

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.05.2009

C O R A M:

THE HONOURABLE MR.JUSTICE S.J.MUKHOPADHAYA

and

THE HONOURABLE MR.JUSTICE F.M.IBRAHIM KALIFULLA

O.S.A.Nos.91 & 92 of 2008

M/s.TVS Motor Company Limited,
Jayalakshmi Estates,
No.8, Haddows Road,
Chennai – 600 006.

.. Appellant in both the OSAs

vs.

M/s.Bajaj Auto Limited,
Bombay-Pune Road,
Akurdi, Pune – 411 035.

.. Respondent in both the OSAs

Original Side Appeals against the common order dated 16.02.2008 in O.A.No.1357 of 2007 in C.S.No.1111 of 2007 and O.A.No.1272 of 2007 in C.S.No.979 of 2007 on the file of this Court.

For Appellant : Mr.A.L.Somayaji and Mr.P.S.Raman,
Senior Counsel for M/s.T.K.Bhaskar.

For Respondent : Mr.C.A.Sundaram,
Senior Counsel for M/s.A.A.Mohan.

- - - - -

COMMON JUDGMENT**F.M.IBRAHIM KALIFULLA, J.**

O.S.A. No.91 of 2008 has been filed by the Appellant as against the fair and decretal order dated 16.02.2008, passed in O.A.No.1272 of 2007 in C.S.No.979 of 2007, in and by which, the Appellant's application for an order of interim injunction restraining the Respondent herein from in any way interfering with the manufacturing and marketing of the Appellant's products using Internal Combustion (IC) engine with 3 valves and 2 spark plugs pending the disposal of C.S.No.979 of 2007 was rejected.

2. O.S.A. No.92 of 2008 has also been filed by the same Appellant challenging the order dated 16.02.2008, passed in O.A.No.1357 of 2007, in C.S.No.1111 of 2007, wherein, the Respondent's prayer for an ad-interim injunction restraining the Appellant herein from in any manner infringing the Respondent's Patent No.195904 and/or from using the technology/invention described in the said Patent No.195904 and/or from manufacturing, marketing etc., for sale or exporting 2/3

3

wheelers, including the proposed 125 cc 'FLAME' motorcycle containing an Internal Combustion engine or products which would infringe the Respondent's Patent No.195904 pending disposal of C.S.No.1111 of 2007 was granted.

3. By a common order dated 16.02.2008, passed in O.A.No.1357 of 2007 in C.S.No.1111 of 2007 and O.A.No.1272 of 2007 in C.S.No.979 of 2007, the learned Judge while granting interim injunction as prayed for by the Respondent in O.A.No.1357 of 2007 in C.S.No.1111 of 2007, dismissed the application of the Appellant in O.A.No.1272 of 2007 in C.S.No.979 of 2007.

4. Both the Appellant and the Respondent are in the automobile field and are manufacturing two wheelers of their own brands. The dispute involved in this litigation pertains to the patent right of the Respondent bearing Patent No.195904 of 16.07.2002, granted by the Patent Office with its sealing dated 07.07.2005. Under the said patent, the Respondent got the exclusive right to prevent third parties from making, using,

offering for sale, selling or importing for those purposes '*An improved internal combustion engine working on four stroke principle*'. The said patent also places restriction for grant of such patent to any one else for a period of 20 years from 16.07.2002.

5. In the suit in C.S.No.1111 of 2007, the Respondent has sought for a permanent injunction to restrain the Appellant from causing any infringement to Patent No.195904 and/or from using the technology / invention described in the said patent in 2/3 wheelers including the proposed 125 cc 'FLAME' motorcycle of the Appellant. They further prayed for a preliminary decree for rendering accounts of profits of the Appellant in the sale of 125 cc 'FLAME' motorcycle and a sum of Rs.10,50,000/- as damages for infringement of Patent No.195904. The last part of the prayer is for destruction of all the infringing copies and articles including vehicles containing engines that infringes Patent No.195904.

6. In the affidavit filed in support of O.A.No.1357 of 2007, while describing the invention, the Respondent has stated that it invented an unique technology of using two spark plugs for efficient burning of lean air fuel mixture in a small bore engine (bore size between 45 mm and 70 mm). According to the Respondent, though the use of two spark plugs in some small bore air cooled engines in racing applications in 1950's as well as in large bore engines or in high performance / racing bikes which do not run on lean air fuel mixture was known in the automobile industry, the same is not comparable to the invention of the Respondent.

7. According to the Respondent the combustion of air fuel i.e. the process of burning would be richer due to the consumption of more fuel in racing engine than the chemically correct ratio of air and fuel which would differentiate as against a lean burn engine. In sum it is claimed by the Respondent that the invention is directed to improve the combustion of lean fuel mixture in the small bore engine ranging between 45 mm and 70 mm for improved fuel efficiency by using a pair of spark plugs to ignite the air fuel mixture.

8. It was further pleaded that the existence of number of valves is not an essential feature of its invention in as much as its invention is spark plug centric and not valve centric. It is therefore claimed that the existence of third valve in the Appellant's product cannot be taken as a variant as the same was not material to the invention. The Respondent was stated to have applied for the grant of patent on 16.07.2002, which was granted/sealed on 07.07.2005 and the grant was published in Issue No.28/2005 dated 29.07.2005. It was further claimed that the 125 cc engine in the Appellant's product 'FLAME' infringes the Respondent's patent No.195904 and therefore the Appellant should be restrained by way of an interim injunction pending suit.

9. The said application of the Respondent was resisted by the Appellant by contending that the use of two spark plugs in an IC engine was a prior art for which no patent could have been applied for and that the Respondent resorted to a deceptive method by introducing a limitation of bore size to the US Honda patent which did not have any such limitation. According to the

Appellant the US Honda Patent No.4534322 which provides for use of two spark plugs did not restrict the application of its patent to the bore dia and that there was no reference to 'more than 70 mm' in the said patent as stated by the Respondent in its averments. It is therefore contended that because of the distorted version of the Respondent while obtaining the patent No.195904 which issue has to be determined in the revocation application filed by the Appellant, the Respondent is not entitled for the equitable relief of injunction as prayed for in the application.

10. According to the Appellant, the argument of twin spark plugs was in public knowledge after the expiry of the 20 years period of US Honda Patent No.4534322, dated 13.08.1985, besides the construction of three valves configuration in the Appellant's engine was protected by the patent granted to AVL which again is covered by US Patent No.6520 146 and Indian Patent No.196636, which has been accepted and not challenged. In other words, according to the Appellant, the use of twin spark plugs in its engine with three valves resulting in combustion of

lean air fuel mixture cannot be taken to have infringed the so called invention of the Respondent under patent No.195904 as the same was hit by prior art, apart from the special characteristics of three valves in the Appellant's engine.

11. The Appellant specifically denied the stand of the Respondent that the third valve in the Appellant's engine was a cosmetic one and contended that the said valve has its own specific functions in the operation of its IC engine for better combustion efficiency and therefore the alleged infringement of the Respondent patent cannot be accepted.

12. By making a specific reference to the claim made by the Respondent in the complete specification filed by it before the authorities in 2004 and with regard to the provision of twin spark plugs as compared to the averments contained in the affidavit filed in support of the injunction application, the Appellant pointed out that what was claimed in the complete specification varies with what is claimed in the application filed in support of the injunction and that the Respondent cannot be permitted to

improve the functions as mentioned in the complete specification by making any statement in the affidavit filed in Court. In other words it was contended that the Respondent will have to stand or fall by what is stated in the complete specification in regard to the specific functions of the twin spark plugs which according to the Appellant was only related to its position in the engine and not in relation to its advantage in making the combustion of lean air fuel mixture.

13. It is stated that the shift made by the Respondent from two plugs centric description of 2003 to two valves centric description of 2004 was due to the existing discovery of 1985 US Honda patent and such being the case, according to the Appellant, the Respondent can never be permitted to shift its claim once again to twin spark plugs centric description to its so called invention.

14.The Appellant also placed reliance upon the Indian Patent application No.678/MUM/2001 filed by Honda in July 2001 in support of its stand that plurality of ignition plugs to four

stroke engine with an intake valve and an exhaust valve to achieve reduction of fuel cost was a known factor in the automobile industry.

15. By relying upon the patent granted to AVL, the Appellant contended that the third valve is not a cosmetic addition but had a specific purpose, in as much as, it is supported by the grant of patent by the authorities and that a contra statement of the Respondent would go against the patent which is not permissible in law. It is claimed that the two inlet valves provided in the Appellant's engine are different from each other and have a specific and independent function to each other. The Appellant would further contend that though the registration of Respondent's patent in 2005 would date back to the original date of application since it being a new one and that its validity is the subject matter of cancellation / revocation, claim for injunction should not have been countenanced. It was therefore contended that the injunction application was liable to be rejected.

16. While dealing with the respective applications of the Appellant as well as the Respondent for interim injunction, the learned Judge by an interim order dated 16.02.2008, while granting interim injunction as prayed for by the Respondent in O.A.No.1357 of 2007 in C.S.No.1111 of 2007, dismissed the Appellant's application No.1272 of 2007 in C.S.No.979 of 2007.

17. Aggrieved against the said common order of the learned Judge, the Appellant has come forward with these appeals.

18. Mr.A.L.Somayaji and Mr.P.S.Raman, learned senior counsel appeared on behalf of the Appellant and advanced arguments. Mr.C.A.Sundaram, learned senior counsel appeared on behalf of the Respondent made his submissions.

19. Mr.A.L.Somayaji, learned senior counsel in his submissions after referring to the respective contentions contained in the affidavit filed in support of the application in O.A.No.1357 of 2007 filed on behalf of the Respondent, the

counter affidavit to the said application as well as the rejoinder filed by the Respondent submitted that the exclusive right of patent claimed by the Respondent is hit by the vice of prior art, apart from the fact that the Appellant's product is not comparable to that of the Respondent, in as much as, apart from the formula of twin plugs, in the Appellant's engine there is an additional valve viz., third valve, that the third valve is not a cosmetic addition, but an essential one and therefore there was no question of infringement in respect of the patent right of the Appellant.

20. The learned senior counsel also took the stand that the Respondent was making a flip-flop claim from the date of provisional specification made in 2002 and the final specification made in 2003 as well as the complete specification made in 2004. According to the learned senior counsel, the teaching of the patent was completely altered in the claims of the Respondent between the years 2002 and 2003 viz., between the provisional claim and the final specification. According to him while in the provisional specification in 2002 and in final

specification in 2003 the teaching was two plug centric of the invention, having noted that the Honda US patent No.4534322 A1 had already introduced two spark plugs arrangement with three valves in a neutral bore engine, in the complete specification made in the year 2004 the Respondent switched over to two valves specific description giving a go bye to the twin plugs centric description.

21. The learned senior counsel in his submissions stated that on infringement what is construed as a patent property and compare the same with the alleged infringed product, the burden is heavy on the plaintiff to establish the said factors.

22. The learned senior counsel relied upon the following decisions in support his contentions :

(a) Reliance was placed upon ***AIR 1982 SC 1444 (Bishwanth Prasad Radhey Shyam Vs. H.M. Industries)*** in particular paragraph No.17 to point out that patent is granted only for invention which must be new and useful i.e. it

must have novelty and utility and therefore essentially for a validity of the patent, it must be the inventor's own discovery as opposed to mere verification of what was already known before the date of the patent.

The learned senior counsel by relying upon the ratio of the decision as held in paragraph 33 in the above said decision contended that even after the sealing of the patent, the validity of the patent can be challenged in the High Court on various grounds for revocation or infringement and that the presumption in favour of the validity of the patent cannot be accepted.

Again by referring to paragraph 44, the learned senior counsel contended that the specifications and the claims must be looked at and construed together in order to find out what was the invention as claimed in the patent.

