

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED.26.04.2012

CORAM:

THE HONOURABLE MR.JUSTICE T. MATHIVANAN

C.S.No.546 of 2009

1. Atlas Metal Processors Pvt., Ltd.,
rep.by its Director, Kingston Victor
Old Mahabalipuram Road
173/3, Nehru Street
Sholinganallur, Chennai-600 019

2. Thermo Housewares Pvt., Ltd.,
rep. by its Director Kingston Victor
W1, Paiyanoor
Old Mahabalipuram Road
Mahabalipuram-603 104

3. Kingston Victor .. Plaintiffs

Vs.

1. H.K. International
rep. by its sole proprietor
H. Narendra
No. 42, Paramasivam Street
Park Town, Chennai-600 003

2. H. Narendra

3. Metro Palace
rep. by Mohammed Moosa
39/1, Rattan Bazaar

Prayer: Suit is filed under Order IV Rule 1 of O.S.Rules r/w Order VII Rule 1 C.P.C., Section 104 of the Patents Act, 1970 and Section 22 of the Designs Act, 2000 for the following reliefs:

- a. For a permanent injunction restraining the defendants their agents, or any person claiming under the defendants from in any manner infringing the plaintiffs' patent No.230421 in India by manufacturing, importing, marketing, selling, distributing either by wholesale or retail or in any other manner dealing with products comprising of stainless steel vacuum bottles in violation of the plaintiffs' patent No.230421;
- b. For a permanent injunction restraining the defendants their agents, or any person claiming under the defendants from in any manner infringing the plaintiffs' design Nos.205153, 207081, 207085, 207083 in India by manufacturing, importing, marketing, selling, distributing either by wholesale or retail or in any other manner dealing with the products comprising of stainless steel vacuum bottles in violation of the plaintiffs' design Nos.205153, 207081, 207085, 207083;
- c. To grant a permanent injunction restraining the defendants their agents, or any person claiming under the defendants from in any manner dealing with the products comprising of stainless steel vacuum bottles of the type identical or deceptively similar or having same colour scheme, getup and layout to the plaintiffs' patented and design protected products and thereby passing-off the defendants' products as that of the plaintiffs' patented and design protected products;
- d. For destruction of all the infringed products that may be ordered to be seized;
- e. To award damages to the plaintiffs for an initial sum of Rs.10,00,000/- towards loss of sales and profits;
- f. To render accounts with regard to the dealings of the defendants with respect to the infringed and pirated products to the plaintiffs and to make payments of all

profits earned by the defendants by reason of the infringed trade being carried on by the defendants; and

g. To order costs of the suit to the plaintiffs.

For Plaintiffs : Mr.P.S.Suman

For M/s. Mysamy Associates

For Defendants : P.V.Rajeshwari

J U D G M E N T

1. The plaintiffs have filed the suit against the defendants under Order IV Rule 1 of O.S.Rules r/w Order VII Rule 1 C.P.C., Section 104 of the Patents Act, 1970 and Section 22 of the Designs Act, 2000 seeking the following reliefs:

a. For a permanent injunction restraining the defendants their agents, or any person claiming under the defendants from in any manner infringing the plaintiffs' patent No.230421 in India by manufacturing, importing, marketing, selling, distributing either by wholesale or retail or in any other manner dealing with products comprising of stainless steel vacuum bottles in violation of the plaintiffs' patent No.230421;

b. For a permanent injunction restraining the defendants their agents, or any person claiming under the defendants from in any manner infringing the plaintiffs' design Nos.205153, 207081, 207085, 207083 in India by manufacturing, importing, marketing, selling, distributing either by wholesale or retail or in any other manner dealing with the products comprising of stainless steel vacuum bottles in violation of the plaintiffs' design Nos.205153, 207081, 207085, 207083;

c. To grant a permanent injunction restraining the defendants their agents, or any person claiming under the defendants from in any manner dealing with the products comprising of stainless steel vacuum bottles of the type identical or deceptively similar or having same colour scheme, getup and layout to the plaintiffs' patented and design protected products and thereby passing-off the defendants' products as that of the plaintiffs' patented and design protected products;

d. For destruction of all the infringed products that may be ordered to be seized;

e. To award damages to the plaintiffs for an initial sum of Rs.10,00,000/- towards loss of sales and profits;

f. To render accounts with regard to the dealings of the defendants with respect to the infringed and pirated products to the plaintiffs and to make payments of all profits earned by the defendants by reason of the infringed trade being carried on by the defendants; and

g. To order costs of the suit to the plaintiffs.

