IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Civil Suit No. 69 of 2005

along with

Counter Claim No. 20 of 2006.

Reserved on : 22.06.2018.

Date of Decision:29th June, 2018.

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1. Civil Suit No. 69 of 2005.

Dhanpat Seth and others **…..Plaintiffs.**

Versus

M/s Nilkamal Plastic Ltd. ……**Defendant.**

2. Counter Claim No. 20 of 2006.

Mr. Dhanpat Seth & others

...Plaintiffs/Non-counter claimants.

Versus

Nilkamal Plastics Ltd.

……Defendant/Counter-claimants.

Coram

The Hon'ble Mr. Justice Sureshwar Thakur, Judge.

Whether approved for reporting? Yes.

For the Plaintiffs: Mr. Vinay Kuthiala, Sr. Advocate with Ms. Vandana Kuthiala, Advocate.

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For the Defendant: Mr. B.C. Negi, Sr. Advocate with Mr. P.P. Singh Advocate.

Sureshwar Thakur, Judge.

The plaintiffs have filed the present suit for grant of an injunction against the defendant, given the latter infringing, the apt Patent, and, for the recovery of damages amounting to Rs.51 lacs, on account of loss, of, profit, and, for future mesne profit(s).

2. Cause of action, as disclosed in the plaint, may be summed up thus. The plaintiffs are members, of, the same family, and, plaintiffs No.2 to 7, have duly authorised plaintiff No.1, to, file the instant suit, on their behalf. The plaintiffs are partners in a registered firm under the name and style of Niovel Appliances India, but since the right to file the present suit has accrued to them in their individual capacity, the same is being filed by them jointly. It is averred that the plaintiffs have been granted patent No.195917, on, 11.07.2005, for " a device for manually hauling of agricultural produce" w.e.f. the date of their application, for, grant of patent i.e. 24.05.2002. The grant of the patent has been recorded by the patent

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office, Govt. of India Mumbai, in the register of patent, on, 24.8.2005. The plaintiffs have been granted the patent, for, complete specifications, design as well as the claim in respect of the device, and, the same are annexed with the plaint along with photographs and details. The defendant is a public limited company incorporated under the Companies Act 1956, and, is being sued through its Managing Director, who is also the Principal Officer of the corporation. The defendant is engaged in the business of manufacturing various plastic products. The defendant is supplying its products in various states, throughout, India including Himachal Pradesh and the plaintiffs are aggrieved by the action of the defendant in the latter infringing the apt patent granted to the invention of “A devise of manually hauling of Agriculture Produce,” hereinafter referred to as the “Invented Device” for the sake of brevity. The defendant has infringed the claim of Patent as provided in the complete specification, under section 10 of the Patent Act, 1970, and, the plaintiffs are thus entitled to the relief claimed in the present suit. The defendant has infringed the patent by

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manufacturing, and, supplying and offering for sale, a device in accordance with the claims of Patent No.195917, in, the state of Himachal Pradesh and in other states. It is averred that the defendant was fully aware that the plaintiffs had conceptualized and visualized the development and invention of the invented device, since, 1999 but despite this the defendant covertly managed, to obtain information about the same and not only manufactured, it but sold it, without, the consent of the plaintiffs to the Govt. of H.P., as well as private parties, in the State of H.P. It is averred that the inventor of the said patent product is Mr. Dhanpat Seth. It is submitted that a device for hauling agriculture produce comprising a container of synthetic polymeric material, defined by a hollow frusto-conical body open at the top and closed at the based and tapering, from, the operative open at the top, and, closed at the based, and, tapering from the operative open top to the base, with, perforated walls said perforations being essentially quadrilateral in configuration, and, reducing in dimensions from the operative top to the base; said wall having a contour

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adapted to proximate the back of a human body; and removable harnessing means secured to the container in the upper perforations, said harnessing means having straps and buckle formations adapted to be irremovably secured in and around the perforations, in the said walls, and, loping means around the back and the shoulders of an individual, said straps and buckle components of the harnessing means being adjustable to permit the harnessing means to be secured to the container at varying locations on the wall of the container in the perforations, and, the loping means adapted to be adjusted to accommodate individual of different heights and body structure. It is averred that in 1999 when the inventor was in Shimla, the inventor noticed that in Himachal Pradesh the farmers and the general people were using long basket made of bamboo for carrying agricultural produce wood and other items. The bamboo baskets are locally known as Kilta. The Inventor also noticed that carrying a Kilta on the back was really painful because for securing the Kilta it was supported by a thick rope and tied to the forehead. There was no provision for laying the Kilta to

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the waist. On making inquiries from the hospitals, doctors and the farmers in and around Shimla, the inventor then thought of an idea of making a long basket in plastic and allied material to replace the Kilta. After development of prototype, the inventor finalized the design in consultation with orthopedic doctors. Various prototypes were taken for survey to the Horticulture Board, Govt. Departments, Cooperative Societies and the farmers in Himachal Pradesh and finally a design with the features as claimed in the said Indian Patent No.195917 hence was frozen. It is further submitted that Immediately after the presentation of the invented device in the seminar/conference, held, at Shimla on 4th April, 2002, a patent and design application for the invented device developed by the inventor, was filed on 24th May, 2002. The plaintiffs commenced commercial production of the plastic long basket/invented device. Till the time of commencement of commercial production the plaintiffs along with the inventor, have spent substantial amount towards the development costs. These include expenses towards development of mould

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infrastructure, samples, travelling and promotion of product etc. The formal marketing of the invented device in accordance with patent application and the design started around 15th June, 2002. The said design was registered under Design No. 189150 on 9th September, 2002. It is submitted that the plaintiff supplied the invented device w.e.f. 2002 to H.P. Govt. Corporations such as HIMFED, and, HPMC through its distributor Rohini Enterprises, Sanjauli,Shimla. It is submitted that under the mistaken impression that suppliers of long basket (kilta) were required to be empanelled with National Horticulture Board, Govt. of India, Gurgaon, before orders were placed on them, the plaintiffs submitted an application with NHB for inclusion of the name of their firm in the panel of parties, for, the purpose of supply of this item. Since, the NHB did not deliberately take any decision on the plaintiffs application for empanelment, they filed a writ petition No.208 of 2005, before, this Court and the aforesaid writ petition was disposed by this Court, on, 29.04.2005. The plaintiffs lateron came to know that some officials of the Directorate of Horticulture Govt. of

