

Garware-Wall Ropes Ltd. vs Mr. Anant Kanoi And Ors. on 13 July, 2006

Author: R.S. Garg

Bench: R.S. Garg

JUDGMENT

R.S. Garg, J.

1. The applicants, original plaintiffs, M/s. Garware-Wall Ropes Limited, filed Regular Civil Suit No. 2 of 2005 in the Court of the Principal District Judge, Surat, praying, inter alia, that a declaration be granted in favour of the plaintiffs that they are registered owners of the patent; defendant No. 1, M/s. Techfab India, either through its servants, employees, agents, officer, etc., are not entitled to manufacture, sell, use and offer for sale the 'gabion' made from synthetic ropes, and also prayed that the defendants are not entitled to do any act, which may infringe the plaintiffs' Patented SRG Invention under Patent No. 195352. They have also prayed to the Court that the defendants be restrained by a permanent injunction from manufacturing, selling and/or offering the product known as 'Gabion', as detailed in Annexure-B. The plaintiffs have also prayed for a sum of Rs. 5 Lakhs as damages with a further prayer for rendition of accounts of profit earned by the defendants by copying the plaintiffs' patent and selling the same in the market.

In the suit, an application under Exh. 5 was made seeking temporary injunction against defendant No. 1 that they be enjoined from manufacturing, selling and/or offering for sale the gabion and they be further restrained from infringing the plaintiffs' patent.

2. The learned trial Court, by its ex parte Order dated 18th October, 2005, restrained the defendants from manufacturing, selling and distributing prefabricated collapsible and flexible gabion made of ropes; the order was to remain in force till 27th October, 2005; a show cause notice was issued to the defendants asking them to show cause as to why the order be not confirmed till the final disposal of the suit. Being aggrieved by the ex parte order, the plaintiffs came to this Court by way of an Appeal From Order (Appeal No. 350 of 2005); the appeal was finally disposed of by prescribing time bound schedule for final hearing of Exh.5 with a further clarification that till final disposal of the said application, the defendants would be allowed to manufacture and market, etc., if according to the defendants, the product manufactured by them is different than the product patented in favour of the plaintiffs, however, the defendants would be obliged to maintain the accounts of the sales.

3. The defendants, thereafter, submitted their written statement and the counter-claim. A rejoinder was also filed. The defendants, in the written statement, submitted that Patent No. 195352 be revoked under Section 64 of the Patents Act, 1970 ('the Act' for short). The plaintiffs, in view of the

counter-claim made by the defendants, made an application to the trial Court that in view of the provisions of law, the suit be transferred to the High Court under Section 104 of the Patents Act. The learned trial Court, vide its Order dated 28th October, 2005, transferred the suit and the counter-claim to this Court and extended the modified interim order. After receipt of the suit in this Court, it was renumbered as Civil Suit No. 4 of 2005.

4. With the consent of the parties, Application-Exh.5, seeking temporary injunction, was taken up for hearing.

5. For proper appreciation of the case and the point in dispute, it would be necessary to refer to the plaint averments. According to the plaintiffs, they have invented gabion made from ropes of any synthetic material and a patent has been sealed in their favour in relation to prefabricated collapsible gabion product in flexible form made from ropes of synthetic materials such as polypropylene or high density polyethylene or polyester or appropriate suitable combination of the said materials, by weaving a number of horizontal, transverse and vertical chords of ropes in a continuous mesh of definite geometrical pattern and having apertures or openings of the desired size and a flip open top lid and with or without inbuilt hangs. According to the plaintiffs, they conceived such gabion after substantial research and development and thereafter, in-house trials and experimentation, the rope gabion was finalised as a new invention to effectively prevent soil erosion. From the plaint, it appears that the application for patent was made on 22nd June, 1999. The same was published on 4th February, 2005 and as no objections were raised after the said publication, the patent was sealed and granted on 13th May, 2005. The plaintiffs say and submit that in inventing the above referred gabion, they incurred huge expenses towards research and development and since after filing of the patent application in June-1999, they were continuously manufacturing, marketing and selling the said gabions. According to them, somewhere in October-2005, it was learnt by them that defendant No. 1 was manufacturing and selling almost identical, rather similar synthetic rope gabions; the said gabions sold by the defendants in the market were deceptively similar and were copying identical/essential features of the plaintiffs' patent. It is submitted that the act on the part of the defendants tantamounts to infringing the patent granted in favour of the plaintiffs, therefore, an injunction must be granted against the defendants in the terms, as prayed for.

