IN THE HIGH COURT OF NAGPUR

DATED: 13.02.1952

CORAM

THE HONOURABLE MR. JUSTICE HIDAYATULLAH

AND

THE HONOURABLE MR. JUSTICE CHOUDHURI

Letters Patent Appeal Nos. 27 and 28 of 1951

The Bombay Agarwal Co. ... Appellant

Vs.

Ramchand Diwanchand and Anr. ... Respondents

For the Appellant: T.L. Sheode, R.R. Dandige and W.A. Sohoni, Advs.

For the Respondents: M.W. Samudra, Adv.

JUDGMENT

1. This appeal and Letters Patent Appeal No. 28 of 1951 are against the judgment of Mudholkar J. in a matter dealing with the infringement of a patent granted in March 1942 to the Appellants in these two appeals. In the suits out of which these appeals arise a claim, for revocation of the patent had also been introduced by the Respondents, and that is also a subject-matter of appeals here. This judgment will dispose of both these appeals.

2. The Plaintiff in the two suits in the Court below is a company called "The Bombay Agarwal Company of Akola". In the year 1942 it had obtained a grant of patent for a drink made out of gram husk which had been processed in the way described in the specifications appended to the patent. The case of the Plaintiff was that the Defendants in the two suits had started in the year 1950 to imitate the stuff produced by them and thus contravened their patent. At first, the

Defendants merely tried to meet the case of infringement. Later, by an amendment, they claimed revocation of the patent granted to the Plaintiff-company and as a result under the proviso to Section 29, Patents and Designs Act, 1911, the case was transferred to this Court. It was dealt with at the stage of statements by Mudholkar J., who, however, under the provisions of the Act, ordered the evidence to be recorded by the Additional District Judge, Akola. These appeals are from the judgment of the learned single Judge, and by that judgment the learned Judge has found against the Plaintiff on the question of infringement and has also revoked the patent of the Plaintiff.

3. The case has been argued before us on the two different heads. It has been argued that the patent could not be revoked and that the Defendants must be found guilty of an infringement of the patent and must be restricted by the grant of injunction sought in the suit and also must be made to pay the damages claimed.

4. The suits were not filed together. The first suit, out of which Letters Patent Appeal No. 23 of 1951 arises, was filed on 24-6-1949. It was directed against Sitaram and Laxmikant Deshpande. The second suit, out of which Letters Patent Appeal No. 27 of 1951 arises, was filed against Ramchand Diwanchand Panjabi and his father Diwanchand Kashmirilal Panjabi. This was filed on 19-4-1950. These two suits were consolidated for trial, and common evidence, both oral and documentary, has been led in. them. They relate almost entirely to the same subject-matter, but since the articles produced by the Plaintiff were seized at different times and different places, it is necessary to recount the various steps leading up to the suits. We shall begin first with the suit against Sitaram and Laxmikant Deshpande.

5. The case of the plff. is that these 2 persons started manufacturing the impugned article first at a ginning factory called "Madhaodas Amarsi Ginning Factory, Akola". One of the partners of the Plaintiff, in the company of some others, went to the ginning factory and from there collected a sample of the

article produced by these Defendants. Later these Defendants shifted the venue of their manufacture to the Dal Karkhana belonging to the two Defendants in the other suit. One of the partners of the Plaintiff visited the Dal Karkhana and from the stuff which was laid out for drying in the sun, collected other samples of the article produced by the Defendants. It is contended that these articles which had been collected from the ginning factory, as well as the Dal Karkhana were in contravention of the patent granted to the Plaintiff in 1942.

6. The case of the Plaintiff in the other suit is that the Panjabi father and son booked for Wadi Bunder 67 bags of what they called "Ayurvedic Malaria Powder". One of the partners of the Plaintiff learning of this from one Prabhakar Dalai, went to the railway station & collected a sample of the powder which had come out of the bags, and finding it to be produced by the process for which the Plaintiff had got a patent, the other suit was instituted.

7. These samples, which were collected from the ginning factory, the, Dal Karkhana and the railway station were produced in the case and have been labelled as B, B-1, B-2 in the first suit and C in the second suit.

8. At first, as already stated, the Defendants " merely denied that they had contravened the patent of the Plaintiff, By an amendment which was allowed in the Court of the Additional District Judge, they pleaded that the patent itself ought to be revoked, and in their counter-claim they stated that the invention of the Plaintiff was not, at the date of the Plaintiff's application for patent, a new invention within the meaning of the Act and that the alleged, invention of the Plaintiff had been used at Akola and at various other places before. On this ground they claimed that the patent granted to the Plaintiff ought to be revoked. It may be pointed out that the actual claim for revocation came even later than the amendment to the written statement by which the plea of lack of novelty was advanced. However, the amendment has gone on the record and is not 'now disputed except in so far as the Appellant contends that ah inference should be

drawn against the Respondents from the slowness with which they came forward to ask for revocation of the patent.

9. During the course of the trial of these two suits, the Defendants Sitaram and Laxmikant Deshpande produced samples of their own product, which is labelled as Art-D. In the other suit no sample was produced, though the learned Counsel for the Panjabi father and son stated that one of the samples related to that suit and was signed for identification by Ramchand Diwanchand. It may be pointed out that the samples produced by the plff. in the two suits were sent for chemical analysis, but not the sample produced by the Defendants. There was no application either by the Plaintiff or by the Defendants to have that sample chemically analysed, with the result that there is nothing known in the case, except on oral testimony of the ingredients which go to make up Art-D in the two suits.

10. The questions in these appeals are, therefore, not of very great magnitude. What we have to determine first is whether the samples which have been produced by the Plaintiff purporting to have been seized from the three separate places are from the stuff produced by the Defendants in the suit. This point appears to have weighed with the learned single Judge, inasmuch as he held that there was no satisfactory evidence to connect Articles B, B-1, B-2 with the manufacture of the impugned articles at the ginning factory and the Dal Karkhana respectively. The learned single Judge also held that there was no satisfactory proof that Article C had in fact been seized at the railway station as alleged by the Plaintiff.