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H.P., in connivance with the defendant, withheld, this fact from this Court, and, that pursuant to the negotiations held in December, 2004, the Director Horticulture had already placed supply orders for plastic long basket i.e. the invented device, upon the defendant. These orders have been placed in utter violation of all the norms and the procedure to be adopted while doing so, and, the defendant has illegally, and, in glove with the officials of Directorate of Horticulture (H.P.), supplied goods worth about Rs.72 lakhs, by infringing the apt patent and has played a massive fraud, and, has subjected the state, to, a massive loss of about Rs.7 lacs, on a supply of Rs. 72 lakhs approximately. The supply order was placed on the defendant @ 282/77 per piece whereas the plaintiffs firm had quoted Rs.252/61 per piece. It has further submitted that on coming to know of this fraud, the plaintiffs firm, filed, a PIL CWP No. 732 of 2005, before this Court. In the reply filed to the aforesaid petition, the defendant admitted that it had manufactured and supplied the plastic long Basket i.e. the invented device to the Director of Horticulture,

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Govt. of H.P. Further defendant also admitted that it had supplied similar long baskets as the invented device worth over Rs.40 lakhs to various other parties in Himachal Pradesh. It is averred that the defendant after seeing the product of the plaintiffs which was created by the Inventor, hence copied the product and are now supplying the same in the market, after, making cosmetic changes in the product, and, are committing acts of infringement of the Patent. It is submitted that the defendant's product consists of a device comprising a synthetic polymeric material having a hollow frusto-conical body open at the top, and, closed at the based, and, tapering from the operative open top to the base. The product has perforated walls. The perforations are essentially quadrilateral in configuration and reducing in dimensions from the operative top to the base. The configuration of the wall is also contoured adapted to proximate the back of a human body. The device has removable harnessing means secured to the container having straps and buckle formations for looping the strap around the back and the shoulders of an

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individual, being adjustable to permit the harnessing means secured at varying locations on the container and to accommodate individuals of different heights and body structure. Sale of the defendant's products in violation of the patent rights of the plaintiff has also caused wrongful loss and damage to the plaintiffs and the plaintiffs, therefore, seek damages to the extent of Rs.51 lakhs. The plaintiffs have been subjected to massive loss by the defendant by infringing the patent and supplying the material in the State of H.P. and elsewhere. The plaintiffs have spent huge amount in the development of the invented device and would have earned over 25 lakhs as profit on the sales made by the defendant in Himachal Pradesh till date. The product of the defendant is also inferior in quality and is harming the reputation of the plaintiffs in marketing his invented device. The plaintiffs are suffering a loss of about Rs.25 lakhs on this account and will also suffer further losses, if the defendant makes any more sales by infringing the patent and the plaintiffs seek future mesne profit of Rs.1 lakh for every 1000 long

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baskets/copied invented device sold by the defendant in future. Hence the suit.

3. The defendant contested the suit and instituted the written statement to the plaint, wherein it has taken the preliminary objections qua maintainability, patent being wrongly obtained by the plaintiffs and being wrongly granted n contraventions of the provisions of the Patents Act and the rules framed thereunder. It is submitted that the patent is bad for want of subject matter at the first instance itself. The plaintiffs failed to define the nature of invention and to disclose the process which produces results to be aimed at. The subject matter is neither a matter of new manufacture nor art. There is no novelty or inventiveness in the subject matter of the patent as opposed to what was already known before the relevant date. Pith and essence of the alleged invention as compared to the pith and essence of traditionally known Kilta (long Basket) is identical/ similar in each respect. The device does perform the function of hauling. It is nothing but simply a long basket. The device does not produce any new result or a new

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article of manufacture or art than before. It is the manual function which facilitate the hauling, of, agricultural produce and storing them in bucket type device/container, and, not the device which performs the function of hauling. The plaintiff cannot claim monopoly in a simple plastic basket. It is submitted that the patent rights can be claimed, under the law, in respect of an article which is new, inventive and industrially applicable. There is nothing new or inventive in the device popularly known as Kilta. The patented device is merely an application, of, an old device known as Kilta, for, the purpose of storage or collection of inter alia agricultural produce. The utility of Kilta had traditionally been known much prior to the relevant date. The title of invention is ambiguous and misleading. The device does not constitute an invention. The subject matter of invention, so far as claimed in the complete specification, is “obvious” and does not involve any “inventive steps”. The plaintiffs have not shown to have taken any inventive step over the known devices. Any workman skilled in the art could have carried out the manufacture of Kilta using

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other raw material(s). The element of invention claimed by the plaintiffs on the known device is obvious to a person skilled in the art and is mere trade variant and does not constitute any inventive step within the meaning of Section 2(1)(j) (a) of the Patent Act. The invention, so far as claimed in the claims of the complete specification, was anticipated having regard to the knowledge available in India as well as in many other countries in the world, on, the relevant date. The anticipation by prior disclosure with the consent of the plaintiffs, commercial working commercial use/sale, public exhibition is admitted by the plaintiffs in the pleadings as well as the documents produced on record. The letter of 19th April, 2002, produced on record by the plaintiffs clearly establish anticipation, lack of novelty, prior publication and prior use of device in question. The defendants submit that launching of plastic Kilta in Shimla on 4th April, 2002, in the presence of Minister of Horticulture, other government officials and many leading apple growers, in, Himachal Pradesh in itself, is, sufficient to defeat the claim for the grant of Patent. The defendants crave leave to refer to the

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letter of 14.03.2005 issued on behalf of the plaintiffs admitting and acknowledging the availability of the device in question in the market much prior to the relevant date. The plastic basket, long as well as short were being openly manufactured, sold and offered for sale not only in the state of Himachal Pradesh but also all over India much prior to the relevant date, to, the knowledge of the plaintiffs. It is submitted that the claims made in the complete specification are not "inventions" within the meaning of the Act. As a matter of fact, a simple plastic bucket of a particular size, shape and configuration popularly known as Kilta is misdescribed as a "device" for hauling agricultural produce. There is no functional aspect of hauling in the device in question, and, the functional aspect claimed as invention, is, not the result of the device but manual hand of farmer. The utilitarian value of the plastic bucket popularly known as Kilta was already known prior to the relevant date. The traditional Kiltas were carried or capable of being carried on shoulders as well as tied to the waist. The size, shape and configuration of Kilta continues to be the same as

