

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Decided on: 27.07.2017**

+ CS(COMM) 1419/2016

HOLLAND COMPANY LP AND ANR. Plaintiffs

Through: Mr J. Sai Deepak, Mr Mohit Goel,
Mr Bhardwaj Jaishankar,
Mr Ashutosh Nagar and Mr Abhishek
Kotnala, Advs.

versus

S.P. INDUSTRIES Defendant

Through: Mr J.M. Kalia and Ms Bhawna Garg,
Advs.

**CORAM:
HON'BLE MS. JUSTICE DEEPA SHARMA**

JUDGMENT

IA No. 1375/2014 (O 39 R 1& 2 CPC) by plaintiffs

1. This order shall dispose of the application of the plaintiffs under Order 39 Rules 1 and 2 of CPC. The application was earlier dismissed by this Court vide order dated 20.05.2014. However, in appeal vide order dated 12.09.2014, the Court was directed to decide the application afresh.

2. The plaintiffs have claimed themselves to be the owner of industrial drawings of Automatic Twist Lock (hereinafter referred to as "ATL") system for securing cargo containers to support such as deck of a vehicle or

a second cargo with which the first container is to be stacked. Plaintiffs claimed to have invented the product and possess intellectual property rights, patent and copyright. It is submitted that, in fact, the invention was done by the plaintiff No.1, but the technology was transferred under an agreement dated 11.07.2006 to the plaintiff No.2. That the plaintiffs had supplied its product to the Indian Railways and it used it on container flat wagon. Plaintiffs claim that the drawings of ATL device along with its component, are the original Artistic Work and plaintiffs is the owner of copyright of these industrial drawings.

3. The Eastern Railway, Sealdah Division floated a tender for carrying out the repairs, replacement of spare parts and service, including overhauling and replacement of defective part of ATL devices and the plaintiff No.2 was also one of the bidder, but the successful bidder was the defendant and the contract for repairing of ATL for BLC Wagon at Wagon Maintenance Depot at NH of Sealdah Division was awarded to the defendant. The case of the plaintiffs is that the defendant does not have requisite know-how to replace and repair the spare parts of ATL device supplied by the plaintiffs to Indian Railways. The case of the plaintiffs further is that the plaintiff's drawings of the spare parts of ATL are readily

available as it is a public document and was published by Indian Railways with due permission from the plaintiff No.2 vide its Publications No.G-100 titled as “*The Technical Pamphlet For Inspection & Maintenance Of Automatic Twist Locks (ATL) Devices Fitted on Container Flat Wagon*” (hereinafter referred as “The Technical Pamphlet”) issued by Research Designs and Standards Organization, Ministry of Railways. It contains the said detailed drawings and this document can easily be procured by making payment of Rs.2300/-. It is submitted that the defendant being in the same trade, aware of such publication and has copied the drawings of the plaintiffs from this document and also procured the plaintiffs’ product and spare parts and prepared the drawings for manufacturing the ATL devices and its spare parts, by using reverse engineering and/or by copying and using unauthorizedly the said drawings. The Indian Railways floated the tender dated 17.05.2012 for replacement and repair of the following parts of ATL devices supplied by plaintiffs:-

- i. Groove Pin
- ii. Torx Screw
- iii. Shaft Sleeve
- iv. Spacer (internal and external)

- v. Torsion Spring
- vi. Locator Pin
- vii. Twist Head

4. The case of the plaintiffs is that these spare parts are components of ATL devices manufactured and supplied by the plaintiffs and plaintiffs have copyright and Patent (an application for registration of patent moved and published). ATL device consists of these assembly parts which can be manufactured only by the plaintiffs since the plaintiffs have proprietorship rights over it. The Railway Board was apprised about the plaintiff No.1's proprietary rights in ATL devices, including its parts, supply and servicing of the said devices vide letter dated 06.12.2012. The case of the plaintiffs is that the defendant has intentionally, deliberately, knowingly and willfully offered its substandard products and services to be used in Indian Railways.

