IN THE HIGH COURT OF CALCUTTA

DATED: 11.04.1996

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THE HONOURABLE MR. JUSTICE NISITH KUMAR BATABYAL

Suit No. 245 of 1993

Hindusthan Lever Limited ... Plaintiff

Vs.

Godrej Soaps Limited and others ... Defendants

ORDER

1. This hearing arises out of an application for temporary injunction filed on behalf of the plaintiff. In the suit the plaintiff prays for leave under Clause 12 of the Letters Patent. Decree for permanent injunction restraining the defendants, their servants, agents, and assignees etc. from in any way in fringing or attempting to infringe Patent No. 170171 of the plaintiff; Decree for permanent injunction restraining the defendants, their servants, agents etc. from in any way manufacturing, selling or offering for sale or advertising any toilet soap bearing the Trade Mark 'VIGIL' or any other trade mark and having the composition that is covered under and/or within the range of Patent No. 170171 of the plaintiff. Delivery upon oath of all toilet soaps already manufactured and in possession, power and custody of the defendant No. 1 and/or the defendants Nos. 2 and 3 and/ or their agents and servants that in any way infringe and/ or have been manufactured in accordance with the Patent No. 170171 of the plaintiff and marked under the trade mark 'VIGIL' or any other trade mark etc. etc., a Decree directing the defendants to render a true and faithful account in respect of the infringed soaps manufactured by the defendant No. 1 and sold by the defendants that are in accordance with the Patent No. 170171; a Decree for Rs.

10,00,00,000/- and in the alternative, an enquiry into the loss and damage suffered by the plaintiff and decree for the amount found due upon such enquiry etc. etc.

2. The petitioner/company is engaged in the manufacture of various kinds of soaps, detergents, cleaning preparations, chemicals, fertilisers, etc. and is a leading manufacturer in this country, of soaps and detergent and their products are sold under different brands and enjoys considerable goodwill and reputation. The respondent No. 1 also carries on business of manufacture of various brands of ' soaps and detergent and is one of the competitors of the plaintiff-company. The respondent No. 2 is a Company which has been incorporated recently and is a collaboration of two Companies, i.e., respondent No. 1 and Proctor and Gamble India Ltd. which is a subsidiary of an American Company having its Headquarters in U.S.A. The respondent No. 3 is one of the distributors of the respondents Nos. 1 and 2 for sale of their products in an around the city of Calcutta. The plaintiff/ petitioner holds and owns more than one hundred and seventy active Patents granted by the Government of India under the Patents Act for inventions in different fields including detergents, soaps, their process of manufacture etc. etc.

3. On or about 2!st September, 1988 the petitioner-company made two applications for Patent in respect of an invention relating to detergent bars suitable for personal bathing or fabric washing under application No. 275/BOM/88 and the improved process for preparing detergent bars suitable for personal or fabric washing under application No. 274/BOM/88. The said two applications were accepted for grant and the acceptances were notified in the Official Gazettes. The Patent Application No. 275/BOM/88 which was accepted under Serial No. 170171 was duly granted and sealed by the Controller after the disposal of the proceedings under Sec. 27 of the Patents Act, 1970 initiated at the instance of the defendant No. 1, before the Deputy Controller of Patents, Bombay. The respondent No. 1 filed opposition proceedings against the Patent Application No. 274/ BOM/88 accepted and published under Serial No. 170480

and the opposition was pending before the Dy. Controller of Patents, Bombay. After hearing the parties the Dy. Controller of Patents, Bombay, directed the Patent Application No. 170171 to proceed to sealing and accordingly the Patent was granted and sealed on 23rd April, 1993. The petitioner has duly deposited the overdue as well as current renewel fees upon the sealing of Patent No. 170171 and the Patent is at present valid and subsisting. Upon acceptance of the said application, the specification of other documents relating to the said two Patent Applications were laid upon to public and thus, all the information relating to the inventions were made open to the public.

4. The petitioner-company had at the material time and still has a Committee of Senior Managers which review the quality of its product and also the quality of its competitors' products on a regular basis. The respondent No. 1 is the manufacturer of a bathing bar and/or a soap named 'VIGIL' which is marked by the respondent No. 2 and distributed by the respondent No. 3. The said Committee of the petitioner upon finding that the said product 'VIGIL' had the legend 'ALL NEW" and "THE LONGER LASTING SOAP" caused the said product 'VIGIL' to be analysed to ascertain its composition. The personal washing bar 'VIGIL' (also called a toilet soap) with manufacturing dates of January, February and April, (993 were analysed at the petitioner's laboratories and the petitioner came to know that the composition of the said bathing soap 'VIGIL' was within the raoge of all or some of the claims of Patent No. 170171 of the petitioner which stands sealed and granted. A copy of the analysis report has been annexed with the application of injunction and marked with the letter "C".

5. By reason of the Patent Specification No. 170131 of the petitioner, the patentee enjoys exclusive right and monopoly in respect of the composition consisting of:--

(i) 25 to 60% by wt. detergent of which at least 50% by wt. is soap.

(ii) 40 to 55% water insoluble structurant including starch and having a particle size of between 0.2 to 30 um. and,

(iii) 8 to 15% by wtc. water.

6. The respondents had access to the specification of Patent No. 170171 since the notification after acceptance, i.e., on 15th February, 1992 and they have wrongfully and illegally copied and materially utilised and reproduced the composition of the said Patent No. 170171 and have thus wrongfully and illegally infringed the said Patent of the petitioner.

7. The toilet soap of the respondents sold under the trade mark 'VIGIL' has a wrapper which also bears the words "ALL NEW" very prominently and dislinclly together with the words "The LONGER LASTING SOAP" is to make the trade and public believe that the toilet soap is an improved product. The said soap is available throughout the country including Calcutta through almost all retail outlets and the respondents have taken wrongful advantage of the publication of the invention of the petitioner under Patent No. 170171 and Patent Application No. 274/ BOM/88 in the Official Gazette notified for opposition purposes. On examination of the wrappers of the aforesaid samples of the toilet soap of the respondents, it is found that there is no mention of the TFM (Total fatty matter) content of the soap. It is usual in the trade to mention the TFM level and different soap manufacturers including the respondent No. 1 and the petitioner indicate all TFM level of the TFM in the wrappers. The respondents Nos. 1 and 2 have deliberately and with a mala fide motive suppressed the use of the low TFM in the impugned product in view of the consumer perception on high TFM level. The respondents have not indicated the TFM level of the impugned toilet soaps in the wrappers as the petitioner's said Patent No. 170171 is the invention of a composition of detergent bars containing low TFM but having satisfactory properties.