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known traditionally with frusto conical body open at the top and closed at the base with perforated walls. In any event no patent can be claimed or granted by mere change of shape, size or configuration. Mere use of different raw material for manufacture of known device does not constitute an invention. The word “haul” is defined by Oxford English Dictionary to mean (I) pull or drag forcibly, (ii) transport by Lorry, Cart, (iii) turn a ships course. It is thus clear that there is no hauling function performed by the device or manually by the farmer. It is a simple case of farmer plucking fruits from the tress and storing it in a long basket secured by belts to his body. The plaintiff have admitted that such device known as Kilta was in use prior to relevant date. The only new feature alleged to have been adopted by the plaintiffs, is, the raw material i.e. “synthetic polymeric material” replacing bamboos/wood. Synthetic polymeric material is in use as a substitute to Rubber for many years for manufacture of hollow frusto conical body like bucket, dust bins etc. The mere fact that raw material bamboo/wood as were allegedly being used for

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manufacture of typical device, for, hauling agricultural produce, does not, tantamount to an invention or an inventive step, within, the meaning of Section 2(1)(j)(i) of the Act. It is submitted that the raw material used by the defendant for the manufacture of their Kiltas, is, High Density Polyethylene, the technical name of which is HDP. The material used by plaintiffs is polyprophylene copolymer, the technical name thereof is PP. The limitation of PP is their low temperature bitterness which is not in case of HDP. Both material PP and HDP differ in their respective characteristics. The plaintiff cannot claim a patent in "synthetic polymeric material" at the first instance or the use thereof, as a substance, for the manufacture or sale of traditionally known device, bucket, container, used or capable of being used as storage basket.

4. It is further submitted that the defendant conceived and invented new and novel design for Kilta in 2001. The artistic drawings used as a blue print, for, the preparation of injunction mould, and, Kilta were originally created by in house design department headed by Mr. A.B.. Ambekar, during, the course of

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their employment with the defendant company, and, in discharge of their official duties. The said original drawings were created on 20th November, 2001, and, the same were forwarded by the defendant to Arries Stell Mould Co. Ltd. Taiwan, for designing the injection mould, as, required for the purposes, of, manufacture of Kilta. The said drawings were received by Arries Moulding Co. Ltd., Taiwan in December, 2001, and, the work for the designing of the injection mould, commenced immediately thereafter. The designing of the injection mould was taken up by Arries Steel Mould Company Limited immediately, and, the final mould design, of Kilta, after incorporation, of, necessary technical modifications, were finalised, and, forwarded to the defendants, by Arries Steel Mould Company Limited. The technical specifications and drawings used for the purpose of manufacture of Kilta are original "artistic works" within the meaning of Copyright Act, and, the defendant, is, the owner thereof. Being the owner of copyright, the defendant has got an exclusive right, to, reproduce the artistic features thereof, in any material form, and, restrain

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others from committing an act of infringement. The plaintiffs have infringed defendant's copyright, in, the artistic drawings, by reproducing the same in three dimensions. No person is entitled to claim patent in a substance, resulting, in the aggregations, of, the properties of the components thereof or a process for producing such substance. The patent No.195917 is purported to have been sealed only, on 11th July, 2005, and, has not stood the test of time and scrutiny. The patent is rent. It is also submitted that the feature of belt claimed as another element of the patent specification, in itself, is not new or inventive. In any even, the mode of affixing belt to Kilta in the defendants product is entirely different. Specification belt-fitting slot has been provided in the defendant's product at the upper and the bottom portion of the device for better utility. There is no belt fitting slot provided in the specification of patent in question. It is also submitted that the this Court, does not, have either the territorial jurisdiction or the pecuniary jurisdiction, to, entertain and try the present suit. It is further claimed that the present suit has malafidely

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been filed by the plaintiffs with a view to scuttle legitimate competition in the market and amounts to an abuse of process of law.

5. On merits, the averments made in the plaint are denied. It is submitted that patent No.195917, has fraudulently been obtained by the plaintiffs, and, has illegally been granted by the Controller of Patent in utter breach and disregard to the provisions, of, the The Patent Act. It is submitted that the mere grant of Patent, is, not in itself sufficient to confer monopoly right in favour of the plaintiffs. The plaintiffs have miserably failed t establish the validity of the patent which is seriously disputed and challenged by the defendants. It is denied that the plastic long basket is an inventive device. There is no inventive step taken by the plaintiffs for the manufacture of plastic long basket called Kilta. Mere use of expression in the specification and the claims does not make an ordinary long plastic basket to be an inventive device. It is submitted that the baskets made of plastic are not only being manufactured by the defendants prior to the relevant date, but such like products are being

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manufactured and sold in India and many other countries in the world much prior to the relevant date. The manufacture of Kilta by using plastic as a raw material is nothing more than the mere workshop improvement and does not satisfy the test of inventions or an inventive steps, within, the meaning of the Patent Laws, as applicable. It is denied that Mr. Dhanpat Seth is the inventor or any invention has been made in the manufacture of plastic basket. The claims made by the plaintiffs are obvious, pre-published, pre-known, pre-used and does not constitute an invention. It is submitted that the history of creation ion of the so-called invention has got no relevance to the fact in issue. The plaintiffs have admitted that HDP as an ingredient, was, in use for the manufacture of plastic devices prior to the relevant date, and, at least in 1989. The raw material which is being used by the defendant for the manufacture of their plastic buckets/baskets, is High Density Polyethylene, the technical name of which is HDP. It is denied that the alleged inventor visited Himachal Pradesh in 1999 and discovered the people using long basket made of Bamboo. Long baskets

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made of bamboo for multiple usage and purposes are being traditionally used for decades by the farmers and labourer in plains as well as in hills for the transportation of material. It is submitted that the plaintiffs have again made vague statement about the persons carrying Kilta having lost their balance or rolled down from the mountain slops. It is denied that there was any mishap or a case of rolling down the mountain slopes on account of persons carrying a traditional Kilta.It is submitted that the plastic bucket/basket in small and long sizes were already manufactured and sold, in the market by large number of manufacturers, when the alleged idea of making a long basket in plastic, is, claimed to have occurred to the so-called inventor. None of the features disclosed in the Indian Patent No.195917, constitute, any infringement or inventive steps, within the meaning of the Patent Act. The plaintiffs have deliberately not disclosed the period of time when the design of the basket/device, subject matter, of Patent No.195917, was finalized or taken for service or submitted to the Government department. It is submitted that the long baskets/Kilta made of

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plastic material was being openly sold in the market, prior to, the date of filing the application, for the grant of Patent on 24th May, 2002. It is denied that any valid claim for patent was made on 24th May, 2002 by the plaintiffs. It is submitted that in the representation made to the National Horticulture Board, Gurgaon, the plaintiffs have themselves admitted having introduced the round basket during 2000-2001 and long basket during 2001. The plaintiffs have deliberately suppressed the entire correspondence exchanged from National Board. It is further denied that the sale of the defendant's products is in violation of the alleged patent rights, of, the plaintiff or that the same has caused any wrongful loss or damage to the plaintiff.

