

MANU/KE/2355/2010

Equivalent Citation: 2010 (2) KHC 566

IN THE HIGH COURT OF KERALA

O.S. No. 3 of 1999

Decided On: 17.05.2010

Appellants: **Low Heat Driers (P) Ltd.**
Vs.

Respondent: **Biju George and Anr.**

Hon'ble Judges/Coram:

V. Ramkumar, J.

Counsels:

For Appellant/Petitioner/Plaintiff: V.K. Isac, Adv.

For Respondents/Defendant: Alexander Joseph, Adv. and Joseph Kodianthara, S.C., Rubber Board

***Case Note:**

Patents Act, 1970 (Central Act 39 of 1970) - 'Patent'--The concept and necessity for granting patent explained.

Plaintiff approached the District Court, Ernakulam, seeking permanent prohibitory injunction restraining Defendants from manufacturing or selling any product covered by specifications of patent No. 176771 during its validity and for a direction to Defendants to pay Rs. 75,000 towards the loss suffered by Plaintiff due to sale of similar device by them. Plaintiff contended that it was the assignee of the inventor of portable rubber heat dryer for which it had secured patent No. 176771 and that the Defendants are manufacturing and selling a produce which is similar to the invention patented by Plaintiff and hence, they are liable to be enjoined from manufacturing or selling such a product. Defendants contended that the drier patented by Plaintiff is not an invention and it is only a workshop modification of drier which was already available in the market and that the product manufactured and sold by the Defendants is not similar to the product sold by Plaintiff. Defendants also raised a counter claim to revoke the patent. The suit was transferred to the High Court by the District Court under the proviso to Section 104 of the Act, since a counter claim was raised. The suit was tried by a learned Single Judge who held that patent is granted to encourage inventions and develop new technology in the country and that an invention is the sine qua non for claiming monopoly right of patent;

Held: The word "patent" denotes a monopoly right in respect of an invention. [Halsbury's Laws of England, IV Edn. Vol. 35(1981), Para 303]. A patent is thus a monopoly right granted to a person who has invented a new and useful article or an improvement of an existing article or a new process of making an article. It consists of an exclusive right to manufacture the new article invented or to manufacture an article according to the invented process for a limited period. During the term of the patent the owner of the patent i.e. the patentee can prevent any other person from using the patented invention. After the expiry of the duration

of the patent anybody can make use of the invention. A patent is a form of industrial property, or as it is now called, an intellectual property. The owner can sell the whole or part of this property. He can also grant licenses to Ors. to use or exploit it. The object of granting a patent is to encourage and develop a new technology and industry in the State. It is desirable in public interest that industrial techniques should be improved. In order to encourage improvement and to encourage also the disclosure of improvement in preference to their use in secret, any person devising an improvement in a manufactured article, or in a machinery or in the methods of making it, may upon disclosure of his improvement at the Patent Office, demand such improvement to be given monopoly in its use for the specified statutory period, (now it is 14 years). After that period the invention passes into the public domain. The temporary monopoly is not objectionable because if it had not been for the inventor who devised and disclosed the improvement nobody would have been able to use it after the statutory period or at any point of time since nobody would have known about it. Furthermore, the giving of the monopoly encourages the commercial exploitation of the invention. The only way the inventor can make a profit from it or even recover the fees for his patent is by putting the invention into practice either by using it himself or by deriving an advantage over his competitors by its use or by allowing Ors. to use it in return for royalties. [Vide "Patents for Inventions", T.A. Blanco White, III Edition and also Asahi Kogyo K.K's Application--(1991) RPC 485 at 523 (HL).

Patents Act, 1970 (Central Act 39 of 1970) - Section 2(j)--'Invention'-- Invention is the sine qua non for claiming patent--When the definition of invention includes any new and useful improvement of any new and useful machine, apparatus or other article, Sections 3(d), (f) & (h) cannot have any application.

Held: An invention is the sine qua non for claiming the monopoly right of patent. What is patentable is only an invention. Any new and useful machine or apparatus or any new and useful improvement of any new and useful machine or apparatus is an invention. While considering the question as to whether a given device is an invention or not, Section 3 of the Act has to be necessarily adverted to because that Section enumerates the processes and methods which are not inventions. Clauses (d), (f) and (h) of Section 3 were pressed into service by the defence to contend that the Plaintiff's drier is not an invention. When the definition of invention includes any new and useful improvement of any new and useful machine, apparatus or other article, the aforementioned three Clauses of Section 3 of the Act cannot have any application. The patented device is not a method of agriculture or horticulture even though the device is used for the curing of an agricultural product. In paragraph 21 of Bishwanath Prasad Radhey Shyam MANU/SC/0255/1978 : A.I.R. 1982 S.C. 1444, the Apex Court has observed as follows:

To be patentable the improvement or the combination must produce a new result, or a new article or a better or cheaper article than before.

Going by Ext. A-17 complete specification including the technical diagrams therein, it cannot be said that the drier manufactured and marketed by the Plaintiff does not amount to an invention. It cannot also be said that the patented device is only a workshop modification. A perusal of Ext.A-17 complete specification will reveal that the Plaintiff's drier is a new and

useful improvement of a new and useful machine or apparatus and squarely falls under the definition of "invention".

Patents Act, 1970 (Central Act 39 of 1970) - Section 108--Infringement of patent right--Infringement can be detected only by an examination and comparison of the patented invention and the device against which infringement is alleged.

Held: The question of infringement cannot be decided without an examination of the patented drier manufactured by the Plaintiff and the offending drier manufactured by the Defendants. The Plaintiff did not produce the two driers before Court obviously for practical reasons. The Plaintiff did not also take out a commission to evaluate the common features, if any, in the two driers so as to enable the Court to come to a finding as to whether the Defendants' driers were a colourable imitation of the Plaintiff's driers. The Plaintiff has remained content by merely producing the instruction manuals (Exts. A-1 and A-16) pertaining to the driers manufactured by the Plaintiff company (Law Heat Driers Pvt. Ltd., Kizhakkambalam) and the second Defendant (Emcees Engineering Centre, Koothattukulam). The question of infringement cannot be decided merely on the basis of the external similarity of the two machines involved. The Defendants have a specific contention that their driers are not identical with that of the Plaintiff and that they have not copied the method adopted in the patented drier. In Ext.A-16 operation manual pertaining to the drier of the Defendants the cross section of the drier shown does not bear any similarity with the cross section of the drier shown in Ext. A-1 operation manual pertaining to the drier of the Plaintiff. Merely because the first Defendant examined as D.W.1 has admitted that his driers have certain features which are present in the patented driers also, it cannot be straightaway concluded that the Defendants are guilty of infringement of the patented driers. Moreover, now after the efflux of the term of 14 years stipulated in Ext.A-10 which is in accord with Section 53 of the Act, even assuming that there was evidence of infringement of the patent, no injunction in terms of Section 108 of the Act can be granted.

JUDGMENT

V. Ramkumar, J.

1. In this suit filed under Order VII, Rule 1 Code of Civil Procedure and Section 108 of the Patents Act, 1970, ("the Act" for short) the Plaintiff seeks a decree for a permanent prohibitory injunction restraining Defendants 1 and 2, their workers, agents and assignees from manufacturing or attempting to manufacture, selling or offering for sale any product covered by specifications of patent No. 176771 of 31-5-1990, during its validity and directing the Defendants to pay a sum of Rs. 75,000 towards the loss incurred by the Plaintiff with interest at the rate of 18 per cent per annum from the date of suit till realisation or in the alternative directing the Defendants to furnish a full and true account of the money realised by sale of the driers manufactured and sold by infringing patent number 176771 of 31-5-1990.

THE PLAINT

2. The material plaint averments are as follows:

The Plaintiff is a company registered under the Companies Act, 1956 and incorporated in the year 1987. The Plaintiff is represented by its Managing

Director K.I. Kuriakose. The registered office of the company is at Kizhakkambalam Village in Ernakulam District. The Plaintiff company is a small scale industrial unit and is promoted by agriculturists to carry on the business of manufacturing, producing and designing of drying equipments for agricultural produces. One Sri C.P. Philipose, who is one of the promoters of the company is a rubber cultivator and is a postgraduate in Engineering. It was he who invented a new device for drying of agricultural produces. The new invention was further developed in consultation with Anr. rubber cultivator who had been a design engineer to TELCO and a new smoke house was developed. The Plaintiff developed the prototype of the new device at the instance of the inventor. The said prototype proved to be useful for drying ribbed rubber sheets and of immense use to the agriculturists. Some of the special features of the new invention are:

- (a) The drying chambers are almirah-like construction having top exit means to permit the escape of smoke and flue gas.
- (b) Furnace with fire splitters placed directly below the chambers.
- (c) The arrangement of the partition plates are in such a manner as to constrain the hot smoke and flue gas which enter the bottom most chamber to take a 'LP turn to enter the next chamber and so on.
- (d) Rubber sheets can be loaded and unloaded without the person entering the smoke house.

