IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CORAM: S.J. VAZIFDAR, J.

JUDGMENT RESERVED ON: 12.2.2008

Ravi Kamal Bali ... Plaintiff

Vs.

Kala Tech and Ors. ... Defendants

JUDGMENT

S.J. Vazifdar, J.

1. The judgment was reserved on 12.2.2008. By a preceipe dated 29.3.2008 the Defendants sought to tender an additional affidavit to bring on record further documents and to raise a new defence. This application was heard by me on 3.6.2008. I have rejected the application for reasons furnished later in this judgment.

2. The Plaintiff has sought an injunction restraining the Defendants from making of, using, selling or distributing tamper proof locks/seals that fall within the scope of the claims of the Plaintiff's patent bearing No. 162675 and patent of addition No. 178879 so as to infringe the same and for delivery of for destruction any material infringing the said patents. The Plaintiff has also sought damages. Defendant No. 2 carries on business as the sole proprietor in the firm name and style of Defendant No. 1. Defendant No. 3 is the former employee of the Plaintiff who has joined Defendant No. 1/2 to assist him in carrying on his business. According to the Plaintiff, Defendant No. 3 has conspired with Defendant No. 1 in the manufacture and sale of the said locks and seals constituting an infringement of the Plaintiff's patents.

3. Mr. Tulzapurkar, the learned Senior Counsel appearing on behalf of the Defendants did not challenge the validity of the Plaintiff's patents. It is

unnecessary therefore to deal with the facts leading to the registration of the Plaintiff's patent including those relating to the Plaintiff's efforts in inventing the seals and locks and the importance thereof to the trade.

4. On 6.5.1991 the Plaintiff, to protect his invention, filed an application for grant of patent for an invention titled "An improved tamper proof seal for directly locking the container". The application was allowed and the patent was sealed and issued by the Controller General of Patents on 29.7.1994. The Plaintiff has been issued a Certificate of Registration with respect to the said patent bearing No. 172675. The patent is valid till 6.5.2011.

5. In respect of the above patent, the Plaintiff has the following claims :−

> 1. An improved tamper proof seal, for directly locking the container having a lock ring, comprising of a metal strip bent near the middle portion into a substantially `V' form, each of the two side arms being provided with atleast one outwardly directed inclined vane and an inwardly directed top, flap at the free end, one of the said top flap being small and other top flap being large for completely covering the slit of the lock ring from the outer side, the said side arm having small top flap being provided with a pair of side flaps below the said vane/s and the said side arm having large top flap being provided with depression below the said top flap.
>
> 2. An improved tamper proof seal as claimed n Claim 1 wherein one of the said side arm being embossed with serial number of the seal.
>
> 3. An improved tamper proof seal as claimed in Claim 1 or 2 wherein the said top flap being embossed with a logo or emblem of the user of the said deal.

6. The Plaintiff claims to have continued his research and improved the said invention and in respect thereof applied for a grant of patent of addition which was granted under Patent No. 178879 titled as "An improved tamper proof seal for directly locking the container having a lock ring". The patent of addition was sealed on 12.3.1988 and a Certificate of Registration has been issued. In respect of the patent of addition, the Plaintiff has made the following claim :−

> 1. An improved tamper proof seal, for directly locking the container, having a lock ring, wherein the improvement in or the modification my main invention

disclosed in Patent Application 126/ BOM/91 dated 6th May, 91, comprises in providing one or more additional outwardly directed inclined vanes/s in one of the said side arms, of the said seal, in another row at a predetermined desired space vertically below the said outwardly directed inclined vanes, originally provided in both the side arms of the seal.

2. An improved seal as claimed in claim 1 wherein the said additional outwardly directed inclined vanes are provided in both the side arms of the said seal.

3. An improved tamper proof seal. For directly locking the container, having a lock ring, as claimed in claim 1, and substantially as herein described and illustrated in accompanying drawings.

7. The annual sales turnover of the Plaintiff's products under the trade mark `Tech−Lock' from the years 2000 to the year 2005 showed a marked increase from Rs. 9,02,143.34 to Rs. 66,16,564/−. The details were not denied. Nor were the details regarding the expenses in promoting the invention denied.

8. The Plaintiff alleges that in June, 2004 he came across similar products bearing the name "SEAL TECH" which had constructional and functional features similar to the Plaintiff's patented inventions and that on further investigation, he learnt that the same were manufactured and sold by Defendant No. 1 with the assistance of Defendant No. 3.

