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MANALI PRASANNA TILAK
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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

IN ITS COMMERCIAL APPELLATE DIVISION

COMMERCIAL APPEAL NO. (L) 14941 OF 2026
IN
INTERIM APPLICATION NO. 88 OF 2026
IN
COMMERCIAL (IP) SUIT NO. 710 OF 2025

Atomberg Technologies Private Limited Having its corporate office at 3rd Floor, Tower B, 247 Embassy Park, LBS Marg, Vikhroli West, Mumbai 400083. Maharashtra.	..	Appellant/ Original plaintiff
Versus		
Stove Kraft Limited Having its registered office at 81/1, Medamarana Halli Village Harohalli Hobli, Kanakapura Taluk, Ramanagar Dist, Karnataka - 562112 and Corporate office at #30, 2nd Cross, CSI Compound, Mission Road, Bengaluru – 560027	..	... Respondent (Original defendant)

Dr. Birendra Saraf, Sr. Advocate with Mr. Hiren Kamod, Mr. Nishad Nadkarni, Mr. Aasif Navodia, Ms. Khushboo Jhunjhunwala, Ms. Rakshita Singh, Mr. Rohan Lopes and Nihala Naiyyira i/b Khaitan & Co. for the appellant.

Mr. Venkatesh Dhond, Sr. Advocate with Mr. Akshay Patil, Mr. Akshay Kamble, Ms. Neha Patil, Ms. Trupti Poojary, Ms. Reshma Rajagopal and Mr. Prateek Pansare i/b Vivaka Partners for the respondent.

Mr. B.V. Baravkar, Court Receiver, present.

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CORAM : BHARATI DANGRE &
MANJUSHA DESHPANDE, JJ.
RESERVED ON : 27th JULY, 2026
PRONOUNCED ON : 16th OCTOBER, 2026

JUDGMENT (PER: BHARATI DANGRE, J.)

1. The present Commercial Appeal is filed by the Appellant - Atomberg Technologies Private Limited, Mumbai,(hereinafter referred to as 'Atomberg') being aggrieved by the impugned judgment and order passed by the learned Single Judge on 17/4/2026, thereby refusing the interim relief sought for in Interim Application No. 88/2026 in Commercial (IP) Suit No.710/2025, filed for damages and injunction, alleging infringement of its design registered on 1/1/2020 in Class 23-04 for 'Ceiling fan' and for passing off of its products i.e the said fan.

By the Interim Application, the Applicant sought a temporary injunction along with appointment of a Court Receiver. Though vide order dated 24/7/2025, an *ex-parte* ad-interim relief, restraining the defendant from manufacturing, using, selling, exhibiting or advertising the impugned fan, imitating or resembling the suit fan was granted, and the Court Receiver was appointed to conduct a search with directions to seize and take possession, custody and control of the impugned fan, by the judgment delivered on 17/4/2026, the learned Single Judge discharged the Receiver and dismissed the interim application on recording a finding, that the plaintiff

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failed to make out a *prima facie* case, or establish balance of convenience and demonstrate irreparable loss that may be suffered in the absence of interim relief. As the Court Receiver was discharged, the goods seized by him were directed to be released forthwith.

2. The present appeal and the challenge to the judgment, refusing the interim relief deserve appreciation in the backdrop of the claim staked by Atomberg in Commercial (IP) Suit instituted by it, with a specific pleading that it is the registered proprietor of, Copyright subsisting in the design of 'Atomberg Renesa Alpha' Ceiling fan bearing Registration No. 325322-001 in Class 23-04. It pleaded that the registration being secured in the year 2020, and in the wake of its commercial success, it was decided to sell the fan with minor variation in the blade connector, in addition to Atomberg Renesa Alpha under the trade marks/brands - Atomberg Renesa Prime, Atomberg Renesa Prime Regulator, Atomberg Renesa Zen, Atomberg Renesa Enzel and Atomberg Renesa Prime Remote.

According to the plaintiff, in or about the first week of June, 2025, its representative learned about the impugned fan of Stove Kraft Limited (hereinafter referred to as 'Stove Kraft') having shape, configuration, design and aesthetic appeal that is identical with and/or a fraudulent imitation and/or obvious imitation of the shape, configuration, design of the plaintiff's fan for which it had secured registration. The representative of the plaintiff thereafter purchased the impugned fan under the

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name "Pigeon fan-tastic BLDC Ceiling fan" from the defendant's dealer/retailer in Dadar, Mumbai.

Followed by this revelation, it also conducted a search on the internet to unravel that Stove Kraft, has a website — www.stovekraft.com, on which, the impugned fan bearing the impugned design/shape was promoted and advertised. It was also learned that the impugned fan bearing the impugned design/shape could also be purchased from www.amazon.in, www.indiamart.com and www.jiomart.com.

3. Upon this information being collected, it was noted that Stove Kraft was trying to take advantage of the plaintiff's fan bearing the registered design, which had gained immense popularity owing to its design, aesthetic look combined with its superior quality and durability, and which was purchased by people at large from different strata of society, including illiterate and semi-illiterate consumers as well as customers belonging to affluent and non-affluent backgrounds, residing in urban or semi-urban areas. Pleading that the plaintiff had acquired statutory and common law rights in the shape and configuration of the fan manufactured by applying the design which was registered and was entitled to the exclusive use of the same to the exclusion of other manufacturers and/or traders, the plaintiff was of the view that it was entitled to for relief in respect of infringement/piracy of the shape, configuration, design of the fan, to which it was applied and also for the act of passing off, in the manner provided by law.

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According to the plaintiff, its design has novelty, which reside in the shape and configuration along with its peculiar features viz. (i) the unique shape of the blades with a petal-inspired curve; (ii) each blade featuring asymmetric tapering, with one side tapering more than the other; (iii) uniquely shaped blades with a subtle V-bend along their length; the body being curved, narrowing at the top and gradually widening towards the bottom, creating a sleek and balanced silhouette along with the canopies having a slanted top edge, matching the fan's diameter for a smooth and continuous look.

The plaintiff claim that the design of its fan with the above-mentioned features was 'New and Original', and it had acquired tremendous goodwill and reputation and that is how it became one of the largest selling fan.

4. Upon Atomberg coming across the attempt of the defendant in infringing its registered design, by blatantly copying, creating a replica and/or reproducing the overall design, shape, configuration, get-up and even the specific features of the plaintiff's fan, it was of the opinion that its design was deliberately copied by Stove Kraft so as to derive undue, unlawful and illicit gains and the design applied to the fan is definitely not a matter of coincidence.

According to the plaintiff the shape, configuration and design adopted by the defendant, is a fraudulent/obvious imitation and/or closely and deceptively similar to the shape, configuration and design of the plaintiff's fan. Pleading that the

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members of the trade and public/informed users having instructed eye, upon coming across the impugned fan bearing a similar/identical shape, configuration, design and aesthetic appeal as that of the plaintiff's fan, are bound to be put in a state of wonderment and are likely to be confused and/or deceived into believing that the fan offered by the defendant are those of the plaintiff and/or are originating from the plaintiff and/or are connected in the course of the trade with the plaintiff.

By this act, it was pleaded that the defendant was passing off its impugned fan/goods as and for the plaintiff's well-known fan/goods and this act would result into irreparable loss to its trade and reputation on account of the aforesaid act of piracy/infringement of plaintiff's registered design and passing off.

Atomberg, therefore, sought a relief of perpetual order of injunction by filing the suit against Stove Kraft Limited by itself, its Directors, Dealers, Stockists, Distributors, Servants, Agents and all persons claiming under or through it, from infringing/pirating the plaintiff's design of the fan with registration number 325322-001 in Class 23-04, by its use in the impugned fan or any other fan which is a fraudulent or obvious or slavish imitation or resembling with the plaintiff's said fan.

Plaintiff also sought a decree against the defendant in a sum of Rs. 110 Crores as and by way of damages for the act of

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infringement of its registered design and passing off or in the alternative, prayed that the defendant be ordered to render a true and faithful account of the profits earned by it by using/selling the impugned fan and it shall be further ordered and decreed to pay to the plaintiff such amount as may be found due on such account being taken.

5. It is in this suit with the aforesaid relief, the plaintiff, Atomberg, took out an interim application praying for a temporary order of injunction against the defendant so as to restrain it from infringing/pirating the plaintiff's design of the fan being registered in Class 23-04 by use of the impugned fan or any other fan, during the course of hearing and till final disposal of the suit.

An interim injunction was also sought against the defendant from manufacturing and/or selling and/or marketing and/or retailing and/or exporting and/or distributing and/or trading and/or exhibiting for sale and/or advertising and/or otherwise dealing in fan bearing the shape, configuration, design of the impugned fan which is identical with and/or deceptively similar to the shape, configuration, design of the plaintiff's said fan so as to pass off or enable others to pass off the defendant's fan/goods as and for the plaintiff's well-known fan/goods or in any other manner whatsoever.

The application also sought appointment of Court Receiver, High Court, Bombay under Order XL, Rule 1 of the Civil Procedure Code, 1908 as a Receiver of the defendant's

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impugned fan, with all incidental powers.

6. The above Interim Application was strongly contested by the defendant by alleging that the ex-parte ad-interim protection was secured, based on a misleading comparative table by incorporating the features of the subsequent models of the product and in fact, these designs were mere trade variants and lacked any novelty or originality. It was specifically urged that the defendant's fan is to be compared with the suit design registration as the 'Other Renesa fan', differ from the plaintiff's registered design.

Heavy reliance was placed upon the comparative charts, drawing a comparison of the defendant's fan with the original models and the subsequent models lodged by Atomberg to distinguish that it's registered design was in no way alleged to be adopted.

The distinction was drawn by submitting that the 'Z' shaped integration, clearly and obviously visible in Atomberg's suit design was absent in Stove Kraft's fan, apart from the distinction in the blade position, canopy design, housing surface pattern, rivet quantity and positions, blade edge profile, motor housing lid, blade interface with motor housing, capacitor, shank profile and floral petal-like pattern. A stand was adopted that there was no novelty in the plaintiff's suit fan, when compared to the existing ceiling fan in the market and there is no technical or functional advancement and therefore, under the provisions of The Designs Act, 2000, if a design does not

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appear to be 'New' or 'Original' and is not significantly distinguishable from the known designs or a combination of the known designs, the registration of the design is liable to be cancelled.

The authoritative pronouncements were relied by the rival parties before the learned Single Judge, who, on perusal of the plaint as well as the affidavit in reply filed, made extensive reference to the table incorporated therein, showing comparison of the products, which according to the learned Single Judge, lead to an inference that the product comparison made by the plaintiff in the plaint, is not between the plaintiff's ceiling fan for which it actually obtained a design registration, as it had claimed design registration for one model and has compared the impugned fan its different variants/models to allege that the impugned fan is similar to the suit fan.

A prima facie finding is also recorded in the impugned order to the following effect :-

> "32. Prima facie, no unique or novel feature is seen in the suit fan that can be said to be obviously different from that of a usual ceiling fan. For example, any ceiling fan will have basic features, such as blades, a shank, a canopy, or even a motor housing lid. Therefore, the basic structure of any ceiling fan is bound to be the same. The overall basic functional appearance of a ceiling fan cannot be compared to identify similarities for the purpose of alleging infringement of a registered design in the absence of any novelty. Some unique feature, pattern, configuration, or even an ornamental appearance may constitute a valid registered design of a ceiling fan that would stand out from the usual ceiling fan. However, the basic features of a fan that would make it a ceiling fan cannot be considered novel."

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7. The learned Single Judge, by applying the well settled criteria/test being, the similarity to be judged solely by the eye, on comparison of the differences between the blade design, motor housing lid, shank profile, rivet quantity and canopy noted that this test is not satisfied.

By applying the test laid down in the various authoritative pronouncements which were relied upon, it was expressed that the Court has to see whether the essential parts or the basis of the claim for novelty form part of the impugned article and in the present case, it was noted that when the fan designs of the rival parties are minutely observed, the impugned fan is substantially different from the suit fan, as the unique features claimed by Atomberg in the suit fan i.e. the bottom view, left side view and right side view are not similarly placed in the impugned fan. On the other hand, the Court found substance in the submission advanced on behalf of Stove Kraft, to the effect that the alleged similarities with the impugned fan, as indicated in the second table to the plaint had drawn a comparison between the pictures of variants/models and not the impugned fan i.e. the registered design.

8. Recording that the plaintiff had introduced various models and actually what deserves comparison was its registered design and not the variants, the trial Judge did not find prima facie case in favour of the plaintiff for the following reasons :-

> "34 In the present case, as seen from the plaintiff's pleadings and the comparative first table in the plaint, the plaintiff claims

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> that the suit fan has an obviously different bottom view, and the side view, which is similar to that of the impugned fan. Such an obvious and usual appearance would be of any ceiling fan. However, if the plaintiff's claim of having a unique design of the blade, shank, canopy and motor housing lid is compared with the impugned fan, no obvious similarity is seen when judged through the purchaser's eye that would make a purchaser believe that the impugned fan is the suit fan. The different shape of the blade with a curve and the "Z" shape shank design of the suit fan is not seen in the impugned fan. Even otherwise, there are differences between the image of the suit fan and the impugned fan. When the suit fan and the impugned fan were produced before this court at the time of the hearing, no similarity was visible that would constitute piracy to seek any relief on the allegation of infringement of the plaintiff's registered design.
>
> 35. Therefore, apart from the valid grounds raised in defence to challenge the plaintiff's registered design, no similarity is seen in the impugned fan when compared with the plaintiff's registered design, i.e the suit fan, that would prima facie show any infringement of the registered design as alleged by the plaintiff. The plaintiff has also not made out a prima facie case to establish goodwill and distinctiveness in a particular getup, which would show something more than mere similarity, providing a cause of action on the aspect of passing off. Learned senior counsel for the defendant is right in pointing out that the CA's certificate relied upon by the plaintiff for claiming goodwill is based on the six model/ brands as pleaded by the plaintiff in the plaint and is not based only on the suit fan. Therefore, by applying the well-established legal principles, as discussed in the above paragraphs, the plaintiff has failed to make out a prima facie case as required under the law to successfully claim interim relief against the defendant."

In light of the above, by recording that the plaintiff had failed to satisfy the triple test for grant of interim injunction, the application was dismissed and the Court Receiver being discharged, was directed to release the goods forthwith.

It is this impugned order which is the subject matter of challenge before us.

9. We have heard Dr. Birendra Saraf for the plaintiff/appellant, who would invite our attention to the

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provisions of the Designs Act, 2000 and his emphasis is on the definition of the term 'Design' and according to him, the design is something which is indicative of shape, configuration, pattern, etc. in any article and it should have an appeal which can be judged solely by the eye. He would invoke the principle laid down by the Apex Court in **Bharat Glass Tube Limited V/s. Gopal Glass Works Limited**[1] which has clearly highlighted that the concept of Design is a particular figure conceived by its designer in his mind and it is reproduced in some identifiable manner and sought to be applied to an article, whenever it is presented for registration and it is this characteristic which would deserve credence. He would also invoke the definition of the term 'Original' as defined in Section 2(g) in relation to a design originating from author of such design and include the cases which though in themselves, are new in their application.

Our attention is invited to the relevant portion of the Law Report where reliance was placed upon the relevant paragraph reproduced from law of Copyright and Industrial design by P. Narayanan (fourth Edition) where design is defined to be a conception, suggestion or idea and not an article which is the thing capable of being registered.

10. As regards the factual aspects are concerned, according to Dr. Saraf, Atomberg, somewhere in the year 2018, introduced a ceiling fan under brand name 'Atomberg Renesa' which is not the subject matter of the proceedings and therefore, he chose to refer it to 'Other Renesa fan'. However, in December 2019, the

1 (2008) 10 SCC 657

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plaintiff conceptualized and developed a completely new and original design for a ceiling fan distinct from any other fan under a distinctive, original and novel design, and according to the learned senior counsel, the plaintiff claimed novelty in shape and configuration only.

Giving the details of the said design, as being created in house by Mr. Aman Sadana and Mr. Utkarsh Gautam, during the course of the employment in terms of the specific instructions imparted as to shape and configuration under a contract of service, the design of this fan was developed and the registration was secured under the Designs Act, 2000 on 1/1/2020 in Class 23-04, vide registration No. 325322-001.

