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Court : Delhi

Decided On : Sep-22-1995

Reported in : 1995(35)DRJ11

Judge : Devinder Gupta, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 39, Rule 1

Appeal No. : Interim Application Nos. 4629 and 7761 of 1995 and Suit No. 1353 of 1995

Appellant : Lintech Electronics (P) Ltd. and anr.

Respondent : Marvel Engineering Co. and anr.

Advocate for Pet/Ap. : Vikramjit Sen,; Mukul Rohatagi and; Vikram Dholakia, Ad

Judgement :

Devinder Gupta, J.

(1) On 26th May, 1995 while issuing summons to the defendants, the plaintiffs' application for an order of injunction was considered. Defendants were restrained by an ex parte order from interfering, selling or offering for sale to any party in India, Steam Leak Detection Equipment, which might be similar in technical specifications to the plaintiff's Acoustic Steam Leak Detection System registered under Indian Patent No.162647. Defendant has now applied for vacation of the

order of injunction. I heard learned counsel for the parties at length, after notice of application under Order 39 Rule 4 of the Code of Civil Procedure had been given to the plaintiffs.

(2) PLAINTIFFS' case is that plaintiff No.1 company is engaged in the manufacture, marketing and installation of highly sophisticated automatic steam leak detection equipment and is also the exclusive licensee of Indian Patent No.162647 dated 12th February, 1985, which is equivalent to European Patent No.0108556, owned by plaintiff No.2. Indian Patent is stated to be owned by plaintiff No.2 company of which plaintiff No.1 are the exclusive licensee in India and it is plaintiff No.1 who has applied for registration of exclusive license agreement under Section 68 and 69 of the Patents Act, 1970, hereinafter referred to as 'the Act'. It is alleged that plaintiff's Acoustic Steam Leak Detection equipment detects the leakage at a pin hole level and also identifies the areas of leaks which helps in taking the decision fast for shut down which reduces the outage time and repair cost. Plaintiff has a good record of installation of the system in various parts of the country. Salient features of its equipment, which is stated to be protected under the Indian Patent No.162647, have been enumerated in para 3 of the plaint. It is alleged that defendants 1 and 2 are also engaged in the same business as the plaintiff. In December, 1994, a tender for supply and installation of steam leak detection system for Tuticorin Thermal Power Station was floated by the Chief Engineer (Thermal Design) of Tamil Nadu Electricity Board. The tender notice also detailed the specifications for automatic steam leak detection equipment for which tender enquiry was made. Plaintiffs learnt that defendant No.2 through defendant No.1 had responded to the tender enquiry. The plaint further says that on comparison of the technical specifications in the tender enquiry read with the salient features of plaintiff's Indian Patent Act, the defendant's response to Chief Engineer's enquiry amounts to infringement of plaintiff's Indian Patent, which in turn violates the exclusive rights conferred on plaintiff No.2. In this back ground, it is alleged that the Acoustic system offered by the defendants to the Chief Engineer (Thermal Designs) of Tamil Nadu Electricity Board is in violation of plaintiffs' Patent in all respect, since all the salient features of the plaintiff's apparatus have in pith and substance been copied by the defendants. It is also alleged that the technology of the plaintiff is highly developed

one and is known only to plaintiff's engineers and scientists. The plaintiff's automatic steam leak detection equipment, which works on an Acoustic principle is the subject matter of patent protection in all countries of the world including India except South Africa. Decree for permanent injunction has been claimed by the plaintiff against the infringement of the patent. Decree for rendition of accounts etc. has also been claimed. Along with the suit, an application for interim relief was also moved, on which the aforementioned order was passed.

(3) DEFENDANTS' main ground in seeking vacation of the ex parte order of injunction is the alleged suppression of material and relevant facts by the plaintiff. It is alleged that defendant No.2 is carrying on its business of manufacture and sale of Steam Leak Detection Equipment based on acoustic principle in various parts of the world but primarily in South Africa and Germany for the last many years, in which countries more than 70 systems had been sold by defendant No.2 to the knowledge of plaintiff No.2. Plaintiff No.2 and defendant No.2 are business competitors. Plaintiff No.2 never thought of challenging the action of defendant No.2 overseas, which it now seeks to do in India although the said plaintiff claims to hold patents in many countries except South Africa. It is alleged that suppression of material fact is of a judgment of the Supreme Court of South Africa dated 5th December, 1991 in a case filed by plaintiff No.2 against defendant No.2 which fact alone is sufficient not only to vacate the order of injunction but also to dismiss the plaintiff's suit. Not only there is deliberate concealment of material fact but there is a positive false statement made that plaintiff's system has got Patent protection in many countries of the world except South Africa. Plaintiff No.2 in the litigation, which resulted in a judgment in defendant's favor, claimed relief against defendant No.2 on the alleged infringement by defendant No.2 of plaintiff's copyright in the drawings and designs relating to the system in question and the alleged misappropriation of the plaintiff's confidential information relating to the system. It is also alleged that in a detailed discussion Mr. Justice Zulman of the Supreme Court of South Africa held that there were in fact many essential dissimilarities between the two systems. A statement of fact was also recorded in the judgment wherein plaintiff No.2 conceded that defendants' system was totally different in at least two vital respects, namely, processing of signals captured by the microphone and display of such information and since a finding was recorded