The new invention is noteworthy for its fuel efficiency, easy of use, portability and for getting better grades of dried rubber. After conducting tests for a long period of three years the Plaintiff company decided to start commercial production of the newly invented driers. Before marketing the product to the rubber cultivators the Plaintiff company contacted the Rubber Board at Kottayam and had preliminary discussions. The Department of Rubber Processing under the Rubber Board Kottayam, as per letter dated 3-11-1989 informed the Plaintiff that they are deputing their Specifications Officer for a detailed evaluation on 15-11-1989. Sri K.T. Mani (Specification Officer) conducted an evaluation and submitted his report dated 29-11-1989. After evaluation, the Rubber Board as per letter dated 30-11-1989 asked for detailed drawings of the two models intended to be marketed by the Plaintiff. The detailed drawings were furnished and as per letter dated 12-6-1990 the Rubber Board accorded sanction to the Plaintiff for marketing the two models of driers developed by it and which were tested and approved by the Rubber Board. The usefulness of the new invention was widely acclaimed by the rubber cultivators and the newspapers. Commercial production of the modern rubber sheet drier was started by the Plaintiff by March 1990. Advertisements were published in various newspapers and in a publication by name 'Rubber' issued by the Rubber Board. The driers manufactured by the Plaintiff company have been marketed all over Kerala including the neighbourhood of the Defendants who are having their activity at Koothattukulam. The Plaintiff also got the new invention evaluated by the Kerala Industrial and Technical Consultancy Organisation (KITCO), an establishment owned by the State Government. They also furnished a copy of their evaluation report to the Plaintiff/company. An application was filed by the Plaintiff company for getting the patent for the invention described "a device for smoke drying of agricultural products" as an assignee of C.P. Philipose, the inventor. The said application was filed on 31-5-1990 as per Form 1A of the Rules framed under the Patents Act, 1970 along with complete specification and requested for the grant of a patent for the said invention. The Controller of Patents issued a notice on 20-9-1996 to the Plaintiff to

the effect that the complete specifications in respect of the application for patent submitted by the Plaintiff was accepted and that information about such acceptance had been published in the Gazette of India dated 7-9-1996. Subsequently, as per notice dated 20-1-1997 the Controller of Patents informed the Plaintiff that the patent was sealed as on 31-5-1990 and that the patent No. is 176771. As a patentee of the new device the Plaintiff company has got the exclusive privilege of making, using, exercising, selling and distributing its drying devices in India. The Plaintiff has also paid the renewal fee on 20-5-1998 for the period from 31-5-1998 to 31-5-1999. The Plaintiff company is putting the patented invention for commercial production of its different models of driers. The Plaintiff company has not issued any licenses or sub licenses to any person. Knowing fully well that the rubber sheet drier manufactured and marketed by the Plaintiff company is a product designed after extensive research and development and that the invention of the device has been patented in favour of the Plaintiff company, the first Defendant designed a drier infringing the specifications in the patent. The first Defendant is manufacturing and marketing the offending driers through M/s Emcee's Engineering Center, the 2nd Defendant which is a proprietary concern of the 1st Defendant. The Plaintiff company came to know of the infringement of its patent rights in the month of December 1997. Immediately on 24-12-1997 the Plaintiff company caused a lawyer notice to be issued to the Defendants calling upon them to forthwith stop the manufacturing and marketing of their rubber sheet driers infringing the Plaintiff company's patent rights and also for accounts. To the said notice, the Defendants have caused a reply dated 23-1-1998 to be sent raising false and untrue contentions. They have contended that the driers designed by them are advanced driers which are marketed under the trade name "Four sheet drier" and that the claims made in the Plaintiff's specifications are publicly known. The Defendants have denied the Plaintiff's allegation regarding infringement and have threatened the Plaintiff that they will launch proceedings under Section 106 of the Patents Act, 1970. The Defendants have not initiated any action under Section 105 of the Act for a declaration that the manufacturing of rubber sheet driers by the Defendants does not constitute an infringement of the claim of the patentee. The Defendants have not also applied to the patentee with particulars of the product in question. In spite of specific notice given to the Defendants they are continuing the manufacture and sale of rubber sheet driers infringing the exclusive right of the Plaintiff company. The claims made in the specification submitted by the Plaintiff are novel and are of immense use to the rubber cultivators. The patent has been granted with effect from 31-5-1990. The Plaintiff company is exploiting the patent by manufacturing and marketing different models of the drier. The modern ribbed rubber sheet driers manufactured by the Plaintiff company are acclaimed for their quality and high standards. The driers manufactured by the Plaintiff company are marketed in the State of Kerala as well as in other States such as Assam, Meghalaya, Missoram, Tripura, West Bengal, Orissa, Maharashtra, Tamil Nadu, Karnataka etc. wherever there is rubber cultivation. The different models manufactured and marketed by the Plaintiff--company are RRSD - 96, 240, RRSD - 320 and larger versions of RRSD-160, RRSD-240 and RRSD-320 suitable for sheets weighing upto 1 kg. All models are now eligible for Rubber Board subsidy. With a view to promote Small Scale Industries, the Plaintiff--company is purchasing different components of the driers manufactured by different S.S.I. Units and different individual establishments. The sales turnover of the Plaintiff--company had been steadily increasing. For the year 1995-96 the sales was Rs. 29,63,028. For the year 1996-1997 the turnover was Rs. 35,14,641. However, the sales turnover for the year 1997-98 recorded a decline to show a figure of Rs. 31,86,551. The sales turnover for the year 1998-1999 was considerably reduced to Rs. 16,76,456. The fall in sales turnover was Rs. 15,10,095. The main reason for the sales turnover coming down to almost half of the turnover of the previous years is due to the manufacturing of

spurious machines by the Defendants imitating the patented device of the Plaintiffs without conforming to the standards. The patented device of the Plaintiff company had inspired the confidence of its customers who were preferring the same to the conventional driers. The manufacturers of imitated driers do not have the know-how nor are they concerned about the quality and standards expected of such driers. The indifference shown by such manufacturers may result in the customers losing their confidence about the safety and utility of the drier. By entering the market such manufacturers cause a threat to the survival of not only the Plaintiff company but also the eleven S.S.I, feeder units depending on the Plaintiff company for work orders. There is a drastic downfall in the sales of the Plaintiff company. The Plaintiff company has exclusive patent right to manufacture the patented devices during the period of validity of the license. The Defendants are manufacturing devices by infringing the patent rights of the Plaintiff. They are liable to be restrained by a decree of permanent prohibitory injunction restraining them from manufacturing or offering for sale of their infringing products. The loss sustained by the Plaintiff due to the sale of the infringing products of the Defendants is estimated at Rs. 75,000. The Defendants are liable to pay the said amount to the Plaintiff as damages. In case, the Defendants dispute the quantum of damages, they are liable to state full and true accounts of the money realised by them through manufacture and sale of their driers by infringing the rights of the Plaintiffs. The Defendants are continuing the infringement even after notice by the Plaintiff. The Plaintiff is not left with any other alternative except filing this suit. The cause of action for the suit arose in October 1997 when the Defendants started manufacturing and selling rubber sheet driers by infringing the patent rights of the Plaintiff and on 24-12-1997 when the Plaintiff caused a lawyer notice to be sent to the Defendants and on 23-1-1998 when the Defendants caused a reply notice to be sent and thereafter within Koothattukulam Village of Moovattupuzha Taluk within the jurisdiction of the District Court, Ernakulam. Hence, a decree may be passed as prayed for.

3. The suit was originally filed on 7-4-1999 in the District Court, Ernakulam as provided under Section 104 of the Act and was numbered as O.S. No. 21 of 1999.

THE WRITTEN STATEMENT

4. The suit was resisted by the Defendants who filed a written statement contending inter alia as follows:

The suit is not maintainable either on facts or on law. The Plaintiff has neither stated in the plaint nor annexed thereto the particulars of the alleged breach relied upon. The suit is liable to be dismissed for the non-compliance of Order VI, Rule 4A, Code of Civil Procedure. The Controller of Patent and the Inventor of the patented invention are necessary parties to the suit. The suit is, therefore, liable to be dismissed for non-joinder of necessary parties. The statements, allegations and averments contained in paragraph one of the plaint are incorrect, misleading and are denied. The statement regarding the legal status of the Plaintiff and its Managing Director and the claim that the Plaintiff is a Small Scale Industrial Unit promoted by an agriculturalist for carrying on the business of designing, manufacturing and producing drying equipments for agricultural produces are not within the knowledge of these Defendants. The Plaintiff is put to strict proof regarding the same. The plaint averments regarding the alleged development of the so-called new invention in consultation with other rubber cultivators are incorrect and are denied. The names of the so-called inventor and developer of the new device have not been mentioned in the plaint. The further claim in the plaint that at the instance of the inventor the Plaintiff developed the prototype of the new