9. Defendant No. 3 had earlier worked with the Plaintiff from 1992 to 1999 as an Office Assistant and as a Works Incharge from 1999 onwards till 2002. During this time, Defendant No. 3 had unrestricted access to the technical and other conventional information relating to the Plaintiff's business including the trading and manufacturing details in respect of the said products. The Plaintiff has alleged that Defendant No. 3 has dishonestly been assisting Defendant No. 1 in the manufacture and sale of the infringing material.

10. The Plaintiff contends that the similarity in the Defendants products to the Plaintiff's products is such that the Defendants products could not have been designed independently of the Plaintiff's inventions. The differences are minor and inconsequential, superficial and cosmetic and are therefore of no

consequence. The Plaintiff further contends that the Defendants products do the same work, in substantially the same way and accomplishe substantially the same result and therefore constitute an infringement of the Plaintiff's patents.

11. The Plaintiff therefore served a cease and desist notice through his Advocates on 28.6.2004. Defendant No. 1 denied the contentions therein by his Advocate's letter dated 21.7.2004. Defendant No. 1 thereafter forwarded to the Plaintiff copies of caveats filed in this Court.

12. The Plaintiff states that thereafter he did not come across the impugned products and believed therefore that the Defendant had discontinued the manufacture and/or marketing of the same. The Plaintiff alleges that in September, 2005 he once again came across the said products and therefore filed the suit on 11.10.2005.

13. Mr. Tulzapurkar denied that the Defendants products infringed the Plaintiff's patents. He further submitted that the Plaintiff is not entitled to the injunction on the ground of delay and in view of his conduct.

14. It would be convenient first to consider the merits of the rival contentions regarding the infringement of the Plaintiff's patents by the Defendants.

15. Mr. Kirpekar submitted that while considering the question of infringement of patents, the Court ought to apply the doctrine of equivalence by which a device is set to infringe a claim if it "performs substantially the same function in substantially the same way to obtain the same result". The test is whether the Defendants product appears to have taken the essence or what is sometimes called the pith and marrow of the invention. Mr. Kirpekar submitted that even under the Indian Patent Act, 1970 while deciding the question of infringement of patents, the Court ought to apply the doctrine of equivalence under which the Court must determine and distinguish the essential and non−essential elements of the product. He submitted that it is not necessary that the infringing goods

must be identical in every respect to the patented goods and it is sufficient if it is found that what has been taken is the essence of the invention.

16. Mr. Tulzapurkar did not dispute these submissions. He contended that as a matter of fact, the Defendants invention/product did not infringe the Plaintiffs patents. In particular, he submitted that the Defendants device even if held to perform the same function, to obtain the same result, did not function in substantially the same way as the Plaintiffs device.

17. Mr. Tulzapurkar stated at the outset that the Defendants do not challenge the validity of the Plaintiff's patents. Defendant No. 1/2 has further claimed that his invention is a patented invention and that he therefore decided to protect his intellectual property right therein and accordingly applied for patent protection on The importance therefore of the invention is admitted.

Accordingly, the importance of the Plaintiffs invention is also admitted. Mr. Tulzapurkar only submitted that as a question of fact the Defendant's products do not infringe the Plaintiff's patents.

18 (A). In order to appreciate the rival contentions on the question of infringement, it is necessary also to note the Plaintiff's stated object for the patent of addition which reads as under :− It has now been observed that these outwardly directed inclined vanes (5), being provided just below the inwardly directed top flaps (6 and 7) of the side arms (Sand4), only abut the upper slit (10) of the clamp (14) of the lock ring (ii) and the lower surface of the projection surrounding the groove (15) in the lock ring (ii) towards, the lower slit (10) of the clamp (14) remains free without and locking means.

> Therefore the main object of this invention is to provide additional outwardly directed inclined vanes, in the side arm/s (3 and/or 4) which abut the lower surface of the projection surrounding the groove (15) in the lock ring (ii), thereby providing a double locking systems in the said seal.

(B). The claim made by Defendant No. 1/2 in his patent application for a patent of addition reads thus :−

1. An improved locking device (6) for locking a lid (2) of a Container (1) with a Ring Lock (3), with two ends, such that the two ends (4) of the ring can be pulled towards each other and make an aligned slit (5) to insert and fix up the locking device (6) made of metal moulded to form a closed box substantially of rectangle shape (6) (Pl. see Fig. 9 and 3 of the Exhibit) comprises of four sides, two large (8 & 9) and two small (10 & 11) and two ends, upper (12) and lower (13) such that the (14) while both the large sides (8 & 9) of the upper end (12) of the device (6) are provided with two outwardly directed inclined arms (15 to 18) (Pl. see Fig 3 of the Exhibit) and one of the large sides (8) of the device (6) is also provided with an inwardly large top flap (19) running in between the arms (15 & 16) and beneath the said large top flap (19), a rib (20) is provided and other large side (9) of the device (6) is provided with a straight arm (21) running between the two outwardly inclined or bent arms (17 & 18) and both the small sides (10 & 11) of the device (6) are also provided with at least one outwardly directed inclined arm (22 & 23) (Pl. see Fig. 3 and 7 of the Exhibit) and therefore, all the four sides (8 to 11) of the device (6) are having outwards inclined arms (15 to 18, 22, 23).