2. The excerpts of the facts, which necessitated the plaintiffs to come forward with this suit may be summarized as under:

2.1. The first plaintiff company is in the business of manufacturing of various kinds of kitchenware and bathroomware products and by reason of its inventive approach now manufacturing a diverse range of 349 different products. From the year 2006, the first plaintiff has inter-alia been continuously engaged in the manufacture, sale, marketing and export of the 'ATLASWARE' range of stainless steel vacuum bottles (herein after referred to as 'Stainless Steel Bottles' / 'The Patented and Design Protected Product') which are unique in nature in terms of both functionality and its design. The first plaintiff company was incorporated in the year 1995 by the third plaintiff as one of its promoter, director and shareholder.

2.2. The second plaintiff company was also incorporated in the year 2006 by the third plaintiff as one of its promoter, director and shareholder.

2.3. The first plaintiff and the second plaintiff companies are therefore under the direct and common control of the third plaintiff.

2.4. The third plaintiff, who is the inventor of the patented product is a graduate in engineering from Coimbatore and an Anna University gold medalist. The third plaintiff has personally along with the other engineers engaged by him conducted and succeeded invented the design, concept and other details of the patented products.

2.5. The first plaintiff is a 100% export oriented unit and therefore exports its entire manufactured products to several countries including various countries of the European Union, the Middle East, Newzealand, Australia etc.,

2.6. The second plaintiff was incorporated to manufacture, market and sell its products including the patented and design protected products in India.

2.7. The patented and design protected product is very widely advertised in India directly by the second plaintiff and also advertised jointly along with the distributors in an exhaustive manner.

2.8. The first and second plaintiffs have been manufacturing, marketing and selling the patented and design protected product and promote such part of their business exhaustively under the brand name 'ATLASWARE' and the associated logo from the year 2006 onwards. The associated logo, which is in connection with the stainless steel vacuum bottles is therefore identified with the business of the first and second plaintiffs and their businesses and such product along with the trade mark has achieved

tremendous goodwill and a very strong brand image.

2.9. The third plaintiff being the inventor of the stainless steel vacuum bottles and obtained a registered patent for such products as an invention entitled under the title 'ROBUST THERMALLY INSULATED BOTTLE' as disclosed in the application filed, seeking the grant of the patent.

2.10. The date of filing of the application for such patent was 18.07.2006 and such patent was granted on 26.02.2009 in accordance with the provisions of the Patents Act, 1970 for a term of 20 years from the date of application. The registration number of the patent granted in relation to the patented product is No.230421.

2.11. Neither the defendants nor any of the other competitors had initiated pre-grant opposition proceedings under Section 25(1) of the Patents Act, 1970 to object the grant of patent. The patented product is being manufactured in various shapes and capacities such as 220 ml, 350 ml, 500 ml, 700 ml, 1000 ml and 1750 ml (6 sizes) all of which come within the ambit of the protection granted.

3. The claims in the granted patent for the 'ROBUST THERMALLY INSULATED BOTTLE' can be broadly summarised as follows:-

1.The invention is a robust thermally insulated leak proof two-shell bottle for designed for hot and cold fluid storage for a long period (hrs.);

2.The bottle design has incorporated two-stopper arrangement for fluid and thermal sealing mechanism to facilitate reliable thermal performance;

3.The two-shell arrangement consists of an outer stainless steel shell and an inner stainless steel shell. Vacuum space between both the shells act as a thermal insulator;

4.The surface of the inner insulating shell is made as smooth as possible. The bottle is designed incorporating with suitable features to augment durability.

5.The thermally insulated bottle is provided with an inner stopper to resist the leak from inner cup. The outer stopper acts as a lock. Combination of two stoppers acts as heat and a leak proof arrangement. The two shells are joined at the inner stopper;

6.Aforementioned arrangement as described in claim 5 has resulted in a perfect thermal and fluid leak proof. This design arrangement facilitates the bottle to retain 96 C hot fluid for a day;

7.Grooves are made in the bottom surface of the bottle. The cup like serrated portion in the bottom augments the strength of the bottle. As claimed in statment 4 the insultaed bottle is designed to resist breakage due to impact and shock loading;

8.Smooth inner surface described in claim 4 eliminates concave surface in the bottle. This facilitates cleaning of the bottle. Odour free characteristics is an added value of this invention.

9.The bottle is compact and weightless.