device which was proved to be useful for drying rubber sheets is also incorrect and is denied. In fact, the drying device produced and sold by the Plaintiff was in existence for the last so many years. A number of persons and workshops have been manufacturing and selling such devices with or without modifications and alterations. Almirah like drying chambers, furnaces with fire splitters etc. were in use in driers of agricultural produces from time immemorial. There is no invention in providing the top exit means of permit for the escape of smoke and flue gases. It is based on the scientific principle that hot smoke and flue gases will go only upward since their weight is less than the atmospheric air. In all smoke exist devices (chimneys) the exit will be at the top. Hence, top exit device is not an invention. There is nothing novel in the loading and unloading of rubber sheets without entering the smoke house and also in the passage of smoke taking a "U" turn. The allegation that the new invention is notable for its fuel efficiency, easy of use, portability and for getting higher grade of dried rubber etc. are exaggerated claims without any basis. The further statement that the Plaintiff had conducted tests over a long period of three years before marketing the product to the rubber cultivators, the Plaintiff had contacted the Rubber Board and had preliminary discussions, that the Department of Rubber Processing in the Rubber Board had deputed their Specification Officer for evaluation, that after the evaluation by the said Officer, the Rubber Board had asked for detailed drawings and that the Rubber Board accorded sanction for two models of driers developed by the Plaintiff etc. are misleading and are denied by these Defendants. The Rubber Board is a Government Agency for Promoting and developing rubber cultivation. It has got its own research wing for conducting researches in various fields such as cultivation and processing of raw rubber. The Rubber Board had introduced modified methods of driers for drying rubber sheets. The Rubber Board is also encouraging the manufacture and use of driers which are useful to the cultivators. These Defendants had also got approval from the Rubber Board for manufacturing and marketing driers. The driers of these Defendants are also getting subsidy and other financial assistance from the Rubber Board. A number of other manufacturers have also got approval from the Rubber Board for manufacturing their driers. Rubber Board approval enables the cultivators to get financial assistance from the Rubber Board such as subsidy, bank loan etc. For getting approval from the Rubber Board, it is not necessary that the model is a new invention. The approval by the Rubber Board cannot be the basis for a claim that the drier of the Plaintiff is a new invention. The Plaintiff is put to strict proof regarding the averments in paragraph 2 of the plaint. The statements in paragraphs 3 and 4 of the plaint are misleading, incorrect and are denied. The claim of the Plaintiff that it has the exclusive privilege of making, using, exercising, selling and distributing its drying devices in India is false, incorrect and are denied. The sealing of a patent by the Controller of Patent does not give rise to a presumption in favour of its validity. The validity of the patent claimed by the Plaintiff has not been approved by any court of law. Hence, the Plaintiff does not have any exclusive right as claimed in the plaint since the same is against Section 13(4) of the Patents Act. A number of other manufacturers such as Dhoomitha Multi Driers, Kuruppampadi and Ors. are manufacturing and selling driers with due publicity in daily newspapers as well as in the "Rubber" Magazine published by the Rubber Board. The statement in paragraph five of the plaint that, the Plaintiff designed its product after extensive research and development is incorrect and misleading. In fact, there is no novelty in their product and it is not an invention as contemplated

under law. The statement that these Defendants designed a drier infringing the specification in the Plaintiffs patent is not correct and is denied. The driers designed and manufactured by these Defendants are not identical to those of the Plaintiff. The main features of the Plaintiffs drier as claimed by the Plaintiff such as fire-splitters, arrangement of partition plates, passage of smoke by taking a 'U' turn, insulated burners, almirah like construction joined in series, top smoke exit etc. are absent in the driers of these Defendants. On the other hand, the driers of these Defendants are having non-insulated single layer burner which is placed at the centre of the drier. Heat-cum-guide plates at both sides of the burner having only two chambers that is the drying chamber and pre-heat chamber, inclined separator plates, insulated inclined top, one time changing of heat from preheat chamber to the drying chamber etc. are the features of the driers of these Defendants and those features are absent in the Plaintiffs driers. From the above it is clear that the model of the Plaintiff and these Defendants are not identical and these Defendants have not infringed the patent of the Plaintiff. The statement that the Plaintiff came to know about the infringement in December 1997 is not correct. These Defendants and Ors. have been selling their driers even before December 1997 after due publicity. The statement that the Plaintiff caused a lawyer notice to be issued to these Defendants is admitted. These Defendants have sent an appropriate reply to the said lawyer notice. The statements made in the said reply notice are true. The non-initiation by these Defendants of any action under Section 105 of the Patent Act will not give any right to the Plaintiff. These Defendants have got every right to manufacture and sell their driers and the Plaintiff does not have any exclusive right as claimed by them. The claim made in paragraph 7 of the plaint that the Plaintiffs specifications are novel and are of immense use to the rubber cultivators is incorrect. The rubber sheet driers claimed by the Plaintiff were already in existence and there is no novelty in them. A simple workshop modification of such driers will not give any novelty to a product and it cannot be called an invention. The grant of patent by the Controller of Patent will not give any exclusive right to the Plaintiff to manufacture and sell driers to the exclusion of all Ors. The claim made that the driers manufactured by the Plaintiff are acclaimed for their quality and high standards is incorrect. If the Plaintiff has lost market due to the poor quality and utility of their driers and it is not the fault of these Defendants or anybody else. The claim made by the Plaintiff regarding the variety of models manufactured and marketed by them and the volume of sales etc. are not within the knowledge of these Defendants and the Plaintiff is put to strict proof regarding the same. The Plaintiff's claim that it is getting different components of the driers manufactured by S.S.I. Units and industrial establishments is not within the knowledge of these Defendants and it is for the Plaintiffs to prove the same. The further statement that the reason for the decline in the turnover of the Plaintiff is due to the manufacture and sale of spurious machines by these Defendants imitating the patented devices without conforming to the standards is incorrect and is denied. If the Plaintiff has suffered a set back in the market it is due to the imperfections in their driers as mentioned above. The statement of the Plaintiff that other manufacturers do not have the know-how regarding good quality driers and that other manufacturers are not concerned about the high quality standards is not correct. If the Plaintiff is facing any threat to survive, it is not due to the fault of these Defendants but is due to the defect of the Plaintiffs product. These Defendants are not liable to pay Rs. 75,000 or any other amount as damages. The Plaintiff has no cause of action for the suit and the cause of

action alleged in the plaint is not true. The suit valuation as well the court fee calculated and paid are not correct. The District Court, Ernakulam, has no jurisdiction to try the above suit. The Plaintiff is not entitled to get a decree of injunction without getting its right declared by a court of law. The suit may be dismissed with costs of these Defendants.

These Defendants are making a counter-claim as follows:

The patent No. 176771 dated 31-5-1990 and sealed on 27-2-1997 in favour of the Plaintiff is invalid and is liable to be revoked. The following are the particulars of the objections raised in support of the invalidity of the patent:

A. The claim of the Plaintiff is not an invention. It is only a workshop modification and/or a rearrangement of a country-side kitchen chimney used for drying agricultural produces and it was in use for a long time in the past. In a conventional kitchen, hearth is acting as the furnace. Above the hearth are horizontal partitions or tiers made of bamboo mats, reeds, etc. which are used for keeping agricultural produces. Modification to the masonry chimney with concrete or tiled roofing and doors is the above steel drier with a facility to load and unload agricultural produce from outside. The Plaintiff claims their furnace to be an important component of their devices. In all drying devices using fire and smoke, furnace is an inseparable part. Hence, furnace cannot be considered as an invention of the Plaintiff. Portable driers made of bamboo reeds, bamboo mats etc. were in existence from time immemorial. Hence, portability of the driers is also not a patentable invention. The further claim of the Plaintiff that upward "U" turn movement of smoke is their invention is baseless. Due to low weight smoke and gas will always go upward. Fire-splitters were known devices which were in use for so many purposes such as Davy Safety Lamp etc. used in mines. Stone pebbles were used as fire splitters in country smoke houses. The device of the Plaintiff does not have any novelty, inventiveness and utility and is, therefore, not a patentable invention.

B. The device of the Plaintiff is an application of certain known scientific principles in a known way. Hence it is not an invention. A known process or an apparatus which was used in kitchens, chimneys, smoke houses etc. has been used by the Plaintiff in their devices.

C. Drying of agricultural produce is part of agriculture. A method or device for drying of agricultural produce is a method of agriculture and, therefore, not an invention.

D. A number of manufacturers like the Defendants, M/s Doomitha Multi Driers, Kuruppampadi etc. are selling driers with modifications and alterations which are beneficial to the agriculturists. The Plaintiff obtained the patent dishonestly and in contravention of the rights of the Defendants and other similar manufacturers.

E. The invention claimed by the Plaintiff in the complete specification is devoid of any novelty. The method was publicly known and publicly used before the priority date of the claim.

F. The invention claimed in the complete specification is an obvious

one which does not involve any inventive step. The method was publicly known and used throughout the country.

G. The invention claimed by the Plaintiff is not useful contrary to the claim made by the Plaintiff.

H. The Plaintiff has obtained the patent by means of false suggestions and representations. What is described as the typical smoke house by the Plaintiff is nothing but the conventional drying devices used by agriculturists. The complete specification of the Plaintiff does not to overcome the deficiencies of other smoke houses.

I. The subject-matter of the complete specification of the Plaintiff is not patentable under the Patents Act.

The valuation of the counter-claim for the purpose of court fee and jurisdiction is Rs. 1,000. It is humbly prayed that this Honourable Court may revoke the Patent No. 176771 of 31-5-1990 which was sealed on 27-2-1997 in favour of the Plaintiff after declaring the same as invalid. This Court may also decree the cost of these Defendants.

5. The Plaintiff filed a written statement to the counter-claim refuting the allegations in the counter-claim and maintaining the stand of the Plaintiff.

6. Since the Defendants had preferred a counter-claim for revocation of the patent claimed by the Plaintiff, by virtue of the proviso to Section 104 of the Act, the suit along with the counter-claim was transferred to this Court for decision. After the transfer, the suit was re-numbered as O.S. 3 of 1999 before this Court.

THE ISSUES

7. In the light of the rival pleadings of the parties, this Court framed the following issues for trial:

- (i) Whether a suit as framed is maintainable?
- (ii) Whether the suit is bad for non-joinder of parties?
- (iii) Whether the Plaintiff company obtained patent for the device for smoke drying of agricultural produce w.e.f. 31-5-1990?
- (iv) Whether the patent obtained by the Plaintiff is an invention or is it a workshop modification as contended by the Defendants?
- (v) Whether the device claimed by Plaintiff is an invention or it is only a method of agriculture as contended by the Defendants?
- (vi) Whether the Defendants started manufacturing and marketing of rubber sheet driers infringing the patent of the Plaintiff?
- (vii) Whether the Plaintiff is entitled to get a decree of injunction as prayed for?
- (viii) Whether the Plaintiff is entitled to get compensation as claimed?

