

M/S.Devans Modern Breweries Ltd. Vs. Controller of Patents and Designs and Ors.

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SooperKanoon Citation : sooperkanoon.com/50949

Court : Kolkata

Decided On : Apr-29-2015

Judge : Biswanath Somadder

Appellant : M/S.Devans Modern Breweries Ltd.

Respondent : Controller of Patents and Designs and Ors.

Judgement :

AID1OF 2013 IN THE HIGH COURT AT CALCUTTA Special Jurisdiction
ORIGINAL SIDE M/S.DEVANS MODERN BREWERIES LTD.Versus
CONTROLLER OF PATENTS AND DESIGNS AND ORS.BEFORE: The Hon'ble
JUSTICE BISWANATH SOMADDER Date : 29th April, 2015.

Appearance: Ms.Moushumi Bhattacharya, Adv.Mr.Prithviraj Sinha, Adv.Ms.Mitul Das Gupta, Adv.Ms.S.Chatterjee Singh, Adv.Ms.Debamitra Adhikari, Adv..for the appellants Mr.Somenath Bose, Adv.for U.O.I The Court : The instant appeal arises out of an order dated 7th November, 2012, passed by the Assistant Controller of Patents and Designs, Kolkata, in connection with an application bearing No.233798, which was filed by the appellant under section 5(4) of the Designs Act, 2000.

By the impugned order, the Assistant Controller refused registration of a design under the application filed by the appellant before it.

It appears from the facts of the instant case that challenging an earlier order passed by the Assistant Controller of Patents and Designs, Kolkata, being order dated 11th January, 2012, the appellants had approached this Court in a previous appeal, being AID No.2 of 2012.

That appeal was disposed of by a judgment and order dated 2nd August, 2012, whereby the order dated 11th January, 2012, passed by the Assistant Controller of Patents and Designs, Kolkata, was set aside and the entire matter was directed to be considered de novo by the said authority based on the observations contained in the said judgment and order dated 2nd August, 2012.

Upon perusing the impugned order dated 7th November, 2012, it appears that the same authority, ie.

the Assistant Controller of Patents and Designs, Kolkata, has virtually overlooked the specific observations made by this Court in its judgment and order dated 2nd August, 2012, passed in AID No.2 of 2012.

Relevant portion of the judgment and order dated 2nd August, 2012, passed by this Court is reproduced hereinbelow: While considering whether a particular design can be registered, the registering authority should, at first, carefully consider the statutory definition of the word, design, as provided under section 2(d) of the Designs Act, 2000, and thereafter, consider the prohibitions laid down under section 4 of the Designs Act, 2000, which specifically debars registration of certain designs.

If any of the prohibitions laid down under section 4 of the Designs Act, 2000, is attracted in respect of a design placed for registration, the same cannot be registered.

However, in the facts of the instant case, in view of what has been observed hereinbefore, it cannot be held with certainty that the design that was placed for registration was not significantly distinguishable from known designs or

combination of known designs.

The yardstick applied for registering a design under a particular class is required to be maintained and adhered to evenly and consistently by the Controller while deciding on the issue of registration of a design falling under the same class and cannot be varied in any manner.

In other words, the parameters for registering a design under a particular class cannot be altered in any manner while the Controller decides on the issue of registration of a design falling under the same class.

Therefore, the issue as to whether the design in question can be registered or not is required to be revisited by the registering authority, namely, the Assistant Controller of Patent & Designs, Kolkata. It appears that while refusing the design application of the appellant, the concerned authority was, inter alia, of the view that design application no.233798 did not have any inventive ingenuity and appeal to the eye as possessing for reason of its shape and configuration and features which distinguished it from the cited designs in the same class. It was further observed to the effect that the applicant (being the appellant herein) did not take any pain to create any new or original design rather than to simply modify some minor features and such microscopic variation failed to establish an overall new aesthetic effect which was judged solely by ocular effect. The concerned authority, while passing the impugned order, also observed that novelty alone was not sufficient for registration of design; there must be substantial originality in the impugned design and if the design features of shape and configuration of cited designs are same or nearly the same with the subject design, then the subject design ought not to be proceeded for registration due to lack of sufficient originality with bare novelty. It appears that while making such observations, as indicated above, the Assistant Controller of Patents and Designs, Kolkata, forgot to take into consideration the observations made by this Court in its earlier judgment and order dated 2nd August, 2012, wherein it was, inter alia, held to the effect that the yardstick applied for registering a design under a particular class is required to be maintained and adhered to evenly and consistently by the Controller while deciding on the issue of registration of a design falling under the same class and

cannot be varied in any manner.

In other words, the parameters for registering a design under a particular class cannot be altered in any manner while the Controller decides on the issue of registration of a design falling under the same class.

During the course of hearing of the matter, the appellant produced a specimen for which registration was sought for under application no.233798.

Upon examining it, this Court observed the presence of a significant curve at the shoulder of the bottle and another significant curve at the start of the neck of the bottle and thereafter a bulge in the neck of the bottle.

For a design to be registered, it is not necessary that the whole of the design should be new.

It is sufficient if some part of it is new or original.

A new combination of two or more old features may form good subject matter for valid registration.

The observations made by the Assistant Controller of Patents and Designs in the last paragraph of the impugned order dated 7th November, 2012, cannot be held to contradict the fact that in the present case, the design of the bottle is original.

Section 2(d) of the Designs Act, 2000, makes it abundantly clear that eye appeal of a finished article has to be judged solely by eye alone having regard to the article applied for registration and not by conducting a comparative study with other articles.

There is nothing provided in section 2(d) of the Designs Act, 2000, wherefrom it would appear that eye appeal has to be judged relative to the eye appeal of articles of the same kind.

If an article has an eye appeal, it cannot lose such appeal only because another article has eye appeal.

The entire concept of eye appeal is , however, quite subjective and the Assistant Controller of Patents and Designs, while considering the matter de novo, ought to have at least relied on the observations of this Court in its earlier judgment and order dated 2nd August, 2012, relevant portion whereof is quoted hereinbefore.

In such facts and circumstances, the impugned order dated 7th November, 2012, passed by the Assistant Controller of Patents and Designs, in respect of application no.233798, is liable to be set aside and is, accordingly, set aside.

The respondents are directed to register the design, under application no.233798 dated 10th January, 2011, in the same class it has been applied for.

Urgent certified photostat copies of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

(BISWANATH SOMADDER, J.) kc.

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