(b) The learned senior counsel then relied upon **1948 (52) CWN 253 (Boots Pure Drug Co. Vs. May and Baker Ltd.)** wherein the Division Bench of the Calcutta High Court has held that in order to get an interim injunction, the

prima facie validity of the patent should be shown that the prima facie infringement must also be proved apart from availability of balance of convenience. It was also stated therein that as a rule of practice if a patent is a new one, a mere challenge at the Bar would be quite sufficient for the refusal of an interim injunction as compared to a patent which is fairly old and has been up into use, in which case, it would be safe for the Court to proceed upon the presumption of its validity. The said principle was applied by the Delhi High Court in the decision reported in ***AIR 1980 Delhi 132 (National Research Development Corporation of India, New Delhi Vs. The Delhi Cloth and General Mills Co. Ltd and ors.)***

(c) The learned senior counsel then relied upon the Division Bench decision of the Delhi High Court reported in ***AIR 1997 Del 79 (Franz Xaver Huemer Vs. New Yash Engineers)***, for the proposition that even in intellectual property cases, the plaintiff has to prove prima facie case, balance of convenience and irreparable injury and that the registration of patent alone would not be sufficient and that the Court must look at the whole case i.e. the strength of the case of the

patentee and the strength of the defendant.

(d) The learned senior counsel relied upon the decision of the Calcutta High Court reported in ***AIR 1996 Cal 367 (Hindustan Lever Ltd. Vs. Godrej Soaps Limited and Ors.)*** wherein a passage from the decision of an English case reported in ***(1972) 1 All ER 1023 (Hubbard Vs. Vosper)*** of Lord Denning is quoted which is to the effect that while considering the grant of an interlocutory injunction, the Judge should look at the whole case and that he must have regard not only to the strength of the claimant but also to the strength of the defendant.

(e) The learned senior counsel then relied upon ***AIR 2000 Delhi 23 (Standipack Pvt. Ltd. and Anr. Vs. Oswal Trading Co. Ltd. etc.)*** for the proposition that no presumption of validity is attached to a patent granted by the Controller under the Act notwithstanding examination and investigation made under Sections 12 and 13 of the Act. It was also relied upon for the proposition that where an application is filed seeking for revocation of patent and question the validity of it, the Court should not grant an

injunction more so when serious controversy exist as to whether or not the invention involves any new inventive skill having regard to what was known or used prior to the date of the patent.

(f) Reliance was also placed upon **2005-BCR-3-191 (Novartis AG Vs. Mehar Pharma)** of the Bombay High Court wherein the settled principle of any matters to grant of interim injunction in relation to a patent, the party applied for it should satisfy that there is probability of the plaintiff succeeding on the trial of the suit and when the patent is of a recent date, no interim injunction should be granted especially when there is serious question as to the validity of the patent was raised by the defendant to be tried in the suit.

(g) The learned senior counsel then relied upon **2006 (33) PTC 339 (NULL) (Dhanpat Seth and Ors Vs. Nil Kamal Plastic Crates Ltd.)** the decision of the Himachal Pradesh High Court wherein the learned Judge held that by virtue of Section 107(1) of the Patents Act, in any suit for infringement of patent, every ground, on which it may be revoked under Section 64, is

available as a ground for defence. The said decision of the learned single Judge was affirmed by a Division Bench in the decision reported in **AIR 2008 HP 23**.

(h) For the proposition that where the patent is of recent origin and its validity has not been tested, the Court should not grant injunction based on the alleged infringement, as well as, the ratio that mere grant of patent does not guarantee its validity, reliance was placed upon an unreported judgment of a learned Judge of Delhi High Court Mr. Justice S. Ravindra Bhat dated 19.03.2008 in **I.A.No.642/2008 in CS (OS) 89/2008 (F.Hoffmann-La Roche Ltd., & Anr. Vs. Cipla Limited)**. The said order of the learned single Judge was also confirmed by the Division Bench in its order dated 24.04.2009 in FAO (OS) No.188 of 2008. In the case on hand, the Respondent obtained the certificate of Patent No.195904 dated 16.07.2002 and the sealing was made on 07.07.2005.

(i) The learned senior counsel then relied upon a Full Bench decision of the Delhi High Court reported in **AIR 2000 Delhi 117 (Metro Plastic**

Industries (Regd.) Vs. M/s. Galaxy Footwear) wherein a provision similar to Section 64 of the Patent Act as provided under Section 51A and 53 of the Designs Act was dealt with by the Full Bench and the Full Bench took the view that though no hard and fast rule can be laid down, in the absence of an application for cancellation of the design such a right can be enforced and no defence can be taken based on a ground of cancellation. The Full Bench further ruled that once an application for cancellation has been made then the Court can take into consideration all the relevant facts which would include the grounds raised in the application for cancellation while considering an application for grant of injunction and that consideration must be made judicial.

23. Mr.P.S.Raman, learned senior counsel also appearing for the Appellant by referring to various provisions contained in the Patent Act took pains to point out by referring to the International Search Report which was passed on to the Respondent on 13.08.2004, to state that subsequent thereafter, the Respondent came forward with its amended Patent

application on 08.11.2004, in which the claim was two valves centric as against twin plugs centric as claimed in the provisional specification made in 2002.

24. The learned senior counsel by making a specific reference to the stand of the Respondent in its amended final specification made in 2004 where specific reference has been made to US Honda Patent No.4534322 A1, pointed out that in the said amended claim, the Respondent highlighted the feature of two valves engine with improved combustion characterises and there by gave a go bye to the twin plug centric in the original specification of 2002. The learned senior counsel therefore contended that the above factors make it clear that the so called right of patent cannot be accepted in as much as US Honda Patent No. 4534322 A1 of 1985 already covered the entire features as it was a prior art.

25. The learned senior counsel by referring to the complete specification of the Honda company made on 24.01.2001, which was made 1½ years before the Respondent's application for

patent viz., 16.07.2002, contended that the same was already teaching the twin plugs provision with three valves and four valves configuration. The learned senior counsel therefore contended that the exclusive right claimed by the Respondent based on Patent No.195904 dated 16.07.2002, is open to challenge on very many grounds in the Appellant's application for revocation of the said patent under Section 64 of the Patents Act and therefore a prima facie case is made out for a triable issue to cancel the said patent.

26. The learned senior counsel by referring to the technical collaboration agreement of the Appellant with AVL, Austria under which the three valves engine of 75 cc capacity with 44 mm bore having been permitted to be manufactured with its whole specifications and when the product of the Appellant stand apart from the product of the Respondent with three valves configuration there would be no question of infringement of the so called patent right of the Respondent.

27. The learned senior counsel while referring to the Technical Collaboration Agreement dated 13.11.2000, of the

Appellant with M/s AVL, Austria contended that the Appellant had agreed for a consideration of EURO 349.522 for designing the new 3-valve cylinder head with AVL Controlled Combustion Burn Rate (CCBR Combustion) apart from a sum of EURO 409.000 by way of consideration for the Technical Collaboration Agreement, and that the Appellant's product of 125 cc 'FLAME' motorcycle with three valve configuration is in no way comparable to the Respondent's patented product in Patent No.195904 and therefore there can be no infringement even if the Respondent's patent was a recognised one.

28. The learned senior counsel however by making a specific reference to the Search Report dated 08.06.2004, mailed on 13.08.2004 pointed out that the Respondent's provisional patent application dated 16.07.2002, was rejected on the ground of prior art of US Patent No.4534322 A1 (MATSUDA) dated 13.08.1985 and that in the subsequent complete specification dated 07.07.2003 and the amended final specification dated 08.11.2004, the Respondent shifted its claim of twin plug centric into one of twin valve centric and therefore there was a prima

facie case made out for a triable issue to cancel the patent.

29. The learned senior counsel drew our attention to the order of the Hon'ble Supreme Court dated 03.03.2008, passed in C.S.No.1759 of 2008 in support of his stand that having regard to the provision contained in Section 13(4) read with Sections 47 and 48 of the Patents Act especially by taking note of the effect of the counter affidavit, the Hon'ble Supreme Court interfered with the order of injunction granted in favour of the party who already had the patent in its possession and while setting aside the order of the Division Bench, the Hon'ble Supreme Court remitted the matter back to make an analysis of the scheme of the provisions under the Patents Act and its effect on a registered patent.

30. The learned senior counsel therefore contended that having regard to the facts pleaded by the Appellant vis-a-vis the patent granted in favour of the Respondent, there can be every possibility of the Appellant succeeding in its application for revocation of the patent and therefore the injunction granted in

favour of the Respondent is liable to be set aside.

31. As against the above submissions of the learned senior counsel for the Appellant, Mr.C.A.Sundaram, learned senior counsel appearing for the Respondent in his submissions stated that while seeking for an order of injunction as against the Appellant what all required was the availability of a registered valid patent, balance of convenience, irreparable loss and infringement by the Appellant under the patent law.

32. The learned senior counsel while transversing the submissions of the Appellant's counsel contended that in order to show that the patent of the Respondent was invalid in law, it is the bounden duty of the Appellant to show that there was a prior art with reference to the patent granted in favour of the Respondent. Highlighting his submissions, the learned senior counsel submitted that to examine the question as to what is the patent that exist, it would be relevant to see how the people in the industry look at the product patented and what the patent teaches.

33. The learned senior counsel also contended that the construction of a validated patent must be accepted. As far as the prior art is concerned, according to the learned senior counsel what can be looked at in a prior art is the pith and marrow and one should not compare the complete and provisional specification for that purpose.

34. The learned senior counsel relied upon the following decisions in support his contentions :

(a) The learned senior counsel relied upon ***AIR 1936 Bombay 99 (Lallubhai Chakubhai Vs. Chimanlal & Co.)*** where a learned Single Judge of the Bombay High Court held that

".....A patentable combination is one in which the component elements are so combined as to produce a new result or to arrive at an old result in a better or more expeditious or more economical manner. If the result

produced by the combination is either a new article or a better or a cheaper article than before the combination may afford subject for a patent....."

".....A specification must be construed impartially, and the Court is generally slow to construe it against the patentee. But the construction must not only be a 'benevolent', but a reasonable one....."

"A patent may sometimes be infringed by taking a part only of the invention, but that depends upon the part for which protection is asked is a new and material part, especially in the case of a combination. If it is not new and material, the Court must consider what is the substance of the invention, and to do so it has to consider the relative importance of all the parts of the invention. The essential part or the substance of the plaintiff's invention is, in his own words, the use of pressure, and

therefore there could be no infringement unless the use of pressure by the defendants in their process was proved....." (underlining is ours)

(b) In the decision reported in **1884 (6) RPC 49 (William Needham and James Kite Vs. Johnson and Co.)** it is held as under:

"Then comes the question, what is the infringement of a combination of elements in a machine? There is not an infringement if you have produced the same results by a different combination of different elements. That is another and a different combination, and is not either an improvement or anything else of the other. It is absolutely and wholly different, if there is a different combination of different elements."
(Emphasis added)

(c) In support of the submission that what the patent teaches should be analysed as was

looked into by the people in the industry viz., based on the knowledge of a skilled man and common general knowledge, the learned senior counsel relied upon the decision reported in **1998 RPC 727 (Lubrizol Corp. & another Vs. Esso Petroleum Co. Ltd and Others)** where it is held as under:

"Patent specifications are intended to be read by persons skilled in the relevant art, but their construction is for the Court. Thus the Court must adopt the mantle of the notional skilled addressee and determine, from the language used, what the notional skilled addressee would understand to be the ambit of the claim. To do that it is often necessary for the Court to be informed as to the meaning of technical words and phrases and what was, at the relevant time, the common general knowledge; the knowledge that the notional skilled man would have."

(d) According to the learned senior counsel by virtue of the amendment to Section 48 (2) (a)

& (b) a provision which was originally positive in its construction is now negatively worded and therefore the injunction granted should be confirmed. The learned senior counsel relied upon **AIR 1982 SC 1444 (Bishwanath Prasad Radhey Shyam Vs. H.M.Industries)** which was rendered prior to the amendment to distinguish the above legal position.