11. In connection with the infringement of the patent it is necessary to decide whether the patent of the Plaintiff had been infringed by the making of the Articles B, B-1, B-2 and C, if they are held, to be those made by the Defendants. It is also necessary to decide in these appeals whether the patent had been granted invalidly to the Plaintiff. We shall take up these questions in the same order.

12. The contention of the Respondents, which has been repeated before us and which was accepted by the learned single Judge, is that the articles said to have been seized from the Defendants have not been sufficiently identified and that the possibility of a fraudulent substitution has not been completely excluded. The learned single Judge considered this question and felt that at the time of the seizures there should have been an attempt to get a 'Panchanama' recorded and the articles seized properly sealed. In the absence of a 'Panchnama' and any proper sealing of the stuff seized, the oral evidence about its identity was not believable because it rested upon the interested testimony of the partners of the Plaintiff. The learned Counsel for the Respondents pointed out to us that more evidence was available which the, Plaintiff could have led and therefore an' adverse inference should be drawn against the Plaintiff-Appellant from its failure to examine the necessary and available witnesses. On the other side, the Appellant's contention is that the identity of these articles was not denied in good time, but for months the Defendants made no statement about these articles which had been produced in Court and it was only after a question fell from the learned single Judge about the identity of the goods that the application for amendment was made denying the identity of those goods. The learned Counsel for the Appellant made a reference to an order-sheet recorded by the learned single Judge, dated 25-10-1950, in which the following is noted:

> Shri T.L. Sheode with Shri R.R. Dandige for Plaintiff. Shri M.W. Samudra for Defendants. They are heard on the application No. 6400 dated 24-10-1950 filed by Defendants. The Defendants pray for amendment of written statement by denying specifically that the samples produced by the Plaintiff as being of the articles manufactured by the Defendants are genuim. The application is opposed by Shri Sheode on the ground that it is belated and is lacking in bona fides. He reminds me that certain discussion which took place in the Court at the last hearing has prompted the application. As however, issues have yet to be framed and no prejudice will be caused to Plaintiff, I allow the application subject to payment by Defendants to Plaintiff of Rs. 50/- as costs. He must pay the amount within a week and then carry out the amendment. The fact that the amendment was sought in the light of the discussion that took place at the last hearing will of course be borne, in mind while judging the relevant issue.

The learned Counsel for the Appellant contends that the denial of the article produced by the Plaintiff in the two suits was prompted by the discussion and was not bona fide and that the implicit acceptance of these articles without demur for months clearly proves, that these articles are the self-same articles seized by the Plaintiff from the three places mentioned above.

13. In all cases in which infringement of a patent is the subject of controversy before a Court, certain principles have to be borne in mind. Those principles are that the onus of proving the infringement lies upon the Plaintiff, who has not only to prove the patent in his favour, but also to prove that the patent is being infringed by resorting to a process patented by the Plaintiff. In doing so he must prove that the Defendant has produced the patented articles or used the patented process, and to that end, the burden is on him to prove that the article seized by him and produced in Court is the article produced by the Defendant. The learned Counsel for the Appellant accepts this burden and states that in the present suits that burden had been satisfactorily discharged by the Plaintiff and that there was nothing to the contrary proved by the Defendants, inasmuch as they did not even volunteer to have their Article-D subjected to a chemical analysis. It is, no doubt, true that the Defendant in the suit need not take any action, but it is open to the Court to pass an order for the examination of the article claimed by the Defendant to be the article produced by him. Such a course was not adopted by the learned single Judge, and the result is that there is no evidence to show what the nature of Art-D is and we will, therefore, have to leave it out of account altogether. We have, therefore, in these appeals merely to determine whether the Plaintiff has discharged the initial burden of proving that the Articles B, B-1, B-2 and C were seized in the manner alleged by it and are those articles which were actually seized.

14. Evidence on this point Jias come from a number of witnesses. It is to be remembered that the alleged seizures took place at three separate places and the evidence, therefore, will have to be scanned in three different parts. We shall, therefore, deal first with the evidence which bears upon the seizure of the

impugned article at the ginning factory. To prove this seizure the Plaintiff has examined Ramlal (P.W. 2), a partner of the Plaintiff firm. He stated that he had gone to the ginning factory in the company of one Deshmukh, Onkar and Shri W.A. Sohoni. There he met Sitaram, who is. Defendant 1 in the first case, and Sitaram went out on a bicycle and brought the Defendant Laxmikant to the spot. The powder which the Defendants were producing at the ginning factory was lying in the open for the purpose of drying and the samples were, therefore, collected from there. This part of the case bears corroboration from the evidence of P.K. Deshmukh (P.W. 4) and also from the evidence of Sitaram who is D.W. 7. We might refer to the evidence of Defendant 1 Sitaram. He stated as follows:

> At the time I was doing the work in the Gin, the Plaintiff Ramlal, Shri W.A. Sohoni pleader and 2 or 3 others had once come to the Gin. At that time I went and called Laxmikant. I went to call him of my own accord and not at the instance of the manager of the Gin. At that time 5 or 10 pounds of the product had been spread out for drying in the Gin. Ramlal asked me to whom the stuff belonged. Hence I went to call Laxmikant. I went to the manager and told him that the Plaintiff & others had come. Kisan was in the Gin at that time. There was no tatta enclosure to the Gin.

15. It is true that Sitaram does not speak specifically of the seizures but it is clear from, his evidence that the visit did take place and that the impugned. article was being manufactured at the spot. The only question is whether we should believe the Plaintiff's witnesses Ramlal (P.W. 2) and P.K. Deshmukh (P.W. 4) when they say that the articles produced are the articles seized at the ginning factory. For this purpose we have to turn to the evidence of the other Defendant, viz: Laxmikant Deshpande (D.W. 9), who stated as follows:

> As a result of experiments at these two places, I prepared 10 or 12 pounds of powder. These 10 or 12 pounds are still with me. The Plaintiff Ramlal had taken a sample of the powder prepared by me from the Madhaodas Amarsi Gin, and also from the Dal Karkhana. (Powders B, B-1 and B-2 shown). These are not the samples of powder prepared by me at the two places. (Powder from the tin now marked D in red pencil shown). This is the powder prepared by me before applying for the patent.

