IN THE HIGH COURT OF DELHI

DATED: 08.03.1996

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THE HONOURABLE MR. M. JAGANNADHA RAO, CHIEF JUSTICE

Franz Xaver Huemer ... Appellant

Vs.

New Yash Engineers ... Respondent

ORDER

M. Jagannadha Rao, C. J.

1. The point arising in the case is of considerable importance in regard to patents registered in India by foreigners and not kept in use in our country and thereby seriously affecting our market and economy. The foreigner in this case is seeking temporary injunction against other users and the question is whether the non-use of the patented mechanical device by the foreigner in India can be a ground for refusing temporary injunction?

2. The appellant, Franz Xayer Huemer, is an Austrian citizen. He filed the Suit No. 468 of 1994 on 26-2-1994 seeking a permanent Injunction restraining the respondent from making, using, exercising, selling or distributing any items which infringe the 5 patents belonging to the plaintiff bearing Numbers 161520, 162589, 162369, 163591 and 163095 and for a mandatory injunction to hand over to the plaintiff all goods, advertising material or items which infringe the above patents, and for accounts of the profits. The plaint is filed by the plaintiffs through his power of attorney, Mr. Raj Kumar Lohia. Pending the suit the plaintiff filed I.A. No. 2233/94 for temporary injunction on the same lines. The Court initially granted temporary injunction on 1-3-1994 but vacated the same

on 27-11-1993 under the impugned order. The plaintiff has preferred this appeal against the said order.

3. The plaintiff, Franz Xayer Huemer, registered the 5 patents in India on 31-7-1985, 7-6-1985, 7-6-1985, 5-3-1984 and 17-1984. The patented items are certain mechanical devices used in textile industry. The plaintiff continued that in Feb. 1994, he came to know from the Journal Plasmas News that the defendants-respondents were claiming to manufacture and sell "Four Shuttle High Special Circular Loom" and "higher line speed magnet type C.W.". The defendants equipment was displayed in the exhibition at Pragti Maidan on 20th Feb. to 4th March, 1994 and plaintiff allegedly found for the first time, the loom and binding mechanism of the defendants' machine infringing the plaintiff's patent.

4. The defendant-respondent contended in the IA that the plaintiff has nowhere alleged that he has been commercially exploiting his patents in India and that Mr. Raj Kumar Lohia, the power of attorney of the plaintiff is the Managing Director of an Indian Company called "Lohia Starlinger Ltd." The said Lohia has displayed his machines in Feb.-March, 1994 at Pragati Maidan and as there was demand for the defendant's machines and no demand for the machines of Lohia Starlinger, the said Lohia decided to secure a power of attorney on 28-2-1994 from the plaintiff and meanwhile filed suit on 26-2-1994, (two days before that date).

According to the defendant, the suit is filed because of malice and business rivalry. There may be an undisclosed arrangement between the plaintiff and Mr. R.K. Lohia which has not been made known to the Court. The defendant has been in the textile business since 1969, he has developed his own machine after 2 years of bard work. His machine is low in cost, maintenance, mechanism, consumes less energy, has low operating costs and higher output as compared to Lohiya Machines. The plaintiffs devices are not inventions as defined in Patents Act, 1970 and there is no novelty. They are liable to be revoked on that very ground under Section 64. Further, on account of prior public knowledge and

public user in India, from dates anterior to the dates of registration, the plaintiffs patents are liable to be revoked. Planintiff does not have a prima facie case and any injunction in favour of plaintiff will cause irreparable injury to the defendants and throw a number of employees out of employment. The circular-loom, the weaving machine and the thread tension control device have been in extensive use in India for 20 years and the balance of convenience is also not in favour of the plaintiff. The plaintiff is guilty of suppression of facts. The main aim of the suit is to throw out small manufacturers out of the field and retain monopoly in the trade under the pretension of infringement of registered patent, even though not put in use by the plaintiff in India. If this monopoly is to be allowed, Indian customers will be left with no option but to buy costlier machines and that will have an adverse effect on the nation's economy and there will be a drain on our foreign exchange. Power consumption will also increase. The plaintiffs suit is barred on account of delay, laches and acquiescence as the technology is already in vogue in India as well as abroad during the last 20 years. The allegation that plaintiff came to know from the Feb. 1994 issue of Plasma Journal is untrue. The defendants' advertisement was appearing in the said journal for more than one year and in the Director of Monthly of Plastic Woven Sanctions', published by the All India Flat Tape Manufacturers Association. (They are filed as 'Annexures A and B) and in the same Journal advertisement of Lohia Stalinger machinery was also appearing and thus' there was knowledge on part of plaintiffs power of attorney agent. In paragaraphs 9, 10, 11 of the reply, the details of various companies in Ahmedabad, Pune, Nagpur using these machines from 1978 or latter years are given. Further in para 12 reference is made to several foreign companies manufacturing the same and as to how those machines have entered India from Taiwan. Austria. The other Indian manufacturers are Orivish Co., Ahmedabad, Brimad, Bombay, Patels, Ahmedabad, etc. (Annexures D, F, FG, H, I, J, K, L). Other details of other manufacturers are given in para 11 of reply (Annexures M, N, O, P.). Various