4. The functional features of the patented product of the plaintiffs are:-

The normal Vacuum flasks are fragile in nature, in which heat retention is not more than a couple of hours with most of them not being capable of being used for both hot and cold water and there is always a trade-off between the weight and the durability of the normal Vacuum flasks. On the contrary the patented product has completely covered all inadequacies of the normal vacuum flasks thereby making the ATLASWARE stainless steel vacuum flasks a patentable product.

5. The ATLASWARE stainless steel vacuum bottles have therefore also been registered in respect its designs for the descriptions specified hereunder under the Designs Act, 2000. The designing has also been done primarily with the purpose to make the bottles shock-proof in case of an accidental drop.

The details of such registration is as follows:-

sL. No.	Description	Date of Registration	Class under which Registered	Design No.	Registered in the name of
1.	Bottle	30.06.2006	09-01	205153	1st Plaintiff
2.	Bottle	13.11.2006	09-01	207081	3rd Plaintiff
3.	Bottle with Sipper	13.11.2006	09-01	207085	3rd Plaintiff

4. Bottle Lid 13.11.2006 09-01 207083 3rd Plaintiff

6. The specific details of novelty of the abovementioned designs are as under:-

Sl No.	Design No.	Description/part of Bottle Design	Statement of Novelty
1.	205153	Front View	a.Shape and Configuration
		Top View	b.Shape and Configuration
		Horizontal View	c.Shape and Configuration
		Bottom View	d.Shape and Configuration
2.	207081	Front View	a.Shape and Configuration
		Top View	and clour combination
		Horizontal View	b.Shape and Configuration
		Bottom View	and clour combination

c.Shape and Configuration
and clour combination
d.Shape and Configuration
and clour combination

3. 207085 Front View a.Shape and Configuration
Top View and clour combination
Bottom View b.Shape and Configuration
and clour combination
c.Shape and Configuration
and clour combination

4. 207083 Perspective View a.Shape and Configuration
Front View b.Shape and Configuration
Top View c.Shape and Configuration

7. By virtue of the above registrations, the 1st and the 3rd plaintiffs have the exclusive right over the registered designs in the territory of India. Further by virtue of Section 11 of Designs Act 2000, the 1st petitioner also has a 'Copyright' in such designs for a period of 10 years from the date of such registration. As in the case of the patented product rights being granted by the 3rd plaintiff to the 1st and the 2nd plaintiff, the right to use the registered designs have also been made available by the 3rd plaintiff to the 1st and the 2nd plaintiff and therefore all three parties possess and have been using such rights on a continuous basis.

8. Apart from the above registrations the 1st plaintiff has also registered its trademark ATLASWARE under the Trade Marks Act, 1999 and the trade mark has also been registered vide certificate No.1465982.

9. The sales figures both in terms of the value and the number of pieces of the patented and design protected product sold by the 1st and the 2nd plaintiff is as under:

TOTAL EXPORT SALES OF THE STAINLESS STEEL VACUUM BOTTLES FROM ATLAS METAL PROCESSORS PVT LTD. (1st PLAINTIFF)

PERIOD	SALES AMOUNT	QUANTITY (in Nos.)
2006-07	3,671,483.16	33832
2007-08	21,215,707.73	107108
2008-09	28,367,293.99	119562

TOTAL	53,254,484.88	260502
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TOTAL SALES OF THE STAINLESS STEEL VACUUM BOTTLES FROM THERMO HOUSEWARES PVT. LTD. (2nd PLAINTIFF)

PERIOD	SALES AMOUNT	QUANTITY (in Nos.)
2006-07	3,482,292.00	10675
2007-08	25,993,673.00	57535
2008-09	43,314,650.83	34216
TOTAL	72,790,615.83	102426

10. By virtue of the grant of the patent and by virtue of the provisions of Section 48 of the Patent Act 1970, the plaintiffs herein have a right to prevent third parties from the act of making, using, offering for sale, selling or importing for the above purpose the patented product in India without the consent of the said plaintiffs. By virtue of the grant of registered design protection by design nos.205153, 207081, 207085, 207083 in India, the plaintiffs are also entitled to file a suit against the piracy of Registered Designs.

11. The plaintiffs have now reliably learnt and have obtained sufficient proof to prove that the defendants are in abundant and in flagrant violation of the patent rights, the design rights and the copyrights vested in the plaintiffs by malafidely engaging in the large scale business of importing, marketing, distributing and selling of stainless steel vacuum bottles which are very similar to the patented and design protected products of the plaintiffs and which are very obvious imitations of the plaintiffs "ATLASWARE" range of Patented and Design Protected Products and such actions are being undertaken by the defendants without obtaining any permission whatsoever from the plaintiffs.