6. The defendant No. 1, on the other hand, pleaded that they are manufacturing and selling the gabions made of synthetic polymers since December-2004, that is, much prior to the date of publication of the patent. It is the submission of the defendants that gabion was invented some time 7000 years' ago and has been in use in almost every part of the world and even in India, since then. It is submitted that gabions are box like structures which are filled with boulders and such other material for being placed along the river beds to prevent soil erosion. If required, individual gabions can be tied together to form continuous structures. It is also the case of the defendants that initially, the gabions were made from wood and wicker; the gabions were used all over the world to avoid soil erosion. By using wire mesh, the first gabion was made in the year 1879 and in any case, the science behind gabion is well known to the world. It is also the case of the defendants that the gabions are made of different materials like welding or weaving wire mesh, galvanised wire mesh, PVC coated mesh, etc. The defendants submit that the gabions made from polymer plastic ropes, synthetic

materials like nylon, etc., are widely used all over the world. Such gabions are prefabricated, collapsible, flexible and they also have baffles and lids. The defendants submit that weaving of ropes/chords to form a box like structure is known to the world since long time and as such, the plaintiffs' claim that they have invented some new product is bad. According to them, what was known to the world is again sought to be brought to the notice of the world by submitting that it is an invention of a new product; in fact, the present work of the plaintiffs is an extension of what was known to the world and published in various journals/articles before the application of the patent and even before the patent was sealed. According to them, the patent is required to be revoked under Section 64(1)(d), 64(1)(e) and 64(1)(f) of the Patents Act.

7. According to the defendants, nylon is a synthetic material and use of ropes of other synthetic materials does not lead to a new invention because the design or box structure, with the object/purpose/function to avoid soil erosion, continues to be the same and is well known to the world. The defendants also submit that the patent deserves to be revoked as it has been obtained on false representations. The defendants also submit that they are not infringing the patent because the patent granted in favour of the plaintiffs is for a rope gabion made by weaving horizontal, transverse and vertical chords of ropes, while the defendants are making gabions from intermeshing ropes and are not using the weaving method. According to them, in intermeshing, splice of rope is opened and another cord is passed and as such, they are not manufacturing gabions by weaving them. They also submitted that they are using virgin wire, especially, polymer ropes and are also passing a copper wire through the rope for additional strength. They submitted that as the product manufactured by the defendants is something different than what is patented in favour of the plaintiffs, the plaintiffs are not entitled to an injunction and in any case, as the process of manufacturing the gabions of different materials was known to the world much before the application for patent was made and as the patent has been obtained on false representations, the patent granted in favour of the plaintiffs deserves to be revoked.

8. I have heard Mr. Kamal Trivedi, learned Senior Counsel, and Mr. K.S. Nanavati, learned Senior Counsel, for the parties.

9. It is not in dispute that the gabions were manufactured, were used and its object was known to the world for long time. It is also not in dispute that gabions were made out of various raw materials and were being used all over the world including India even prior to the application for patent.

10. The learned Counsel for the plaintiffs, however, submitted that they did not seek any patent in relation to the process of manufacturing the gabion, but, they sought patent in their favour for a particular product. It is submitted by Mr. Trivedi that under the law, a particular product can be patented, a particular design, a particular process and a particular work can always be patented. He submits that even if the gabions were known to the world and were used at different places, then too, the plaintiffs were entitled to make an application for grant of patent on the ground that the product manufactured or conceived by them was different than what was used in the world. It is submitted that the plaintiffs have invented a new product which is prefabricated, collapsible and flexible in nature and the said properties are typical to the synthetic rope gabion and are not available to other forms of gabions made of other material; the work of the plaintiffs would certainly

be a new invention involving inventive steps. Mr. Trivedi has invited my attention to Page Nos.41, 42 and 43 of the plaint to show that what inventive steps were taken by the plaintiffs and what particular benefits would flow from the said invention. He has invited my attention to the affidavit of Mr. M.S. Shitole, affidavit of Mr. Mahesh Desai, affidavit of Mr. R.M. Telang, report of the Indian Institute of Technology (IIT), Chennai, Technical Report of Dr. Nayan Sharma, Technical Report of Dr. G. Venkatappa Rao, further affidavits filed by Mr. Ramesh Telang and rejoinder affidavit of Mr. Shitole.

11. It is submitted by Mr. Trivedi that use of ropes and use of synthetic material rope was not obvious to the persons engaged in the field as they were forging/manufacturing the gabions of different materials. According to him, it was an inventive step on behalf of the plaintiffs leading to a new invention and the said product is much superior and better/workable in comparison to the gabions made from other material. According to him, the Authorised Officer in the Patents Department considered everything and only thereafter, granted registration and sealed the patent in favour of the plaintiffs.