differences between plaintiffs mechanism and defendants' mechanism are set out.

5. The learned trial Judge observed in the impugned order that R.K. Lohiya has not placed any material on record to prove that he is the exclusive licencee of the plaintiff. The power of attorney in favour of R.K. Lohia is dated 2 days after the date of filing of suit. Defendants' machine has been advertised from 1992 and it is difficult to believe that plaintiff came to know about defendants machine only in Feb. 1994. Learned Judge also pointed out that according to the defendants' contention, plaintiff's patent is liable to be revoked and under Section 107 of the Patents Act, in a suit for injunction, every ground on which the plaintiffs patent could be revoked, could be a ground of defense. On this reasoning the injunction granted earlier was vacated.

6. In this appeal we have heard Shri Arun Jaitely for the appellant and Shri H.N. Chaudhary for the respondent.

7. The points for consideration are:

1. Whether the plaintiff-patentee is entitled to temporary injunction in spite of practically no evidence of user of the said patent in India since 1984?

2. Whether non-user of the patent cannot be a defense under Section 107 read with Section 64 (which deals with revokation) and Section 84 (which deals with compulsory licencing).

3. Whether the appellant can be permitted to raise a new factual plea in the appeal that the appellant, Mr. Franz Zaver Huemer held 40% of the equity in Lohia Starlinger Ltd. and Mr. R.K. Lohia is the M.D. of the said Indian Company and also became the plaintiff's power of attorney (even though 2 days after suit)?

4. Whether there are defenses falling under Section 107 read with Section 64 which require refusal of temporary injunction?

5. Whether in regard to patents and other intellectual property cases, prima facie case, balance of convenience have both to be established and if so, to what extent?

POINTS 1 AND 2

8. We have set out the facts and pleadings in the IA in sufficient details. There is no evidence of user of the patents by the plaintiff except in six bills. That means that there is practically no evidence of user since 4984-85.

9. Learned senior counsel for the appellant, Shri Arun Jaitely argued that while Section 107 of the Indian Patents Act, 1970 says that every ground on which a patent could be revoked under Section 64 could be available as a defense, non-user by the plaintiff-patentee even if it was for considerable period was not a ground for revocation under Section 64. Learned counsel also submitted that while non-user by the patentee could be a ground under Section 84 for grant of compulsory licence to another person, the grounds in Section 84 are not made defenses for purposes of Section 107 of the Act.

10. In our opinion, this contention raised for the appellant is well founded. Non-user of the patent by the patentee is a ground only under Section 84 for grant of compulsory licence to another person but the grounds in Section 84 have not been made grounds of defense under Section 107 in a suit by the patentee. Hence, Section 107 cannot by itself come to the aid of the respondent.

11. Even so, the question is whether, while exercising discretion under Order 39, Rule 1, CPC for granting temporary injunction, it is not open to the Court to rely on the conduct of the plaintiff in not using his patent or virtually "suppressing" his patent for all practical purposes in India?

12. The Indian precedents in this behalf are clear and say that non-user of the patent by the patentee is a ground for refusing injunction. A learned single Judge of the Delhi High Court in N.R.D. Corporation of India v. D.C. and G. Mills Co., AIR 1980 Delhi 132 refused injunction on the ground of non-user by the

plaintiff-patentee. To a like effect is the decision of the Calcutta High Court in Boots Pure Drug and Co. (India) v. May & Baker Ltd., (1948) 52 Cal WN 253 which was followed by the Madras High Court in Manicka Thevar v. Star Plough Works, . We are in agreement with these decisions for the more elaborate reasons we propose to give below.