6. The plaintiffs herein filed replication(s) to the written statement(s) of the defendants, wherein, they denied the contents of the written statements and re-affirmed and re-asserted the averments, made in the plaint.

7. The defendant instituted a counter claim against the plaintiffs, for seeking cancellation, of, Patent No.195917, with, averments that the defendant

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company is Asia's Largest manufacture of injection moulded plastic articles since 1985. The defendant is an ISO 9001 and ISO 14001 company, and, has pioneered the business of manufacturer of wide range of furniture and material handling crates, having its factory(ies)/units at various parts of India. The defendants Nilkamal Products are self designed articles and retain its pioneer position, with, a large chunk of market share, in the industry. The defendant conceived and invented new and novel design of Kilta, in, 2001. The artistic drawings used as a blue print for the preparation of injunction mould and Kilta, were, originally created, by in house design department headed, by Mr. A.B.. Ambekar, during, the course of their employment with the defendant company, and, in discharge of their official duties. The said original drawings were created on 20th November, 2001, and, the same were forwarded by the defendant to Arries Steel Mould Co. Ltd. Taiwan, for designing injection mould, as, required, for, the purposes of the manufacture of Kilta. The said drawings were received by Arries Moulding Co. Ltd., Taiwan in December, 2001,

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and, the work for the designing of the injection mould, hence commenced immediately thereafter. The designing of the injection mould, was, taken up by Arries Steel Mould Company Limited immediately and the final mould design of Kilta, after incorporation necessary technical modifications, were finalised, and, forwarded, to the defendant, by Arries Steel Mould Company Limited. The technical specifications and drawings used for the purpose of manufacture of Kilta are original “artistic works”, within, the meaning of Copyright Act, and, the defendant is the owner thereof. Being the owner of copyright, the defendant has got an exclusive right, to reproduce, the artistic features thereof in any material form, and, restrain others from committing any act of infringement. The plaintiffs have infringed defendant's copyright, in the artistic drawings, by reproducing the same in three dimensions. It is submitted that the petitioner is well known manufacturer and seller of devices comprising, of, containers of various sizes, designs made by synthetic polymeric material and/or High Density Polyethylene defined by hollow frusto conical body

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open at the top and closed at the base with perforated walls. No person is entitled to claim, any monopoly, in a substance resulting in the aggregation of the properties of the components thereof or a process for producing such substance under the provisions of law, as applicable. The plaintiffs have obtained patent No.195917 by making false statements, claims and representations. The patent No.195917 is purported to have been sealed on 11th July, 2005. The aforesaid patent has fraudulently been obtained by the plaintiffs and it is liable t be revoked under Section 64, of, the Patents Act, 2005. The aforesaid patent was wrongly obtained by the plaintiffs, and, was wrongly granted by Controller of Patents, in, contravention of the provisions of the Patents Act, and, the rules framed thereunder. The subject matter of any claim, of, the complete specification of Patent No.195917, is, not patentable under the provisions of the Act. The patent is bad for want of subject matter, at, the first instance itself. The plaintiffs failed to define the nature of invention, and, to disclose the process, which produces results to be aimed at. The subject matter is neither a matter of

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new manufacture nor art. There is no novelty and inventiveness in the subject matter of the patent, as opposed, to what was already known before the relevant date. Pith and essence of the alleged invention as compared to the pith and essence of traditionally known Kilta, is, identical similar in each respect. The device does perform the function of haling. It is nothing but simply a long basket. The device does not produce any new result or a new article of manufacture or art than before. It is the manual function which facilitates the hauling, of, agricultural produce, and, storing them in bucket type device/container and not the device which performs, the, function of hauling. The plaintiff cannot claim monopoly in a simple plastic basket. It is submitted that the patent rights can be claimed, under the law, in respect of an article which is new, inventive and industrially applicable. There is nothing new or inventive in the device popularly known as Kilta. The patented device is merely an application of old device known as Kilta for the purpose of storage or collection of inter alia agricultural produce. The utility of Kilta

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had traditionally been known much prior to the relevant date. The title of invention is ambiguous and misleading. The device does not constitute an invention. The subject matter of invention, so far as claimed in the complete specification, is “obvious” and does not involve any “inventive steps”. The plaintiffs have not shown to have taken any inventive step over the known devices. Any workman skilled in the art could have carried out the manufacture of Kilta, using, other raw material(s). The element of invention claimed by the plaintiffs, on, the known device is obvious to a person skilled in the art, and, is mere trade variant and does not constitute any inventive step, within, the meaning of Section 2(1)(j) (a) of the Patent Act. The invention, so far as claimed in the claims of the complete specification, was anticipated having regard to the knowledge available in India as well as in many other countries in the world, on, the relevant date. The anticipation by prior disclosure with the consent of the plaintiffs, commercial working commercial use/sale, public exhibition, is, admitted by the plaintiffs, in the pleadings as well as the documents

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produced on record. The letter of 19th April, 2002, produced on record by the plaintiffs clearly establish anticipation, lack of novelty, prior publication and prior use of device in question. The defendants submit that launching of plastic Kilta in Shimla on 4th April, 2002, in the presence of Minister of Horticulture, other government officials and many leading apple growers in Himachal Pradesh in itself is sufficient to defeat the claim for the grant of Patent. The defendants crave leave to refer to the letter of 14.03.2005, issued, on behalf of the plaintiffs admitting, and, acknowledging the availability, of the device, in question in the market, much prior, to the relevant date. The plastic basket, long as well as short were being openly manufacture, sold and offered for sale not only in the state of Himachal Pradesh but also all over India much prior to the relevant date to the knowledge of the plaintiffs. It is submitted that the claims made in the complete specification are not “inventions” within the meaning of the Act. As a matter of fact, a simple plastic bucket, of, a particular size, shape and configuration popularly known, as, Kilta is misdescribed as a “device” for

