Glaverbel S.A. vs Dave Rose & Ors. on 27 January, 2010

Author: Manmohan Singh

Bench: Manmohan Singh

.* HIGH COURT OF DELHI : NEW DELHI

+ I.A No. 3756/2007 in CS (OS) No. 594/2007

% Decided on: 27th January, 2010

Glaverbel S.A. .....Plaintiff
Through: Mr. Sudhir Chandra, Senior Adv. with Mr. Hemant Singh, Ms. Deepti Maheshwari and Ms. Mamta Rani Jha, Advs.

Versus

Dave Rose & Ors. .....Defendants
Through: Mr. Arun Jaitley, Senior Adv. with Ms. Pratibha M. Singh, Mr. Kapil Wadhwa, Mr. J.P. Karunakaran and Ms. Bitika Sharma, Advs.

Coram:

HON'BLE MR. JUSTICE MANMOHAN SINGH

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes

2. To be referred to Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

MANMOHAN SINGH, J.

1. By this order I shall dispose of I.A. No. 3756/2007 filed by the plaintiff under Order XXXIX Rule 1 and 2 of Code of Civil Procedure, 1908 (for short „CPC) for an ad-interim injunction restraining the defendants from manufacturing, selling and offering for sale copper free mirrors infringing the plaintiff s registered patent No. 190380.

Case of the Plaintiff

2. In the plaint, it is stated that the plaintiff is a company incorporated under the laws of Belgium. In India, the plaintiff s sales and marketing etc. are carried out by Glavindia Pvt. Ltd., 507 Gateway Plaza, Hiranandani Gardens, Powai, Mumbai- 400076, Maharashtra.

3. The plaintiff claims to be engaged in the business of manufacturing, marketing and selling glasses, mirrors of world class quality. The plaintiff claims in the suit to be the innovator of the technology which has lead to the manufacture of mirrors of improved quality.

4. The plaintiff in the present suit claims to be owner of the process as well as product patent involving the manufacturing process of the mirror which is registered as patent No.190380 dated 8th May, 1995 granted on 12th March, 2004 in respect of „a mirror with no copper layer and process for manufacturing the same . The plaintiff has stated in the suit that the process and product involving the mirror without a copper layer is an innovative one and the said process and the product is easily distinguishable from that of the ordinary and conventional mirrors in the market which contain the copper layer.

5. The plaintiff developed the said technology and got it patented in India on 8th May, 1995 under Patent No. 190380 and launched the MNGE mirror in September 1998. As per the plaintiff, the novelty in Indian Patent No. 190380 resides in a mirror with no copper layer and a process for preparing the same. Claims for the purpose of present dispute of patent inter alia reads as under :

> "1) A Mirror with no copper layer comprising:
>
> i) a vitreous substrate,
> ii) at least one material selected from the group consisting
>
> of bismuth, chromium, gold, indium, nickel, palladium, platinum, rhodium, ruthenium, titanium, vanadium and zinc at the surface of the said substrate,
>
> iii) a silver coating layer on the surface of the said substrate, said silver layer optionally comprising at least one material selected from a group consisting of tin, chromium, vanadium, titanium, iron, indium, copper, and aluminum present at the surface of the silver coating layer and/or traces of silane; and
>
> iv) at least one paint layer covering said silver coating layer.
>
> 9) A process for the manufacture of a mirror as claimed in Claim 1, said process comprising
>
> i) sensitizing a surface of a glass substrate by bringing it into contact with a sensitizing solution and activating the surface in an activating step, in which the surface is brought into contact with an activating solution, whereby the activating solution contains ions of at least one of the metals of bismuth (III), chromium (ii), gold (iii), rhodium (III), ruthenium (III), titanium (III), vanadium (III) and zinc (II),

ii) a silvering step, in which said surface is brought into contact with a silvering solution and optionally compromising contacting the silver coating layer with a solution containing ions of fat least one of the group consisting of Cr (II), V (II or III), Ti(II or III), Fe(II), In(I or II), Sn (II), Cu(I) and A1(III) and/or contacting the silver coating layer with a silane; and

iii) a step for covering the resulting silver layer with one or more protecting paint layers.

The material at the surface of the (glass) substrate is preferably palladium; this is preferably present as „islets on the glass surface (as opposed to being present as a continuous layer) present in an amount not more than 3.6 mg per square meter."

6. The plaintiff submits that the inventions protected by the Indian patent are substantially similar to the plaintiff s inventions protected in United States of America under Patent Nos. US6251482, US6565217, US6749307 and US6942351. The uniqueness of its invention, according to the plaintiff, lies in (i) copper free metal coating over the silver layer and (ii) use of lead free protection paint over the so coated silver layer.

7. The plaintiff claims that although the said process is known to the mirror manufacturing industry in broad terms, the contents used in the said process and the treatment of the same makes it different. Moreover, as against conventional mirror making which involves four step procedure, wherein there is a step in between which is the treatment with copper before silvering, the plaintiff s process reduces the same into three steps and is thus different from the normal manufacturing process.

8. The plaintiff claims that after the said process, the out come is a mirror which is without copper layer and the said mirror is durable in nature and improves the adhesion of the silver coating on the mirror resulting in the long life of the mirror. Further, the invention is stated to be useful as the same also enhances the corrosion resistibility of the mirror.

9. The inventions that are protected by plaintiff s Indian Patent No.190380 are substantially similar to those protected in the United States of America by plaintiff s United States patents US6,251,482, US6,565,217, US6,749,307 and US6,942,351. Again, these patents were only granted after a thorough search and examination by the experts at the United States Patent and Trade Mark Office. By citing the aforesaid patents, the plaintiff claimed that it is the owner of the subject invention world wide. The said invention according the plaintiff is an innovative one.

10. It is submitted that around early 2006, the plaintiff come across the mirrors being sold and manufactured by the defendants, and suspecting that these might be infringing the plaintiff s Indian patent, a sample of the same was procured and sent for testing and analysis to the plaintiff s R&D center in Belgium.

11. Thereafter, the R&D centre analyzed the sample of the defendants using the process of XPS (X-Ray Photoelectron Spectroscopy) and the result thereof was that the chemical composition of the defendants mirror was similar to the plaintiff s MNGE mirror, i.e. it had no copper layer, and in fact was a glass sheet substrate with palladium and tin at the surface (with the palladium present in the form of islets), a silver coating thereon with tin present at the surface of the silver coating and two layers of lead free paint covering the said silver layer.

12. To support the same, the plaintiff has filed the affidavit and certification of Dr. Pierre Boulangar, a senior research scientist who has conducted the test on the mirror of the defendants. The results which came into light are as under:

i. A glass sheet substrate.

ii. Palladium and tin at the surface of the substrate, the

palladium being present in the form of islets on the glass surface;

iii. A silver coating on the surface of the glass with tin present at the surface of the silver coating; and iv. Two lead free paint layers covering the silver layer.

13. The plaintiff alleges that in view of the aforementioned results, it is evident that the defendants manufacturing process corresponds to Claim 9 of the plaintiff s Indian Patent. The resultant mirror with no copper layer and lead pigments found also makes it clear that the defendants mirror is an infringement of the plaintiff s patented mirror.

14. Further, the plaintiff alleges that the defendants are replicating the steps of the plaintiff s patented process, the same being as under :

(i) Sensitization of the glass surface with tin chloride;

(ii) Activation of the glass surface with palladium chloride;

(iii) Formation of a silver layer and coating thereof with tin chloride;

(iv) Coating of the resultant layer with lead free paint.

15. Hence in the present application, the plaintiff has alleged that the defendants are clearly infringing its registered patent no. 190380 by their activities and are thus liable to be restrained.

16. The plaintiff has contended that it has a prima facie case evident from the result of the scientific analysis conducted by its R&D wing in Belgium. Balance of convenience also, as per the plaintiff, lies in its favour as an injunction would only stop the defendants from using the plaintiff s technology whereas not granting the injunction would cut at the root of the plaintiff s business.

17. Also, it is submitted that the plaintiff has a significant advantage over its competitors due to its patented mirror and the chemical process thereof as it has various agreements all over the globe as regards its product. Grant of licenses generates huge revenue on account of the restrictive use of the patented product and process. If the defendants are allowed to continue infringing the plaintiff s registered patent, the revenue as well as the credibility of licenses of the plaintiff will be affected very negatively.

Plea of the Defendants in their Written Statement and Reply

18. The defendants, in their reply to the present application, have contended that mirrors without copper/lead layer have been available before the plaintiff claims to have developed the same. Also, the process of manufacturing the „MNGE mirrors is not novel as alleged by the plaintiff as the same is anticipated by prior art.

19. In nut shell, the case of the defendants in substance in the written statement and reply is enlisted as under:

> (a) That the alleged invention is not patentable as it lacks novelty and the same is anticipated by the prior arts, (the detailed analysis is discussed in the judgment)
>
> (b) That the alleged invention is short of inventive step, in other words, the said invention is obvious to a person skilled in art and thus, the said invention ought not be accorded patent and is also not worthy of protection
>
> (c) That the plaintiff has failed to disclose that a similar patent/ patent claim which is substantially the same with that of the impugned patent has been rejected in German Patent office and in an appeal thereof, it has been affirmed and the said judgment has attained finalty. The said fact is not disclosed which has material bearing upon the question of novelty and obviousness of the same claim in Indian patent and further it prima facie establishes that the defendants are raising a challenge to the patent which is worth considering.
>
> (d) That the said invention has not been commercially exploited in India and thus, the present suit is nothing but thrashing out the competitor from the market in order to gain commercial edge in the market without actually exploiting the invention.
>
> (e) The defendants have also filed the counter claim alongwith the written statement for revocation of the impugned patent.