(e) In the decision reported in **1972 RPC 457 (The General Tire & Rubber Company Vs. The Firestone Tyre and Rubber Company Ltd and others)** on the principle of common General Knowledge, it is held as under:

"For construing the patent in suit and again for reaching a conclusion, if there was no anticipation, on the issue of obviousness, it is necessary for us to put ourselves into the position of a skilled addressee at the time the specification was published on 20th November, 1950. For it is to a skilled addressee-a skilled man reasonably well versed in the art - that the specification is deemed to be

addressed, and it is by the standards of the common general knowledge of such a man that one tests whether the invention was obvious or not."

(f) In the House of Lords decision reported in **1982 RPC 183 (Catnic Components Limited and another Vs. Hill and Smith Limited)** at page 242 it has been held as under:

"My Lords, a patent specification is a unilateral statement by the patentee, in words of his own choosing, addressed to those likely to have a practical interest in the subject matter of his invention (i.e. "skilled in the art"), by which he informs them what he claims to be the essential features of the new product or process for which the letters patent grant him a monopoly. It is those novel features only that he claims to be essential that constitute the so-called "pith and marrow" of the claim. A patent specification should be given a purposive construction rather than a purely literal one

derived from applying to it the kind of meticulous verbal analysis in which lawyers are too often tempted by their training to indulge. The question in each case is: whether persons with practical knowledge and experience of the kind of work in which the invention was intended to be used, would understand that strict compliance with a particular descriptive word or phrase understand that strict compliance with a particular descriptive word or phrase appearing in a claim was intended by the patentee to be an essential requirement of the invention so that any variant would fall outside the monopoly claimed, even though it could have no material effect upon the way the invention worked."
(Underlining is ours)

(g) In a Division Bench decision of the Delhi High Court reported in **AIR 1978 Delhi 1 (Raj Prakash Vs. Magnet Ram Choudhary and others)** it has been held as under in paragraph

12 :

"12. We have therefore, to read the specifications and the claims from the specifications and the claims from the point of view of the persons in the trade manufacturing film strip viewers. It is the pith and marrow of the invention claimed that has to be looked into and not get bogged down or involved in the detailed specifications and claims made by the parties who claim to be patentees or alleged violators....." (Underlining is ours)

again in paragraph 13 it is held that:

"13.....It is settled law that the title of the specifications of an invention claimed does not control the actual claim. A misleading title similarly is of little consequence. It is on a proper construction of the specifications and the claims that the true nature of the invention claimed is to be determined and the patent granted has to be construed....." (Emphasis added)

(h) In the decision of the Judicial Committee of the Privy Council reported in **Vol. XX No.32 RPD 745 (Consolidated Car Heating Company Vs. Came)** the Privy Council referred to an earlier decision of the Chancery Division @ pg. 765 which is to the following effect:

"In Proctor v. Bennis (L.R. 36 Ch.D. 740), Lord Justice Cotton, at page 750, said:- "In my opinion omissions and additions may be very material in considering whether, in fact, the machine of the Defendant is an infringement of the combination which the Plaintiff claims; but if the Defendant really has taken the substance and essence of the Plaintiff's combination, the mere fact that certain parts are omitted or certain parts added cannot prevent his machine from being an infringement of the Plaintiff's Patent." (Underlining is ours)

thereafter it was ultimately held as under:

".....For if the merit consists in

the idea or principle which is embodied in it, and not merely in the means by which that idea or principle is carried into effect, a machine which is based on the same idea or principle may still be an infringement, although the detailed means for carrying it into effect may be somewhat different....."

(i) In another Privy council decision reported in **AIR 1930 PC 1 (Canadian General Electric Co. Ltd. Vs. Fada Radio Ltd.)** the Privy Council extracted the words of Lordship Maclean, J., which reads as under:

"There must be a substantial exercise of the inventive power or inventive genius, though it may in cases be very slight. Slight alterations or improvements may produce important results and may disclose great ingenuity. Sometimes it is a combination that is the invention; if the invention requires independent thought, ingenuity and skill, producing in a distinctive form a more efficient

result, converting a comparatively defective apparatus into a useful and efficient one, rejecting what is bad and useless in former attempts and retaining what is useful, and uniting them all into an apparatus which, taken as a whole, is novel, there is subject matter. A new combination of well known devices, and the application thereof to a new and useful purpose, may require invention to produce it and may be good subject matter for a patent." (Emphasis added)

(j) In the decision reported **AIR 1969 Bombay 255 (F.H. & B. Corpn. Vs. Unlchem Laboratories)** Justice Vimadalal on the question as to what is an invention has held as under in paragraph 16(i):

"16(i). An invention consisting of the production of new substance from known materials by known methods cannot be held to possess subject-matter merely on the ground that the substances produced are new, for the substances produced may serve no

useful purpose, in which case the inventor will have contributed nothing to the common stock of useful knowledge (the methods and materials employed being already known) or of useful materials (the substances produced being ex hypothesis, useless)."

(k) In the Division Bench decision of our High Court reported in **(2000) 3 MLJ 85 (Gandhimathi Appliances Limited Vs. L.G.Varadaraju and others)** at page No.93 the Division Bench has stated as under in paragraph 20:

"20....Though the grant of a patent by itself does not guarantee it's validity, the fact that a patent has been granted must be given some weight and significance while considering the question of prima facie case. The plaintiffs are entitled to place reliance on the fact that they have already secured patent. The grant of the patent does not on the basis of such grant, make the patent

impregnable. The burden is always on a plaintiff to establish its case prima facie before it can claim any interlocutory relief. It is always open to the defendant to question the validity of patent. When the defendant is able to point out some grounds for regarding the patent already granted, as being prima facie invalid then at the interlocutory stage, this factor of patent having been granted to the plaintiff would cease to be of significance while considering the question of prima facie case. The burden of proof on the plaintiffs at the interlocutory stage, therefore is not so rigorous, as it would otherwise be, if no patent had been granted in the first place." (Emphasis added)

The Division Bench has also held in paragraph 30 as under:

"30. Applying the test set out in the decisions to which we have referred to earlier, the inevitable conclusion that

we reach is that the product patented by the plaintiff, though when dissected and as part taken separately may now show inventiveness, a combination of the same, and the fact that a new use has been discovered for a combination of known integers, and the further fact that inventive steps by way of ingenuity and skill were required to be and have been displayed in bringing about such a combination and discovering the mode of application of known integers for a product, whose usefulness has been amply demonstrated by the large number of units of wet grinders sold by the plaintiffs since it was first, put on the market in the year 1991, establish that the patent granted in favour of the plaintiffs cannot be regarded prima facie as invalid. The plaintiffs must be held to have made out a prima facie case for grant of an injunction....."

(I) The learned counsel also relied upon the following decisions:

(i) AIR 1936 Bombay 99 (Lallubhai Chakubhai Vs. Chimanlal & Co)

(ii) Vol. XLIV (5) RPD 105 (Boyee Vs. Morris Motors Ld.)

(iii) 1903 (20) RPC 225

(iv) 1995 RPC 585

(m) As far as the submission made based on prior art is concerned, the learned senior counsel submitted that it is not merely similarity but also identity should be shown and for that purpose placed reliance upon **Vol.XXVI IOJ 78** and **1977 FSR 137 (Badische Anilin & Soda Fabrik AG (Distiller's) Application.**

35. The learned senior counsel by relying upon a report in a magazine viz., 'Techno Treat' contended that a comparative study of the Respondent's product with Honda patent, what is disclosed in the said magazine can be taken as how the industry has understood the product as the report states that the twin plug configuration in the Honda product was in a large bore engine as compared to the Respondent's product in a small bore engine.

36. The learned senior counsel by referring to the complete specification filed by the Respondent dated 07.07.2003, submitted that the patent as claimed by the Respondent related to an invention to improve the combustion characteristic of an internal combustion engine with improved combustion capacity. By pointing out the same, the learned senior counsel contended that the teaching of the patent of the Respondent's invention was a combination of twin plug configuration in a small bore engine with twin valve facility along with other allied provisions in the engine in order to achieve improved internal combustion.

37. The learned senior counsel contended that the Respondent made a search and brought to the notice of the Patent Controller by pointing out that the Honda twin plug was in a large bore engine and the Patent Controller was satisfied with the differentiation while granting the patent after the submission of the complete specification. The learned senior counsel by referring to Section 57 of the Patent Act contended that the Statute provided for making necessary amendments to the claim

for better understanding of the invention. By referring to the Honda Patent No.4534322 A1 the learned senior counsel contended that it related to a large bore engine and 'V' type engine which cannot be construed as a prior art.

38. As far as the Honda Patent application 678 of 2001 dated 17.07.2001, the learned senior counsel pointed out that the invention though related to an engine with plurality of ignition plugs attached to the same combustion chamber, the same is not comparable as the said engine was fitted with a water pump and thermostat and also fitted with a radiator for a cooling system inbuilt in the engine which is not comparable at all to the Respondent's patented product.

39. As far as the AVL specification is concerned, the learned senior counsel by referring to the report of the AVL engineers themselves pointed out that the disadvantage of a three valve engine listed makes a specific reference to the fact that big bore i.e. above 70 mm would only work with twin spark plug.

40. As far as the allegation of infringement is concerned, according to the learned senior counsel except the fact that the Appellant product is a three valve in all other respect it matched with the Respondent's patented product viz., twin plug, internal combustion engine with lean burn fuel. The learned senior counsel therefore contended that the third valve which is a variant being a cosmetic one and if such a variant is relied upon to escape from the allegation of infringement, it must be shown to be a substitute or a different way of doing the same thing. According to the learned senior counsel, the variant did not in any way improve the ignition or the engine function and therefore it has to be construed as a cosmetic one as it had nothing to do with the invention of the Respondent.

41. The learned senior counsel in his submissions stated that the teaching of prior art not being the same, the injunction granted cannot be found fault with.

42. On the balance of convenience, the learned senior

counsel contended that the Respondent's product came into the market three years prior to the Appellant's product and that it had already achieved commercial success. The learned senior counsel also contended that the product was recognised by the entire field in the automobile industry and more than 50% of the market is possessed by the Respondent as compared to the Appellant's product which is yet to be launched as the booking itself was announced on 13.12.2007, while injunction was granted on 19.12.2007 and that when the Division Bench suspended the injunction on 20.12.2007, there was a specific condition that the Appellant will not claim equity later on.

43. The learned senior counsel also relied upon the subsequent order of the Hon'ble Supreme Court dated 18.01.2008, which set aside the order of the Division Bench and ultimately the Appellant's motorcycle viz., 'FLAME' was introduced in the market on 10.03.2007 with one spark plug alone.

44. By referring to the above factors, the learned Senior counsel contended that the Appellant's business is not in any way

affected and therefore no irreparable hardship would be caused to the Appellant by the grant of the injunction. The learned senior counsel relied upon **1978 RPC 761 (Corruplast Ltd. Vs. George Harrison (Agencies) Ltd.)** and **1984 FSR 574 (Monsanto Company Vs. Stauffer Chemical Co.)** in support of his submissions.

45. To meet the arguments of the learned senior counsel for the Respondent that a strong prima facie case should have been made by the defendant to resist an injunction, Mr.A.L.Somayaji, learned senior counsel by relying upon **AIR 1980 Delhi 132 (National Research Development Corporation of India, New Delhi Vs. The Delhi Cloth and General Mills Co. Ltd. and Ors.)** stated that it is on the plaintiff to show strong prima facie case and not on the defendant. Reliance was also placed upon **AIR 1997 Delhi 79 (Franz Xaver Huemer Vs. New Yash Engineers)**.

46. By relying upon **1969 RPC 367 (Rodi & Weinberger Vs. Henry Showell)** the learned senior counsel contended that

to allege infringement all the integers should be shown to be present and that the Respondent failed to show that the third valve is a variant and that the Respondent has also failed to show that in the Honda Patent bore size is more than 70 mm while on the other hand the said patent did not refer to any bore size and therefore the Appellant's stand based on prior art was well founded.

