

**Lambda Eastern Telecommunication and ors. Vs. Acme Tele-power Private Ltd. and ors.**

**Lambda Eastern Telecommunication and ors. Vs. Acme Tele-power Private Ltd. and ors.**

**SooperKanoon Citation :** [sooperkanoon.com/514222](http://sooperkanoon.com/514222)

**Court :** Uttaranchal

**Decided On :** Mar-19-2008

**Reported in :** AIR2008Utr38

**Judge :** V.K. Gupta, C.J.

**Appellant :** Lambda Eastern Telecommunication and ors.

**Respondent :** Acme Tele-power Private Ltd. and ors.

**Disposition :** Appeal allowed

**Judgement :**

ORDER

V.K. Gupta, C.J.

1. In a suit filed by respondent No. 1 against the five appellants herein and respondent No. 2 herein (who was defendant No. 6 in the said suit), the learned District Judge, Udham Singh Nagar at Rudrapur passed an ex parte ad interim injunction in favour of the aforesaid plaintiff-respondent No. 1 herein and against the defendants-appellants herein.

2. Aggrieved by the passing of the said ex parte ad interim injunction at the stage of threshold of the suit by which time naturally the appellants had not even been

summoned as defendants in the suit, the appellants filed A.O. No. 412 of 2007 in this Court. By a detailed judgment dated 1-10-2007, the learned single Judge of this Court while dismissing the aforesaid appeal of the appellants, granted liberty to the appellants to file objections to the Temporary Injunction Application in the trial Court. The learned trial Court was directed by the learned single Bench of this Court in the aforesaid appeal to decide the Temporary Injunction Application within one month.

3. Aggrieved by the aforesaid order passed by this Court in A.O. No. 412 of 2007, the appellants approached the Supreme Court in Special Leave to Appeal (Civil) No. 20925 of 2007. Their Lordships of the Supreme Court vide order dated 26th November, 2007 passed in the aforesaid SLP, while dismissing the same, directed the parties to appear before the District Judge, Udham Singh Nagar at Rudrapur on 11th December, 2007. The District Judge, in turn, was directed by the Supreme Court to take up the Temporary Injunction Application for final hearing on day-to-day basis and dispose it of.

4. The learned District Judge passed the impugned order on 18-12-2007 after hearing the parties. Vide the impugned order, he issued an injunction against appellants restraining them from violating the patent etc. of respondent No. 1 - plaintiff and producing and selling the product etc. (as have been mentioned in details in the operative part of the order). Aggrieved, the appellants have come up to this Court in the present appeal filed Under Section 104 read with Order 43, Rule 1(r) of the Code of Civil Procedure.

5. Mr. S.K. Bansal, for learned Counsel appearing for the appellants took me through various provisions of the Patent Act, 1970, particularly Section 3(f), Section 25(2), Section 64, Section 104 and Section 107. According to Mr. Bansal, the very arrangement or re-arrangement or duplication of the known devices, each device functioning individually or with one another in a known way, does not amount to an invention within the meaning of the Patent Act, 1970. He submitted that in terms of Sub-section (2) of Section 25, the appellants have already objected to the grant of two patents in favour of respondent No. 1 - plaintiff. Mr. Bansal, informed me and this is not disputed by the learned Counsel appearing for

respondent No. 1 and is also borne out from the records of the case that in the aforesaid pending suit, the defendants (appellants herein) have filed their counter-claim. Under Section 64 of the Act, a patent can be revoked either on a petition filed by any person interested etc. etc. or upon a counter-claim filed in a suit and in such a situation, the revocation of the patent has to be made by the High Court. Even though, Under Section 104, the jurisdiction to entertain and decide the suit for a declaration, etc. or for any other relief relating to the infringement of a patent vests in a District Court, proviso to Section 104 clearly states that where a counter-claim for revocation of the patent is made by the defendant in the suit, the suit along with the counterclaim shall be transferred to the High Court for decision.

6. Section 104 of the Act for the ready reference is reproduced herein, which reads as under:

104. Jurisdiction.- No suit for a declaration under Section 105 or for any relief under Section 106 or for infringement of a patent shall be instituted in any Court inferior to a district Court having jurisdiction to try the suit:

Provided that where a counter-claim for revocation of the patent is made by the defendant, the suit, along with the counterclaim, shall be transferred to the High Court for decision.

7. In Section 107 of the Act, it is clearly mentioned that in a suit for infringement of any patent, every ground on which the patent can /may be revoked under Section 64, shall be available as a ground for defence. Section 107 for ready reference is reproduced, which reads as under:

107. Defences, 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 of other article or by the using of any process or by the importation, use or distribution or 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.

8. A very careful perusal of the impugned order dated 18th December, 2007 passed by the learned District Judge reveals to me that even while the counter-claim for revocation had been filed by the appellants - defendants on 8th September, 2007 in the trial Court, the learned District Judge did not take any notice of the said counter claim and proceeded to decide and dispose of the Interim Injunction Application unmindful of the counter-claim. A combined reading of Sections 64, 104 and 107 and a reference to other relevant provisions of the Patent Act, 1970 leaves me in no manner of doubt that when a counter-claim for revocation of the patent is filed by the defendants in a pending suit, grant or refusal of a temporary injunction under Order 39 Rules 1 and 2, apart from other legal considerations has to be influenced by and linked with the merits of the counter-claim, because while deciding a Temporary injunction Application, the cardinal principles of prima facie case, balance of convenience and irreparable loss or injury, etc. have to be judged and applied both based upon the pleadings and the material accompanying the pleadings as well as the counter-claim for revocation. The learned District Judge, however, without at all considering the counter-claim, proceeded to grant ad interim injunction in favour of the respondent No. 1 - plaintiff in total disregard to the counter-claim and its merits, if any.