that system of plaintiff No.2 and defendant No.2 were dissimilar in their essential facts and material respects, there was no question of infringement of plaintiffs' copyright in the technical drawings on which the system in question is based.

(4) Another ground on which injunction is sought to be vacated is the revocability of plaintiffs Patent under Section 64 of the Act. It is alleged that according to plaintiffs' own showing its Indian Patent 162647 dated 12th February, 1985 is equivalent to their European Patent No.0108556 dated 26th October, 1983. Apparently, the Indian Patent as per plaintiffs' own showing had wrongly and erroneously been granted, since the relevant technical specifications before the priority date of claim, were already in public knowledge and public domain since the European Patent was published prior to in 1984, before the date of the Indian Patent. Thus it is claimed that Indian Patent granted is invalid and void and cannot give rise to any cause of action since the same is liable to be revoked. There is yet another ground that the plaintiffs have also concealed a material fact that there are various other manufacturers in England, Japan, Germany and Italy manufacturing Steam Leak Detection system based on acoustic principle. It is pleaded that since defendant No.2 is a business competitor in the same field having considerable goodwill and reputation, there is no balance of convenience in continuing with the order of injunction which, if continued, is likely to cause not only immense loss and harm to its goodwill and reputation but also such loss and damage to the defendant's business, which it will not be possible to compensate in terms of money. The defendants have also challenged not only the court's jurisdiction to try the suit and raised an objection that the suit is bad for non-joinder of the Tamil Nadu Electricity Board, but also challenged plaintiff's claim on merits, which need not be stated for the purpose of deciding the applications.

(5) As noticed above, on 26th May, 1995 ex parte order of injunction was granted in plaintiffs' favor. Application under Order 39 rule 4 of the Code for vacation was moved by the defendants on 24th July, 1995 with advance copy served on the learned counsel for the plaintiffs on the same day. Application came up in Court on 31st July, 1995 when notice of the application was formally directed to be issued to the plaintiffs through their counsel for 3rd August, 1995. Necessity to issue notice arose since nobody appeared in Court on 31st July, 1995 on behalf of the

plaintiffs, although under the Rules of the Court, appearance ought to have been made on behalf of the plaintiffs on 31st July, 1995 when the application was posted before the Court and it was shown in the cause list. On 3rd August, 1995, Ms. Pratibha K. Singh sought leave to withdraw from the proceedings after Mr. Vikramajit Sen put in appearance on behalf of the plaintiffs. On his request, the application was adjourned to 7th August, 1995, on which date the case could not be taken up, therefore, it was taken on 9th August, 1995. No reply was filed on behalf of the plaintiffs to the application moved by the defendants despite the fact that copy was served on the plaintiffs' on 24th July, 1995. Since there was an ex parte order of injunction operating in plaintiffs' favor and no plausible reason was forthcoming for not filing reply, I proceeded to hear learned counsel for the parties.

(6) Learned counsel for the plaintiff raised a technical objection that defendants' application is not supported on affidavit, therefore, the same deserves to be discarded. Since the objection is contrary to the fact on record, the same is liable to be rejected. The application is duly supported on an affidavit duly sworn by Shri Sudhir D. Ahuja, constituted attorney of the defendant/applicant.

(7) Copy of the judgment of Supreme Court of Africa in *Lintvalve Electronic Systems Limited v. Instrotech (PROPRIETARY) Limited*, if taken into consideration, alone is sufficient to vacate the order of injunction. From the judgment, it is apparent that an action was commenced by plaintiff No.2 against defendant No.2 for infringement of its copyright in which proceedings the question was whether defendant No.2 had devised an acoustic steam leak detection system copying plaintiffs' design or whether this was accomplished by defendant No.2 through the application of its own research and development. It is held that the plaintiffs' system had three different parts, namely, (i) parts which extend beyond a micron which is installed outside a particular boiler; (ii) the processing of the signal captured by the microphone and (iii) the display of the information so captured. The judgment records that plaintiff No.2 conceded that there are differences in regard to the second and third portions of the system. As regards the first part of the system, the only claim of plaintiff No.2 was that the system developed by defendant No.2 was virtually indistinguishable from plaintiff's system. The judgment noticed a fact that at least three other acoustic steam leak