47. Again Mr.P.S.Raman, learned senior counsel also appearing for the Respondent contended that what AVL teaches is that the third valve aids lean burn, then again there was a good ground made out by the Appellant for a triable issue and with that consideration, the grant of injunction was not justified.

48. Having heard the learned counsel for the respective parties and before considering the various submissions, it is worthwhile to refer to some of the relevant provisions of Patents Act 1970 for the proper disposal of these appeals viz.,

(i) Sections 2(j), (ja), (l) and (m) talks of invention, inventive step, new invention and patent which reads as under:

"Section 2(j) "invention" means a new

product or process involving an inventive step and capable of industrial application;"

"Section 2(ja) "inventive step" means a feature of an invention that involves technical advance as compared to the existing knowledge or having economic significance or both and that makes the invention not obvious to a person skilled in the art"

"Section 2(l) "new invention" means any invention or technology which has not been anticipated by publication in any document or used in the country or elsewhere in the world before the date of filing of patent application with complete specification, i.e., the subject matter has not fallen in public domain or that it does not form part of the state of the art;

"Section 2(m) "patent" means a patent for any invention granted under this Act;

(ii) Section 3 falling under Chapter-II mentions as to what are all not inventions.

(iii) Section 9 prescribes as to how and in what manner a

provisional and complete specification can be filed.

(iv) Under Section 10(4) it is stipulated that every complete specification should describe fully and particularly the invention and its operation or use and the method by which it is to be performed. The sub-clause (a) to (d) of 10(4) reads as under:

"Section 10(4) Every complete Specification shall--

(a) fully and particularly describe the invention and its operation or use and the method by which it is to be performed;

(b) disclose the best method of performing the invention which is known to the applicant and for which he is entitled to claim protection; and

(c) end with a claim or claims defining the scope of the invention for which protection is claimed;

(d) be accompanied by an abstract to provide technical information on the invention:"

(v) Section 11 talks of priority dates of claims of a complete specification. Sub-clause (7) with its first proviso to Section 11-A is to the following effect;

"Section 11-A (7): on and from the date of publication of the application for patent and until the date of grant of a patent in respect of such application, the applicant shall have the like privileges and rights as if a patent for the invention had been granted on the date of publication of the application;

Provided that the applicant shall not be entitled to institute any proceedings for infringement until the patent has been granted:"

(vi) Examination of an application through an Examiner by the Controller to call for a report as a result of the investigation made under Section 13 is provided under Section 12 while the various aspects to be taken into account while examining the application for a patent referred to under Section 12 to the examiner is specified in Section 13.

(vii) Section 25 of the Act provides for opposition of the patent either before or after the grant.

(viii) Section 43 falling under Chapter VIII specifies the manner in which the patent is to be granted.

(ix) Under Section 45 of the said Chapter, it is specified

that every patent should be dated as of the date on which the application for patent was filed and the said date should be entered in the register. Sub-clause (3) to Section 45 specifically states that no suit or other proceedings shall be commenced or prosecuted in respect of an infringement committed before the date of publication of the application.

(x) The grant of patent is also subject to certain conditions as stipulated in Section 47 of the Act.

(xi) The rights of the patentees has been stipulated under Section 48, which reads as under:

"Section 48. Rights of patentees.-- Subject to the other provisions contained in this Act and the conditions specified in Section 47, a patent granted under this Act shall confer upon the patentee---

(a) where the subject-matter of the patent is a product, the exclusive right to prevent third parties, who do not have his consent, from the act of making, using, offering for sale, selling or importing for those purposes that product in India;

(b) where the subject-matter of the patent is a process, the exclusive right to prevent third

parties, who do not have his consent, from the act of using that process, and from the act of using, offering for sale, selling or importing for those purposes the product obtained directly by that process in India:"

(xii) Section 57 falling under Chapter-X provides for amendment of application and specification or any document relating thereto before the Controller.

(xiii) Section 64 falling under Chapter-XII provides for revocation of patents granted either before or after the commencement of the Act. The relevant part of the said Section falling under sub-section (1)(e),(f),(j) and (m) reads as under:

"Section 64(1)(e): that the invention so far as claimed in any claim of the complete specification is not new, having regard to what was publicly known or publicly used in India before the priority date of the claim or to what was published in India or elsewhere in any of the documents referred to in Section 13;

Section 64(1)(f): that the invention so far as claimed in any claim of the complete specification is obvious or does not involve any inventive step,

having regard to what was publicly known or publicly used in India or what was published in India or elsewhere before the priority date of the claim;

Section 64(1)(j): that the patent was obtained on a false suggestion or representation;

Section 64(1)(m): that the applicant for the patent has failed to disclose to the Controller the information required by section 8 or has furnished information which in any material particular was false to his knowledge;"

(xiv) Section 104-A(1) specifies about the burden of proof in case of suits concerning infringement which reads as under:

"Section 104-A(1): In any suit for infringement of a patent, where the subject-matter of patent is a process for obtaining a product, the Court may direct the defendant to prove that the process used by him to obtain the product, identical to the product of the patented process, is different from the patented process if,--

(a) the subject-matter of the patent is a process for obtaining a new product; or

(b) there is a substantial likelihood that the identical product is made by the process, and the patentee or a person deriving title or interest in the patent from him, has been unable through reasonable efforts to determine the process actually used;

Provided that the patentee or a person deriving title or interest in the patent from him, first proves that the product is identical to the product directly obtained by the patented process."

(xv) Section 107 specifies the defence available in a suit for infringement which reads as under:

"Section 107: Defence, etc., in suits for infringement.-- (1) In any suit for infringement of a patent, every ground on which it may be revoked under section 64 shall be available as a ground for defence.

(2) In any suit for infringement of a patent by the making, using or importation of any machine, apparatus or other article or by the using of any process or by the importation, use or distribution of any medicine or drug, it shall be a ground for defence that such making, using, importation or distribution is in accordance with any one or more

of the conditions specified in section 47."

49. Keeping the above provisions of the Patents Act in mind when we consider the rival submissions of the parties, we are able to discern the following uncontraverted facts viz.,

(a) The Respondent's patent application along with the specifications was filed on 16.07.2002. In the said application, the invention claim related to improvement in the combustion characteristic of a single cylinder internal combustion engine working on four stroke principle with two valves and with two spark plugs.

(b) On 07.07.2003, the Respondent filed its amended complete specification, wherein, it was claimed that the provision of pair of spark plugs was an improvement of the prior art with one spark plug and that the provision of two spark plugs improved combustion of lean mixture of fuel without affecting the performance.

(c) On 13.08.2004, the International Search

Report came to be made which stated that the claimed invention cannot be considered novel or cannot be considered of involving inventive step when the document is taken alone in the light of the US Honda Patent No.4534322 A1 (MATSUDA) dated 13.08.1985. Subsequently, the Respondent filed the provisional / complete specification on 08.11.2004 titling the same as an improved internal combustion engine working on four stroke principle.

(d) Honda Patent No.4534322 is known as US Patent MATSUDA dated 13.08.1985, the engine of which contained two spark plugs with two valves. The details of the said patent as placed before the Court did not specify the bore dia, but it was a 'V' type engine.

(e) The Respondent's patent No. 195904 of 16.07.2002, came to be issued with a date of sealing of 07.07.2005, declaring the invention as an Improved Internal Combustion Engine working on four stroke principle and was published in Issue No.28/2005 dated 29.07.2005.

(f) The Appellant entered into a Technical

Assistance Agreement dated 13.11.2000, with M/s. AVL, Austria for designing a new three valve cylinder head with lean burn combustion system with a provision for twin plugs. The consideration as stipulated in the agreement payable by the Appellant was fixed at a sum of EURO 349.522. The agreed bore dia in the said agreement was 44 mm and upwards with cylinder volume capacity of 75 cc and upwards with three valves provision.

(g) The Appellant entered into a Technical Collaboration Agreement with M/s. AVL, Austria on 10.06.2005.

(h) The Appellant has filed his application for revocation of Respondent's patent No.195904 before the Intellectual Property Appellate Tribunal, Chennai on 24.08.2007. In the grounds of revocation, the Appellant contended that the subject matter of the patent specification stands anticipated, it is obvious, it is not patentable and that the patent specification is not clear. In support of its stand that the Respondent's patent stands anticipated, the Appellant relied upon the Japan publication No.59-060056 published on 05.04.1984. For the ground that the Respondent's

patent was not new, the Appellant relied upon US Patent No.4534322 of MATSUDA. For the contention that the Respondent's invention claim was obvious and that internal combustion engine with two spark plugs was already known, the Appellant relied upon various other existing patents.

(i) The invention as claimed by the Respondent in the application filed in support of the injunction application is usage of two spark plugs for efficient burning of lean air fuel mixture in a small bore engine (bore size between 45 mm and 70 mm) in order to provide improved combustion characteristic of lean air fuel mixture burning as stated in paragraphs 11 and 14 of the affidavit filed in support of the injunction application with specific averment in paragraph 34 (i) to the effect that its invention is spark plug centric and not valve centric.

(j) There was a complete specification bearing No.678-2001, dated 17.07.2001 of Honda Giken Kogyo Kavushiki Kaisha a Corporation of Japan claiming invention of four stroke engine with plurality of ignition plugs exposed to the

same combustion chamber stating that it can be applied widely to any engine i.e. without any restriction to the size of the bore.

50. The sum and substance of the invention as claimed by the Respondent is a small bore four stroke engine having twin spark plugs with two valves to achieve efficient combustion on lean air fuel mixture.

51. The teachings of the patent according to the Respondent is an improvement in the combustion (combustion is the process of burning) of lean air mixture in the small bore engine for improved fuel efficiency and emission characteristics . According to the Respondent the arrangement of twin spark plugs in a small bore engine is positioned in such a manner that efficient burning of lean air mixture takes place to provide improved combustion and thereby there would be high saving of fuel while at the same time without compromising on the performance of the engine. It is further contended on behalf of the Respondent that if the said teaching of the Respondent's

patent is not in controversy, the Respondent is entitled for the injunction as against the infringement of the said patent.

52. The infringement complained of is that the Appellant's 125 cc motorcycle called "FLAME" contains a four stroke internal combustion engine in a small bore lean air burn engine of size 54.5 mm to 53.5 mm possessing combustion of lean air fuel mixture with two spark plugs located diametrically opposite. The Respondent would therefore contend that the characteristics of the product of the Appellant in its 125 cc motor cycle called "FLAME" having everything similar and identical to that of the patented product of the Respondent except the three valve arrangement and the third valve being a cosmetic one, the allegation of infringement is fully established and consequently the injunction applied for and granted by the learned Judge is justified.

53. As against the above case pleaded by the Respondent, according to the Appellant the first and foremost allegation of infringement as against the Appellant cannot be accepted since

the product of the Appellant is covered by the concept of prior art, in so far as, it relates to twin spark plug arrangement in an internal combustion engine and apart from the fact that the provision of three valves in its internal combustion engine is by way of an arrangement with M/s AVL, Austria makes all the difference in the working of the engine.

54. On behalf of the Appellant, it is strenuously contended that the three valves arrangement in its internal combustion engine is not a cosmetic one nor a variant. It is claimed that the US Honda Patent bearing No.4534322, nowhere stipulates the bore size while on the other hand a reading of the said patent discloses that in order to overcome the disadvantage of effective combustion process in a large bore, the invention of introduction of twin plug came to be made for effective combustion process in an internal combustion engine, that therefore the Respondent's claim of new invention while securing the Patent No.195904 itself will not stand and consequently it would necessarily result in the revocation of it, in its application filed before the Tribunal.

