far no application has been filed challenging the same and the Defendants are contemplating further action as against such registration.

(4) In paragraph 11 of the plaint, they claimed that there are five registrations to their credit in respect of the designs described therein and the Defendants already challenged the other four designs by filing appropriate application before the authority concerned under the Designs Act.

(5) The typed set of papers filed by the Defendants would make the point clear that the design right which the Plaintiff does claim is not really their brainchild, but it is only an imported one.

(6) No similarity could be seen between the machine of the Plaintiff and the machine of the Defendants and there are differences in almost all aspects.

(7) The Defendants cannot claim any right over the configuration of the machine or any of its parts or the alleged design or the alleged drawings as though they do have a monopoly over it, as even prior to the Plaintiff having started manufacturing its product, i.e., its harvester machine, in the concerned field, various other companies started manufacturing such harvesters. Accordingly, he prayed for vacating the injunction orders.

7. The points for consideration are as to:

(1) Whether the Defendants have infringed the Plaintiffs copyright in the artistic work in the drawings?

(2) Whether the Defendants have infringed the registered designs of the Plaintiff?

(3) Whether the Defendants have passed off their combines, parts and fittings, which are identical and deceptively similar to the Plaintiffs Combines?

(4) Whether the exparte injunctions already granted have to be vacated?

8. At the outset, I would like to point out that the A. No. 5837 of 2009 challenging the jurisdiction of this Court to entertain the suit and A. No. 4596 of 2009 relating to joinder of causes of action and A. No. 5836 of 2009 to dismiss the A. No. 4596 of 2009 could be taken up later in view of effective submissions put forth before me on either side and I am of the view that it warrants deep scrutiny and they have to submit further arguments on those applications.

9. The Learned Counsel for the Plaintiff would submit that it is the Plaintiff who actually combined the three devices, viz., Harvester, Straw walker and peg tooth cylinder; even the use of Rubber Track in harvester also has been brought in to vogue only by the Plaintiff and not by any other manufacturer of harvester machine and accordingly, he would pray for injunction to continue.

10. He by inviting the attention of this Court to the typed set of papers as well as the copies of the registration of the designs, including the literature available in the typed set, would develop his argument as under:

(1) The gear manufactured and utilised by the Plaintiff is cylindrical in shape and the gear board is also having its own peculiarities.

(2) Whereas, the Defendants are copying the same and fraudulently passing off the apparatuses of the Plaintiff as that of the Defendant.

(3) He would also point out that the farmers who are taking on lease the harvester machines would certainly be misled by the similarities that are there in the machines produced by the Plaintiff as well as the Defendants' machines and ultimately that would cause loss to the Plaintiff.

11. Whereas, by way of contradicting and torpedoing, the plea as put forth by the Learned Counsel for the Plaintiff, the learned Senior Counsel for the Defendants would invite the attention of this Court immediately to the compilation filed by the Defendants under the name "Self Propelled Track Type Combine Harvester "Kartar 3500 (Gajjendhra)" at page 18, paragraph bearing 3.1.3. having the caption Assemblies/Components Indigenised and it is extracted hereunder for ready reference:

Assemblies/Components Indigenised	Except for the following major imported components the other assemblies are stated to be indigenised
Rubber track	Mclaren
Planetary gear box	ReggianaRidduttori, Italy

Tandem Axial piston pump	Eaton, USA
Hydraulic motors	Danfoss Hydraulics, Denmark
Directional control valve	Walvoil, Italy

12. He would develop his argument placing reliance on the above extract that the Plaintiff is not justified in projecting itself before this Court as though its designs are all original designs and that it deserves exclusivity over them. It is quite obvious and axiomatic that the aforesaid items which are used in the machine of the Plaintiff are all imported ones. It appears prima facie, the designs concerning some of the items which they imported also, were got registered as their own designs.

13. At this juncture, the Learned Counsel for the Plaintiff would submit that the particular compilation filed on the side of the Defendants was given to them only recently and he has to look into it in detail by ascertaining further particulars from his client and then only the Plaintiff will be able to reply suitably. Be that as it may, as of now, this Court is concerned with certain prima facie and ex facie evidence and materials for passing this present interim order.

14. In respect of the submission made by the Learned Counsel for the Plaintiff, that earlier to the Plaintiff making its machine by combining the said three in one, none were making such machines, the learned Senior Counsel for the Defendants would put forth and set forth his argument to the effect that even much earlier to the Plaintiffs combining the three apparatuses, others also started using them and he would also incidentally point out that "'Swaraj' Combine Harvester (Track type)" came into the market long prior to the Plaintiffs product, and for that the Learned Counsel for the Plaintiff would submit that the said "Swaraj" Combine Harvester did not contain the component, namely Straw Walker, but the type of system was "Tangential axial flow" and not "Straw Walker", and the drawings concerning Swaraj's and Kartar's products are different from each other, for which the learned Senior Counsel for the Defendants would submit that except straw walker, all other features are similar.