2. An improved locking device (6) for locking a lid (2) of a Container (1) having a lock ring (3) as claimed in Claim 1, wherein at least one of the large sides (8) of the device (6) is provided with an outwardly notch or flap (24) (Pl. see Fig. 3 of the Exhibit).

3. An improved locking device (6) for locking a lid (2) of a Container (1) having a lock ring (3) as claimed in Claim 1 or 2 wherein the said large top flap (19) is embossed with an unique serial number(25).

19. The Plaintiff has tabulated the similarities between the products manufactured by him and by Defendant No. 1 as follows:

1. Usage/Purpose 1. Usage/Purpose Tech Lock is meant for locking the Seal Tech is also meant for locking open mouth Fiber Drum, HDPE, the open mouth Fiber Drum, HDPE M.S. Drum M.S. Drum

2. Material Of Construction 2. Material Of Construction Tech−Lock is made of EN− 9/EN−42 Seal Tech is made of EN−9 spring J spring steel strip strip

3. Principle of working 3. Principle of working Tech Lock works on compression Seal Tech also works on compression decompression/expansion and decompression/expansion

4. Construction Features 4. Construction Features A. Top Flap : A. Top Flap :

i. Tech Lock has a Top flap in the Indian Patent specification no. 172675, which is meant for covering the drum ring clamp groove after locking clamp to avoid any attempt of tampering from the top side.	i. Seal Tech also has a Top Flap that is meant for covering the clamp groove of the drum ring after locking the drum ring to avoid any attempt of tampering from the topside
ii. The same top flap of the Tech−Lock is used for customization i.e. to embossing of client's name and serial number or client's logo as per the requirement	ii. The same Top Flap of Seal Tech is used for customization i.e. emboss client's name and Serial number or logo as per the client's' requirement.
B. Vanes	B. Vanes
Tech Lock (Patent No.172675) bears 4 outwardly inclined vanes which are based on upper edge of the two walls of Tech−Lock, these vanes locks the innerwall drum ring clamp due to spring action longitudinally and latitudily i.e. X and Y axis.	i. Seal Tech has 6 vanes on the upper edge that lock the inner of the drum ring clamp on the both axis. 4 out of 6 vanes of the said lock on X axis and remaining 2 vanes of the said lock on Y axis
ii. Side walls of the Tech Lock are are used to emboss clients logo, serial logo number as per the requirement.	ii. Side walls of the SEAL TECH also used to emboss clients serial number as per the requirement.
iii. Side walls of Tech−Lock provides the base on the upper edge	iii. Side walls of SEAL TECH Provides the base on the upper edge.
iv. Tech Lock has 4, 6 and 8 locking vanes on upper and lower edge of the side walls for greater safety which locks the clamp from inner (Upper Edge) & Outer side (lower edge) in Patent No.172675 & 178879.	iv. Seal Tech having the 6 vanes is meant for inner side locking
5. Tech−Lock has small stopper for allowing Tech−Lock to be pressed upto a specified limit only	5. SEAL TECH also has small stopper for allowing Tech Lock to be pressed upto specified limit only

6. TECH−LOCK has a notch depression, which is provided for breaking the Top Flap while lifting the Flap upwards for opening the drum.	6. Seal Tech also has a notch depression which is provided for breaking the Top Flap while lifting the flap upwards, for opening the drum
7. After formation of the Tech Lock mechanically on sheet metal press it is hardened to attain spring action.	7. After the formation of Seal Tech mechanically on sheet metal press it is also hardened to attain the spring action
8. Place of Locking the Drums: Tech−locks the inner side of the clamp & lower outer side of the Drum ring clamp	8. Place of Locking the Drums: Seal Tech locks only inner side of the drum ring clamp

20. It is common ground that the usage or the purpose of the material produced by the Plaintiff and Defendant No. 1 are the same. The nature of the material viz. spring steal is the same. It is nobody's case that the marginal difference in the quality of steal accounts for any difference in the invention.