55. As far as the stand of the Respondent that its patented product is plug centric and not valve centric, the Appellant placed reliance upon the amended complete specification dated 08.11.2004, wherein, after describing the nature of its product and after making reference to the International Search Report which pointed out that in the light of the US Patent No.4534322 A1, the invention claimed by the Respondent cannot be considered novel or possess any inventive step, the Respondent attempted to highlight the working of the product by concentrating on the provision of two valve as against three valves pointed out in the US patent and ultimately while summarising its invention in the form of a claim gave thrust to the two valve arrangement for efficient burning of lean air fuel mixture in a small bore engine which display the Respondent real claim based on valve centric and not plug centric.

56. According to the Appellant when the ultimate patent came to be granted/sealed on 07.07.2005, after the amended final complete specification dated 08.11.2004, it is no longer open to the Respondent to still contend that efficient internal

combustion of the lean air fuel mixture was due to twin plug arrangement was a misnomer and therefore the patent granted itself cannot be held to be valid as there is every likelihood of the said patent being revoked in the Appellant's application for revocation before the Appellate Tribunal.

57. One other factor referred to by the Appellant is the specific reference made by the Respondent in its amended complete specification where while referring to the US Patent No.4534322 A1, the Respondent while admitting the use of two spark plugs in an engine with three valves made a statement that such a provision was in a large bore engine with diameter of more than 70 mm as a known prior art. According to the Appellant, such a statement contained in the amended complete specification of 2004 was contrary to the specification contained in the US patent and came to be made by the Respondent distortedly with a view to overcome the hurdle pointed out in the International Search Report dated 13.08.2004 and consequently, the Respondent cannot be permitted to rely on the patent and the alleged infringement by the Appellant for the grant of

injunction.

58. When we analysis the above stand of the respective parties, we find in the description of the US Patent No.4534322, in particular in the background of the invention and the object of the invention a specific statement as found which is to the following effect viz.,

"....This in turn requires larger cylinder heads 106 and 108, precluding the possibility of making the engine more compact."

Thereafter, while considering the object of the invention, it is stated that

"The present invention is intended to overcome these disadvantages, by means of a pair of cylinder heads, in a V type horizontal opposition engine, which have spark plugs installed from the cam chain chamber side, bringing about compactness as well as the ability to use the two heads together."

A reading together of the last part of the "background of the invention" and the first part of the "object of the invention" as extracted above, it is quite clear that the patented US invention contained several improvements including the disadvantage of larger cylinder heads which was overcome by the patented product and the same obviously means the provision of twin spark plugs with three valve fitted in a small bore engine for efficient internal combustion process.

59. If such a reading of the US patent can be prima facie inferred, by a reading of the said US patent No.4534322, we find force in the submission of the Appellant that there is a ground available for the Appellant to be considered in its application for revocation pending before the Appellate Tribunal. Besides, the above position in regard to the Respondent's patent vis-a-vis US Patent No. 4534322, the contention of the Respondent that effective combustion process in a lean burn air mixture was due to twin plug arrangement as highlighted in its pleading requires to be examined with little more circumspection, in as much as, a close reading of the amended final complete specification of the

Respondent dated 08.11.2004, discloses that the Respondent wanted to highlight more on the twin valve provision rather than twin plug arrangement. It would be worthwhile to extract some of the statements contained in the said amended complete specification of the Respondent dated 08.11.2004 viz.,

"This invention relates to improvement in the combustion characteristics of a two valve per cylinder internal combustion engine working on four stroke principle....."

"These engines are provided with two valves namely inlet valve and exhaust valve. These valves open in a cavity in the cylinder head conventionally known as combustion chamber. The valves are actuated by rocker arms....."

".....There are various methods known to improve the engine performance by optimizing the combustion characteristics. Some of these are improved ignition timing, improved combustion chamber design, improved

valve timing and valve angles etc."

"The invented two valve per cylinder engine with improved combustion characteristics for efficient air fuel mixture burning, essentially comprises of a pair of spark plugs (21 & 22), sleeve (23), O rings (24 and 24a), cylinder head (25), circlip (26) and sleeve cap (27)."

"With reference to figure 2, the two valve per cylinder engine with improved combustion characterises for lean air fuel mixture burning has two spark plugs are located in the cylinder head 25 diametrically opposite to each other....."

"The applicants have developed a two valve, per cylinder 150 cc capacity with invented features of this application and the same has been evaluated....."

"WE CLAIM:

(1) An improved Internal Combustion Engine working on four stroke principle, having two valves per cylinder, for efficient

burning of lean air fuel mixture used in engines wherein the diameter of cylinder bore ranges between 45 mm and 70 mm, characterized in that said Internal Combustion Engine comprises a pair of spark plugs....."

(6) An improved Internal Combustion Engine working on four stroke principle, having two valves per cylinder, for efficient burning of lean air fuel mixture used in engines wherein the diameter of cylinder bore ranges between 45 mm and 70 mm.....

(7) An improved single cylinder Internal Combustion Engine working on four stroke principle having two valves for efficient burning of lean air fuel mixture used in engines wherein the diameter of said cylinder bore ranges between 45 mm and 75 mm substantially as herein described and as illustrated in the drawings accompanying the specification."
(Emphasis added)

60. Therefore in the original specification filed on 16.07.2002, the provision of twin spark plugs as against the prior art engine with one spark plug was the centric of the claim.

61. In the amended complete specification dated 07.07.2003 also, the centric point was the provision of two spark plugs for generating spark at two predetermined location at the same time to enable the engine to run efficiently resulting in decreased emission, decreased fuel consumption and good drivability.

62. It is relevant to note that after the filing of initial specification dated 16.07.2002, as well as the amended complete specification on 07.07.2003, the International Search Report dated 13.08.2004, came to be issued pointing out that the claimed invention cannot be considered novel or involving inventive step in the light of the US Patent No.4534322 A1 and that thereafter making a specific reference to the said US patent, the Respondent came forward with its amended final complete specification dated 08.11.2004, giving more thrust to the

provision of two valves even while referring to the twin plugs configuration which apparently appeared to have persuaded the Controller to grant the patent and sealing on 07.07.2005.

63. If such a prima facie conclusion is inevitable, we are constrained to state that there is considerable force in the claim of the Appellant in contending that the patent of the Respondent suffers from the *vice* of prior art and obviousness.

64. At the risk of repetition, it will have to be stated that the US Honda Patent having twin plugs configuration, without specific reference to the bore size with three valve provision granted on 13.08.1985, would certainly militate against the claim of the Respondent based on its patent dated 16.07.2002, sealed on 07.07.2005 in Patent No.195904. In all fairness, it would be appropriate for the parties to workout their remedies in the application for revocation pending before the Appellate Tribunal filed at the instance of the Appellant in order to ascertain whether or not the grounds raised in the said application would render the already granted patent in favour of the Respondent invalid. In as

much as Section 107 of the Patents Act enable the Appellant in a suit for infringement of a patent to rely upon every ground on which it may be revoked under Section 64 as a ground of defence for the defendant, the parties can work out their remedy in the suit as well.

65. We are of the considered opinion that such grounds raised by the Appellant in its application for revocation included the grounds viz., anticipated patent, obviousness in the patent and the invention in the patent is not patentable. In support of the ground that the patent stands anticipated, the Appellant relied upon Japan Patent No.59-060056 dated 05.04.1984 and the characteristic contents in the said publication to show that the Respondent patent contains the very same characteristics. As far as the ground that the patent is not new, the Appellant relied upon US Patent No.4534322 published on 13.08.1985, which again was a specific ground raised in the present suit as well as in the application for injunction. For the contention that the invention is obvious, the Appellant relied upon several patents granted in 1938, 1989 and certain other publications

referred in detail in the application for revocation.

66. Apart from the above analysis, when we consider the claim of valid patent by the Respondent and the alleged infringement by the Appellant it will be worthwhile to understand the teachings of the already patented product of the Respondent and the claim of the Appellant in respect of the alleged infringed product viz., 125 cc 'FLAME', we had an opportunity of making a reference to an article written by a student of Rajiv Gandhi School of Intellectual Property Law, IIT Kharagpur, Mr.J.Sai Deepak titled "*SPARKS FLY AS TITANS CROSS PLUGS*". The said article throws much light on the working of the product of the patentee viz., the Respondent and that of the Appellant. We deem it appropriate to extract a few points expressed in the said article which reads as under:

".....Through its written description, Bajaj has explained in sufficient detail the disadvantage of using a single spark plug, as opposed to using twin spark plugs located preferably diametrically to each other (US patent 4177783 too contains a

similar arrangement). This is because of better-controlled ignition timing in the latter and lesser time taken for the flame to travel during combustion. It has specifically listed the merits of use of twin spark plugs in a lean mixture (a mixture where the proportion of fuel in air is lesser when compared to rich mixture).

The novelty according to Bajaj, also lies in the use of a sleeve to protect the spark plug which is susceptible to exposure to lubricating oil. Such being the case, the emphasis and the scope of protection would be limited to use of twin spark plugs in a single cylinder with two valves, one plug protected by a sleeve. It is interesting to note that of the four patents cited in the International Search Report in the PCT application, 3 relate to inventions only on sleeve, and only one speaks of use of twin spark plugs.

CC-VTi, on the other hand, predominantly is about even combustion of fuel by altering the air-fuel mixture received by the 2 intake ports or valves. Usually, a cylinder has one intake and one exhaust valve. Earlier, the charge (air-fuel mixture) was either subjected to swirl or a tumble

depending on the load conditions and speed. The stirred or circumferential motion of charge in the cylinder is called swirl, whereas a motion directed towards the axis of the cylinder is called tumble.

The former is used for a lean mixture and the latter is used for richer mixtures at high speeds. Several patents on the use of these phenomena exist. TVS's technology combines both these phenomena with 2 intake ports, providing swirl and tumble simultaneously, making the design compatible for both lean and rich mixtures. The degree of swirl would be greater for a lean mixture and the degree of tumble for rich mixture. This design ensures even combustion of fuel in all corners of the cylinder and is further marked by the use of twin spark plugs, which as explained earlier, provides fuller combustion.

This shows that the points of emphases in the designs of both these technologies differ considerably, notwithstanding the use of twin spark plugs in both instances....." (Emphasis added)

67. The distinction made out by the Author of the said

article is quite appealing and does not conflict with the facts pleaded by the parties before us. By taking a clue from the said article, when the patented product of the Respondent is considered, the granted patent is an improved internal combustion engine working on four stroke principle. Accepting the stand of the Respondent that with the placement of the twin spark plugs in the cylinder head on diametrically opposite sides and the ignition points set in such a manner resulting in improved internal combustion in a lean burn mixture, the claim of the Appellant's in relation to its product viz., 125 cc 'FLAME' talks of even combustion of fuel by altering the air fuel mixture received by the two intake valves with the combination of swirl as well as tumble operated air fuel mixture. In other words, while the Respondent's patented product of an improved internal combustion engine is by virtue of the functioning of two spark plugs due to its ideal location and the point of ignition in a lean burn operation, the product of the Appellant though also with the provision of twin spark plugs, the internal combustion was due to the receipt of air fuel mixture by the two intake valves (one providing swirl action and another tumble action) with the third

valve being exhaust valve also providing effective internal combustion with the combination of lean burn and rich burn mixture.

68. Having regard to the nature of operation of the engine of the patentee viz., the Respondent as well as the Appellant in such a descriptive manner viz., one by virtue of twin spark plugs and the other by virtue of receipt of air fuel mixture through two different intake valves both by swirl and tumble operations, as rightly observed by the author of the said article, the point of emphasis in the description of the product of the Appellant as well as the Respondent differ considerably notwithstanding the use of twin spark plug in both the technologies. Viewed in that respect also we are convinced that the alleged infringement of the Respondent's patent cannot be prima facie accepted.

69. When we refer to the various decisions relied upon by the learned senior counsel for the respective parties the following principles emerge viz.,

(i) *The validity of a patent can be*

challenged in a suit on various grounds of revocation as set out under Sections 64 and 107 of the Patents Act.