15. The learned Senior Counsel for the Defendants by inviting the attention of this Court to the relevant papers would submit that the device, namely Rubber Track was used by Swaraj even before the Plaintiff using it in their harvester machine. As such, ex facie and prima facie, I am satisfied that so far the use of Rubber Track is concerned, the Plaintiff during the pendency of the suit cannot seek any injunction as against the Defendants.

16. In view of my discussion supra, the Plaintiff cannot also seek injunction based on the designs relating to gear and gear board also, as ex facie and prima facie on the Defendants' side they pointed out that those gears are imported from foreign countries.

17. The learned Senior Counsel for the Defendants without prejudice to the Defendants' contentions as against the Plaintiffs whole claim, would make a submission to the effect that they already switched over from the peg tooth model to Iron spike model and in future also the Defendants are not going to adopt peg tooth design and as such, this Court records the same.

18. Relating to straw walker is concerned, the Learned Counsel for the Plaintiff inviting the attention of this Court to the various portions of the typed set of papers filed by the Plaintiff as well as the Defendants would highlight and spotlight that in the American model, i.e. U.S. Straw walker, there is side metal walls in that device, whereas, in the Plaintiffs straw walker, there is no side metal walls and in such a case, the Plaintiff is having design right over its straw walker. Whereupon, the learned Senior Counsel for the Defendants without prejudice to the Defendants' contentions as against the Plaintiffs whole claim, would make a supine submission that the Defendants in their straw walker would provide side metal walls. As such, this Court records the said submission also.

19. Relating to the design bearing Registration No. 212482 relating to harvester is concerned, the Learned Counsel for the Plaintiff would submit that the Plaintiff has got exclusive right over such configuration which they got registered with the authority concerned and they are having a right to injunct the Defendants from deceptively simulating or emulating their model.

20. The Learned Counsel for the Plaintiff also invited my attention to various photographs of the Plaintiffs as well as the Defendants' harvester machines and pointed out that much of a muchness could be seen between the two and the Defendants' product is nothing but a spitting image of the Plaintiffs and in such a case, this Court has to injunct them from using the same configuration, colour etc.

21. Whereas, by way of countering the submissions made by the Learned Counsel for the Plaintiff, the learned Senior Counsel for the Defendants would submit that the green colour is something which the farmers would like; dark green colour is being adopted by the Plaintiff and that the Defendants could have light green colour or some other colour.

22. I would like to observe that over colour combination also the manufacturer could claim certain rights and in such a case, in the interest of the general public as well as for smooth conduct of the business by both sides, the Defendants shall do well to switch over to some other colour, which should not be the dark green colour of the Plaintiff.

23. The learned Senior Counsel for the Defendants by inviting the attention of this Court to the various drawings found in the typed sets of papers would develop his argument that the Learned Counsel for the Plaintiff was not right in trying to distinguish the drawings available in the typed set of papers pertaining to Swaraj with that of the drawings available in the Plaintiffs typed set.

24. At this juncture, the Learned Counsel for the Plaintiff also would submit that if a Commissioner is appointed to note all those details, then it would be exposed that the Defendants' case is not well founded, but ill-founded, but on the other hand, the Plaintiffs case is cent percent true and correct. No doubt, it is for the Plaintiff to move appropriate application at the appropriate stage, which would be considered on merits.

25. The learned Senior Counsel for the Defendants would submit that without a driver seat and frontage, there cannot be any harvester machine and in such a case, it is fastidious on the part of the Plaintiff to contend that the Defendants are deceptively bamboozling and beguiling the mind of the farmers who are interested in taking the Kartar machine of the Plaintiffs by projecting before them the Defendants' product.

26. On seeing the two photos concerning the respective machines of the rival parties available before me, I am satisfied that ex facie and prima facie a man on the top of a Clapham omnibus or a lay man or a common man of ordinary prudence would not be able to make much difference between the facade, i.e., the front portions of both the products. The frontal outward appearance of any vehicle or apparatus or even any building, is of utmost importance rather than any other features. Here no doubt a driver should have a driver seat to drive the vehicle, but it is not compulsory that it should be in pari materia or in consonance with or a spitting image of, the Plaintiffs design, but it could be different. The employees of the Defendants who are well versed in designing, can very easily make some modifications and see that it is not resembling the Plaintiffs model. As such, I am of the considered view that the Defendants, pending disposal of the suit should change the facade/frontal appearance of the Defendants' machine in appropriate manner.