12. It is submitted that the defendants are making gabions of synthetic ropes, which are similar to the patented product, and as such, they are infringing the patent. Referring to plaint's pages 45 and 46, it is submitted that the product invented by the plaintiffs and the product manufactured by the defendants have all similarities. It is submitted that on grant of the patent, the patent-holder is entitled to monopoly in support of the patented article for a period of twenty years because he is disclosing his invention to the society. It is submitted that the defendants cannot be allowed to copy his product and thereby defeat his patent and earn illegal profits. It is also submitted that the plaintiffs have a prima facie case in view of the grant of the patent and the balance of convenience is also in favour of the plaintiffs. It is submitted that irreparable injury would be occasioned to the plaintiffs because non-grant of the injunction would lead to a situation where the plaintiffs would lose the benefit of exclusive market, which under the Act, he is entitled to exploit.

13. It is also submitted that the basic burden to prove the patent deserves to be revoked is upon the defendants and the defendants are required to make out a good case to show that the patent could not be registered or it deserves to be revoked. He submits that the plaintiffs, on one side have produced technical representations and the affidavits of the experts, but, on the other hand, the defendants have not produced any material to show manufacture/use of the gabions made from synthetic material ropes. He submits that the defendants could not make out a prima facie case for revocation, while on the other hand the plaintiffs could successfully make out a strong prima facie case in favour of the validity of patent infringement by the defendants and as such, the plaintiffs are entitled to an order in their favour to restrain the defendants from manufacturing and selling the gabions made of synthetic ropes. In support of his detailed submissions, Mr. Trivedi has relied upon the judgements .

14. Mr. K.S. Nanavati, learned Senior Counsel, assisted by Mr. Saurabh Amin, learned Advocate, on the other hand referring to his pleadings with his usual tenacity, submitted that the science behind gabions is well known to the world and at the same time, the design and methodology, etc., were well published much prior to the date of the application. He submits that the gabions could not be

patented because gabions are known to the world for more than 7000 years. They are being widely used in the world and looking to the requirement, these are made of different materials. It is submitted that the gabion is used for filling boulders and other materials and is to be placed at the river bank to avoid soil erosion. It is submitted that almost around 7000 years' ago, the gabion baskets made of wood were placed along the banks of river Nile. It is submitted that with the advancement in the technology and availability of other materials, the gabions could be made by welding iron wire mesh, galvanised wire mesh, mesh cord, plastic tension polymer and polymer ropes. It is submitted that the gabions manufactured from ropes, etc., are in use in the world and it would be clear from the documents annexed with the written statement and produced in this Court that nylon, which is also a synthetic material, is commonly used for manufacture of gabions and as such, gabions are being used for long many years. Referring to Page No. 739, the Article on History of Gabions, and further referring to the article entitled as 'Gabions for Streambank Erosion Control' by Garie E. Freeman and J. Craig Fischenich at Page No. 747, it was submitted that nylon rope box, which in fact, are gabions are being used for long time and such gabions made of synthetic polymer like nylon are in use in India since 1989. Referring to the letter dated 3rd March, 2006, written by the Engineer in Chief, Water Resources Department, Government of Bihar, it was argued that the Government of Bihar was using gabions made of nylon since last seventeen years. It is submitted that the structures made of nylon threads are always being used as gabions. He submits that nylon is a synthetic polymer material and as such, the plaintiffs have not shown any new invention or bringing into existence a new product, which was not known to the world. It is also submitted that M/s. Netlon Limited gave a case study in February-1994, wherein it is stated that Netlon gabions made from polymer were used in November-1987 at Gandhar for avoiding erosion problem faced by the Oil & Natural Gas Commission. He submits that from letter dated 8th November, 2005 issued by M/s. Spandan Enterprises Pvt. Ltd., it would be clear that Netlon polymer gabions were used by them in 1991-1992. On the foundation of certificate of M/s. Transparent Creations Pvt. Ltd., it is submitted that they had used polymer rope gabions in the year 1998 for minimising the soil embankment erosion. Taking a clue from the certificate of one M/s. T. Raju, a Government Contractor, it is submitted that he had used nylon rope wires in Andaman Islands in 1997. It is submitted that polymer gabions or rope gabions are, in fact, rope nets, which are manufactured in a box like shape. He submits that nylon is a polymer and is also a synthetic material and if synthetic material or polymer was used for making and manufacturing of the gabions, then, the plaintiffs would not be entitled to say that they have brought into existence something which was not known to the world and for such service to the society, they are entitled to have the monopoly. It is submitted that the design, objective, purpose, function and use of the gabion is always similar, but, different material is used looking to the different requirement.