21. I am inclined to accept the Plaintiff's claim that the two products work/function on the same principle viz. compression and decompression/expansion. Mr. Tulzapurkar however submitted that the mode of compression and decompression/expansion in the two products is different. He submitted that in the Plaintiff's product physical pressure, minor as it may be, to compress the vanes is necessary whereas in the Defendant's products, the compression does not require any physical force.

22. This does not appear to be even factually correct. From the samples produced in Court, it appears that even the Plaintiff's products may be inserted without any use of physical pressure to compress the vanes. They are compressed upon insertion and decompress/open up once inserted. Even if I were to come to a conclusion that some amount of compression is required by pinching the two sides of the `V' shaped body between the thumb and the index fingure, it would make no difference. This would be a mere cosmetic or superficial difference which does not have any bearing on the invention.

23. Mr. Tulzapurkar submitted that the top flap really does not make any difference as, a top flap would necessarily be required in any such locking system to ensure that the lock does not slip out. While I agree that the mere provision of a top flap would not be decisive of the matter, it is one of the facts which must be considered along with the other facts specially while determining the intention to infringe. The manner in which the Defendants have provided the top flap, indicates an intention to infringe. The top flap in both the products is an attachment/extension of the middle of the main body with two vanes on either side. It is not the Defendants case that the top flap could not have been provided in any other manner, for instance, by it being attached to the side portion of the Defendants product.

24. That the provisions of vanes and the operating system viz. compression and decompression are essential ingredients in the invention is admitted. While the term "vanes" is not used in the claim of Defendant No. 1 in the patent application, it is clear that the Defendant considered the provision of vanes and the mode of operation thereof to be essential to the invention. I did not in fact understand Mr. Tulzapurkar to argue to the contrary. Indeed, if this was not an essential feature of the invention, it might have been difficult for either side to support the patent at all. As stated above, the validity of the patent and therefore its status as an invention was not questioned by the Defendants.

25. Mr. Tulzapurkar then submitted that whereas in the Plaintiff's product the main structure of the body is `V' shaped, in the Defendant's product the main body is a rectangular box type seal with four walls, two large and two small with vanes on all the four walls with a window and a top flap so as to fix the seal by pressing the same in a predetermined sized slit provided in the ring lock wherein the top flap covers the ring lock slit.

26. The difference in the shape of the main body does not by any stretch of imagination constitute the Defendants product as a separate or a new invention. The rectangular box shape has no functional novelty. At the highest, if it was the

Plaintiff's product, there may have been a case for registering the same as a patent of addition. It certainly does not constitute a novel independent invention by itself, warranting the registration thereof as a main invention.

27. Nor do the number of vanes make any difference to the question of infringement. A view to the contrary would enable any manufacturer to use the Plaintiff's invention by the mere provision of a different number of vanes.

28. The provisions of vanes on the sides does not carry the Defendants case further either. The constructional and functional structure of the product still remains the same. Nor am I impressed by the Defendants contention that his product provides protection on all four sides. So do the Plaintiff's products. The vanes as pointed out by Mr. Kirpekar, are placed towards the edge of each ring thereby providing protection on all four sides. The provision of an outwardly facing notch/flap window for additional safety also makes no difference to the question of infringement. It does not change the essential functional system.

29. At the highest, if the features of the Defendants products were the work of the Plaintiff, it would have entitled the Plaintiff to a patent of addition in respect thereof vis−a−vis the Plaintiff's main invention and not to independent patents in themselves.

30. I have read the affidavits of the experts of both the parties. At this stage, they do not carry the matter further. I am inclined to accept what is stated in the affidavit of the Plaintiff's expert Shirish Ketkar, annexed as Exhibit "B" to the Plaintiff's affidavit dated 8.3.2006. My findings are in fact in accordance with much of what is stated therein.

31. Mr. Tulzapurkar further submitted that the Plaintiff's patent of addition is itself an inventive step. He submitted that a patent of addition can also be granted only if the improvement or modification constitutes an inventive step. He relied upon Section 2 (j)(a) of The Patents Act, 1970 which reads as under :− [(ja) "inventive step" means a feature of an invention that involves technical

advance as compared to the existing knowledge or having economic significance or both and that makes the invention not obvious to a person skilled n the art;] Mr. Kirpekar did not deny this submission. I would proceed on the basis therefore that it is well founded.

32. Based on this, Mr. Tulzapurkar further submitted that the only difference between the patent and the patent of addition is the addition of vanes in the patent of addition. He submitted that if two additional vanes makes for a new invention, the Defendants invention would also constitute a new invention qua the invention that is patented, as the differences between the Defendants invention and the Plaintiff's patented invention is greater than the difference between the patent of addition and the patent itself.