Later the witness stated as follows:

> The samples picked up by the Plaintiff from the Madhaodas Amarsi Gin and the Dal Karkhana was powder in the process, i.e. unfinished powder. The samples B, B-1 and B-2 are of finished product.

16. There has been considerable dispute as to the meaning of the last sentence in the quotation. But it appears to us that the witness was trying to say that the visitors, had picked up an unfinished product; the product produced in Court was finished one and that it was therefore different. All the same, there is corroboration coming from the pllf.'s witnesses that samples were in fact seized at the Madhaodas Amarsi Ginning Factory and were taken away. The only question, therefore, is whether the samples which were taken away are the samples produced in Court.

17. We do not see any force in the argument that other witnesses were present at the seizures who have not been examined. It appears to us that unless a 'Panchnama' was recorded, the Defendants would have been able to deny their allegations in the same manner in which they have denied the evidence of the Plaintiff's witnesses. What we have to see is whether the word of the witnesses produced on behalf of the Plaintiff can be relied upon, regard being had to the entire circumstances in the case.

18. Now, it appears to us that if there was any difference between the article produced by the Defendants at the Madhaodas Amarsi Ginning Factory and the article produced by the Plaintiff in the Court, on the allegations that it had been seized at the said ginning factory, the solution of that problem was easy. It was the easiest thing for the Defendants to insist upon a chemical, analysis 6f the Article-D in conjunction with the Articles-B, B-1, B-2 and C. No such attempt was, made by the Defendants and they allowed the matter to go by default. We must also bear in mind that the samples produced by the Plaintiff were not denied for a very long time till a discussion about the admission of the Defendants implicit in the want of denial took place in open Court. The learned

single Judge has noted in his judgment that such a discussion did in fact take place, and a reference has already been made by us to the order-sheet in which this fact is recorded. In our judgment, the slowness with which the amendment was urged and the long time which elapsed between the production of the impugned articles by the Plaintiff and their-denial by the Defendants are important factors in judging this issue. Bearing all the circumstances in mind, we have no reason to discard the evidence of the Plaintiff's witnesses when they state that the articles which they had seized had been produced intact in Court.

Of course, the chance of substitution was always there, but the substitution could have been demonstrated by proving that the Article D was different, from the articles produced by the Plaintiff in Court. The entire conduct of the Defendants in the suit, particularly the delay in denying the articles till a discussion had taken place about them in Court, leads to no other inference but this that the articles produced by the Plaintiff were from the Madhaodas Amarsi Ginning Factory and were not substituted by them. It is obvious that the Defendants must have at the very first opportunity examined the articles and they would have been high in their disclaimer if they found that a substitution had taken place. The contention of the learned Counsel for the Defendants that they relied entirely upon the onus which the Plaintiff had to discharge, does not appeal to us. No Defendant placed in this predicament would have merely relied upon the burden of proof and not seized the earliest opportunity for denying the genuineness of the articles produced in the Court.

-21. What we have stated above applies 'mutatis mutandis' to the seizures made from the Dal Karkhana and the railway station. We shall touch briefly upon the evidence bearing on these seizures. We are satisfied for the reasons which we have already given that neither of these two circumstances exists and we hold, therefore, that the article produced in the Court is the article seized by Ramlal and Deshmukh at the Dal Karkhana.

22. With regard to the third seizure, namely, the railway station, the evidence comes from Mukundlal (P.W. 1), who stated that he went to the railway station and found that 67 bags of what was described as. "Ayurvedic Malaria Powder" had been consigned by the Defendants in the second case to Wadi Bunder. He collected a sample of the powder and produced it in Court as Article C. The argument of the Respondents here is, once again, that there is nothing to prove that the samples were in fact taken and also that the article produced in Court (Article C) is the article seized at the railway station. It is contended by the Respondents that Prabhakar Dalai and Deshmukh were present at the seizures and ought to have been examined. Deshmukh has in fact, been examined, but was not questioned about this; and Prabhakar, though cited, was not examined and was given up. In our judgment, the absence of Prabhakar Dalai is amply justified, because on the evidence of Mukundlal (P.W. 1), it is obvious that the seizures took place between 4 and 5 P.M. and Prabhakar Dalai was in the company of Mukundlal when the latter visited the railway station a second time at night. Prabhakar Dalai, therefore, could not have thrown any light upon the seizures and therefore no inference can be drawn against the Plaintiff from its failure to examine him. As regards Deshmukh, the witness was in the witness-box, but no question, even by way of cross-examination, was put to him; and it cannot be said, therefore, that an inference should be drawn against the Plaintiff in the case. It is obvious that for the purposes of the Evidence Act no fixed number of witnesses is needed to prove a fact: even the testimony of but one, witness is sufficient, if that witness can be believed. For the reasons which we have already given, we do not see any reason to doubt the word of Mukundlal. We have seen all the powders in the case. There is some slight difference in granulation, texture and colour, but it does not appear that they have all come from the same lot. If any doubt about the identity of these articles existed, it could have been best resolved by the production and examination of the genuine, article produced by the Defendants in the case. No attempt, as we have already stated, was made in that direction, and the denial of the produced articles came

after a very long lapse of time and when the question was already mooted in Court. We, therefore, hold that the articles produced as impugned articles by the Plaintiff are the articles seized severally at the ginning factory, the (sic) Karkhana and the railway station.