15. Placing reliance upon Tender Document dated 24th September, 2001 issued by the Public Works Department, Government of Maharashtra, it is submitted that the said Government invited offers for supply and use of gabions made from ropes of synthetic, polypropylene. It is submitted that if in the year 2001, that is, much before publication of the plaintiffs' application of 4th February, 2001, the Government was inviting tenders, then, it cannot be said that the gabion made by the plaintiffs is a new invention or the product is a new product. It is also submitted that the gabions made of different polymers/synthetic material are collapsible and flexible, so also, those are prefabricated. It is also the case of the defendants that the gabions made of different materials are

prefabricated and looking to the requirement, they can be made collapsible and flexible. It is submitted that the plaintiffs have not made any improvement on the existing gabions and in fact, it is only an extension of what was known to the world in the prior Art. It is submitted that the defendants, on the strength of the material produced before the Court, have made out a strong prima facie case for revocation of the patent under Section 64 of the Act. He submits that in absence of the prima facie case, the plaintiffs are not entitled to any injunction.

16. Mr. Nanavati has also relied upon , to contend that mere change of integers or workshop improvements do not amount to a new invention, as defined under Section 2 of the Patent Act. He has also relied upon the judgements of different High Courts , : : AIR 1985 (Delhi) 136 and PTC Supple. (1) 180, to contend that in a patent case, the plaintiff must prove existence of a prima facie case for validity of the patent, so also a strong prima facie to show that his right and patent have been infringed and that the balance of convenience would tilt the equity in his favour. It is submitted that the plaintiffs have miserably failed in making out a prima facie case while on the other hand, the defendants could make out a case for revocation of the patent. Placing reliance upon the above referred judgements, it is submitted that there is no presumption of validity to the application granted and when an application is filed for revocation of patent and if the patent is new and a serious controversy exists that the invention is involving or not any new inventive and innovative skills having regard to what was known or used prior to the date of patent, the Court should be loath in granting the injunction.

17. Mr. Nanavati, after taking me, to the claim, as contained in the patent specification, submitted that the said claim of the plaintiffs is for gabion of synthetic ropes made by weaving horizontal, transverse and vertical cords of ropes. It is submitted that the defendants are manufacturing the gabions from synthetic ropes by intermeshing the ropes and not by weaving. According to him, intermeshing is a process where splice of the rope is opened and another rope is inserted through the opening of the first rope. It is submitted that in the textile world, weaving and intermeshing have different meanings and if the claim of the plaintiffs was that they were manufacturing the gabions by process of weaving, then, they cannot be allowed to say that they were also manufacturing the gabions by process of intermeshing.

18. The parties had produced their products before the Court. I have seen the same.

19. It is submitted by Mr. Nanavati that in the weaving process, horizontal ropes are passed over and under the vertical ropes, consequently mesh does not remain fixed, it may lead to variation in the meshing size and ultimately, may lead to spilling of boulders, which may ultimately make the gabion worthless. Placing reliance upon the reports of Bombay Textile Research Association, Report of Professor A.S. Khanna of IIT, Bombay and Report of The Synthetic & Art Silk Mills Research Association, it is submitted that intermeshing and weaving are different processes and the gabions made by the defendants by intermeshing the ropes are different than what has been patented in favour of the plaintiffs. It is also submitted that the plaintiffs, who got the patent in the name of weaving the ropes, gave up manufacturing by applying the said process and are, in fact, copying and adopting the method invented by the defendants. It is also submitted that synthetic ropes are susceptible to degradation by some light, therefore, to prevent such degradation, the defendants are