Addl. Issue No. IX.--Whether the counter-claim made by the Defendants

seeking revocation of Ext.A-10 patent is allowable ?

Addl. issue No. X.--To what reliefs and costs are the parties entitled?

THE EVIDENCE

8. On the side of the Plaintiff four witnesses were examined as P.Ws. 1 to 4 and 20 documents were got marked as Exts. A-1 to A-20. On the side of the Defendants the first Defendant was examined as D.W. 1 and Exts. B-1 to B-7 were got marked. Ext. X-1 is the photocopy of the files produced by the Rubber Board at the instance of the Plaintiff and Exts. X-1(a) to X-1 (d) are the evaluation reports occurring in Ext. X-1 files.

9. I heard Advocate Sri V.K. Issac, the learned Counsel appearing for the Plaintiff and Advocate Sri Alexander Joseph, the learned Counsel appearing for the Defendants.

10. Issue No. 1

The suit is one for a perpetual injunction against infringement of patent and for damages. The reliefs claimed in the plaint fall under Section 108 of the Act No suit for infringement of a patent can be instituted in a Court inferior to a District Court having jurisdiction to try the suit by virtue of Section 104 of the Act. The present suit was instituted before the District Court, Ernakulam on 7-4-1999 as O.S. 21 of 1999. In the written statement filed on 1-7-1999 by the Defendants they had inter alia made a counter claim for revocation of the patent. Hence, by virtue of the proviso to Section 104 of the Act the suit was transferred to this Court for trial and disposal. Section 104 of the Act reads as follows:

104. No suit for a declaration under Section 105 or for any relief under Section 106 or for infringement of a patent shall be instituted in any Court inferior to a district court having jurisdiction to try the suit:

Provided that where a counter-claim for revocation of the patent is made by the Defendant, the suit, along with the counter-claim, shall be transferred to the High Court for decision.

After the transfer the suit was tried by this Court. Apart from the fact that no argument was addressed before the in support of the contention that the suit is not maintainable, it has not been shown that the suit is not maintainable. This issue is accordingly found in favour of the Plaintiff.

11. Issue No. 2

No arguments were addressed by the learned Counsel for the Defendants to the effect that the suit is bad for non-joinder of necessary parties. That apart, it has not been shown that the suit is bad for non-joinder of parties. The specific case of the Plaintiff is that the first Defendant is the proprietor of the second Defendant proprietary concern by name M/s Emcees Engineering Centre. In paragraph five of the written statement the contention raised by the Defendants is that the driers sold by the Defendants are distinct and different from the driers of the Plaintiff and that the Defendants have not infringed the patent of the Plaintiff. Moreover, Sri C.P. Philipose, the inventor of the patent and who was examined as P.W. 2 on the side of the Plaintiff and the Controller of Patents need not be made parties to the suit, orders of the High Court in revocation proceedings and orders granting certificate of validity of any claim are, by virtue of Section 151 of the Act required to be transmitted to the Controller of Patents for the purpose of making suitable entries in the Register. If so,

it cannot be said that the suit is bad for non-joinder of necessary parties. This issue is answered in favour of the Plaintiff.

12. Issue No. 3

The fact that the Plaintiff has obtained Ext. A-10 patent in respect of a device for the smoke drying of agricultural products is not disputed. Ext. A-17 gives the complete specification including the schematic diagram of the drier. The Plaintiff company applied for the patent to the Controller of Patent, Chennai on 31-5-1990. Ext. A-10 patent was issued for a term of 14 years from 31-5-1990. The date of sealing of the patent was 21-2-1997. The patent No. is 176771. The Defendants are also conceding the fact that the Plaintiff has obtained Ext. A-10 patent and their counter-claim is for revocation of the said patent. Hence, it is held that the Plaintiff company obtained Ext. A-10 patent for the device for smoke drying of agricultural produces with effect from 31-5-1990. This issue is answered in favour of the Plaintiff.

13. Issue No. 4 to 7 and Addl. issue No. 9

These are the main contested issues and for the sake of convenience, they can be considered together.

THE DEFENCE ARGUMENTS

14. Advocate Sri Alexander Joseph, the learned Counsel appearing for the Defendants made the following submissions before the opposing the suit claim:

The second Defendant is an industrial unit of the first Defendant who is a qualified Engineer. His father is running a mechanical workshop. The first Defendant has thus the legacy as well as knowledge regarding industrial driers. Drying equipments are not new to Kerala. Every drying device can be considered to be an improvement of the other. The driers manufactured by the Plaintiffs company are only workshop modifications. There is no invention involved in those driers. What is patentable is only an invention. The plaint is liable to be dismissed for non-disclosure of particulars in view of Order VI, Rule 4A Code of Civil Procedure Going by paragraph 1 of the plaint Philipose who is one of the promoters of the Plaintiff company had invented the device. His name is not mentioned in the plaint nor is he made a party to the suit. It was only during the stage of evidence that the Plaintiff brought in the said Philipose (P.W.2) as the inventor. In Ext. A-2 write up in the Malayala Manorama Daily dated 20-7-1990 one Rajan Paul is shown as the inventor. The Plaintiff has no case that the Plaintiff company is the inventor. There is nothing in the plaint to show as to how the Plaintiff got the rights of Sri Philipose. Ext. A-10 patent itself states that the exclusive privilege given thereunder is subject to Section 47 of the Act. The said statement is in accord with Section 13(4) of the Act. Paragraph 33 of the decision of the Apex Court in Bishwanath Prasad Radhey Shyam v. S.H.M. Industries MANU/SC/0255/1978 : A.I.R. 1982 S.C. 1444 indicates that there is no guarantee nor presumption regarding the validity of a patent. The burden is on the Plaintiff to prove the alleged infringement of the patent. There is no material produced for comparison of the Plaintiff's products and the Defendants' products and the question of infringement cannot be decided without that. See paragraph 25 of Raj Prakash v. Mangat Ram Choudhary MANU/DE/0152/1977 : A.I.R. 1978 Delhi 1. Comparison of pamphlets is not sufficient. P.W. 1 the Managing Director of the Plaintiff company has admitted that he has not taken any expert Commission. On the merits of the case also the Plaintiff has also no chance to succeed. Sections 6 and 7 of the

Act will suggest that there can be a patent only in respect of an invention. Section 2(j) defines an invention as follows:

'Invention' means any new and useful--

- (i) art, process, method or manner of manufacture;
- (ii) machine, apparatus or other article;
- (iii) substance produced by manufacture, and includes any new and useful improvement of any of them, and an alleged invention.

Section 3 of the Act enumerates processes and methods which are not inventions. The said section reads as follows:

3. The following are not inventions within the meaning of this Act:

- (a) an invention which is frivolous or which claims anything obviously contrary to well established natural laws;
- (b) an invention the primary or intended use of which would be contrary to law or morality or injurious to public health;
- (c) the mere discovery of a scientific principle or the formulation of an abstract theory;
- (d) the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant;
- (e) a substance obtained by a mere admixture resulting only in the aggregation of the properties of the components thereof or a process for producing such substance;
- (f) the mere arrangement or re-arrangement or duplication of known devices each functioning independently of one Anr. in a known way;
- (g) a method or process of testing applicable during the process of manufacture for rendering the machine, apparatus or other equipment more efficient or for the improvement or restoration of the existing machine, apparatus or other equipment or for the improvement or control of manufacture;
- (h) a method of agriculture or horticulture; and
- (i) any process for the medicinal, surgical, curative, prophylactic or other treatment of human beings or any process for a similar treatment of animals or plants to render them free of disease or to increase their economic value or that of their products.

Notification falling under the Explanation to Section 106 of the Act can afford a ground for filing a suit under Section 105 but not under Section 106 for which there should be a threat of infringement proceedings. Section 107(1) of the Act provides that in a suit for infringement of a patent the grounds which can be raised for revocation proceedings are available as grounds of defence. Section 64 enumerates

