

Pradeep Sharma & Anr vs.upl Ltd

Pradeep Sharma & Anr vs.upl Ltd

SooperKanoon Citation : sooperkanoon.com/1214419

Court : Delhi

Decided On : Apr-20-2018

Appellant : Pradeep Sharma & Anr

Respondent : Upl Ltd

Judgement :

\$~12 * + IN THE HIGH COURT OF DELHI AT NEW DELHI Date of Judgment:

20. 04.2018 FAO(OS) (COMM) 70/2018, CAV3392018 & CM APPLN. 15397-15398/2018 PRADEEP SHARMA & ANR Appellants UPL LTD Through Mr.Benu Gunjan Jha, Advocate. versus Respondent Through Mr.Amit Sibal, Ms.Rajeshwari, and Mr.Tahir A.J., Mr.Aditya Mr.Amber, Advocates. CORAM: HON'BLE MR. JUSTICE S. RAVINDRA BHAT HON'BLE MR. JUSTICE A. K. CHAWLA S. RAVINDRA BHAT, J.

(oral) 1. The appellant is aggrieved by an order restraining him from infringing the plaintiff/respondents patents (IN20613, IN19422 and IN24455- hereafter as INs 130, 225 and 551, respectively). IN225 titled "a process of preparing a chemically stable synergistic herbicidal composition" is a process patent; IN130 titled as "a chemically stable synergistic herbicidal composition" is a product patent and IN551 titled as "a stable synergistic herbicidal composition" is both a product and process patent. According to the plaintiffs claim, Metsulfuron Methyl and Sulfosulfuron are compounds which are used to control weeds without affecting the main FAO(OS)(COMM) 70/2018 Page 1 of 9 crop. Metsulfuron controls grassy

weeds but has no control on broad leaf weeds, whereas Sulfosulfuron has no control on grassy weeds but controls broad leaf weeds. The two compounds are not physically and chemically compatible; consequently no single composition containing both the compounds was available. Plaintiff claims to have developed a composition comprising of these compounds along with suitable excipients such as inert fillers, stabilizer (0.1-1 wt%), defoamer (0.1-1 wt%), wetting and dispersing agents. The composition is in the form of wettable granules (hereafter WG). The uniqueness of the composition is that it is effective against both grassy as well as broad leaf weeds.

2. On 06.01.2003, a patent application titled A process for preparing chemically stable Synergetic Herbicidal Composition whereon the process patent IN225 was granted. On 18.01.2009, patent application titled A chemically stable Synergetic herbicidal Composition was filed. Pre-grant opposition was filed by Gharda Chemicals Ltd. against this application which was dismissed vide order dated 25.01.2007 by the patent office which resulted in grant of product patent IN130. Gharda Chemicals had challenged the claim in pre grant opposition; its petition (before Bombay High Court) was dismissed. The parties entered into a settlement on 03.10.2008 wherein Gharda acknowledged plaintiff to be the owner of IN225 and IN130 and agreed not to infringe the two suit patents. Plaintiff claimed that a pre-grant opposition of a party challenging the novelty and inventive steps of the invention not having been sustained, the defendant cannot now challenge the same by taking the defence under Section 107 of the Patents Act. The plaintiff claimed that various reputed FAO(OS)(COMM) 70/2018 Page 2 of 9 companies had obtained licenses of its patents, including Tata Chemicals Ltd., Coromandal International Ltd., Gharda Chemicals Ltd. etc. The plaintiff claimed that they became aware that the defendants/appellants were participating in a tender floated by Directorate of Industries & Enterprises Promotion, U.P. for manufacture and supply of Sulfosulfuron (75%) + Metsulfuron Methyl (5%) WG. It was further revealed that defendants had applied for registration under Section 9 of the Insecticides Act, 1968 for the composition of Sulfosulfuron (75%) + Metsulfuron Methyl (5%) WG which is the composition as per the patents of the plaintiff. The plaintiff claimed that it alone has the rights to manufacture and sell Sulfosulfuron (70-80%) + Metsulfuron Methyl (5-10%) WG meaning that composition is in the

form of granules, the defendant is liable to be enjoined from infringing the plaintiff's patents. Based on these facts and assertions, the plaintiff filed the suit for infringement before this court.