8. By reason of the aforesaid wrongful and illegal acts of the respondents the petitioner company has suffered an irreparable loss, damage, injury and

prejudice. There exists no standard for ascertaining the actual damage caused or likely to be caused to the petitioner company and if the respondents are permitted to carry on and continue with its wrongful and illegal acts, compensation in money could not be afford adequate relief to the petitioner.

9. Hence the prayers for temporary injunction as follows:--

> "(a) an order of injunction restraining the respondents, their servants, agents etc. from in any way infringing the Patent No. 170131 of the petitioner;
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> (b) a temporary injunction Restraining the respondents, their servants, agents eic, from manufacturing, selling etc., the impugned bathing bar Vigil with the words "ALLNEW" AND "THE LONGER LASTING SOAP" which uses and/or utilises the composition of the Patent No. 170131 of the petitioner; and
>
> (c) such further or other orders be made as the Court may deem fit and proper.

10. In the affidavit-in-opposition on behalf of the respondent No. 1, it has been stated that the respondent No. 1 is a multinational company and a competitor to the plaintiff in soap industry. The first respondent is a pioneer in the field of manufacture and sale of Toilet Soaps in India for the last 60 years. Since 1987 the first respondent has been manufacturing and selling the brand of low-priced popular Toilet Soap under the Trade Mark "VIGIL". Since November, 1991 they have been selling the Toilet Soap under the same Trade Mark "VIGIL" with a variant 'Pink'. The said product is sold in a wrapper and bears the words "All New" and the words "The Longer Lasting Soap". The said soap is marketed all over India by the second respondent through a net-work of 2000 stockists.

11. Although the first respondent has been utilising various admixtures for various soaps, they did not apply for or obtain any patent for such admixture as a substance obtained by a mere admixture is not an invention within the meaning of Section 3(e) of the Patents Act, 1970. According to the respondent No. 1, the alleged invention under the Patent No. 170131 of the plaintiff is a mere admixtures and is not an invention as claimed by them. The first respondent has challenged the order passed by the Deputy Controller of Patents, Bombay by

filing an appeal being Misc. Petition No. 24 of 1993 in the Bombay High Court, that matter is still pending.

12. It has been further stated that the plaintiff and the first respondent and second respondent have their registered offices in Bombay, the impugned application No. 170131 of the plaintiff-petitioner for registration of their invention was filed in the Patent Office at Bombay and the impugned order of the Deputy Controller of Patent was also passed in Bombay. The appeal from the said order of the Deputy Controller of Patents, Bombay is now pending in the High Court of Judicature at Bombay. Still the plaintiff-petitioner has filed the suit in Calcutta High Court so that the respondents are embarrassed and are compelled to come over to this place without any allegations that the petitioner or their agents had purchased any sample of the soap 'VIGIL' at Calcutta. The next contention of the objector, respondent is that the impugned Patent of the petitioner has been sealed recently. The law is well settled that the Courts will refuse to grant injunction and at any rate interim injunction when the patenl in question is a new one the validity of which has not been established in any legal proceedings and the validity whereof is under serious dispute or challenge. When the patent which is sought to be enforced is a recent one, an interlocutory injunction should not be granted. It has also been submitted that the petitioner has, not manufactured and marketed any low-priced popular soap using the composition of the alleged patent. Whereas the respondent No. 1 has been manufacturing and selling such low priced popular soap for a longtime. If an order of injunction as prayed for by the petitioner is passed, it would cause extreme: hardship on the first respondent leading, to a situation of impossibility of compliance with the order, keeping valuable labours and equipments of production idle.

13. It has been stated in the objection that purported expert opinions which have been filed with affidavits in support of the petitioner for injunction by the plaintiff are suspect. The purported expert opinion by way of three affidavits are guilty of making false statements on oath. In the analysis report referred to in the affidavit of Mr. Chittaranjan Mitra, "insoluble matter of alcohol" is mentioned.

In the analysis report annexed to the affidavit of Prof. Dr. Chakraborty, the very sarnu matter is mentioned as "Matter Insoluble" and in the report of Messrs. Jewel Metelochem Laboratories, Bombay, the tests have been done for "alcoholic insoluble" matters and not for "Water Insoluble Matter". It has been further ascertained that the plaintiff-petitioner has no lawful right, title or interest to prohibit the respondent No. 1 from using their alleged process or, alleged composition of the impugned Patent No. 170131. The respondent No. 1 has denied that the analysis of 'Vigil' soap in Annexures 2 and 3 to the injunction petition indicate a detergent and soap combination level between 40.8% and 42% as alleged or which includes soaps at a level which is more than 50% of the soap and detergent combination as alleged. None of the four reports relied on by the petitioner indicates "Water Insoluble" matter which is the term in the impugned patent.

14. It has been lastly submitted that if the petitioner is granted an injunction at this stage then it would enable the petitioner to appropriate a large chunk of the soap industry to itself and would result in stifling trade competition.

15. In support of their objections the respondent No. 1 have filed affidavit sworn by Dr. V. V.R. Subrahmanyam who is also an expert in the field of chemical technology. In his opinion, making detergent bars containing varying amounts of percentages of soap including non-soap detergent and water insoluble fillers, including starch and varying ranges of moisture (water) by plodding, is not new, but is a state-of-art technology, so also use of additives like water-soluble polymers to improve the quality of detergent, bars, which fall under the category of 'Combo Bars' is known and is not new.

16. In the affidavit-in-reply filed on behalf of the plaintiff-petitioner the material allegations made in the objection have been denied. It has been stated further that the respondent No. 1 in the opposition have not disclosed the composition of the impugned 'Vigil' soap. If the respondent No. 1 are not infringing the petitioner's patent, the simplest thing to do for the respondents would be to

disclose the composition. It has further been submitted that the proposition of law as made out in the objection petition is based upon the earlier Patent Act, 1911. The English law on the subject as laid down in Smith v. Grig, (1924) 1 KB 655, has been expressly not followed by English Courts and has been overruled by the decision of the House of Lords in the case of American Cynamide, 1975 RPC 513: 1975 AC 396.

17. It has been also stated that in the objection, alteration has been drawn to the fact that the analysis report mentioned "Water Insoluble" and "Alcohol Insoluble" whereas the Patent is for "Water Insoluble Particulate Structurant". It is well known that the BIS method for ascertaining water/alcohol insoluble particulate Structurant is normally through the route of alcohol and as such wherever the analysis has been done in alcohol, the report mentioned "Alcohol Insoluble" and whenever the matter insoluble has been indicated, the method of analysis has been indicated in the report itself. It has also been stated that it is common knowledge that to ascertain water-soluble to toilets bar, it has to be done in alcohol in order to ensure that all the soap is dissolved in alcohol and fully removed "but the starch in the process is not destroyed. It is well known that the expression matter insoluble indicated in the various reports are nothing but water insoluble particulate Structurant as given in the specification.