20. As regards the first defense, the defendants have submitted various sources that contain prior art, which anticipate the plaintiff s patent and invention.

21. The description of the prior art is given in the written statement which reads as under :

A.) BUCKWALTER (US patent 4285992) dated 25.08.1981 "Process for Preparing Improved Silvered Glass Mirrors"

> This patent was filed on 28.01.1980 for an improvement in the method of making mirrors so that they are less susceptible to degradation due to weathering. Buckwalter discloses a mirror production process in which "the cleaned surface of the glass is contacted with a solution of lanthanide ions in addition (sic) to a tin or palladium sensitizing solution before the surface is silvered" (col 3, lines 13-16). Buckwalter utilizes a tin OR a palladium solution to sensitize the glass surface. Although Buckwalter improves upon this process by application of a solution of Lanthanide rare earth ions, it is clear that those skilled in the art were aware that mirrors could be made without the application of a Lanthanide solution. Buckwalter was also cited in the proceedings for plaintiff s related German Patent, which in fact was rejected by the German Federal Patent Court.

> B.) FRANZ (US Patent No.3,798,050) dated 19.03.1974 "Catalytic Sensitization of Substrates for Metallization"

The Franz patent was filed on 28.05.1997 and relates to chemical plating (referred to in the art as electroless plating(using a new method of sensitizing a substrate to produce a catalytic surface receptive to the deposition of metal containing film. Franz discloses a method of coating a glass substrate with a metal such as silver (i.e. a group B metal). Franz discloses sensitizing the substrate surface with tin chloride (sncl2), followed by a rinsing step to "supersensitize" the surface with PdCl2 or PdCl4 solution (col. 2 lines 40-46 and col. 5 lines 7-67). Franz explains in detail that the Palladium acts as a catalyst to improve adhesion and uniformity of the metal film to on the substrate (Col. 3, lines 60-65, and col. 8 lies 50-53). After the substrate has been sensitized using Tin Chloride and supersensitized using PdCl2 or PdCl4, a metal containing solution is sprayed on to the substrate to form the metal coating (col. 6 lines 1-10). Franz also does not mention any Copper layer.

C.) A publication titled "The Nucleation with SnCI2-Pd CI2 solutions of Glass before Electroless plating" by C.H. de MINJER and P.F.J.v.d. Boom This article confirms that the process of "sensitization" and "activation" in a Stannous Chloride and Palladium Chloride solution was widely known. This publication dates back to December 1973 and clearly teaches the plaintiff s alleged invention. (Response pg. 1644 and 1645).

D.) ORBAN (US patent No.4,643,918) dated 3rd May, 1985 "Continuous process for the metal coating of fiberglass"

> This patent clearly shows the use of palladium chloride and tin chloride for activating the surface of fiberglass filaments.

> E.) GREENBERG (US Patent No.3,978,271 dated st 31 August, 1976) In this patent, the glass sheet is sensitized with tin salt which may include Tin Bromide, Tin Lodide, Tin Sulfate, etc. Thereafter, activation is carried out using a Palladium salt. The

patent clearly shows that the process of activation and sensitization using Tin and Palladium was known in the industry much before the plaintiff s claimed inventino date. F.) SHIPLEY- Great Britain Patent No.GB929799 This patent talks about improved metal depositions by treating the substrate with tin chloride or another tin salt to catalyze the deposition of a desired metal coating. The tin salt forms catalytic metal mucleating centres so that the desired metals can be easily deposited using known deposition solutions. The deposition solution usually comprises of nickel, cobalt, copper, silver, gold, chromium etc. (col. 1 lines 40-55; col. 1 lines 30-35; col. 1 lines 46-

65).

22. In their second defense, the defendants state that Claim 1 as well as Claim 9 of the plaintiff in patent no. 190380 are not valid as per the Patents Act, 1970.

23. It is further contended by the defendants that the plaintiff has concealed various material facts from this court as well as from the Patent Office. The plaintiff has failed to disclose relevant information, contrary to the mandatory provision of disclosure in Form 3 as per Section 8 of the Patents Act. A patent application no. 10157294 was filed by the plaintiff on 22.11.2001 in Germany as regards a similar „invention .

24. As alleged by the defendants the claim of the plaintiff was rejected, where after the amended claim was filed to the following effect:

"Process for preparing a mirror without copper layer, comprising a sensitizing step, wherein said surface of a glass substrate is contacted with a sensitizing solution, an activating step, wherein said surface is contacted with an activating solution, the activating solution containing an ion of at least one of the metals bismuth (III), chromium (II), gold (III), indium (III), nickel (II), palladium (II), platinum (II), rhodium (III), ruthenium (III), titanium (III), vanadium (III) and zinc (II), a subsequent silvering step, wherein said surface is contacted with a silvering solution, and a step of covering the resulting silver layer with one or more protective layers of paint."

25. It is alleged that the plaintiff s application was rejected after which it filed an appeal with the Federal Patent Court proposing several new amendments, but this appeal was also rejected. The rejection was explained by reference to various prior art references being US Patent 4288992, German Application DE 4135800 A1, German Patent DE 2136348 B2, Ullmann s Encyclopedia of Technical Chemistry, 4 th Edition, Volume 21, published by Verlag Chemie, Weinheim 1982, pages 633 to 638. The plaintiff failed to disclose any of this information to the Indian Patent Office.

26. The defendants submit that the plaintiff has also concealed that in its most closely related patent as regards the Indian patent no. 190380, which is US Patent no. 6251482, Claim 1 was rejected and

amended almost 8 times before finally being accepted. The US Patent Examiner stated that the plaintiff s patent was based on prior art. It was only when the plaintiff argued that palladium was used as a catalyst in the prior art references whereas in the plaintiff s invention, palladium was not used as a catalyst that the said patent application was allowed. The Indian application contained nothing to the effect of palladium not being used as a catalyst and hence the same is still based on prior art.

27. It is contended that the defendants have been manufacturing copper free mirrors in India way back since year 2002 and the balance of convenience surely lies in favour of the defendants. The sales of the defendants are given below :

Year	Quantity (In Sq. Mtrs.)
2002-03	3,259,284
2003-04	3,736,325
2004-05	3,608,493
2005-06	3,497,735
2006-07	3,098,039
2007-08	2,965,332
2008-Feb. 09	2,568,246

28. The defendants have also given the steps of the process of manufacturing their product as follows :

1. A glass is sensitized with Tin Chloride.

2. Glass is super-sensitized with palladium chloride. It acts as a catalyst and promotes silver film adhesion with the glass by electrically charging the glass.

3. Glass is activated with Silver Nitrate Solution.

4. Silvering the glass with silver nitrate solution + ammonium hydroxide.

5. Protect silver layer by passivation and Coating Paints.

29. The defendants thus state that in the present case there is no infringement, thus no case of injunction is made out.

30. It is stated by the defendants that in view of the above, the plaintiff has no prima facie case against them and in fact, the balance of convenience lies on the side of the defendants as the plaintiff is only trying to cease/pause the defendants manufacturing by relying on their invalid patent in the meantime using the vacuum in the market to bring an inflow of their patented product and since the defendants are not infringing the impugned patent of the plaintiff, this is not a fit case for grant of injunction.

31. During the hearing of the interim application both the parties have filed further affidavits in order to support their submission. The first affidavit was filed on 24th March, 2009 alongwith list of documents of Mr. George Pilloy designated as Plant and Technical Coordination Manager of AGC Flat Glass Europe SA. Reply affidavit of Mr. R.B. Dadu, Company Secretary of defendant No.2 to the affidavit of Mr. George Pilloy was filed on 6th April, 2009. Rejoinder affidavit of Mr. George Pilloy was also filed on 1st May, 2009.

32. In another suit filed by the plaintiff being CS (OS) No.593/2007 in respect of the same patent, the plaintiff sought the amendment of claim No.1 and filed an application under Sections 57 and 58 of the Patent s Act, 1970 read with Section 151 of the Civil Procedure Code, 1908 being I.A. No.13519/2007 which was allowed by this Court vide order dated 10th September, 2009. Claim No.1, as it originally stood, is reproduced herein below :

> "1) A Mirror with no copper layer comprising:
>
> i) a vitreous substance,
>
> ii) at least one material selected from the group
>
> consisting of bismuth, chromium, gold, indium, nickel, palladium, platinum, rhodium, ruthenium, titanium, vanadium and zinc at the surface of the said substrate,
>
> iii) a silver coating layer on the surface of the said substrate, said silver layer optionally comprising at least one material selected from the group consisting of tin, chromium, vanadium, titanium, iron, indium, copper, and aluminum present at the surface of the silver coating layer and/or traces of silane; and
>
> iv) at least one paint layer covering said silver coating layer.

The amended Claim No.1 as prayed for and allowed by order dated 10th September, 2009 is reproduced hereunder :

> 1. A mirror with no copper layer comprising :
>
> i) A vitreous substrate,
>
> ii) A sensitizing material, typically tin, and at least

material selected from the group consisting of bismuth chromium, gold, indium, nickel, palladium, platinum, rhodium, ruthenium, titanium, vanadium and zinc at the surface of the said substrate.

iii) A silver coating layer on the surface of the said substrate, said silver layer optionally comprising at least one material selected from the group consisting of tin, chromium, vanadium, titanium, iron, indium, copper and aluminum present at the surface of the silver coating layer and/or traces of silane; and

iv) At least one paint layer covering said silver coating layer."

Contentions of the Plaintiff

33. Mr. Sudhir Chandra, Learned Senior Counsel appearing on behalf of the plaintiff has made his submissions which can be elucidated as under:

a) Shri Sudhir Chandra submitted that the impugned Patent is relating to the glass/ silver/ paint mirror without the copper layer.