12. The 1st and the 2nd defendants have been importing the infringed products from China and more specifically from one M/s.Jinxinda Tools Company Limited and markets, distributes and sells the products under its own name in India. The plaintiff have also reliably learnt that a huge consignment of around 8000 numbers of infringing bottles have been imported by the 1st and 2nd defendants as recently as on the 1st of June 2006. The 2nd and 3rd defendants have imported, marketed and are involving in the wholesale/retail supply of the infringing and pirated products to several retail stores in Tamil Nadu and probably outside Tamil Nadu.

13. The infringing products have a two shell arrangement consisting of outer and inner stainless steel shells as in the case of the plaintiffs patented invention. The infringing product is directly covered by the claims as specified in the granted Patent No.230421. Further the infringed product is branded as "GLOBUS" which word is encompassed by an oval circle which is similar to the oval circle contained in the "ATLASWARE", product thereby making the appearance of the 'logo' of the infringed product similar to that of the logo of the Patented Product. The infringing products comprise of stainless steel vacuum bottles are identical and deceptively similar, having same colour schemes, getup and layout as that of the plaintiffs design protected products and the defendants are therefore passing-off the defendants products as that of the plaintiffs design protected products.

14. A comparative table showing the similarities between the patented and design protected product and the infringing and pirated product is shown below:

Plaintiffs Product	Defendant's Product
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-Thermally insulated two shell bottle designed for hot (18 hrs) and cold (24 hrs) fluid storage for a long period.

-Stainless steel used is top quality.

-Two-stopper arrangement for fluid and effective thermal sealing mechanism.

-Vacuum space between the outer and inner stainless steel shells.

-Inner shell constructed with a smooth finish, eliminating a concave surface which

- Deceptively similar looking product/design of all components simply copied from the Patented and Design

Protected Product but which is low in terms of its thermal efficiency (in Hrs).

-Stainless Steel used is of 18/2 grade only.

-Imitation of the plaintiffs' product.

-Imitation of the plaintiffs' product.

-Imitation of the plaintiffs' product.

facilitates easy cleaning.

-Construction which makes the
bottle leak proof.

-Imitation of the plaintiffs'
product.

-Grooves on the bottom
surface and on the cap.

-Imitation of the plaintiffs'
product.

-Unique colour scheme, getup
and layout of the design and
shape.

-Imitation of the plaintiffs'
product.

15. Apart from infringing the rights of the plaintiffs as set-out above, the defendants are cheating the public by duping them to believe that they are purchasing the product of the plaintiffs while on the other hand the defendants are passing-off and selling their cheap quality product to the public.

16. The sales of second plaintiff of the patented product in Chennai alone account to around 50% of its total sales and the conduct of the defendants in importing and selling the infringed and pirated product in Chennai has affected and is continuously affecting the sales of the second plaintiff and its profitability and goodwill of the other plaintiffs as well. Further the same amounts to a clear infringement and passing off in law and hence this suit is filed seeking the relief as aforesated.

17. The defendants in their written statement have contended that the 3rd plaintiff claims to be the inventor of the patent which is the subject matter of the suit and in the absence of any specific assignment or license, the plaintiffs 1 and 2 who are in fact manufacturing the article covered under the alleged patent cannot maintain the suit. Though the 3rd plaintiff claims for the invention of the patent which is the subject matter of the suit, the 1st plaintiff had applied for and obtained the registration of the design for the alleged shape and configuration in respect of thermo flask which is the subject matter of the suit. If the design in respect of the alleged patented article is developed by the 1st plaintiff, it cannot be said that the 3rd plaintiff is the inventor of the patent and there is contradiction in the claims of the plaintiffs.

18. The stainless steel vacuum bottles manufactured and sold by the plaintiffs which is the subject matter of the suit cannot be either patented or registered under the Designs Act. The plaintiffs have obtained the patent and design rights now claimed by them by suppressing the material facts and misleading the controller of Patents and Designs. There is in fact no uniqueness in the design or inventive steps in the manufacture of the stainless steel vacuum bottles which is the subject matter of the present suit. The patent that is obtained by the plaintiffs under No.230421 is liable to be revoked on various grounds including:-