23. This brings us to the question whether by the production of the impugned articles B, B-1, B-2 and C the Defendants in the two suits have committed an infringement of the patent (if valid) of the Plaintiff. All these samples, together with the sample Article A, which is the product under the patent by the Plaintiff, were subjected to chemical analysis and the report of the Public Analyst and his deposition are before the Court. Major N.K. Roy (P.W. 5) chemically examined these samples and the Article A, which is the admitted article of the Plaintiff's production, and gave his reports (Exhibits P-28 and P-29). According to him, Article A resembled tea dust and did not contain any protein and there was no smell of influsion. On microscopic examination, he found gram husk to be present & this husk was found to be treated with Ferrous Sulphate (green vitriol). He subjected sample B to a similar examination and he found all these circumstances present there also. His remark was:

> Both the samples marked A and B are found to contain the same constituents and are also similar.

24. Similarly, the Public Analyst subjected Articles B-1, B-2 & C to chemical analysis as against sample A. He found the above indicia present in all the four samples before him and he opined:

> All the four samples marked A, B-1, B-2 and C are found to contain the same constituents and are similar.

25. In addition to this, we have subjected them to an ocular examination and we say that in appearance, except for granulation and a slight difference in the depth of colour, they appear to be alike. Of course, the evidence of the Public Analyst is of more importance than any visual observation by us, but we add this to show that we have viewed the articles-on our own.

26. The learned single Judge felt that quantitative analysis ought to have been made and the proportion of ferrous sulphate to the quantity examined ought to have been determined. This leads us to an important question whether the quantities mentioned in the specification were of the essence of the invention or were merely given to describe completely the process. The learned single Judge in his judgment observed as follows:

> Even assuming for the nonce that the sample; which the Plaintiff says is that of the Defendants' powder, the question is whether it has been satisfactorily proved that the powder is identical or at least similar to the one which the Plaintiff manufactures. All that we have is the evidence of the Analyst who says that both the powders contained gram, husk and ferrous sulphate and that they appeared to be similar. To my mind, evidence of this kind is not sufficient. What the Plaintiff must establish is the 'quantity' of gram husk and ferrous sulphate found in each of the two powders and 'their proportion' to one another. Further, it being the case of the Plaintiff that these powders are used for preparing beverages, it was necessary for the Plaintiff to show that the beverages prepared from each, of the two kinds of powders were similar in appearance and taste. There is no evidence of this type at all either in respect of the powder manufactured by the Defendants in Civil Suit No. 3 of 1950.

27. Now, there may be cases in which the quantity of any chemical to be used is so vital to the successful production of an article that It cannot be varied without changing the nature of the product. There are also cases in which the quantity which is mentioned in the specification is the best for the purpose of achieving the result, though variations in that quantity may not lead to any different result and the finished product, though the same, may be of a better or a worse quality than the one intended. Different principles must necessarily apply to these two kinds of cases. In the first case, the quality of chemicals used is an essence of the invention and a variation of its proportions might lead to the production of a totally different article. In the second case, the proportion of the chemicals to be used is not the essence of the patent and may not, by variation, lead to the production of a different article.

The patent here, to which more specific reference will be made hereafter, is a simple one. It consists of the preparation of a beverage by the decoction of gram husk. The decoction is presumably, according to the claim made, wholesome and takes the place of tea which by its prohibitive value is not available to poor consumers. To make the article resemble the original beverage, an attempt has been made to produce a similar colour in the resulting beverage. To that end, it is obvious, ferrous sulphate is used to tint the vegetable matter, so that the ultimate decoction may be of the colour which tea normally bears. A little more or a little less of ferrous sulphate might produce a richer or a weaker hue in the decoction; but it would not essentially change the nature of the article in respect of which the claim for the patent was made. If it were not so, the decoction which would be made by the use of a smaller or larger quantity of ferrous sulphate than is mentioned in the specification would produce an entirely different article. No such claim has been made before us and it is patent, regard being had to the simplicity of the whole specification, that it could not be made.

28. In connection with those cases in which the specification either does not name the quantity or states the quantity only approximately, their Lordships of the Privy Council have made a valuable observation in - Wanganui Sash v. Roland Moore AIR 1930 PC 115 at p. 116 (A) as follows:

> The proportions of the ingredients of the mixture are only mentioned in the specification as 'approximate' and 'sufficient', and could only be treated as referred to in the claim by virtue of further indefinite words, viz., 'substantially as described.' Their Lordships are of opinion that the proportions are not claimed by the patentee: but that upon the true construction of the patent, the patent (if valid) would be infringed by the manufacture of a tile composed of a mixture of the three ingredients in any proportions.

To the same effect are the observations of Fletcher Moulton L.J., in a case quoted at p. 126 of Terrell's Law and Practice relating to Letters Patent for Inventions, eighth edition, which run as follows:

> These two things - the delimitation of the invention and full practical directions how to use it - are in their nature almost antagonistic. As it is the duty of the

> inventor to give the fullest practical information to the public, he is bound to put in, if, for instance, the invention is a process, quantities and times which are the best he knows. But it would be very cruel to hold him to the invention when carried out only with those best quantities and times, because a person could then take his invention in substance if he did not take it in quite the best way, and the value of- the grant would be practically nothing.

29. We may also point out that Halsbury in his Laws of England, second edition, Vol. XXIV, states the law as follows:

> Proportions may be given broadly, unless the exact amount is of the essence of the invention and essential to success.

& quotes a number of cases including the ones we have referred to above. We are indeed sorry that in this Court we have not the reports of Patent Cases and we have, therefore, been unable to check up the references which have been made; but considering the fact that these references occur both in Halsbury's Laws of England, 2nd edition, Vol. 24, and also in Terrell on Patents, eighth edition, and also in Ormond's Law of Patents in India, we have no hesitation in accepting the principle enunciated by the learned editors of Halsbury's Laws of England. Relying, therefore, upon these observations we are clear in our minds that the patent in this case did not involve the use of any exact amount of ferrous sulphate in proportion to the gram husk and therefore the quantity of ferrous sulphate was not of the essence of the invention or essential to its success. Lack of proof, therefore, on this head did not militate against the case of the Plaintiff and, so far as the identity of the articles seized-and produced in Court with the articles produced by the Plaintiff is concerned, we have no hesitation in holding that it has been established.