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hauling agricultural produce. There is no functional aspect of hauling in the device in question and the functional aspect claimed as invention is not the result of the device but manual hand of farmer. The utilitarian value of the plastic bucket popularly known as Kilta, was, already known prior to the relevant date. The traditional Kiltas were carried or capable of being carried on shoulders as well as tied to the waist. The size, shape and configuration of Kilta, continues, to be the same as known traditionally with frusto conical body open at the top and closed at the base with perforated walls. In any event no patent can be claimed or granted by mere change of shape, size or configuration. Mere use of different raw material for manufacture of known device, does not, constitute an invention. The word “haul” is defined by Oxford English Dictionary to mean (I) pull or drag forcibly, (ii) transport by Lorry, Cart, (iii) turn a ships course. It is thus clear that there is no hauling function performed by the device or manually by the farmer. It is a simple case of farmer plucking fruits from the tress and storing it in a long basket secured by belts to his body. The

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plaintiff have admitted that such device known as Kilta was in use prior to relevant date. The only new feature alleged to have been adopted by the plaintiffs is the raw material i.e. “synthetic polymeric material” replacing bamboos/wood. Synthetic polymeric material is in use as a substitute to Rubber for many years for manufacture of hollow frusto conical body like bucket, dust bins etc. The mere fact that raw material bamboo/wood as were allegedly being used fr manufacture of typical device, for, hauling agricultural produce, does not tantamount, to an invention or an inventive step, within, the meaning of Section 2(1)(j)(i) of the Act. It is submitted that the raw material used by the defendant for the manufacture of their Kiltas, is High Density Polyethylene, the technical name of which is HDP. The material used by plaintiffs is polyprophylene copolymer, the technical name thereof is PP. The limitation of PP is their low temperature bitterness which is not in case of HDP. Both material PP and HDP differ in their respective characteristics. The plaintiff cannot claim a patent in “synthetic polymeric material” at the first instance or the use thereof as a

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substance for the manufacture or sale of traditionally known device, bucket, container, used or capable of being used as storage basket. It is submitted that thus it is apparent from the above that there is no invention in the subject matter; there is nothing new or novel; there is no method or process performed by the device and cannot be the subject matter of patent; there is no inventive step involved in the manufacture of the device; the invention claimed by the plaintiffs is obvious; and without prejudice to the above, the invention claimed by the plaintiffs, was, anticipated on the relevant date and as such the patent is liable to be revoked for the grounds enumerable under Sections 64(1)(a), (c), (d) to (I) and (q) of the Patents Act, 1970. It is submitted that this court has jurisdiction to entertain and try the present petition, as, the plaintiffs have instituted a civil suit alleging infringement, of patent No.195917 before this Court, and, that the provisions of the Patents Act, provides, that a petition for cancellation of a patent can be instituted in the Court where a suit for infringement, is, instituted for proper adjudication of controversy, between, the

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parties in infringement proceedings, and, in cancellation action.

8. The plaintiffs instituted written statement to the rectification petition/counter claim instituted by the defendant, wherein, they have taken preliminary objection qua maintainability, valuation for the purpose of court fee and jurisdiction, cause of action suppression of material facts etc. On merits, the averments cast in the counter claim, by the defendant have been denied in toto. It is denied that the plaintiffs have obtained Patent No. 195917, by making false statements or claims. It is submitted that the patent has been granted in favour of the plaintiffs, in accordance with law, and, the same is valid. It is submitted that the patent has been granted in favour of the plaintiffs, after, complying with all the statutory requirements, and, the plaintiffs have a right to prevent a third party, from, infringing his patent. The patented article involves advance as compared to the existing knowledge, and, has economic significance, and, is not obvious to a person skilled in the art. Thus the patent in question has been validly granted in favour of the

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plaintiffs. It is denied that a technical advance does not tantamount to an invention or an inventive step.

9. On the contentious pleadings of the parties, this Court on 30.10.2007, struck the following issues inter-se the parties at contest:-

1. Whether the plaintiff is entitled to the grant of a decree for permanent prohibitory injunction restraining the defendant from infringing Patent No.195917 in any manner whatsoever? OPP

2. Whether the plaintiff is entitled to a decree for mandatory injunction directing the defendant not to infringe Patent No.195917 in any manner whatsoever, as alleged? OPP.

3. Whether the plaintiff is entitled to damages on account of profits and mesne profits as prayed for?

4. Whether the goods supplied by the defendant by infringement of the Patent are liable to seizure, forefeiture and destruction?OPD.

5. Whether a plastic 'Kilta', as manufactured by the plaintiffs, can be granted a Patent?OPD.

6. Whether there exists a legal and a valid Patent of a 'Kitla' with the plaintiffs?OPD.

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7. Whether the suit is maintainable in its present form?OPD.

8. Whether the suit is properly valued for the purposes of Court fee?OPD.

9. Relief.

10. For the reasons to be recorded hereinafter, my findings on the aforesaid issues are as under:-

Issue No.1..... No.

Issue No.2..... No.

Issue No.3..... No.

Issue No.4..... No.

Issue No.5..... No.

Issue No.6..... No.

Issue No.7..... No.

Issue No.8..... No.

9. Relief..... Suit of plaintiff is dismissed, whereas, counter claim instituted by the defendant is decreed as per the operative portion of the judgement

Reasons for findings.

Issues No.1 to 6.

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11. All the aforesaid issues are being disposed, of by, a common discussion, given, all the aforesaid issues being common in nature besides when in proof thereof, common evidence stands adduced.