13. Learned counsel for the appellant submitted that while non-user of a trademark for considerable time could be a good ground for refusing temporary injunction, that principle cannot apply to patents, Reference is made to Section 48(2) of the Act which says that the patentee has the "exclusive right" to make, use, exercise, sell or distribute the article in India and he can do so also through his agent or licencee. Under Section 53(b) of the Act, the plaintiff's exclusive right to exploit the invention lasts for 14 years and during the period plaintiff may use or not use it. It is his exclusive privilege to use or not to use. That is the contention for the appellant.

14. In our view, the contention of the appellant's counsel, if accepted, would seriously affect the market and economic conditions-in our country in as much as it would enable a mechanical device, invented abroad (or in India) to be registered in India and kept unused thereby excluding public of its benefit and, at the same time precluding a similar device being produced or used in our market of industry. In the wake of the new liberalisation policy of the government, this contention of the appellant, if accepted, would seriously upset our plans. It has therefore become necessary to go a little deep into certain fundamental principles and precedents in England and the USA.

15. In England, it has been accepted more than a century ago that a patentee who does not put his patent for use by the public is not entitled to temporary injunction. In Plympton v. Malcolmson, (1875) LR 20 Eq 37, the plaintiff who claimed to be owner of a patent sought interim injunction to restrain the defendant from making, selling or using an article which was alleged to be an infringement of the plaintiff's patent. The plaintiff's patent was dated 25-5-1865

and the plaintiff filed the bill in 1875 to establish the validity of his patent and to restrain the defendant (who obtained patent on 7-5-1874) from infringing the plaintiff's patent. There was no evidence of actual user of the plaintiff's patent except of recent date. Refusing injunction on the ground of non-user, Sir George Jessel M.R. observed "When a patentee comes to this Court for interim protection on the ground of previous enjoyment, he must show that there has been actual public user of his patent. In this case, there is no evidence of actual user for any number of years".

Adverting to this case in Croysdale v. Fisher, (1994) IRPC 17 (at 21) and referring to the adverse consequences on the industry, Pollock B. said :

> "There (i.e. Plympton v Malcolmson (1875) LR 20 Eq. 37), the late Master of Rolls laid down that there was no previous publication by the introduction into England by a book, unless the invention, if an invention, has been made known in such a way as to become part of public knowledge but to bring a book from abroad and catalogue it and put it in a shelf in the British Museum may or may not be a publication. On the evidence, the Master of Rolls dealing with it as a matter of fact certainly came to the same conclusion as I should have done that there was no previous publication. But when you get to the question as to whether there has been publication by user.... because the mode perhaps as different modes of refinement and variations and improvements continue to multiply, the more does it happen that one portion of the manufacturing world does not know what is going on or what is being done by another portion of the manufacturing world. Certainly, still more does the public not now with very great nicety, unless concerned either as manufacturers or traders, what is going on in the different laboratories and manufactories attached to any particular trade".

On facts, it was however held that there was user of the patent by the patentee and the injunction was refused.

16. In the United States of America, initially, the Courts expressed the view that non-user was a ground for refusing injunction. But in later cases though a contrary view was taken, it was observed that whether on principles of equity an injunction is to be refused, is left open, We shall now refer to these aspects.

17. In 1886 it was initially held by Blodgett, J. in Hoe v. Knap, (1886) 27 F 204, (212) (CC N.D. 111) that a patentee "is bound either to use the patent himself or allow others to use it on reasonable or equitable terms". In Ewart Mfg. Co. v. Baldwin Cycle-chain Co. (1098) 91 Fed 262 (CCP D, Mass) the Circuit Court also declared that where the patentee refused to make the device available for himself or for others was not within the spirit of the Constitution. Under the Constitution, the reason for granting the patent was the desire to promote progress of science and the useful arts, by encouraging authors and inventors. "Patents suppressed were entitled to scant recognition at law, though necessarily to some, but to none whatever is equity".