30. There is, therefore, no doubt that the question of infringement of the Plaintiff's patent was proved in the case and that the Defendants would have been liable to damages and also to be prohibited by an injunction-against them. The learned Counsel for the Respondents, however, argued that the conditions of the patent had not been fully carried out, and that there was no notice to them from-some of the packages which the Plaintiff has been issuing containing his

product, that it was a patented article. He also contended that the articles which were sold under the patent did not bear the true name and description of the patentee. He argued, therefore, that the infringement cannot be brought home to his clients.

31. It is true that in all the packages which, are produced and put out for sale by the Plaintiff, the name of the patent is described as. "Agarwal and Company", whereas in the Letters Patent the description of the patentee is "The Bombay Agarwal Company". The Plaintiff has explained that this is due to an error in. printing. Similarly, the name "Golden Drink", under which the patented article is being, vended, does not make any difference to the infringement. The name "Golden Drink" is not the subject-matter of any registration or patent, and it is the process by which the article is produced which is protected. It is stated that the patent number does not figure on some of the brands which the Plaintiff puts out for sale, and therefore, there is no notice to the Defendants that they are infringing somebody's patent. As against this, it is sufficient to say that one of the brands which is marketed does bear the number of the patent and to that extent, there would be notice to the Defendants. However, the question of notice is irrelevant and a patent may be infringed even in ignorance. As is observed by Terrell at pp. 150 and 151 of his book:

> It is equally an infringement whether the Defendant acted in ignorance of the Plaintiff's patent or not. In - Proctor v. Bennis (1887) 4 RPC 333 (B) (at p. 356) Cotton, L.J., said: 'The right of the patentee does not depend on the Defendant having notice that what he is doing is an infringement. If what he is doing' is in fact an infringement, even although the Defendant acts in the way which was 'bona fide' or honest, he will not be protected from an injunction by that. It does not depend on notice'.

32. In the present case, however, we are perfectly satisfied that the Defendants did have notice of the patent of the Plaintiff. It is significant that an old employee of the Plaintiff, namely, Sitaram, who figures as Defendant 1, is now working with the Defendants. It is easy to see that the Defendants have been told of this process by Sitaram, even if they did not get it from the Letters Patent, and

that they are working in conjunction with an old employee of the Plaintiff. It is clear that Sitaram, who had worked for several years with the Plaintiff, must have known that it was a patented process, and when he took on the work with the Defendants, it is obvious that he in conjunction and collusion with the other Defendants, started to infringe the patent of the Plaintiff.

33. It was next contended that according to the claim and the specification in the Letters Patent the product was to be issued in air-tight tins and the learned Counsel for the Respondents produced for our inspection the paper packets in which the product of the Plaintiff is now being marketed. Such packets are also produced in the case and were also exhibited to us by the Counsel for the Respondents as handed over to him by his clients. There is no doubt, therefore, that the Plaintiff is selling his product in paper packets instead of air-tight tins as is stated in the Letters Patent. We do not know whether the Plaintiff has not perfected the technique by which he can dispense with the costlier tins and resort to the paper package. The selling or packing of a thing in air-tight tins, in the circumstances of the case, was not an essential condition of the patent and could be departed from if the circumstances changed. We are quite clear in our minds that the vending of the produce of the Plaintiff in paper packets instead of airtight tins as mentioned in the Letters Patent does not militate against the case. It may also be pointed out that though the written statement was amended on 18-1-1950, the only condition which was mentioned was that the original and the amended specifications did not sufficiently describe the process and the omission was fraudulent. There was no reference either to the labels or to the name or to the air-tight tin packages. If this had been pleaded, the Plaintiff would have been in a position to prove that by a change in the process of packing or manufacturing they have been able to dispense with the tins.

34. We are, therefore, satisfied on the evidence in the case that the patent (if valid) has been infringed and the Plaintiff in both the suite is entitled to a permanent injunction against the Defendants in the two suits, as also to damages as claimed. There is nothing to prove the extent of the sales effected and, under

an arrangement arrived at between the parties, the production of the impugned article is now in suspense. There is, however, proof that 67 bags were sold in Bombay for Rs. 2000/-; and considering the cheapness of the process, it is manifest that considerable profit must have, been made. We are, therefore, of opinion' that the damages claimed are reasonable in all the circumstances of these two cases.

35. This brings us to the question of the validity of the patent which has been granted to the Plaintiff. We may mention here that in reaching the above conclusion we have taken into account the pleas which have been raised for getting the patent revoked. Indeed, the law is that pleas sufficient for the revocation of the patent can be taken as a defence in a suit for infringement of the patent, and therefore it must not be taken that we reached the above conclusion without adverting in our minds to the various pleas on which the grant of patent itself is challenged. For convenience we have deferred the discussion of them up to this moment. We now proceed to discuss the question of the validity of the patent granted to the Plaintiff.

36. It is necessary to bear in mind the observations of their Lordships of the Privy Council in - James Lewis Kraft v. Oliver Kenneth McAnulty AIR 1931 PC 279 (C) where their Lordships observed as follows:

> All the Judges, who have given careful consideration to the patent, formed the opinion.' that it contained subject-matter and utility. Issacs J. said that it was mot in controversy that the patentee's 'lucky disco very'...might well have been made the subject of a patent. These opinions would lead their Lordships, in accordance with well-known principles, to approach the case with a desire to uphold the patent as valid; nor do they overlook the conduct of the Defendant in the action which Rich J. described as of an unmeritorious; character, and to which Henchman J. and Sir Adrian Knox rightly applied stronger terms.

37. In cases of patents we have to find out whether there is a proper subject-matter of the patent: also whether there is novelty and, lastly, whether there is utility. By the 'subject-matter of a patent' is meant the exact advance upon existing knowledge which the patentee claims. The subject-matter must be of

substantial proportions. But it may be slight if it conduces to a better result than what had been achieved beforehand. The subject-matter of a patent is, of course, intermixed with the question of what is called 'obviousness' & 'novelty', to which we shall presently refer. We have to-find out in the present case what is the subject-matter of the patent.