33. The submission is not well founded. The error lies in equating − a patent with a patent of addition. There is to my mind, a fundamental difference between the two. Sections 2(1)(j), (ja), (m), (o), (q) and Section 54, 55, 56 of The Patents Act, 1970 read as under :−

> 2. Definitions and interpretation.-(1) In this Act, unless the context otherwise requires,-
>
> [(j) "invention" means a new product or process involving an inventive step and capable of industrial application;] [(ja) "inventive step" means a feature of an invention that involves technical advance as compared to the existing knowledge or having economic significance or both and that makes the invention not obvious to a person skilled in the art;]
>
> (m) "patent" means a patent for any invention granted under this Act;]
>
> (o) "patented article" and "patented process" mean respectively an article or process in respect of which a patent is in force;
>
> (q) "patent of addition" means a patent granted in accordance with Section 54;
>
> 54. Patents of addition.-(1) Subject to the provisions contained in this section, where an application is made for a patent in respect of any improvement in or modification of an invention described or disclosed in the complete specification filed therefor (in this Act referred to as the "main invention") and the applicant also applies or has applied for a patent for that invention or is the

patentee in respect thereof, the Controller may, if the applicant so requests, grant the patent for the improvement or modification as a patent of addition.

(2) Subject to the provisions contained in this section, where an invention, being an improvement in or modification of another invention, is the subject of an independent patent and the patentee in respect of that patent is also the patentee in respect of the patent for the main invention, the Controller may, if the patentee so requests, by order, revoke the patent for the improvement or modification and grant to the patentee a patent of addition in respect thereof, bearing the same date as the date of the patent so revoked. of addition unless the date of filing of the 1 2 the date of filing of the [application] in respect of the main invention.

[(4) A patent of addition shall not be granted before grant of the patent for the main invention.]

55. Term of patents of addition.-(1) A patent of addition shall be granted for a term equal to that of the patent for the main invention, or so much thereof as has not expired, and shall remain in force during that term or until the previous cesser of the patent for the main invention and no longer:

Provided that if the patent for the main invention is revoked under this Act, the court, or, as the case may be, the Controller, on request made to him by the patentee in the prescribed manner, may order that the patent of addition shall become an independent patent for the remainder of the term for the patent for the main invention and thereupon the patent shall continue in force as an independent patent accordingly.

(2) No renewal fees shall be payable in respect of a patent of addition, but, if any such patent becomes an independent patent under sub−section (1), the same fees shall thereafter be payable, upon the same dates, as if the patent had been originally granted as an independent patent.

56. Validity of patents of addition.- (1) The grant of a patent of addition shall not be refused, and a patent granted as a patent of addition shall not be revoked or invalidated, on the ground only that the invention claimed in the complete specification does not involve any inventive step having regard to any publication or use of- (a) the main invention described in the complete thereto; or specification relating (b) any improvement in or modification of the main invention described in the complete specification of a patent of addition to the patent for the main invention or of an application for such a patent of addition,

and the validity of a patent of addition shall not be questioned on the ground that the invention ought to have been the subject of an independent patent.

(2) For the removal of doubts it is hereby declared that in determining the novelty of the invention claimed in the complete specification filed in pursuance of an application for a patent of addition regard shall be had also to the complete specification in which the main invention is described.

34. The terms "improvement" and "modification" involve a reference to an existing state of affairs or article. Under the Act, the terms "improvement" and "modification" refer to a comparison of the improved or modified version of the main invention with the main invention. The validity of the patent of addition granted to the Plaintiff is not challenged including on the ground that it ought to have been the subject of an independent patent and not a patent of addition. In other words, the status of the invention as an improvement in or modification of the Plaintiff's main invention was not challenged. Sections 54 and 55 in terms establish the link between the main invention and the patent of addition. It posits that the patentee of the main invention and the patentee of the patent of addition, are the same. Section 54 permits the grant of a patent of addition only if the applicant thereof applies or has applied for a patent of the main invention in respect whereof the notification or improvement is claimed. It is obvious therefore that only the patentee of the main invention is entitled to improve or modify the main invention for otherwise it would permit anybody to benefit from it by exploiting the main invention. A stranger to the main invention cannot apply for a patent of addition in respect of any modification or improvement of the main intention.