5. Claim of the plaintiffs is that the drawings of ATL device and of its parts belong exclusively to the plaintiffs and that it is an artistic work in which plaintiffs have copyright.

6. On these facts, the plaintiffs have prayed to pass a permanent injunction decree, restraining the defendant, its proprietor, partners, or directors, etc. from manufacturing, selling, offering for sale, advertising,

directly or indirectly ATL and parts thereto as detailed in para 12 of the plaint by using know-how information of the plaintiffs by making ATL and spare parts in three dimensional form from the two-dimensional artistic work of the plaintiffs in drawings of the ATL as it amounts to infringement of copyright of the plaintiff No.1 and also restrained from servicing of the original ATL and parts thereto supplied by the plaintiffs to Indian Railways.

7. In the application under Order 39 Rules 1 and 2 of CPC, the same prayer has been made by the plaintiffs. It is submitted that they have a good *prima facie* case as they have a copyright over the industrial drawings and the balance of convenience also lies in their favour and they shall suffer a loss not only financially but also in their reputation if the injunction is refused which cannot be compensated in terms of the money.

8. The suit as well as the application is contested by the defendant. At the outset, the defendant has submitted that the plaintiffs have no copyright in the industrial drawings. It is submitted that by virtue of Section 15 of Copyright Act, 1957, no copyright exist in any drawing or design once the production has been done more than 50 times by an industrial process using such drawing or design. It is submitted that the plaintiffs have themselves admitted that they have supplied ATL devices to the Railways and thus by

using drawing they have reproduced more than 50 articles. It is further submitted that under the contract awarded to it by the Indian Railways, it was bound to fulfil its obligation on the basis of specification and drawings mandated in terms of the contract. It is also contended by the defendant that it had never claimed to be manufacturers and supplier of the plaintiff's spare parts. The defendants have to do only those things which it is required to do under the contract awarded by the Indian Railways which is for the repair or replacement of parts of ATL devices. Having lost the tender, the plaintiffs cannot claim to have exclusive rights to repair and replace the ATL devices which belong to Indian Railways. It is denied by the defendant that it has misappropriated the know-how or information, drawings or designs of the plaintiffs. The plaintiffs also cannot be said to have exclusive intellectual property right over the said drawings since these drawings have been published and are readily available in the market. The defendant is to confine its work under the contract. It is submitted that the components required to be replaced as per the tender awarded are not the components of the plaintiffs. It is submitted that the defendant is neither infringing the copyright nor stealing the drawings of the plaintiffs by using reverse engineering. It is submitted that the quality check of the work carried out by

the defendant is done by the Indian Railways and their representatives. It is submitted that even before this contract which was awarded to the defendant, the Indian Railways have placed orders on M/s Escorts Ltd, Faridabad, M/s Ad Electrosteel Co. Pvt. Ltd, Kolkata, M/s Buttweid Industries, Kolkata for the repair and maintenance of the same product, i.e., ATL devices and/or its spare parts. It is submitted that the plaintiffs cannot claim proprietary right over the drawings with an intent to keep the other competitors out with a view to maintain monopoly more so when the plaintiffs participated in the bid process and lost the contract. It is further submitted that this case is the outcome of the frustration on the part of the plaintiffs in losing the contract. The fact that it had participated in the bid process, clearly shows that it never had any objection against Railways for carrying out the repairs of ATL devices by inviting different players in the field by process of tender. It is submitted that the plaintiffs have no copyright in the industrial drawings and peculiar facts of the case clearly shows that the suit itself is not maintainable and liable to be dismissed.

9. Both the parties have submitted their written submissions. It is argued by learned counsel for the plaintiffs that a combined reading of Section 2(c), Section 13(1)(a) and Section 14(c)(i)(B) of the Copyright Act, 1957 shows

that a copyright exists in engineering drawings/technical drawings under the category of Artistic Works, which includes the exclusive right to depict the drawings in three dimensions. It is further argued that such engineering drawings/technical drawings need not possess any artistic qualities to claim protection under Section 2(c) of the Copyright Act, 1957. It is further submitted that Section 40 of the Copyright Act further extends copyright protection to foreign works. The learned counsel has relied on the findings in *Microfibres Inc. v. Girdhar & Co. & Anr.* 2009(40) PTC 519 (Del) (DB), *Photoquip India Ltd. vs. Delhi Photo Store*, 2014 (60) PTC 563 (Bom), *Indiana Gratings Pvt. Ltd. & Anr. v. Anand Udyog Fabricators Pvt. Ltd. & Ors.* 2009(39) PTC 609 (Bom), *John Richard Brady and Ors. v. Chemical Process Equipments P. Ltd. and Anr.* AIR 1987 Delhi 372.

