

Philco Industries and Ors. Vs. The Dy. Controller of Patents and Designs and Anr.

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Court : Kolkata

Decided On : Jul-13-2017

Judge : Soumen Sen

Appellant : Philco Industries and Ors.

Respondent : The Dy. Controller of Patents and Designs and Anr.

Judgement :

ORDER

SHEET AID No.14 of 2016 IN THE HIGH COURT AT CALCUTTA Special Jurisdiction ORIGINAL SIDE PHILCO INDUSTRIES & ORS.Versus THE DY.

CONTROLLER OF PATENTS & DESIGNS & ANR.

BEFORE: The Hon'ble JUSTICE SOUMEN SEN Date : 13th July, 2017.

Appearance: Mr.Gautam Roy, Adv.Ms.S.Ghosh, Adv.for the appellant.

Mr.Arunabha Deb, Adv.Ms.Anshumala Bansal, Adv.Mr.Souvik Kundu, Adv.for the respondent no.2.

The Court : The appeal is arising out of an order passed by the Deputy Controller of Patents and Designs on 28th June, 2016 in connection with the petition for

cancellation of registered design no.205014 filed by the appellant under Section 19 of the Designs Act, 2000.

The Deputy Controller has rejected the said application for cancellation of the aforesaid design.

The grounds for cancellation taken before the Deputy Controller are: (a) That the design has been published in India or in any other country prior to the date of registration.

(b) That the design is not a new or original design.

(c) That the design is not registrable under the Designs Act, 2000.

(d) That it is not a design as defined under Clause (a) of Section 2.

The appellant before the Deputy Controller has urged that the appellant is involved in manufacture of various utensils including bowls.

It has extensively sold bowls since 2005.

The petitioner has produced invoices and few catalogues to show that the appellant cannot claim novelty as the design of the petitioner is taught by a prior design inasmuch as the said design is common in trade.

The petitioner is using its trademark PHILCO which was registered under number 286729 in Class 21.

The appellant claimed that the appellant is the first adopter of the design Euro bowl and sold the same prior to the date of registration of the impugned design and hence the impugned design was prior published and prior used.

It was strenuously argued that no novelty of any kind was highlighted in the alleged design and as bowls are manufactured by several persons, the impugned design suffers from non-disclosure as portions claimed are not highlighted.

The private respondent appeared and submitted its affidavit in which the respondent has disclosed documents to show that the respondent had invented a

thermal and dent resistant bowl which is primarily a utensil bowl for keeping solid, liquid and for feeding and has filed a patent application in the year 2006 for registration of its patent with regard to the mode of construction and functionality of the said product.

It was contended that the private respondent is manufacturing and exporting steel and plastic wares and products blending of both plastic and steel since 2006 and had disclosed invoices in justification of the said claim.

The private respondent has referred to a cease and desist notice issued in 2010 and a civil suit filed against the appellant/petitioner for infringing the registered design of the private respondent.

It is submitted that the said design is novel and not a usual design and the invoices of the appellant do not indicate actual products.

The private respondent, accordingly, has prayed for dismissal of the cancellation of the petition.

The onus is on the appellant to show that the impugned design is taught by a prior design and there is a prior publication.

The Deputy Controller has meticulously examined and considered each of the annexures disclosed by the appellant and had arrived at a finding that none of the documents disclosed by the appellant would show that the impugned design is taught by a prior design or prior published or prior used.

The observations and findings of the Deputy Controller on the basis of the examination of the documents disclosed by the appellant could not be faulted on the basis of the disclosure made.

It was not possible for the Tribunal as well as for this Court to arrive at a conclusion that the impugned design was prior published and/or prior used.

The invoices would not show that same and/or similar bowl was sold by the appellant prior to the date of registration of the impugned design.

Similarly, the catalogue disclosed by the appellant would also not show the date of publication and hence no finding could be arrived at in favour of the appellant that the impugned design is either taught by a prior published design or there has been prior user.

The registered design no.205014 was in respect of the design of a bowl and was registered under Class 30-03 in respect of the application of such design to bowl.

The representation consists of five pages comprising front perspective view, back perspective view, top perspective view, bottom perspective view and perspective view of the article respectively.

The novelty is claimed to be residing in the shape and configuration of the bowl as illustrated.

Disclaimers were provided in the representation sheets regarding mechanical action, mode or principle of construction and in respect of any words, letters, numbers or trademarks or in respect of colours and colour combination.

The Deputy Controller has relied upon the decision of the Honble High Court in Gopal Glass Works LTD.versus Asstt Controller of Patents & Designs reported at 2006 (33) PTC434(Cal) and applied the tests therein in order to ascertain if the design is new and original as also what would constitute prior publication.

The Deputy Controller has considered the invoices and documents annexed to the cancellation application in order to ascertain whether the present design was taught by a prior publication and on examination of the evidence on record has arrived at a finding that none of the documents and/or invoices referred to the impugned design shows any prior publication of the design.

This Court is in agreement with the findings of the Deputy Controller that the said invoices and/or documents would only show that sale of certain types of bowls but does not show any particular design of the article except stating that the articles may be in various shapes and colours. In absence of any cogent evidence to show that the pattern disclosed in the application for registration is taught by a prior published document, the findings of the Controller who is an expert in the

field do not call for any interference.

The Deputy Controller did not stop there.

The Deputy Controller applied its mind to find out whether the impugned registration could be considered to be devoid of newness in view of certain documents claimed to have been downloaded from Wikipedia.

Each of the said documents were scrutinized and the finding of the Deputy Controller was that the printouts does not show the date of publication of the document in website nor the pictures of bowl suggests that the impugned design might have published before the date of registration.

Such results are all subsequent to the date of registration and there was no evidence before the Deputy Controller to show that the appeal with the design with the novelty as claimed in the petition was published prior to the date of registration.

In ITC Limited versus Controller of Patents & Designs reported at 2017 (2) CHN (Cal) 367 this Court had the occasion to consider the question of novelty and originality of a design as well as what would constitute a prior publication.

It was held that a design is an idea or conception as to features of shape, configuration, pattern or ornament applied to an article.

Although an idea may be potentially capable of registration, in fact, it must be reduced to visible form to be identified with.

The design must be such that in the finished article, the features of it appeal to the eye and are judged solely by the eye.

The Court followed the dictum of Buckley L.J.as to the distinction between new or original.

The surface features, particularly if they are pronounced, may be treated as features of shape or configuration, as in Co.& Co.LTD.versus Cannon Rubber Manufacturers LTD.reported at (1959) RPC240at 347 where it was held that a

series of ribs on the surface of a hot water bottle were features within the scope of the statement of novelty which claimed such features.

The novelty in the instant case is also claimed on surface pattern and the Deputy Controller has applied its mind to such features before concurring with the earlier finding that novelty resides in the surface pattern of scarf as illustrated.

In *Anuradha Doval versus The Controller of Patents and Designs & ORS.* being AID No.1 of 2015 on 13th April, 2017, This Court had the occasion to consider what would constitute in the prior publication and after considering the laws on the subject held:if a document is to constitute prior publication, then a reader of it, possessed ordinary knowledge of the subject, must from his reading of the document be able, at least, to see the design in his minds eye and should not have to depend on his own originality to construct the design from the ideas which the document may put into his head.

The bills and invoices disclosed by the appellant before the Deputy Controller does not disclose anything about the impugned design.

The appellant has failed to discharge its onus.

Under such circumstances, this Court is in agreement with the findings of the Deputy Controller of Patens and Designs and affirms the said order.

The appeal is dismissed.

However, there shall be no order as to costs.

(SOUMEN SEN, J.) B.Pal/sp

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