35. A view to the contrary would lead to the most incongruous results. A view to the contrary would dilute if not obliterate the rights of a patentee in respect of a main invention entirely. For instance, if the patentee of the main invention and the patentee of the patent of addition are different, the validity of the patent of addition would continue only till the validity of the patent of the main invention. Even if the patent in respect of the main invention is revoked, the validity of the

patent of addition can under the proviso to Section 55, continue only for the remainder of the term for the patent of the main invention.

36. Defendant No. 3 in his affidavit dated 24.1.2006 admitted that he was employed by the Plaintiff earlier. He states that he is now working with a firm which manufactures embroidery and cigarette machines and spares, that he is only in charge of the accounts, credit control and administration. He denies any involvement in the manufacture of the said locks/seals.

37. As rightly contended by Mr. Tulzapurkar, this aspect of the matter is of no consequence as admittedly there is no secret process involved. The products are there, the goods are available in the market and there is nothing on record which indicates that the manufacture thereof involves any secret process. The only question is whether the Defendant's goods infringe the Plaintiff's patents.

38. Mr. Kirpekar contended that the Defendants had falsely stated in paragraph 10B of the affidavit in reply dated 24.1.2006 that the application for a patent filed by Defendant No. 1/2 is still pending before the competent authorities under the examination stage. He submitted that in April, 2005 the application had been withdrawn. In this regard, he relied upon certain documents obtained by the Plaintiff pursuant to an application under the Right to Information Act. By a letter dated 6.4.2005, Defendant No. 1/2 had requested the withdrawal of the patent application filed on 9.1.2004 and requested the Controller of Patents and Designs not to publish the application in the Official Gazette in the interest of the Applicant/Defendant No. 1/2.

39. Technically, the statement is not false. The statement was made in an affidavit dated 24.1.2006. However, it was only by a letter dated 2.2.2006 that Defendant No. 1/2 was informed by the Assistant Controller of Patents and Designs that the application is deemed to have been abandoned due to non−compliance of the requirements mentioned therein. I will assume that on 24.1.2006 i.e. the date of the affidavit containing the statement, technically the statement was not false as the application was deemed to have been abandoned

not on the date the Defendants sought to withdraw the application but on the date of the Assistant Controller's letter dated 2.2.2006. However, these are facts that the Defendants ought to have disclosed while alleging that the application for patent was pending. This is more so as the affidavit was filed in support of the application for vacating the ad−interim order.

40. Mr. Tulzapurkar submitted that the injunction ought to be refused on the ground of delay as well as on the ground that the Defendant had approached the Court with unclean hands. He submitted that the Plaintiff had suppressed material facts while applying for the ad−interim injunction on 2.12.2005 and which application was granted by an order passed by me on that day.

41. The cease and desist notice issued by the Plaintiff's Advocate to the Defendants was dated 28.6.2008. The Defendants Advocate replied to the same by a letter dated 21.7.2004. Thereafter, the Defendants had filed a caveat on 23.7.2004 which expired three months thereafter on 22.10.2004. On 20.10.2004, the Defendants had filed a second caveat, the term of which expired on 20.1.2005. The Plaintiff filed the suit only about nine months later on 11.10.2005 and took out the Notice of Motion on 2.12.2005 and made an application for ad−interim reliefs on the same day. I passed an ex−parte order on 2.12.2005. By the order dated 2.12.2005, I permitted the Plaintiff to make the application for ad−interim reliefs without notice to the Defendants in view of the averments in paragraph 23 and 24 of the plaint.

42. The Defendants filed an affidavit dated 25.1.2006 in support of an application to vacate the ex− parte ad−interim order and in reply to the Notice of Motion. By an order dated 30.1.2006 S.U. Kamdar, J. (as His Lordship then was) vacated the ad−interim order, discharged the Court Receiver and directed the Court Receiver to release the seal which had been placed on the Defendants goods.

The Appeal Court in the Plaintiff's Appeal against the said order being Appeal No. 76 of 2005, by an order dated 14.2.2006 inter−alia held that in view of the

Defendants having earlier filed two caveats to oppose the grant of ad−interim/interim reliefs there was no justification for passing the order on 2.12.2005 without notice to the Defendants. It was held that the order vacating the ad−interim relief therefore could not be faulted. The Appeal Court however held that the same would not debar the Plaintiff in pressing for ad−interim reliefs after notice to the Defendants. The Appeal Court granted the Plaintiff liberty to apply to the learned Motion Judge for ad−interim reliefs that very day at 3.00 p.m. or the next day at 11.00 a.m. as may have been convenient to the learned Judge. No application however was made by the Plaintiff for ad−interim reliefs.

