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SooperKanoon Citation : sooperkanoon.com/808680

Court : Chennai

Decided On : Jan-05-2007

Reported in : LC2007(1)352; (2007)2MLJ907; 2007(34)PTC689(Mad)

Judge : S. Rajeswaran, J.

Acts : [Patents Act, 1970](#) - Sections 48, 104A and 108

Appeal No. : O.A. No. 535 and 536 of 2006 in C.S. No. 495 of 2006

Appellant : K. Ramu

Respondent : Adyar Ananda Bhavan and Muthulakshmi Bhavan

Advocate for Def. : A.K. Lakshmi Narayanan, Adv.

Advocate for Pet/Ap. : R. Krishnamurthy, Sr. Counsel for ;A.A. Mohan, Adv.

Disposition : Application allowed

Judgement :

ORDER

S. Rajeswaran, J.

1. O.A. Nos. 535/2006 has been filed by the plaintiff to grant an ad-interim injunction restraining the respondent its partners or proprietors as the case may be their men, agents, servants, successors-in-business, legal representatives or any

person claiming through or under them from in any manner infringing the applicant's product patent under No. 200285 by making, using, selling or offering for sale of sweets made with fructose/levulose or in any other manner violating the said registered patent whatsoever pending disposal of the suit.

2. O.A. No. 536/2006 has been filed by the plaintiff to grant an ad-interim injunction restraining the respondent, its partners or proprietors as the case may be, their men, agents, servants, successors-in-business, legal representatives or any person claiming through or under them from in any manner infringing the applicant's process patent under No. 193899 by making any product, using, selling, offering for sale products made with the patented process or otherwise dealing with the patented process in any manner whatsoever pending disposal of the suit.

3. The plaintiff is the applicant.

4. The brief facts leading to the above applications are as under:

Plaintiff is carrying on business in the name and style of Sundar Chemicals Pvt. Ltd., Sundar Dietetics Pvt. Ltd., and Sundar Diabetics Desire. The plaintiff along with his daughter Lavanya found that fructose/levulose which is a sweetener that does not have the injurious effect of sugar produced from sugarcane, can be used for the purpose of making traditional Indian sweets. After much efforts, the plaintiff invented a process by which fructose either singly or in combination can be used for manufacturing Indian sweets. The process involves fructose being prepared in a particular manner so as to prevent fructose from browning due to maillard reaction and caramelization when exposed to high temperature. The plaintiff along with his daughter applied for a patent on 13.2.2003 for the process for preparation for low glycemic sweets. After filing the process patent application, they further invented improved process to extend the said improved process for the preparation of traditional Indian sweets, where browning of sweets does not occur. Then the plaintiff and his daughter filed an application for product patent on 28.7.2004. After examining the application for process patent and product patent, registration certificate was issued for both process patent and product patent on 5.12.2005 under No. 193899 and on 1.5.2006 under No. 200285 respectively.

5. The plaintiff has been selling Indian sweets made by fructose since 6.7.2005 and their sweet shop was inaugurated at T.Nagar, Chennai. The plaintiff's process patent is renewed time and again and would be valid for a period of 20 years from 13.2.2003 up to 12.2.2023 and the product patent is also renewed and it would also be valid for a period of 20 years from 28.7.2004 i.e., up to 27.7.2024. Thus the plaintiff is entitled to prevent any 3rd party from making use of plaintiff's inventive process resulting in the plaintiff's products.

6. While so, the plaintiff was shocked and surprised to know that the defendant is violating the registered patent rights and he is selling sweets containing fructose in all his sweet shops. The products of the defendant are identical to the product of the plaintiff and therefore the defendant ought to be using the same process which is patented by the plaintiff. Hence the plaintiff filed the above suit for a permanent injunction restraining the defendant from infringing the plaintiff's process patent and product patent by making or selling products made with the patented process and also from making or selling sweets made with fructose by violating the registered product patent Plaintiff also prayed for the destruction of all the materials and implements used by the defendant for creation of the infringing goods and also for damages amounting to Rs. 10,50,000/-.