27. The Learned Counsel for the Plaintiff would develop his argument that simply because the Defendants have filed certain objections in respect of registrations of four designs of the Plaintiff, there is no presumption that the Plaintiff cannot seek injunction and in support of his plea, he narrated at length the relevant facts as well as cited precedents as under:

(i) 1999 PTC (19) 757 (DB) of the Calcutta High Court (Rotomac Pens Ltd. v. Milap Chand and Company)

"..." We also agree with H.L. Anand. J's view expressed in Tobu Enterprises Pvt. Ltd. v. Joginder Metal Works (supra) when he said that:

the defence of invalidity of the registration of the design on any of the grounds which may justify cancellation of registration are not open to a Defendant in a suit for infringement without resort to proceedings for cancellation of registration u/s 51A of the Act.

The decision in Nicky Tasha's case was considered, albeit at an interim stage, by a Division Bench of this Court in an unreported judgment in Priya Food Products Limited v. Sona Biscuits (P) Ltd. Appeal No. 766 of 1997, judgment dated 22.12.97 and this is what was said:

Section 53A of the Designs Act, 1911 categorically provides that during the existence of copyright in any design it shall not be lawful for any person for the purpose of sale to apply or cause to be applied to any article in any class of goods in which the design is registered the design or any fraudulent or obvious imitation thereof, except with the license or written consent of the registered proprietor or to do anything with a view to enable the design to be so applied. The heading of Section ought also to be noticed and the same reads, "piracy of registered design" and Sub-section (2) of Section 53 provides that if any person acts in contravention of this section, he shall be liable for every contravention to pay the registered proprietor of the design a sum not exceeding five hundred rupees recoverable as a contract debt or if the proprietor elects to bring a suit for recovery of damages for any such contravention, and for an injunction against the repetition thereof, to pay such damages as may be awarded and to be restrained by injunction accordingly.

From the factual score it further appears that there is in fact an application for cancellation of the design pending in this Court but without however there being any order passed thereon. Be it also noted that this application has been filed after initiation of the suit in this Court. The registered design gives some amount of protection and there cannot be any denial with regard thereto and the Statute is clear and categorical on the score. The registered holder has a copyright in the design and in terms of Section 53, no one has the authority to act contrary to, or pirate the design which stands registered with the Registrar.

(ii) Unreported judgment of the Division Bench judgment of this Court O.A. Nos. 1065 of 1995 and etc. batch.

7. The prayer for injunction cannot be granted in this case for two reasons. Firstly, prima facie, official acts are presumed to have been validly done. In particular, a registration under a statute which has been granted by the appropriate authority cannot be presumed to have been granted illegally or unlawfully without any evidence being placed before the Court in that regard. As at present, no allegation has been made as regards any irregularity in the procedure adopted by the Joint Registrar. The only case put forward by the original Petitioner is that the design was not a novel one and similar designs had been adopted earlier by other businessmen. That is a matter which has to be considered only on evidence. So long as there is no apparent illegality or irregularity in the procedure adopted by the Joint Controller of Patents and Designs, the design has to be presumed to be valid till the Court comes to a contrary conclusion.

28. Whereas, the learned Senior Counsel for the Defendants would submit that he could also cite various decisions, but for the purpose of disposal of these interim applications, it might not be necessary. He would also submit that those Division Bench judgments cited supra on the side of the Plaintiff are pertaining to Designs Act, 1911, but now the provisions of the current Act are different. Be that as it may, for the purpose of the disposal of these applications, this Court need not dilate on those points.

29. The learned Senior Counsel for the Defendants would submit that there are fifteen machines manufactured by them ready for being sold as per their earlier undertaking given to their customers and they might be permitted to sell the same and maintain accounts.

30. Whereupon, the Learned Counsel for the Plaintiff would submit that they have to furnish the chassis numbers and engine numbers of those fifteen machines, so that the Court as well as the Plaintiff would be able to know as to how many machines were sold under the old pattern and subsequently under the new pattern, during the pendency of the suit.

31. Hence, in view of the ratiocination adhered to by me above, the following directions are issued ultimately:

(i) The Defendants are at liberty to sell away their fifteen machines which they claim to have already manufactured and keeping them for sale and maintain accounts and they shall also continue to maintain accounts even while selling their new products as per the changed configuration and other changes which this Court has ordered the Defendants to carry on in their product.

(ii) By 27.11.2009, engine numbers and chassis numbers of those fifteen machines shall be furnished by the Defendants to the Court as well as to the Plaintiff.

(iii) During the pendency of the suit, the Defendants are permitted to manufacture new harvest machines by using Iron spile and straw walker with metal side walls and also using Rubber Track. Further, they shall not use the straw walker without side walls and also shall not use peg tooth of the Plaintiff.

(iv) The Defendants also shall change the facade/face lift/frontal appearance of their machine as set out supra.

(v) The Defendants shall also not adopt the dark green colour that is being adopted by the Plaintiff.

With these observations, these applications are disposed of.

32. The learned Senior Counsel for the Defendants would make an extempore submission to the effect that this Court even though recorded the submissions made by him in certain places, it may not be taken that the Defendants admitted the Plaintiffs claim for its design right or copy right. It goes without saying that this is an

interim order and the Defendants are at liberty to contest the matter in all fours