the grounds which are available to the High Court for revocation of patent. In Ext. A-11 lawyer notice issued by the Plaintiff, there is no allegation about the date of infringement. There is no evidence to substantiate the claim for Rs. 75,000 as damages. The Defendants were aware of the patent only when they received Ext.A-11 lawyer notice and, therefore, no reliefs can be granted to the Plaintiffs in view of Section 111(1) of the Act. Since the device of the Plaintiff is only a workshop modification and not an invention, the patent granted to the Plaintiff is liable to be revoked. The observations of the Supreme Court in paragraphs 18 to 26 of the decision in A.I.R. 1982 S.C. 1446 (supra) indicate as to what exactly is an invention. A perusal of Ext. A-17 complete specification shows that the drier is not only for smoke drying of rubber latex sheets but also for copra, nutmeg spices etc. As against the above, the products of the Defendants are exclusively for rubber sheets. An invention is confined only to a claim. The claim in Ext.A-17 is that the hot and flue gases take a "U" turn. Another claim is the employment of fire splitters. P.W.2 the inventor would say that they are not using fire splitters. The 3rd claim is that the drier is almirah like device joined in series. There is absolutely no novelty in the said claim. The 4th claim is that the loading and unloading of rubber sheets can be effected by sliding into or drawing from the tiers. The device of the Plaintiff is thus a workshop modification as in the case of the Defendants' device. A perusal of Ext. B-6 list of manufacturers of driers accepted by the Coconut Development Board will show that the Rubber Board had approved 10 manufacturers of whom Sl. No. 1 was the Plaintiff and Sl. No. 6 was the Defendant. As per Exts.B-2 and B-3 letters, the Rubber Board had proved the Defendants driers also. Pages 6, 30 and 31 of Ext. B-6 Magazine issued by the Rubber Board contain the developments pertaining to the driers manufactured and marketed by the Plaintiff-company, Dhoomitha and the Defendants respectively. The pictures of all the driers shown there will indicate that they are all almirah type driers. The Plaintiff has not controverted he specific allegation in the written statement that Dhoomitha and Ors. are also selling similar devices. P.W.1 has admitted that Dhoomitha Multi Driers and ten other manufacturers have come out with similar driers and that the Plaintiff has not filed any case against them. The testimony of P.Ws. 3 and 4 examined to prove that the Plaintiffs drier is an invention have not succeeded in doing so. A comparison of the Defendants' drier at page 18 of Ext. A-20 journal and the Plaintiff's drier at page 19 of Ext. A-20 journal will show that there are dissimilarities in the two driers. Merely because both are almirah type no patent could be claimed. In order to be patentable, the contrivance should be something more than a workshop improvement See paragraph 21 of Bishwanath Prasad Radhey Shyam v. Hindustan Metal Industries MANU/SC/0255/1978 : A.I.R. 1982 S.C. 1444. The grant and sealing of the patent does not guarantee the validity of the patent and this legal position is fortified by Section 13(4) of the Act [Vide paragraph 33 of Bishwanath Prasad Radhey Shyam's Case (Supra)]. The publicity and user envisaged by Section 64(1)(f) of the Act need not be wide publicity or user. It is sufficient if the machine, apparatus or process is known to persons who are engaged in the pursuit of the knowledge of the patented product either as men of science or men of commerce or consumers. Vide Monsanto Co. v. Coromandel Intag Products (P) Ltd. MANU/SC/0317/1986 : A.I.R. 1986 S.C 712. The principles governing the issue of interlocutory injunction in cases of alleged infringement of patent are the same as are applicable under Order XXXIX, Rules 1 and 2 of the Code of Civil Procedure, 1908. See Francis Xavier Huemer v. New Yash Engineer MANU/DE/0015/1997 : A.I.R. 1997 Delhi 79 and Hindustan Lever Ltd. v. Godrej Soaps Limited MANU/WB/0049/1996 : A.I.R. 1996 Cal 367. Taking into account the principles laid down in the aforesaid decisions, it cannot be said that the Plaintiff has made out a case for the grant of any of the reliefs prayed for in the suit.

THE PLAINTIFF'S REPLY

15. Advocate Sri V.K. Isac, the learned Counsel appearing for the Plaintiff made the following submissions before the in support of his request for a decree in terms of the plaint:

One C.P. Philipose examined in this case as P.W.2 was the inventor of the patented device claimed to be one for smoke drying of agricultural products. P.W.2 was aged 64 when examined before this Court in the year 2007. He is a graduate in electrical engineering having post-graduate qualification in Industrial Electronics Engineering. After an extensive research which included a discussion with one Rajan Paul who was his friend, neighbour and college-mate, P.W.2 stumbled upon the novel idea of a steel fabricated, portable, almirah type, user friendly AND fuel efficient device with drying chambers. Wet rubber sheets could be loaded into the drier and after drying the dried sheets could be unloaded without the person entering the drier. P.W. 2's friend Rajan Paul who was a postgraduate in Mechanical Engineering and who was working as a Design Engineer in TATA Engineering and Locomotives, had become a quadriplegic after an accident. It was after consulting with the said Rajan Paul also that P.W.2 came out with the prototype of the new and improved design. P.W. 2 is one of the promoters of the Plaintiff company. The company was formed for the commercial production of the new generation driers in the year 1987. The Plaintiff company started manufacturing modern rubber sheet driers from 1987 onwards and was marketing the same under the series RRSD (ribbed rubber sheet drier) based on specifications given by P.W.2. The Plaintiff company wanted its driers to be tested by the Rubber Board. P.W.4 (K.T. Mani) who was the Specification Officer in the Quality Control Division of the Rubber Board made an evaluation of the drier spreading over a period of 1 1/2 years. Ext.X-1 is the file of the Rubber Board. Exts.X-1 (a), X-1 (b), X-1(c) and X-1(d) are the evaluation reports submitted by P.W.4. The Plaintiff company contacted the Kerala Industrial and Technical Consultancy Organization Limited (KITCO for short) established by the Industrial Development Bank of India in association with the Government of Kerala. P.W.3 who was the Joint General Manager of "KITCO" has deposed that Ext. A-6 is the technical report regarding the Plaintiffs driers prepared by one M.S. Unnikrishnan a Senior Consultant of KITCO. The conventional smoke houses were of masonry constructions with an oven underneath. Those smoke houses were having several defects. The Plaintiffs driers have no masonry structure. The patented device is an almirah type structure made of steel. The furnace is below the chamber. The advantage is that the person feeding the rubber sheets into the drier need not enter the chamber for loading or unloading of rubber sheets. Another advantage is that smoke is passing through a controlled path. So, uniform heat is ensured. Moreover, the patented driers require far less fuel than the conventional smoke houses. The patented invention is economical as well as portable. The company, therefore, applied for patent in Form No. 1A of the II Schedule of the Patents Rules, 1972 on 31-5-1990. Ext. A-17 is the complete specification containing the technical drawings and the claims. Ext. A-17 complete specification was accepted by the Controller of Patents under Section 22 of the Act. The acceptance of the complete specification was published in the Gazette of India as provided under Section 23 of the Act. The patent was sealed and granted on 21-2-1997 under Section 43 of the Act. Since by virtue of Section 45 of the Act the patent was to be dated as of the date on which the complete specification was filed, Ext. A-10 patent was dated 31-5-1990 which was the date on which the application for patent along with the complete specification was filed. The term of the patent was 14 years from

the date of patent by virtue of Section 53 of the Act. Thus the patent was effective till 31-5-2004. In the year 1997 the Plaintiff company came to know that the Defendants are manufacturing and selling driers by imitating the essential features of the Plaintiffs patented product in gross violation of the monopoly rights conferred on the patentee by Section 48(2) of the Act. Thereupon the Plaintiff issued Ext. A-11 lawyer notice calling upon the Defendants to stop selling the driers by infringing the Plaintiffs patent and to pay damages. On receipt of Ext. A-11 notice the Defendants had any of the following two options.

(i) Make an application to the patentee under Section 105(1)(a) of the Act, or

(ii) file a suit under Section 106(1) of the Act.

The Defendants did not resort to any of the above courses. Instead, the first Defendant sent Ext. A-12 reply denying the allegation in Ext. A-11. Besides denying the infringement alleged the first Defendant took the stand that Ors. were also violating the Plaintiffs patent. It has been specifically alleged in paragraph 8 of the plaint that the sales turn over of the Plaintiff was reduced by Rs. 4 and odd lakhs in the year 1997-98 and by 16,76,456 in the year 1998-1999. If the Defendants have copied the essential features of the Plaintiffs machine it would be a colourable imitation and the absence of certain non-essential integers in the offending machine will not save the Defendants from the charge of infringement. If infringement is proved, then the Plaintiff is entitled to damages. See MANU/DE/0152/1977 : A.I.R. 1978 Delhi 1. The counterclaim by the Defendants is not liable to be decreed. The defence contention that the Plaintiffs invention lacks novelty cannot be sustained at all. The answer to question Nos. 29 to 35 in the cross-examination of the first Defendant examined as D.W. 1 will clearly show that both the driers are similar. His further statement that both the driers do not look alike is belied by the advertisements. At page 17 of his deposition D.W. 1 has admitted that the Plaintiff has obtained patent for the patentable features and that he did not raise objections to the grant of patent by the Controller of Patents. Merely because the Defendants have also got approval of their driers by the Rubber Board it does not follow that their driers are not infringing copies. The defence contention that their driers are not identical since there are no fire splitters, partition plates and insulation for burners cannot be upheld. Fire splitter is an additional precaution against combustion. Partition plates are also safety measures and Ext. B-1 sketch submitted by the Defendant shows the existence of flow path in the driers of the Defendants for the control of the smoke. Providing insulation for the burners is also a protective measure and has nothing to do with the basic design of the machine. The Rubber Board which conducted experiments and tests on the driers of the Plaintiff was convinced that the Plaintiffs driers were novel. Since D.W. 1 has admitted at page 6 of his deposition that his drier has almost all the salient features of the Plaintiffs driers it was not necessary for the Plaintiff to produce both the machines or take out a commission. There is no evidence to the effect that Dhoomitha and other driers were in use in the market when the Plaintiff applied for patent in the year 1990. Hence, failure by the Plaintiff to take action against them cannot be taken advantage of by the Defendants who are infringers. Drying of agricultural produce may be part of agriculture. But, it cannot be said that the patented device is part of agricultural produce. Features of the Plaintiff's patent are stated in the plaint. This Court permitted the Plaintiff to adduce

evidence without asking the Plaintiff to furnish further particulars under Order VI, Rule 4 Code of Civil Procedure. The cause of action in the suit arose in April, 1997. Hence, compensation is awardable from that date till 31-5-2000 when the Plaintiff paid renewal fee on 31-5-1999 as per Ext. A-19 for the period from 31-5-1999 to 31-5-2000.