10. It is further submitted that the Designs Act, 2000 features “*appeal to the eye alone*” and it does not apply to “*functional*” features. It is submitted that the Designs Act, 2000, therefore, is not applicable on the industrial/engineering drawings and technical drawings and reliance has been placed on *Escorts Construction Equipment v Action Construction Equipment* 1999 PTC 36 (DEL) and *Mohan Lal v. Sona Paint & Hardwares*, 2013 (55) PTC 61 (DEL)(DB). It is further argued that at no

stage the defendant has denied the facts that ATL devices were not supplied by the plaintiffs.

11. It is further argued that in *Syndicate of the Press of the University of Cambridge v. B.D. Bhandari*, 185(2011)DLT 346 (DB) in paragraph 38 to 56, the Court has specifically held that the owner can relinquish its copyright by dedicating the same in public domain as prescribed under Section 21 of the Copyright Act, 1957. But in a case where the owner neither relinquished nor entered in public domain its copyright, it cannot be said that the work has entered in public domain.

12. On the other hand, learned counsel for the defendant argues that industrial drawings are not an artistic work and, therefore, no copyright exist and that the plaintiffs have no copyright in the industrial drawing since the plaintiffs are not the author of the work and so not entitled protection under law. It is further argued that even if it is presumed that the plaintiff is the author of the work, he is not entitled for the protection because his work has been duly published in India. It is also argued that industrial drawings since capable of being registered under the Designs Act, 2000, are exempted from the purview of the Copyright Act, 1957. It is further argued that the defendant is not infringing any copyrights of the plaintiff rather it is acting

as per the contract awarded to it by the Railways for service and maintenance of ATL. It is further argued that since it is the Railways who had awarded the contract for service and repair of ATL devices, the Railways are a necessary party, but yet the plaintiffs have not made them a party to the suit and the suit is liable to be dismissed on this count. It is further argued that once Railways have published the drawings and have also duly published the drawings of the articles which needed to be repaired, it cannot be said that the plaintiff continues to have any copyright in those drawings.

13. I have heard the arguments and have given thoughtful consideration to the rival contentions raised by the parties.

14. The facts which emerge from the pleadings are that the plaintiffs had supplied ATLs to the Railways under a contract. The plaintiffs claim is that they are the owner of the industrial drawings/engineering drawings which were prepared for manufacturing of ATL devices. The plaintiffs have placed on record the drawings of ATL devices which it had supplied to the Railways. The railways had been inviting bids for the repair and maintenance of ATL devices and in one of such tenders floated by Railways, the plaintiffs and the defendant participated. The defendant emerged to be

the successful bidder and his bid was accepted and the contract for repair of ATL devices was awarded to the defendant.

15. At the time when the tender was floated by the Railways for repair and maintenance of ATL devices, it had also given in detail the specifications of the items needed to be repaired, maintained or serviced. The plaintiffs have not challenged this act of the Railways. When the defendant submitted its bid, it was according to the specifications, etc. mentioned in the tender notice dated 17.05.2012.

16. The issue of existence of copyright in the industrial drawings of ATL devices of the plaintiffs is to be considered in the light of these facts.