detection systems developed by Japanese and Italian Companies, which differ substantially from both plaintiff's and defendant's systems were in existence. After discussing the evidence and other material on record, it was held that defendant No.2 had not copied any copyright work of the plaintiff and there has been no infringement of copyright. It was also held that there was no question of infringement of any copyright since already disclosure to the public at large were made of the plaintiff's system due to the fact that the research that was alleged to have been made by plaintiffs was freely available to anyone who wish to discuss it. These observations made in the judgment have been noticed merely to highlight the argument made on behalf of the defendant's and stand taken by them that there has been not only mis-statement but also deliberate suppression of material facts.

(8) In case plaintiff No.2 and defendant No.2 had already litigated and there was a judgment of the Supreme Court of South Africa having material bearing, it was but necessary for the plaintiffs, at least to have made a mention thereof. Plaintiffs not only concealed this fact but also made a positive statement that it had patent in all countries of the world including India except South Africa. This statement is also shown to be wrong. Annexure R.5 at page 124 of the file is a copy from Register of Patents of the Republic of South Africa to the effect that an application of plaintiff No.2, which was accepted on 10th September, 1985, Patent No.851318 was granted on 30th October, 1985 pertaining to plaintiff's invention 'Steam Leak Detection'. Had this information been brought to Court's notice that plaintiff No.2 had a Patent in South Africa where defendant No.2 had been engaged in similar business and both plaintiff No.2 and defendant No.2 had litigated with respect to the infringement of copyright for the drawings and designs of the said system, in which litigation plaintiff had failed to get any favorable order on recording of a finding that there have been essential dissimilarities in the two systems, there was no question of any order of injunction being granted in plaintiff's favor.

(9) It also deserves to be noticed that as per the averments made in the plaintiff's Indian Patent is equivalent to European Patent. For European Patent, application was published with specification on 16th May, 1984 with priority date as 5th November, 1982. For Indian Patent the application with complete

specification is dated 12th February, 1985. Acceptance of the complete specification was advertised on 25th June, 1988. Considering these dates and the fact that Indian Patent was obtained subsequently, prima facie there is considerable force in the submission made on behalf of defendants that the same would be liable for rejection, in view of the provisions of Section 64 read with Section 13 of the Act. Defendant has not yet filed written statement or counter claim, but at this stage is entitled to rely upon one of the grounds of revocability of the patent as a defense in application under Order 39 Rule 4 Civil Procedure Code . The ground being that the invention so far as it was claimed in application for Indian Patent, of the complete specification, has not new but the technical specifications were available to the public and were publicly known prior to the claim since there has been publication of plaintiff's application for European Patent.

(10) The defendant's on affidavit stated that as many as 70 systems and 1356 sensors had already been sold by defendant No.2 in South Africa and Germany since 1985. Because of the judgment of the Supreme Court of South Africa, it cannot be said that the plaintiffs had no knowledge that defendant No.2 was not competing in the same field.

(11) In view of the defense raised by the defendants as regards revocability of the Indian Patent for which there is enough material on record, there is absolutely no prima facie case in favor of grant of injunction. The fact that in the trade in question defendant No.2 is well established to the plaintiff's knowledge, there is also no balance of convenience in the grant of injunction. There is also no question of any irreparable loss or injury being caused to the plaintiffs, since loss or injury, if any, in the instant case, due to non grant of injunction can very well be compensated in terms of money. The plaintiffs application is otherwise liable to be rejected because of a positive assertion, in a manner not warranted, made by them that they had no patent in South Africa. In the statement and undertaking, which was made under Section 8 of the Act in Form 4 by plaintiff No.2 while applying for Indian Patent, it was declared on 16th April, 1987 that in South Africa application had been moved for Patent on 21st February, 1985 for invention relating to Steam Leak Detection, on which Patent M.85/1318 had been granted. A

statement made in the plaint that plaintiff has Patent in many countries except South Africa is prima facie a false statement made, knowing and believing that such statement is not true. Prima facie such a statement was made malafide with a view to obtain an interim order against defendant No.2, who according to plaintiffs' knowledge was well established since 1985 in South Africa in which country plaintiff No.2 had taken out an unsuccessful action against defendant No.2. Due to this fact also, I am not inclined to continue with the order of injunction.

(12) In view of the above, plaintiff's application deserves to be rejected and order of injunction deserves to be vacated. Accordingly, the defendant's application is allowed and plaintiff's application is dismissed with costs quantified at Rs.5,000.00.

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