43. I would not deny the Plaintiffs the reliefs which I find he is otherwise entitled to on merits if I am satisfied that there were no mala−fides on his part regarding the manner in which he made the application on 2.12.2005. Mere delay of the nature in the present case would not disentitle the Plaintiff to reliefs atleast at the hearing of the Notice of Motion. If however the delay was with a view to snatching an order from this Court without notice to the Defendants in a dishonest manner, the Notice of Motion ought to be dismissed.

44. I am unable to agree with Mr. Tulzapurkar that there was any suppression on the part of the Plaintiff in making the application on 2.12.2005. In paragraph 15 of the plaint the Plaintiff had fairly disclosed the fact of the cease and desist notice, the reply thereto and about the caveats filed by Defendant No. 1/2. Moreover, in paragraph 3 of the further affidavit dated 2.12.2006, the Plaintiff expressly referred to the caveats dated 20.7.2004 and 20.10.2004 and mentioned that the same had been served on him. The Plaintiff having disclosed the necessary facts, no fault can be found with him that I was persuaded to grant the ad−interim injunction.

45. Indeed, the observation of the Division Bench in the order dated 14.2.2006 that there was no justification in passing the ad−interim order dated 2.12.2005 in view of the Defendants having earlier filed two caveats are directed not against the Plaintiffs conduct but against the correctness of the order I passed on

2.12.2005. A party that discloses the necessary facts cannot be faulted or penalized for the Court having passed a wrong order or an order held by the Appeal Court to be wrong.

46. This observation of the Division Bench therefore cannot be a ground for rejecting the Notice of Motion without considering the merits. Indeed, the Division Bench by the same order expressly observed that nothing debarred the Plaintiff from pressing the application after notice to the Defendants.

47. The question that remains is the tenability of the Plaintiff's contention that after the receipt of the reply to the cease and desist notice in June/July 2004 the Defendants had in fact stopped manufacturing the infringing products. This is the Plaintiff's explanation, for having filed the suit almost ten months after the expiry of the validity of the second caveat.

48. The Plaintiff admittedly was aware of the Defendants products since June, 2004. The Plaintiff sought to explain the delay in filing this suit stating in paragraph 15 of the plaint that after the cease and desist notice and the reply thereto, the Plaintiff did not come across the impugned seal/locks manufactured and/or marketed by the Defendants and believed that the Defendants had discontinued the manufacture and/or marketing thereof but that in September, 2005 the Plaintiff once again came across the impugned seal/locks and had therefore filed the suit. Even thereafter the Plaintiff waited for two and a half months before taking out the Notice of Motion and making the ad−interim application.

49. Defendant No. 1 in his affidavit dated 24.1.2006 to vacate the order dated 2.12.2005 and in reply to the Notice of Motion, specifically alleged that as a result of aggressive marketing coupled with the quality of his products, there had been a large volume of sales from May, 2004 continuously upto December, 2005. The Defendants furnished particulars thereof which indicate that the sales between May, 2004 and December, 2005 ranged from about Rs. 22,000/− to Rs. 1,25,000/− and the total quantity of material during this period ranged from

about 8000 pieces to about 56000 pieces. These are not high priced products. Considering the nature of the product, I would consider the sales to be substantially enough for a competitor to be aware of the same.

50. Added to this is the fact that the Plaintiff was admittedly aware of the Defendants website WWW.KALASEALS.COM atleast since August, 2005 as stated in the Plaintiff's affidavit dated 30.1.2006 (see paragraph 8, page 6 at page 9). It is not that the website was discontinued after August, 2005 or that the website had come into existence only recently. The Defendants website has been operating since 10.12.2003. It is not the Plaintiff's case that after the cease and desist notice of 28.6.2004 the website was discontinued or stopped operating.

51. In the affidavit dated 24.1.2006 Defendant No. 1/2 had also annexed a list of forty six purchasers including companies such as Merck Ltd., Themis Laboratories Ltd., Dr. Reddys Laboratories Ltd., Glenmark Pharmaceutical Pvt. Ltd., Cipla Ltd. It is difficult to believe that the Plaintiff was not aware of the Defendants sales to any of the Defendants said customers.

52. To overcome this difficulty, the Plaintiff in an affidavit dated 8.3.2006 contended in paragraph 7 thereof that he bona−fide believed that the Defendants had stopped manufacturing and marketing the said products as he had not come across the impugned locks and purchase orders were received by his concerns and associates from many of the Defendants clients for the period July 2004 to September 2005.