The said patent has been granted as of 8th May, 1995 and the same is statutory right emanating from the Act. Thus, according to the learned Senior counsel for the plaintiff, the said patent rights must be respected by this court in form of grant of interlocutory injunction.

b) Secondly, Shri Chandra submitted that the defendants have cited several alleged prior arts which according to him are relating to the mirror with copper layer which is ordinary and conventional form of producing the mirror. The invention according to Mr. Chandra lies in the underlying process of manufacturing the mirror without copper layer and the apparatus itself. Thus, it is the case of Mr. Chandra that all the prior arts are irrelevant for the purpose of looking into the present patent as the same are relating to conventional process of manufacturing mirror and there is fundamental difference between the prior arts and the invention in question.

c) Thirdly, Mr. Chandra submitted that the defendants have failed to discharge the onus of proof as envisaged under section 104 A of the Act while contending the difference in the competing inventions.

d) Fourthly, Mr. Chandra argued that assuming for the sake of argument that the prior arts cited are correct, the question still has to be seen from the perspective of an unimaginative person normally skilled in the art on the date of the plaintiff s patent. Thus, when seen from that angle, it is questionable as to how the defendants could have arrived at the same invention causing the infringement of the plaintiff s invention.

e) Fifthly, Mr. Chandra contended that the plaintiff has filed on record the affidavit of Dr. Pierre Boulanger - who is the scientist appointed by the plaintiff who conducted the test pointing out similarities between the two products. The counsel placing reliance upon the same contended that

the same has gone unrebutted and hence there is no denial to the effect that the invention and the manufacturing process is the same and no explanation has been put forth to substantiate about the manufacturing process of the defendants. It ought to be assumed and rather believed on prima facie basis that the inventions are the same and injunction must follow.

f) Sixthly, Shri Chandra contended that the prior arts are to be read in total in order to find out whether the invention is an anticipated one. It is not permissible under the law to read one portion of the claim and there after another to breakdown the invention and the defendants are seeking recourse to a technique which is popularly known as Mosiacking.

g) Lastly, the plaintiff counsel has pointed out several similarities between the plaintiff s patent and that of the defendants from the chart filed alongwith the written submission dated 28 th March, 2009 alongwith plaintiff s comments.

Judgments referred by the Plaintiff

34. In support of his contentions, learned senior counsel for the plaintiff has referred to various cases which are enumerated below :

> i) Bajaj Auto Vs. TVS Motor Company Ltd., 2008 (36) PTC 417 (Madras) wherein it was held in paragraph 25 that in a case where a person creates what is in substance the equivalent of a patented article, the creation would be an infringement of the patented article and trifling and unessential variations would be ignored.

ii) Raj Prakash Vs. Mangat Ram Chowdhary, AIR 1978 Del 1 wherein it was held in paragraph 25 that minor variations in the two relevant5 products are irrelevant for the purpose of deciding whether there is infringement and if the infringing article is an equivalent of the patented article, infringement would be proved.

iii) In Telemecanique and Controls (I) Ltd. Vs. Schneider Electric Industries SA, 2002 (24) PTC 632 (DB), the Court held that a monopoly of the patent is the reward for the inventor as a patent creates a statutory monopoly protecting the patentee against unlicensed user of the patented device (paragraph 30).

iv) Hind Mosaic and Cements Works & Anr. Vs. Shree Sahjanand Trading Corp., 2008 (37) PTC 128 (Guj) (DB) wherein the Court relied upon the principles for grant of interim injunction laid down in American Cyanamid Co. Vs. Ethicon Ltd., (1975) 1 All ER 504 held that the „Expert s report ought to have been considered by the Court.

v) Wockhardt Ltd. Vs. Hetero Drugs Ltd. and Ors., 2006 (32) PTC 65 (Madras) wherein the Court held (in paragraph 17) that relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before certain uncertainties could be resolved and to avoid such injury to the plaintiff that he cannot be adequately compensated for even if the uncertainty is eventually resolved in his favour at the trial.

vi) M/s. National Research Development Corporation of India Vs. M/s. Delhi Cloth & General Mills Co. Ltd. & Ors., AIR 1980 Delhi 132 wherein it was held as under :

> "7. For the grant of temporary injunction, principles applicable to the infringement of Patent actions are that there is a prima facie case, that the patent is valid and infringed, that the balance of convenience is in favor of the injunction being granted and that the plaintiff will suffer an irreparable loss. It is also a rule of practice that if a patent is a new one, a mere challenge at the Bar would be quite sufficient for a refusal of a temporary injunction, but if the patent is sufficiently old and has been worked, the court would, for the purpose of temporary injunction, presume the patent to be valid one. If the patent is more than six years old and there has been actual user it would be safe for the court to proceed upon this presumption."

vii) Farbewerke Hoechst Aktiengesellschaft Vormals Meister Lucius & Bruning Corporation Vs. Unichem Laboratories and Ors., AIR 1969 Bombay 255 wherein paragraph 15 it was held that to anticipate a patent, a prior publication or activity must contain the whole of the invention impugned; i.e. all the features by which the particular claim attacked is limited. In other words, the anticipation must be such as to describe, or be an infringement of the claim attacked. The same position was also earlier held in Pope Appliance Corpoartion Vs. Spanish River Pulo and Paper Mills Ltd., AIR 1929 PC 38.

viii) As regards the technique of mosaic, in H. Millwood Ld. Vs. H.G. Martin and Biro Swan Ld. the House of Lords held that to establish anticipation, the appellant must show that some prior publication has information about the alleged invention equal for the purposes of practical utility of the suit patent. It is not enough to make a mosaic of prior publications and to say that the whole invention has already been disclosed. It was similarly held in M/s. Bishwanath Prasad Radhey Shyam Vs. M/s. Hindustan Metal Industries, AIR 1982 SC 1444 that in order to be patentable a creation should be more than a mere workshop improvement and must not be a mere collection of more than one integers or things not involving the exercise of any inventive faculty.

35. Accordingly, Shri Chandra contended while citing all the authorities that it can be said with certainty that defendants have not given a valid explanation for copying the invention pertaining to manufacturing the mirror without the copper layer rather the defendants have chosen to challenge the validity of the Patent by citing prior arts which do not teach as how to arrive at the present invention; the said prior arts are in piecemeal and some are relating to an altogether different invention and thus, the trivial similarities with the prior arts are to be ignored till the time it teaches the entire patent/ claim of the invention as one has to see the patent while comparing the entire claims; the invention is sufficiently old to accord protection as the same is a 1995 patent although granted in 2004 and the protection if not granted at this stage will make the patent redundant. A prima facie case, according to Shri Chandra, is made out for the grant of injunction and thus, this court must grant the injunction for the reasons stated above and in view of his submissions.

36. Learned Senior Counsel Shri Sudhir Chandra has relied upon the commentary of Terrel on the „Law of Patent , 16th Edition para 7-62 at page 250 which reads as under:

"Mosaicing 7-62 The "mosaicing" of individual documents or prior uses is not permissible, unless it can be shown that the skilled person, confronted with a particular citation, would turn to some other citation to supplement the information provided by the first. Whether he would do so is a question of fact. Lord Reid said in Technograph vs. Mills & Rockley [1972] R.P.C. 346 346 at page 355 :

"When dealing with obviousness, unlike novelty, it is permissible to make a „mosaic out of the relevant documents, but it must be a mosaic which can be put together by an unimaginative man with no inventive capacity."

Contentions of the Defendants

37. Per Contra Shri Arun Jaitley, learned Senior Counsel appearing on behalf of defendants has strenuously made certain submissions which can be summarized as follows:

(i) Shri Jaitley submitted that the impugned patent no.190380 lacks novelty which is the first pre requisite for the grant of the patent. The patent in question is thus subject to challenge as it lacks novelty or newness. Rather, the copper free mirror technology is the existing state of the art and the prior arts which are available further make it evident on the face of it that the impugned patent lacks novelty. Section 2 (1) (l) of the Act has been relied which defines the expression new invention under the Act.

(ii) Shri Jaitley emphatically attacked the subject matter of the patent by stating that the said copper free mirror manufacturing process is obvious to the person skilled in the art. Shri Jaitley submitted that the impugned patent even fails on the second tests which is the requirement of the inventive step. It is the contention of Shri Jaitley that patents are accorded to inventions which qualify the test of inventive step, which means that there must be technological advancement from the existing state of the art. In the absence of the same, the invention would become obvious to the person skilled in the art. In order to substantiate this argument, Shri Jaitley, Learned Senior Counsel relied upon the definition of inventive step under section 2 (1) (ja) of the Patents Act, 2005 which reads as under :

"Section 2(1)(ja) : "inventive step" means a feature of an invention that involves technical advance as compared to the existing knowledge or having economic significance or both and that makes the invention not obvious to a person skilled in the art"

(iii) Shri Jaitley further submitted that there are several prior arts which if are examined, then the invention becomes obvious to a person skilled in the art. Shri Jaitley categorized the said prior arts into the following:

a) Buckwalter US 4285992

b) Franz US3798050

c) Greenberg US 3978271

d) Minjer

e) Shipley

(iv) Fourthly, Mr. Jaitley has contended that the question of mosaicing does not arise in the present case. The thrust of the contention of Shri Jaitley is that breaking down of the patent by citing several art is permissible while looking for obviousness unlike novelty. In order to support the argument, Shri Jaitley relied upon the observations of Lord Reid in Technograph v.

Mills & Rockley, (1972) R.P.C. 346 at page 355 which reads as under :

"When dealing with obviousness, unlike novelty, it is permissible to make a „mosaic out of the relevant document, but is must be a mosiac which can be put together by an unimaginative man with no inventive capacity."