12. The plaintiffs avers qua the defendant hence infringing, the, apposite patent granted qua them, vis-a-vis, (i) a device for manually hauling of agricultural produce, (ii) device whereof, comprises a container of synthetic polymeric material defined by a hollow frusto-conical body open at the top, and, closed at the base, and, tapering, from, the operative open top, on the base, with perforated walls", (iii) infringements whereof, are contended, to be made by the defendant, comprised in its, as testified by DW-1, in his cross-examination, qua inter se the kiltas manufactured, by the defendant and, vis-a-vis the patented product, there occurring only minimal differences, in, size(s) and perforations thereof. Consequently, the counsel, for, the plaintiffs, contends, that there, hence, being an open breach, of the patent, granted, vis-a-vis, the plaintiff company, and, as embodied in Ex.PW1/C-2, hence, the contracts made upon the defendant, for

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supplying Kiltas, to the appropriate authority, rather visiting the plaintiffs, with pecuniary damages, hence, pecuniary compensation, borne in a sum of Rs.51 lacs, being meted vis-a-vis the plaintiffs, by an apposite decree in respect thereof, being pronounced, by this Court.

13. Be that as it may, an appeal bearing No. OA/5/2—7/PT/Num, for revocation(s) of the apposite patent, and, as preferred before the Intellectual Property Appellate Board, Chennai, is, yet awaiting pronouncement, of, an adjudication thereon. However, dehors, the pendency, of, the revocation appeal, before, the aforestated Board, this Court would yet be vested, with, the apt jurisdiction, to make a pronouncement, upon, the extant suit, (i) given the provisions, borne in Section 64(1) of the Patents Act, 1970, (hereinafter referred to as the Act), hence, bestowing a right, upon the aggrieved to either seek revocation of the grant of patent, by availment, of, the apt statutory remedy or through, a counter claim instituted, in the plaintiffs' suit, for infringement, of the apt patent. Since, the defendant, has, hereat instituted

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a counterclaim, wherein, it agitates the factum probandum, of, the purported patented product, not, within the ambit of the provisions, of, Section 2 (j)(a) of the Act, mandate whereof stands extracted hereinafter, hence, being an inventive step, (ii) also when they contend, of, the Kilta, supplied to the department(s) concerned, rather falling within the ambit, of clauses (d), (f), and, (p) of Section 3 of the Act, (iii) wherein, are encapsulated, the, apposite exclusionary provision(s) hence for rendering, rather inefficacious, the, validity of the patent accorded, vis-a-vis, a patentee, and, vis-a-vis, a specific product, (iv) thereupon, with the counter-claim, instituted by the defendant, hence, carrying therein, all apt contentions, falling within, the ambit, of, the provisions supra of the Act, (v) hence, this Court, dehors, the pendency of an appeal before the Intellectual Property Appellate Board, Chennai, as, preferred therebefore, by the aggrieved defendant, wherein, a challenge, is, cast to the patent granted, vis-a-vis, the apposite product, rather would hence, proceed, to, dwell upon the validities, of, the respective contentions, reared by the plaintiffs, and, by the

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defendant. Provisions of Section 2(ja) of the Act read as under:-

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

Provisions of clause (d), clause (f) and clause (p) of Section 3, of, the Act read as under:-

> "(d) the mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of the substance or the mere discovery of a ny new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant.
>
> (f) the mere arrangement or re-arrangement or duplication of known devices each functioning independently of one another in a known way;
>
> (p) an invention which in effect, is traditional knowledge or which is an aggregation or duplication of known properties of traditionally known component or components"

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14. However, before proceeding, to make an adjudication, upon, the merits of the respective contentions, as, reared herebefore, respectively by the plaintiffs, and, by the defendant, it is also deemed imperative, to bear in mind, the provisions, borne, in sub section (4) of Section 13 of the Act, provisions whereof stand extracted hereinafter:-

> **"13. Search for anticipation by previous publication and by prior claim**.-(1) The examiner to whom an application for a patent is referred under section 12 shall make investigation for the purpose of ascertaining whether the invention so far as claimed in any claim of the complete specification-
>
> (a) has been anticipated by publication before the date of filing of the applicant's complete specification in any specification filed in pursuance of an application for a patent made in India and dated on or after the 1st day of January, 1912;
>
> (b) is claimed in any claim of any other complete specification published on or after the date of filing of the applicant's complete specification, being a specification filed in pursuance of an application for a patent made in India and dated before or claiming the priority date earlier than that date.
>
> (2) The examiner shall, in addition, make such investigation [3] [***] for the purpose of ascertaining whether the invention, so far as claimed in any claim of the complete specification, has been anticipated by publication in India or elsewhere in any document other than those mentioned in sub-section (1) before the date of filing of the applicant's complete specification.
>
> (3) Where a complete specification is amended under the provisions of this Act before [4][the grant of patent], the amended

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> specification shall be examined and investigated in like manner as the original specification.
>
> (4) The examination and investigations required under section 12 and this section shall not be deemed in any way to warrant the validity of any patent, and no liability shall be incurred by the Central Government or any officer thereof by reason of, or in connection with, any such examination or investigation or any report or other proceedings consequent thereon."

In the afore-extracted apt provisions borne, in, sub-section (4), of, Section 13, of the Act, there occurs a statutory engraftment, (a) whereunder, the examiner, wherebeforewhom, an apt application, cast under Section 12, of the Act, for grant of patent, stands prereferred, is, thereafter rather statutorily obliged, to make investigations thereof, and, besides the apt investigations, as, carried under the substantive portion, of Section 13 of the Act or any report prepared in sequel thereto, are, statutorily per se constituted unbefittingm, to warrant, the apt validity of any patent, (ii) thereupon, upon reading(s), of, the aforestated statutory engraftment, as, borne in sub section (4) of Section 13 of the Act, in entwinement, with sub-section (1), and, with sub-section (4) of Section 64, of, the Act, (iii) wherewithin, the, aggrieved, is, bestowed, with, a right, to challenge the grant of patent, to a patentee,

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either by availing the apt statutory remedy/mechanism or through a counter claim, (iii) cumulatively and reinforcingly thereupon, dehors, the patent granted, to, the patentee/plaintiff company, and, as embodied in Ex.PW1/C-2, this Court would proceed, to hence dwell, upon, the aforesaid espousal(s), reared by the defendant, in its counter claim, given, conspicuously the grant of patent, embodied in Ex.PW1/C-2, not, hence per se comprising, any, unimpeachable evidence, vis-a-vis, the validity, of, the apposite patented product.