38. Accordingly to the claim, which is not so adequately described except in the preamble, it is an "improved powder composition for cold and hot drink from grain husk" and; in the specifications it is stated:

> The invention relates to the preparation of an improved powder composition used for cold or hot drink, for consumption by poor people. This powder is mainly prepared from corn husk. The most suitable grain husk used for this composition is taken from the grains of gram and Tur (pulse).

It is to be stated that the subject-matter of the patent was not attacked on the ground of insufficiency. At the stage of this appeal we questioned the learned Counsel for the Respondents about the Clauses under which he impugned the patent, and he confined himself to Clauses (d) and (e) of Section 26(1), Patents and Designs Act. These Clauses read as follows:

> (d) that the invention was not, at the date of the patent, a manner of new manufacture or improvement;
>
> (e) that the invention does not involve any inventive step, having regard to what was known or used prior to the date of the patent.

Similarly, it is obvious that the utility of the invention, which is the subject-matter of Clause (f), is not questioned. Indeed, the greatest proof of the utility of the invention (if upheld) would be the proof of direct imitation by others. There is ample proof in the case that this drink has become quite a favourite, and is vended at the railway stalls under the sanction of the railway authorities. However, that is not a matter on which we have to express our opinion. We confine ourselves to the line of attack which has been adopted by the Defendants in the case in their counter claim and which has found favour with the learned single Judge.

39. In support of their claim for revocation of the patent the Defendants in the case have produced evidence of two kinds. They have attempted to prove that long before this patent was taken out the Plaintiff itself was manufacturing & selling this powder to the public. They have also attempted to prove that others were also manufacturing and selling similar article before the grant of the patent to the Plaintiff. It may be stated, however, that they do not claim to have produced the article themselves prior to 1949 and 1950. The patent was in operation for no less than eight years before the present action was brought. It appears that before these suits, another suit had been directed against one Dhiraj, who compromised it and took out a licence from the patentee. Beyond this there is no proof that the patent had been infringed by any person after its grant in 1942.

40. We have thus before us a case in which the patent was not infringed by anyone except Dhiraj & the present Defendants. Dhiraj compromised the case and took out a licence. The Defendants have not submitted to the patent and they questioned it. It does not appear that during these long eight years the patent was ever questioned or that at the inquiry which took place before the Controller there was any objection filed on behalf of any person. We have, therefore, to construe the evidence which is entirely oral, to find out whether the patent ought to have been granted on the date it was, because it was not a manner of new manufacture or improvement or because it did not involve any inventive step, having regard to what was known or used prior to the date of the patent.

41. Before dealing with this subject, we shall refer to the observations of their Lordships of the Privy Council in - Canadian General Electric Co. v. Fada Radio AIR 1930 PC 1 (D). That was a case from Canada and turned upon the interpretation of Chap. 69 of the Revised Statute of Canada of 1906. But in dealing with this matter their Lordships adverted to the English practice as being opposed to the interpretation which had been placed upon the Canadian Statute by the Supreme Court in Canada. They made observations which are pregnant

with meaning and which, we, with the utmost deference, adopt as our own. Their Lordships observed as follows at p. 5:

> This is a very far-reaching pronouncement. It undoubtedly overturns patent law as understood in England, for it is quite certain that in English law if A applied for and took out a patent it would be neither here nor there for B to come forward and say, 'I will show that I had already made the discovery, but I kept it to myself.' A had made a contribution to the public by showing them how to practice the invention. B had made no such contribution, and therefore he had no rights in the matter. Also it obviously opens the door to defeat any invention, it may be after a long space of time when it has shown itself to be really valuable, by parol evidence which may be hard to check.... It must be clearly kept in view that the date of the knowledge or use by any other person is a date before the invention, not before the patent. This therefore lets in parole evidence to uphold, just as it has let it in to cut down.

42. We have, therefore, to examine in this case, which is entirely buttressed by oral evidence led by the Defendants, whether the patent was in respect of a "new manufacture". Emphasis has not been laid on the word "manufacture" but on the word "new". But if it had been laid on the word "manufacture", we feel that this would have amounted to be manufacture. The process here consisted in producing a dry powder which could by infusion make a beverage. "Manufacture" has been defined in Section 2 (10) of the Act as follows:

> 'Manufacture' includes any art, process or manner of producing, preparing or making an article, and also any article prepared or produced by manufacture.

The definition is a wide one and the produced article as well as the manner of production amount to manufacture. We may quote here also the observations of Abbott, C.J., in - R. v. Wheeler (1819) 2 B & ALD 345 at p. 349 (E) which, in our judgment, are a clear exposition of the term as understood in patent law and are apposite to explain the ambit of the definition under the statute we are considering. The learned C.J. observed as follows:

> Now the word 'manufactures' has been generally understood to denote either a thing made, which is useful for its own sake, and vendible as such, as a medicine, a stove, a telescope, and many others, or to mean an engine or

> instrument to be employed either in the making of some previously known article, or in some other useful purpose, as a stocking frame, or a steam engine for raising water from mines. Or it may perhaps extend also to a new process to be carried on by known implements, or elements, acting upon known substances, and ultimately producing some other known substance, but producing it in a cheaper or more expeditious manner, or of a better or' more useful kind.

The amplitude in which the definition of the word 'manufacture' is couched in the Indian Act and the observations of the learned C.J. leave no manner of doubt that both that the process here as well as the finished powder must be treated as 'manufacture'. Indeed, the definition is an inclusive one and its ambit is not to be confined to what is stated there. Its ambit is larger and we are, therefore, disposed to take into consideration the observations of the learned C.J.