18. This rule was unfortunately repudiated in 1896 by the Circuit Court of Appeals for the Sixth Circuit in Heaton-Peninsular Button Fastener Co. v. Eureka Speciality Co. 77 F 288 where the Court stated that a patentee's "title is exclusive, and so clearly within the Constitutional provisions in respect of private property that he is neither bound to use the discovery himself, nor permit others use it. That theory was adopted by the U.S. Supreme Court in Continental Paper Bag Co. v. Eastern Paper Bag Co., (1908) 210 US 405 : 52 Law Ed. 1122. There the owner of a patent on a machine manufacturing paper bags, acquired a competing patent and then suppressed it. A suit arose from an infringement of the unused patent. In the Circuit Court, two Judges held that notwithstanding suppression the plaintiff had the right to restrain infringement by injunction. The third Judge dissented. Dismissing the appeal and ruling against the defendant, the majority of the Supreme Court observed that unless the non-use was motivated, the patentee who is the exclusive owner of the patent for a period, had an absolute right to use or not to use the patent. The majority however left the question so far as 'equity' is concerned, open, observing as follows :

> "Whether, however, a case cannot arise where, regarding the situation of the parties in view of the public interest, a Court of equity might be justified in withholding relief by injunction, we do not decide."

Justice Harlan dissented stating injunction has to be refused. He observed :

> "The facts are such that the Court should have declined, upon grounds of public policy to give any relief to the plaintiff.

The view in Continental Paper Bag was reiterated in Special Equipment Co. v. Coe (1945) 324 US 370 by a majority of five against four, observing again that they had "no occasion to consider here..... whether the Courts on equitable principles should decline and enjoin patent infringement....."

19. For our purpose the minority view pronounced by Douglas, J. in the Special Equipment Co. case is important. He declared that the absolute right theory had come into the law a decade after the first patent Act was passed and that it "was time to be rid of that rule". It was inconsistent with the Constitution (Article I Cl. 8) and the Act. He said that a patent is not a form of private property but a "privilege" "conditioned by a public purpose," to promote the progress of science and useful arts. (Mercoid Corp. v. Mid-Continent Invest Co., (1943) 320 US 661 : 88 Law Ed 376). The exclusive right of the inventor is but the means to that end. This principle was recognised in several cases earlier in US. But the Continental Paper Bag case had deviated radically from that theory and equated the "exclusive" right with an "absolute" right, thereby subordinating the public purpose of the grant to the self-interest of the patentee. The results were far reaching, observed Douglas, J. :

> "The result is that suppression of patents has become common place. Patents are multiplied to protect an Economic barony or empire, not to put new discoveries to use for the common good."

Protection to unused patents would result in economic barony or empire. Douglas, J. quoted Hamilton, Patents and Free Enterprises (1941) (p. 161) "It is common practice to make an invention and to secure a patent to block off a competitor's progress. By studying his ware and developing an improvement upon it, a concern may 'fence in' a rival, by a series of such moves it may pin the trade enemy within a technology which rapidly becomes obsolete. As often as not, such maneuvers retard, rather than promote, the progress of useful arts.

Invariably their effect is to enlarge and to prolong personal privilege within the public domain."

He said that one patent is used merely to protect another. The use of a new patent is suppressed so as to preclude experimentation which might result in further invention by competitors. "A whole technology is blocked off. The result is a clog to our economic machine and a barrier to an economy of abundance". The learned Judge asked can the suppression of patent which arrests the progress of technology be said to promote that progress?" Can the words to make, use and vend be read as to mean "not to make, not to use and not to vend". He asked :

> "Take the case of an invention or discovery which unlocks the doors of science and reveals the secrets of a dreaded disease. It is possible that a patentee could be permitted to suppress that invention for seventeen years (the term of the letters patent) and withhold from humanity the benefits of the cure."

We are in entire agreement with the strong views expressed by Douglas, J. in his dissenting judgment. The philosophy behind his view appears to us also to be.the basis of the views of the Calcutta, Madras and Delhi High Courts earlier referred to. Apart from that even the majority decision in the US cases has clearly left the question open so far as equity is concerned.

20. In his book 'The United States Patent System' (1956), Chapter VIII) relating to 'Suppression of Patents', Floyd L. Vaughan, refers to what Mr. R.H.F. Palgrave, stated in his Dictionary of Political Economy (III, 76). He stated that the granting of a patent may be a hindrance to industrial life of the patentee, who through want of energy or want of means, neglects to work his invention, while others, who would be willing and able to do so, are afraid of infringing his rights. Reference is made to Mr. William Robinson's. The Law of Patents For Useful Inventions (65-67) wherein he said that the expectation that the patentee will use his invention is implied in the infringement laws, which protect the legal monopoly of the patentee throughout the entire period during which his monopoly extends. The Corollary of this protection is that the patentee must develop his invention. These views suggest that if the patentee releases his

inventions into the market, it will help in further research, improvement and development of better technology. Floyd L. Vaughan finally says (p. 259) that the US laws allow foreigners to take out patents in US merely for the purpose of reserving the US as a market for their parented products; If there is suppression, it will prevent manufacture in US in spite of more favourable factors for production in US.