15. Even though, as aforestated, the deposition of DW-1, does tentatively bear out the contention, of, the plaintiff qua apart from the apt minimal difference(s), in the size(s), and, perforations, of, the Kilta, manufactured by the defendant, drawings whereof, are borne in Ex.DW1/E-1 to Ex.DW1/E-4, vis-a-vis, the kiltas manufactured by the plaintiffs, in respect whereof, the apt patent was granted, vis-a-vis, the plaintiffs, (a) yet per se, thereupon, it cannot be concluded, of, hence the defendant, rather infringing the apposite patent. Contrarily, this Court, is, enjoined

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to mete, an, appropriate adjudication, vis-a-vis, the espousal(s) reared by the defendant, in its counter-claim, (b) anchored upon the definition, of, “inventive step”, borne in Section 2(ja) of the Act, (c) and, also, upon, the contention, of the defendant, grooved, in the provisions borne in clauses (d) and (p) of Section 3 of the Act, (d) and, upon ingredients, of, provisions thereof, being satiated, by adduction, of, cogent evidence, this Court, would negate the claim of the plaintiffs, (e) besides upon evidence on record, making forthright and invincible displays, of, the patented product not being an “inventive step”, thereupon, also the claims of the plaintiffs, would stand obviously, hence omnibusly negated. Consequently, it is imperative, for this Court to initially, decipher, from the evidence on record, qua the patented product, constituting, an “inventive step”, as, defined in Section 2 (ja) of the Act.

16. Before proceeding to search, for, the apt evidence, as may be adduced, in satiation, of all the ingredients, borne, therein, it is, of utmost significance to bear in mind the statutory connotation, ascribed in

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Section 2 (ja) of the Act, vis-a-vis, an “inventive step”, (i) therein “inventive step” is ascribed the signification, of, a feature of an invention that under takes technical advance, as compared to the existing knowledge; (ii) or having economic significance or both; (iii) that makes invention, not, obvious to a person skilled in art. In case, the learned counsel, for the defendant/counter-claimant, hence succeeds, in establishing, that the features of the patented product, uncontrovertedly a Kilta, does not bear out, the trite fact of it being an invention, (a) given, its evidently not involving any technical advance, vis-a-vis, the existing knowledge prevailing qua it or if he establishes, that dehors its holding, any economic significance or both, (b) that even, too, a person skilled in the art, the patented product not carrying any inventive features, rather, upon, a person skilled in the art, on, sighting the patented product, his gathering, an impression, that, it carries a look alike, vis-a-vis, the traditional product, (c) thereupon, the patented product hence would not be construable to be a “inventive step”, nor hence, any, replicate thereof, save and except, minimal differences,

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inter se both, specifically in size(s), and, in user therein, of any alternate raw material, would not hence constitute, any infringements, of the apt patented product. In the aforesaid assay, the learned counsel, appearing for the defendant, has drawn the attention, of this Court, to, the bespeakings hence occurring in the cross-examination, of, PW-3, and, as appertain to the kilta, in respect whereof, patent was granted, bespeakings whereof loudly rather echo qua the kiltas, hence being in use in the country side, since, times immemorial, (d) and, qua further acquiescence(s), also occurring, in, his further cross-examination, qua, instead of user, of, bamboo, as a raw material in manufacture thereof, the plaintiffs, using plastic, as a raw material, in manufacture of the product, in respect whereof, the plaintiffs claim a patent. The aforesaid testification, borne in the cross-examination, of, PW-3, does bear out, the, contention of the counter-claimant/defendant, that the patented product, does not display, any feature of any invention, and, also that hence no technical advance, has occurred, in, its fabrication or manufacture, vis-a-vis, the prevalent

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knowledge, with respect, to the patented product, (e) except, the apt inter se both hyphenated/segregable, trite factum, qua except bamboo, the hitherto used raw material, rather the patented product, hence,using plastic as a raw material. Conspicuously also, the, parlance ascribable, vis-a-vis, the statutory coinage, “technical advance”, (f) is, of, the plaintiffs being enjoined to make evident display, of, apart from user, of, the aforesaid substituted substance, as, a raw material, in the manufacture of Kilta, hence any significant mechanical, automated or robotic advances, visibly occurring, (g) whereupon, the apt automated or mechanical hauling, of, agricultural produce, has substituted the manual hauling, of, agricultural produce, (h) whereas, hereat gross absence, of, the aforesaid evidence, renders the purported patent being not construable to hence secure a technical advance, vis-a-vis, traditional Kilta, nor it can be constituted to be an apt “inventive step”. Furthermore, the plaintiffs also omitted to adduce any material, personificatory, of the inventive product, in respect whereof, the apt patent was granted, holding economical significance,

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vis-a-vis, the traditional kilta, evidence whereof, is, comprised, in, the purported inventive product holding higher economical viability, vis-a-vis, the manufacturing, of, or user of, and, longevity, of, the traditional kilta, in manufacturing whereof rather bamboo straw, is, used as a raw material. In addition, the last part, of the statutory definition, ascribed, vis-a-vis, "inventive step", qua, the purported invention, not, on its appearance, before a person skilled, in, the art, rearing any impression, in his mind, of, its obviously, holding alikeness, vis-a-vis, the traditional kilta, (i) except the user nowat therein, of, plastic as a raw material, instead of bamboo, previously used in the manufacturing, of, traditional kilta, (j) thereupon, alone, it being construable to be an "inventive step", whereas, with the aforesaid acquiescence(s), occurring, in the cross-examination of PW-3, does prima facie, make a display, of PW-3 also concomitantly, hence acquiescing, that save and apart, from user in the patented produce, a contradistinct, raw material, as, used, nowat, in the manufacture of a traditional Kilta, rather upon visual appearance of the patented

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product, it being obvious, qua their occurring similitude(s), and, resemblance(s), in both, the patented product, and, the traditional Kilta, (k) thereupon, the surfacing, of imperative evident non-obviousness, upon, the physical appearance, of, the patented product, before a person skilled in the art, especially, vis-a-vis, its not bearing any similitude, and, utmost resemblance, vis-a-vis, the traditional Kilta, except user therein, of, a contradistinct, raw material, rather was, indispensable, (l) imperatively for thereupon rather rendering the patented product, to be construable to be a “inventive step” whereas, evidence thereof, is, grossly amiss. Thereupon, contrarily, with, the evident imperative obviousness, of its similitude, vis-a-vis, the traditional kilta, it cannot be deemed, to be an “inventive step”, qua, the traditionally manufactured Kilta. Even though, PW-3, is, not a person skilled in the art, nor hence he can make any deposition, vis-a-vis, the patented product, being an “inventive step”, given, upon its obvious physical appearance before him, its not displaying any features, of, similitude or visible resemblanceness, with, the