using U.V., especially, virgin polymer ropes. It is submitted that not only that, the defendants are passing copper wire through the boards of rope or splice of gabions, which gives an additional strength to the gabions made by the defendants and this special quality of the defendants gabions would show that not only these are different from what was manufactured and patented in favour of the plaintiffs, but, these gabions are much better and workable in comparison to the plaintiffs' gabions. It is submitted that the defendants have not committed any infringement of the alleged patent firstly because the patent has been obtained by playing a fraud and secondly, the product of the defendants is altogether different. Referring to the question of balance of convenience and irreparable injury, it is submitted that the defendants are manufacturing and selling the gabions since 2004 and have created their own market and their total sales are to the extent of Rs. 2.22 Crores per annum and if the injunction is granted in favour of the plaintiffs, the defendants would be required to close their own industry and they would be wiped away from the market. The argument further is that if the plaintiffs have themselves computed losses to be Rs. 5 Lakhs, then, such an injunction cannot be granted because irreparable injury likely to occasion to the plaintiffs can be calculated and compensated in terms of money. It is also submitted by the learned Counsel for the defendants that they are ready to provide security in the sum of Rs. 5 Lakhs, they are also ready to observe any condition imposed by this Court with a further obligation of maintaining of proper accounts. It is submitted that the research and development pleadings and submissions made by the plaintiffs may appear to be lucrative, but, in fact, those are absolutely misconceived because the plaintiffs have not provided any foundational facts. Referring to the different affidavits filed in favour of the plaintiffs, it is submitted that Mr. Telang happens to be the Director of the plaintiff-Company, Mr. Shitole and Mr. Desai are having business relations with the plaintiff and they being interested persons, their affidavits cannot be relied upon. It is also submitted that the defendants have provided legal, credible and simple evidence to prove that synthetic rope gabions in different forms, including nylon thread box, were being used in Bihar since 1987. It is submitted that from the materials submitted by the defendants, it would be clear that the defendants are using intermeshing process and are not engaged in weaving process, therefore, the product produced by the defendants is different, the alleged invention of the plaintiffs in fact is neither an invention nor is bringing in existing any new product worth patent and weaving of ropes in this or that manner would not bring into effect or existence a new product. On the strength of the above submission, it is contended that the application for grant of injunction deserves to be rejected.

20. The Apex Court in the matter of Bishwanath Prasad Radhey Shyam v. Hindustan Metal Industries (1979) 2 SCC 501, rejected the contention of the patent-holder that there is a presumption in favour of the validity of the patent, it rather held that grant and sealing of the patent does not guarantee its validity, and it can be challenged before the High Court on myriad grounds. The Madras High Court in case of V. Manicka Thevar v. Star Plough Works, Melur, has held that in a suit for infringement of the patent, the plaintiff must make out a strong prima facie case for grant of temporary injunction. The Court further held that from the objection raised by the defendant if it appears to the Court that serious controversy exists as to whether or not the invention made by the plaintiff is a new or it involves inventive skills, the Court should not grant interim injunction in favour of the plaintiff restraining the defendant from pursuing or carrying on or carrying his normal business activities. It is also the view of the Courts that if the patent is new and its validity is not established in judicial proceedings, and the defendant's endeavour is to show that the patent ought

not to have been granted, ordinarily, the Court should not issue a temporary injunction. Almost identical is the view of the Calcutta High Court and Delhi High Court, which is clear from : and .

21. For grant of temporary injunction, the Court has to consider three basic aspects, namely, prima facie case, which would mean a triable issue, secondly balance of convenience, meaning thereby, that who would suffer more inconvenience in case of grant or non-grant, and thirdly irreparable injury to be suffered by a party. Principle of irreparable injury means which of the parties is likely to suffer mischief of injury if the injunction is granted or refused, the irreparable injury should be one which cannot be repaired or cannot be compensated in terms of money. While appreciating the question of balance of convenience and irreparable injury, the Court may have to enter into some guess work, but, while appreciating the question of prima facie case, the Court must be governed by sound principles of law, the facts floating on the surface of the record and whether the plaintiff has made out a case for grant of injunction or the defendant could make a case for vacation of the ex parte injunction.

22. In case of threat of dispossession, the Court is required to look into the question of possession, nature of possession and legality of possession. If a trespasser is in possession for long, the Court would protect his possession observing that the original owner if was sleeping for a long time, then, the possession of the trespasser must be protected. In a case of demolition, if the Court comes to the conclusion that the demolition would be illegal and is likely to cause irreparable injury, the Court would always hold that the plaintiff has a prima facie case in his favour. In case of partition, the Court can always grant injunction against the defendants, who are intending to alienate the property. Different injunctions can be granted looking to the nature of the controversy, but, in case of a patent, the plaintiff though has a sealed application and registered patent in his favour, he is still required to make out a prima facie case to show to the Court that the patent is valid despite challenge to the validity of the patent. The plaintiff is further required to show that there is an infringement of his patented rights. When the validity of the patent is challenged on the ground that the patent has been obtained by fraud, there is no new invention or new product, but, it is simply an extension of what was earlier used or was known to the world, then, the burden extra weighs upon the plaintiffs to show to the Court that their work or the invention or the product is not simply an extension, but, is the result of inventive process and innovation. When the defendants come out with a case that the patent is illegal and deserves to be revoked, then, obviously, there would be a triable issue in favour of the defendants and not in favour of the plaintiffs.