- a) That as far as the various claims made by the plaintiffs, in the complete specifications, are concerned they are not an invention within the meaning of the Patents Act,
- b) That the invention as claimed in the complete specifications particularly the claim (1) is publicly known and publicly used all over the world including India before the claim made under the complete specifications filed by the plaintiffs for grant of patent under No.230421.
- c) That the claim of invention involves no inventive step particularly having regard to what was publicly known and publicly used all over the world including India.
- d) That the claims (1) and (2) as per the patent granted in respect of the patented product under No.230421 are very vague, not specific and made to claim the patent right in respect of the stainless steel vacuum bottles for storage of hot and cold fluids.
- e) That as far as claims 1 and 2 are concerned, it is very well known that the thermo flasks/bottles are made of two shell containers consisting of the outer shell and inner shell with vacuum space between the two shells which acts as thermal insulator. This technology is prevailing for over a century and the claim as made in the complete specifications relating to the patent granted under No.230421 claims patent for such universally known vacuum thermo flasks/bottles. The said claims for invention are very well known and extensively used in thermo flask/bottles for more than 100 years. These defendants produce the list of thermo flasks/bottles of other manufacturers to show that the said technology is already prevailing and is in the public domain even before the 3rd plaintiff filed the application with complete specifications for grant of patent under No.230421. The complete specifications also do not disclose any specific invention or any novel method of manufacturing the thermo flask/bottle and therefore the patent granted under No.230421 is liable to be revoked.
- f) That the claim (4) is also likewise commonly used in all thermo flasks/bottles and the plaintiffs cannot claim to have invented the same. In any event the same is very obvious and there is no inventive step in the said claim as it is well known and publicly used in INDIA and all over the world.
- g) That the claims (2), (5) & (6) relate to the claiming of invention with respect to the lid consisting of inner stopper to restrain leak from the lid and other stopper acting as lock and the combination of two stoppers act as hot and cold proof arrangement. This type of lid is also extensively used by various manufacturers for thermo flasks/bottles much before the 3rd plaintiff filed the application seeking patent and the priority date claimed in the patent granted under No.230421 and therefore it is neither novel nor the 3rd plaintiff can claim to have invented the same.
- h. That so far as the claim (7) is concerned, even the grooves are commonly used in most of the soft drink bottles and in bottles used for storing/carrying water

including bottles used in the sale of bottled drinking water. The said claim for invention is also in the public knowledge much before the priority date of the patent under No. 230421.

- i. That the claim (8) is also known and it is commonly used in all the thermo flasks/bottles or other water storing/carrying bottles.
- j. That the claim (9) is very vague and no patent can be granted to the said claim.

19. The defendants have further contended that the complete specifications as filed by the 3rd plaintiff for grant of patent under No.230421 do not describe the invention and the complete specifications also lack of details regarding the manner or the method of manufacturing the alleged patented products. Since there is no disclosure, the patent is liable to be revoked in limine.

20. In the absence of any specific written license/agreement to use the design by the 1st and 2nd plaintiffs, cannot claim to the legal users of the alleged patent and thus cannot also maintain the present suit against these defendants. The said patent itself do not disclose any invention and every claim made in the complete specifications relating to the patent under No.230421 is very obvious and openly available in the public domain for over more than 30 years and therefore the plaintiffs cannot claim any exclusive right over the alleged invention as claimed in the complete specifications of the patent under No.230421 or in respect of the design for which the plaintiffs obtained registration.

21. They have contended further that in view of the claim made by the 3rd plaintiff for grant of patent in respect of the said shape/configuration it cannot be considered as a design within the meaning of the Designs Act as defined under Section 2(d) of the Designs Act, 2000. Admittedly the plaintiffs also in the business only since 2006. The repeated claims that the thermo flasks/bottles manufactured and sold by the plaintiffs is protected under the Patents and Designs Act is also totally untenable as the patent obtained by the plaintiffs is revocable for the obvious reason that the invention as claimed by the plaintiffs suffers from serious non-obviousness in the product. The failure to initiate pre-grant opposition would not take away the right of the aggrieved party to revoke the patent which discloses no inventive step.

22. The alleged aesthetic features of the stainless steel vacuum bottles are already available and publicized previously in India. The registration of designs under Nos.205153, 207081, 207085 & 207083 are liable to be cancelled under the following grounds:

a) that the designs previously published in India and all over the world and are being extensively used by various traders in respect of liquid containers such as soft drinks, aerated water, refrigerator bottles and in respect of vacuum bottles.

b)that the design is not new and there is no originality or novelty

c)that the plaintiffs having contended the shape and configuration has functionality, the same is not a design as defined under clause 'd' of Section 2 of Designs Act, 2000.

23. The defendants have also submitted that the registration of the trademark has no relevancy in the present suit as there is no allegation of infringement of the trademark, and therefore they are seeking for revocation of the said patent by way of Counter Claim in the present suit and filing a separate petition for cancellation of the registrations granted in respect of the alleged designs.