(v) Fifthly, learned Senior Counsel Shri Jaitley submitted that there is no infringement as there are marked differences in the process of the plaintiff and that of the defendants which are seen below :

Step In In Patented Plaintiff's Claims in In Conventional Mirror of Suit Patent Guardian's Mirror Plaintiff mirror Substrate A Glass A vitreous A vitreous Substrate A Glass Substrate Sensitization With Tin With TinNo sensitization With Tin Chloride Chloride (asmentioned in Claim Chloride stated in1.

specification) Mentioned in Claim 9

(i) but does not specify Tin Chloride Amended Claim 1 states:-

Sensitizing material, typically tin and at least one material selected from BISMUTH, CHROMIUM, GOLD, INDIUM, NICKEL, PALLADIUM, PLATINUM, RHODIUM, RUTHENIUM, TITANIUM, VANADIUM, ZINC Super ABSENT ABSENT ABSENT With Sensitization Palladium Chloride Palladium di chloride solution is sprayed on glass. It acts as a catalyst and promotes silver film adhesion with the glass.

					[solution code - .7252E] RNG
Activation	With Ammonical Silver Nitrate Solution	With Palladium	At least one material selected BISMUTH, CHROMIUM, GOLD,	INDIUM,	With Silver from Nitrate Solution. Silver nitrate

			NICKEL, PALLADIUM, PLATINUM, RHODIUM, RUTHENIUM, TITANIUM, VANADIUM, ZINC	soln. is sprayed to electrically charge glass	
Silvering	Silvering Solution	Silvering Solution	Claim 9 (ii) A silvering step, in which said surface is brought into contact with a silvering solution	AgNO3 - silver nitrate + NH4[OH] Ammonium hydroxide Silver nitrate solution is sprayed along with ammonium hydroxide solution. A layer of silver film gets deposited on glass.	
Passivation	ABSENT	ABSENT	ABSENT	GMP 2000 A - Metallizing concentrate solution + GMP 2000 B - Activating concentrate solution Treating with two different solutions simultaneously - Activating concentrate soln. containing principally sodium hydroxide & ammonia and Metallizing concentrate solution containing tin	

			fluoride and mineral acid, which soln is milky and opalescence liquid. The PH on the glass is bet. to 9.5 which is highly alkaline media.	
Covering silver coating	Layer covered with protective layer of copper	Contacting the silver coating layer with ions of at least one of the group consisting CHROMIUM, VANADIUM, TITANIUM, IRON, INDIUM, COPPER, ALUMINIUM	Claim 9 (ii) second part Optionally comprising contacting the silver coating layer with ions of at least one of the group consisting CHROMIUM, VANADIUM, TITANIUM, IRON, INDIUM, COPPER, ALUMINIUM	ABSENT
Paint	Paint	Paint	Claim 9(iii) With one or two protective layer Paint layers	Two layers of paint are coated one by one and also cured separately in Baking ovens.

(vi) Sixthly, Shri Jaitley submitted that the challenge of the defendants to the novelty and obviousness of the impugned patent process cannot be faulted with and rather the said challenge is a tenable and credible one. This is also apparent from the fact that the plaintiff s claim relating to the same invention wherein identical claim is made in the Indian patent is put into question and rejected by the German Federal court and the copy of the judgment is also filed with the list of the documents filed by the defendants. Accordingly, as per learned senior counsel for the defendants, prima facie substantial and tenable challenge has been made out against the patent and thus the same has to be examined and tested during the trial and consequently, it does not warrant the grant of temporary injunction at this stage.

(vii) The next argument of Mr. Jaitley is that the patent in question was not commercially exploited in India and the dicta of Franz Zavier passed by the division

bench should be applicable atleast at the interlocutory stage.

(viii) Mr. Jaitley also argued on balance of convenience stating that the plaintiff has failed to prove the commercial working of subject invention in India. It is submitted by the learned senior counsel that as per plaintiff s own admission the plaintiff has not manufactured the MNGE mirror and was doing business in India on royalty paying license basis. On the other hand, the defendants have been commercially manufacturing mirrors in India and as the business of defendants runs into crores of Rupees, the comparative hardship and irreparable injury is greater on the part of the defendants and thus balance of convenience is on favour of the defendants and has to be seen in view of dicta of American Cynamide v. Ethicon Ltd.

(ix) Lastly, Mr. Jaitley, learned senior counsel has also highlighted the comparison between the claims of the plaintiff s several patents wherein there are marked differences in the number of the claims and the subject of the invention.

38. To counter the submission of the plaintiff that the patent in question has been working in India, Mr. Jaitley, learned Senior Counsel has submitted that the alleged statement in Form 27 filed on 17 th January, 2005, 30th March, 2006, 8th March, 2007 and 20th March, 2008 does not establish the commercial working of the suit patent in as much as :

All of the stated Forms 27 allegedly show import from Thailand, Singapore and primarily Indonesia. As per the Form 3 of the plaintiff s patent application, the plaintiff does not have any patent protection in all these countries. In fact in Indonesia and Thailand there are applications for which no status is mentioned. In Singapore there is not even an application for patent. This obviously means that in these counties, the technology is in public domain and is being allegedly imported into India.

However, no document has been produced to show

(i) as to who is the exporter;

(ii) whether such export is under license or what arrangement, if any & how do the said exporters possess the so-called patent technology;

(iii) details of such license/agreement not produced before this Hon ble Court.

The affidavit of Mr. George Pilloy does not state as to who all are their licensees in Europe, Far East, US, South Africa, China and India through whom they allegedly „Manufacture the patented glass/silver/paint mirrors without copper layer First the plaintiff claims „manufacture , then in the very subsequent para of affidavit claims that the mirror is „sold under License agreement with ASAHI INDIA GLASS LTD., as well as by way of import.

No such details of license agreement with ASAHI have been placed on record.

Decisions referred by the Defendants

39. Learned Senior Counsel for the defendants has also referred various judgments, some of them are discussed hereunder :

> i) M/s. Bishwanath Prasad Radhey Shyam (supra) wherein paragraph 33 it is noted that grant of a patent or the decision rendered by the Controller in the case of opposition does not guarantee the validity of the patent and this position is now expressly provided in Section 13(4) of the Patents Act. Similar observations can be seen in M/s. Standipack Pvt. Ltd. Vs. Oswal Trading Co. Ltd., AIR 2000 Delhi 23 wherein paragraph 15 and 16 make it amply clear that presumption of validity is not attached to a patent granted by the Controller of Patents, notwithstanding examination under Sections 12 and 13 of the Act. The same dictum has been reiterated in Surendra Lal Mahendra Vs. Jain Glazers & Ors. (Unreported), IA No. 1871/ 1979 and Suit No. 672/1979, in Bilcare Ltd. Vs. Supreme Industries Ltd., 2007 (34) PTC 444 (Delhi) (paragraph 16) and in Novartis AG & Anr. Vs. Mehar Pharma & Anr., 2005 (30) PTC (Bombay) (paragraph 24).
>
> ii) Stressing the argument that an interim injunction ought not be to granted in the face of lack of commercial use of the patented product, the judgment in V. Manioka Thevar Vs. Star Plough Works, AIR 1965 Madras 327 has been referred, the relevant portion whereof is reproduced hereinbelow :
>
> "5. ... An interim injunction will not be granted if the patent which has been obtained by the plaintiff is a recent one and there is a serious controversy about the validity of the grant of the patent itself. In other words, if from the objections raised by the defendant it is clear that that a serious controversy exists as to whether or not the invention claimed by the plaintiff is a new one or a new manufacture of whether or not the invention involves any new inventive skill having regard to what was known or used prior to the date of the patent, courts will not grant an interim injunction restraining the defendant from pursuing his normal business activity. An interim injunction will not be granted if the defendant disputes the validity of the grant. The facts of the instant case disclose a bona fide tribal issue as regards the inventive genius claimed by the plaintiff. If the patent is new and its validity has not been established in a judicial proceeding till then, and if it is endeavoured to be shown that he patent ought not to have been granted under the provisions of S. 26 of the Patents and Designs Act, 1911, the court will not interfere by issuing a temporary injunction."

The argument as regards non-grant of interim injunction in a case where the validity of the patent - especially a „new patent not in use commercially - is assailed and the same has also been stressed and reiterated in Bilcare Ltd. Vs. Amartara Pvt. Ltd., 2007 (34) PTC 419 (Delhi) in paragraph 81 thereof.

iii) While referring to the finding in M/s. Biswanath Prasad Radhey Shyam (supra) that "a mere collection of more than one integers of rthings, not involving the exercise of any inventive faculty, does not qualify for the grant of patent", the observation of the Court in Dhanpat Seth & Ors. Vs. Nil Kamal Plastic Crates Ltd., 2008 (36) PTC 123 (HP) (DB) was as under :

> "17. The device being manufactured by the plaintiffs is basically a Kilta but made out of synthetic polymeric material which is commonly known as plastic. The process of making traditional items out of such polymers is a well known and well established process. This Court can take judicial notice of the fact that much prior to the device being manufactured by the plaintiffs, traditional items made out of woods, steel, brass, leather and other natural materials have been replaced by plastic. In this regard reference may be made to chairs, tables, Jugs, baskets, shoes and numerous other items which were traditionally made of natural material but are now made of plastic. Therefore, in our opinion, the mere fact that the device is made of polymeric material instead of bamboo is not an inventive step involving any novelty. There is nothing new about the process of manufacturing the traditional Kilta made of natural material from synthetic material. Even nylon straps now added are virtually copies of the ropes used in the traditional Kilta. The ropes in the Kilta can also be adjusted by the user keeping in view the height of the person using the Kilta and the weight being carried by him. The mere introduction of buckles would not amount to a new device being called an invention or an inventive step."

iv) J. Mitra & Co. Pvt. Ltd. Vs. Kesar Medicaments & Anr., 2008 (36) PTC 568 Delhi, paragraph 51 of which is a composite finding as regards validity of a patent as well as actual user of the patent and is reproduced hereunder :

> "51. Although the examiner looks into various aspects and makes a rigorous examination of the patent application and opposition thereto, in view of the decisions in Bishwanath Prasad Radhey Shyam and Standipack Private Ltd cases (supra), the order of the patent controller granting the patent and the decision on the opposition cannot of itself give rise to a presumption of validity of the patent notwithstanding the investigation and examination made and the same can be challenged. Insofar as the decision in M/s National Research Development Corporation of India case (supra) is concerned while the actual user and duration of the patent may be one of the factors that may be taken into account, I am of the view that that factor alone cannot give rise to a presumption of validity of the patent. This Court would thus have to look into the merits of the case of the plaintiff as also the defense put forth by the defendant."