53. This may have been a valid explanation but for an obvious fact. As rightly contended in the affidavit of Defendant No. 1/2 dated 17.3.2006 (paragraph "G") products such as these are commercially used and especially by the pharmaceutical and chemical industries and hence, some of the customers are bound to be the same. It is also contended that it is common trade practice for consumers to have more than one supplier for the same kind of product so as to ensure smooth supply and deter a monopoly. This appears to be quite obvious. If the Plaintiff's contentions were correct, the Plaintiff ought to have established

that the Defendants customers from whom he had received orders during this period from June 2004 to September 2005 were not his customers earlier but had transferred their orders to the Plaintiff in view of the Defendants having stopped manufacturing the same. This aspect was specifically pointed out by Defendant No. 1/2 in the affidavit dated 17.3.2006 but has not been dealt with. The Defendants specifically called upon the Plaintiff to specify customers during this period.

54. As rightly pointed out by the Defendants − the Plaintiff became aware of the Defendants products almost immediately after he started manufacturing them in June 2004 and served the cease and desist notice. It is difficult to believe in the facts and circumstances of this case that he remained unaware of the Defendants commercial activities thereafter for fifteen months.

55. Indeed, if all that the Plaintiff has said was true, he ought to have made enquiries with the clients directly. It is extremely important to note that in paragraph 7 of his affidavit dated 8.3.2006 the Plaintiff stated that the said products "are normally sold directly to the clients and customers and are not freely and readily available over the counters in the market". In that event, on the Plaintiff's own admission, he ought to have ascertained from the clients and customers directly after the cease and desist notice and the reply thereto whether the Defendants had stopped manufacturing the products. It is not even his case that he did so.

56. Prima−facie therefore, the Plaintiff's averments in paragraph 15 of the plaint that he believed that the Defendants had stopped manufacturing the goods after June 2004 appear to be incorrect and made only with a view to making an application for ad−interim reliefs without notice to the Defendants.

57. The power of the Court to grant ad−interim reliefs without notice to the other side is an important one to do justice in certain cases where the issuance of a notice to the other side would defeat the purpose of the application and very often the suit itself. It is a power which atleast in this Court is exercised

sparingly. Indeed, it ought to be exercised sparingly as it affects the rights of parties without affording them an opportunity of being heard. The power is important, and indeed invaluable including in cases which involve the protection of intellectual property rights. However, a party seeking an order without notice to the other side ought to make a honest and full disclosure of facts. There may be cases where an incomplete disclosure may not be significant. There may be cases where the omission to disclose a fact may not be deliberate. Where however, the Court finds that the application contained a representation which was deliberately incorrect, it would be justified in denying the discretionary relief of an injunction.

58. I do not suggest for a moment that mere delay would itself disentitle the Plaintiff to the injunction. I would however deny the Plaintiff an injunction the present case having come to the conclusion albeit prima−facie, that the injunction was sought on a representation which was incorrect as to a material aspect. There is every possibility that had the Court been informed that the Plaintiff was aware since June 2004 of the Defendants continued infringement, it may not have entertained the ad−interim application made after a delay of 18 months without notice to the Defendants.

59. This leaves me with one further aspect observed in the order dated 30.1.2006 passed by S.U.Kamdar, J. (as he then was). The Plaintiff had addressed a letter to the office that the name of the parties should not be disclosed on the board of the Court and therefore the matter appeared on the basis of unidentified parties on the board. This prevented the Defendants from noticing the matter even if they were vigilant.

60. I am in respectful agreement that the office should not accept or act upon any preceipe from the parties or their Advocates for not showing the names of the parties or any of them on the board of the Court. This is an aspect for the Court to decide. A party ought to make an application in this regard to the Court and it is for the Court to decide whether or not the names of the parties ought not to

appear on the board of the Court. The office is directed therefore in future not to act on such a request or an application from the parties or their Advocates unless there is an order from the Court.

61. The matter was argued fully. The judgment was reserved. By a preceipe dated 29.3.2008 the Defendant sought to tender a further affidavit to bring on record documents allegedly discovered after the judgment was reserved. It was stated that the documents have been downloaded from the internet. This application was heard today. I see no reason to allow the further documents to be taken on record at this stage. It is not the Defendants case that the documents were not available on the internet earlier. In the circumstances the application is rejected.

62. In the circumstances, the Notice of Motion is dismissed. However, the Defendants shall maintain accounts in respect of the said products and shall furnish copies thereof in a sealed cover to the Prothonotary and Senior Master on or before the 10th of January and 10th of July each year. Defendant No. 1/2 shall within eight weeks from today file the accounts for the period June 2004 to date in a sealed cover with the Prothonotary and Senior Master. The Plaintiff is at liberty to make an application to inspect the same after notice to the Defendants Advocates.