21. In our opinion, what was said about unused foreign patents and their adverse effect in US, equally applies to foreign patents registered in India but not used.

22. For the above reasons, the plaintiff who has registered patents in India in 1984 but has not used them in India cannot, in equity, seek temporary injunction against the respondent. Points 1 and 2 are decided accordingly.

POINT 3

23. Neither in the plaint nor in the IA, has the appellant pleaded that he held 40% equity in Lohia Starling Ltd. It is therefore not possible to permit the plaintiff to raise a new issue of fact for the first time in appeal. Alternatively, if the plaintiff cannot get temporary injunction himself, he cannot be in a better position by employing a power-of-attorney.

24. The fact that R. K. Lohia is manufacturing and using these mechanical devices in India cannot help the plaintiff inasmuch as Mr. Lohia does not have a registered patent in his name. The registration of the plaintiff Mr. Franz Xayer Heumer cannot help Mr. R. K. Lohia nor of M/s. Lohia Starlinger Ltd. in fact, as pointed by the learned Judge, the arrangement between the plaintiff and his power of attorney has not been spelt out anywhere. The suit is not by Mr. R. K. Lohia or by M/s. Lohia Starlinger. Hence Point 3 is held against plaintiff.

POINT 4

25. The defendant has taken out a large number of other pleas to bring the case under Section 64 of the Act, which read with Section 107, could be grounds of defense irrespective of whether the defendant has applied for revocation or not.

Some of these pleas of the defendants, particularly, absence of novelty or utility -- have been dealt with by the Supreme Court in Biswanath Prasad Radhey Shyam H. M. Industries, . The Supreme Court had also occasion to consider Sections 64 and 107 in Monsanto Co. v Coramandel Indage Products (P) Ltd., . In the latter case, it was held that the Herbicide (p. 53619 (Butacher) was publicly known long before the Patent No. 125381 was granted to the plaintiff. Its formula and use had already been made known to the public by the Report of the International Rice Research Institute for the year 1968. It was observed (at p. 717 of AIR) :

> "To satisfy the requirement of being publicly known as used in Clauses (e) and (f) of Section 64(1), it is not necessary that it should be widely used to the knowledge of the consumer public. It is sufficient if it is known to the persons who are engaged in the pursuit of the knowledge of the patented product or process either as men of science or men of. commerce or consumers. The section of the public who, as men of science or men of commerce were interested in knowing about Herbicides which would destroy weeds but not rice, must have been aware of the discovery of Butachlor."

26. The defendant has in the present IA likewise enumerated several facts in his reply to say that long before the plaintiff registered his patent in India, these mechanical devices have been extensively in use in India, at Pune, Nagpur, Ahmedabad and that this invention has become public property, at any rate property of those in the line of manufacture. Having regard to the several Annexures (A to P) filed along with the counter-affidavit, there is considerable force in this defense taken out by the defendant. But in view of our findings on Points 1, 2 it is not necessary for us to go in depth into this question.

POINT 5

27. iN intellectual property matters, is it sufficient to raise a 'triable issue' or is it necessary to make out prima facie case, balance of convenience and irreparable injury under Order 39, Rule 1, C.P.C.?

Prima facie case

28. It is true that earlier, in the well-known case in American Cyanamid v. Ethican (interlocutory) 1975 RPC 513 (at 541, 542), it was observed that it was sufficient if a 'triable issue' was there. According to Lord Diplock, the Court must also be satisfied if. there is a "serious question to be tried" : thereafter it should not try to assess relative merits by looking into prima facie case in the affidavit evidence but should instead turn at once to the balance of convenience; if damages to be awarded at the trial can adequately compensate plaintiff and the defendant could pay them, injunction could be refused; if not, injunction could be refused; if not, injunction could be granted; if defendant could be compensated by way of damages later by plaintiff, injunction could be granted; where there is doubt about the adequacy of damages to one or both, any factor which may affect balance of convenience is to be considered. If the balance is even, the relative strength of the case is to be considered.