It is on the basis of this registration that Atomberg staked the claim of being the registered proprietor of the Copyright subsisting in the said 'design', which entitled it to possess the exclusive right to use and/or reproduce the shape and configuration of the design and use of its design or any obvious or fraudulent imitation thereof would amount to piracy/infringement. Dr. Saraf would submit that due to commercial success of its products bearing the said design, Atomberg came out with other fan, with minor non-aesthetic variation under six trademarks/brands, in distinct time zones and according to him, when a reference is made to 'said fan' it includes the fan sold by the appellants under six brands/trade marks.

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11. According to Dr. Saraf, the novelty of the said fan lies in its shape and configuration and, the following features combined together were relied upon before the learned Single Judge, to establish its exclusive right to use and reproduce the shape and configuration, the plaintiff being the registered proprietor of the Copyright subsisting in the said design and it included the following :-

> "(i) the blades are uniquely shaped with a petal inspired curve. The surface flows in a smooth, continuous curvature from root to tip;
> (ii) each blade features asymmetric tapering, with one side tapering more than the other.
> (iii) where the blade narrows at the edge, a rounded junction (fillet) creates a smooth transition;
> (iv) the blades are uniquely shaped with a subtle V-bend along their length;
> (v) the body is curved, narrowing at the top and gradually widening towards the bottom, creating a sleek and balanced silhouette;
> (vi) the canopies have a slanted top edge, matching the fan's diameter for a smooth, continuous look;
> (vii) the bottom circular plastic base of the fan features a cut away edge that creates a dip, that helps to reduce visual bulk."

12. It is a specific contention advanced by Dr. Saraf that the aesthetic look and design along with the features of the said fan i.e 'Atomberg Renesa Alpha' have never been used in the aforesaid combination for any fan and therefore, is novel. He would submit that Atomberg do not claim monopoly in any independent feature as mentioned above but the novelty/monopoly is claimed in all the above features taken together as a part of the design & novelty resides in the shape, configuration and overall aesthetic appeal created by the same

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as would be visible to the consumer, when put to use.

Relying upon the well settled position in law demonstrated through various pronouncements, he would submit that the dominant aspect of the plaintiff's fan is the aesthetic appeal created by all the above features combined together and when it adopted the said fan, with the aforesaid design, there was not a single fan which had the above mentioned feature and the aesthetic appeal, which was applied to the said product.

13. According to Dr. Saraf, the goodwill and reputation achieved by Atomberg qua the said fan, was apparently evident from the annual sale figures which were relied upon from November 2020 to April-May 2025, which was the relevant criteria to take into consideration the relief of passing off.

As against the said fan, according to Dr. Saraf, the fan of Stove Kraft styled as "Pigeon fan-tastic BLDC Ceiling fan", has blatantly copied and reproduced the overall design, comprising of shape and design of the plaintiff's fan, for which it has secured registration in Class 23-04. According to him, Atomberg in its plaint clearly brought out a case that the design of the impugned fan is nothing but a fraudulent and/or obvious imitation of its registered design and the adoption and/or use thereof cannot be a matter of coincidence and/or honest adoption.

According to him, the deliberate imitation of the design of its fan by Stove Kraft amounts to infringement of its registered

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design and to compare the features of rival fan, Dr. Saraf has physically placed before us the plaintiff's fan as well as the impugned fan, and also relevant photographs of the fan taken from different angles are also relied upon.

14. In support of his contention to prove infringement and the test to be applied, Dr. Saraf would rely upon the decisions in cases of:-

(i) Whirlpool India Ltd V/s. Videocon Industries Ltd.[2]
(ii) Videocon Industries Ltd V/s. Whirlpool India. Ltd[3]
(iii) Cello Household Products and Anr V/s. Modware India[4]
(iv) Asian Rubber Industries, New Delhi and ors V/s. Jasco Rubbers
Calicut and ors[5]
(v) Faber-Castell Aktiengesellschaft and ors V/s. Cello Pens Pvt. Ltd[6]

In addition, he would also rely upon the decision of Delhi High Court in **TTK Prestige Ltd V/s. KCM Appliances Pvt. Ltd**[7].

15. The submissions advanced on behalf of Atomberg received strong opposition from the learned senior counsel Mr. Dhond representing Stove Kraft, as according to him, the impugned order dated 17/4/2026 has rightly analysed the submissions and a conclusion is drawn that plaintiff is not entitled for an injunction on the ground raised that the defendant was allegedly infringing the plaintiff's registered design in respect of 'Atomberg Renesa Alpha' and passing off the defendant's fan as that of plaintiff's.

2 2014 SCC Online Bom 565
3 2012 SCC Online Bom 1171
4 2017 SCC Online Bom 394
5 2012(5) Mh.L.J. 548
6 2015 SCC Online Bom 6410
7 2023 SCC Online Del 2129

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At the outset, Mr. Dhond would rely upon the principle well settled by the Apex Court, as regards scope of interference in an Appeal and according to him, the scope of interference is minimal and the appellant has not made out any case for interference, particularly when the order challenged is an interlocutory order.

It is urged before us that an order granting or refusing to grant an injunction passed by the learned Single Judge is in exercise of discretion and the only scope of interference in exercise of the appellate power is if the learned Single Judge has exercised the discretion arbitrarily, capriciously, perversely and when the settled principles of law were ignored.

Heavy reliance is placed upon the test laid down by the Apex Court in **Wander Ltd and anr V/s. Antox India P. Limited**[8].

16. The learned senior counsel Mr. Dhond would also invoke the principle of law laid down by the Apex Court in **Bharat Glass Tube Limited** (supra), which has expressed as to what would amount to a 'Design' and it is urged that design is a conception, suggestion or idea applied to an article and the Apex Court has declared the concept of design, being a particular figure conceived by its designer in his mind, and reproduced in an identifiable manner and sought to be applied through an article.

Submitting that design is an extension of Copyright, Mr. Dhond would submit that design is not a source identifier and it is rather an extension of Copyright. He would compare

8 1990 (Supp) SCC 727

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provisions of Section 11 and 22 of the Designs Act, to demonstrate that Design is closer to Copyright, than to a trademark, as unlike trademark, the design is not a source identifier and trademarks are to be judged by their broad features and overall impression assessed by a consumer having average intelligence and imperfect recollection. According to him, under the Designs Act, the settled principles for testing infringement are distinct than the one which are applied for determining whether there is trademark infringement and the test of a consumer with average intelligence with imperfect recollection is not applicable in case of Design.

According to Mr. Dhond, as far as design is concerned, the applicable test is of an "informed user" having an instructed eye though such a person is not a person skilled in the art, but he definitely is not an average consumer but he is a person who; (i) have experience of other similar articles (ii) is reasonable and discriminatory and (iii) is able to appreciate enough detail to recite if a design creates an overall impression which has individual character and whether an alleged infringement produces a different overall impression.

Reliance is placed by Mr. Dhond upon the decision of Delhi High Court in case of **M/s. B. Chawla and Sons V/s. M/s. Bright Auto Industries**[9], when the Division Bench held that in final analysis, the matter would boil down to whether addition of further curve on either side of the 'mirror' which received

9 1980 SCC Online Del 320

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registration and whether it would make the variation a striking one or substantial, so as to constitute a novelty, meriting for registration and it was held that the learned Single Judge had correctly used his eye for discerning if there was infact a novelty and found none.

Reliance is also placed upon the decision of the learned Single Judge in case of **Carlsberg Breweries A/S V/s. Som Distilleries and Breweries Ltd**,[10] when the article involved was a unique and distinctive bottle which was used in respect of its product i.e. Beer under the brand 'Tuborg', design which received registration under the Designs Act. The novelty of the registered design was claimed to be in the shape and configuration of the bottle. The grant of injunction as claimed by Carlsberg Breweries was considered by ascertaining whether there is sufficient resemblance between the alleged infringing copy and the plaintiff's registered design leading to an action for infringement u/s.22 of the Designs Act.

It was held that, not every resemblance in respect of the same article would be actionable at the instance of the registered proprietor of the design but the Court is required to see, in particular, as to whether the essential part of the basis of the plaintiff's claim for novelty forms part of the allegedly infringing copy and it was specifically ruled that the task of the Court is to judge the similarity or difference through, eye alone and where the article in respect of which the design is applied

10 2017 SCC Online Del 8125

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is itself the object of purchase than through the eye of the purchaser.

In addition to the aforesaid decisions, Mr. Dhond would also invoke that the principle of law laid down the following three decisions from the Delhi High Court :-

(i) Diageo Brands B.V & Anr. Vs Alcobrew Distilleries India Pvt Ltd,[11]
(ii) TTK Prestige Ltd V/s. KCM Appliances Pvt Ltd,[12]
(iii) Trodat GmbH & Anr vs Addprint India Enterprises Pvt Ltd & Anr,[13]

17. By relying upon the aforesaid pronouncements, according to Mr. Dhond, the test to be applied is that of an informed user having an instructed eye, which can discern if the product is pirated/infringing the copy of the registered design.

According to him, the test to be applied in meeting the claim of infringement is comparing the two products side by side, by an informed man, and it is his specific contention that this comparison should be made with the original designs (registered work) and not with the variants.

Coming to the facts of the case, it is the contention of Mr. Dhond that Atomberg's fan which received registration was the only one which deserve comparison with its product which is alleged to be infringing the design. According to him, in the original (registered design) the novelty is the Z Shape shaft but this is conspicuously absent in the other variants. According to the learned counsel, if the concept of design as defined under

11 2022 SCC Online Del 4499
12 2023 SCC Online Del 2129
13 2025 SCC Online Del 4342

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the Designs Act, revolve around shape, configuration, pattern, which must be judged by an eye, the design registration secured by Atomberg in the registration certificate itself would reveal that the novelty was claimed on the basis of shape and configuration. The whole view of the article/product (front/ bottom/down) has laid its emphasis on shape/configuration and it is the contention advanced that in the registration granted to the plaintiff's product, no where the shaft is part of the novelty projected. According to him, the novelty was the Z pattern, but that was not staked as a novelty while the registration was sought and therefore, it was not even mentioned by the Controller, but it is open for the Court to discern as to what is 'novel' and according to Mr. Dhond, though the plaintiff did not claim it nor has the Controller recognised it.

However, in the subsequent fan of the plaintiff, according to Mr. Dhond, the 'Z' shaft is missing. It is this feature which the learned Single Judge found to be unique, as the plaintiff staked a claim upon it by stating that it was a novelty. However, according to Mr. Dhond, Atomberg cleverly migrated to its new designs and now seek a comparison with this modified design which have never received registration where, the 'Z' shape, the unique feature of the 'registered fan' was absent.

Since the test to be applied under the Designs Act, is of an eye which is instructed and under Section 22, it is imperative to

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establish "fraudulent or obvious imitation", according to Mr. Dhond, mere resemblance is not sufficient and what is required to be established is an imitation, where some efforts are put in, and has the involvement of *mens rea.* Definitely under section 22, it is only when during the existence of copy right and design, any party for the purpose of sale, apply or cause to apply to any article in which design is registered, the design or any fraudulent or obvious imitation thereof, where it is prohibited, though by securing necessary licence or written consent of the registered proprietor, he may be allowed to do so.

18. Mr. Dhond would distinguish the decision in case of Whirlpool (supra) as according to him, the fraudulent intention can be garnered, only by applying the eye test and comparison of the product side by side with emphasis on the essential features. Reliance on variants of Atomberg's fan with no Z shaft, would not amount to infringement as they are not the registered product according to Mr. Dhond.

19. In response to the aforesaid submissions advanced by Mr. Dhond, Dr. Saraf would rejoin by submitting that the defendant is not coming with any explanation as to why it chose this particular design, and particularly, since no prior art was brought by him on record and it appears to be Stove Kraft's first fan brought in the market. According to Dr. Saraf, it was imperative for the defendant to explain as to how it conceptualised this particular design. Dr. Saraf is very clear in

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stressing on the plaintiff's stand that the registration sought by Atomberg was not qua a specific design, but it was on the whole get-up of the product and that is what the certificate of registration mentions.

Dr. Saraf would also draw our attention to the dividing line between the decisions of Delhi High Court and that of the Bombay High Court, which has applied the test of a common man/average buyer, whereas the Delhi High Court has applied the test of an Instructed eye, which is competent enough to pick up the novelty. According to Dr. Saraf, if the average consumer is the first step in the claim for infringement and if he is to be accepted as an instructed eye, ultimately, there must be a novelty which is noticed, but according to him, Atomberg do not claim novelty in Z shaft per se. It is his specific contention that if the defendant has applied the design in case of five other variants, to its product, it is the case of fraudulent imitation and the learned Single Judge has failed to apply the correct test and therefore, the Appellate Court must apply the test of ascertaining infringement by applying the test of a common man and not that of an instructed eye.

20. The question that fall for consideration before us is whether Stove Kraft's fan is infringing the registered design of Atomberg applied to the Ceiling fan, for which it has sought registration, when the claim was staked in regards to its shape, configuration and pattern, which appealed to and can be judged solely by the eye.

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Before we proceed to determine the same, it is necessary to refer to the provisions of Designs Act, 2000, which has been enacted to protect New and Original designs and visual appearances of such designs being applied to an article. The sole purpose of the enactment of 2000 is protection of intellectual property right of original design for a period of 10 years or whatever further period the protection is extended. The underlying object in conferring such protection, is to benefit the person for his research and labour put in by him in evolving a new and original design and since much thought process, time and expense may be invested in its conceptualisation, the design, on being applied to a product, will enhance its value and appeal. As per the Hon'ble Apex Court in **Bharat Glass Tube Ltd.** (supra), the object of design registration is to see that the originator of the profitable design is not deprived of the reward by others copying it, by applying it to its goods.

21. The Designs Act, 2000 defines two important terms viz. 'Design' and 'Original', as below :-

> "2(d) "design" means only the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article whether in two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction or anything which is in substance a mere mechanical device, and does not include any trade mark as defined in clause (v) of sub-section (1) of section 2 of the Trade and Merchandise Marks Act, 1958 (43 of 1958) or property mark as defined in section 479 of the Indian Penal Code

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(45 of 1860) or any artistic work as defined in clause (c) of section 2 of the Copyright Act, 1957 (14 of 1957).

2(g) "original", in relation to a design, means originating from the author of such design and includes the cases which though old in themselves yet are new in their application."

22. The term 'design' is thus confined to the features in form of shape, configuration, pattern, ornament or composition of lines or colours applied to any article by an industrial process or means and in the finished article it create a distinct appeal, which can be judged solely by the eye. The definition specifically excludes; (a)any mode or principle of construction; (b) anything which is, in substance, a mere mechanical devise; (c) a trade mark; (d) a property mark; and (e) an artistic work as defined under the Copyright Act, 1957.

Thus, the statutory inquiry under the Act is confined to the features of shape, configuration, pattern etc. in the finished article, which is capable of an appeal and judged solely by the eye.

23. Under the scheme of Designs Act, 2000 it is open for the person claiming to be the proprietor of any new or original design, not universely published in any country, to make an application to the Controller for it's registration and Section 4 of the Act prescribe the threshold parameter for registering it. A design cannot be registered if, (a) It is not new or original or (b) It has been disclosed to the public anywhere in India or any other country by prior publication, use or advise or (c) It is not significantly distinguishable from known designs or

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combination of known designs or (d) It comprises or contains scandalous or obscene matter.

It is worth to note that Section 4 of the Act do not require every individual feature of a design to be new or original, as a 'Design' can be new or original in the combination of its features and the overall visual impression created by it.

Upon registration being granted, the Controller under Section 7 is duty bound to cause publication of the prescribed particulars of the design as prescribed, and thereafter, the design shall be opened for public inspection. Once the design finds its way in the 'Register of Designs' along with the name and address of its Proprietor, it shall be *prima facie* evidence of any matter under the Designs Act, 2000, directed or authorized to be entered therein.

24. Upon a design being registered, the registered proprietor of the design, subject to the provisions of the Act, enjoy the Copyright in the design during 10 years from the date of registration, which is extended by a further period of 5 years, upon compliance with the prescribed requirements.

Such Copyright being conferred for the design gives the proprietor the exclusive right, during its subsistence and in terms of Section 22, it shall not be lawful for any person to apply or cause to apply the said design and any fraudulent or obvious imitation thereof, except with the licence or written consent of the registered proprietor, shall amount to piracy.