9. Actually, keeping in view the proviso to Section 104 (supra), this Court at the same time would like to observe that the District Judge at the very moment the counter-claim stood filed in his Court, ceased to have any jurisdiction to deal with the suit or any application arising out of the same or relating thereto. The proviso to Section 104 clearly and unmistakably suggests that the moment the counter-claim for revocation of the patent is filed, the suit along with the counter-claim, etc. shall be transferred to the High Court for decision. In other words, what the proviso unmistakably suggests is that the moment counter-claim for revocation of the patent is filed, the jurisdiction for deciding the suit along with the counter-claim vests with the High Court. The legislative intent is more discernibly clear by a reference to Section 64 of the Act, which also states that revocation of a patent upon a counter-claim can be done by a High Court only and not by any Court inferior to the High Court. It is based on such clear legislative intent as well as

legislative mandate that I have no hesitation in coming to the conclusion that the moment the counterclaim for revocation of patent is filed, the District Court ceases to have the jurisdiction to deal with the suit and the matter immediately is required to be transferred to the High Court for hearing and decision. In other words, it is the High Court which shall now hear and decide the Temporary Injunction Application.

10. Based upon the aforesaid reasoning, I have no hesitation in coming to the conclusion that the impugned order dated 18-12-2007 is vitiated on account of patent lack of jurisdiction. This order on this ground alone is liable to be set aside.

11. In view of what has been stated aforesaid, the suit along with the counter-claim is transferred to the High Court from the file of the District Judge, Udham Singh Nagar at Rudrapur. I also order and direct that all applications in the suit including the contempt application shall stand transferred to the High Court. The Registry shall take consequential steps of summoning the record from the learned District Judge accordingly.

12. The pleadings in the Temporary Injunction Application are complete. Mr. Bansal very strenuously and vehemently argued that even though I am transferring the suit to the High Court and ordering the rehearing of the Temporary Injunction Application, I should vacate the ex parte ad interim injunction issued by the District Judge on 10-8-2007. I am not inclined to do so for two reasons; firstly because as far as this Court is concerned, it had offered to Mr. Bansal that Temporary Injunction Application can be taken up for consideration, hearing and disposal by the High Court tomorrow itself (Mr. Bansal, however, suggested that the case be listed on 1st of April, 2008), and secondly, the grant of ex parte ad interim injunction by the District Judge was challenged by the appellant in this Court and later on in the Supreme Court. Both the Courts declined to interfere and instead directed the parties to appear before the learned District Judge. Both the Courts also declined to vacate the ex parte ad interim injunction. Any order to the contrary passed by me, therefore, would defeat the aforesaid decisions of a coordinate Bench of this Court as well as of Their Lordships of the Supreme Court.

13. I reiterate that as far as this Court is concerned, it was inclined to list the Temporary Injunction Application tomorrow itself, but Mr. Bansal prayed that it be listed on 1st of April, 2008. In conclusion, the following order is passed and herein below directions are issued:

(i) The suit in question along with the counter-claim for revocation and all applications including the contempt application are transferred from the file of the District Judge to this Court. The Registry shall take consequential action of summoning the record of the case.

(ii) The Temporary Injunction Application shall be listed on 1st of April, 2008 before an appropriate Bench at Serial No. 1 of the cause list, above all other cases. No adjournment to any party shall be granted on any ground whatsoever. Specially, no adjournment shall be granted at all to the plaintiff in the suit. It will be, therefore, up to the plaintiff to ensure that adjournment is not asked for on any ground at all.

(iii) The Temporary Injunction Application shall be heard on day-to-day basis till the hearing is concluded.

(iv) The impugned order dated 18-12-2007 is set aside on the ground mentioned hereinabove, but the ex parte ad interim injunction granted on 10-8-2007 shall continue to remain in force until the fresh decision on Temporary Injunction Application.

14. Mr. Bansal, the learned Counsel appearing for the appellants, submitted that I should make a pertinent observation that despite this Court and Supreme Court, not having interfered in the ex parte ad interim injunction, the learned Judge of this Court, when hearing the Temporary Injunction Application on 1-4-2008 shall be uninfluenced by the ex parte ad interim injunction or by the orders of this Court as well as the Supreme Court in not having interfered in the matter.

15. With absolute emphasis, I do wish to observe that what Mr. Bansal has stated is the law. There is absolutely, no doubt and there is no gainsaying that the Temporary Injunction Application has to be disposed of afresh by the High Court on its own merits and in accordance with law, totally uninfluenced in any manner

by the earlier grant of ex parte ad interim injunction by the learned District Judge or the earlier two orders passed by this Court and the Supreme Court declining to interfere with the aforesaid ex parte ad interim injunction.

**SooperKanoon - India's Premier Online Legal Search - [sooperkanoon.com](http://sooperkanoon.com)**