40. In support of the defences raised in the written statement and the grounds raised in the counter claim of revocation of impugned patent and documents placed on record, Mr. Arun Jaitley, learned Senior Counsel has also referred para 8-75 at Page 130 of Terrell on the Law of Patents, Sixteen Edition which reads as under :

"Infringement not novel" (Gillette defence) 8-75 Since no relief could be obtained in respect of an invalid patent, if the defendant could prove that the act complained of was merely what was disclosed in a publication which could be relied on against the validity of the patent, without any substantial or patentable variation having been made, he had a good defence. This is the so-called "Gillette defence" arising out of the words of Lord Moulton in Gillette Safety Razor Co. Vs. Anglo-American Trading Co. where he said :

"I am of opinion that in this case the defendant s right to succeed can be established without an examination of the terms of the specification of the plaintiff s letter patent. I am aware that such a mode of deciding a patent case is unusual, but from the point of view of the public it is import that this method of viewing their rights should not be overlooked. In practical life it is often the only safeguard to the manufacturer. It is impossible for an ordinary member of the public to keep watch on all the numerous patents which are taken out and to ascertain the validity and scope of their claims. But he is entitled to feel secure if he knows that that which he is doing differs from that which has been done of old only in non-patentable variations such as the substitution of mechanical equivalents or changes of material, shape or size. The defence that „the alleged infringement was not novel at the date of the plaintiff s letters patent , is a good defence in law, and it would sometimes could and would put forth his case in this form, and thus spare himself the trouble of demonstration on which horn of the well-known dilemma the plaintiff had impaled himself, invalidity or non- infringement."

41. Mr. Sudhir Chandra, learned Senior counsel for the plaintiff in rejoinder argument has countered the submissions of the defendants in relation to evidence referred to prior art by the defendants.

42. He has referred the pleading, documents and written-note submitted during the hearing of the interim application and contended that :

i) Franz did not teach use of palladium for corrosion resistance.

In fact, Franz is almost silent on corrosion resistance. In particular, Franz teaches only with regard to transparent articles and does not teach anything about any reflective articles such as mirrors whereas the plaintiff s patent claims a glass/silver/paint mirror with no copper layer.

Franz has no paint layer whereas plaintiff mirror has a paint layer. Franz relates to metal layers of copper, nickel, cobalt and iron whereas plaintiff patent relates to a silver layer. Franz is concerned with deposition of a uniform thin transparent layer without the defect of pinholes and streaks whereas the plaintiff s patent s technical know how improves corrosion resistance of a glass/silver/paint mirror with no copper layer. Franz used palladium chloride not for increasing the corrosion resistance, nor for adhesion but for uniform application of a thin transparent metal layer.

ii) It is also contended that the difference between the prior art cited by the defendant i.e. Buckwalter and the plaintiff s invention are -

Buckwalter s invention is a glass/silver/paint mirror with Copper layer whereas plaintiff s invention is a glass/silver/paint mirror with no copper layer.

Buckwalter teaches how to treat the glass surface with lanthanide rare earth iron and does not teach how to manufacture a mirror without copper layer having adequate corrosion resistance.

iii) It is submitted that the difference between the prior art cited by the defendant i.e. Orban and the plaintiff s invention are -

Orban teaches how to deposit copper on a fiberglass filament and does not teach how to manufacture a glass/silver/paint mirror with no copper layer.

iv) The difference between the prior art cited by the defendant i.e. Greenberg and the plaintiff s invention are -

Greenberg teaches how to manufacture transparent articles by depositing nickle on a transparent substrate and does not teach how to manufacture a glass/silver/paint mirror with no copper layer.

v) The difference between the prior art cited by the defendant i.e. Shipley and the plaintiff s invention are -

Shipley teaches how to deposit a conductive layer of copper on a printed circuit board. He does not teach how to manufacture a glass/silver/paint mirror with no copper layer.

vi) According to the plaintiff the difference between the prior art cited by the defendants i.e. Research paper by Minjer & Book and the plaintiff s invention are -

Minjer & Boom relates to nickel plating and discusses possible reaction mechanisms at a glass surface during electroless plating. It does not teach how to manufacture a glass/silver/paint mirror with no copper layer.

vii) Bergstorm & Franz were both dealing with glass with transparent metal film for use in architecture. Both used palladium. Franz refined the use of palladium by buffering method and controlling the pH content. Franz used palladium for uniformity of application of thin metal film. Neither Bergstorm nor Franz were concerned with manufacture of a mirror. Neither Bergstorm nor Franz deals with copper layer of a mirror and reading of neither teaches that the copper layer could be removed in a conventional mirror by the use of palladium. In fact 10 years later, even Buckwalter, who had access to Franz and Bergstorm, could not figure this out despite being concerned with a glass/silver/paint mirror.

Discussions on Patent in question

43. I shall now discuss the patent in question, its claims and the challenges to it as made by the defendants. The Indian Patent no. 190380 consists of the following claims in which the novelty is claimed by the plaintiff:

"1) A Mirror with no copper layer comprising:

v) a vitreous substance,

vi) at least one material selected from the group

consisting of bismuth, chromium, gold, indium, nickel, palladium, platinum, rhodium, ruthenium, titanium, vanadium and zinc at the surface of the said substrate,

vii) a silver coating layer on the surface of the said substrate, said silver layer optionally comprising at least one material selected from the group consisting of tin, chromium, vanadium, titanium, iron, indium, copper, and aluminum present at the surface of the silver coating layer and/or traces of silane; and

viii) at least one paint layer covering said silver coating layer.

44. The plaintiff stated as mentioned above that the aforesaid claims are novel and inventive in the sense that the said process of manufacturing the mirrors as stated in the aforementioned claims involves a mirror with no copper layer and its treatment in the following steps :

i) sensitising a surface of a glass substrate by bringing it into contact with a sensitizing solution and activating the surface in an activating step, in which the surface is brought into contact with an activating solution, whereby the activating solution contains ions of at least one of the metals of bismuth (III), chromium (II), gold (III), indium (III), nickel (II), palladium (II), platinum (II), rhodium (III), ruthenium (III), titanium (III), vanadium (III) and zinc (II).

ii) a silvering step, in which said surface is brought into contact with a silvering solution and optionally compromising contacting the silver coating layer with a solution containing ions of at least one of the group consisting of Cr(II), V(II or III), Ti(II or III), Fe(II), In(I or II), Sn (II), Cu(I) and A1(III) and/or contacting the silver coating layer with a silane; and

iii) a step for covering the resulting silver layer with one or more protective paint layers.

45. The first step has been further sub categorized by the plaintiff in to two steps namely „sensitization and „activation .

46. The invention improves the corrosion resistance power of the mirror as against the ordinary mirror where the silver which is adhered to the mirror surface is prone to corrosion and damage. In short, the said invention improves the life and durability of the mirror.

47. The defendants have launched manifold attacks on the impugned patent by citing the prior arts which are analysed as under:

> "Buckwalter (Patent no. 4285992 granted on August, 25 1981)
>
> - The title of invention states " process for preparing improved silvered Glass Mirrors"- The Abstract of invention reads " Glass mirrors having improved weathering properties are prepared by an improvement in the process for making the mirrors. The glass surface after it has been cleaned but before it is silvered, is contacted with a solution of lanthanide rare earths in addition to a sensitization solution of tin or palladium. The addition of rare earths produces a mirror which has increased resistance to delamination of the silver from the glass surface in the presence of the water."

48. From the bare reading of this prior art, the similarities in the process of the Indian patent with that of prior art can be gathered which can be summarized as :

> a) That the process of activation before silvering is not novel atleast on the date of application of the patent which is 1995.
>
> b) The treatment of the glass surface with a tin or palladium is also not novel on the date of application.
>
> c) That the prior art which is cited also talks identical advantage resulting with the treatment of glass surface with activation solution and the said advantage is resistance to the delamination of the silver ; in other words the corrosion resistance and improvisation in adhesion of silver which is primary aim and usefulness claimed in the said invention.

In Buckwalter (Supra), the claims which are close to the Indian patent are:

> „1. In the method for preparing silvered mirrors of glass, wherein one surface of the glass is scrubbed with a slurry of an abrasive to clean the surface, a solution of a soluble compound of tin or palladium is applied to the cleaned surface to sensitize the glass, and the sensitized surface is contacted simultaneously with a solution of a soluble silver compound and one or more solutions of caustic and reducer which together with the silver solution react to precipitate a layer of silver on the sensitized surface of the glass, a layer of copper is applied over the layer of silver, and a layer of paint is applied over the layer of copper, the improvement which comprises applying

a solution of a soluble compound of lanthanide rare earth ions to the cleaned surface of the glass before the silver is precipitated on the sensitized surface whereby the layer of silver has increased resistance to delamination from the surface of the glass in the presence of moisture.