23. From the facts of the case, it would clearly appear that the plaintiffs submitted in their patent application that the application was for prefabricated, collapsible and flexible rope gabions made by synthetic ropes after using the method of weaving (emphasis supplied). The plaintiffs under the circumstances would be bound by the contents of the application. They cannot be allowed to say that method of weaving is the only statement in the application, but, they can refer to any other method of manufacture. If by adopting one method and referring the same in the application and consequent publication, they could mislead the defendants, who otherwise could file objections against intermeshing, then, the plaintiffs would not be allowed to take advantage of their own wrong. It would be clear from the documents available in the file that weaving is a different process where the ropes (threads) cross over vertically and horizontally over and under the other ropes

(threads), while the process of intermeshing is opening the splice of the rope and then to pass the cord of another rope from the open splice. The certificate issued by the Textile Experts though have been condemned by the plaintiffs observing that they are not rope manufacturers, but, I will reject the said objection, because in any case, the Textile Experts know that what is weaving and what is the difference between weaving and intermeshing. After closely seeing the product of the defendants, I must immediately say that the defendants are not using any weaving process in manufacturing the gabions, their process is certainly intermeshing because in their product, one rope/cord crosses through the splice of another rope. When the plaintiffs rely upon the patent, then, they would not be allowed to say that the word, 'weaving', has been used loosely, though, in fact, their work was also of intermeshing. When the plaintiffs say that they got the article patented because of the new invention, it was inventive in nature, then, they knew that what was manufactured by them. If the plaintiffs are not clear about their own work and the product, then, they must thank themselves. In any case, they would not be allowed to say that their product also involves the process of intermeshing. If the two processes, intermeshing and weaving, are different, then, the defendants certainly would be entitled to say that their work is of intermeshing and the plaintiffs' patent being work of weaving, are different works.

24. It is also to be seen that the plaintiffs submit that they have invented a new product. I have already observed that it is not in dispute before me that the gabions were used and are known to the people for thousand of years. If the gabions made of different materials were used to avoid or protect soil erosion for more than 7000 years, then, invention of a gabion cannot be said to be a new or inventive invention, no research was required to be made into something which was publicly known. The gabions of different materials are being used in the world looking to the requirement. The rope gabions and polymer gabions are being used in Maharashtra and Bihar since 1991 and 1987 respectively. These rope gabions are made of polymer and synthetic ropes, that is, nylon or so. It cannot be said that any other synthetic material would not include nylon. If nylon crates and gabions are used by these Governments for long many years and are being manufactured by M/s. Netlon and other Companies looking to the requirement, then, the plaintiffs would not be entitled to say that they have brought into existence a new product, which was not known to the world.

25. True it is, that a new invention may be a new process or a new product. In the present matter, the plaintiffs submit that the gabions though are known to the world, but, the rope gabions made after weaving cords were not known to the world, therefore, after a great research and undergoing huge experiments, they have brought into existence a new product, which was unknown to the world. In my considered opinion, the submission of the plaintiffs is bad in law and untenable on facts.

26. After going through the pleadings of the parties, appreciating the arguments and with a close look to the products of the parties, I must immediately hold that the product of the plaintiffs does not involve any inventive step. Even otherwise it is clear that if a serious challenge is thrown to the said product or process and the legality of the patent has not been examined on the judicial side, the Court would not grant any injunction in favour of the plaintiff, who claims to be the patent-holder. The plaintiffs, in the present case, have come out with a specific case that they have improved upon the gabions and the said improvement is involving inventive and innovative steps. The defendants

simply say that on the subject of patent, it is not an invention because the same was known to the public and it was used by public for time immemorial.