(ii) *For the grant of interim injunction in a patent matter, the prima facie validity of the patent should be shown and also the prima facie infringement should be proved apart from the availability of balance of convenience and irreparable loss.*

(iii) *If the patent is a new one, mere challenge at the Bar would be quite sufficient for the refusal of an interim injunction as compared to a fairly old patent.*

(iv) *Even in IPR cases, apart from prima facie case, balance of connivence and irreparable injury, the mere registration of the patent alone would not be sufficient and the Court must look at the whole case i.e. the strength of the case of the plaintiff and the strength of the defendant.*

(v) *Irrespective of the examination and investigation made under Sections 12 and 13 of the Patents Act, no presumption can be drawn as to the validity of the patent and whether the*

application for revocation of patent is pending and when serious controversy exist as regards the existence of an invention based on prior art, the Court should be slow in granting the injunction.

(vi) *There can be no infringement if the opponent has proved the same result by a different combination of different elements.*

(vii) *The general rule in regard to the construction of the validity of a patent is, that construction which makes it valid should be preferred rather than the construction which rendered it invalid.*

(viii) *Patent specification should intend to be read by a person skilled in the relevant art but their construction is for the Court and to do so it is necessary for the Court to be informed as to the meaning of the technical words and phrases and what was the common general knowledge i.e., the knowledge that the notional skilled man would have.*

(ix) *In construing an allegation of infringement, what is to be seen is whether the*

alleged infringement has taken the substance of the invention ignoring the fact as to omission of certain parts or addition of certain parts.

(x) *While analysing a claimed invention, it is relevant to examine as to whether the invention requires independent thought, ingenuity and skill, producing in a distinctive form a more efficient result and there by converting a comparatively defective apparatus into a efficient and useful one which, taken as a whole, is novel.*

(xi) *Though the grant of patent by itself does not guarantee its validity, it should be given some weight and significance while considering the question of prima facie case and it is always open to the defendant to question the validity of the patent.*

(xii) *Though the claimed invention may consist of known factors, known integers i.e. if by combination of such known integers if a new use has been discovered that should be construed to have displayed inventive steps by way of ingenuity and skill.*

70. By applying the above settled principles deduced from the decisions of both English as well as Indian cases, we find that the Appellant's contention as regards the validity of the patent is a matter for detailed investigation in the main suit as well as in the application for revocation pending before the Appellate Tribunal.

71. Prima facie when we examine, as rightly set out in the article of Mr.J.Sai Deepak, student of I.I.T. Kharagpur, the Respondent's patented product *de hors* the fact that it has the already existing concept of twin plug operation in an internal combustion engine, at the threshold we are not inclined even prima facie to state that the validity of the patent is doubtful. The operation of the invention as claimed by the Respondent appears to be plug centric one in as much as having regard to the descriptive statement in the final complete specification it will have to be held that the claim as set out therein if accepted would spark the ignition with twin plugs in a four stroke engine of a single cylinder with two valves specification produce improved internal combustion in a lean burn mixture and the Respondent

may well be justified in its attempt to enforce its rights based on the said patent. Nevertheless, on that score alone, we find it difficult to countenance the claim of the Respondent that the Appellant's product specification have infringed its patented right. Here again, we find considerable knowledgeable expression made by the author of the article Mr.J.Sai Deepak, wherein, he has differentiated the product of the Appellant as valve centric one in as much as the two intake valves as claimed by the Appellant provides for combined air fuel mixture of swirl and tumble action, with a separate exhaust valve in an internal combustion engine of single cylinder with four stroke with the aid of twin plug provision. The descriptive note of the author in stating that the Appellant's product is predominantly of even combustion of fuel by altering the air fuel mixture received by two intake ports or valves and that therefore the said technology differs considerably with that of the Respondent is quite convincing.

72. In this context, it will be worthwhile to refer to the AVL patent No.196636, dated 25.05.2000 granted/sealed on 08.11.2006, which has been adopted by the Appellant based on

the Technical Assistance Agreement dated 13.11.2000, Technical Collaboration Agreement dated 25.06.2004 and another Technical Collaboration Agreement dated 10.06.2005 with AVL Austria. In fact, the Patent Office of Government of India, Ministry of Commerce and Industry, registered the name of the Appellant as a Licensee based on its agreement dated 09.10.2007, with AVL LIST GMBH in respect of Patent No.196636 dated 25.05.2000, granted to AVL LIST GMBH. In the provisional and complete specifications of AVL, the operation of three valve system in a four stroke internal combustion engine has been set out as under:

"This is achieved in accordance with the invention in that the fuel supply device is formed by a joint carburettor for both inlet ports, with preferably the carburettor being arranged in the zone of the branching of the inlet ports from the inlet pipe. As a result of the combination between load charging port, volumetric port and a fuel supply device arranged as a conventional carburettor, it is possible in a very simple manner to achieve a controlled combustion in the combustion chamber with very low emission

values and very favourable fuel consumption. By using a conventional carburettor with a double inlet port configuration with a volumetric port and a charge loading port it is possible to make do without any complex electric and electronic devices. Thus one can omit complex control and regulation apparatuses for injecting the fuel, including the higher provision of energy. Carburettor technology moreover offers the highest possible reliability and the additional advantage that the dimensional volume, weight and costs of the internal combustion engine can be kept very low.

In order enable the optional performance of a stratification in the combustion chamber, it is provided for a further embodiment of the invention that during the opening of the throttle device the charge loading port can be opened at first and the volumetric port thereafter.

The charge loading port has the task of providing the charge in the combustion chamber with a momentum about the cylinder axis. It can be arranged as a tangential or spiral port.

It can be provided for on the basis of the concept that the charge loading port which is arranged as a tangential or swirl port is provided with a larger length than the volumetric port. If the charge loading port is arranged as a tangential port, it is provided with only a low curvature and is strongly inclined towards the valve axis and produces a flow which hits the cylinder wall tangentially and leads to the formation of a strong swirling movement in the cylinder. The volumetric or natural port is provided with a stronger curvature as compared with the tangential port, but shows a lower inclination towards the valve axis. It produces a stream directed approximately against the centre of the cylinder which neither produces a marked swirling movement, nor a tumble movement.

The throttling of the volumetric port ensures that the admission of the charge from this port occurs with a lower impulse into the cylinder chamber than the air supplied by the tangential port. The overall flow field in the cylinder chamber is thus dominated by the unthrottled tangential port. The charge loading thus produces a rapid, stable and even combustion.

This leads to a lower susceptibility to engine knock despite higher compression. This creates the prerequisites for achieving high thinnability in order to achieve lower fuel consumption. At the same time, compatibility for higher exhaust gas return rates is increased, thus enabling a considerable decrease in Nox emissions."

In the pleadings viz., the counter affidavit of the Appellant filed in O.A.No.1357 of 2007 in C.S.No.1111 of 2007 in paragraph 30, the Appellant has specifically averred that its arrangement with AVL, Austria, the Appellant is as a Licensee of Indian Patent No.196636, dated 25.05.2000. In the same counter affidavit in para 39, the Appellant has explained about the operation of three valve configuration in the internal combustion engine, the operation of which has been patented in patent No.196636 dated 25.05.2000.

73. Besides the above, the set of photographs filed by the Appellant in Volume VIII of the typed set of papers which have been marked as Figures I to XIX also discloses the marked

difference as between the three valve configuration of the Appellant and two valve configuration of the Respondent vis-a-vis the positioning of the twin plugs in the respective engines which are quite visible. The photographs are annexed as Figures I to XIX to this Judgment for ready reference. The above referred to statements contained in the Indian Patent No.196636, the terms of the agreement and the recognition of the Appellant as a Licensee by the patent office read along with the stand of the Appellant in its counter affidavit sufficiently demonstrate that the internal combustion process in the Appellant product was not exclusively dependent on the twin plug operation but was based on the three valve configuration in Patent No.196636 dated 25.05.2000. If such a conclusion can be arrived at even prima facie, we are convinced that the stand of the Appellant is well justified. We therefore approve the stand of the Appellant that the third valve is not merely a cosmetic one.

74. Our conclusion is also fortified by the statutory provision of the Patents Act. A reading of the definition 'invention', 'inventive step' and 'new invention' as defined under

Section 2 (j), (ja) and (l) respectively, makes it clear that the technical advance which had not so far fallen in public domain in an industrial application and which was not obvious before its pronouncement, such technical advance though may be miniscule in nature could still be recognised as an invention and once it gets the seal of approval of the Patent Authority by way of grant of patent, the same will have to be given its due recognition. In the case on hand, the claimed invention of the Respondent in respect of its patent No.195904 viz., improved internal combustion working on four stroke principle with twin plug and two valves configuration merits its own recognition by virtue of the patent dated 16.07.2002, with date of sealing on 07.07.2005 and is protected by the provision of the Patents Act in particular Section 48. In the same manner, the Appellant as a Licensee of Patent No.196636 dated 25.05.2000, with date of sealing on 08.11.2006, in respect of its invention of four stroke internal combustion engine with at least two inlet valve and one exhaust valve also with twin plug configuration is entitled to be recognised on its own merits with equal protection of the Patents Act in particular Section 48.

75. Our conclusion being prima facie for the purpose of dealing with an Interlocutory Application of the Appellant as well as the Respondent, the parties will have to workout their remedies in the revocation application of the Appellant before the Appellate Tribunal and also while contesting the main suit on merits at the time of its final hearing independent of whatever stated in this Judgment. Operation of Sections 64, 104-A and 107 of the Patents Act will have to be independently applied at the appropriate stage of the respective proceedings.

76. When we apply the law laid down in the various decisions cited before us, as far as the validity of the patent is concerned, it is by now well settled that the validity of the patent can always be challenged in the High Court on various grounds for revocation as provided under Section 64 or the ground on which the allegation of infringement is to be established as provided under Section 104 and or could be defended under Section 107 of the Patents Act.

77. In as much as we have held that the patent of the Respondent viz., patent No.195904, dated 16.07.2002 and the claim of the Appellant as a Licensee of patent No.196636 dated 25.05.2000 are prima facie valid in their respective spheres of invention, even applying the ratios laid down in the decisions referred to in our Judgment, the parties are relegated to workout their remedies at the appropriate stage in an appropriate manner while contesting the revocation application before the Appellate Tribunal or at the time of the final hearing of the main suit.

78. As far as the ratio laid down to the effect that if a patent is a new one, the Court are to be slow in granting interim injunction, we find that in the case on hand, the Respondent's patent No.195904 came to be granted/sealed on 07.07.2005 and the launching of the Appellant's vehicle 125 cc 'FLAME' was scheduled in the month of December, 2007. Moreover, as discussed in detail in the earlier paragraphs, even the Appellant's vehicle contains four stroke internal combustion engine with three valve configuration by virtue of the licence it holds in respect of Indian Patent No.196636, dated 25.05.2000,

granted/sealed on 08.11.2006. In such circumstances, while it cannot be held that the Respondent's patent No.195904 was too old, while at the same time the fact that the Appellant was also supported with a valid patent as a licensee, the grant of injunction does not call for in the facts and circumstances of this case.

79. Further applying the well laid down principle that when application for revocation of a patent of the Respondent is pending before the Appellate Tribunal and when such an application has been preferred on the ground of existence of a prior art, obviousness and other formidable grounds as provided under Section 64 of the Patent's Act, the Court should not grant injunction in such cases. We hold that in the special facts and circumstances of the case, grant of interim injunction cannot be sustained. According to the Appellant the failure of the Respondent in its initial specification dated 16.07.2002 and the amended specification of the year 2003, in not specifically referring to the Honda Patent No.4534322 dated 13.08.1985, and making a reference to the said patent after the International

Search Report dated 13.08.2004 and that too by making a statement that the said existing Honda Patent related to large bore size and not with reference to a small bore are all grounds which require detailed consideration on merits. The allegation of the Appellant that the Respondent secured the patent by making a deceptive statement about the bore size of the Honda Patent, requires a detailed investigation. Further it will have to be stated that such an allegation of the Appellant cannot be rejected as baseless or made without any substance. In such circumstances as held in various decisions referred to above, the grant of interim injunction would be wholly not justified.