43. Placing the emphasis now on the word 'new' we have to find out whether there was what is called in English law 'any novelty' about 'the process. It is true that the action of ferrous sulphate upon tannic acid is well known in trades connected with dyeing, tanneries and allied industries. It was, however,' not put to the use to which it was when this colouring was resorted to simulate the colour of tea in a decoction made, not from tea leaves, but from grain husk. To that extent there is the subject-matter of the patent and also novelty, because the attraction of the people to this homely brew would depend not only upon its usefulness and taste, but also its pleasing appearance, so that they could drink it in substitution of the other beverage more expensive and difficult to get. It is this process - this manufacture - which is the "subject-matter" of the patent and which, if new at the time the patent was granted, would sustain the patent unless otherwise impeached.

44. In determining the application of the two Clauses on which the patent is impeached, it is necessary to bear in mind the distinction between them. Under Clause (d) the patent can be defeated if it is not "a new manufacture or improvement", thereby indicating that 'qua' manufacture it was being indulged in by others prior to the date of the patent. Clause (e), however, relates to a totally

different matter and is based upon the lack of inventive quantum in the new process. In that Clause the emphasis is laid upon existing knowledge and the use to which that knowledge was put and, with that background, one has to see whether the new invention involves any inventive step at all. We must, therefore, in the present case, keep these two distinctions in mind and attempt to resolve the controversy between the parties, first, with advertence to the existing kinds of manufacture before the date of the patent and then to the existing knowledge and the possibility of this step being taken by someone without there being an inventor,

45. The word "invention" has been defined, in the Act. The definition reads as follows:

> 'invention' means any manner of new manufacture and includes an improvement and an alleged invention.

The definition is not too precise for our purpose, because it throws us back upon the Clauses which we are considering. But a definition of 'invention' given by their Lordships of the Privy Council is of great utility and to that we address ourselves here. In - Pope Appliance Corporation v. Spanish River Pulp and Paper Mills Ltd. AIR 1929 PC 38 (F) their Lordships observed as follows at p. 43:

> It must be remarked that in almost every patent for mechanical combination (and we would add respectfully also in chemical combinations) the elements are old. It must also be considered that there may be invention in what, after all, is only simplification.... After all, what is invention? It is finding out something which has not been found out by other people.... There are many instances in various branches of science of independent investigators making the same discovery. That does not prevent the one who first applies and gets a patent from having a good patent, for a patent represents a quid pro quo. The quid to the patentee is the monopoly; the quo is that he presents to the public the knowledge which they have riot got. That knowledge the other inventor has kept sealed in his own breast, and he therefore cannot complain that his rival got the patent. And if this is the case when a person can show, that he actually made the discovery surely that is a much stronger case than the present, when the objector does not say that he did discover, but only that if he had experimented

> he would have discovered. The real invention often may be and is just the last element of the combination.

46. In the present case, the Defendants do not claim that they are the true inventors of the process. They have not even named the true and real inventor. They merely say that others, including the Defendants, were manufacturing this product on a commercial -scale before the application for patent was made. We have, therefore, to bear in mind that for practical purposes the present Plaintiff must be regarded as the inventor who brought the process to the notice of the public, though by doing so he claimed a monopoly to himself. Unless it can be shown that it was not either a new process because the knowledge of the manufacture was public or that, regard being had to the knowledge which was then existing, there was no inventive step, the patent cannot be defeated. These two matters necessarily fall within different categories and must be dealt with in a different manner. We may also point out that the question of prior user also falls into two separate categories, namely, user by the patentee himself and user by other persons. We shall take these matters in the same order.

47. Beginning, therefore, with the question whether there was any inventive step at all, we may say that we have already found that the preparation of a powder which would result in decoction resembling tea and be at the same time palatable and invigorating was a sufficient quantum of invention to sustain the patent. It is not shown that the action of ferrous sulphate on grain husk as a colouring medium was known to science. It is not stated that anybody thought of it earlier, except those who have been named as the manufacturers of a similar powder before the patent. Thus the matter resolves to an examination of the evidence which half been led on the second part of the case, and we need not, therefore, concern ourselves with the inventive quantum, which impliedly has been conceded in favour of the Plaintiff.

48. As we have already stated, the question whether it was publicly used, that is to say, that it was not new, falls to be considered under two different heads. "Public user", which is a term of art used in English law, has been defined on

more than one occasion, and the definitions given by eminent judges throw; a considerable flood of light upon how to approach this vexed question. In - Carpenter v. Smith (1842) 152 ER 127 (G) the "public use and exercise" of an invention, which inhibited it from being called new, was discussed and it was laid down by Lord Abinger, C.B., that "the public use and exercise of an invention means a use and exercise in public, not by' the public", that is to say, that it should become a knowledge not confined to the claimant but to others. A better definition of this is to be found in a decision of the House of Lords in - Patterson v. Gas Light & Coke Co. (1877) 3 AC 239 at p. 244 (H) in the speech of Lord Blackburn. This is what the noble Lord stated:

> It is not necessary that the invention should be used by the public as well as known to the public. If the invention and the mode in which it can be used has been made known to the public by a description in a work which has been publicly circulated: - Stead v. Williams (1844) 7 M & G 818 (842) (I); or in a specification duly enrolled: - Bush v. Fox (1856) 5 HLC 707 (J); - Betts v. Menzies (1862) 10 HLC 117 (K); it voids the patent, though it is not shown that it ever was actually put in use.

We might add that the practice of it by others would also disclose that amount of knowledge which would inhibit its being characterised as new and to that end we must, therefore, examine the evidence led on behalf of the Defendants.