18. In the reply it has also been submitted the contention of the respondent No. 1 that they will suffer considerable hardship and irreparable loss and prejudice by the grant of injunction petition no prayer has been made for stopping of manufacture and sale of 'Vigil' soap manufactured by the respondent No. 1 but the only prayer is that the respondent should be restrained from using the plaintiff's patent in the manufacture of the said soap. So there is no question of exploiting a monopolistic situation. Whereas in the reply it has been stated that the report of Dr. Subramanayam suffers from contradiction and lack of reasoning. It has been stated that Dr. Subramanayam has conceded that the composition is a "State-of-art technology". The composition which is a "State-of-art technology" meaning "today's technology" cannot be thirty years old. It

has also been stated that the water soluble polymer is not an essential part of the petitioner's patent. It has been submitted that no reliance should therefore be placed on the report of Dr. Subramanayam overriding the opinion given by the expert of the petitioners.

19. On 12-7-1993, a learned Judge of this Court, on the petition for temporary injunction, passed an interim order in terms of prayer (c) of the petition restraining the respondents, their servants, etc. from manufacturing, selling or marketing or advertising the impugned bathing soap 'Vigil' with the words "ALL NEW" AND "THE LONGER LASTING SOAP" which utilises the process of composition of Patent No. 170131 of the plaintiff-petitioner or any composition which comes within the range covered by the said patent.

20. On 21st July, 1993, the learned Judge on hearing the parties passed the: following order :--

> "It has ordered that the defendants will be at liberty to sell soaps wherein TFM i.e. total fatty matter percentage is mentioned but will not sell any soap infringing the composition of the plaintiffs patent bearing No. 170131. Earlier interim order is modified to this extent only. Defendants will file their affidavit-in-opposition by 26th July, 1993; plaintiff will file reply by 28th July, 1993 and the injunction matter will come up for hearing as a 'Specially Fixed Matter' on 29th July, 1993."

21. Against that order two appeals were taken. One by Godrej Soaps Ltd. and the other by Procter and Gamble Godrej Ltd. The learned Appellate Court on hearing the parties was pleased to pass the following order:--

> "We, therefore, allow this appeal and set aside the orders under appeal. However, we direct that the appellants shall keep separate accounts of the manufacture and sale of the impugned product and furnish monthly statements of such manufacture and sale to the Advocate-on-Record of the plaintiff. We make it quite clear that we have not. expressed any opinion on the merits of the contentions. We were only concerned to decide whether at this stage any temporary injunction should be granted or not. The Court of the first instance will decide the issues raised after completion of the affidavits."

22. Against that order an SLP was filed in the Apex Court being SLP (Civil) No. (S) 13082/93. Their Lordships were pleased to record the following order :--

> "We are not inclined to interfere with the impugned interim order passed by the Division Bench of the High Court. We, therefore, request the learned trial Judge to dispose of the original petition within three months from today. In case the petition is not disposed of within the said period, then the further continuance of the interim order shall be reconsidered by the trial Court on the basis of the affidavits already placed on record, uninfluenced by any observations on fact or law made by. the Division Bench of the High Court. With this observation the Special Leave Petition is disposed of."

Matter has now come up before this Court for disiposal of the petition for temporary injunction.

23. The principles upon which an interlocutory injunction may be granted in a patent case are the same as in a case under the provisions of Order 39, Rules 1 and 2 of the Civil Procedure Code, though interim injunction restraining the defendant from infringing a patent does not come strictly within this scope of Order 39. The plaintiff in a patent case must show a prima facie case of an infringement and further that the balance of convenience and inconvenience is in his favour. In patent cases the onus of showing a prima facie case justifying the grant of an injunction is a heavy one and it is comparatively easy for the respondent to establish a defence sufficient to prevent the grant of such an injunction. In Hubbard v. Vosper, (1972) 1 All ER 1023 : (1972) 2 QB 84 at 1029, Lord Denning observed:-- "In considering whether to grant an interlocutory injunction, the right course for a Judge is to look at the whole case. He must have regard not only to the strength of the claimant but also to the strength, of the defence, and then decide what is best to be done. Sometimes, it is best to grant an injunction so as to maintain the status quo until the trial. At other times, it is best not to impose a restraint on the defendant, but leave him free to go ahead. For instance, in Frazer v. Evans, (1969) 1 All ER 8, although the plaintiff owned the copyright, we did not grant an injunction, because the defendant might have a defence of fair dealing. The remedy by interlocutory

injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules."

24. Mr. Chakraborty, Ld. Sr. Counsel, appearing on behalf of the plaintiff-petitioner has submitted that the patent application No. 275/BOM/88 which was accepted under SI. No. 170171 was duly granted and sealed by the Controller of Patents of Bombay. According to the Ld. Lawyer, Patent Application No. 274/BOM/88 published under Sl. No. 170480 was considered along with the objection filed by the Respondent No. 1 thereto by the Dy. Controller of Patents of Bombay, whodirected the Patent application to proceed to sealing end accordingly, the patent was granted and sealed on 23rd April, 1993. The petitioner/Company has duly deposited the entire dues upon the sealing of Patent No. 170171 and the patent is still valid and subsisting. It has accordingly been sub-milled by the Ld. Counsel that his client has been able to prove that there is a prima facie case for granting of an interlocutory injunction in this case.

25. So far as infringement of patent and the balance of convenience are concerned, it has been submitted, on behalf of the petitioner/company that the respondent No. 1, the manufacturer of a Bathing soap and/or a soap named 'VIGIL' which is marketed by the respondent No. 2 and distributed by the Respondent No. 3 on chemical analysis was found coming within the range of all or some of the claims of Patent No. 170171 of the petitioner. As a result of the wrongful and illegal acts of the respondents, the petitioner-company has suffered irreparable loss, damage, injury and prejudice. There exists no standard for ascertaining the actual damage caused or likely to be caused to the petitioner and if the respondents are permitted to carry on or to continue with the wrongful and illegal acts, compensation in money would not afford adequate relief to the petitioner. Therefore, the damage is irreparable and the balance of convenience or inconvenience is definitely in favour of the petitioner.