17. An artistic work is defined in Section 2(c) of the Copyright Act. The relevant Section is reproduced as under:-

“2(c) “artistic work” means—

(i) a painting, a sculpture, a drawing (including a diagram, map, chart or plan), an engraving or a photograph, whether or not any such work possesses artistic quality;

(ii) a [work of architecture]; and

(iii) any other work of artistic craftsmanship;”

18. Section 14 of the Copyright Act deals with the artistic works in which the copyright exists in favour of the creator of the artistic work. Clause (c) of Section 14 is relevant on the facts of this case and is reproduced as under:-

“14. Meaning of copyright.—For the purposes of this Act, “copyright” means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely:—

(a) xxx xxx xxx

(b) xxx xxx xxx

(c) in the case of an artistic work,—

(i) to reproduce the work in any material form including depiction in three dimensions of a two dimensional work or in two dimensions of a three dimensional work;

(ii) to communicate the work to the public;

(iii) to issue copies of the work to the public not being copies already in circulation;

(iv) to include the work in any cinematograph film;

(v) to make any adaptation of the work;

(vi) to do in relation to an adaptation of the work any of the acts specified in relation to the work in sub-clauses (i) to (iv);

(d) xxx xxx xxx

19. Under this provisions, the owner of a copyright has a right to depict its work in three dimensions or in two dimensional forms or or to communicate the work to the public or to issue copies of the work of the public etc.

20. Section 15 is an exempting Section exempting certain artistic works from the purview of copyright in favour of its creator. While Section 15(1)

states that no copyright exists in a design which is registered under the Design Act, section 15(2) deals with those designs which is capable of being registered under the Designs Act, but has not been so registered, and the design has been used to reproduce more than 50 times using industrial process an article to which such design applies and if it so happens, no copyright can be claimed in such design. Section 15(2) of the said Act reads as under:-

“15. Special provision regarding copyright in designs registered or capable of being registered under the Designs Act, 1911

(1) XXX XXX XXX

(2) *Copyright in any design, which is capable of being registered under the Designs Act, 1911, but which has not been so registered, shall cease as soon as any article to which the design has been applied has been reproduced more than fifty times by an industrial process by the owner of the copyright, or, with his licence, by any other person.”*

21. The Designs Act, 2000 deals with the protection of designs and

Section 2(d) of the said Act defines the Design as under:-

“2 (d) “design” means only the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article whether in two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction or

anything which is in substance a mere mechanical device, and does not include any trade mark as defined in clause (v) of subsection (1) of section 2 of the Trade and Merchandise Marks Act, 1958 (43 of 1958) or property mark as defined in section 479 of the Indian Penal Code (45 of 1860) or any artistic work as defined in clause (c) of section 2 of the Copyright Act, 1957 (14 of 1957);”

(Emphasis supplied)

22. As per this definition of Design, the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article whether in two dimensional or three dimensional or in both forms by any industrial process or means, which in finished articles appeal to and are or judged solely by eyes, but does not include any mode or principle of construction or anything which is in substance a mere mechanical device, etc. constitute a Design. The Design Act, 2000, envisages that a design itself is not sold but what is sold is an article which is reproduced from the application of the design by using an industrial process. Two types of designs can be prepared. The one which is used for the manufacture of an article, it, therefore, is design which is used for the purpose of industrial production of that article of which the design has been prepared. Other design could be an artistic work which has been produced and that artistic work has been used and such two dimensional artistic work is thus reproduced in a three dimensional form by an industrial process. In a case

where design is produced for manufacturing a product the design can be registered under the Designs Act and where a design is so registered, it has the protection under the Act for 10 years. A conjoint reading of Section 2(d) of Designs Act, 2000, Section 14(c) and 15(2) of the Copyright Act, 1957, makes it amply clear that where a design of an article is prepared for the industrial production of an article, it is a design and registrable under Designs Act and under Section 14(c), the author of such design can claim copyright, however, since such a design is registrable under the Designs Act, and if such design has been used for production of articles by an industrial process for more than 50 times by the owner of the copyright, or, by any other person with his permission, then such person ceases to have copyright in such design.

23. The plaintiffs have clearly averred in their plaint that:-

“7. The present suit is concerned about the plaintiff No.1’s copyright over the industrial drawings of its product and mechanical part thereof namely automatic Twist Lock (hereinafter also referred as “ATL”) system for securing of the containers which is a device for automatically securing a cargo container to a support such as a deck of a vehicle or a second container with which the first container is to be stacked. Photograph of the Automatic Twist Lock of the Plaintiffs is submitted herewith.