JUDICIAL EVALUATION OF THE CONTESTED ISSUES

16. This case is governed by the provisions of the Act as were applicable in the year 1997 since Ext. A-10 patent was sealed on 21-2-1997. We are not concerned with the amendments to the Act which were made after 21-2-1997. A patent granted after the commencement of the Patents Act, 1970 (hereinafter referred to as "the Act" for short) shall by virtue of Section 48(2) of the Act confer upon the patentee.

(a) where the patent is for an article or substance, the exclusive right by himself, his agents or licensees to make, use, exercise, sell or distribute such article or substance in India; and

(b) where a patent is for a method or process of manufacturing an article or substance, the exclusive right by himself, his agents or licensees to use or exercise the method or process in India.

This exclusive right to make, use, exercise, sell, or distribute such article or substance in India can be exercised by the patentee, his agents or licensees from the date of advertisement under Section 23 of the acceptance of the complete specification in view of Section 24 of the Act. Ext. A-7 notice dated 20-9-1996 issued by the Controller of Patents states that the acceptance of Ext. A-17 complete specification of the Plaintiff was published in the Gazette of India--Part III dated 7-9-1996. Thus, with effect from the said date the Plaintiff was entitled to the exclusive rights of a patentee under Section 48(2) of the Act by virtue of Section 24 of the Act. But the Plaintiff could not institute any suit or other proceeding for infringement of the patent until the patent was sealed in view of Section 45(3) of the Act and also in view of the Proviso to Section 24 of the Act. Ext. A-10 patent was sealed only on 21-2-1997. It was only after 21-2-1997 could the Plaintiff institute a suit for infringement of the patent. Even though Ext. A-10 patent bears the date 31-5-1990 as enjoined by Section 45(1) of the Act, the said patent was sealed and granted only on 21-2-1997 as provided under Section 43 of the Act. That is why it was mentioned earlier that this case shall be governed by the provisions of the Act as existed on 21-2-1997 which is the date on which patent was sealed and granted.

17. Ext. A-3 is the copy of the application dated 31-3-1990 filed by the Plaintiff company under Section 7 of the Act in Form 1A of the Second Schedule to the Patents Rules, 1970. (Hereinafter referred to as "the Rules" for short). In this case, the complete specification (which by virtue of Section 9 of the Act, could be filed within 12 months of the application) was filed along with the application and it contained the following 4 claims defining the scope of the invention for which protection was sought:

(i) A drying device comprising at least one furnace and one or more drying chambers having doors, each of such chamber being provided with a plurality of horizontal partition plates to define several tiers the tiers of each chamber being inter-connected with the corresponding tiers of the adjacent chamber, the partition plates of each chamber being in alignment with the corresponding partition plates of the adjacent chamber leaving no gap there in between so as to constrain the hot smoke and flue gases to pass through all the tiers at the same level and then take a "U" turn to enter the tiers of

the higher levels in succession and means for loading and unloading the tiers with the material which is being dried.

(ii) A drying device as claimed in claim 1 wherein fire splitters are provided with the furnace.

(iii) A drying device as claimed in claim 1 where in the said drying chambers are of almirah-like construction joined in series and having top exit means to permit the escape of the smoke and flue gases there through.

(iv) A drying device as claimed in claim 1 wherein the loading and unloading means are adapted to be slidably inserted into and drawn out from the tiers.

In Ext. A-3 application the Plaintiff company has figured as the assignee of C.R Philipose shown as the true and first inventor. The said inventor was examined as P.W. 2. His deposition is inter alia to the following effect:

He is the inventor of the new device for smoke drying of agricultural products patented under Patent No. 176771 dated 31-5-1990. After satisfying about the usefulness of the device for drying rubber sheets, the Plaintiff company was promoted for commercial manufacture of the device. Based on the specifications given by P.W. 2 the company started manufacturing modern rubber sheet driers and marketed the same under the series RRSD (ribbed rubber sheet driers). The company got models RRSD-80 and RRSD-240 tested by the Rubber Research Institute of India, Kottayam. The said Institute after investigations found that the fuel efficiency of RRSD-240 model was much higher than that of the conventional smoke houses. The novel idea of a portable, user friendly and fuel efficient rubber sheet drier was conceived and evolved due to the engineering background of P.W. 2 and also due to the necessities felt by him as a rubber cultivator. He is a graduate in Electrical Engineering with postgraduate qualification in Industrial Electronic Engineering. He had inherited landed properties which were planted with rubber. When the rubber plantation attained the tapping stage he thought of making a smoke house for drying the rubber sheets and visited some of the places where conventional smoke houses were in operation. He found the following defects/disadvantages in the conventional smoke houses:

(i) For loading and unloading the rubber sheets the operator had to go inside the smoke house made of masonry construction. In doing so, operator would have to expose himself to toxic gases and high temperature,

(ii) The operator had to carry out the exchange of rubber sheets in semi darkness.

(iii) The body of the operator as also his dress would be smeared with soot.

(iv) Heat loss was considerably high resulting in higher fuel consumption giving rise to higher cost of drying.

(v) There was sweating on the walls of the smoke houses during rainy season affecting the drying speed.

(vi) The conventional smoke houses which were of masonry

construction were not portable.

(vii) Most of the sheets dried in conventional smoke houses could be graded only of inferior grade like R.M.A. 5 as against higher grade dried sheets such as RMA 1, 2, and 3.

Since the conventional smoke did not suit the requirement of P.W. 2, he thought of designing a convenient smoke drying device. P.W. 2's experience in Waves Electronics Pvt. Ltd. of which he was the Technical Director helped him to conceive of an almirah type drying device. Waves Electronics Pvt. Ltd. was manufacturing almirah like Panel Boards. Fruitful discussion with his friend, neighbour and college mate Rajan Paul who was bed ridden after an accident also helped him to have a clearer vision of the new device. Rajan Paul was also having rubber plantation and was planning to construct a smoke house. The discussion between P.W. 2 and Rajan Paul led to the fabrication of a steel almirah type device with drying chambers in which wet rubber sheets could be loaded and dried sheets could be taken out without the operator entering inside the Chamber and exposing himself to the toxic gases and soot. Since the furnace in the conventional smoke houses was located outside the smoking room and below the plinth level there was loss of heat by conduction to the masonry structure and also to the earth. In the patented version P.W. 2 decided to install the furnace below the drying chamber and to provide a zig-zag flow-path between the layers of the Chambers ensuring smoke and heat to reach every nook and corner of the chambers. For the convenient loading and unloading of sheets to and from the drier, slidable and removable wooden sheet holders were provided. Fire splitters were provided to quench the naked flame reaching the drying chambers. Appropriate roofing was also provided so that the drier could be installed at suitable places of the cultivator's choice. This was the background under which the prototype were manufactured and the Plaintiff company was promoted for the commercial production of the newly invented driers.

18. P.W.1 (K.I. Kuriakose) is the Managing Director of the Plaintiff company. He has deposed in terms of the Plaintiffs case. P.W. 3 (T.R. Remanan) is the Joint General Manager of Kerala Industrial and Technical Consultancy Organization Ltd. (KITCO). Ext. A-6 is the Technical Report prepared by one M.S. Unnikrishnan, a Senior Consultant of KITCO after evaluating the driers manufactured by the Plaintiff company. P.W. 3 has deposed that the driers manufactured by the Plaintiff company were notable for their fuel efficiency and portability, that the workers were less exposed to heat, that there was uniformity in drying, that heat would pass from one chamber to the other and the end products were of high quality and that the sheets could be easily removed from the chambers. He has also deposed that the driers were made of metal sheets and were approved by the Rubber Board. P.W. 4 (K.T. Mani) who was the Deputy Director (Rubber Processing), of Rubber Board produced and proved Ext. X-1 files in which the portable rubber sheet driers developed and manufactured by the Plaintiff company were evaluated. He also corroborated the version given by P.Ws. 2 and 3. Except the interested testimony of the 1st Defendant examined as D.W. 1, the Defendants did not adduce any other oral evidence.

19. The word "patent" denotes a monopoly right in respect of an invention. Halsbury's Laws of England, IV Edn. Vol. 35 (1981), Para 303. A patent is thus a monopoly right granted to a person who has invented a new and useful article or an improvement of an existing article or a new process of making an article. It consists of an exclusive right to manufacture the new article invented or to manufacture an

article according to the invented process for a limited period. During the term of the patent the owner of the patent i.e., the patentee can prevent any other person from using the patented invention. After the expiry of the duration of the patent anybody can make use of the invention. A patent is a form of industrial property, or as it is now called, an intellectual property. The owner can sell the whole or part of this property. He can also grant licenses to Ors. to use or exploit it. The object of granting a patent is to encourage and develop a new technology and industry in the State. It is desirable in public interest that industrial techniques should be improved. In order to encourage improvement and to encourage also the disclosure of improvement in preference to their use in secret, any person devising an improvement in a manufactured article, or in a machinery or in the methods of making it, may upon disclosure of his improvement at the Patent Office, demand such improvement to be given monopoly in its use for the specified statutory period (now it is 14 years). After that period the invention passes into the public domain. The temporary monopoly is not objectionable because if it had not been for the inventor who devised and disclosed the improvement nobody would have been able to use it after the statutory period or at any point of time since nobody would have known about it. Furthermore, the giving of the monopoly encourages the commercial exploitation of the invention. The only way the inventor can make a profit from it or even recover the fees for his patent is by putting the invention into practice either by using it himself or by deriving an advantage over his competitors by its use or by allowing Ors. to use it in return for royalties. Vide "Patents for Inventions", T.A. Blanco White, III Edition and also Asahi Kogyo K.K's Application (1991) R.P.C. 485 at 523 (HL).