26. Mr. Goutam Chakraborty, learned counsel for the petitioner-company has relied upon the following cases in support of his contention. He has heavily

relied upon the principles laid down in American Cyanamid Company v. Ethicon Ltd., (1975) RPC 513 : 1975 AC 396 : 1975 (1) All ER 504. In that celebrated judgment, Lord Diplock at p. 539 made the following observations :--

> "The instant appeal arises in a patent case. Historically there was undoubtedly a time when in an action for infringement of a parent that was not already "well established", whatever that may have meant, an interlocutory injunction to restrain infringement would not be granted if counsel for the defendant stated that it was intended to attack the validity of the patent.
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> "Relies of this reluctance to enforce a monopoly that was challenged, even though the alleged grounds of invalidity were weak are to be found in the judgment of Scutton L.J., as late as 1924 in Smith v. Grigg Ltd., (1924) KB 655; but the elaborate procedure for the examination of patent specifications by expert examiners before a patent is granted, the opportunity for opposition at that stage and the provisions for appeal to the Patent Appeal Tribunal in the person of a Patent Judge of the High Court, make the grant of a patent now-a-days a good prima facie reason, in the true sense of the term, for supporting the patent to be valid and have rendered absolute the former rule of practice as respects interlocutory injunctions in action for infringement actions. In my view the grant of interlocutory injunctions in actions for infringement of patents is governed by the same principles as in other actions ....."

27. Mr. Chakraborty, learned counsel has submitted that in view of the above decision of the House of Lords, the view taken by a Division Bench of this Court in Boots Pure Drug Co. v. May & Baker Ltd, (52 CWN 253) should be taken as not laying down the correct principle of law. In that case, it was held that in order to get a temporary injunction against the infringement of a patent right, it is necessary that the plaintiffs should prove three things :--

> (a) that they have a prima facie right, that is to say, they have such evidence as would lead the court to come to the conclusion that the patent is prima facie a valid patent;
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> (b) they must prove by prima facie evidence that there has been an infringement on the part of the defendant; and
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> (c) that the balance of convenience is in favour of the plaintiffs.

28. As regards condition (a) it is a rule of practice that if a patent is a new one, a mere challenge at the Bar would be quite sufficient for the refusal of a temporary injunction, but if the patent is sufficiently old and has been worked, the court would., for the purpose of a temporary injunction, presume the patent to be a valid one. If the patent is more than 6 years old and there has been actual user it would be safe for the court to proceed upon this presumption.

29. Mr. Chakraborty, learned counsel has also cited Continental Paper Bag Co. v. Eastern Paper Bag Co., (1907) 210 US 1122 : 52 Law Ed 405, to show that even in case of non-user of a patent, it is quite competent for the court to grant injunction. In that case, the U.S. Supreme Court held, non-user of a patent, at least, if such non-use is not unreasonable and does not involve its rights of the public, will not justify the court of equity in withholding injunctive relief against infringement. Mr. Chakraborty, learned counsel has referred to this case presumably because the petitioner company in our case has not yet used the patent. The learned counsel in his inimitable style has put the crux of the problem in the following way : I have kept my newly acquired house vacant but you cannot trespass into it.

30. Mr. Chakraborty, learned counsel has cited Biswanath Prasad Radhey Shyam v. H.M. Industries AIR 1982 SC 1444. He has drawn the attention of this court to para 15 at p. 1447 which runs as follows :

> "15. As against this, Mr. Mehta, appearing for the respondent, submits that whether the process got patented by the respondent involves a method of near manufacture or improvement, is one purely of fact and should not as a matter of practice, be disturbed by this court. Even in cases of doubt -- proceeds the argument -- the court should uphold the patent. It is submitted that a patent is granted by the controller after due inquiry and publication and unless the contrary is proved, should be presumed to have been duly granted. In the instant case, it is urged, that presumption is wronger because the trial Judge as well as the Appellate Bench of the High Court have concurrently held that the process patented had utility."

31. Mr. Chakraborty, learned counsel, in his usual fairness, has also drawn the attention of this court to para 33 at p. 1450, of the reported judgment which runs as follows :

> "33. It is noteworthy that the grant and sealing of the patent, or the decision rendered by the Controller in the case of opposition, ' does not guarantee the validity of the patent which can be challenged before the High Court on various grounds in revocation or infringement proceedings. It is pertinent to note that this proposition, viz., the validity of a patent is not guaranteed by the grant, is now expressly provided in S. 13(4) of the Patents Act, 1970. In the light of this principle, Mr. Mehta's argument that there is a presumption in favour of the validity of the patent cannot be accepted".

32. Mr. S. B. Mukherjee, learned counsel appearing, on behalf of the Soaps Ltd. has opposed the contention of the learned counsel for the petitioner. He has first drawn the attention of the Court to the meaning of the term 'patent' as given in standard vocabularies and legal dictionaries. He has drawn the attention of the Court to Halsbury's Laws of England, 4th Edition, Vol.35 (1981), para 303 which runs as follows:-- The word 'Patent' as used in this title denotes, a monopoly right in respect of an invention."

33. Mr. Mukherjee, has then drawn the attention of the Court to page 329, under the heading 'Patent' of 'Words and. Phrases', Legally Defined, 3rd Edn., Vol.3, K-Q, edited by John B. Saunders (1989) which runs as follows :-- "The truth is that letters patent do not give the patentee any right to use the invention -- they do not confer upon him a right to manufacture according to his invention. That is a right which he would have equally effectually if there were no letters patent at all; only in that case, all the world would equally have the right. What the letters patent confer is the right to exclude others from manufacturing in a particular way, and using a particular invention".

34. He has next drawn the attention of the Court to Black's 'Law Dictionary', 6th Edition (1990), at p. 1125, where 'Patent right' has been defined as "a right secured by patent; usually meaning a right to the exclusive manufacture, use and sale of an invention or patented article".

35. Mr. Mukherjee has also drawn the attention of the Court to the meaning of the expression 'privilege' at page 1197 of the said Dictionary which runs as follows:-- "A particular and peculiar benefit or advantage enjoyed by a person, company or class, beyond the common advantages of other citizens. An exceptional or extraordinary power of exemption. A peculiar right, advantage, exemption, power, franchise or immunity held by a person or class not, generally possessed by others".

36. Mr. Mukherjee, has also drawn the attention of the Court to the meanings of the expressions 'Patent' and 'Privilege' as given in 'The New Shorter Oxford English Dictionary' edited by Lesley Brown, Vol. 2, N-Z (1993) at pp.2121 and 2360. -- In this Dictionary, 'patent' 'is a document constituting letters patent, especially a licence from a government to an individual or organisation conferring for a set period, the sole right to make, use, or sell some process or invention, a right conferred in this way'. The term 'privilege' has been interpreted as meaning a right, advantage or immunity granted to or enjoyed by a person or a class of people beyond the usual right or advantages of others.