80. In the case on hand, the alleged infringement is in respect of the improved internal combustion achieved by the Respondent in a four stroke engine of small bore with twin plugs operations of lean burn fuel. In the decision relied upon by the learned senior counsel for the Respondent reported in **1884 (6) RPC 49 (William Needham and James Kite Vs. Johnson and Co.)** it has been held that there can be no infringement if one has produced the same results by a different combination of

different elements, that is another and a different combination, and is not either an improvement or anything else of the other and that it should be wholly different. Applying the said principle as we have noted that the Appellant's product is a four stroke internal combustion engine with two inlet valves and one exhaust valve which application had its own special effects in the operation of the internal combustion of the engine or in its improvement, such an operation when supported by another valid Indian Patent No.196636 dated 25.05.2000, it will have to be necessarily held that the allegation of infringement based on the Respondent's patent No.195904 dated 16.07.2002 by itself cannot form the basis for the alleged infringement. In other words, we are convinced with the teachings of the Respondent's invention of its Patent No.195904 dated 16.07.2002 has been distinctively distinguished by the teaching of the patent No.196636 dated 25.05.2000, which supports the alleged infringed product of the Appellant and therefore the grant of injunction by the learned Single Judge cannot be sustained.

81. As far as the proposition that the patent specifications

are intended to be read by persons skilled in the relevant art, we have found that there is at least one article by an enlightened student of Intellectual Property Law of I.I.T. Kharagpur, which we have referred in detail in the earlier paragraphs, where the Author was able to demarcate the distinctive features of the patented product of the Respondent as well as that of the Appellant and by making a reference to the descriptive distinction in the respective specifications of the Appellant as well as the Respondent, we are quite convinced that even going by the independent opinion of a person in the concerned field of art there is no scope to restrain the Appellant by way of grant of interim injunction. In the various other materials relied upon, we do not find a comparative analysis made with particular reference to the respective patents of the parties.

82. As far as the application of the concept of pith and marrow of the claim, what is stated is that novel feature which is claimed to be essential would constitute the pith and marrow. The novel feature in the invention of the Respondent based on patent No.195904 dated 16.07.2002, varies in very many

respects in the novel feature of the Appellant's product based on patent No.196636 dated 25.05.2000. While the acclaimed novel feature of the Respondent's product is twin plug operation resulting in improved internal combustion, the acclaimed novel feature in the Appellant's product is in the operation of two intake valves with one exhaust valve providing a combination of swirl and tumble operation of lean and rich air fuel mixture in its internal combustion process of course with the aid of twin plugs. If the pith and marrow of the Respondent and the Appellant are distinctively identifiable there is absolutely no scope for grant of injunction as has been done by the learned Single Judge.

83. In fact in the decision reported in ***AIR 1930 PC 1 (Canadian General Electric Co. Ltd. Vs. Fada Radio Ltd.)*** the Privy Council has held that slight alterations or improvements may produce important results and may disclose great ingenuity. When we apply the said law laid down in sustaining an invention, we are convinced that the "invention" consisting of an "inventive step" at the hands of the Appellant and the Respondent operate independently though in respect of four stroke internal

combustion engine with twin plug operation of lean burn mixture.

84. Therefore, while on the one hand the Respondent's patent having been granted is to be accepted prima facie as a valid one, in the same breath, it will have to be held that merely because such a valid patent is existing in favour of the Respondent, that by itself, it cannot be held that the Respondent has made out a strong prima facie case of infringement as against the Appellant. We say so because we too find a distinctive feature of a different operation in the Appellant's technology with three valve provision with twin plugs operation and the said three valves operation of the engine produce distinctively different result in its operation. To be more precise, while the twin plug operation in the Respondent's internal combustion engine may have resulted in improved internal combustion, the three valve technology of the Appellant also with twin plug provision produce a distinctive product of its own, different from the claimed invention of the Respondent.

85. Such a distinction as between the patented claim and the infringed product is well protected under the provisions of the

Patents Act, as has been set out in the various decisions we have no hesitation in holding that in the case on hand, even while holding that the claim of valid patent at the instance of the Respondent can be prima facie accepted, the alleged infringement as against the Appellant cannot be held to have been made out at the instance of the Respondent. Therefore, there is no case made out for grant of interim injunction. However, taking into account of our observation that the controversy can well be decided in the Suit or in the Revocation Application, we only state that if the Respondent seeks for an early hearing of the Suit or the Revocation Application, the learned Judge or the Tribunal, as the case may be, may decide the Suit or the Revocation Application on its own merits uninfluenced by whatever stated in this Judgment and may decide the case at an early date.

86. In the light of our above conclusion, the question of balance of convenience or irreparable loss does not come into play. Having regard to our above conclusion, we hold that the

Respondent is not entitled for an injunction as applied for and the injunction granted by the learned Single Judge cannot therefore be continued. Both the appeals stand allowed for the reasons stated herein and the impugned common order of the learned Single Judge dated 16.02.2008, passed in O.A.No.1357 of 2007 in C.S.No.1111 of 2007 is set aside and the application in O.A.No.1272 of 2007 in C.S.No.979 of 2007 stands allowed. There will be no orders as to Costs. All the M.Ps. are closed.

(S.J.M.J.) (F.M.I.K.J.)

18.05.2009

Index : Yes
Internet : Yes
kk

S.J.MUKHOPADHAYA, J.

and

F.M. IBRAHIM KALIFULLA, J.

kk

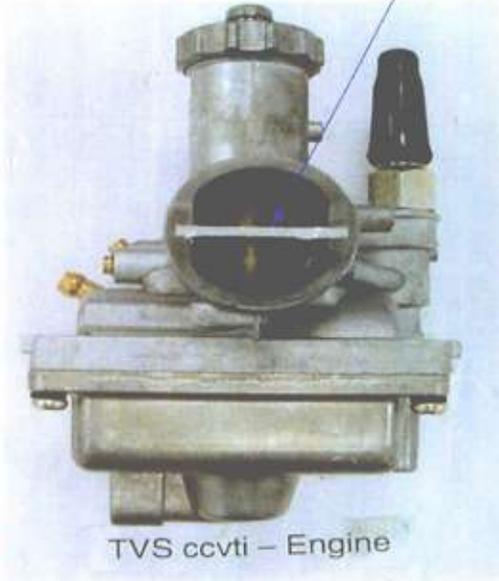
PRE DELIVERY JUDGMENT
in O.S.A.Nos.91 & 92 of 2008

18.05.2009

Constructional details of 2-intake valve design

TVSM Carburetor has split outlet

Bajaj carburetor has no split outlet



6

FIG I (a)

FIG I (b)

Constructional details of 2-intake valve design

TVSM Intake pipe with separate passages for 2-intake valves

Incase of Bajaj intake pipe has single passage



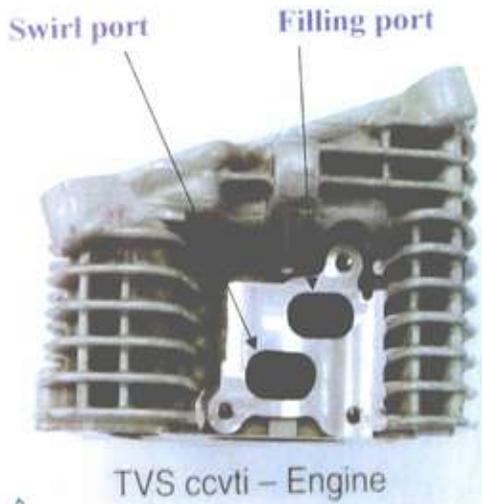
6

FIG II (a)

FIG II (b)

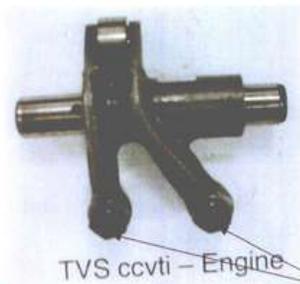
Constructional details of 2-intake valve design

Cylinder head with separate intake ports for 2-intake valves



Constructional details of 2-intake valve design

Design of one of the two rocker arms for operating two intake valves



Two arms with elephant foot

Design of rocker arm for operating intake valve



Only one arm

Constructional details of 2-intake valve design

- Independent housing for camshaft & rocker arms as compared to split type housing in Bajaj



Fig 5 (c)

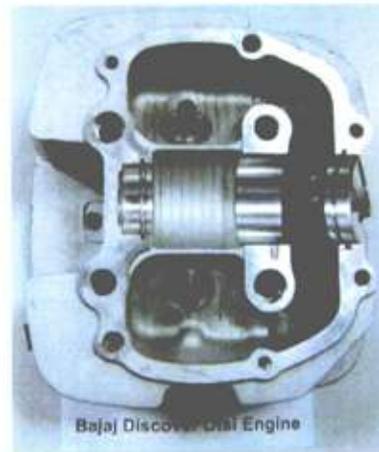


Fig 5 (d)

Constructional details of 2-intake valve design

- Slant top surface to facilitate serviceability of tappet (as compared to flat top surface in Bajaj)

Slanted top surface



Fig 5 (e)

Flat top surface

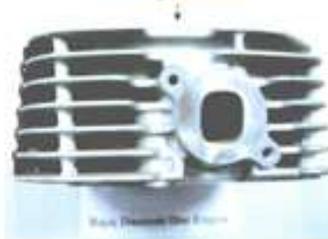


Fig 5 (f)

TVSM Sleeve assembly v/s Bajaj sleeve assembly for second spark plug

TVSM	Bajaj
Threaded sleeve, as taught in prior art Honda US patent 4534322, 1985 only one sealing ring	Push fitted sleeve, pair of sealing means, fixing means.
Metallic sleeve, resilient rubber connector housing provides sealing, provides adequate space around timing chain and sprocket	Metallic sleeve requires precise machining and alignment to provide good fit between the sleeve and cylinder head bore.



TVS ccvti - Engine

FIG VII (a)



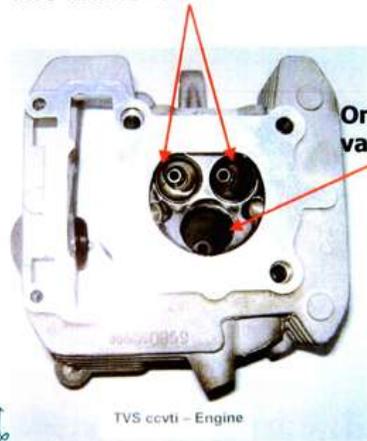
Bajaj Discover Dtsi Engine

FIG VII (b)

Constructional details of TVS 2-intake valve design & Bajaj 1 intake valve

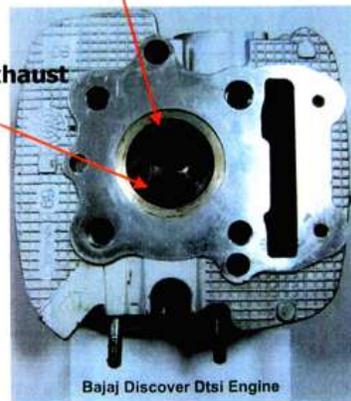
Two intake valves in TVSM design

One intake valve in Bajaj DTSi



TVS ccvti - Engine

FIG VIII (a)



Bajaj Discover Dtsi Engine

FIG VIII (b)

Constructional details of TVS CCVTi design



TVS ccvti – Engine

6

Fig IX (a)



Bajaj Discover Dtsi Engine

Fig IX (b)

Constructional details of TVS CCVTi Design



TVS ccvti – Engine

3 springs,
one spring per valve

Fig IX (a)