49. The evidence which has been led in this case of other persons having used a similar process for manufacturing a substitute for tea powder conies in this case from a number of witnesses cited by the Defendants. This evidence has been accepted by the learned single Judge, though he qualified himself by saying that but for the admissions made by the Plaintiff, to which we shall refer presently, he would have been disposed to rejecting it entirely. The main witnesses in this connection are Swami Sheoram Ponkshe (D.W. 2), Municipal Engineer; Dr. K.G.G. Mudaliyar (D.W. 3), Narayan contractor (D.W. 4), Ramchandra Raoji (D.W.5), Mannu (D.W. 6) and Sitaram (D.W. 7). We shall scrutinize this evidence to see if others manufactured this kind of article before the patent or not. The first two witnesses, namely, Ponkshe and Mudaliyar, do not speak of

manufacture by others. D.W. 4 Narayan contractor, who also admits that he is a carpenter by trade, stated that from 1938 to 1942 he prepared this kind of artificial tea. He also gives a list of persons who also indulged in such manufacture. He names Vithal Lala, Natu, Maoji, Dhiraj, Ramlal, Deulal and Mukundlal. In so far as Ramlal, Deulal and Mukundlal are concerned, they are partners of the Plaintiff firm and their manufacture would be the subject of a separate examination under another head. Dhiraj, as we have already pointed out above, was a licensee; and no attempt was made to controvert the sworn statement of the Plaintiff's witnesses on this point. It was easy to examine Dhiraj and there was no burden, at least in the matter of revocation of the patent, upon the Plaintiff to have examined Dhiraj. We must, therefore, accepting the evidence on this point, hold that Dhiraj attempted an infringement of the patent, was sued and accepted a licence in compromise of that suit. That leaves out three persons - Vithal Lala, Natu and Maoji, none of whom has been examined, and, apart from the sworn testimony of D.W. 4 Narayan, there is no other evidence to corroborate him.

-51. The evidence of Narayan (D.W. 4) itself is not worthy of much credit. Now, this appears to be too thin an evidence on which a patent which has been in vogue for 8 or 9 years, should be revoked. We may recall the words of their Lordships of the Privy Council which we have quoted elsewhere that a patent should not be defeated after a long lapse of time, when the challenge is based on oral testimony which is hard to check. A witness of this character can easily be procured and there is no means of verifying the authenticity of such a witness. Therefore, if, as their Lordships said, the subject-matter, utility and novelty and to be found, the Courts should do everything to upheld a patent, and not defeat it.

52. This brings us to the next limb of the that the Plaintiff itself was manufacturing this artificial tea for sale prior to the grant of the patent. Here again, the question is not easy to resolve. If the inventor secretly prepared the article and sold it to public in a manner that the public would not be possessed of

the knowledge how it is manufactured, the patent can still be applied for. There may be others who may also be preparing the stuff, but unless it be a question of a true invention, the patent can be taken by one who wants to get the public possessed of the knowledge of its preparation. That follows from the quotation in - AIR 1929 PC 38' (F) (op. cit. sup.). The learned Counsel for the Respondents in this connection drew our attention to two exhibits, D-3 and D-4, which have particularly weighed with the learned single Judge in reaching the conclusion that the Plaintiff was manufacturing and selling this product even prior to the patent. Of these exhibits, Ex. D-4 is the pertinent one. That exhibit was put to Ramlal (P.W. 2), who admitted that the document was signed by him. No question was put to him to draw out from him whether there was any truth in the statement. It is obvious that it was sought to be used as a piece of contradiction, but the provisions of Section 145, Evidence Act as explained by their Lordships of the Privy Council in - Bal Gangadhar Tilak v. Shrinivas Pandit AIR 1915 PC 7 (11) (L) have not been followed. That apart, even if it is held as admission by a partner of the Plaintiff against the interest of the Plaintiff, it was incumbent to plead the fact of this admission in the written statement. Every admission is capable of being explained or withdrawn, as was laid down by Bayley J., in the leading case of - Heane v. Rogers (1829) 9 B & C 577 (M). No opportunity appears to have been afforded to the Plaintiff to explain or, if so advised, to withdraw the admission. It is apparent that the admission was made in an application in a police case in which the Plaintiff company was in danger of being prosecuted. It is possible that a certain amount of exaggeration entered in that application and instead of stating that they had been selling this stuff for eight or nine years, they stated that they had been selling it for 12 years.

53. Even apart from this, it is permissible for a person to manufacture and sell the goods without endangering a future patent. The law on the subject has been laid down by Madeley J., in - Ganendro Nath v. Dhanpal Das AIR 1945 Oudh 6 (N). The test of publicity is whether or not the secret process was being carried out with the assistance of people who were not bound to secrecy. In the present

case, there is no proof that any person other than the Plaintiff was in the secret and therefore we cannot hold that the artificial tea was manufactured in a way which would make the process public knowledge.

-57. We shall now touch briefly upon the evidence which has been led in this behalf.

58. We are, therefore, satisfied that there was not that lack of newness or inventive step which would defeat the patent today. In view of this, we must, differing respectfully from the learned single Judge, uphold the patent as also the case of infringement.

59. It only remains to observe that the Defendants in this case obviously maintained account books and could have easily proved the ingredients which go to make up their own product (Art-D). Ramchand Diwanchand in the other case admits that there are account books of this business, but those account books have not been filed. It may also be observed that the Panjabi father and son and the other two Defendants are obviously working together. It must be remembered that after the business moved from Madhaodas Amarsi Ginning Factory compound, it was located in the Dal Karkhana of the Panjabi Defendants and thereafter the consignment of 67 bags to Wadi Bunder was at their own instance. They have also jointly applied for a patent find the proceedings are pending. The connection between the two sets of Defendants, therefore, is completely established and there is no need, therefore, to make any distinction in their cases. We may further observe that Laxmikant Deshpande has obtained a patent for "Amrutpeya", which, according to them, is prepared from soya beans. It was also pointed out to us during the course of the arguments that on appeal that order of the Controller has been set aside and the case is pending. In any event, whether or not he got a patent for some other invention of his own would not militate against the patent granted to the Plaintiff. Since these matters are irrelevant for the purposes of the present case, we need not advert to them in more detail.

60. In the result, both the appeals are allowed with costs and the Plaintiff's suits in the Court below will be decreed with all costs on the respective Defendants. A copy of this judgment shall be forwarded to the Controller of Patents, Calcutta.