7. By way of interim relief the above applications have been filed for interim injunction.

8. On 28.9.2006 after recording the undertaking given by the learned Counsel for the defendant that he would advice the defendant not to manufacture or to sell the low glycemc sweets made with fructose, this Court granted two weeks time to file counter. Thereafter a counter affidavit has been filed by the defendant for which a reply affidavit has been filed by the plaintiff.

9. In their counter affidavit the defendant contended that the plaintiff made misrepresentation and played fraud upon the authorities for getting the patent rights and therefore they are taking steps to revoke the grants. It is denied by the defendant that they copied the applicant's inventions and what they are doing is that they are using fructose in the manufacture of traditional Indian sweets instead of sugar and the preparation does not involve anything new as claimed by the

plaintiff. It is also denied that the products of the plaintiff are identical to the products of the defendant. It is admitted by the defendant that they are manufacturing sweets with fructose only recently on an experimental basis and there is not much of demand for such sweets. In any event the defendant submitted that the plaintiff is not entitled to any interim injunction until he proves his case finally in the suit.

10. In the reply affidavit it was specifically stated by the plaintiff that even if fructose is freely available in the market the same could not be used to manufacture sweets without the process invented by the plaintiff which avoids browning due to maillard reaction and caramelization. If fructose can be easily substituted for sugar for manufacturing sweets, then any one could have made such sweets in the past very easily and that itself, according to the plaintiff, will prove that without using the process invented by him such sweets could not be made or manufactured.

11. Heard Mr. R. Krishnamoorthy, the learned Senior Counsel for the plaintiff and the learned Counsel for the defendant. I have also gone through the documents filed and this judgments referred to by them in support of their submissions.

12. The learned Senior counsel has submitted that the plaintiff has been issued with patent registration certificate for both process patent and product patent and in such circumstances a prima facie case has been made out in favour of the plaintiff. He refers to 2j, 2ja, Section 48, Section 104A and 108 of [Patents Act, 1970](#) and contends that in view of the above provisions of the Act the plaintiff is entitled to an order of interim injunction. In support of his submissions, the learned Senior counsel relied on the following decisions:

- 1) 1975 (1) All E.R. 504 (American Cyanamid v. Ethicon)
- 2) 2002 (24) PTC 632 (Del)(DB) (Telemecanique & Controls (I) Limited v. Schneider Electric Industries SA)
- 3) 2006(32) PTC 65 (Mad.)(DB) (Wockhardt Ltd. v. Hetero Drugs Ltd. and Ors.)

13. Per contra the learned Counsel for the defendant submitted that there is nothing new nor any invention in the preparation of sweets with fructose and therefore the plaintiff has committed a fraud before the authorities to get the patent right and steps have been taken already to revoke the grant. He further submitted that when the invention itself is questioned and until the patent right is tested before this Court, the plaintiff is not entitled to any order of injunction.

14. In support of his contentions the learned Counsel for the defendant relies on the following decisions.

1) : AIR1965 Mad327 (Manicka Thevar v. star Plough Works)

2) : AIR1976 Delhi87 (Ram Narain v. Ambassador Industries)

3) : [1986]1SCR120 (Monsanto Co. v. Coramandal Indag Products (P) Ltd.)

15. I have considered the rival submissions carefully and I have given my anxious consideration to their submissions.

16. It is an admitted fact that the Plaintiff has been issued with patent rights for both process and product. The process is for preparation of low glycemic sweets for a term of 20 years from 13.2.2003. Similarly they are also entitled to patent for the product for 20 years from July 2004. Thus the plaintiff has discharged his initial responsibility by proving that they are protected by the certificate issued by the authorities under the Patents Act 1970. In other words the plaintiffs have established a prima facie case on the strength of their two certificates. In such circumstances Section 48 of the [Patents Act, 1970](#) will hold the field according to which a patent granted under this Act shall confer upon the patentee the exclusive right to prevent third parties from the Act of making, using, selling or importing that product in India if the subject matter of the patent is a product. Similarly if the subject matter of the patent is a process the patentee has the exclusive right to prevent 3rd parties from the act of using the process for sale, selling for those purpose the product obtained directly by that process in India.