20. An application for a patent in respect of an invention can be made--

- (a) by any person claiming to be the true and first inventor of the invention;
- (b) by an assignee of the person claiming to be the true and first inventor;
- (c) by the legal representative of any deceased person who immediately before his death was entitled to make such an application.

An application for a patent can be made by any of the aforementioned persons either alone or jointly with any other person (Section 6 of the Act).

An application for patent can be filed either with a provisional specification or with a complete specification. Where the application is filed with a provisional specification, the complete specification is to be filed within twelve months of the application or within such further time as provided under Section 9 of the Act. Priority date within the meaning of Section 11 of the Act is ordinarily the date when the subject-matter of the claim of a specification is first disclosed. In the present case, since the detailed specification was filed by the Plaintiff along with the filing of the application for patent itself, the priority date is 31-5-1990.

Specifications are made up of four key parts:

- (i) An abstract (which is a brief summary of the more important technical features of the invention);
- (ii) A description of the invention which will explain the invention that has been created, the problems which the invention solves, why it is important and how the invention differs from what has been created before;

(iii) One or more claims (the primary function of which is to set out the scope of the legal protection conferred by the patent); and

(iv) Any drawings referred to in the description or claims (Along with the description, the drawings may be used to interpret the claims).

21. As observed above, an invention is the sine qua non for claiming the monopoly right of patent. What is patentable is only an invention. The definition of "invention" in Section 2(j) of the Act as obtained in the year 1997 was as follows:

"Invention" means any new and useful--

(iv) art, process, method or manner of manufacture;

(v) machine, apparatus or other article;

(vi) substance produced by manufacture, and includes any new and useful improvement of any of them, and an alleged invention.

Thus, any new and useful machine or apparatus or any new and useful improvement of any new and useful machine or apparatus is an invention. While considering the question as to whether a given device is an invention or not, Section 3 of the Act has to be necessarily adverted to because that Section enumerates the processes and methods which are not inventions. Clauses (d), (f) and (h) of Section 3 were pressed into service by the defence to contend that the Plaintiff's drier is not an invention. When the definition of invention includes any new and useful improvement of any new and useful machine, apparatus or other article, the aforementioned three Clauses of Section 3 of the Act cannot have any application. The patented device is not a method of agriculture or horticulture even though the device is used for the curing of an agricultural product. In paragraph 21 of Bishwanath Prasad Radhey Shyam's case MANU/SC/0255/1978 : A.I.R. 1982 S.C. 1444, the Apex Court has observed as follows:

To be patentable the improvement or the combination must produce a new result, or a new article *or a better or cheaper article than before*.

(emphasis supplied)

Going by Ext. A-17 complete specification including the technical diagrams therein, it cannot be said that the drier manufactured and marketed by the Plaintiff does not amount to an invention. It cannot also be said that the patented device is only a workshop modification. A perusal of Ext. A-17 complete specification will reveal that the Plaintiff's drier is a new and useful improvement of a new and useful machine or apparatus and squarely falls under the definition of "invention". It is true that Ext. A-17 patent is granted subject to the conditions specified under Section 47 of the Act which are really the superior right of user of the Government or the user for experiment or research or for imparting of instructions to pupils and the like and not for the commercial exploitation by any private individual. The following are the schematic diagrams submitted by the Plaintiff company in Ext. A-17 complete specification filed along with Ext. A-3 application for patent.

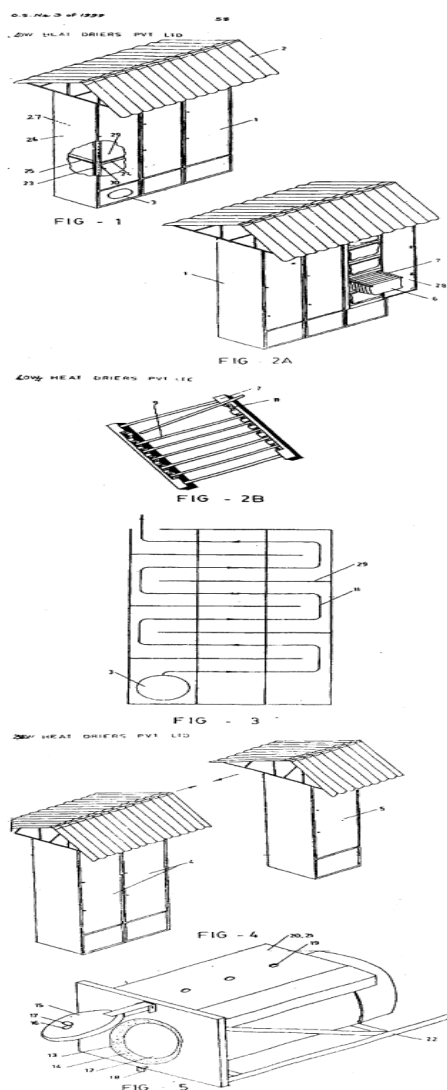


Fig-1-- shows a partly cut-open view of a three chamber drying device according to the present invention.

Fig-2A--shows the device of Fig-1 with the door of one of the three chambers being open.

Fig-2B--shows the latex sheet holder

Fig-3-- is a schematic diagram showing the path of hot smoke and flue gases.

Fig-4-- shows how the capacity of a double-chamber drying device of the present invention is increased by joining a chamber thereto, and

Fig-5-- shows the furnace.

All the 4 claims in Ext. A-17 complete specification have a definite tendency of defining the scope of the invention for which protection has been claimed and, are, therefore, upheld as valid. As already seen, what is patentable is only an invention.

22. The observation of the Apex Court in paragraph 33 of Biswanath Prasad Radhey Shyam's case (supra) to the effect that the grant and sealing of the patent does not guarantee the validity of the patent can only be understood to mean that the validity of the patent is subject to revocation of the patent under Section 64 of the Act in case

there is a request to revoke the same or in case any of the grounds under Section 64 of the Act are raised as a defence as provided under Section 107(1) of the Act. Incidentally, it is pertinent to observe that Section 13(4) of the Act is not an express provision which says that the validity of a patent is not guaranteed by the grant of a patent. Section 13 of the Act is a provision for examination of applications by the examiner to whom a patent is referred under Section 12 for investigation. This is a stage prior to the grant of a patent. Section 13(4) reads as follows:

Section 13(4). The examination and investigations required under Section 12 and this Section shall not be deemed in any way to warrant the validity of any patent, and no liability shall be incurred by the Central Government or any Officer thereof by reason of, or in connection with, any such examination or investigation or any report or other proceedings consequent thereon.

Where in a suit for infringement of patent or in a counterclaim for revocation of a patent all or any of the grounds enumerated under Section 64 of the Act are/is raised, then the validity of the patent can obviously be subject to such grounds for revocation. In other words, a patent granted as per the provisions of the Act after due enquiry and publication can be presumed to be valid unless it is found otherwise by upholding any of the defences in a suit for infringement or unless it is revoked on a counterclaim for revocation.

23. The grounds for revocation which by virtue of Section 107(1) of the Act, are also the defences to a suit for infringement of a patent are enumerated under Section 64 of the Act. The said Section as obtained in the year 1997 reads as follows:

(1) Subject to the provisions contained in this Act, a patent, whether granted before or after the commencement of this Act, may, on the petition of any person interested or of the Central Government or on a counterclaim in a suit for infringement of the patent, be revoked by the High Court on any of the following grounds, that is to say,--

(a) that the invention, so far as claimed in any claim of the complete specification, was claimed in a valid claim of earlier priority date contained in the complete specification of Anr. patent granted in India;

(b) that the patent was granted on the application of a person not entitled under the provisions of this Act to apply therefor:

Provided that a patent granted under the Indian Patents and Designs Act, 1911 (2 of 1911) shall not be revoked on the ground that the applicant was the communicatee or the importer of the invention in Indian and therefore not entitled to make an application for the grant of a patent under this Act;

(c) that the patent was obtained wrongfully in contravention of the rights of the Petitioner or any person under or through whom he claims;

(d) that the subject of any claim of the complete specification is not an invention within the meaning of this Act;

(e) that the invention so far as claimed in any claim of the complete specification is not new, having regard to what was publicly known

or publicly used in India before the priority date of the claim or to what was published in India or elsewhere in any of the documents referred to in Section 13:

Provided that in relation to patents granted under the Indian Patents and Designs Act, 1911 (2 of 1911), this Clause shall have effect as if the words 'or elsewhere' had been omitted;

(f) that the invention so far as claimed in any claim of the complete specification is obvious or does not involve any inventive step having regard to what was publicly known or publicly used in India or what was published in India or elsewhere before the priority date of the claim:

Provided that in relation to patents granted under the Indian Patent and Designs Act, 1911 (2 of 1911), this Clause shall have effect as if the words 'or elsewhere' had been omitted;

(g) that the invention, so far as claimed in any claim of the complete specification, is not useful;

(h) that the complete specification does not sufficiently and fairly describe the invention and the method by which it is to be performed, that is to say, that the description of the method or the instructions for the working of the invention as contained in the complete specification are not by themselves sufficient to enable a person in India possession average skill in, and average knowledge of, the art or which the invention relates, to work the invention, or that it does not disclose the best method of performing it which was known to the applicant for the patent and for which he was entitled to claim protection;

(i) that the scope of any claim of the complete specification is not sufficiently and clearly defined or that any claim of the complete specification is not fairly based on the matter disclosed in the specification;

(j) that the patent was obtained on a false suggestion or representation;

(k) that the subject of any claim of the complete specification is not patentable under this Act;

(l) that the invention so far as claimed in any claim of the complete specification was secretly used in India, otherwise that as mentioned in Sub-section (3), before the priority date of the claim;

(m) that the applicant for the patent has failed to disclose to the Controller the information required by Section 8 or has furnished information which in any material particular was false to his knowledge;

(n) that the applicant contravened any direction for secrecy passed under Section 35;

(o) that leave to amend the complete specification under Section 57 or Section 58 was obtained by fraud;

(2) For the purpose of Clauses (e) and (f) of Sub-section (1),--

(a) no account shall be taken of secret use; and

(c) where the patent is for a process or for a product as made by a process described or claimed, the importation into India of the product made abroad by that process shall constitute knowledge or use in India of the invention on the date of the importation, except where such importation has been for the purpose of reasonable trial or experiment only.