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Section 22 of the Designs Act, 2000 prescribe the substantive remedy against piracy of a registered design, the requirement being; (a) It is a fraudulent or obvious imitation of the registered design; (b) There is import for sale of any article bearing the registered design or fraudulent or obvious imitation; or (c) Publication or exposure for sale of such an article with knowledge that it is fraudulent or obvious imitation of an article to which design has been applied.

25. A peculiar provision in form of sub-section(3) of Section 22 prescribe that, in any suit or any other proceeding for relief available upon an action of piracy of registered design, every ground on which registration of design may be canceled under Section 19, shall be available as a ground of defence. It is also relevant to note that Section 19 permit the person interested to present a petition for cancellation of registration of design any time after its registration and such application shall be made to the Controller on the following grounds :-

> "(a)That the design has been previously registered in India; or
> (b)That it has been published in India or in any other country prior to the date of registration; or
> (c) That the design is not a new or original design; or
> (d)That the design is not registrable under this Act; or
> (e)That it is not a design as defined under clause (d) of section 2."

26. With this statutory background, we must note the facts presented before us.

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Atomberg, the plaintiff, began to sell its fan online in 2016 and it introduced a ceiling fan styled as 'Atomberg Renesa' in or about 2018, for which no registration was ever sought.

In December, 2019, a design was created in house by two of its employees in the course of their employment, which was unique and the plaintiff claimed novelty in its shape and configuration only and it was so designed as per the instructions given under the Contract of Service.

An application was preferred for registration and on 01/01/2020 the registration was secured for the said design under the Designs Act bearing Registration No. 325322-001.

We must take note of the said registration, as when pertinently the plaintiff claimed novelty only in 'shape and configuration' by combining several features and the Certificate of Registration of Designs certify that design, for which a copy was annexed has been registered in respect of the application of such design to 'Ceiling fan' in the name of Atomberg Technologies Pvt. Ltd. in pursuance of the provisions of the Act of 2000 and the Rules of 2001.

The design accompanying the said Certificate, reflected the perspective/ front/ rear/ left/ right/ top/ bottom view of the design applied to the article. It claimed novelty in shape and configuration of ceiling fan as illustrated. Dr. Saraf has asserted before us that novelty was claimed only in the shape and configuration, which combined several features together.

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27. It is the claim of the plaintiff that the aesthetic look and design along with the aforesaid features of the fan were never used in combination for any form and there lies its novelty. The design for which the registration is sought being applied to the said fan, according to the plaintiff, is distinct than the design which was applied in its old versions.

Very clearly, the plaintiff stake its claim that it do not enjoy any monopoly in any independent feature, but the novelty is claimed in all the features taken together in the design and, therefore, ultimately it reside in the shape, configuration and overall aesthetic appeal created by the same, which would be visible to the consumer, when put on display.

Thus, the plaintiff by combining qualities of earlier design and by modifying certain features, like shape of the blade, the body, the canopies and the bottom circular base has created a new design and this design came to be registered, conferring the Copyright in the design, which as on date, is valid and subsisting.

Based upon the registration of the design, Atomberg claims to have exclusive right to use and/or reproduce the shape and configuration of the design, and is entitled to protect the use and application of the said design or prevent any fraudulent or obvious imitation thereof, in accordance with Section 22 of the Act.

28. Atomberg, thereafter, decided to use the said design with slight variation and came up with 5 different models, which are

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still sold in the market and the plaint is accompanied with the design of all the 6 fan viz. Atomberg Renesa Alpha, Atomberg Renesa Prime, Atomberg Renesa Prime Regulator, Atomberg Renesa Zen, Atomberg Renesa Enzel, Atomberg Renesa Prime Remote with a slight variation , but applying the design which involved the uniquely shaped blades with a petal-inscribed curve and each of the blade featuring a symmetric taper, with one side tapering more than the other.

According to the plaintiff, all the above six brands(s)/ trade mark(s) have been used exclusively in respect of the fan forming the subject matter of the Suit and it has never been used in respect of any other fan of the plaintiff, and, therefore, according to it the reference to the 'said fan' include 'fan' sold by the plaintiff under the above six brand(s)/trade mark(s). The novelty in the design is claimed in it's shape and configuration by combining features stated above, with a specific declaration that the aesthetic look and design alongwith the said features of the fan had never been combinely used for any fan and the dominant aspect of the plaintiff's fan is the aesthetic appeal created by all the features combined together, and there is no other single fan with the combination of the aforesaid features and aesthetic appeal.

The claim of infringement was set out in the backdrop of the fact that Atomberg acquired the statutory and common law rights in the shape and configuration of the fan and was entitled to the exclusive use of the same, to the exclusion of

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other manufacturers and/or traders and entitled to protect it against infringement/piracy and for action of passing off.

29. The defendant's fan 'Pigeon fan-tastic BLDC Ceiling fan which which sold on its website www.stoveKraft.com as well as other sites like www.amazon.in.; www.indiamart.com.; www.jiomart.com according to the plaintiff is nothing but an imitation of its registered design and it was so obvious that even an informed user having instructed eye would find it difficult to distinguish the two products.

A comparison of features between the fan of Atomberg and Stove Kraft as set out in the Plaint deserve reproduction:-

plaintiff's said fan	defendant's impugned fan
The plaintiffs said fan has a unique shape and configuration	The defendant's impugned fan has an identical/similar shape and configuration as that of the said fan
The blades are uniquely shaped with a petal-inspired curve. The surface flows in a smooth, continuous flow, curvature from root to tip	The blades are also of a similar petal-like curvature and continuous surface imitating the overall form
Each blade features asymmetric tapering, with one side tapering more than the other	Each blade is more rounded with slight asymmetric tapering.
Where the blade narrows at the edge a rounded junction (fillet) creates a smooth transition	The blades show a similar rounded junction at the taper-trailing edge for creating a smooth transition.
The blades are uniquely shaped with a subtle V-bend along their length	The blade also display a similar V-bend along their length.
The body is curved, narrowing at the top and gradually widening towards the bottom, creating a sleek and balanced silhouette.	The fan body or the silhouette shares a similar shape, narrowing at the top and widening towards the base.
The canopies have a slanted top edge, matching the fan's diameter for a smooth, continuous look	The canopy is also slanted at the top and aligns with the fan's diameter.
The bottom circular plastic base of the fan features a cut away edge that	The bottom base is also circular and has similar cut away edge with dip(s).

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creates a dip, that helps to reduce visual bulk.	

30. In the suit filed, the plaintiff staked its claim that the use of the shape, configuration, design of the impugned fan by Stove Kraft is detrimental to the distinctive character and repute of Atomberg fan, as it caused confusion, deception, customers, informed users and average purchasers and knowingly and deliberately it has adopted the shape, configuration, design of Atomberg's registered design to trade upon its goodwill.

What is strenuously urged before us by Dr. Saraf is that no explanation is coming forward from Stove kraft as to how it invented this particular design, which it applied to its fan and the adoption and/or use of the very same design which received registration in favour of Atomberg is not a matter coincidence.

31. For determining as to whether the product of Stove Kraft is the imitation of Atomberg's product/fan particularly as to whether it has copied the design, which is registered, will be ultimately tested on the well established Parameters.

As the term 'design' has a specific connotation under the Designs Act, 2000, it is indicative of a particular figure/image conceived by a Designer in his mind and then reproduced in some identifiable manner. With the requirement of registration, the person by whom or in whose favour the figure was

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conceived is entitled for protection and once the design is registered, a right is conferred on the registered proprietor to use it and reproduce it on any any article to the exclusion of others.

A design is ultimately an idea or conception as a feature or shape, configuration, pattern or ornament applied to an Article. Although the idea, while still in the Author's/Creator's head, may be potentially capable of registration, but in fact it must be reduced to visible form to be identifiable and until it is so done, it is not capable of registration and in order to secure the benefit under the Designs Act, it must be necessarily placed on a piece of paper in a way that the shape or other features, drawn are visible to the eye.

Design is thus synonymous to a conception, suggestion or idea, and it is not an Article or thing, which is capable of being registered, but the design when made applicable to any article, whether for the pattern, the shape/configuration or ornamenting of a feature thereof, or for any two or more of such purposes, then it receive identity.

32. Keeping in mind the provisions of Section 22 of the Act, which permit institution of a Suit for infringement by a registered Proprietor against any person who has committed the piracy of his registered design, we have to consider whether in a case before us infringement is made out.

The learned Single Judge of Bombay High Court, Justice S.J. Kathawalla (as His Lordship then was) in **Whirlpool India Ltd. V/s. Videocon Industries Ltd (supra)** answered the said

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question by applying the test in this regard and by invoking several judicial pronouncements setting out a clear test.

Reliance was placed upon the decision in case of **Castrol India Limited V/s. Tide Water Oil Co. (I) Ltd**[14] & **M/S Kemp & Co. V/s. Prima Plastics Limited**,[15] from where a proposition emerged which constituted the test to decide whether there is obvious imitation and/or piracy of a registered design, the test being laid thus :-

> "(i) The word 'imitation' does not mean 'duplication' in the sense that the copy complained of need not be an exact replica.
> (ii) The Court is required to see in particular as to whether the essential part or the basis of the plaintiff's claim for novelty forms part of the infringing copy.
> (iii) The similarity or difference is to be judged through the eye alone and where the article in respect of which the design is applied is itself the object of purchase, through the eye of the purchaser.
> (iv) The Court must address its mind as to whether the design adopted by the defendant was substantially different from the design which was registered. The Court ought to consider the rival designs as a whole to see whether the impugned design is substantially different from the design sought to be enforced.
> (v) 'Obvious' means something which, as soon as one looks at it, strikes one as being so like the original design/the registered design, as to be almost unmistakable."

In Kemp & Co. the following test evolved :-

> "(i) If the visual features of shape, configuration pattern designs are similar or strikingly similar to the eye, it is not necessary that the two designs must be exactly identical and same. The matter must be looked at as one of substance and essential features of the designs ought to be considered.
> (ii) In a given case, where the registered design is made up of a pattern which has no one striking feature in it, but it appeals to the eye as a whole, it may very well be that another design may be an imitation of it which makes the same appeal to the eye notwithstanding that there are many differences in the details. (The opinion of Farwell J. in Dunlop Rubber Co. Ltd. v. Golf Ball

14 (1996)16 PTC 202
15 1998 SCC Online Bom 437

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Developments Ltd. was cited with approval).
(iii) In comparing rival designs the Court is required to see whether the impugned design/product is substantially different to the design which is sought to be enforced."

33. The Jurisdiction of the learned Single Judge was invoked by Whirlpool Corporation, claiming to be the world's leading manufacturer of home appliances globally and a pioneer in the manufacture and sale of washing machines, who obtained two design registrations and while they were valid, subsisting and in force, it came across the washing machine manufactured and marketed by Videocon Industries Ltd, under the brand name 'Videocon Pebble'. It was alleged that it had virtually the same and/or similar design and features of shape and configuration as that of the plaintiff's product and the design registered by it.

Whirlpool pleaded that a bare look at the product of Videocon made it absolutely evident that it is a complete copy of its product and the shape and/or configuration was almost identical to its own machine. It also pleaded a case that not only the individual features and/or components were copied, but even the combination thereof was replicated as even the distinctive colour scheme and/or two tone combination which was employed by the plaintiff was also copied, making two products, indistinguishable on an initial look.

Videocon, however, staked a claim that its registered design was substantially different from the registered design of Whirlpool's washing machine and the learned Single Judge

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deemed it appropriate to apply the well recognized test of 'Judged solely by the eye'.

On examining the products of the rival companies, being physically produced before it, Justice Kathawalla (as His Lordship then was) arrived at a conclusion that the machine of Videocon was almost total replica of the Whirlpool's design, barring one or two minor variations, like the control panel instead of three nobs and one outlet point. However, on a physical comparison of the two products, a conclusion was derived that the slight variation did not detract from the overall identity of the two, and in fact, the defendant's product is substantial reproduction and/or imitation of the plaintiff's design.

Videocon adopted a specific defence that it has been manufacturing large number of washing machines with diverse shapes and designs and, therefore, it had no intention to replicate, but J. Kathawalla arrived at a conclusion that the offending design has been devised with an intention of copying the plaintiff's design and had Videocon genuinely wished to adopt different design, many other options were available to it without replicating whirlpool's design and/or products.

Referring to the figures pressed into service by the plaintiff in regards to its sales and the fact that its machine had become immensely popular within a period of two years, the reason for defendant replicating the plaintiff's product became evidently clear to the learned Single Judge and the

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contention of the plaintiff that once the explanation offered by the defendant in regards to its product was found to be unbelievable and specious, the Court did not hesitate in deriving a conclusion that Videocon had copied the plaintiff's design.

34. As far as functionality aspect is concerned, the learned Single Judge laid down a proposition of law which has been subsequently followed in various authoritative pronouncements by the Bombay High Court, and we deem it appropriate to reproduce the relevant observations :

> "46. The defence attributing features of the plaintiff's design to functional requirements also cannot be accepted. This is evident from a bare perusal of the plaintiff's registered designs. As correctly submitted on behalf of the plaintiff, the plaintiff has not sought any monopoly in any functional feature and/or element. As is evident from the plaintiff's registered design, the novelty that is claimed by the plaintiff is in the shape and configuration of the washing machine as illustrated i.e. the shape and configuration of the machine as a whole. The functional elements of a washing machine are inside the washing machine viz. the drums and/or apparatus which is used for washing and drying clothes. The shape of the outer receptacle inside which the washer and dryer units are contained is governed by aesthetic considerations since this appeals purely to the eye. Every semi auto washing machine has a washer and a dryer and a set of buttons or knobs which operate both dryer as well as washer. Despite this, the outward appearance of different washing machines is different. The defendant itself has any number of models of semi automatic washing machines which have/had a washer, dryer and knobs and/or controls. These look completely different from the impugned product. Also besides a mere argument of functionality, no material whatsoever had been produced to show that the outside receptacle or outer body and/or control panel of the machine could not have been different and owe their present form solely to functional considerations. For a defence of functionality to succeed, it is not enough to say that the form has some relevance to the function. If a particular function can be achieved through a number of different forms, then a defence of functionality must fail. For the defence of functionality to succeed, it is essential for the defendant to establish that the design applied for is the only mode/option which was possible considering the functional requirements of the products. Even otherwise, as submitted by the plaintiff assuming that the shape also performs a certain function, that by itself is not determinative of the fact that the design is functional if that is not the only shape in which the function

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> could be performed. In the case of Cow (P.B.) and Coy Ltd. v. Cannon Rubber Manufacturers Ltd. (cited at page 75 of the majority judgment of the Delhi High Court), the court held that there may be cases where the design while fulfilling the text of being appealing to the eye is also functional. In such cases, the conundrum of functionality is resolved by taking note of the fact that it would make no impact on the articles functionality, if the function could be performed by the use of another shape as well. The fact that there are umpteen number of shapes in which washing machines are sold clearly shows that the external shape has nothing to do with the function sought to be performed. In the present case, it surely cannot be argued that the constraints of functionality were such that the plaintiff's design was the only design which could have been devised. Since the external shape of the plaintiff's washing machine has nothing to do with the function it performs and since the plaintiff in the present case is seeking enforcement of its entire design and not an individual component thereof, the case law cited by the defendant in support of its defence attributing features of the plaintiff's design to functional requirements, has no bearing on the present case."

35. Dealing with the defence raised to the plaintiff's registration that it lacked novelty as there was no new, novel or original shape in the plaintiff's design, and rather it was the combination of known designs, it was held that the plaintiff's product had a design and/or shape which was distinctive and it was a novel combination of a distinctive circular shaped wash area, an equally distinctive rectangular shape dry area and the uniquely placed and/or designed panel. By placing reliance upon the decision of the Division Bench in **Asian Rubber Industries Limited V/s. Jasco Rubbers**,[16] it was held that the defendant cannot be heard to urge lack of novelty in the plaintiff's design, as the defendant themselves claimed to be registered proprietors of the design, and therefore, even this contention of the defendant came to be rejected.

16 2012(5) Mh.L.J. 548

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36. In determining the claim of passing off, since Videocon's product was found to be almost in identical in shape and configuration pattern as that of Whirlpool and rather they were found almost identical, as the learned Judge had an opportunity to see both the products as they were brought to the Court, the test applied was, whether the similarity was so striking that the two appear to be deceptively similar. The Judge also applied the test as to what appeal to the eye of the Judge on the first impression, and this impression, according to the learned Single Judge had to be of a person with average intelligence and/or imperfect recollection.