37. Mr. Mukherjee has drawn the attention of the Court to S. 48(1) of the Patents Act, 1970, where the term 'exclusive right' has been substituted in place of the term 'exclusive privilege' used in S. 12(1) in the Indian Patents and Designs Act, 1911. It has been submitted by him that the substitution of the expression 'privilege' by the expression 'right' has not made much of a difference because a 'privilege' is nothing more than a 'right' which is conferred by the crown. This aspect of right has been explained in the Dictionary as stated above. This submission has been made by Mr. Mukherjee, learned counsel, especially to meet the point raised by Mr. Goutam Chakraborty, learned counsel, appearing on behalf of the petitioner that under the Act of 1911, Patent was only a privilege and not a right.

38. Moreover, Mr. Mukherjee, relying upon the decision in Bishwanath Prasad Radheshyam v. H. M. Industries AIR 1982 SC 1444 has submitted that the fact

that the controller has granted patent does not give rise to a presumption in favour of the validity of the patent. The grant and sealing of the patent or the decision rendered by the Controller in the case of opposition does not guarantee the validity of the patent which can be challenged before the High Court on various grounds in revocation or infringement proceedings. This position, i.e., the validity of a patent is not guaranteed by the grant, is now expressly provided in S. 13(4) of the Patents Act, 1970.

39. Mr. Mukherjee has also submitted that the order of the Dy. Controller of Patents at Bombay for registration of the invention filed in the Patent Office as per Application No. 170131 has been challenged in appeal by the respondents Nos. 1 and 2 and the said appeal is now pending before the Hon'ble High Court at Bombay.

40. Mr. Mukherjee, has further submitted that the impugned patent of the petitioner has been sealed recently and that the law is well-settled that the Courts will refuse to grant injunction and at any rate interim injunction when the patent in question is a new one, the validity of which has not been established in any legal proceeding and the validity of which is under serious dispute or challenge.

41. Mr. Mukherjee, learned counsel has first referred to the American Cyanamid Company case, (1975) RFC 513 : 1975 (1) All ER 504 (supra) decided by the House of Lords in 1974. In that case, the plaintiffs were the owners of a patent covering sterile, absorb-able, surgical articles formed from PHAE, (Poly-hydroxyacetic ester). The defendants manufactured a suture formed from a co-polymer and were nearly ready to launch it upon the British market. The plaintiff's alleged that it infringed their patent. The trial Judge granted interlocutory relief. The Court of Appeal allowed the appeal concluding simply that on the question of infringement, the plaintiff had not made a strong prima facie case and that in consequence that was the end of any claim to interlocutory relief. The question of balance of convenience was not considered.

42. Held, per Lord Diplock, the reminder of the House concurring :

(i) That there was no rule of law that precluded the grant of an interim injunction Unless upon the; evidence adduced by both parties, the applicant had satisfied the court that on the balance of probabilities the acts of the other party sought to be enjoined, if committed, would violate the applicant's legal rights;

(ii) Unless the material available to the court at the hearing of the application for an interlocutory injunction failed to disclose that the plaintiff had any real prospect of succeeding in a claim for a permanent injunction at the trial, the Court should go on to consider whether the balance of convenience lay in favour of granting or refusing the relief that was sought;

(iii) That the grant of interlocutory injunctions in patent infringement actions was governed by the same considerations as in other actions;

(iv) In contrast with former practice in relation to interlocutory relief in patent infringement cases, the grant of a patent was in present times a good prima facie reason for supposing a patent to be valid in this context.

43. Mr. Mukherjee has also relied upon the decision of our Apex Court in Bishwanath Prasad Radhey Shyam's case, AIR 1982 SC 1444 (supra). According to him, para 33 of the reported judgment lays down the Indian law. The last sentence of para 33 takes the bottom out of the proposition that there is a presumption in favour of the validity of a patent.

44. Mr. Mukherjee has drawn the attention of the Court to a single Bench decision of the Delhi High Court in N. R. D. Corpn. of India v. D.I.C. & G. Mills Ltd. (AIR 1980 Delhi 132). In that case, it has been held that 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 favour of grant of injunction and that the plaintiff will suffer an irreparable loss. The learned Judge relied upon the same principles as laid down in Boots Pure Drug Co.'s, 52 CWN 253 (supra) though within the four corners of the judgment that decision is not referred to.

45. Mr. Mukherjee has also referred to the decision of a Division Bench of Delhi High Court is Niky Tasha India Pvt. Ltd. v. M/s. Faridabad Gas Gadgets Pvt. Ltd. (AIR 1985 Delhi 136). Their Lordships considered the American Cyanamid

Company's case, (1975) RPC 513 : 1975 (1) All ER 504 (supra) and held, it is well-settled, both in India and in England, that an interlocutory injunction will not normally be granted where damages will provide an adequate remedy should the claim succeed. Furthermore, the Court will not grant an interlocutory injunction unless satisfied that there is a real probability of the plaintiff succeeding on the trial of the suit. Where the design is of a recent date, no injunction should be granted. Moreso, when there is a serious question as to the validity of the design to be tried in the suit and an application for cancellation has been made.

46. Mr. Mukherjee has also cited Monsanto Company v. Coramandal Indag Products (P) Ltd. AIR 1986 SC 712. That was a case for revocation of apafent. Mr. Mukherjee has presumably referred to the principles laid down in this case, as in our case, a point has been raised by Godrej Co. that the plaintiff's patent suffers from lack of novelty and from anticipation. In Monasanto's case, it has been held that to satisfy the requirement of being publicly known as used in clauses (e) and (f) of S. 64(1) of the Patents Act, 1970, it is not necessary that it should be widely used to the knowledge of the consumer public. It is sufficient if it is known to the persons who are engaged in the pursuit of the knowledge of the patented product or process either as men of science or men of commerce or consumers. The section of the public who are men of science or men of commerce were interested in knowing about herbicides which could destroy weeds but not rice must have been aware of the discovery of the active agent. There was no secret about the active agent as claimed by the plaintiffs since there was no patent for the agent. The process was known, the product was known, the use was known and then there was no invention.

47. Mr. Mukherjee has also referred to the following passage at p. 113 of Brain C. Reid's "A Practical Guide to Patent Law", 2nd Edition, (1993):

> "Nevertheless, the grant of interlocutory relief is by no means automatic; it remains, at the end of the day, an exceptional remedy given at the Court's direction -- for which exceptional cause has to be shown. The leading modern

> decision in this area of the law generally, American Cyanamid v. Ethico (Interlocutory) was in fact enunciated in a patent dispute in 1974."