29. But, after the American Cyanamid case, several Judges have said that too rigid an approach based on 'triable issue' rather than 'prima facie case' might only benefit rich plaintiffs and that it would "be intolerable if Cyanamid case was allowed to become" a charter of success for all rich companies pitched against poor companies, especially if the latter were not expected to be capable of paying damages. If the defendant was already in a precarious financial state, injunction might drive him into insolvency and leave a monopoly in favour of the rich plaintff. Courts must therefore be astute to prevent unfairness (Vernon 89) (Pulp Products) Ltd. v. United Pulp Containers Ltd., (1980) FSR 179 quoted in Brupat Ltd. v: Sandford Marine Products Ltd., (1983) RPC 61. The rigidity of Cyanamid Was reduced by Lord Denning M. R. and Pennycuick V. C. (See Fellows v. Fisher, (1976) QB 122; Hubbard v. Pitt, (1975) 3 All ER 1, Dunford v. Johston, 1978 FSR 143) and also in Australia (Firth v. Polyglas) (1977 RPC 213) and in South Africa (Beecham Group v. B. M. Group), 1972 RPT 220 (PDS Africa). Therefore in considering whether there is a triable issue, as per Cyanamid are, certain considerations concerning "prima facie" case are also to be taken into account, in intellectual property matters (Revlon v. Cripps & Lee)

(1980 FSR 85); Mothercare v. Penguin Books, 1988 RPC 113; Mail Newspapers v Express Newspapers, 1987 FSR 90.

30. In a recent intellectual, property case concerning trade mark, the Supreme Court after referring to Cyanamid, still observed that plaintiff has to prove prima facie case, balance of convenience and irreparable injury if injunction is to b'e granted. Gujarat Bottle Mfg. Co. Ltd. v. Coca Cola Co., . That would mean that the rule of 'triable issue' stands mellowed down in favour of prima facie case, in intellectual property matters.

31. It is said that in the law of patents, it is not sufficient merely to have registration of a patent. The Court must look at the whole case, the strength of the case of the patentee and the strength of the defense such as those falling under Section 107 ,read with Section 64.

32. The need to establish prima facie has been emphasized in recent cases in England and in India. The Court has to consider whether there is prima facie proof of infringement (Lord Denning M. R. & Megaw LJ Hubbard v. Vosper, (1972) 1 All ER 1023. Prima facie proof of validity is different from prima facie proof of infringement as stated by Suitan Singh, J. in NRDC Co. v. DCM Ltd., AIR 1980 Delhi 132. In that case, the learned Judge quoted Terrel on the Law of Patents (12th Ed. para 830) : (at p. 135 of AIR) :

> "The plaintiff must first establish such facts as will satisfy the Court that there are strong prima facie reasons for acting on the supposition that the patent is valid. The most cogent evidence for this purpose is either that there has been a previous trial in which the patent has been held to be valid, or that the patentee has worked and enjoyed the patent for many years without dispute", or may be that as between the parties the plaintiff is relieved from the onus of establishing validity, as where the defendant has admitted it or is so placed in his relationship to the plaintiff as to be estopped from denying it."

In Surendra Lal Mahendra Jain v. Glazers, 1981 PTC 112 (117) it was held that a prima facie case about the existence of the monopoly, right and its infringement must be established. (See also Ram Narain Kher v. Ambassador Industries, .)

Balance of convenience.

33. Balance of convenience has also an important role to play. Stultification of defendants investment, loss of employment, public interest in the product (such a life saving drug), product quality coupled with price, or the defendant being smaller in size, may go against the plaintiff. Cases of a 'Bridgehead (only a short period to go before expiry of plaintiff's patent), parties being of equal size, -- may go in favour of plaintiff. Case of snowball (more future infringements) may not till the balance in favour of plaintiff. (See Halsbury's Laws of England, 4th Ed, Vol. 35, para 623). Again, even delay of a few months in some cases has led to refusal of injunction. In Minnesota Mining & Manufactory v. Johnson & Johnson, 1971 FSR-Supply (1) at 623, the delay was seven months and injunction was refused.

34. In view of our findings on Points 1 to 4, we agree with the learned Judge that the appellant-plaintiff has neither made out a prima facie case nor is the balance of convenience in his favour. We have given additional reasons as to why the order of the learned Judge is to be affirmed. We accordingly dismiss the appeal.

35. Appeal dismissed.