By applying the test of the potential customer for a washing machine, it was held that a customer who had visited somebody's house and had seen or heard the reports about the plaintiff's product and who had its fleeting glimpse, but have received positive reports about the machine, without naming the brand, and if such a person come across the defendant's washing machine, he/she would immediately believe that this is exactly the same machine which was seen at the residence of someone or in the photographs or advertisements, and would assume that it is the plaintiff's product or was associated with the plaintiff and therefore, an action for passing off was made out.

37. The view expressed by the learned Single Judge is consistent with the view of the Division Bench and the judgment authored by Justice N.M. Jamdar (as His Lordship

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then was), also applied the test of judging through eye alone. The Division Bench which was hearing an Appeal from the interim order passed, affirmed a finding of the learned Single Judge, by taking note of the shape and configuration of the two machines, since Whirlpool claimed novelty in its shape which had certain appeal to the eye.

Noting that it is this shape which had created value in the product, which may not be relatable to improved functionality but may be desirable, the Bench found that the trial Judge was right in holding that Videocon has infringed the design registered by Whirlpool and rightly the test applied was judging solely by the eye alone and his conclusion that both the machines are similar cannot be faulted, and therefore, the case was made out under section 22(1)(a) of the Designs Act.

As far as the action of passing off is concerned, when reliance was placed on the judgment of **U.K. Court of Appeal in Lancer Trade Mark**,[17] when the Court was considering the infringement of trademark of an automobile Lancia by the mark 'Lancer' and it was observed that by the nature of the goods (i.e. Automobiles), which is not to be equated with everyday purchase over shop counter, risk of confusion between the products of misrepresentation was ruled out.

38. An argument was canvassed before the Division Bench that washing machines are sold in large shops often with other machines and all washing machines have their brand names prominently written on them and the consumer of these

17 1987 R.P.C. 303

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machines is normally educated class and therefore, there is no question of any confusion, as the consumer makes conscious choice and there is no passing off. The Division Bench found that the test indicated in Lancer Trade Mark (supra) which was a case of automobiles, is not applicable to washing machines as the class of buyers for automobiles is different and definitely exhibit high degree of brand consciousness.

Commenting upon the argument canvassed about the functionality, the Division Bench found that the novelty lied in the design, which desired to make the article/product more attractive and was not intended to add functionality to the product and what Whirlpool by applying the design to its machine did, was to make its washing machine otherwise a piece of machinery to make it look more artistic and appealing to aesthetic sense. Very pertinently, the Division Bench observed :-

> "The design seeks to appeal to the heart rather than to the head, to use in common parlance. Once the consumer likes such a design, then the choice is made on aesthetic values rather than solely on functionality."

In addition, the claim of Videocon for adopting this particular design, in absence of any specific reasons being placed on record, did not warrant any consideration from the Division Bench, which expressed a clear view that Videocon attempted to take advantage of the popularity of the design of Whirlpool washing machine.

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39. Applying the principle laid down in the case of Whirlpool by the learned Single Judge as well as the Division Bench, what is strikingly noted by us is the test applied to find a similarity of the two products and this test being 'judging through eye alone' and the eye is of the consumer of average intelligence.

In **Benchairs Limited V/s. Chair Center Limited**,[18] where the design was applied to a chair, it was held that in judging the articles solely by the eye, the Court must see whether the defendant"s version is an obvious or a fraudulent imitation. Russell L.J in facts placed before him observed thus :-

> "As we see it, our task is to look at these two chairs, to observe their similarities and differences, to see them together and separately, and to bear in mind that in the end the question whether or not the design of the defendant"s chair is substantially different from that of the plaintiff is to be answered by consideration of the respective design as a whole: and apparently, though we do not think it affects our present decision, viewed as though through the eyes of a consumer or customer."

40. Atomberg has claimed novelty in its shape and configuration, which according to it, is a result of combination of several features involving the blades which were uniquely shaped, the curved body narrowing at the top and gradually widening towards the bottom, creating a sleek and balanced silhouette with the canopies slanted at the top edge, matching the fan's diameter for a smooth, continuous look coupled with the bottom circular plastic base of the fan featuring a cut-away edge that created a dip, helping to reduce the visual bulk. Very pertinently, we have noted that the Z-shank on which emphasis is placed by Stove Kraft to distinguish its product is not an

18 1974 RPC 429

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aspect of the design in which Atomberg claimed novelty, but according to it, it is merely a mechanical feature/means of connecting the blades of the fan to the motor assembly.

41. In the application which was preferred to the Controller for Registration and which was granted, emphasis was laid on the perspective/front/rear/left side/right/top view/bottom view and novelty was claimed in the shape and configuration of the ceiling fan and no claim was staked in respect of any mechanical or other action of mechanism or in respect of any other mode or principle of construction of the article.

42. Apart from the comparative table which form part of the plaint and the compilation of photographs of the fan of the plaintiff with the registered design applied in all six variants, the competing fan were also produced before us during the course of hearing, and we had an opportunity to examine the design applied to the product of the plaintiff and defendant.

While advertising the product, Renesa Alpha, though Atomberg highlighted its features, it also emphasized on its sleek design and on the efficiency of the fan along with a tag line "A range which suits the aesthetic of every home".

A comparison of the two products is undertaken by us keeping the fan side by side, and we have compared them with reference to blade design, shank design, canopy design, motor housing and housing lid.

On comparison, we note that the blade design with reference to the angle of the blade is *prima facie* identical

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except that on the plaintiff's product, there are four rivets and on the defendant's product, there are three rivets. As far as the shank design is concerned, though much emphasis is laid during the course of argument by Mr. Dhond upon the 'Z type' profile which is absent in the defendant's product, which has a straight profile, we find that when actually the shank portion is carefully examined, the only difference on close perusal is that the plaintiff's shank design has a squarish profile as against the defendant's product which has a radial profile, but obviously, this is only when we consider it part by part. Similarly, the canopy design of Renesa Alpha is a circular profile but that of the defendant is not circular and as far as motor housing is concerned, it appear to be identical as the machine is mounted on a stack and a small triangular shape for housing the machine on the defendant's product it not actually visible to the eye, so as to draw a distinction.

Atomberg has staked a claim in the plaint as well as before us that the novelty of its design is the Shape and Configuration and it is on account of various features being compiled together creating a visual appeal, and that is where we need to compare Atomberg's Renesa Alpha with its variations and the defendant's 'Pigeon fan-tastic'.

A very minor change is noticed in the positioning of the blade or in that of a canopy with slight change in the number of rivets resembling the corners of the rectangular/triangular integrating shank/blade, is the only thin distinction, but when

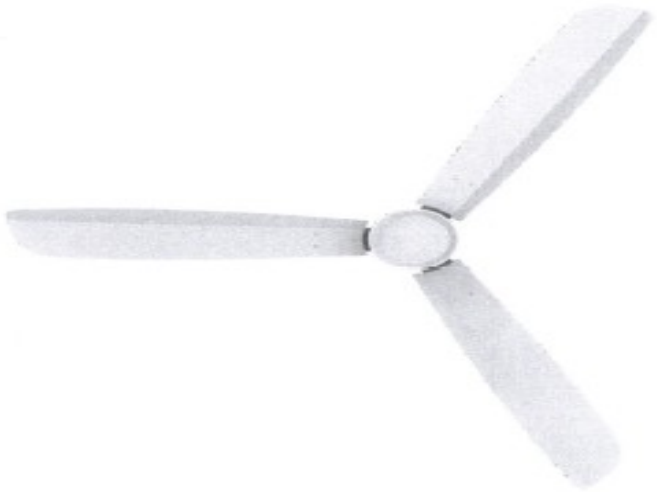
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the two fan are compared when all the features being combined, they appear to be similar and identical in its design which is registered by Atomberg by claiming novelty in the shape and configuration.

43. In the plaint, the plaintiff pleaded that its fan for which registration was secured and the other five variants, based on the said design, the novelty is in its shape and configuration, and with the combination of distinct features, it being applied to an article/product which bear an aesthetic look and design, due to these features and the claim is that the said features were never being combinedly used for any fan in the past.

The grant of registration in favour of Atomberg in class 23-04, is granted by taking into consideration the novelty which resided in the shape and configuration on the design being presented and examined from various perspectives i.e. front/rear/left/right/top/bottom view. The design which secured registration at the hands of the Controller bearing No. 325322-001 captured from distinct angles reflect thus :-

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BOTTOM VIEW



LEFT SIDE VIEW

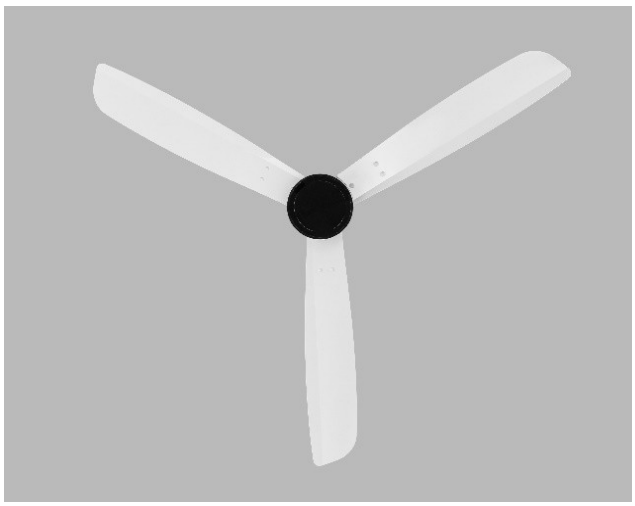
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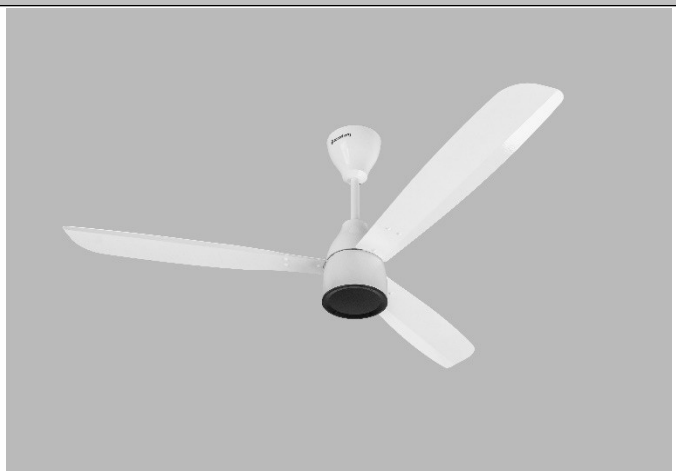
RIGHT VIEW

44. The overall get-up of the plaintiff's product and captured from different view is depicted thus :-

Appellant's said fan with different views


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Appellant's said fan with different views


45. When the subject fan and the infringing fan of Stove Kraft was placed for our viewing, we have noticed that when the ceiling fan is hanged from the ceiling, what immediately catches one's attention is the canopy which holds the blades and the shape of the blades. The manner in which the blades are fitted becomes irrelevant as the aesthetic appeal lies in the petal shaped blades with the surface flowing in smooth, continuous curvature from the canopy. The shank design and in particular, 'Z' type profile which is highlighted by Mr. Dhond as a feature/ novelty in the plaintiff's registered fan is not at all visible unless and until a consumer decides to dissect its parts separately/ individually.

What caught our eye was uniquely featured blades with asymmetric tapering with one side tapering more than the other and the blade narrowing at the edge with a subtle V-bend along with its length. The shape of the blade noticed by us clearly reflected its narrow shape at the juncture, where it was

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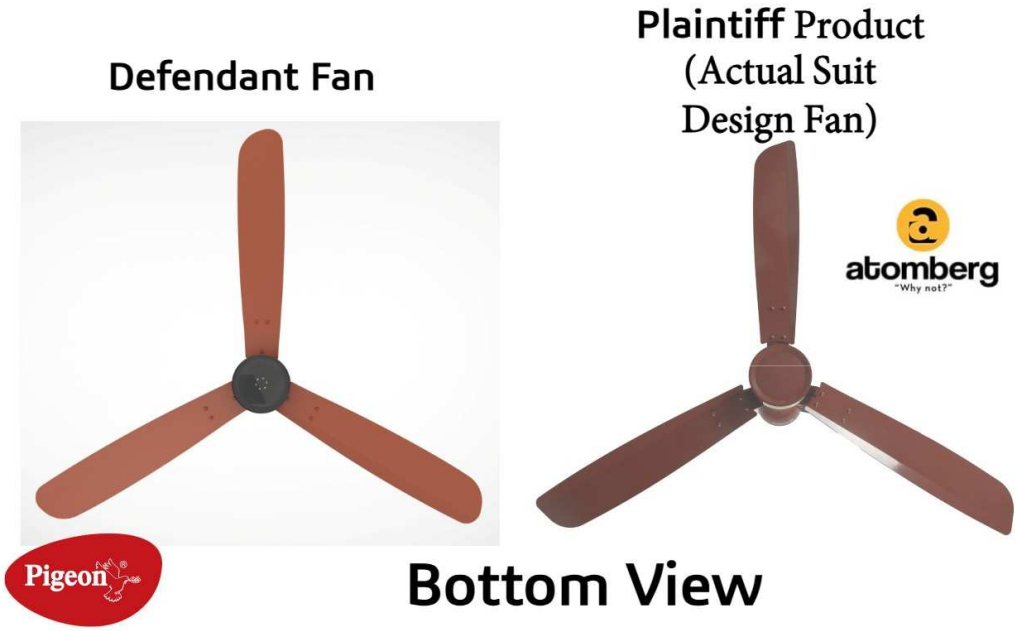
attached to the canopy and its gradual widening towards the end with a slight roundish ending.

Thus, we could notice that the uniqueness and novelty lied in the blade design and the shank design with the Z type profile in the plaintiff's product actually was not evident to the eye, as it gets submerged into the canopy where the motor is placed. Though in the original design, the housing lid was opaque, it was varied subsequently and in any case, merely because it emits light, cannot be considered as a dissimilarity.

46. Further, the comparison of the two products from the top and bottom view, would also reflect the striking similarity as the two products placed before us are depicted as below :-



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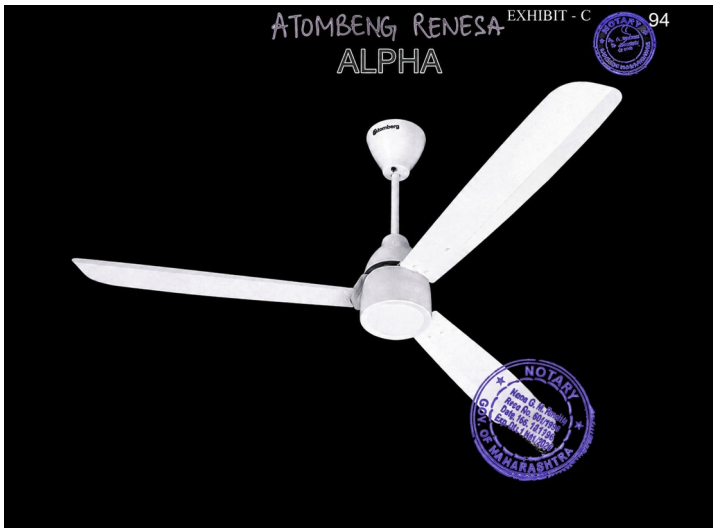


47. The aesthetic value of the product, a ceiling fan ultimately lies in the placement, length of its uniquely shaped blades and shall not necessarily depend upon the shank design or the number of rivets and what appeals to the eye are the blades and what deserve comparison is the profile of the blade.

The two images which we have reproduced, reflecting the top and bottom view, comparison of the suit fan and the infringing fan would bring about the striking similarity between the two products. In any case, the emphasis laid by Mr. Dhond on the Z-shaped integration which, according to him, was the novelty in Atomberg's registered design, but which is not subsequently adopted in respect of the other fan manufactured by it i.e. Atomberg Renesa Prime, Renesa Prime Regulator, Renesa Zen, Renesa Enzel and Renesa Prime Remote lack the said uniqueness.