48. But the learned author at p. 116 of the same treatise has drawn the attention to the danger inherent in mechanical application of the American Cyanamid approach : "In particular, the Court will not allow the American Cyanamid approach (which in principle is quite favourable to the patentee) to become by over-rigid application an engine of oppression. This is highlighted by the decision of the Court of Appeal in Brupat v. Sandford Masion Products (1983 RPC 61) where a defendant of extremely modest financial standing (normally a good reason for grant of relief since it gives rise to doubt as to their eventual capacity to pay damages if infringement is found at the trial) was allowed to continue provided that he pay in the interim into an escrow account a reasonable royalty".

49. Mr. Mukherjee has also referred to the treatise of Kerr on "Law and Practice of Injunction" (6th Edn. 1981) where at p. 320 under the heading "Interlocutory Relief it has been pointed out as follows :--

> "If one clear instance of infringement or a strong prima facie case of infringement is made out and the plaintiff has not been guilty of laches, the court will generally grant an interlocutory injunction in the following cases : (1) when the validity of the patent has already been established in a previous action; (2) when the patent is of old standing and the enjoyment under it has been uninterrupted; (3) when the validity of the patent is not in issue; and notwithstanding that the deferent offers to keep an account.
>
> "Conversely, in general, if the patent is new, and its validity has not been established, and endeavoured to be shown that it ought not to have been granted, the Court will not interfere."

50. Mr. P. K. Das, learned counsel appearing on behalf of the Proctor & Gamble Godrej Ltd., defendant No. 2, has fully adopted the arguments of Mr. S. B. Mukherjee, learned counsel for Godrej Soaps Ltd. Mr. Das has mainly argued on two new grounds of attack.

51. The first point urged by Mr. Das is regarding forum inconvenience. Mr. Das has drawn the attention of the Court to paras 30, 33, 35, 39 and 40 of the plaint and to para 4 of the A.O. filed on behalf of respondent No. 2 and to para 7 of the affidavit-in-reply at p. 352 of Vol. II of paper book. According to the learned counsel, the point to be judged is whether the plaintiff would have more inconvenience in Bombay. He has in support of his contention cited a number of cases.

52. The first case cited is Mac Shannon v. Rockware Glass Ltd., (1978) 1 All ER 625 : 1978 AC 795. Held, in order to obtain a stay of proceedings the defendant had to show that there was another forum in which justice could be done between the parties and to refuse a stay would produce injustice. He was under no duty to show that the institution of the proceedings in England was vexatious or oppressive. Where England was not the natural forum and the plaintiff offered no. reasonable justification for his choice of forum in the shape of some real personal or juridical advantage which could be objectively demonstrated, the Court could grant a stay if the defendant merely established that he would be involved in substantial inconvenience and unnecessary expenses if the proceedings were allow in England.

53. He has next referred to In re Norton's Settlement, Norton v. Norton, (1908) 1 Ch D 471. Held, that the plaintiff had in fact brought the action in England instead of in India, not for any bona fide purpose but in order to obtain an undue advantage over the defendants and that the continuance of the proceedings in England would necessarily be productive of injustice to the defendants. So the action ought to be stopped.

54. He has also cited Saudi India.Navigation Line v. Asteroid Maritime Ltd., (1985) 2 CHN 149; The Abidin Daver, (1984) 1 All ER 470 : 1984 AC 398; Logan v. Bank of Scotland, (1906) 1 KB 141; Hansraj Bajaj v. The Indian Overseas Bank Ltd. AIR 1956 Cal 33 and Jokai (Assam) Tea Co. Ltd. v. Bhawani Shankar AIR 1976 Cal 18. In all these cases, the same principle which

is running like a thread is that the court would stay a proceeding if it was not brought in the natural forum without any reasonable justification and if the defendant merely established that he would be involved in substantial inconvenience and unnecessary expenses if the proceeding was continued.

55. Mr. Das has next referred to the "Gillette" plea viz. that the alleged infringement was no t novel, at the date of the patent-In Gillette Safety Razor Co. v. Anglo-American Trading Co. Ltd. (30 RPC 465) Lord Moulton observed : "I am of the 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 plaintiffs letters 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 important 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 were taken out and to ascertain the validity and scope of their claims. But he is entitled to feel secure if he knows 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 equipments or changes of material shape or size. The de fence that the alleged infringement was not novel at the date of the plaintiff's letters patent was a good defence in law and it would sometimes obviate the great length and expenses of patent cases if the defendant could and would put forth his case in this form, and spare himself the trouble of demonstrating on which horn of the well-known dilemma the plaintiff had impaled himself, invalidity or non-infringement".

56. Mr. Das has cited the decision in Windsurfing International Inc. v. Ta.bur Marine (Great Britain) Ltd., ((1985) RFC 59). In that case, the patent in suit claimed a wind -propelled vehicle having; an unstayed spar connected through a universal joint and sail attached to the spar and held taut between a pair of arcuate booms in ounted on the spar at one end and joined together at the other. In an action for infringement, the defendants claimed for its revocation on the grounds that what was claimed lacked novelty over a prior user by C and was

obvious in view either of the prior user or of a printed publication D which described some basic concepts as that of the patent but the said board had been fitted with a square-rigged sail. Held, upholding the defendants' contention that (1) the philosophy behind obviousness must take into account the same concept as anticipation, namely, that it would be wrong to prevent a man from doing something which, was known in the art before the priority date; (2) the question of obviousness was not to be answered by looking with the benefit of hindsight at what was now known and what had been known at the priority date and asking whether the former flowed naturally and obviously from the latter, but by hypothesising what would have been obvious at the priority date to a person skilled in the art who had access to what was known in the art at that time. In that case, their Lordships relied upon the principles laid down in Gillette case, 30 RPC 465 (supra).

57. Mr. Das then cited the decision in Hickman v. Andrews (1983 RPC 147). In that case there were inconsistencies in the defendant's evidence as to how the prototype of their product had come to be made. In addition, no contemporaneous corroborative material had been put forward by the defendants to support their evidence on this point. The balance of probabilities led to the conclusion that the defendant's product had originated from use having been made of knowledge of the plaintiffs' "workmate". Since the standard of proof in a "Gillette" defence was steict, the defendants had accordingly failed to make good their defence. Held that since approaching a patent infringement action by means of the "Gillette" defence was unusual, it was justifiable that the defence be strictly proved and accordingly the trial Judge' had not misdirected himself in this respect.