They have been importing, marketing, distributing and selling stainless steel kitchen ware for a considerable period of time by themselves and by their sister concerns.

24. The defendants have imported only one consignment and the said products have already been sold. The defendants are now having no stock of the said vacuum flasks/bottles. In fact the plaintiff are trying to take advantage of the fraudulently obtained patent and design to cheat the public by pricing at very high rates. It is the public who will suffer by giving monopoly to the plaintiffs as sought to be claimed by the plaintiffs. If the monopoly as claimed by the plaintiff is granted, there will not be any competition and thereby facilitating the plaintiffs to extract unreasonable prices for the products of the plaintiffs which involve no invention or novelty.

25. With regard to the comparative table shown in para 26, the defendants have stated as follows:

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|                               |                                |
|-------------------------------|--------------------------------|
| Plaintiffs product -          | No patent or designs can be    |
| thermally insulated two shell | claimed by the plaintiffs      |
| bottle designed for hot (18   | since there is no inventive    |
| hrs) and cold (24 hrs) fluid  | step involved (as the same are |
| storage for a long period.    | available in public domain)and |

the same were obtained by suppressing material facts and misleading the Controller of Patents & Designs and these defendants are seeking for revoking the patent and cancellation of the designs by way of counter claim in the present suit.

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Plaintiffs product - The quality of the defendants  
Stainless steel used is of products are also of top  
top quality. quality.

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Plaintiffs product - two The plaintiffs cannot claim  
stopper arrangement for fluid any exclusive right or patent  
and effective thermal sealing of the same as the same are  
mechanism. known and available in the  
public domain.

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Plaintiffs product - Vacuum These features are also common

space between the outer and inner stainless steel shells. to the product.

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Plaintiffs product - inner shell constructed with a smooth finish, eliminating a concave surface which facilitates easy cleaning. These features are common to the product.

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Plaintiffs product - Leak proof commonly used by construction which makes the bottle leak proof. various traders.

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Plaintiffs product - grooves on the bottom surface and on the cap. These features are common to the product.

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Plaintiffs product - unique colour scheme, get-up and layout of the design and shape. There is no uniqueness in the colour scheme, get-up and layout of the design and shape and these are commonly used by

all traders.

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26. The defendants have claimed that they have not committed any infringement of the alleged patent as the alleged patent itself is liable to be revoked for obviousness in the alleged function as well as the alleged invention claimed in respect of the products which are openly available in public domain. Nobody can have monopoly or patent at this point of time over the thermally insulated two shell bottle or quality of stainless steel or two stopper arrangements or vacuum space or inner shell smooth finish or leak proof or grooves etc. Furthermore, the alleged novelty in the design is non-existing as it is commonly used by various traders in respect of the various containers of similar sizes and shapes.

27. The plaintiffs have not suffered with any loss as the claim for patent and design itself is fraudulent. The suit is also not maintainable as the patent granted to the plaintiffs are liable to be revoked and cancelled. In any event the plaintiffs are not entitled to combine the cause of action.

28. The defendants have also made a counter claim under Order VIII Rule 6(a) of CPC r/w. Section 64 of Patents Act claiming the following reliefs;

- a) declaring that the patent granted under No.230421 is liable to be revoked under Section 64 of the Patent Act, 1970;
- b) revoking the patent granted under No.230421 in favour of the 3rd plaintiff dated 26.02.2009;
- c) for cost of the counter claim.

29. Based on the pleadings of the plaintiffs and the defendants and also based on the counter claim of the defendants, this court has formulated the following issues for the better adjudication of the suit.

1. Whether there is any inventive step in the patent under No.230421 ?
2. Whether the patent under No.230421 is liable to be revoked under Section 64 on the grounds made in the written statement and the counter claim ?
3. Whether the claims made in the patent under No.230421 disclose any inventive step ?
4. Whether the claims made under patent No.230421 is new having regard to what was publicly known or used in India before filing of the application for grant of patent ?
5. Whether the patent was obtained by false claims and representations ?
6. Whether the claims as made under patent No.230421 is patentable under the Patent Act, 1970 ?
7. Whether the designs which are the subject matter of the suit is previously published in India before filing of the application for registration ?
8. Whether the designs are new?
9. Whether the designs are original ?
10. Whether the designs are registerable under the Designs Act, 2000 ?
11. Whether the designs which are the subject matter of the suit are designs within the meaning of Section 2(b) of the Designs Act, 2000 ?
12. Whether the defendants are liable to render accounts?
13. Whether the plaintiffs are entitled for damages as prayed for?
14. Whether the plaintiffs are the valid owners of Indian Patent No.230421?
15. Whether the defendants are infringing the plaintiffs Indian Patent No.230421 ?
16. Whether the plaintiffs are the valid owners of Indian Design Nos.205153, 207081, 207085 and 207083 ?
17. Whether the defendants are infringing the plaintiffs Indian Design Nos.205153, 207081, 207085 and 207083 ?
18. Whether the defendants' defences regarding infringement of Indian Design Nos.205153, 207081, 207085 and 207083 ?
19. Whether the plaintiff's product have an established goodwill and reputation ?
20. Whether the purchasing public associate the plaintiff's goodwill and reputation with the get-up of the plaintiff's product ?