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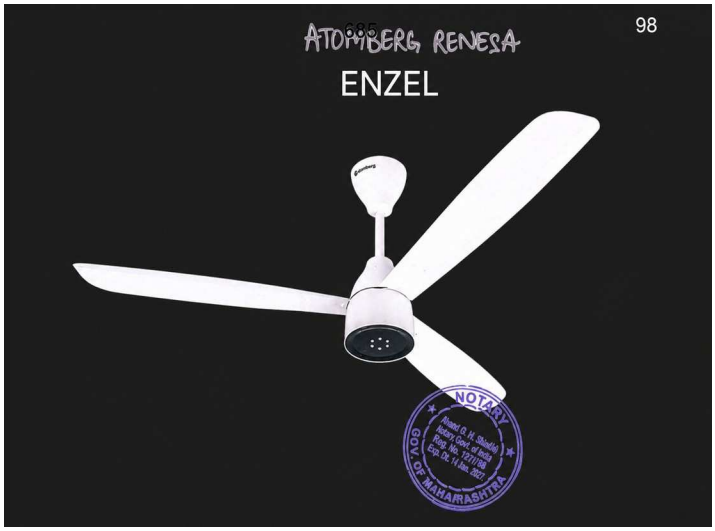
On physical verification of the two articles/products placed before us, the Z-shape attachment/shaft is not visible to naked eye and the variations of the design which is registered and applied in Atomberg Renesa Alpha, which has subsequently been concealed in the further variants, is evidently clear. We would also like to reproduce the six variants being the articles on which the registered design has been applied.

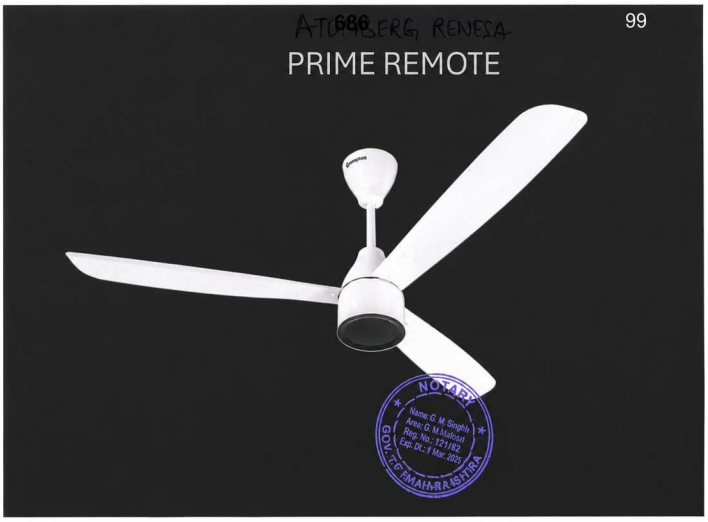




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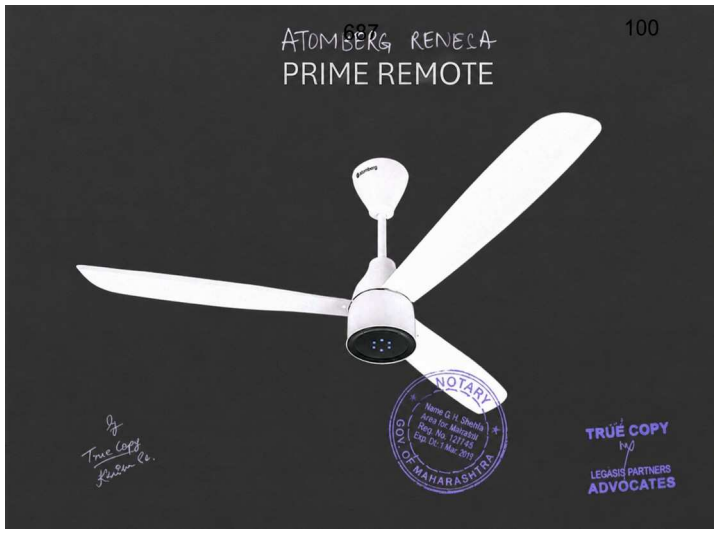






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48. Atomberg's case is very specific that it combined various features with the emphasis on the unique shape of the blades, the body of the fan featuring a curve, narrowing at the top and widening towards the bottom along with canopies with slanted top edge and the bottom circular plastic base of the fan, creating a dip helping to reduce the visual bulk.

Atomberg does not claim any monopoly in its independent features, but the monopoly is claimed in all the features combined together resulting into a design which has created an aesthetic appeal visible to the consumer, when put to use.

49. The Designs Act focuses on the features of shape, configuration, pattern ornament or composition of lines or colours applied to the article, which in the finished article, appeal to the eye.

In terms of the Designs Act, 2000, "original" in relation to a design, means originating from the author of such design and shall include cases where it is applied in a new form. In our

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view, a comparison between the two products for the purpose of design, focus shall be on the aesthetic appeal created by the features, when combined together and it is not the functional aspect of such adoption which warrant any consideration, as it is not relevant for asserting the alleged piracy or infringement by the defendant.

Atomberg has not sought any monopoly on any functional feature, as the novelty is claimed only in respect of the shape and configuration. In any case, it is settled position that the defence of functionality is not available while testing whether there is an infringement of the design by the defendant, as it has no relevance to the aesthetic appeal and if a particular function can be achieved through a number of different forms, then the defence or functionality must necessarily fail.

A ceiling fan involves blades, a canopy and since it is ceiling fan, a hanging rod. Its uniqueness would lie in the shape of its blades, including its length, breadth, placement, unique shaping and it is this novelty of a design when put up before the Controller receive recognition and was registered.

50. The defendant Stove Kraft, in its reply filed, opposing the application for grant of interim injunction has specifically pleaded that it is engaged in manufacturing and selling of various products under its popularity, brand and trademark "Pigeon" and this include the revolutionary "Pigeon BLDC fan" which is designed with advanced dual-motion technology and it delivers a refreshing, uniform breeze that transforms the space

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into a haven of cool and balanced air. Setting out it is engineered to deliver smart, year-round comfort, emphasis is laid on its unique dual motion capability as the fan can rotate clock-wise to create a cool refreshing breeze during summer and counter clock-wise to circulate warm air in the winter.

It is specifically pleaded in the reply that Stove Kraft conceived and integrated the distinctive and novel features in the overall shape, configuration and ornamentation of the fan and recognising the commercial and intellectual value of the unique design elements, it filed an application for design registration before the Controller of Patents & Designs, Patent office at Kolkata as early as on 21/2/2025 in Class 23-04 by invoking the provisions of the Designs Act, 2000, its intention being to protect its exclusive right over the visual appeal and ornamental aspect of the fan, thus preventing its unauthorised imitation or reproduction.

51. What is attempted to be seriously contested before us by the defendant, is what is liable for comparison with its product is only the fan which has applied the design registration secured under No.325322-001 and therefore, the comparison with other variants of Atomberg's fan is irrelevant and this is what the plaintiff is exactly attempting to do.

We do not approve of the said contention as we find that when Atomberg sought registration from the Patent office for its design, number 325322-001, the certificate issued by the Controller General of Patents as certified as below :-

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> "Certify that the design of which a copy is annexed hereto has been registered as of the number and the date given above in Class 23-04 in respect of the application of such design to the ceiling fan in the name of Atomberg Technologies Pvt. Ltd. Navi Mumbai, Maharashtra, India."

52. The Certificate is accompanied with the application comprising of seven sheets, highlighting the design with it's different view, and we must clarify that Atomberg secured registration of it's design, which combined various features/pattern and it applied the said design to its various models. It is worth to note that the design is not sought against a particular model, but the design which is registered was applied to various models of fan manufactured by it, though its first application from November 2020 was to Atomberg Renesa Alpha and for the subsequent periods, it was also applied to other variations, as we find that with advancement of time, the variations were made by applying the said design, by adding feature of remote, light etc. The case of the plaintiff seeking infringement is based on all the six variations manufactured by it by applying the design registration No. 325322-001.

53. A comparison of the variations of the fan of the plaintiff, i.e. Atomberg Renesa would reveal to us that every variation has added some additional functionality like the regulator, remote, light, panel etc. but the design for which the registration is secured is applied in all the six models, including the first model Atomberg Renesa Alpha, and the plaintiff has

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specifically pleaded its case to the effect that all those six brand(s)/trade mark(s) are the fan sold by it and the comparison of the infringing fan of Stove Kraft is with 'said fan' which shall include the fan sold by Atomberg under the six brand names.

In any case, since the functionality of a particular article will not be determinative of its uniqueness, but the innovation lie in its aesthetic appeal, as different products serving the same purpose may be designed differently, it is the innovation in achieving this object in form of shape and configuration deserve registration. If a product is designed with the purpose of making it more attractive to the buyer, by giving it a particular pleasing shape, then the innovation lies in this aesthetic appeal.

54. When the rival designs are called for comparison, then the test applied by which it is to be tested is of placing them side by side and assessing the product/article as a whole.

In **Cello Household Products & Anr. V/s. Modware India, and anr, (supra)** the learned Single Judge of this Court (G.S. Patel, J, as His Lordship then was), while he was dealing with an action in design infringement and passing off, the design in question being of a plastic water bottle.

Cello Household, the plaintiff claimed to have designed a unique water bottle, which had novelty and originality and the claim was based on the shape, configuration and surface ornamentation of the bottle.

Modware, the defendant brought a product into the

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market, which according to Cello was indistinguishable in every respect, and hence, it brought an action for infringement of and passing off. The plaintiff's bottle 'PURO' claimed novelty in its shape, configuration and surface pattern making the design aesthetically appealing and attractive and the plaintiff combined various features to create a design, which according to it, was novel. After drawing a comparison between the features of the two products and they being placed before the learned Single Judge, he questioned "Which is whose?". Taking note of the confusing and deceptive similarity of Modware's product to that of Cello, he deemed it appropriate to grant the relief in its favour.

Dealing with the submissions advanced on behalf of Modware, that "a bottle is a bottle, by whatever name called as it is a container of a liquid, it is taller than wider, and then there lies the distinction", it was pleaded that there is neither novelty nor originality in Cello's claim as to 'shape or configuration' as there are many bottles in the market which are in form of tall cylinders with screw tops or flip top lids and, therefore, Cello lacked originality.

55. The learned Single Judge dealt with the said submission by applying the test laid down in Whirlpool (supra) and observed thus :

> "20. Section 22 of the Act thus gives the registered proprietor a right to relief against "any person" who applies the design of the registered proprietor to any article of the class of articles in which the design is registered. The words" any person", which are used without any words of limitation, ordinarily must be given their plain and natural meaning - namely, any person whosoever - unless the statute compels by reason of

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the context in which the words “any person” are used or by reason of the other provisions of the Act to restrict the meaning of the words to “any person other than a registered proprietor”.

22. It is necessary to understand what right is conferred on the registrant of a design under the Act and then analyze the provisions of Section 22 in the light of such right. Section 11 provides that the registered proprietor of a design shall have Copyright in the design for ten years commencing from the date of registration - meaning thereby, the exclusive right to apply the design to any article in the class in which the design is registered. But such exclusive right is, as noted above, “subject to the provisions of the Act”. These provisions include Section 4 (which contains a prohibition for registration on certain grounds), Section 6 (registration to be in respect of particular article) and Section 19 (cancellation of registration on certain grounds which include grounds under Section 4). Section 22 itself is one of the provisions to which such exclusive right is subject and this has distinct implications for a registered proprietor - whether such proprietor be a plaintiff or a defendant. From the plaintiff's point of view, the exclusive right which a registered proprietor can claim against “any person” and on the strength of which he can claim relief under Section 22 against such person, is itself subject to the restriction contained in sub-section (3) of Section 22, namely, the plaintiff - proprietor's registration should not be liable to be cancelled under Section 19 of the Act. If it is held to be so liable, that is a complete defence to the plaintiff - Proprietor's action for claiming relief under Section 22. Equally would the provisions of Section 22 be a restriction on the defendant - Proprietor's exclusive right to apply his registered design to his articles. The defendant - proprietor would have a complete defence to the plaintiff - Proprietor's action only if his (the defendant's) registration is prior in point of time, since such prior registration is a ground for cancellation of the plaintiff's registration. A defendant proprietor, who holds a subsequent registration cannot plead his subsequent registration in defence to an action under Section 22, since a subsequent registration is no defence within the meaning of Section 22(3) read with Section 19. That is an obvious consequence of Section 22 from the defendant's point of view.”

With the above observation, the argument thus was rejected.

56. On the aspect as to how the design was adopted by the defendant and a defence being raised, based on Section 4(1)(c) of the Designs Act that the plaintiff's bottle is not significantly distinguishable from known designs or a combination of known

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designs, and the argument being advanced that 'bottle is a bottle' and is always only a bottle, and only an expert can tell the difference between one bottle and the other, even this argument received a rejection, with the following observation :

> " 36. A look at the above comparative charts along with the charts set out/annexed to the Plaint and the affidavit in rejoinder of the plaintiff giving a comparative analysis of the common features and similarities of the defendant's product and the plaintiff's registered designs establishes beyond any doubt that the defendant has slavishly/brazenly copied/imitated the plaintiff's design which clearly satisfies the test for infringement and/or piracy as laid down in the judgments in Castrol (supra) and Kemp (supra). Therefore, by no stretch of imagination, can it be said that the defendant's products are substantially different from the plaintiff's registered design"

57. When we compared the rival designs of the competing fan as a whole, by applying the principle laid down in Cello (supra), that the Court must consider the visual impression and visual appeal of the products rather than dissecting the designs into individual features or treating isolated similarities and differences as decisive, from the comparison of the two products placed before us, and particularly when Atomberg never claimed novelty in its Z-shaped shaft, and never sought its registration as a part of the 'design', the emphasis on the said feature can be no ground for bringing the distinctiveness.

For judging the similarity or difference between the two products in question, to which the design is applied by Atomberg, the test to be applied is judging through eye alone, and it should be the purchaser of the said product who shall judge the similarity or dissimilarity between the two products.

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Though we find that both the parties have placed comparative charts in their pleadings, in our view, the comparison on paper is not determinative, but what appeals to one's eye shall be the determinative factor to point out the existing differences and the similarities in the two rival products. We, therefore, had an opportunity to view the rival products and have recorded our observations in the aforesaid paragraphs.

58. We have reached the above conclusion, by comparing the products by physically viewing them, when we look at it from the point of an average consumer or purchaser of the goods, and necessarily the test of an average consumer as laid down in Whirlpool (supra) must apply.

We are guided in reaching the above conclusion by the illustrations set out by Justice S.J.Kathawalla, (as His Lordship then was), in Whirlpool about the potential consumer, who is desirous of purchasing a washing machine and who had a fleeting glimpse of this machine at someone else's house or had seen this machine in an advertisement or photograph that were displayed, he was impressed by it's distinctive shape and appearance and that leads him to purchase a washing machine with that image in his mind.

Applying the said test to a ceiling fan, a purchaser here is an ordinary/common man, who is impressed by the novel design of the fan manufactured by Atomberg, though he may not recollect the name of the manufacturer, but what impressed

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him was its aesthetic appeal i.e. long blades with peculiar shape and curvature. This common man with average intelligence and imperfect recollection is often led to buying of a product of the defendant, in the wake of the confusing similarity. As we have already indicated that the Z-shaped shafts are not visible when a ceiling fan is hanging from the ceiling, and what can only be seen is its shape and configuration, which becomes unique on account of the shape of its blades and therefore, the average consumer would be misled to buy the product of the defendant, which is strikingly similar to that manufactured by Atomberg.

59. The learned Single Judge of the Delhi High Court in **TTK Prestige Ltd (supra)** has crystallised the law revolving around "design" and has enumerated the principles emerging from various decisions and amongst the various principles that have been crystallised, what is relevant for our purpose is to take note of the following take aways in paragraph no.134 of the said decision :-

> (i) The sole purpose of the Designs Act is protection of novel and original designs, for the benefit of the person who has expended time, research and labour in conceiving it.
>
> (ii) While ocular appeal is the definitive test of a valid design, what may appeal to one may appear bizarre to another. The corollary would, therefore, be that the Court, while examining the ocular appeal of a design, should not apply its own subjective standards.
>
> (vi) "Design" is defined, in clause (d) of Section 2 as meaning only the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article. A design cannot, therefore, be a mere concept or idea. While it is true that the Designs Act protects the concept or idea,

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which is new or original, the right to such protection enures only when the idea becomes a "design" under the Designs Act, which requires its application to an article. Sans any article, therefore, there can be no design. The design must be intended to produce an article by industrial application, though the "design" is not the article itself, but "the conceptual design containing the features of a shape, configuration, pattern, composition of lines etc".