58. Mr. Das has also cited Page v. Brent Toy Products Ltd., (Vol. LXVII, Reports of Patent, Design and Trade Mark Cases 4). In that action for infringement of patent, the defendants applied, after the case was set down for trial, for leave to amend their defence so as to include a "Gillette" plea, viz. that the alleged infringement was not novel, at the date of the patent, by reason of a foreign

patent specification over 50 years old. It was stated on behalf of the plaintiff that the amendment was allowed and the new plea disclosed a defence to the action, the action would probably be discontinued. The learned Trial Judge held that the balance of convenience required that the soundness in law of the proposed plea should be decided upon the application to amend and not left to the trial. The learned Judge decided the merits of the plea upon the application to amend, The learned Court of Appeal upheld the view of the learned Trial Judge and explained the nature of "Gillette" defence at page 12 as follows :--

> "I think I should refer, not to the whole speech, but to certain passages in it, before I add a few words of my own on the same line as Roxburgh, J's judgment. The case, as may be judged from its title, was a case in which the Gillette Razor Co. were alleging against the Anglo-American Trading Co. that the latter had infringed the former's Latters Patent for a razor. It appears that one of the matters discussed during the hearing was this, that there had previously been a razor handle, invented by a gentleman called Burler; and as Lord Moulton points out, if you put a blade into Butler's handle the article was indistinguishable for all practical purposes from the defendants' allegedly infringing article. The noble Lord, having stated that, goes on : "It follows, therefore, that no patent of date subsequent" to the publication of Butler's specification could possibly interfere with the right of the public to make the defendants' razor. If the claims of such a patent were so wide as to include in it, the patent would be had, because it would include something which differed by no patentable difference from that which was already in the possession of the public. Such a patent would be bad for want of novelty. If the claims were not sufficiently wide to include the defendants' razor, the patentee could riot complain of the public making it. In other words, the defendants must succeed either on invalidity or on non-infringement".

59. From the submission made by the learned lawyer of the parties it is clear that in order to get a temporary injunction against the infringement of a patent right, the party claiming has to prove three things as in all cases for grant of temporary injunction, namely, that the party has a prima facie case, that there is a prima facie infringement and that the balance of convenience is in his favour. But right from Smith v. Grigg Ltd., (1924 (1) KB 655), there was a practice that if a patent was new, a mere challenge at the bar would be quite sufficient for refusal of

temporary injunction, but if the patent was sufficiently old and had been worked out, then the Court would for the purpose of temporary injunction presume the patent to be a valid one. This view as affirmed in a Division Bench decision of this Court in Boots Pure Drug Co. (India) Ltd.'s case, 52 CWN 253 (supra). But this view received a jolt for the first time in the American Cyanamid case, (1975) RPC 513 (supra). It was laid down by the House of Lords that the grant of a patent now a days prima facie constitutes a good ground for supposing the patent to be valid. But even, the English Courts after about 8 years of the decision in this case (American Cyanamid case) have held that the Court will not allow the American Cyanamid approach to become by over-rigid application an engine of oppression. (Vide : 'A Practical Guide to Patent Law' by. Brain C. Reid referred to above). The learned author says that this is a leading, modern decision in this area. But the learned author has also drawn our attention to the decision of the Court of Appeal in 1983 in Brupat v. Sanford Marine Products, (1983) RPC 61 (supra) highlighting this aspect" of Lord Diplock's judgment.

60. Now let us have a look at the Indian Law on the matter. The Patents Act, 1970 has introduced some textual change in S. 12(1) of the Indian Patent and Designs Act, 1911. The term -- "exclusive privilege" has been changed into "exclusive right" in S. 48 of the Act of 1970. A Division Bench of the Delhi High Court in M/s. Niky Tasha's case, AIR 1985 Delhi 136 (supra) has observed as follows :

> "In the leading case of American Cyanamid v. Ethicon, 1975 AC 396 : 1975 RPC 513: 1975 (1) All ER 504, the House of Lords has stated the principles governing the grant of injunction in patent litigation. According to Lord Diplock, the correct approach is as follows : The Court must first be satisfied that there is a serious question to be tried. Then it should turn at once to the balance of convenience. If it appears that damages awarded at the trial will adequately compensate the plaintiff and the defendant is likely to be able to pay them, interlocutory relief should not normally be granted. If damages will not "be adequate to compensate the plaintiff, becomes necessary to consider whether, on the other hand, the defendant would be adequately compensated by damages upon the plaintiffs cross-undertaking, should he not make good his

> claim at trial, if they would be adequate, the injunction would be granted. If the balance remains substantially even, some account can ultimately be taken of the relative strength of each party's case as revealed by the affidavit evidence".

61. This Lordships took the view, "I take it to be well settled, both in India and England, that an interlocutory injunction will not normally be granted where damages will provide an adequate remedy, should the claim succeed. Furthermore, I have always understood the rule to be that the Court will not grant an interlocutory injunction unless satisfied that there is a real probability of the plaintiff succeeding on the trial of the suit. When the design is of recent date, as in this case, no injunction should be granted. More so, when there is a serious question as to the validity of the design to be tried in that suit and an application for cancellation has been made".

62. A Division Bench of this Court in Boots Pure Drug Co. case, 52 CWN 253 (supra) also took the similar view in 1947. Since then the Indian Act was substituted by a new Act in 1970. It has already been rioted above that "exclusive privilege" in Section 12(1)of the Act of 1911 has been changed into "exclusive right" in Section 48 of the Act cf 1970. The Apex Court of our land in Bishwanalh Prasad Radhey Shyam, AIR 1982 SC 1444 (supra) at para 33, has held that there is no presumption in favour of the validity of a patent by 'the mere grant or sealing of the patent, This is now expressly provided in Section 13(4) of the Act of 1970.

63. This dictum of the Apex Court of our land clearly spells out the law in India on the point and the ratio of the decision in American Cyanamid case, (1975) RPC 513 : 1975 AC 396 : 1975 (1) All ER 504 (supra) cannot govern the field here. Therefore, the contention of Mr. G. Chakraborty that the grant of patent in favour of his client shows prima facie validity of the patent cannot be entertained.

64. The point which demands our active consideration next is which there is prima facie infringement of plaintiffs patent. In para 23 of the petition for

injunction it has been stated as follows (at p. 78 of paper book No. 1) :--

"23. By reason of the aforesaid the petitioner as the patentee enjoy exclusive right and monopoly in respect of the aforesaid composition consisting of :

(i) 25 to 60% by wt. detergent of which at least 50% by wt. is soap;

(ii) 49 to 50% water-insoluble structurant including starch and having a particle size of between 0.2 to 30m. and

(iii) 8 to 15% by wt. water.

The petitioner further states that no one else has any right to use the aforesaid composition and/or to use a composition which comes within the scope and/or range of the said Patent No. 170131 of the petitioner."