21. Whether the products marketed by the defendant closely resemble the get-up of the plaintiff's product ?

22. Whether the products marketed by the defendant mislead the public in a manner which is leading or likely to lead the public to believe that the defendant's products are the plaintiff's products ?

23. Whether the plaintiff suffered a loss as a result of the defendant's misrepresentation to the public of the defendant's product as the plaintiff's product ?

24. To what reliefs the parties are entitled ?

30. In order to substantiate their respective claims both parties were directed to face the trial. One Mr. Kingston Victor who is the 3rd plaintiff in the suit has been examined as PW 1. During the course of his examination Ex.P1 to P26 and the material objects ranging from Mos.1 to 4 were marked. Neither oral nor any documentary evidence was adduced on behalf of the defendants.

31. When the suit stood posted for hearing the arguments of both sides, Mr.P.S.Suman learned counsel appearing for the plaintiff has submitted, that the concurrence of the 3rd plaintiff have an arrangement whereby the 1st and the 2nd plaintiff have been permitted to use the technology developed and patented by the 3rd plaintiff to manufacture inter-alia the patented and design protected product and to market and sell the same in the Indian market directly and indirectly through its distributors for its products. They have also claimed that the plaintiffs 1 and 2 have been manufacturing, marketing and selling the patented and design protected product and promote such part of their business exhaustively under the brand name "ATLASWARE" and the associated logo from the year 2006 onwards. They have also claimed that the defendants 1 and 2 have been importing the infringing products from China and more specifically from one M/s.Jinxinda Tools Company Ltd., and markets, distributes and sells the products under its own name in India.

32. They have also claimed that the defendants 1 and 2 have been importing the cheap quality imitations, pack each bottle in a separate carton box with the name of the 1st defendant printed on such carton boxes as the distributor of such product and lure all retail stores in purchasing such infringing products for re-sale mainly using the price advantage of such infringing products over the pricing of the patented and design infringing products.

33. They have also claimed that the defendants 1 and 2 have imported huge consignment of around 8000 numbers of infringing bottles as on 1st June, 2006.

34. In paragraph 21 of their written statement, the defendants have admitted that they have imported only one consignment and the said products have already been sold. They have also admitted that they are at present not having any stock of the said vacuum flasks/bottles.

35. On the other hand the defendants have contended that the plaintiffs cannot claim any patent for the very obvious and commonly available vacuum flasks/bottles and it is only, in order to stifle fair competition and take undue advantage in marketing the plaintiffs products, the plaintiffs have come out with the dubious method of obtaining patent in respect of the vacuum flasks/bottles which are openly available in public domain. They have also contended that the patent and the designs are liable to be revoked and cancelled. They have also made a counter claim to declare that the patent granted in favour of 3rd plaintiff dated 26.02.2009, under No.230421 is liable to be revoked under Section 64 of the Patent Act 1970.

36. The 3rd plaintiff viz., Kingston Victor seems to have filed an application for grant of patent on 18.07.2006 and that the patent was also granted on 26.02.2009. It is also revealed that the registration number of the patent granted in relation to the patented product is No.230421 in favour of the 3rd plaintiff.

37. It is also found in Form-II relating to the Patent Act 1970 (39 of 1970) that the title of the invention of the 3rd plaintiff has been given as Robust Thermally Insulated Bottle under the caption of complete specification as contemplated under Section 10, Rule 13 of Patents Act 1970.