2. The process of claim 1 wherein the cleaned glass surface is contacted with the solution of rare earth ion before the surface is sensitized, the solution being acidic and containing from 0.01 to 1.0 weight percent rare earths.

3. The process of claim 2 wherein the rare earths are selected from the group consisting of neodymium, praseodymium, erbium, lanthanum, samarium, and dysprosium.

4. The process of claim 1 wherein the cleaned glass surface is contacted with the solution of rare earth after the surface has been sensitized, the solution being acidic and containing from about 0.01 to 1.0 weight percent of rare earths.

5. The process of claim 4 wherein the rare earths are selected from the group consisting of neodymium, praseodymium, erbium, lanthanum, samarium, and dysprosium.

6. The process of claim 5 wherein the sensitizing solution also contains from 0.01 to 1.0 weight percent rare earths whereby the cleaned glass surface is contacted simultaneously with the tin or palladium and the rare earths.

7. The process of claim 6 wherein the rare earths are selected from the group consisting of neodymium, praseodymium, erbium, lanthanum, samarium, and dysprosium.

49. By citing the aforementioned claims in Buckwalter, the defendants intended to show to this court that the base of the plaintiff s invention as regards the treatment of the glass surface with sensiting solution, thereafter with activating solution comprising palladium or tin is not novel and it has been taught in the Buckwalter patent. The plaintiff however, disputes this prior art stating that the same does not relates to the mirror without copper layer and rather it relates to mirror with copper layer.

50. The defendants in second prior art referred the Franz patent. The same is analysed as under:

"Franz (patent no. 3798050 granted on March 19, 1974) - The title of the invention reads " Catalytic Sensitization of Substrates for Metallization" - The Abstract of the invention reads : " Metal films of improved uniformity are formed on substrates having their surfaces sensitized by the deposition of palladium or tin by buffering the palladium salt solution in contact with the glass at PH from 6 to 9. Buffering is preferably accomplished by contacting the substrate with an aqueous bufferng

solution and acidic palladium salt solution" - The Background of the invention reads " This invention relates to chemical plating reffered to in the art of electroless plating, and more particularly relates to the new method of sentisitizing a substrate surface to produce a catalytic surface receptive to the deposition of metal born containing film.

The claims of this invention are not reproduced herein as the defendant has cited this as a prior art to denote that the process of sensitization of substrate is not new to the industry and the use of the palladium or tin as a activating agent and consequently leading improvised adhesion is discovered way back in 1971 when this patent was filed in US.

The plaintiff lodged its protest in reply that the Franz (supra) does not in stricto senso relates to glass mirrors and it essentially relates to glass films and thus the same should not operate as a prior art to anticipate the subject patent. It is further urged by the learned senior counsel for the plaintiff that Franz patent does not talk about paint layer and palladium chloride is not used for increasing corrosion resistance etc."

51. ORBAN (US - 4643918 filed on May 3, 1985) - The title of the invention reads " Continuous process for the metal coating of fiberglass". The abstract of the same reads as under :

"The preparation of fiberglass filaments for subsequent coating with metal wherein the fiberglass filaments first are immersed in a wetter solution containing alcohol, a detergent, and an ethylene oxide and propylene oxide copolymer surfactant. Following this treatment the filaments may be treated with conventional palladium chloride or tin chloride activators, followed by treatment with an acid accelerator and then autocatalytically coated with metals such as copper, gold, palladium, cobalt, nickel, and nickel alloys of phosphorus, boron, or tungsten. A second electroplating or immersion plating step may be included where the metal-coated filaments are electroplated or immersion plated with either the same metal, or a different metal taken from the group consisting of nickel, silver, zinc, cadmium, platinum, iron, cobalt, chromium, tin, lead, rhodium, ruthenium, or iridium. The filaments are rinsed with water following immersion in the wetter solution and after each plating step and then finally are rinsed with alcohol and dried."

The relevant claims are as under :

"1. A method of continuously coating fiberglass filaments with metal comprising the steps of :

Immersing said filaments in a wetter solution containing alcohol, a detergent and an ethylene oxide and propylene oxide copolymer surfactant, rinsing said filaments with water, treating said filaments with an activator selected from the group consisting of palladium chloride and tin chloride, treating said filaments with an acid accelerator,

coating said filaments with a metal selected from the group consisting of copper, gold, palladium, cobalt, nickel, and nickel alloys of phosphorus, boron, or tungsten, rinsing said filaments with alcohol, drying said filaments.

2. The method of claim 1 wherein, immediately prior to rinsing said filaments with alcohol, said metal coated filaments are coated with a second metal, which metal is the same as the metal first used to coat said filaments, then rinsing said thus coated filament with water.

3. The method of claim 2 wherein said filaments are coated by a process selected from the group consisting of autocatalytic coating, electroplating, and immersion plating.

4. The method of claim 1 wherein said alcohol is isopropyl alcohol.

5. The method of claim 1 wherein the filaments are coated by a process selected from the group consisting of autocatalytic coating, electroplating, and immersion plating.

6. A method of continuously coating fiberglass filaments with metal comprising the steps of :

immersing said filaments in a wetter solution containing alcohol, a detergent and an ethylene oxide and propylene oxide copolymer surfactant, rinsing said filaments with water, treating said filaments with an activator selected from the group consisting of palladium chloride and tin chloride, treating said filaments with an acid accelerator, coating said filaments with a metal taken from the group consisting of copper, gold, palladium, cobalt, nickel and nickel alloys of phosphorous, boron, and tungsten, rinsing said filaments with water, coating said metal coated filaments with a metal selected from the group consisting of nickel, silver, zinc, cadmium, platinum, iron, cobalt, chromium, tin, lead, rhodium, ruthenium and iridium, rinsing said filaments with water, rinsing said filaments with alcohol, drying said filaments.

7. The method of claim 6 wherein said filaments are coated by a process selected from the group consisting of autocatalytic coating, electroplating, and immersion plating."

52. The defendants cited it as a prior art to single out that the process involved is taught in the said patent ORBAN (supra). Further, the defendants also pointed out that the said patent also talks about the selection of the activator and palladium and tin elements. Lastly, the said patent also gives a choice of selection of copper, gold, palladium and many others for metalling/ treatment. Hence, the plaintiff s choice of palladium as against copper can easily be said to be the workshop result by picking, choosing and experimenting in the workshop.

53. The Plaintiff sought to distinguish the said patent by stating that the said patent teaches how to deposit copper on a fiber glass filament and it does not teache how to manufacture glass/silver paint

mirror with no copper layer.

54. GREENBERG (US Patent no.3978271 filed on April 15th 1975 and granted on August 31, 1976) - The said patent is again essentially relied upon as a prior to demonstrate that the treatment of the glass articles/ transparent articles with the solution containing the ions of the metals lead to electroless plating. The abstract of the said prior art reads "Films containing metallic silver and nickel are deposited on transparent articles according to the present invention. A nickel coated glass article having a reflective gray appearance is contacted with a solution comprising water, a silver salt and a complexing agent. The resultant article has a low reflectance surface and the color of which appears brown - gray floroscent lighting." The said prior art is relied upon by the defendants to the limited extent as explained above and thus it does not necessitate the claim analysis.

55. The plaintiff again raised similar objections stating that the Greenberg teaches how to manufacture transparent articles by depositing nickel on a transparent substrate and does not talk about the manufacturing of mirror with no copper layer.

56. SHIPLEY (Great Britain PATENT No. GB929799 granted on May 23rd, 1960) - The said invention is relied upon as a prior art by the defendants to apprise this court of the fact that the process of electroless metal deposition and its related process have been researched way back since 1959 and thus, the same is known to the person skilled in the art. The title of the invention reads " Improvements in or relating to Electroless Metal Deposition". The claims are not reproduced herein as the same is relied upon to strengthen the argument of obviousness.

57. In addition to the above, the defendants have relied upon the publication titled as "The Nucleation with SnC12-Pd12 Solutions of Glass Before Electroless plating by C.H. de Minjer and P.F.j.v.d. Boom published in December 1973 and while citing the same, the defendants contended that the main ingredient of the plaintiff s invention regarding the treatment of the mirror with tin as well as that of palladium fails as the same was a known technology at the time of the publication and also on the date of application of the patent.

58. While citing all these prior arts, the defendants intended to attack the Indian patent as a mere workshop result as by studying these patents as mentioned above granted in US, the present alleged invention becomes a mere discovery and usefulness of the same is also withered away.

59. The defendants have also relied upon one judgment of Federal patent court of Germany wherein vide detailed order, the appeal filed by the same plaintiff against the rejection of the claims which were similar to that of the Indian patent was rejected. The defendants have stated that the said judgment has attained finality. The defendants essentially relied upon the claims 1, 3 and 11 in question of that judgment which are reproduced hereinafter:

> "1. Process for preparing a mirror without copper layer, comprising a sensitizing step, wherein said surface of a glass substrate is contacted with a sensitizing solution, an activating step, wherein said surface is contacted with an activating solution, the

activating solution containing an ion of at least one of the metals bismuth (III), Chromium (II), gold (III), indium (III), nickel (II), palladium (II), platinum (II), rhodium (III), ruthenium (III), titanium (III), vanadium (III) and zinc (II), a subsequent silvering step, wherein said surface is contacted with a silvering solution, and a step of covering the resulting silver layer with one or more protective layers of paint.