65. In para 24 of the said petition, it has been stated as follows :

"24. The composition of the aforesaid patent of the petitioner according to claim 7 (when dependent on claims 1, 4 and 6) and that of the impugned toilet soap of the respondent No. 1 bearing the trade-mark VIGIL are set out side by side for ready composition :--

(i)	25 to 60% by wt. detergent of which at least 50% by wt. is soap.	(i)	44 to 52% detergent of which at least 75to 89% by wt. in soap.
(ii)	40 to 55% water insoluble structurant including starch and having a particle size of between 0.2 to 30m (microm) and	(ii)	44 to 50% water insoluble including strach and having particle size of between 6 to 10 m (microm) and
(iii)	8 to 15% by wt. water.	(iii)	About 8 to 13% by wt. water.

In this connection, the petitioner wilt crave leave to refer to expert opinion at the hearing of the application."

66. In para 26 of the said petition, it has been stated as follows:--

"26. The respondent No. 1 and/or the respondents had access to the specification of Patent No. 170131 since the notification after acceptance, that is, on 15th Feb. 1992 and they have wrongfully and illegally copied and materially utilised and reproduced the composition of the said Patent No. 170131 and have thus wrongfully and illegally infringed Patent No. 170131 of the petitioner. The respondent No. 1 has no right to use the process and/or

composition of the said Patent No. 170131 or use any composition by utilising the same range and/or parameter of the said Patent."

67. The respondent No. 1 in the A.O, affirmed on 16-8-1993 at paras. 24 (page 35 of the Paper Book II), 25 to 27 (Pages 36 to 40 of Paper Book II) has covered the allegation made in paras 23, 24 and 26 of the injunction petition. Lots of technical expressions have been used in the paras 25 A, 2SB to 25C but the main conclusion is a wholesale denial of the allegation made by the petitioner Company. The respondent No, 1 has also raised the point, in this connection, that prima facie there is no invention element in the alleged patent of the petitioner. Thus they have raised the "plea of Gillette" defence indirectly. The main thrust of the respondent No. 2 is on this point. There are expert opinions both in favour and against the contention of the petitioner. In this connection reference has already been made to the decisions laid down in Gillette Safety Razor Co. v. Anglo- American Trading Co. Ltd. 30 RPC 465 (supra), Windsurfing International Inc. v. Tabur Marine (Great Britain) Ltd. 1985 RPC 59 (supra). Hickman v. Andrews (1983 RPC 147 (supra) and Page v. Brent Toy Products Ltd. Vol. LXVII Report of Patent, Design and Trade Mark Cases 4 (supra). The most striking thing with respect to the case of the respondent No. 1 is that they have not come with a chemical analysis report showing the composition of VIGIL Soap. They have chosen to rely upon the Gillette plea indirectly. At the core of the plea is the stand that the alleged infringement was not novel at the date of the patent. Thus there is an implied stand that even if there is an infringement, temporary injunction cannot be granted due to the Gillette plea.. Narayanan in his treatise on "Patent Law" 2nd Edn., at para 1299 at p 528 has in connection with a discussion on Gillette defence, observed: "This kind of defence has not so far been considered by High Courts in India. But there is no reason why such a defence will not be considered when properly pleaded." In this case, in the affidavit sworn by Mr. V.V.R.Subrahmanyamon 12-8-1993 (Vide pages 148 to 158 of Paper Book II) which is annexure to the A.O. on behalf of the respondent No. I sworn on 30-6-1993 (Vide: pp 147 of Paper Book 'II), it has

been stated at p 156 that "The composition of the pleaded bars of the invention is mentioned in the claims of the U.S. Patent No. 2438169 as 5 -- 40% starch, at least 6% non-soap detergent, remaining being soap and other fillers".

68. Mr. S.B. Mukherjee, learned Counsel for respondent No. 1 has drawn the attention of this Court to the United States Patent Office Publication in connection with U.S. Patent No. 2438169 patented on 23-3-1948 (Vide p. 189 of Paper Book No. II). He has also given a comparative Chart of the Hindusthan Lever Ltd.'s Patent No. 170131 and the U.S. Patent No. 2438169.

HLL Patent No.170131			U.S. Patent No.2438169		
I	(a)	Total detergent (Soap + non-Soap detergent) 25% to 60%	I	(a)	Total detergent (Soap * non-Soap detergent) 30% to 80%
	(b)	Soap content at least 50% or above		(b)	Soap content at least 30%
	(c)	Non-Soap detergent 0% to 30%		(c)	Non-soap detergent 5% to 40%
II	(a)	Filters including starch 30% to 60%	II	(a)	Fillers including starch 10% to 60%
	(b)	Starch Trace to 60%		(b)	Starch 10% to 40%
				(c)	Sodium Sulphate 0% to 20%
III		Water 8% to 35%	III		Water 5% to 15%

from a plain look at the comparative table it appears that the basic pattern in the composition of the two are more or less the same, though the percentage are not identical. But a mere arrangement or rearrangement of known devices each functioning independently of one another in a known way is not prima facie an invention under Section 3 of the Patent Act, 1970. So the plea of Gillette defence can be considered in this case as it has been properly pleaded in this case.

69. The last question that is to be considered is whether the balance of convenience and inconvenience is in favour of granting interlocutory injunction. It is obvious that the patent has not yet been exploited by the petitioner. So there is no question of loss of employment or fall in revenue of the plaintiff-company.

They apprehend that they will suffer an irreparable loss unless injunction is granted. But it is clear that in Para 39 of the plaint it has been averred that the damage suffered by the petitioner can be provisionally quantified. The implied presumption is that there is some basis for assessment of the damages though the exact figure cannot be arrived at the stage. So it cannot be said that the balance of convenience is definitely in favour of granting interlocutory injunction.

70. Before winding up the matter a few words need be said about the plea of forum inconveniens raised by Mr. Das, learned Counsel for the respondent No. 2. At this stage, when this Court is considering the question of granting interlocutory injunction, it is useless to raise the plea of forum inconvenience for staying this proceeding. Certainly the respondent No. 2 can raise the plea at the appropriate stage. If this plea is entertained at this stage, then there will be no chance of complying with the direction of the apex Court. Moreover, this plea could be raised before the apex Court but that was not raised. In the circumstances, it will not be proper to go into the prima facie merits of the plea of forum inconveniens in this case.

71. In view of the above discussions, this court holds that there is no case for granting interlocutory injunction in this case. The petition for temporary injunction is accordingly dismissed on contest. But this cannot prevent this Court from passing an order directing the respondents to keep monthly accounts of the sales of VIGIL Soap and to furnish the same in court and also give a copy to the plaintiff an every quarter till the disposal of this suit. The first such statement of account is to be filed within 30-6-1996 positively.

72. Petition dismissed.