(vii) The burden to show that a design is not entitled to registration for want of novelty or originality is on the person so asserting. Novelty and originality necessarily predicate the absence of any prior publication of the design, or of the design having earlier been made known to the public.

(ix) Registration of a design amounts to facial satisfaction of the existence of novelty and originality in the design, as well as the absence of any prior publication thereof.

(xiv) A design which exists in the public domain, but the application of which, to an article, is new, would be novel. It is not necessary, therefore, that the design is "totally new". An existing design, apply to an article in a new manner, in which manner it has not been earlier applied to any article, would also be entitled to registration.

(xv) At the same time, the design, in order to be entitled to registration, must be new vis-à-vis prior art. The novelty must be substantial, not trivial or infinitesimal. Ultimately, it would be for the Court to compare prior art and the asserted design to determine whether the asserted design actually possesses novelty vis-à-vis prior art, or is merely the prior art with mild, trivial or trade variants.

(xvi) The test to assess whether the features of a design, which are not present in prior art, actually impart novelty or are mere trade variants, is the test enunciated in Phillips, which is that if it is common practice to have, or not to have, spikes in the soles of running shoes, a man does not make a new and original design out of an old type of running shoes by putting spikes into the soles.

(xix) Registration of a design is article specific. What is

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protected is, therefore, not the artistic effort solely in the form of an idea, but as an embodiment in a commercially produced artifact.

(xxii) While a purely functional design is not entitled to registration, a design which has both functional and aesthetic attributes, is so entitled.

(xxiii)While the perspective of the consumer, who views the suit design with an instructed eye which is aware of prior art, undoubtedly forms the definitive test to assess infringement, the issue of whether the customer would purchase the product for its aesthetic appeal for its utilitarian advantages is irrelevant. Where the suit design possesses aesthetic value, and the novel features that lend it such value are replicated in the defendant's design, piracy has taken place.

60. The learned Single Judge in **TTK Prestige (supra)** applied the aforesaid principles to the case before him which involved a design registered in favour of the plaintiff in form of "Pressure Cooker with Container and Lid Set for Household" and the certificate of registration issued considering the front/back/ right/left/top/bottom and perspective view of the design and each of the projection being accompanied with the following note :-

"Novelty resides in the shape and configuration of the PRESSURE COOKER WITH CONTAINER AND LID (SET) FOR HOUSEHOLD as illustrated :-

No claim is made by virtue of the registration in respect of any mechanical or other action of the mechanisms whatsoever.

No claim made by virtue of the registration in respect of any mode or principle of construction of the article.

No claim made by virtue of the registration in respect of colour or colour combination.

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No claim made by virtue of the registration in respect of words, letters, number or trademark."

Applying the principles so crystallised, in determining the aspect of piracy/infringement by the design of the Impex Dripless pressure cooker, which was argued to be not infringing the suit design in the wake of the significant differences, the learned Single Judge expressed his disagreement.

While comparing the two products, the similarities were noticed by recording a finding that the defendant's Impex Dripless Pressure Cooker is similar in shape to the container of the suit design and even the shape of the lid is also similar. Barring superficial differences in shape, it was found that there was no substantial difference between the two lids as the lid of Impress Dripless pressure cooker also had a central depression portion in which froth can be collected and evaporated.

Since no earlier design except the design of the Pressure Cooker on You-tube video was brought to the notice of the learned Judge, a following conclusion is recorded :-

"152. The differentiating features, as tabulated by the defendant in para 19 of the written statement and reproduced in para 17 supra, are clearly merely trade variants, or functional differences attributable to the different capacities of the pressure cookers. The heights of the lid and of the container are obviously because of the difference in capacity of the pressure cookers. If one compares the shape and configuration of the lids of the 5 l and 8 l pressure cookers, except for the height of the containers and lids, there is no difference whatsoever. The same shape and configuration, but for insignificant trade variations such as the "width" of the raised wall of the lid, exist, between the suit design and the impugned design of the Impex Dripless Pressure Cooker of the defendant. All other differences, such as the "straight moulding of bakelite", minor change in the shape of the handle, shape of the base, etc., are insignificant in the light of the overall shape and configuration

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> of the pressure cooker itself, and, vis-à-vis the shape and configuration of the lid, which is the feature which mainly imparts novelty to the suit design, are even more inconsequential.
>
> 153. Most significantly, the defendant has clearly borrowed the idea of the central depressed portion of the lid for collection and evaporation of froth, thereby resulting in spillage control, from the idea devised by the plaintiff. No other source, from which the said idea was adopted by the defendant, has been brought to my notice. Prima facie, therefore, a clear case of piracy exists.

61. Mr. Dhond would rely upon the test of identification of piracy as crystallised in TTK Prestige. He would also rely upon another decision by the same learned Judge of Delhi High Court in **Diageo Brands B.V V/s. Alcobrew Distilleries India (P) Ltd,**[19].

The design for comparison before the learned Single Judge was the one which was applied to a 180 ml bottle, a "Hipster" in which the alcoholic beverages are packed and sold. Examining the said design from its various views, it was found that the plaintiff asserted proprietorial rights even in its trademark. The certificate of registration granted in respect of the said design certified that the novelty resided in each view (aspect) of the registered design "in the shape and configuration of the bottle" as illustrated.

Though registration did not allude to any particular feature of the bottle as being specifically novel, novelty, therefore, was claimed to be residing in its overall shape and configuration.

62. The defendant is manufacturing and selling whiskey under the trade name "Golfer's shot" in a bottle/flask and it was

19 2022 SCC Online Del 4499

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alleged that this design infringed the suit design. The plaintiff claimed that the suit design had become exclusively identifiable with the plaintiff and its product and it emphasized on the goodwill which the design had garnered over a period of time by relying upon the upto date sale figures. It was alleged that the defendant intended to take benefit of this goodwill and therefore, imitated the design of the plaintiff, so as to confuse purchasers of the plaintiff's product which was sold as "Pocket Scotch". It was alleged that all distinctive elements of the suit design were replicated by the defendant in the impugned design and the similarity between the two was so glaring that the customer, would invariably associate the defendant's product with that of the plaintiffs, especially when the products would be placed next to each other on the shelf. As the defendant's product was cheaper than the plaintiff, it was pleaded that the defendant is eating – or rather drinking – into the plaintiff's market.

A decree of permanent injunction was therefore, sought against the defendant, restraining it from promoting or selling its product, using its mark/tagline "Pocket Shot" or any other mark/tagline deceptively similar to the plaintiff's mark "Pocket Scotch" apart from delivery, rendition of accounts, damages and costs.

63. The defendant adopted a stand that the suit design is merely the design of a plain hip flask, which is a flask for holding liquids, rectangular in shape (with a cap for fastening

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and cavities for pasting/affixing logos and labels of the manufacturers. These common features, according to the defendant, could not be allowed to be monopolised by the plaintiffs and the suit design, vis-a-vis the design of an ordinary hipflask, contained mere ordinary trade variants and therefore, such incorporation of ordinary trade variants into an existing design would not render the design new or original.

The written statement specifically emphasized on the differences in the design of its bottle vis-a-vis the suit design by comparing its overall shape and size, rounder edges, smaller concave bottom i.e. part by part.

64. The rival contentions came to be noted and the counsel for the defendant clearly conceded that he was not disputing the validity of the suit design as it was already upheld in **Diageo Brands B.V V/s. Great Galleon Ventures Pvt. Ltd,**[20] but it was canvassed that the sweep of infringement analysis has necessarily to be equal to the sweep of analysis of novelty of the suit design vis-a-vis prior art and the perspective on the basis of which the aspect of imitation has to be decided, was not that of an average customer, as in the case of trademarks, but of an instructed_ eye i.e. an eye who is aware of the prior art. It was assertively stated that the instructed eye decide both the aspect of novelty and infringement.

A distinction was also drawn between the approach to be adopted in Design Infringement cases vis-a-vis the one to be adopted in trademark infringement cases, as unlike trademark

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infringement cases, which rely on the impression of a person of average intelligence and imperfect recollection, it was urged that design infringement shall be decided on the basis of bare comparison of the two design, and therefore, there was no scope of applying 'imperfect recollection test'. As against this, on behalf of the plaintiff, the contention that the test for determining the infringement and the case of trademark and design is different was strongly disputed, and it was urged that while the novelty of the design has to be tested on the basis of instructed eye, the aspect of infringement has to be examined from the point of view of the average purchaser.

Reliance was placed upon the relevant portion to that effect in the decision of **Diageo Brands B.V V/s. Great Galleon Ventures Pvt. Ltd (supra)**, which had referred to the earlier decision in case of **Steelbird Hi-Tech India Ltd. v. S.P.S. Gambhir**,[21] when it was held thus :-

> "It is rightly held in the cases decided that in the matter of novelty the eye is to be the ultimate test and the determination has to be on the normal ocular impression. In order to know its newness or originality it is necessary that a design identical with or even materially similar to the relevant design should not have been published or registered previously. A slight trivial or infinitesimal variation, from a pre-existing design will not qualify it for registration. Taking into account the nature of the article involved, the change introduced should be substantial. It is not necessary to justify registration that the whole of the design should be new, the newness may be confined to only a part of it but that part must be a significant one and it should be potent enough to impart to the whole design a distinct identity, unless registration is sought for the said part alone."

21 2014 (58) PTC 428 (Del).

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65. The appellant however, pressed into service the well settled test for design infringement i.e. "obvious imitation and fraudulent imitation" and it was urged that the test should be perception of 'an average purchaser'. Heavy reliance was placed upon the decision in case of **Videocon Industries (supra).**

Justice Hari Shankar of the Delhi High Court analysed the rival contentions with reference to the decision of **Diageo Brands B.V V/s. Great Galleon Ventures Pvt. Ltd** (supra), as it was the interlocutory order disposing the application under Order XXXIX Rules 1 and 2; and by referring to the authoritative pronouncements on the issue as to whether interlocutory orders would operate as precedent, he recorded thus :-

> "While, therefore, interlocutory injunctive orders, even in intellectual property matters, are not binding precedents, if the facts and issues are identical, Courts should strive to maintain uniformity of approach so that, even at the interlocutory stage, contrasting orders are not passed in identical facts.

With this observation it was noted that the co-ordinate Bench while deciding the said issue identified certain features of the suit design being distinctive and imparting novelty to it and this included the long, lean and sleek design, curved shoulders, 'V' element on the neck, dimpled base, symmetrical edges, etc.

66. Taking note of the fact that the Court while deciding the said issue was aided by presentation of physical samples of the two products and took note of the distinguishing features which

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were identified earlier, to note that there are several striking differences between the design of defendant's bottle in the earlier round as compared to the design of the defendant's bottle in the present case.

Dealing with the issue of novelty and originality, the Court preferred to proceed on a premise that the suit design possessed novelty vis-as-vis, a prior art. After referring to the precedents including the decision in case of Bharat Glass Tubes Limited (supra), Carlsberg Breweries (supra), Mohan lal V/s. Sona Paint and Hardwares, the principle laid down in **Reckitt Benckiser India Ltd V/s. Wyeth Ltd,**[22] was also invoked to appreciate the aspect of novelty. The decision in **Crocs Inc. V/s. Batas India Limited,**[23] **B. Chawla (supra)** find a special mention.

67. As regards the submission as to whether the test in identifying the infringement is the test of informed user through 'instructed eyes', it came to be addressed, in the light of the judgment of the Court of Appeal of **U.K in Procter & Gamble Co. V/s. Reckitt Benckiser**,[24] the ratio of which was reproduced in Halsbury's Laws of England, and it reads as below:-

> "A design infringes the right given by registration if it does not produce on the informed user a different overall impression. An informed user is not the same as a person 'skilled in the art' of patent law nor the average consumer of trade mark law. The informed user is a user who has experience of other similar articles and who will be reasonably discriminatory; he is able to appreciate enough detail to decide whether a design creates an overall impression which has individual character and whether an alleged infringement produces a different overall impression."

22 2010 SCC Online Del 3582
23 2019 SCC Online Del 6808
24 (2007) EWCA Civ 936

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68. The learned Single Judge expressed disagreement of the co-ordinate Bench in **Diageo Brands B.V V/s. Great Galleon Ventures Pvt. Ltd (supra)** that design infringement has to be seen by holding the product in hand or as assessed by a person who sees them on a shelf eight to ten yards away and he expressed that in **B. Chawla (supra)**, it was held that the matter has to be viewed from the perspective of instructed eye "who is an informed person" and not an "average person" much less the consumer of average intelligence and imperfect collection"who straddles trademark infringement law.

Reproducing the principle laid down in **Procter and Gamble (supra)**, that had an overall impression is what strikes the mind of the informed user when it is carefully viewed, not what he may recollect afterwards, Justice Hari Shankar noted that though Procter and Gamble was rendered in the context of Registered Designs Act, 1949 in force in U.K, it has considerable precedential value in the wake of the declaration by the Supreme Court in **Bharat Glass Works (supra)** that provisions of registered Designs Act are pari materia to the provisions of the Designs Act, 2000.

69. The principle laid down in **Carlsberg Breweries (supra)** was also invoked to note that there is a distinction between the statutory provision relating to infringement in Trade Marks Act, and those relating to Designs Act, as in the former, the test of confusing and deceptive similarity between the rival trademarks

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would be applied and the intention to infringe is not necessary under Section 29.

As against this, under Section 22, where there is no use of the word 'infringement', but the word used is 'piracy', the distinction must be kept in mind as 'piracy' of a registered design, when the defendant's design is fraudulent or obvious imitation of the design of the plaintiff.

Piracy, according to the said decision pre-supposes imitation which may be obvious or fraudulent. It is in the background of this appreciation of the facts and the law laid down on the subject, he proceeded to examine the rival contentions from the point of view of 'instructed eye' of a person who is instructed with prior art, reasonably discriminatory and able to appreciate the details as the test of an average consumer who sees the bottle on a shelf, from a distance, according to the learned Judge would not be an appropriate test to apply.

The conclusion drawn in the background facts came to be recorded thus :-

> "207. The first point of difference between Mr. Sibal and Mr. Lall, i.e. as to whether the test to be applied while examining the aspect of validity of the suit design on the point of novelty and originality vis-à vis prior published designs, and the test to be applied while examining infringement, are different, is not really unconnected with the second point of difference. The familiarity, of the instructed eye, through whose iris the aspect of infringement has to be examined, with prior art, itself factors in the aspect of novelty and originality of the suit design, again vis-à-vis prior art. This, it appears to me, should be plain and obvious. Novelty and originality are prerequisites for registration of a design under the Designs Act. A design which is not novel or original, vis-à-vis prior

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> art cannot, therefore, be entitled to registration. In order to establish its claim to registration, therefore, the suit design has to be shown as being novel and original, vis-à-vis prior art. Familiarity with prior art, of the instructed eye, therefore, necessarily presages familiarity of the points on which the suit design is novel and original vis-à-vis prior art. The aspect of novelty and originality of the suit design vis-à-vis prior art, therefore, becomes a relevant factor while examining the aspect of infringement of the suit design by the impugned design.
>
> 208. An ignorant observer, who is uninformed of the state of prior art and is merely comparing the design of the plaintiff with the product of the defendant, cannot, therefore, be the person from whose view point the aspect of infringement is examined."

70. Based on the aforesaid reasoning, ultimately, the conclusive finding is recorded thus :-

> "216. Viewed from the point of view of the instructed eye, therefore, it is not possible for me to hold that, prima facie, the design of the bottle of the defendant was an obvious imitation or a fraudulent imitation of the suit design. If it was, then the plaintiff's bottle would also be an obvious imitation or a fraudulent imitation of prior art. The difference in tests to be applied, while examining the aspect of validity on the ground of novelty and originality, vis-à-vis infringement analysis, as so persuasively urged by Mr. Sibal is, therefore, actually a difference more of form than of substance."

71. The Delhi High Court invoked the UK test of the 'informed user' through whose 'instructed eyes' the aspect of infringement is to be assessed, being laid down by the Supreme Court in **Procter & Gamble Co. V/s. Reckitt Benckiser,** (supra).