38. In Form No.2 under the caption of "Detailed Description of the Invention" it is stated that, the invention has incorporated all desirable values of an ideal thermo flask in the bottle design to suit day-to-day requirements of office goers and patients. Inner shell stores the hot fluid. Outer shell protects the inner shell from shocks. Vacuum space between two shells acts as a thermal insulation. Both the shells are made out of stainless steel. The bottle is designed to retain a hot fluid up to 96°C for a day. Two sealing arrangements are incorporated to suit aforementioned requirements. The Nylon O ring present in the inner shell acts as a stopper. The inner stopper is used to resist the leak from inner cup. The outer stopper acts as a lock means. The outer and inner shells are joined at inner stopper. This arrangement prevents further fluid leakage. The special design of both outer and inner stopper is responsible for reliable thermal performance. The outer shell is at room temperature even though hot water is poured to it at 90°C. Other specifications have also been mentioned in Form No.2, need not be repeated hereunder.

39. Ex.P18 is the certificate of Registration and Design dated 30.06.2006, issued by the Patent Office Government of India, with regard to the Design No.205153.

40. It is revealed from Ex.P25 Cash Bill, that on 16.06.2006, the plaintiffs have purchased the alleged infringed bottles said to have been sold by the defendants for Rs.435/-.

41. It is significant to note here that in paragraph No.12 of the counter affidavit filed by the defendants in O.A.Nos.650, 651 and 652 of 2009 they have admitted that they had imported only one consignment and that the said products had already been sold and they were not having any stock of the said vacuum flasks/bottles.

42. It is also revealed that in the above applications, this court had granted an order of injunction against the defendants 1 and 2. The learned counsel appearing for the defendants has also submitted that in paragraph 12 of the counter affidavit filed by the defendants in the above said applications, they had admitted that they had imported only one consignment and that the said products were already sold out and she has also maintained that the defendants were not having any stock of the said vacuum flasks/ bottles at present. The learned counsel for the defendants has also argued that the defendants had not imported any such consignment thereafter and to that effect she has also submitted that the defendants had given an undertaking that there would be no importation of any consignment containing the said products in future. The learned counsel for the plaintiff has also fairly admitted that no importation was done thereafter.

43. On perusal of the records this court finds that in M.P.No.1 of 2009 in OSA No.404 of 2009, the Division Bench of this Court on 15.06.2010 in paragraph No.3 has observed as follows;

"When the appeal came up for admission on 26.11.2009, the statement of the learned counsel appearing for the respondent was recorded that they will not import and sell stainless steel vacuum bottles (which are alleged to be imitations of the appellant's products until the matter is heard). On 21.12.2009, the order was passed that the respondents shall not import and sell the stainless vacuum bottles until further orders."

This order is still in force.

44. From paragraph No.2 of the above order, it is revealed that pending suit an interim injunction was sought for and that on 02.07.2009, the learned single judge of this court has granted an ad interim injunction. It is also revealed that on 23.10.2009, a final order was also passed. The operative portions of the order reads as under;

"(i) The prayer for injunction as against the defendants not to adopt the bottle containing thermal mechanism is dismissed pending disposal of the suit.

(ii) However, the defendants are enjoined from passing off or simulating the plaintiff's bottle by importing or manufacturing similar RTIB with such design as that of the plaintiffs. The defendants are enjoined from using the design of the cap as well as the design of the bottom portion as found in the plaintiff's RTIB. The defendants shall see that the product which they sell or manufacture contains metal ridges not less than five in number in the middle outer circumference of the bottle. Whereas, the learned senior counsel for the plaintiffs at this juncture would submit that there shall be injunction as against the defendants, even not to have the similar type of neck of the plaintiffs' RTIB, for which the learned counsel for the defendants would submit that if such an injunction is granted, that would certainly amount to throttling the business of the defendants. Hence, in such a case, such a submission on the side of the plaintiffs cannot be accepted at this stage. Accordingly, all these applications are disposed of."

45. Mr.P.S.Suman learned counsel for the plaintiffs' has urged before this court that since the learned counsel for the defendant had given an undertaking before the Division Bench of this Court, the suit in respect of the prayer portions A,B and G alone might be decreed and the suit in respect of the prayer portions C, D and F might be dismissed. This has also been conceded by the learned counsel for the defendants.

46. Based on the suggestion made by the learned counsel for the plaintiffs' which has been duly conceded by the learned counsel for the defendants, this court finds that each and every issue which have been formulated by this court need not be discussed. Instead, this court finds that to meet the ends of justice, the suit in respect of the

prayer portions A,B and G alone be decreed and the suit in respect of the prayer portions C,D and F may be dismissed.

47. Accordingly, the suit in respect of the prayer portions viz.A and B is decreed with costs and the suit in respect of the prayer portions viz.C, D, E and F is dismissed. Equally, the counter claim made by the defendant is also dismissed.

prm