27. In the matter of M/s.Bishwanath Prasad (supra), the Supreme Court has observed that the object of the patent law is to encourage scientific research, new technology and industrial progress. I have to simply add to the observations made by the Apex Court that the object of the patent law is not to discourage the marketability of a product, which is different from what has been registered, nor the object is to protect a fraud or misrepresentation. A monopoly is created in favour of a person because he has brought into existence something new either in the form of a process or in the form of a product, but, patent may not be granted in favour of some one, who very cunningly makes an application to the authority for grant of the patent without even disclosing that what is new in his item and how it was not known to the public previously. A patent, ordinarily, cannot be granted in favour of some applicant if the product is known and there is no involvement of an inventive step or bringing into existence a specific inventive invention. True it is, that an improvement would be taken to be an invention, but, to be so, the improvement must be something more than workshop improvement and independently, should satisfy the test of invention involving inventive steps. The Supreme Court has further observed that in order to be patentable, an improvement of combination must produce in result a new article or provide something which is better and cheaper than what was available before. Mere collection of something in a different form would not involve the exercise of any inventive faculty and would not qualify for grant of the patent. The Supreme Court further observed that a patentable invention must involve a skill which is outside the probability/ordinary capacity of a craftsman. The Supreme Court has observed that if the manner of manufacture, which has been patented, was publicly known used and practised in the country before or on the date of the patent, it would negative novelty. According to the Supreme Court, the prior public knowledge still disqualify the grant of patent. The Supreme Court has further observed that the question for consideration would be whether the alleged discovery was so much out of track of what was known before as not naturally to suggest itself to a person, who is thinking on the subject. It must not be obvious or natural suggestion of what was previously known. Mr. Trivedi has submitted that in most of the inventions, after the product is brought into market, people start saying that it's so simple that anybody could do it, but, that exclamation or appreciation by the public would not undermine the inventive steps and because of such statements of the public, the article would not lose its novelty. The submission of Mr. Trivedi would not be bad provided the facts were such. In the present case, we will have to see that the gabions are known to the world for more than 7000 years; their objectivity and use are also known to the public; these are being manufactured by different materials; time and again, improvements have been made on them; these are being made of ropes, synthetic material and such boxes like gabions made of synthetic material/polymer are being used by the Governments of Maharashtra and Bihar for more than fourteen years. If such products are used for long time, then, it would be a tall claim of the plaintiffs that they have brought into existence something very new and their patent deserves to be protected. It will have to be seen that grant of a patent would be no guarantee of its validity.

28. The argument of the plaintiffs is that use of synthetic rope in place of iron-mesh, tensor or polymer involved inventive steps and the plaintiffs have invented a new product. It is also urged by the plaintiffs that the gabions manufactured by them are of definite geometrical shape with or

without baffles, they have a lid which can be used to close the gabion to prevent the boulders from spilling. Can this statement of the plaintiffs bring their product into an inventive step? Undisputedly, such gabions are being used in the world for long time in almost every country, including different parts of India. The gabions made of different materials are being used looking to the requirement. Flexibility and collapsibility would obviously be a quality of a gabion made from rope, polymer or synthetic rope. Flexibility and collapsibility, ordinarily, may not be available in a gabion made of wire, wire-mesh or which has been forged and prefabricated by some metal. It is common knowledge that a rope can be rolled and as such, the material manufactured by the rope can also be rolled. This rolling in itself would make the gabion flexible and collapsible. The wire mesh gabions or wooden gabions could not ordinarily resist the onslaught of the water or the natural conditions, therefore, their use is now being discontinued and the gabions made from the raw material, which can resist the onslaught/attack of the nature/water and which has inbuilt strength, are being used. Nylone, which is also used for manufacturing the gabions, is a strong polymer/material and if that use is known to the world, then, simply by replacing nylon by some other synthetic material, the plaintiffs would not be allowed to claim that they have invented a product, which is absolutely new or which was not known to the world. The submission of Mr. Trivedi was that by using synthetic ropes in place of solid material, the plaintiffs have invented a flexible gabion, which can adjust itself to the level of the ground better than the other gabions and it can be used even if the ground is undulated. The rope gabions obviously are more flexible, but, use of the rope in place of other material, would not make it a new invention, especially, when the nylon rope or nylon fibre was used for manufacturing the prefabricated, collapsible and flexible gabions. In a given case, the size of the gabion may be reduced or enlarged. In a given case, typical type of gabion may be required on a particular site, but, simply because the plaintiffs are making a rope gabion, it cannot be said that they have invented something which was not known to the world. At this point of time, it will also have to be noted that empty rope gabions are collapsible and flexible, but, once those are filled with stones and boulders, the flexibility and collapsibility would reduce to a larger extent. The only thing left with such gabions would be adjustability at a particular place. This adjustability at a particular place or on the undulated ground would not make the product a new product, not known to the world. I would again repeat that the rope gabions or fibre/synthetic gabions or nylon gabions are being used for long many years in Bihar and Maharashtra. It cannot be said that nylon is not strong, but, a soft material. If nylon can be used and the Governments are not making any complaint against nylon made gabions, then, the claim of the plaintiffs would be too tall to say that they have manufactured something or invented something, which is not known to the world. Prima facie, there does not appear to be a substantial improvement in the article, which was commonly known to the world. The plaintiffs' submission that flexibility is a particular quality available to the plaintiffs patented gabion, cannot be accepted.