8. The Plaintiff No.1 submits that the Industrial drawings of the automatic securing device of the cargo container was first

conceived and invented by M/s Mclean-Foga Company for the Automatic container securement device with a spring biased and cam surfaced head. The Plaintiff No.1 in the year 1986 acquired the railway product portion of the McLean-Fogg Company along with all Intellectual Property Rights including Copyright and Patents. The Plaintiff No.1, at present is the proprietor/assignee of the Copyrights vested in the Industrial Drawings of the said product worldwide.

9. That, the Plaintiff No.1 has put in its hard work, time, skill and investment to get updated version of the Container Secruirement Device which was the assigned to it by M/s Mclean-Foga Company and come with some new and exclusive drawings to manufacture the product called Automatic Twist Lock for the container securement. The Plaintiff No. 1 first time in the year 2006 launched its updated concept of the Automatic Twist Lock Device to be manufactured on the basis of its proprietai drawings.”

24. These averments in the plaint clearly show that plaintiffs had prepared the engineering drawings for the purpose of production of ATL devices. The industrial drawings are, therefore, or a design of the ATL device which the plaintiffs had supplied to the Railways under a contract given to them by the Railways. The drawings of the ATL devices of the plaintiffs, therefore, are registrable under the Designs Act. The said drawings have not been registered under the Designs Act. The plaintiffs have also not disputed the fact that while using these engineering drawings, it had used for more than 50 ATL devices by an industrial process and, therefore, it is clear that it has used these engineering drawings for more than 50 times in an industrial

process. By virtue of Section 15(2) of Copyright Act, therefore, even if assuming the plaintiffs had a copyright in these engineering drawings, it ceases to have the same. There is other aspect of the present suit as well. The plaintiffs have not made the Railways as a party to the suit knowing well that it was the Railways which had awarded the contract to the defendant for repair/maintenance of ATL devices. There is no dispute to the fact that after the ATL devices were supplied by plaintiffs to the Railways under the contract, it had become the property of the Railways and it is within the proprietary of the Railways to award contract of its maintenance/repair. It is the admitted case as well that the plaintiffs had also participated in the tender invited by the Railways for maintenance of the ATL devices, but it had lost the bid. The plaintiffs had not claimed that the Railways had been debarred under the contract of supply of ATL devices, to award the contract of its repair/maintenance to any other company, but the plaintiffs. It is not in dispute that at the time when the tender was floated, the specifications/drawings of the ATL devices which were required to be maintained was also the part of the tender notice and the plaintiffs had also participated in the tender process and it had not raised any objection against the Railways for publishing the engineering drawings of ATL devices or for

calling different parties to provide its service for maintenance of these products as per their specifications. The averment in the plaint also shows that the Railways had published the engineering drawings of the ATL devices. The plaintiffs seek to have no objection to such publication. The defendant has clearly stated that it is not indulging into any activity of manufacturing or copying the product of the plaintiffs, but going to repair and maintain the ATL devices strictly under the contract awarded to it by the Railways. The plaintiffs have not made the Railways a party to the suit although in the facts and circumstances of the case it is a necessary party because *prima facie* it is the Railways who have used the engineering drawing of the ATL devices for inviting tenders. The findings in the case relied upon by the plaintiffs and the defendant are given on the peculiar facts and circumstances of those cases. The facts and circumstances in the present case are entirely different. For being entitled for interim injunction under Order 39 Rule 1 and 2, the plaintiff is required to show a strong *prima facie* which means the plaintiff is required to show that it has a right which needs protection. The plaintiffs have failed to show any *prima facie* case in their favour. In the light of the above discussion, the application of the plaintiffs under Order 39 Rules 1 and 2 CPC stands dismissed.

CS(COMM) 1419/2016

List before the Roster Bench on 02.08.2017.

**DEEPA SHARMA
(JUDGE)**

**JULY 27, 2017
BG**