3. The defendant's position in the suit - and in resistance of the ad interim injunction claim was Sulfosulfuron and metsulfuron methyl were admittedly already known and not proprietary to the plaintiff; both substances are individually well recognized herbicides, metsulfuron methyl since 1986 and sulfosulfuron since mid-1990 and the combination of various sulfonylurea as including these two have been known since 1990s. The plaintiff had to show that each element of the patent products/compositions were covered by the scope of the specific claim of any of suit patents asserted by it and if admittedly any essential element is missing then there can be no infringement. The defendant argued that a comparison of the two products, showing the difference between the compositions is evident. The FAO(OS)(COMM) 70/2018 Page 3 of 9 plaintiff's product registration necessarily requires suspending agent, and a tallow soap defoamer in addition to other defoamers and significantly high amount of wetting agents and dispersing agents. Additionally, the product registration does not contain polyoxyethylene sorbitan fatty acids ester and stabilizing agent. The defendant's claim is outside the scope of the suit patents. The defendant says this is supported by the finding of a technical body i.e. the Registration Committee of the Central Government Insecticides Board as far back as in 2006 when it held that defendant's registration did not cover a composition which was prepared by a process IN225. It was pointed out that it filed an appeal against this decision before the statutory authority in the year 2006 itself but did not pursue it. The Plaintiff's denial that the appeal related only to the process patent IN225 and deserves to be rejected for the reason the suit relates to the three patents IN130 being divisional to the process patent IN225 and IN551 being a patent of addition.

4. The two product patents i.e. IN130 and IN551 do not have any existence outside the process patent IN225 which also covers the composition. There is no claim by the plaintiff that the defendant is copying its process as per claim in IN225. Further as noted above, there is no infringement of IN551. The product covered by the defendant's registration is outside the scope of the claims of the plaintiff's patents,

since several material and essential elements of the said claim (i.e. the stabilizer, absence of tallow soap as defoamer) are missing. In addition even the amount of wetting agents, dispersing agents and suspending agent is significantly higher in the product of the defendant as compared to IN551. It was argued, FAO(OS)(COMM) 70/2018 Page 4 of 9 besides that the claims did not provide a clear description, contrary to Section 10 (4) of the Patents Act. The defendant relied on decisions reported as S.P. Chengalvaraya Naidu Vs. Jagannath AIR (1994) SC853 Bishwanath Prasad Radhey Shyam Vs. Hindustan Metal Industries (1979) 2 SCC511 Ten XC Wireless Vs. Mobile Antenna Technologies CS(OS) No.1989/2010.

5. The learned Single Judge analysed briefly, each claim in the plaintiff's product and after a comparison with the description of the defendant/ appellants product description. The appellant had relied on the research paper of one Dr. C.P Singh as well as a US patent claim (301). The learned Single Judge then held as follows: The difference between the plaintiff's and defendant's product is absence of a stabilizer which cannot be an essential ingredient. A comparison of the claim of the plaintiff's suit patent and the defendant's product reveal that prima facie the defendant's product registration relates to the suit patent of the plaintiff. It is not the case of the plaintiff and the defendant that the composition is not a stable compound and an addition of .1 to 10% weight of the stabilizer being added further would not make the compound as a different compound not infringing the patent of the plaintiff, as all the essential ingredients with their requisite composition and percentage are the same. ***** 25. No doubt Dr. C.P. Singh's research paper was a prior art, however the findings of the same were contrary to the product of the plaintiff and the study of Dr. C.P. Singh being contra indicative to the product of the plaintiff cannot be used to come FAO(OS)(COMM) 70/2018 Page 5 of 9 to the conclusion that the invention of the plaintiff was obvious and not a novelty. The differences between the claim in the US301 and the suit patents are too many and US301 nowhere suggests a combination as prepared by the plaintiff's product and cannot be thus treated as a prior art to reject the claim of the plaintiff as not novel or obvious.