3. Process according to Claim 1 or 2, wherein the sensitizing step is carried out prior to the activating step.

11. Process according to any one of the preceding claims, wherein, prior to covering the resulting silver layer with one or more protective layers of paint, the silver layer is contacted with a solution comprising ions of at least one of the metals of the groups Cr(II), V(II or III), Ti(II or III), Fe(II), In(I or II), Sn(II), Cu(I) and AI(III)."

60. The said claim which closely resembles the Indian patent has been rejected on the count of the lack of novelty and inventive step and the finding of the German federal court is recorded and the same is reproduced as under :

"3. The process according to Claims 1, 3 and 11 of the Main Request and the 1st Auxiliary Request, according to Claims 1, and 3 of the 2nd Auxiliary Request and according to Claim 1 of the 3rd Auxiliary Request is rendered obvious by the prior art.

A process for preparing a mirror without copper layer, comprising a sensitizing step, wherein the surface of a glass substrate is contacted with a sensitizing solution, a silvering step, wherein said surface is contacted with a silvering solution, and a step of covering the resulting silver layer with one or more protective layers of paint, wherein, prior to covering the resulting silver layer with one or more protective layers of paint, the silver layer is contacted with a solution comprising the ions of Sn(II) is known from the teaching of Published Application (8) of the Applicant (Claims 14, 16, 17 and 21 of combination with p. 3, 1.29 to 32 and Examples 1 to 4 and 8 to 13), which is considered closest prior art. The process is according to the above mentioned claims (1, 3 and 11 according to the Main Request and the 1st Auxiliary Request, 1 and 3 according to the 2nd Auxiliary Request and Claim 1according to the 3rd Auxiliary Request) differs from the above process only in that it comprises an activating step, wherein said surface is contacted with an activating solution comprising at least one of the ions bismuth (III), chromium (II), gold (III), indium (III), nickel (II), palladium (II), platinum (II), rhodium (III), ruthenium (III), titanium (III), vanadium (III) or zinc (II) after the sensitizing step.

The fact that passivation with an Sn (II)-ions containing solution, which is obligatory according to (8), is not described as obligatory in the main claims according to the Main Request and the 1st Auxiliary Request, is not recognized as a further difference in view of the teaching according to (8) by the Board. The formulation of these main claims according to the Main Request and the 1 st

Auxiliary Request does in fact not exclude such passivation treatment, but actually even comprises such treatment - according to the respective Claims 11 - as preferred embodiment. However, if this possibility is made use of according to the application - as is the case in the majority of the examples - the passivation treatment does not constitute a difference in view of the prior art according (8).

The measure of activating after sensitizing, which is the only remaining difference compared to (8), cannot substantiate inventive step of the process according to the application.

....Moreover, in the relevant literature concerning mirror manufacture, it has already been described that activation leading to the improvement of adhesion of silver to the glass substrate leads to an improvement of resistance to moisture and weathering, i.e. properties which can be summarized by the term of resistance to corrosion (cf. (5), column 3, line 3 to 20).

4. As a result of all this, Claims 1, 3 and 11 according to the Main Request and the 1st Auxiliary Request, Claims 1 and 3 according to the 2nd Auxiliary Request and Claim 1 according to the 3rd Auxiliary Request cannot be granted due to lack of inventive step. All of the other claims underlying the requests of Applicant must be rejected together with the mentioned claims."

61. On being questioned with respect to the same, the learned Senior counsel for the plaintiff clarified that the judgment has been given according to German Law and the same should not influence this court while deciding the present controversy.

62. I have read and understood the assertions of the defendants relating to the challenge made by them against the plaintiff s patent. Learned Senior counsel for the plaintiff has sought to distinguish the prior arts on one count or the other by stating that they do not teach the manufacture of a mirror without copper layer. At this stage, I would like to state that the test is to examine whether the patent is vulnerable to challenge and whether the said patented subject matter can be attributed as a mere workshop result by mixing or working upon it or experimenting upon the same. The test is not that whether the said invention can be exactly arrived at by way of the prior art. The distinctions sought to be made by the plaintiff, if it all have any merit shall be tested at the time of trial. At this stage, taking the prima facie view of the matter, it can be stated that the suit patent is vulnerable to challenge.

63. The claim of the impugned patent granted in India and challenge made by the defendants to that of the plaintiff s patent. Before proceeding with my discussion, it would be appropriate to discuss the parameters in which the examination of the patents are required to be done at the interlocutory stage which has been extensively discussed by this court and other courts time and again.

64. There is no res integra to the question that the grounds of challenge of the patent which are available to the defendant in revocation of the patent are also available to the defendant by way of challenging the validity of the same in an infringement suit. The same exposition of law has been discussed in Bishwanath Prasad Radhey Shyam s case (supra) which has been the authority on the point and also discusses in detail the tests of patentability.

65. There are other authorities which reiterate the said exposition of law from time to time and discuss the grant of injunction at the interlocutory stage, however, the recent one which encapsulates the law on the subject and lays down the parameters within which this court has to scrutinize the patents and the challenge thereto is decided by a Division Bench of this Court in F. Hoffmann- La Roche Ltd Vs. Cipla Ltd; 159(2009)DLT243 wherein the division bench while dealing with a similar issue of the grant of injunction laid down the extent of examination by the court for the grant of injunction which is stated as under :

> " Notwithstanding the above, assuming that the plaintiff held a valid patent for the product which has been subject matter of the suit for infringement, the grant of such patent to the plaintiffs will not ipso facto entitle them to an interim injunction if the defendant is able to satisfy the court that there is question to be tried as to the validity of the patent. In the present case, the defendant has raised a credible challenge to the validity of the patent by raising the serious triable and substantial question that renders it vulnerable to challenge."

66. Thus, this court has to examine the challenge made to the patent as to whether there is any serious, triable dispute which is made out and the same renders the patent vulnerable to challenge or not.

67. The another thing which requires discussion at this juncture is that novelty, inventive step and industrial application are the three trinity tests of patentability and the same are to be satisfied independently of each other although it is separate issue that they may be interdependent upon each other as novelty promotes invention which enhances its applicability in the industry. Thus, the challenge which in the present case is raised has to be looked into from the perspective of novelty or newness as well as inventive step or obviousness wherein the criterion is that the same invention cannot be known to the person skilled in the art.

Discussion on submissions by the parties

68. Now, I shall proceed to examine the submissions of the rival parties on these principles in order to decide the application for ad interim injunction.

69. While looking into the invention of the plaintiff, it can be stated that the same is related to a mirror without a copper layer with the processes including sensitization, activation, silvering and layering. The said process and product uses essential ingredients including treatment with tin and/ or palladium chloride. The plaintiff asserts that the same is novel process although the steps for manufacturing the said mirror may be known and the specification of Indian patent itself mentions about the same.

70. However, the defendants have cited several prior arts which relates to similar processes as mentioned above which, prima facie in the opinion of this court, show that the patent of the plaintiff is vulnerable to challenge. This is due to the reason that the prior arts talk about the researches

which have been carried out for decades in the area of improvisation of adhesion of metals on glass and also talks about the processes including the sensitizing, activating process with a treatment of the subject with the activating solution and also with palladium and tin. Furthermore, there are claims and corresponding industrial application which show that the Indian patent and that of the arts cited are quite close.

71. The challenge to the patent made by the defendants is not unfounded and rather it raises a serious credible challenge to the patent and the same is discernible from the fact that the German Federal court rejected the claims closest to those of the Indian patent on the grounds of lack of novelty and inventive step. Incidentally, the German court while rejecting the claims of the patent of the present plaintiff relied upon the same prior arts which have been relied upon by the defendants in the present proceeding. Thus, as a matter of proprietary and also international comity which warrants that the judicial decision of the foreign tribunal/court may be respected in the same manner as that of the national court, this court is not inclined to take a different view atleast at an interlocutory stage.

72. The submission of the learned senior counsel for the plaintiff that the German court decision may not be considered as the same is based upon German law is devoid of any merit. This is so due to the reason that after India has signed WTO, the member countries have been made TRIPS compliant. The law relating to patent although territorial in nature operates on the three tests of patentability namely, novelty, inventive step and industrial application and the same are to be satisfied for the purposes of examining the patentability of the subject matter. The tests for patentability are same worldwide and the same is also clear after reading the decision of German Federal court.

73. The learned Senior Counsel for the plaintiff strenuously argued that assuming that the prior arts cited by the defendants are correct, the obviousness has to be looked into by the court from the perspective of an unimaginative person normally skilled in the art on the date of the plaintiff s patent. There is no dispute to the submission which has been made by Learned Senior counsel but when the present prior arts are looked into and examined from the standpoint of an unimaginative person normally skilled in the art, it raises a doubt as to how the said person will not learn as to how to arrive at the said patent after knowing about the technology in question.

74. It is noteworthy that the Supreme Court in Bishwanath Prasad (Supra) has laid down that the obviousness has to be gauged from the perspective of a person skilled in art. The nomenclature of the said person howsoever embellished it may be is not relevant for the purpose of determining the same. The substratum of it will remain the same which is that whether the alleged prior arts teach as to how to arrive at the invention in question or whether it makes the invention a mere workshop result. If the answer of the same is in affirmative, then the same may attract obviousness. Thus, the submission of the learned Senior Counsel is meritorious but the same if applied to the present case satisfies the said criterion of obviousness.

75. The submission of learned senior counsel for the plaintiff on Mosaicing which means that the defendants for the sake of undermining the patent are seeking the aid of too many prior arts and

making a mosaic of the prior arts, the submission of the plaintiff has been disputed by the learned senior counsel for the defendants by stating that the challenge to the Indian patent is not raised merely on the count of novelty but also on the count of inventive step.