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traditional kilta, save and except, the user therein, of, plastic, as a raw material, (m) yet, may tentatively render his aforesaid deposition, to be rather not rendering the patented product to be, not, hence an “inventive step”. However, with the plaintiffs when hence were also enjoined, to lead into the witness box, a person skilled in the art, for enabling him, to depose, that, upon, its being visually presented before him, it being not obviously, decipherable therefrom, qua it not bearing any similitude or resemblance, with the traditional Kilta, except user therein of plastic, as, a raw material. Nonetheless, the aforesaid person skilled, in the art, omitted to be examined by the plaintiffs, hence, an adverse inference is drawable, against, the plaintiffs qua theirs acquiescing, to the factum of the patented product not being an “inventive step”, given, reiteratedly, it obviously, to a person skilled in the art, upon its visual display before him, garnering an inference in his mind, qua it, rather bearing similitude, and, resemblance, with, the traditional Kilta, (l) especially when PW-3 in his deposition, borne in his cross-examination, does make a display, of upon, its

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physical appearance before him, its, obviously displaying similitude, and, resemblance with the traditional kilta, apart from, user therein, of, plastic as a raw material. The sequel of the aforesaid discussion, is, that the patented product, being not construable, to be a “inventive step” nor the defendant can be construed, to infringe the apposite patent, as, granted, qua the plaintiffs.

17. With, the evidence on record, hence, making a clear lucid earmarked, display, qua except for apt contradistinct user hence in the patented product, of, plastic as a raw material, the latter yet bearing similitude and resemblance, vis-a-vis, the traditional Kilta, rather hence also carries the further effect, qua, hence the mandate of clause (a) of Section 3 of the Act, rather being attracted, (i) imperatively, when the patented product, within, its ambit, is hence construable, to be, merely a discovery, of a new form, of, a known substance, inasmuch, as traditional Kilta, and,also its user within its ambit, is, further not proven to result in enhancement of the known efficacies, of, the traditional kilta, even with its possessing, any,

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purported orthopedic superiority, as, deposed by PW-3, vis-a-vis, the traditional kilta, deposition whereof, is, oustable, given, no orthopedic surgeon, making any apt testification. Furthermore, the deposition, existing, in the cross-examination, of, PW-3 qua Kilta being in user in the countryside, of, Himachal Pradesh, since times immemorial, and, except the user, of, plastic as a raw material, in the manufacture, of the patented product, in replacement, of, bamboo, (i) thereupon, with, there being no earmarked contradistinctivity, inter se, both qua their similitude, and, mode, of, user by the agriculturists, more so, when, for, reasons aforesaid, it is bereft, of, any technical advance, rather enjoins this Court, to, therefrom, gauge qua, hence it bearing concurrence, with, the provisions, borne in clause (p) of Section 3 of the Act, (ii) wherewithin, stands engrafted, a, mandate qua, upon cogent evidence being adduced, in satiation, of, all ingredients thereof, thereupon, the benefit, of, apt exclusionary mandate thereof, being visitable, vis-a-vis, the counter-claimant. Since, the apposite exclusion(s), vis-a-vis, the patented product, embody therein, apt exceptions, vis-a-vis, invention, (I)

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and, are comprised, in the purported invention, being per se traditional knowledge, (ii) or, upon the patented product, being merely a aggregation, or, a duplication, of the known component or components, (iii) thereupon, also, hence it being not construable to be an invention. Upon apt therewith voicings standing borne, in the cross-examination, of, PW-3, hence renders the patented product, to, rather fall within the opening coinage, of clause (p), borne in Section 3 of the Act, (iv) inasmuch, as, it being per se traditional knowledge, conspicuously, vis-a-vis, the known properties, of, the traditionally known component or components thereof, thereupon, the factum, of, it being an "inventive step", is negated, (v) and also thereupon, the factum of, or it being construable to be an invention, is, negated, (vi) besides when the patented product, hence merely upon user therein, of plastice, as a raw material, is, rather an aggregation or specifically, a, duplication, of, known properties of traditionally known component or components, inasmuch as, of, the known properties, of, the traditional kilta, (vii) comprised, in its alike therewith

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only facilitating, the hitherto also rather manual hauling of agricultural produce, (viii) and, reiteratedly when the known properties thereof, are, apparently duplicated, merely, by contradistinct user therein, of, plastic, than, of bamboo, as a raw material, (ix) hence, the replacement or substitution, of, the hitherto raw material, inasmuch, as of bamboo, by, plastic in the manufacture, of, the patented product, reinforcingly, does not either add or enhance,, the traditional knowledge, with, respect to the manufacturing, of, a Kilta.

18. Be that as it may, the aforesaid negation, of claim, of patent, vis-a-vis, the patented product, hence constrains this Court, to, attract the mandate, of sub-section 64 of the Act, and, also the compatible therewith mandate, borne in sub-section (4) of Section 13, of the Act, wherewithin, jurisdiction, is bestowed upon this Court, to test validity of grant of patent, (I) corollary whereof, is that the grant, of, patent vis-a-vis the patented product, in favour of the patentee, not, being an inventive step nor its purported infringement, if any, hence empowering the plaintiffs to claim any

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pecuniary damages, from, the defendant/counter-claimant.

19. In view of the above, issues No.1 to 6 are decided in favour of the defendants/counter claimants and against the plaintiffs/non-counter-claimants.

Issue No.7 and 8.

20. No evidence exists on record to show qua how the suit of the plaintiffs is not maintainable, and, qua as to how the plaintiffs' suit is not properly valued for the purposes of Court fee. Moreover, a persual of the record that the plaintiff's suit is properly valued for the purpose of court fee and jurisdiction, hence, both the aforesaid issues are decided in favour of the plaintiff and against the defendant.

Relief.

21. In sequel to findings on issues aforesaid, the plaintiffs' suit is dismissed, whereas, the counter claim instituted by the counter-claimant/defendant is decreed and the patent No.195917, titled as “A Device for Manually Hauling of Agricultural Produce” granted in favour of the plaintiff by the Statutory Authority is

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cancelled. Decree sheet be prepared accordingly. All pending applications also stand disposed of.

(Sureshwar Thakur)
Judge.

29th June, 2018
(jai)

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