26. Defendants claim that the plaintiff is not entitled to an interim injunction for concealment of facts and material variations deserves to be rejected for the reason even if there has been amendment in the plaint, this Court has to construct the claim on the basis of what is claimed in the patent documents, as has been noted above. Further the Insecticides Registration Committee has no jurisdiction to decide on patent registration as held in the decision reported as Shogun Organics Ltd. Vs. Union of India (2013) SCC Online Ker 22792. Finding by the Insecticides Registration Committee being finding of a body which has no effect on the validity of the patent, mere non-disclosure of the finding of the Insecticides Board prima facie cannot be held to be material suppression of facts and injunction refused on the said count. The defendant having not been able to demonstrate invalidity of the suit patents and a pre-grant opposition to the patent of the plaintiff already having been dismissed by the Appellate Board and in writ petition settlement arrived at with Gharda Chemicals, the plaintiff has made out a strong prima facie case in its favour. 6. The appellant urges that the learned Single Judge fell into error in not giving importance to the findings of an official body, such as the Insecticides Registration Committee which has expertise and disregarded its word altogether. The counsel submitted that matters -such as the research paper relied on and US301were in the public domain and anyone was entitled to use the teaching, as was done by the defendant in this case. It was FAO(OS)(COMM) 70/2018 Page 6 of 9 urged that the learned Single Judge erred in giving credence to the fact that a large number of companies had obtained license of the product; those facts were irrelevant in determining whether there was infringement. The plaintiffs case had to stand or fall on its own merits. He emphasized that there was neither novelty, nor were the plaintiffs claims entitled to patent protection.

7. This court notices that the learned Single Judge, conducted a compact analysis of plaintiffs case, in each claim made and granted to it. She then considered the Insecticide application, seeking registration and made a comparison of the claims in those- juxtaposing them with the defendants claims. As noticed from the extract of the learned Single Judges decision, the defendants reliance on a research paper and the ruling of the Insecticides Registration committee were also considered (apart from US Patent 301).

8. The learned single judge, in the opinion of this court, did not err in stating that the claims of the plaintiff's suit patents comprise of 5- 10% metsulfuron methyl and the defendants 5% weight of metsulfuron methyl. Its suit patent claimed 70-80% by weight of sulfosulfuron. The defendant/appellant's product registration consisted of 75% weight of sulfosulfuron. The Q.S. filler (precipitated silica) is also noted in the plaintiff's claim besides .1 % weight of silicon defoamer. The appellant- defendants claim is that its product contains polyoxyethylene sorbitan; however that is also existent in the plaintiff's suit patent IN551 the fatty acid ester which is missing in the defendant's product is also missing in the plaintiff's suit patent IN551 Therefore, the learned Single Judge correctly FAO(OS)(COMM) 70/2018 Page 7 of 9 concluded that the difference between the infringing product and the plaintiffs patented product was the absence of a stabilizer. The learned Single Judge stated that this could not be an essential ingredient. A comparison of the claim of the plaintiff's suit patent and the defendant's product reveal that prima facie the defendant's product registration relates to the suit patent of the plaintiff. It is not the case of the plaintiff and the defendant that the composition is not a stable compound and an addition of .1 to 10% weight of the stabilizer being added further would not make the compound as a different compound not infringing the patent of the plaintiff, as all the essential ingredients with their requisite composition and percentage are the same. 9. Given that the patent claims had faced pre-grant opposition which were rejected right up to the Intellectual Property Appellate Board (in favour of the plaintiff) and the challengers writ petition too did not succeed- as well as the further fact that the patents have been licensed and are worked out for over 10 years, this court is of the opinion that second guessing the learned Single Judges opinion at this prima facie stage would be unwarranted. The learned Single Judge, we notice, applied the correct tests in adjudicating patent infringement by citing the judgments in F. Hoffmann- La Roche Ltd. & Anr. Vs. Cipla Ltd. 225 (2015) DLT391(DB) which indicates the correct approach in such cases.

10. An appellate court, against an interlocutory matter, should be circumspect in interfering with the prima facie decision of the single judge: in this regard, this court recollects Wander limited v. Antox India (Pvt.) Limited 1990) Suppl. SCC727 and Mohd. Mehtab Khan & Ors. Vs FAO(OS)(COMM) 70/2018 Page 8 of

9 Khushuma Ibrahim & Ors (2013) 9 SCC221 The impugned order is based on a detailed analysis and appreciation of the facts. Consequently, this court should not subject the materials appraised by the learned Single Judge as though the present proceeding were a regular appellate review of a final judgment.

11. In view of the above reasons, this court is of opinion that there is no merit in the appeal; it is accordingly dismissed. S. RAVINDRA BHAT (JUDGE) APRIL20 2018 A.K.CHAWLA (JUDGE) FAO(OS)(COMM) 70/2018 Page 9 of 9

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com