29. As a last resort, it was submitted that nylon crates are made of nylon threads, which are only 2.5 mm of diameter, whereas the plaintiffs' patent is made of synthetic rope having a diameter of at least 4 mm. The further submission is that nylon crate bags are used for flood control and not for soil erosion. In my opinion, the diameter of the thread/rope would not make any difference because nylon crate bags, which, in fact, are gabions, are known to the world. A thicker size of rope if is used for creating a heavy gabion, then, it cannot be said that it is a new invention. The only importance which can be attached to the work would be that looking to the requirement, heavy material has

been used.

30. The challenge to the letters issued by different authorities in favour of the defendants, can be rejected by a simple observation that the letters have been issued by the Competent Officers of the Government, who have no interest in the defendants and do not bear any enmity with the plaintiffs. The documents filed by the defendants cannot be rejected just for nothing.

31. There is no reason to doubt the official communication between the Joint Secretary, Water Resources Department, and the Chief Engineer, Government of Bihar. I must observe that nylon is a synthetic material and is a polymer. The patent, as granted, is in respect of a gabion made of ropes of synthetic material. Mere use of one synthetic material or another synthetic material, would not bring into existence a new product, which was unknown to the world.

32. So far as the affidavits of the plaintiffs' deponents are concerned, true it is, that those do suggest that the plaintiffs have invented something novel and new, in their opinions, they have suggested that the product is an invention, but, such opinion evidence can be relied upon only when they refer to scientific study and research, so also consider other material produced by the other side. The Court cannot rely upon the said opinion affidavits because they do not deal with the documents submitted by the defendants, nor the plaintiffs ever obtained second opinion from these experts on the documents submitted by the defendants. But, for the submission that the documents do not inspire confidence, nobody has dared to file an affidavit challenging the genuineness of the said documents, on which the defendants are placing reliance.

33. After considering the totality of the circumstances, I am unable to hold that the product of the plaintiffs can satisfy the test of the invention or an inventive step. The product is neither new nor a result of the research, nor it is cheaper, nor it is something, which, for the first time, came into existence and was not known in the field. Taking into consideration the totality of the circumstances, I am of the opinion that no prima facie case exists in favour of the plaintiffs.

34. Once the Court holds that there is no prima facie case in favour of the plaintiffs, then, the questions of balance of convenience and mischief of irreparable injury, ordinarily, become irrelevant, but, in the present case, I will look into the said requirements also.

35. An injunction under the statute can be granted in favour of a party entitled to it, but grant of an injunction is an act in equity. The plaintiffs must show that the existence of equity would tilt the balance in their favour. If they are unable to show that how the equity helps them, then, balance of convenience would not tilt in their favour. The plaintiffs, in their application, had said something and before the Court, are making different allegations. When the defendants say that their product is the result of intermeshing, then, the plaintiffs cannot be allowed to say that though they have mentioned in their application for patent that it was weaving, but, in fact, it is intermeshing. The balance of convenience is to be weighed not in the golden scales, but, on the strength of preponderance of probabilities. I hold that the balance of convenience is in favour of the defendants, who could successfully give a dent to the patent and are successful in showing that their product is something different than what has been registered in favour of the plaintiffs. They have even

otherwise developed the market and are manufacturing the goods and there is an order in their favour that they would be entitled to produce and market their product if, in their own opinion, their product is different than what is being patented in favour of the plaintiffs and manufactured by the plaintiffs. The product manufactured by the defendants, in the considered opinion of this Court, is not same or similar to what is patented in favour of the plaintiffs.

36. So far as the question of irreparable injury is concerned, I must hold that if a tripod does not have two legs out of three, it cannot stand. If the plaintiffs do not have a prima facie case and the balance of convenience is also not in their favour, then, simply on their submission of irreparable injury, injunction cannot be granted in their favour. If injunction is granted simply on the ground that the party would suffer an irreparable injury, then, every producer/manufacturer, to avoid competition in the market as every competition leads to some injury, would come to the Court and pray for an injunction. I do not think that, that is the law.

I do not find that the plaintiffs would suffer mischief of irreparable injury in case of rejection of their application.

37. After taking into consideration the totality of the circumstances and for the reasons aforesaid, I hold that the plaintiffs have miserably failed in making out a prima facie case, balance of convenience is not in their favour and refusal of injunction is not likely to occasion irreparable injury to them. The application for grant of absolute injunction is rejected. Injunction is refused. However, observing this Court's Order dated 26th October, 2005, passed in Appeal From Order No. 350 of 2005, I direct defendant No. 1 to maintain accounts of sales. The defendant No. 1 shall also furnish a guarantee in favour of this Court, through the Registrar General, for payment of Rs. 5 Lakhs to the plaintiffs in case the plaintiffs finally succeed in the matter. There shall be no order as to costs.