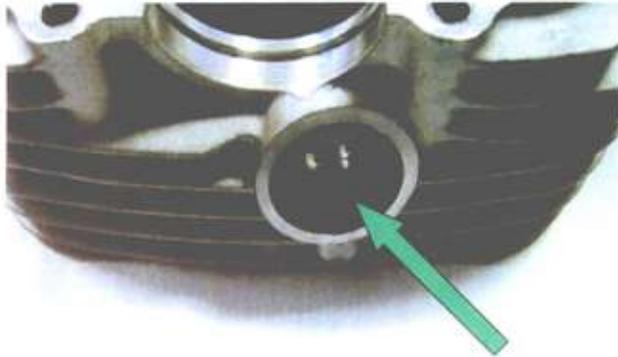


Bajaj Discover Dtsi Engine

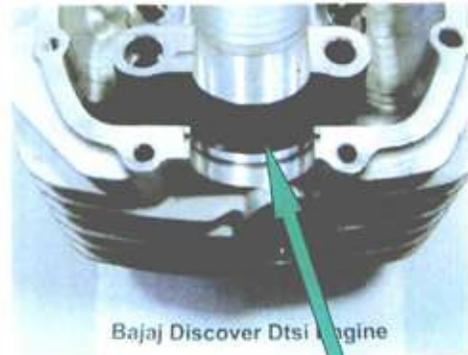
4 springs,
2 springs per valve

Fig IX (b)

Constructional details of 2-O rings in Bajaj DTSi



Bajaj Discover Dtsi Engine



Bajaj Discover Dtsi Engine

⚡

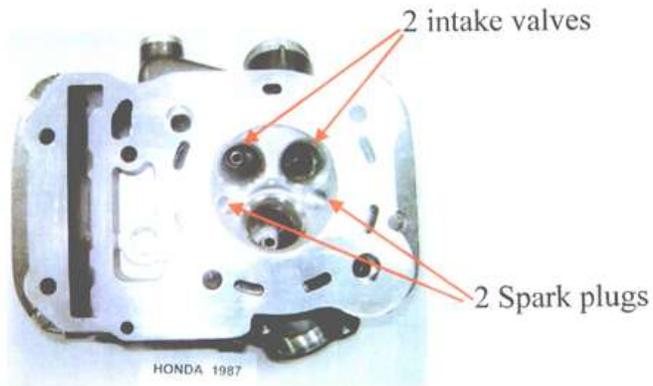
Fig XI (a)

Outer O ring

Fig XI (b)

Inner O ring

Honda Bros, 1987 Model motorcycle
3 Valve engine, (2 intake,1 exhaust), 2 spark plugs, 64mm bore size



HONDA 1987

⚡

Fig XII

Honda Bros, 1987 Model motorcycle

3 Valve engine, (2 intake,1 exhaust), 2 spark plugs, 64mm bore size



HONDA 1987

Fig XIII (b)



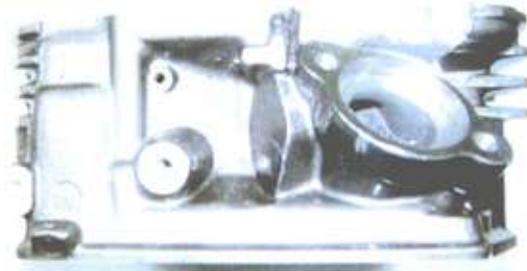
HONDA 1987

Fig XIII (d)



HONDA 1987

Fig XIII (c)

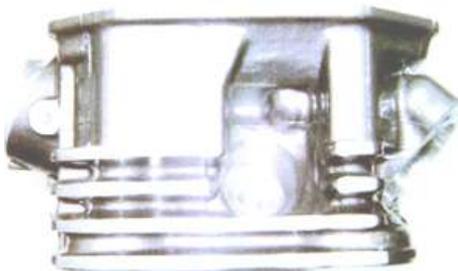


HONDA 1987

Fig XIII (e)

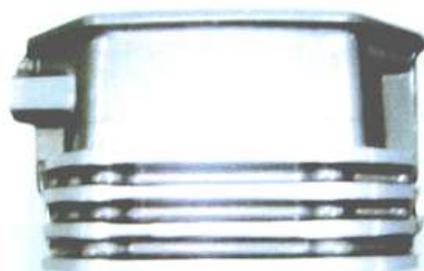
Honda Bros, 1987 Model motorcycle

3 Valve engine, (2 intake,1 exhaust), 2 spark plugs, 64mm bore size



HONDA 1987

Fig XIV (a)

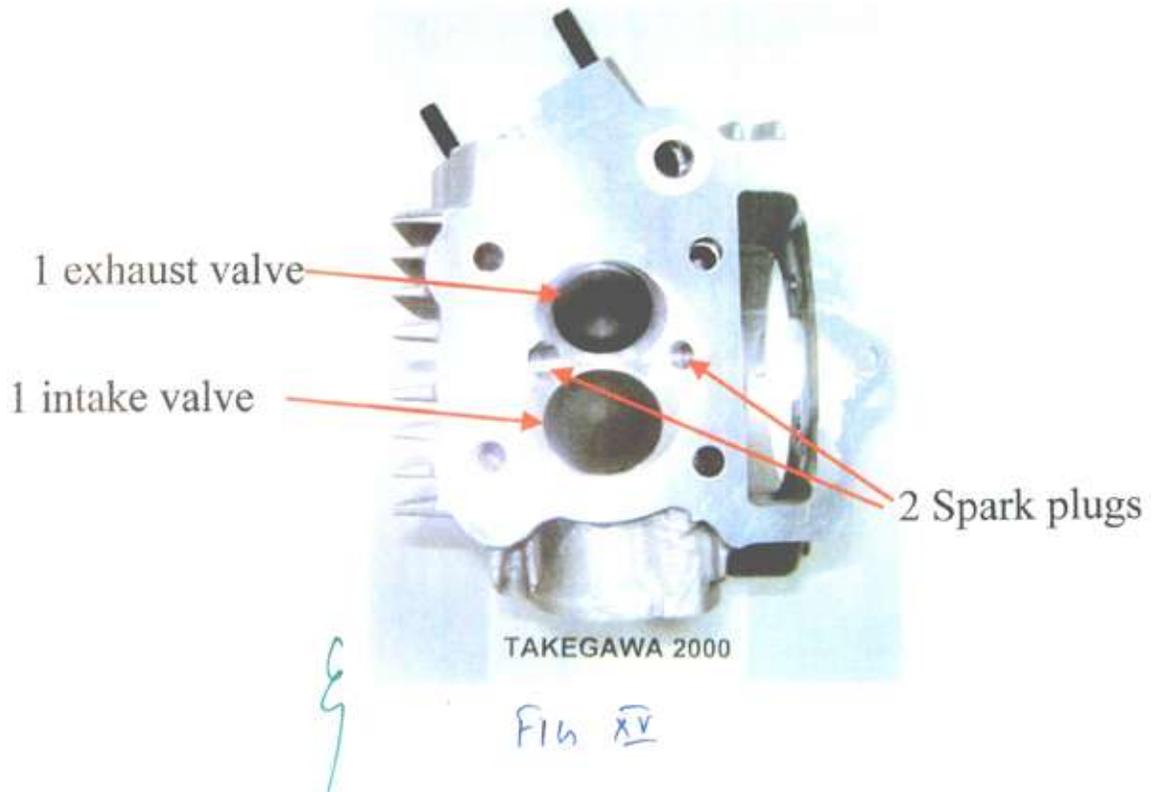


HONDA 1987

Fig XIV (b)

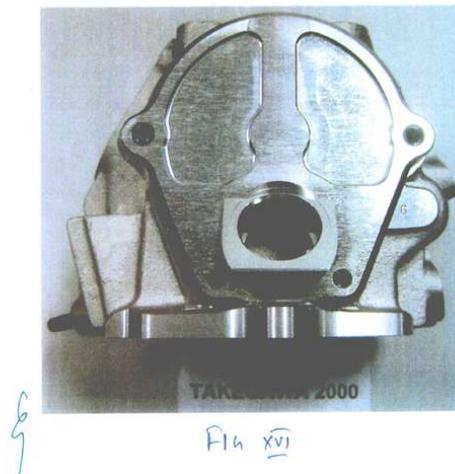
Takegawa Cylinder head, 2000 Model

2 valve engine, (1intake,1exhaust) 2 spark plugs



Takegawa Cylinder head, 2000 Model

2 valve engine, (1intake,1exhaust) 2 spark plugs



Takegawa Cylinder head, 2000 Model
2 valve engine, (1intake,1exhaust) 2 spark plugs



Fig XVIII (a)



Fig XVIII (b)

Takegawa Cylinder head, 2000 Model
2 valve engine, (1intake,1exhaust) 2 spark plugs

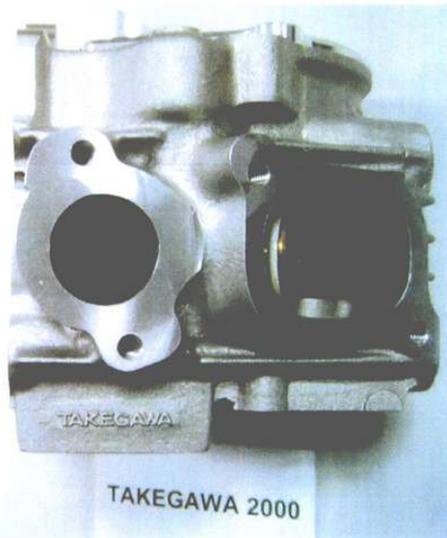
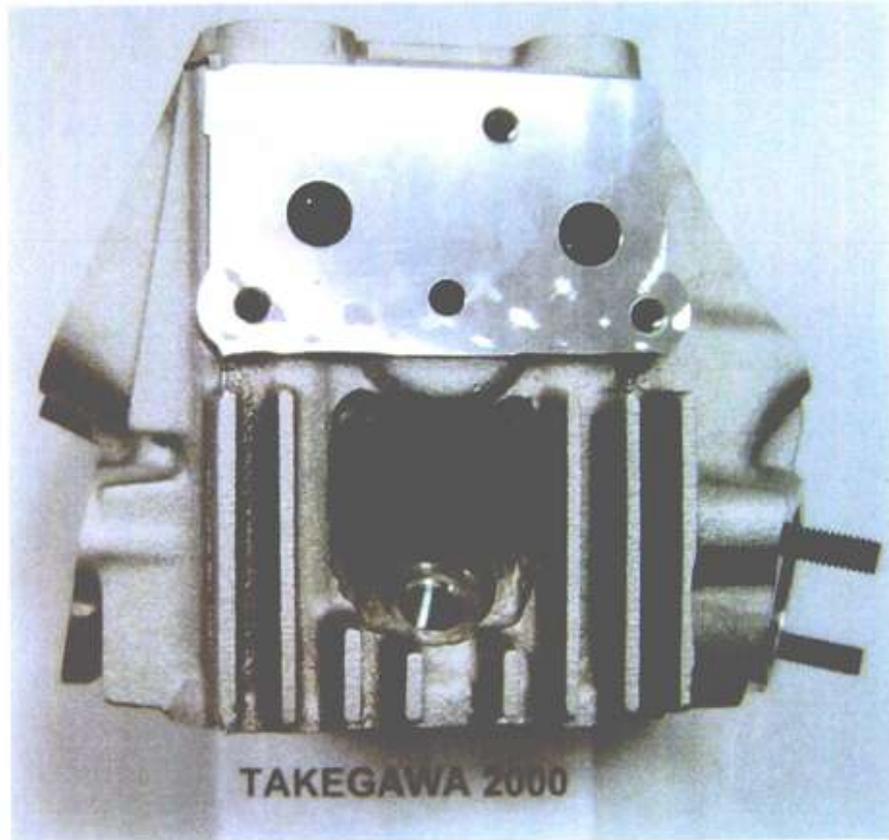


Fig XVIII

Takegawa Cylinder head, 2000 Model
2 valve engine, (1 intake, 1 exhaust) 2 spark plugs



6

Fig XIX