76. The observation of Lord Reed in the case of Technograph vs. Mills & Rockley s case (supra) has been cited to show that mosacing is permissible in order to find the element of obviousness. To this, I would say that I have already discussed the aspect relating to the novelty and inventive step which are the two independent tests of patentability. The inventive step of course has to be tested on the basis of the techniques and technologies which are existing and preexisting to the date of the patent and to find the same as to whether the same is obvious to the inventor of the patent.

77. That being the position, there would be no harm in relying upon the prior arts so far as it makes sense to show that by studying these prior arts, the inventor s job is reduced to sitting in the workshop. Thus, this court holds that mosaicing may not be relevant to undermine novelty in the circumstances of the case but obviousness has to be seen while looking into the techniques and technologies of existing and preexisting state of art.

Discussions on prima facie case and balance of convenience

78. At this interlocutory stage, this court refrains from commenting as to whether the patent is bad or not. Suffice to say that a consideration of the prior arts cited by the defendants and bare perusal of the Judgment of the German Federal court, it can be said that a substantial, tenable and credible challenge is made out which is required to be tested at the time of trial and thus, at this stage, the grant of interim injunction is not warranted.

79. Furthermore, it is the contention of the learned senior counsel Shri Jaitley that the technology and the steps involved in the process of manufacturing defendants mirror is not the same as that of the plaintiff. The plaintiff has based its claim while examining the defendants mirror at its own laboratory in Belgium. The affidavit of one Dr. Pierre Boulangar is filed to substantiate the ingredients of the defendants invention and to state that the same corresponds to the Patented mirror of the plaintiff.

80. On the other hand, the defendants dispute the same and state that the defendants are using the process which is based on Franz Patent (Supra) and the same is different from that of the plaintiff. It is further contended and pointed out that plaintiff itself has distinguished Franz (Supra) before USPTO to wriggle out itself from the prior arts cited by the US examiner. The said process were distinguished by the plaintiff itself in the reply to the office actions given by the US patent examiner. Thus, according to the defendants, the defendants are using the process based on the Franz patent which involve the following steps:

> "This invention relates to chemical plating referred to in the art as electroless plating, and more particularly, it relates to a new method of sensitizing a substrate surface to produce a catalytic surface receptive to the deposition of metal-boron containing film.

> In the art of metalizing substrate, particularly non- conductive materials such as non-metals, for example glass and plastics, it has been found desirable to prepare the substrate surface to make it more receptive to metal deposition."

81. The said fact again raises a disputed question of fact which requires evidence and raises a prima facie doubt on the fact as to whether the defendants are using the same process which corresponds to that of the plaintiff patent. At the interlocutory stage, this court has to form a just and a prima facie opinion and the disputed questions which have been asserted by the plaintiff and denied by the defendants and the veracity of which is in question requires a trial. Thus, the same is another reason for the non grant of interim injunction as question of infringement or no infringement in the present is disputed question of the fact.

82. The plaintiff on other hand in order to show that there is working of the patent in India has filed form- 27 declaring before the patent office that the said invention is exploited in India filed by the attorney of the plaintiff. Furthermore, the affidavit of Georges Pilloy is also filed to depose the same.

83. The test which has to be applied is whether there is an actual commercial working/ exploitation of Invention in India. Thus, the plaintiff when it files merely forms and an affidavit to depose the working is not able to qualify on the count of commercial working of the invention. The test of commercial working is of course very difficult to define but at the same time giving meaningful reading would mean that the product or invention must be put to commerce, it must have sales arising out of the exploitation of the same. The commercial working may not be present in vacuum. The forms filed by the plaintiff do not clearly reveal commercial sales arising out of the sale of the plaintiff s inventions in India. Copies of the licenses if any as alleged by the plaintiff have not been produced.

84. In a way, no cogent evidence for commercial working is placed on record except the averments in various pleadings. The patent which has been granted in the year 2004 is merely stated in the affidavit to be used in India since the year 2007 in the said affidavit of Mr. Pilloy which is dated 17th March 2009. It again does not depose about the commercial working of the said invention in India on continuous and consistent basis from the year 2007. It is again questionable that to what extent can import of goods be considered actual commercial working of the inventions. The said facts again require to be tested at trial and are disputed questions. It is difficult to comment upon the commercial working of the patent in India based upon the existing documents.

Principles for grant of Injunction

85. The principles for grant of injunction have been succinctly discussed in American Cynamide Co. s case (supra) which have been accepted and followed in the case of Franz Xaver Huemer Vs. New Yash Engineers; AIR 1997 Delhi 79 wherein it was held in paras 28, 31 and 32 as under :

> "28 It is true that earlier, in the well known case in American Cyanamid Vs. Ethican (interlocutory) 1975 RPC 513 (at 541, 542), it was observed that it was sufficient if a „triable issue was there. According to Lord Diplock, the Court must also be satisfied

if there is a "serious question to be tried" : therefore it should not try to assess relative merits by looking into prima facie case in the affidavit evidence but should instead turn at once to the balance of convenience; if damages to be awarded at the trial can adequately compensate plaintiff and the defendant could pay them, injunction could be refused; if not, injunction could be refused; if not, injunction could be granted; if defendant could be compensated by way of damages later by plaintiff, injunction by way of damages later by plaintiff, injunction could be granted; where there is doubt about the adequacy of damages to one or both ; any factor which may affect balance of convenience is to be considered. If the balance is even, the relative strength of the case is to be considered.

31. It is said that in the law of patents, it is not sufficient merely to have registration of a patent. The Court must look at the whole case, the strength of the case of the patentee and the strength of the defence such as those falling under Section 107 read with Section 64.

32. The need to establish prima facie has been emphasized in recent cases in England and in India. The Court has to consider whether there is prima facie proof of infringement (Lord Denning M.R. & Megaw LJ Hubbard Vs. Vosper, (1972)1 All ER 1023. Prima facie proof of validity is different from prima facie proof of infringement as stated by Sultan Singh, J. in NRDC Co. Vs. DCM Ltd., AIR 1980 Delhi 132. In that case, the learned Judge quoted Terrel on the law of Patents (12th Ed. Para 830) : (at p 135 of AIR) :

"The plaintiff must first establish such facts as will satisfy the Court that there are strong prima facie reasons for acting on the supposition that the patent is valid. The most cogent evidence for this purpose is either that there has been a previous trial in which the patent has been held to be valid, or that the patentee has worked and enjoyed the patent for many years without dispute or may be that as between the parties the plaintiff is relieved from the onus of establishing validity, as where the defendant has admitted it or is so placed in his relationship to the plaintiff as to be estopped from denying it."

86. In view of the above, it is clear that the said irreparable injury has to be measured while looking into the corresponding injury to the defendants if the injunction is granted.

FINDING

87. As I have already stated that the defendants have raised substantial, tenable and credible challenge to the patent which raises a triable dispute, therefore, the plaintiff has failed to make out a prima facie case for the grant of ad interim injunction. Considerable doubt has been raised by this court about the working of the patent in commercial sense and on the other hand, the defendants are stated to be in the business of manufacturing mirrors since the year 1993.

88. It is further asserted that the defendants belong to Guardian International Corp which is the subsidiary of Guardian Industries Corp. The defendants have stated that they own a Rs. 450 Crore plant in India for the purposes of manufacturing mirrors. The defendants are stated to be formed under the joint venture with Guardian Industries Corp which is one of the world largest glass manufacturing company having 22 float glass facilities located in North and South America, western, Central Europe etc.

89. The defendants have stated to have done immense business while effecting the sales of glasses and mirror at a commercial scale since the year 1993 and without the copper layer since 2002. Thus, it would be more inconvenient at this juncture to restrain the defendants from manufacturing the mirrors given the fact that there is substantial credible challenge raised to the patent, on the contrary, the plaintiff would be less inconvenienced at this stage if the injunction is not granted. The irreparable damage consequently will be caused to the defendants if there is an injunction against them.

90. This court is also not unmindful of the fact that the patent was filed on 8th May, 1995 and the same was granted on 12th March, 2004. The term of the patent is limited to 20 years and thus, the delay in trial of the suit may cause prejudice to the plaintiff. This court has also given careful consideration to the recent dicta of Supreme Court in the case of Bajaj Auto Limited Vs. TVS Motor Company Limited; 2009 (2) CTMR 326 (SC) wherein the Supreme Court ruled that the patent and trade mark matters may be put to trial and the same may be heard on day to day basis in order to decide the suits itself instead of injunction applications.

91. Given the present situation and the nature of matter wherein the delay in litigation may defeat the rights of the plaintiff, this court is of the opinion that this court may give the liberty to the parties to seek appropriate directions for appointment of local commissioner for expediting the trial in the matter.

CONCLUSION

92. For the aforesaid reasons, the application filed by the plaintiff being I.A. No.3756/2007 under Order XXXIX Rule 1 and 2 CPC is disposed of with the following directions :

(a) The suit proceedings shall be expedited;

(b) The defendants are directed to maintain the accounts and file it on monthly basis in this Court in respect of the sales arising without copper layer mirrors so that the plaintiff may be adequately compensated in the event of failure of the defendants in the trial; and

(c) The defendants shall file an undertaking by way of an affidavit within two weeks from today that in case the suit of the plaintiff is decreed after trial, the defendants shall pay the profits and damages on their sale of impugned product without copper layer to the plaintiff.

93. It is needless to say that the prima facie view taken by me in the present case and any observations made herein shall be treated as tentative in nature and shall not constitute any expression of final opinion on the issues involved in the matter and shall have no bearing on the final outcome of the case.

94. List the matter before the Court for framing of issues and for appropriate directions, if any, on 5th February, 2010.

MANMOHAN SINGH, J.

JANUARY 27, 2010 sa