(3) For the purpose of Clause (1) of Sub-section (1), no account shall be taken of any use of the invention--

(a) for the purpose of reasonable trial or experiment only; or

(b) by the Government or by any person authorised by the Government or by a Government undertaking, in consequence of the applicant for the patent or any person from whom he derives title having communicated or disclosed the invention directly or indirectly to the Government or person authorised as aforesaid or to the Government undertaking; or

(c) by any other person, in consequence of the applicant for the patent or any person from whom he derives title having communicated or disclosed the invention, and without the consent or acquiescence of the applicant or of any person from whom he derives title.

(4) Without prejudice to the provisions contained in Sub-section (1), a patent may be revoked by the High Court on the petition of the Central Government, if the High Court is satisfied that the patentee has without reasonable cause failed to comply with the request of the Central Government to make, use or exercise the patented invention for the purpose of Government within the meaning of Section 99 upon reasonable terms.

(5) A notice of any petition for revocation of a patent under this section shall be served on all persons appearing from the register to be proprietors of that patent or to have shares or interests therein and it shall not be necessary to serve a notice on any other person.

As already observed, the ribbed rubber sheet drier manufactured and sold by the Plaintiff company is the product of an invention which is not only useful but is also distinctive. None of the grounds under Section 64 of the Act is attracted so as to come to a finding that no patent could be granted in respect of the Plaintiffs drier or that Ext. A-10 patent is liable to be revoked on any of the grounds enumerated under Section 64 of the Act. Hence the counterclaim by the Defendants seeking revocation of Ext. A-10 patent is misconceived. The said counterclaim has also become infructuous since Ext. A-10 patent was granted for a period of 14 years from 31-5-1990. The said term of the patent expired on 31-5-2004 by the operation of Section 53 of the Act.

24. I now proceed to consider the case of infringement of the patent. Unlike other statutes on Intellectual Property Rights, the Patents Act, 1970 does not define the acts which constitute an infringement of a patent. For example, Section 29 of the Trade and Merchandise Marks Act, 1958 defined what would constitute an

infringement of trade mark. Section 29 of the Trade Marks Act, 1999 also similarly defines infringement of a registered trade mark. Section 22 of the Designs Act, 2000 defines what would constitute a piracy of a registered design over which a copyright subsists. Section 51 of the Copyright Act, 1957 notices the state of things during when a copyright could be said to have been infringed. But there is no such analogous or related provision in the Patents Act, 1970. The Court has, therefore, to gather the meaning of infringement from the scope of the monopoly rights conferred on the patentee. Ext. A-10 patent confers on the Plaintiff the exclusive privilege of making, using, exercising, selling or distributing their drying device which is inconformity with Section 48(2) of the Act. The question of infringement cannot be decided without an examination of the patented drier manufactured by the Plaintiff and the offending drier manufactured by the Defendants. The Plaintiff did not produce the two driers before Court obviously for practical reasons. The Plaintiff did not also take out a commission to evaluate the common features, if any, in the two driers so as to enable the Court to come to a finding as to whether the Defendants' driers were a colourable imitation of the Plaintiff's driers. The Plaintiff has remained content by merely producing the instruction manuals (Exts. A-1 and A-16) pertaining to the driers manufactured by the Plaintiff company (Law Heat Driers Pvt. Ltd., Kizhakkambalam) and the second Defendant (Emcees Engineering Centre, Koothattukulam). A photocopy showing the front pages of the operation manuals pertaining to the driers of the Plaintiff and the second Defendant carrying the pictures of the respective driers is shown below:



The question of infringement cannot be decided merely on the basis of the external similarity of the two machines involved. The Defendants have a specific contention that their driers are not identical with that of the Plaintiff and that they have not copied the method adopted in the patented drier. In Ext. A-16 operation manual pertaining to the drier of the Defendants the cross-section of the drier shown does not bear any similarity with the cross-section of the drier shown in Ext. A-1 operation manual pertaining to the drier of the Plaintiff. Merely because the first Defendant examined as D.W. 1 has admitted that his driers have certain features which are present in the patented driers also, it cannot be straightaway concluded that the Defendants are guilty of infringement of the patented driers. Moreover, now after the efflux of the term of 14 years stipulated in Ext. A-10 which is in accord with Section 53 of the Act, even assuming that there was evidence of infringement of the patent, no injunction in terms of Section 108 of the Act can be granted.

25. In the light of the foregoing discussion, it is found that the driers manufactured and sold by the Plaintiff for the smoke drying of agricultural products constitute an invention which was patentable under the provisions of the Act, that it is not a workshop modification of any existing device, that it was not a method of agriculture

attracting Section 3(h) of the Act, that the Defendants have failed to substantiate the counterclaim set up by them, that the Plaintiff has failed to prove that the Defendants have committed infringement of Ext. A-10 patent and that the Plaintiff is, therefore, not entitled to get a decree of injunction as prayed for. Issue Nos. 4 and 5 are accordingly answered in favour of the Plaintiff and issue Nos. 6 and 7 are answered against the Plaintiff and additional issue No. 9 is answered against the Defendants.

26. Issue No. 8:

The further question is as to whether the Plaintiff is entitled to any compensation as claimed. It has already been found that the Plaintiff has failed to prove that the driers manufactured and sold by the Defendants are colourable imitations of the Plaintiff's patented products. Hence, even if the turnover of the Plaintiff had come down during the period from 1997 to 1999, it cannot be attributed to the manufacture and sale of the offending driers by the Defendants. That apart, the Plaintiff has not produced any accounts from which it could legitimately be concluded that the Plaintiff had suffered a decline in the sales turnover during the relevant period. Accounts are the best and dependable reflections of the sales figures of a company. For reasons best known to the Plaintiff, it has not chosen to produce accounts and this Court is hence deprived of the opportunity to Assess the situation. It is, therefore, found that the Plaintiff is not entitled to get any compensation as claimed. This issue is found against the Plaintiff.

27. Addl. Issue No. 10:

After a careful consideration of the rival contentions and the evidence on record, I am of the view that the only relief which can be granted to the Plaintiff in this case is a certificate of validity of Ext. A-17 complete specification as envisaged by Section 113(1) of the Act. It is well-settled that the ordinary rule of civil law is that the rights of parties stand crystallised on the date of institution of the suit and, therefore, the decree in a suit should accord with the rights of the parties as they existed at the commencement of the lis. See *Om Prakash Gupta v. Ranbir B. Goyal* MANU/SC/0035/2002 : (2002) 2 S.C.C. 256 and *Kedarnath Agarwal and Anr. v. Dhanraji Devi* by LRs and Anr. MANU/SC/0887/2004 : (2004) 8 S.C.C. 76. The decision in the suit or in the appeal therefrom will relate back to the date of institution of the suit. See *Anandan v. Kunhi Pokker* 1961 K.L.T. 805, *Kaderkunhi v. Kadre Beary* MANU/KE/0030/1976 : A.I.R. 1976 Kerala 92 and *Rameshwar and Ors. v. Jot Ram and Ors.* MANU/SC/0512/1975 : A.I.R. 1976 S.C. 49. The contest in this case was during the period of validity of Ext. A-10 patent and the adjudication in this case also should relate back to the date of institution of the suit which was on 7-4-1999.

THE CONCLUSION

In the result, the suit as well as the counter claim are disposed of as follows:

- (i) The device for smoke drying of agricultural products as manufactured and sold by the Plaintiff is an invention which was patentable under the Patents Act, 1970.
- (ii) The Plaintiff had validly obtained Ext. A-10 patent for the aforementioned device.
- (iii) Ext. A-10 patent obtained by the Plaintiff was not liable to be revoked under Section 64 of the Act during the currency of the patent, i.e. during the period from 31-5-1990 to 31-5-2004.

(iv) For want of proof of infringement of the patent by the Defendants, the Plaintiff is not entitled to a decree of injunction or compensation.

(v) Although the validity of the claim of Ext. A-17 specification was contested, since this Court has upheld the validity of the said claim, a certificate shall be issued in terms of Section 113(1) of the Act and shall be transmitted by the Registry of this Court to the Controller of Patents for causing an appropriate entry in the Register as provided under Section 151(1) of the Patents Act, 1970.

(vi) Having regard to the facts and circumstances of the case the parties shall bear their respective costs in this suit.

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