The test laid down is of an 'instructed eye' and this person is neither 'skilled in the art' nor an 'average consumer', but reliance upon this test, which received a meaningful interpretation in **Diageo V/s. Great Galleon** (supra) by the co-ordinate Bench of the Delhi High Court, did not find favour

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with Justice Hari Shankar while deciding **Diageo Brands BV & Anr. V/s. Alcobrew Distilleries Ind Pvt.Ltd.** (supra) , as regards the infringement of the registered design, which was also the subject matter of earlier design infringement proceedings in **Diageo V/s. Great Galleon** (supra) and the suit design was the same as the suit design which came for consideration in **Diageo Brands BV** (supra), the only difference being the product of the defendant as in the earlier case i.e. **Diageo V/s. Great Galleon**(supra), the defendant's product was a near identical replica of the suit design, but while considering the said case in the second round, the learned Single Judge found that the impugned design is different from the suit design in several respects, and this fact was not disputed.

Justice Hari Shankar, in the second round was unable to subscribe to the view adopted earlier by the coordinate bench, that the infringement has to be seen by holding products hand in hand or as assessed by a person who sees them on a shelf 8 to 10 yards away. Invoking the test laid down in **B. Chawla & Sons (supra)** to the effect that the matter has to be viewed from the perspective of the 'instructed eye' which is an eye of an 'informed person' and not of 'average consumer' much less the consumer of 'average intelligence and imperfect recollection'.

Thus what emerges from a thoughtful deliberation was the test of an 'instructed eye' and not a person with 'average intelligence' in judging novelty. In the law applicable to the

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intellectual properties, when we compare it with the cases of infringement of the trademark, the test to be applied is of an average person with imperfect collection, as the statutory framework under the Trademark Act is based upon the source identifier/indicator, which is not applicable to a Copyright and for this purpose, the test to be applied is of a conscious eye. Design lies somewhere between a Trademark and a Patent, which involves technical aspect as it is based on invention.

72. In the Judgment of Justice Hari Shankar there is a reference to the decision of Federal Circuit in **Egyptian Goddess Inc. V/s. VSM Swisa Inc.**[25] which, while holding that, infringement would have to be analyzed from the point of view of an ordinary observer, clarified that, the ordinary observer would have to be a person who was conversant with prior art and the Federal Circuit applied the test, 'whether a purchaser familiar to the prior art would be deceived by the similarity between the claimed and accused designs, inducing him to purchase one supposing it to be the other'.

Worth it to note that this test was not directly applied in Diageo, but the instructed eye principle was followed, but this was only restricted to ascertain the novelty, as a distinction is made in comparing the design of the bottle of the defendant with an obvious imitation or a fraudulent imitation of the suit design. But while examining the aspect of validity on the ground of novelty and originality vis-à-vis infringement

25 543 F.3D 665 (Fed. Cir. 2008)

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analysis, it was noted that it is actually a difference more of form than of substance.

It is in the wake of the aforesaid finding, the learned Single Judge noted that the plaintiff had failed to make out a prima facie case of obvious imitation or fraudulent imitation by the defendant of the suit design of the defendant's bottle, so as to justify injunction.

73. Here, we must make reference to the decision of the United States Court of Appeals, Federal Circuit in **Egyptian Goddess INC (supra).**

Egyptian Goddess INC (EGI) brought an action alleging that Swisa INC and Dror Swisa infringed its US Design Patent No. 467, 389, and the patent claimed a design for a nail buffer, consisting of a rectangular hollow tube, having a generally square cross-section and featuring buffer surfaces on three of its four sides, whereas Swisa's product consisted of a rectangular, hollow tube having a square section, but featuring buffer surfaces on four of its sides.

While deciding the issue whether 'point of novelty' test should continue to be used as a test for infringement of a design patent, or whether the court should adopt the 'non-trivial advance test' as a means of determining whether a particular design feature qualifies as a point of novelty, and as to how the point of novelty test should be administered, particularly when numerous features of the design differ from certain prior art designs, reference was made to the Supreme

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Court's decision in **Gorham Co. V/s. White**.[26]

The case involved a design pattern for the handles of tablespoons and forks and in the analysis of the claimed infringement, the court stated that the test of identity of design must be sameness of appearance and near difference of lines in the drawings or sketch or slight variance in configuration will not destroy the substantial identity. It explained 'sameness of effect upon the eye' was a main test of substantial identity of design, as the two will not be same 'to the eye of an expert', because if that was the test, then there never could be piracy of a patented potential design, since human ingenuity has never yet produced a design, which in all its details, is exactly like another, that even an expert would be unable to distinguish them.

In light of a detailed discussion and considering the findings rendered by the trial Judge, it was noted that the general shape of the buffer is the same as that of a patented buffer design, and the difference between the two is that the accused buffer has raised buffing pads on all four sides, while patented buffer has buffing pads only on three sides, but the two closest prior art nail buffers had solid rectangular cross-section with slightly raised buffers on all sides, and the another one was a design of triangular shape and a hollow cross-section with raised buffing pads located on all three sides.

74. When the question arose, as to what standard should be applied, and whether it is to be an ordinary observer who is

26 81 US 511 (1871)

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familiar with the prior designs and who will be deceived into believing that Swisa buffer is the same as the patented buffer. Based upon the declaration of the expert witness, who reached a conclusion that because of the substantially similar appearance between the accused and the patented designs, resulting into both designs having a hollow tube, square in cross-section and rectangular in length, with multiple raised rectangular pads mounted on the sides, which did not cover the corners of the tube, and the opinion expressed an ordinary observer and purchaser of nail buffers would notice the presence of one more buffer pad altering the ornamental effect and appearance of the whole design as compared to the patented design, the Court observed thus :

> "In light of the similarity of the prior art buffers to the accused buffer, we conclude that no reasonable fact finder could find that EGI met its burden of showing, by a preponderance of evidence, that an ordinary observer, taking into account the prior art, would believe the accused design to be the same as the patented design. In concluding that a reasonable fact finder could not find infringement in this case, we reached the same conclusion that the district court reached and for many of the same reasons. Although we do so by using the ordinary observer test as informed by the prior art, rather than by applying the point of novelty test, our analysis largely tracks that of the district court. After analyzing the nail patent and claimed design, as related to the accused design, the district court concluded that 'in the context of nail buffers, a fourth side without a pad is not substantially the same as fourth side with a pad."

While the trial court focused on the differences in the particular feature and issue, rather than the effect of those differences on the appearances of the design as a whole, it was noted that the difference on which the court focused is important, viewed in the context of the prior art.

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75. The test laid down in EGI is not formally applied by the Indian Courts and not even by Justice Hari Shankar of the Delhi High Court while deciding the issue too. However, he has independently developed and applied an identical legal principle that mirrors the outcome of Egyptian Goddesses, namely that design infringement must be judged by the 'instructed eye' of an ordinary consumer viewing the product as a whole rather than isolating an exact 'point of novelty'.

In **Cello Household Products (supra),** when Cello sued Modware, over the design of a distinctive water bottle and Modware raised a defence that they had changed certain geometric details and lines on the bottle surface, the Bombay High Court held that the test for design infringement is the visual impression in the eye of the customer. It is, held that a design cannot be broken down piece by piece, to find minor differences, and what is to be taken into consideration is the 'visual appeal' and if the overall shape and configuration create an obvious imitation, then it is a case of infringement, effectively mirroring the U.S. 'ordinary observer test'.

In **Whirlpool (supra)**, the test laid down by the single judge of Bombay High Court was of the novelty being appreciated by an average consumer in the shape and configuration of the product by keeping aside its functionality and this judgment is followed on several occasions as having applied the right test in the Indian scenario.

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Indian Courts have consistently rejected the minor modifications to evade the challenge of similarity and instead they have looked at the core aesthetic appeal. A minor or trivial distinction is ignored in applying the test of deceptive similarity. Therefore, in our view, the test laid down by **Whirlpool (supra)** still continue to hold the field, and we intend to apply the same to the case in hand after going through various decisions cited before us.

76. The test of 'informed user' or 'instructed eye' , as the one who is aware of prior art and common trade knowledge for the aspect of infringement of design in our view does not fit into the facts of the case and cannot be applied to a product as common as a fan and definitely, the product which is purchased by a consumer, who will choose a particular design by keeping in mind the image of a 'fan', which he had seen at someone's place and the comparison would be done through his eyes alone. The design of a fan is appreciated by the common consumer/purchaser as a whole and he need not be necessarily an 'informed user' or an 'instructed eye' to remember or recollect as to what was the previous design to find out whether there is any novelty.

The learned Single Judge as well as the Division Bench of Bombay in the context between **Whirlpool (supra)** physically examined the rival washing machines and the learned Single Judge ignoring the trivial differences asserted by the defendant, recorded that if such minor differences are held to be sufficient

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enough to avoid a finding of infringement, then it will be impossible for any plaintiff to succeed, since the skillful defendant will knowingly make some cosmetic and minor changes in its product. The test applied was of comparing the two products by ignoring irrelevant features and a comparison being drawn between its essential features. Similarly, the Division Bench hearing the Appeal against the interim order, applied the same test viz. judging through eye and observed that, when the Court is to judge similarity or differences, it should be done through the eye alone and when the article in respect of which design is applied is the object of purchase, then through the eye of the purchaser. In judging the articles solely by eye, the court must see whether the defendant's version is an obvious or fraudulent imitation.

Applying the aforesaid test, the Division Bench focused upon the shape and configuration of the two machines and though it was urged the machines marketed by Videocon are different as it had a different colour scheme, ornamentation, but recording that the novelty of the design registered by Whirlpool, its rival company actually was in its shape which had distinct appeal to the eye and it is this shape which created a value in the product, completely distinct from adding to its functionality, it was categorically held that merely by placing certain ornamentation's, changing position of knobs or adopting a different colour scheme, the rival company Videocon has not been able to make any difference to its

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product to give a completely different look than the product of Whirlpool.

77. It is a consistent approach adopted by this Court, when it has been held that the Court must consider whether the essential part or basis of the plaintiff's claim to novelty is found in the impugned product and the similarity or difference is to be judged through eye alone and in case of a marketed product through the eye of the purchaser. The consistency which has emerged through all the decisions cited before us is that the rival designs are to be viewed as a whole to determine whether the impugned design is substantially different.

The instructive test which implicitly has an element of the purchaser, being aware of the prior art and common trade knowledge may be relevant in examining validity of the design, particularly to ascertain whether the novelty staked is merely an ordinary trade variant, but it shall not replace the settled test laid down of piracy under Section 22, which prohibit application of registered design, to any article, in any class, which would result into a fraudulent or obvious imitation thereof. In testing the accusation of piracy/infringement, it definitely call for an overall visual assessment of the registered design and the impugned product through the eye of the purchaser/common consumer. A prior art may be a relevant circumstance in a properly constituted challenge to validity under Section 22(3) read with Section 19, but in our view it cannot be employed to undertake a microscopic dissection of

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the plaintiff's registered design and thereby dilute the statutory protection available against piracy.

In our view, as far as the product in question i.e the ceiling fan, the test to be applied is whether on visual comparison of rival products through the eye of the purchaser/common consumer, the impugned fan is substantially different from the fan which has the application of registered design. If the essential visual features which impart the registered design a distinctive appearance based on shape and configuration and if this ocular appeal has been substantially applied by the defendant, with only minor differences in individual features or some dimensions or material components it cannot escape the accusations of obvious or fraudulent imitation.

78. The test of 'instructed eye' as laid down by Delhi High Court in **Diageo Brands BV** (supra), contemplates that the 'instructed eye' is one who is aware of prior art and has compared the registered design with prior art, but we must note that the learned Judge has clarified that the difference in the test shall be applied while examining the aspect of validity on the ground of novelty and originality vis-a-vis the infringement analysis is actually different mode of a form than a substance.

If the suit design is novel and original as compared to a prior art with respect to certain aspects and the infringing design of the defendant is similar to prior art in respect of

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these aspects, then Justice Hari Shankar has concluded that the impugned defendant's design is novel and original vis-a-vis the suit design qua the said aspects. However, if these aspects of novelty and originality raised in the impugned design as against the suit design, a question was posed whether it can be said that the impugned design infringes the suit design merely because if the two products are able to distinguish the two. This according to him would do away with the 'informed user' test as also ability of such user to reasonably distinguish and appreciate the details and according to him the question posed had to be answered indesign the negative. However, we find that when this test of 'instructed eye' was put forth in **Cello Household Products** (supra) before the Bombay High Court, while dealing with a plastic water bottle, which according to the plaintiff possessed novelty and originality, the claim being based upon its shape, configuration and surface ornamentation, Justice G.S. Patel observed that if one has to ascertain the similarity in the two products, for maintaining an action of infringement and passing off with the test applied often overlapping, it will have to be ascertained whether Modware's product was substantially and deceptively similar to that of Cello's registered design and if it is so then an injunction should follow.

Applying it to the parameters set out in the Designs Act, reference was made to the defences which were available including that the design is known to the prior art, there is prior

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publication or that there is no novelty or originality in the design, but it is an outcome of cobbling together several pre-existing known designs or mosaicing.

Dismissing the contention that a bottle is a bottle, by relying upon the decision in case of **Whirlpool** (supra) , laying down the principle that the approach should not be in identifying individual similarities or dis-similarities as they are not dispositive, but the judicial assessment must be on examination of rival products, actually made available if possible and they should be examined as whole, from the perspective of a common consumer. The emphasis was laid upon the visual appeal and the task to be seen if the essentials of that which make it visually appealing have been substantially, but not necessarily exactly, copied, and the arguments advanced that an expert view is only the test of novelty and originality did not appeal to the Court as it was sought to be suggested that Cello's bottle was not significantly distinguishable from known designs or combination of known designs and at least this was not demonstrated. However, it was noted that on comparing the bottles the differences could be evidently observed as each one may have a unique shape and configuration and in his inimitable style, Justice Patel observed thus :-

> "For some who claim familiarity with bottles – perhaps for reasons unrelated to their design – the differences are evident; many cylindrical liquid containers are instantly recognized as unique and as indicative of their contents. The expertise, usually borne of much experience, in such cases has not so much to do with the design of a bottle as

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its contents. No "expert" can add much more than that which is obvious to the "naked eye."

79. In the case before us, Atomberg has placed on record material to demonstrate that it ranked first in the market to conceptualize/adopt the registered design in the year 2019, and commercially used the same since November 2020, and though it applied the very same design with little variations comparable to its own registered design to other fan, but definitely the conceptualized design was applied to the fan much prior to that of Stove Kraft which was adopted only in February, 2025. In any case, the defendant did not produce any instance of prior art to demonstrate that the novelty features claimed by Atomberg were a combination of those existing in the market, and in fact, the emphasis of the defendant is only on the distinction in relation to the shape of the shaft which was found in the Atomberg Renesa Alpha, but according to us, this feature was not claimed to be novel while the registration was sought, and in fact the application for registration as well as the registration certificate do not even make a mention of the position of blade with Z shaft being a unique one.

When we actually compared the model of the said fan of Atomberg as against Stove Kraft, its novelty according to us, lies in the petal shape of the blades and/or configuration and/or get up resulting into giving it an overall appearance which is claimed to be the success of its product according to the plaintiff. We find that the subsequent fan of Atomberg other

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than Renesa have the novelty of the registered design, and we do not find any justification in the stance of Mr. Dhond for the defendant that the comparison of the defendant's fan cannot be made with its other variants. The novelty which is claimed in the shape and configuration is sought to be justified with the functionality and is capricious, in the sense that it is not purely functional, but it is an aesthetic or artistic appeal. As explained by the Bombay High Court in **Faber-Castell Aktiengesellschaft** (supra) 'capricious' refer to a feature that is not purely functional and which has an aesthetic or artistic appeal and rather it denotes a design in which form predominates over function.

In the fan belonging to Atomberg and especially Renesa Alpha, the product to which the design was applied for the first time, and thereafter, replicated in other models, the petal shape blade configuration is capricious, as it is not a form dictated by functional requirement of a ceiling fan, as this function of circulating air can be achieved through numerous other blade shapes and configurations. However, the petal shape configuration in which uniqueness is claimed and adopted by Atomberg has given its fan a distinctive and aesthetically appealing visual identity.

80. It is this unusual and distinctive appearance of the plaintiff's product which has acquired a goodwill and the attempt on the part of the respondent in copying that appearance is what is sought to be set at naught by seeking an

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injunction. In fact, Atomberg's subsequent Renesa fan are variants embodying the same essential and distinctive design features and cover within the scope of its registered design and the attempt of Stove Kraft to adopt an almost identical fan, according to us, is not accidental, and more particularly, when no explanation has been offered as to how the idea of the said design was conceived.

81. The Appellant had placed before the learned Single Judge the material to establish that its fan ("said fan) had acquired substantial goodwill, reputation and recognition which was owed to its distinctive appearance and the CA certificate, representative invoices, promotional material were placed alongwith the plaint. In addition, the annual sale figures were also reproduced indicating thus :-

i	November 2020 – March 2021 – 1.16 Cr.
ii	April 2021 – March 2022 - 11.88 cr.
iii	April 2022 – March 2023 – 27.27 Cr.
iv	April 2023 – March 2024 – 46.97 Cr.
v	April 2024 – March 2025 – 184.7 Cr.
vi	April – 2025 – May 2025 - 57.71 Cr.

The above material thus demonstrate goodwill and reputation earned by Atomberg, by applying the design which was unique in its overall shape and configuration and its claim that no other ceiling fan with similar or comparable shape existed in the market prior to the introduction thereof, was in any way contradicted.

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The novelty of the shape and configuration of its petals giving rise to an overall appearance, became peculiar to its product i.e. ceiling fan Renesa Alpha and its subsequent variations and since the distinctive appearance of this fan has been slavishly copied by the respondent and, in our view, a case for passing off is clearly made out.

The fan of the rival parties i.e. Appellant and Respondent are competing ceiling fan which are purchased by the same class of consumers and possibly through overlapping trade channels. The photographs placed before us, reflecting the manner in which the fan are displayed physically, and on Online Channels/Platforms, would clearly reveal to us that a consumer who either visit the shop or surf the net on various platforms, which sell the said fan is impressed by the distinctive aesthetic appearance, which lies in its unique shape petal like blades and its configuration, and may result in purchasing the respondent's impugned fan under the belief that it is the product of Atomberg or it is a variant or it is commercially associated with its fan. The possibility of such confusion increases as the essential feature of Atomberg's fan which attract the consumers attention are its petal shape blade configuration giving rise to an aesthetic appearance, which on comparing the respondent's product, according to us, has been substantially copied.

The test which we are applying for comparing the 'said fan' of Atomberg, as against the impugned fan of 'Stove Kraft',

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is the perspective of an average consumer who is likely to get confused on account of identical design i.e. the shape and configuration being applied to its impugned model.

In any case, we have noted that Atomberg is not claiming novelty in the basic features of ceiling fan, but novelty and uniqueness is claimed in the shape and configuration and this can only be judged solely by the eye and for this purpose it need not be an instructed eye, but as the product itself is a common one, being a ceiling fan, purchased by an average man, the test to be applied is his capability to compare and whether he would get confused between the two fan and would buy the impugned fan presuming it to be the fan of Atomberg or associated with it. Being a product of normal use, as every household will have a ceiling fan and particularly an average consumer, for whom it is an essential feature of his house to enjoy the comfort of his home, it is possible that the consumers have encountered the fan of Atomberg at some other place including the house/office of his friend orrelative or as projected in advertisements or in photographs and what he would retain by way of an impression, is the distinctive shape and appearance of the product. Therefore, when he make his decision to buy a ceiling fan and when the products are sold by placing them side by side, he may mistake the respondent's substantially similar fan for the plaintiff's, and that is it may suffer adversely. No comparable ceiling fan with the similar shape and configuration existed in the market prior to the

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plaintiff's adoption of the design, and we find substance in its claim that the shape and overall appearance of the fan had acquired distinctiveness, and in fact when the respondent adopted a substantially similar design, it reasonably would have been aware of the presence of the appellant in the market with its distinctive design.

In any case, in an action of passing off the actual confusion need not be established and it is sufficient to establish that there is likelihood of confusion.

82. It is in this background, we must briefly refer to the findings rendered by the learned Single Judge, which according to us call for interference by applying the test in **Wander Ltd.** (supra), if the impugned order has ignored the settled principle of law or did not apply the correct law.

The learned Single Judge proceeded on the footing that there is no similarity in the rival fan, but has failed to note as to how they differ. The focus was on isolated distinction like the Z shape shaft as we have noticed that the Renesa Alpha hanging from the ceiling do not reflect the Z shape shaft with a distinction, but it merges with the canopy and definitely do not form its distinctive feature.

In any case, even Atomberg while it secured registration for its design did not claim the 'Z' shape shaft as its distinct or unique feature. The learned Single Judge has compared the product with the comparison set out in two tables, resulting in product to product comparison, but in our view that is not the

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proper basis for comparison as to assess infringement; the test to be applied is from the perspective of the eye of the Judge and in case of a purchaser of the product from his eyes. The comparison drawn by the learned Judge is based on features of the model and not of the registered design and based on this, it is held that Atomberg has attempted to compare, the respondent's impugned fan with its other models and there is no clarity about 'said fan'. It is to be noted that in the plaint, Atomberg has set out the comparative table of the novelty feature of its 'said fan' and the comparison was drawn with the features that have been copied by the respondent in the impugned fan. In fact it is the case pleaded even before the trial Judge that the subsequent models applied the same design and embodied all novelty features of the registered design, to all the variant fan, and all being within the scope of its registered design.

The impugned order in para 33 records that the test, which is of similarity to be judged solely by the eye is not satisfied, but the learned Judge had adopted the said test by comparing photographs and tables, and here, according to us she has grossly erred as the similarity is to be judged solely by the eye and what is to be assessed is the overall similarity, but the Judge ultimately landed in dissecting the rival designs into separate integers, which is not the test to be applied under the Designs Act. No doubt the similarity is to be judged on obvious visuals, and overall appearance through the purchaser's eye,

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but when an imitation of the said appearance is alleged and that too, against a registered design, which may be less apparent than obvious imitation, it will still amount to infringement and this is what is observed in **Whirlpool** (supra), where 'obvious' is stated to mean something, as soon as one looks at it, strikes one as being so like the original design/the registered design, as to be almost unmistakable.

The test laid down in **Kemp & Co.** (supra) was reiterated in the following words :-

> "Fraudulent imitation is an imitation that is deliberately based upon the registered design and is an imitation which may be less apparent i.e. may not be an obvious imitation that is to say one may have a settled distinction between registered design and fraudulent imitation and yet the fraudulent imitation, although it is different in some respect from the original and in respect which tendered it not obviously an imitation may yet be an imitation perceptible when the two designs are closely scanned and accordingly amounts to infringement."

83. The learned Single Judge, in our view, has failed to appreciate the key test laid down, being that the two designs need not be exactly identical and same, and the matter must be looked at as one of substance and essential features of the design ought to be considered.

By applying the aforesaid test, since the essential feature of the design in which novelty claimed are the petal shape elongated blades with its tapering at the end and its attachment to the canopy, by applying the well settled test of the two products being judged solely by the eye to assess whether the essential features present, or whether the two substantially differ. On examination of the two products, according to us,

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the test is satisfied and, therefore, we must record that the findings rendered by the learned Judge, that Atomberg is not able to make out a case for infringement of and passing off, does not appeal to us and that justify our interference in the impugned order passed by the learned Single Judge.

84. The respondent's adoption of the impugned design and applying it to its own fan is likely to divert the plaintiff's sale and also erode its goodwill which has been sufficiently established before us through sale figures and the fact that plaintiff is using the suit design, openly and continuously in the market. The plaintiff has demonstrated goodwill and reputation in the shape and configuration for which it claimed registration, and it being granted, as no other ceiling fan existed in the market prior to its introduction, and it is that novelty in shape and configuration/get up/overall appearance that is associated with the said fan of plaintiff. The misrepresentation on part of the respondent is evident and the same is causing irreparable harm, loss and injury to the plaintiff and this has been ignored by the learned Single Judge. The reputation and goodwill owned by the plaintiff in the distinctive appearance of the said fan, which has been slavishly copied by the respondent, and therefore, in our view, a case of passing off is made out.

In an action for passing off, it is not necessary to establish actual confusion, but the enquiry is limited to, whether a purchaser is likely to be misled and the consumer may mistake the respondent's fan which is substantially similar to the

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plaintiff's fan, and in our view, it is not necessary to establish "something more" as the product shape and configuration, along with the overall visual similarity, has established requisite representation and likelihood of deception finding that the respondents act is dishonest as adopted the registered design applied by the plaintiff to its "said fan" and with the registration of the design, subsisting, Atomberg in our opinion is entitled to enjoy the status of a registered proprietor and entitled for the benefits flowing therefrom, and it is necessary to protect it from infringement and passing off.

The primary test to determine novelty, originality and infringement under the Designs Act, 2000, is the 'eye' test to evaluate whether two designs are substantially identical or if an imitation has occurred through visual comparison, then the technical analysis or breaking it down into a minute or isolated differences, is not permissible. This test, based on a holistic impression involves what appear to the eyes alone i.e. judging the comparative designs by ocular perception.

Another test which could be discerned from a line of pronouncements including the decision of Delhi High Court in Diageo (supra) is that of 'instructed/informed eye' which involve comparing a product through eyes of a person who is familiar with the prior art and who is capable of reasonably discerning of appreciating the design details and definitely, as laid down by Justice Harishankar, this test reject the casual glance from a distance.

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85. With the conundrum as to which test should be applied, though even the Delhi High Court has agreed that the eye test shall be applied to ascertain infringement (piracy). The question which requires consideration is whether this test shall be applied only for infringement, or even in ascertaining the novelty.

This, however, must be judged from the point whether the design is capable of registration under the 2000 Act, which requires it to be 'New' or 'Original'. 'New' is not defined in the Act, but in common parlance, it is something which is not known. 'Original' is defined in section 2(g) and in relation to a design, it means originating from the author of such design and includes the cases which, though old in themselves, yet are new in their application.

'New' is therefore something which comes in knowledge of the public for the first time but, 'Original' may not be 'New', but there is newness or originality in applying an existing design to an article, which no one thought of before. Courts have zealously guarded an old design applied to a new article, to which it was never applied, and have protected this adaptation. For e.g. Petal-shaped blades being applied to a ceiling fan although petal shapes may be found elsewhere in the Universe, or it being having applicability to various products, but the originality lies in applying this shape to the fan.

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For a design to be new or original; (i) it must not be disclosed to public prior to the filing date. (ii) it must be distinguishable from known design or combination of known design.

'New or Original', must therefore exhibit significant change or difference in the design as compared to the known design, and trade variants may not meet the test under the Designs Act. Therefore, to determine the similarity or dissimilarity, the visual effect and its appeal require appreciation.

86. The 'eye test', which is invoked in ascertaining whether a case of infringement/piracy under section 22 has been made out, involve examining the two products from their appearance, by appreciating its aesthetic sense and who may do it better than the one who is desirous of purchasing the product.

It is quite possible that when a person goes to the market, he do not go searching for novelty or originality, but as observed in Whirlpool, he had a glimpse of the product and with this image of the product in mind, he visit the market so as to own this product and here, he would appreciate the product from what image he had in his mind, and may be misled if he come across a product which is strikingly similar to the image which he carried in his mind. It is only in exceptional circumstances a consumer visits the market expecting a novelty, or when he make up his mind that the product he want to purchase must be a completely new one, and then he has the

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knowledge of the past variants of the product in the market, and his motto is to have a product which is completely distinct, different, and unique as against the products which are available in the market and here, the test that will be applied is that of 'an instructed eye' .

The instructed eye test expands the visual review by adding contextual knowledge. Instead of a casual shopper, the design is viewed through the eyes of an informed user — someone who is not an engineering expert, but is highly familiar with the specific industry, prior products, and common trade variations. But here, we are talking of a consumer who is interested in novelty and originality, as against a prior art.

This test surely is applicable in judging the novelty, and it is a standard applied when a defendant tried to cancel a design registration, by claiming that it isn't actually 'new'. An instructed eye knows what already exists in the market and therefore what it shall look for is the past basic, unavoidable industry, shapes, and then pinpoint whether the design features truly introduced a visual novel visual impact, or it is just a minor obvious trick.

87. In **Diageo Brands B.V & Anr. Vs Alcobrew Distilleries India Pvt Ltd** (supra) , the test applied was of an informed user and not the casual "look and feel" or a person with imperfect collection, and while determining the said test, the emphasis was upon the novelty, which can be stringently weighed by an instructed eye against prior art to prevent companies from

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monopolising shapes.

Under the Designs Act, 2000, the protection is confined to aesthetic features appealing to the eye, excluding purely functional or mechanical ones. The balance between the two aims at boosting creativity without monopolising utility. The two tests differ in its applicability and as far as infringement is concerned, in our view, it is the eye test (ocular impression), which is the most suitable one which shall be applied as in articles to which the design is applied and the claim for piracy is staked, it is to be ascertained whether the infringing design is a fraudulent or obvious imitation of the registered design and because of this adaptation, whether the common consumer is getting confused and ultimately result in buying the infringing product on a mistaken belief that it is the product of the registered designer.

Design law is a tool to incentivize production of novel and original designs and ensure its protection by conferring the right of having Copyright in the design, once it is registered. Since there is a procedure prescribed for registration of a design, and only when a novelty or originality is proven, and as the statute itself prescribes prohibition of registration of certain designs, like the one which is not new or original, or that it has been disclosed to the public by publication prior to the filing date, or that it is not significantly distinguishable from known designs or combination of known designs, in such case, it shall not be registered. It is only when the design is registered, it

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confers a right on the one who secures this registration, from the date of its registration and thereupon, the registered design possesses the potential of exclusivity, which extends to the market power to exclude others. However, an average consumer has no idea about this specific novelty vis-à-vis prior art and therefore, expecting two designs to be infringing merely due to their "look and feel", or because they seem to be alike or different by testing them through the naked eye, is a feature which needs to be applied when it comes to testing of its novelty. The ordinary observer for design infringement, therefore, need not necessarily be the one who is familiar with prior art, and for the average customer, the test to be applied would be the likelihood of confusion, to be judged from the products available in the market but while judging the novelty or originality, definitely the test of the instructed eye shall be applied. In any case, piracy of a design invites the consequences as stipulated under sub-section (2) of Section 22, which may involve payment of damages as specified, and a person who is able to prove infringement is entitled to injunct the infringer.

88. In conclusion, we, therefore, set aside the impugned order passed by the learned Single Judge, strictly by confining ourselves to parameters laid down in **Wander** (supra) as the learned Judge has failed to apply the correct test to the fan for comparison.

89. As a consequence thereof, IA No.88/2026 is allowed in terms of the prayer clauses (a) and (b) which reads thus :-

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> "a) that pending the hearing and final disposal of the suit, the defendant by itself, its directors, dealers, stockists, distributors, servants, agents and all persons claiming under or through it be restrained by a temporary order of injunction of this Hon'ble Court from infringing/ pirating the plaintiffs design of the said fan bearing registration no. 325322-001 in class 23 -04 by the use of the impugned fan or any other fan which is a fraudulent or obvious or slavish imitation or resembling with the plaintiffs said fan;
>
> b) that pending the hearing and final disposal of the suit, the defendant by itself, its directors, dealers, stockists, distributors, servants, agents and all person claiming under or through it be restrained by a temporary order of injunction of this Hon'ble Court from manufacturing and/or selling and/or marketing and/or retailing and/or exporting and/or distributing and/or trading and/or exhibiting for sale and/or advertising and/or otherwise dealing in fan bearing the shape, configuration, design of the impugned fan or any other fan bearing shape or design which is identical with and/or deceptively similar to the shape, configuration, design of the plaintiffs said fan, so as to pass off or enable others to pass off the defendant's fan/goods as and for the plaintiffs well-known fan/goods or in any other manner whatsoever;"

The ad-interim order passed by the learned Single Judge on 24/7/2025 appointing the Court Receiver, High Court, Bombay, under Order XL Rule 1 of Code of Civil Procedure as receiver of defendant's impugned fan, and to take them into possession and control by exercising all necessary powers conferred upon him is also restored.

(MANJUSHA DESHPANDE, J) (BHARATI DANGRE, J)

Tilak

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