17 . Therefore the plaintiff having obtained the patent for both the process and product under the Patent Act, 1970 has got the statutory right to prevent 3rd

parties from infringing those rights.

18. When third parties infringe the rights granted under the Patent Act then Section 108 of the Act will come into operation according to which in case of infringement the court may grant the reliefs including injunction and ordering the goods to be seized, forfeited or destroyed.

19. In the present case it is the specific case of the plaintiff that he and his daughter invented a process to make the end products namely, sweets containing fructose. According to them if the fructose is ordinarily substituted in the place of sugar, in the preparation of sweets the same will get affected because of browning due to maillard reaction and caramelization. That is the reason no such sweets made in the past until they invented a process of their own which prevents the browning of sweets even though fructose is used in the manufacture. Thus they applied for patent right for process and also the end product making use of the process. Both the rights are granted by the authorities and therefore the plaintiff has the exclusive statutory right to prevent 3rd parties from making use of the process and manufacturing the products making use of that process.

20. In 1975(1) All E.R. 564 (cited supra), it was held that grant of interim injunction in action for infringement of patent is governed by the same principles as in other actions.

21. In 2002(24) PTC 632(cited supra), the Division Bench of Delhi High Court held that undoubtedly patent creates a statutory monopoly protecting the patentee against any unlicensed user of the patented device and thus once violation is established, it will not be permissible to contend that the said patentee is not entitled to any injunction.

22. In 2006(32) PTC 65 (cited supra), a Division Bench of this Court held as follows:

16. The above observations of the Supreme court would make it clear that the following guidelines have to be taken into consideration, while dealing with the issue of grant of an interlocutory injunction during the pendency of legal

proceedings, which require the exercise of the discretion of the Court. While exercising the said discretion, the Court applies the following tests:

- (a) Whether the plaintiff has a prima facie case;
- (b) Whether the balance of convenience is in favour of the plaintiff; and
- (c) Whether the plaintiff would suffer an irreparable injury, if his prayer for interlocutory injunction is disallowed.

17. Relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved. The object of the interlocutory injunction is to protect to plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial.

23. In the above decision, the Division Bench of this Court reiterated the guidelines to be considered by the court while dealing with the issue of grant of interim injunction.

24. In the light of the above legal principles, provisions of the Patent Act, 1970 and the facts of the present case I am of the considered opinion that the plaintiff is entitled to an order of interim injunction in both these applications.

25. In : AIR1965 Mad327 (cited supra), this Court held that when the patent is a very recent one, and there is a controversy about the validity of the grant of patent touching the originality or inventive genius of the plaintiff, to the grant of the patent, then the plaintiff is not entitled to an order of interim injunction.

26. The above decision has been rendered prior to amendment made to Patent Act and Section 48 (with effect from 20.5.2003) and Section 108 (with effect from 20.5.2003) were not there at the time of delivering the above decision and therefore on the strength of this decision, the plaintiff cannot be denied the relief of interim injunction. In fact strong reliance was placed on this decision by the learned Counsel for the defendant and in view of the subsequent amendment. I

am rejecting the argument of the learned Counsel for the defendant.

27. In AIR 1976 Delhi 86 (cited supra), the Delhi High Court held that court will be reluctant to grant the injunction if the defendant disputed the validity of the grant and if the patent is new and its validity has not been established in a judicial proceeding till then.

28. This decision was also rendered before the amendment and in fact in the recent decision of Delhi High Court reported in 2002(24) PTC 632 (cited supra), the Division Bench held otherwise. Therefore this decision is not helpful to the defendant.

29. In : [1986]1SCR120 (cited supra), the Hon'ble Supreme Court held that when the plaintiffs were merely camouflaging a substance whose discovery was known through out the world, the patent is liable to be revoked.

30. The facts in the above Supreme Court decision are totally different from the case on hand and therefore that decision is easily distinguishable.

31. In the present case it has not been established that the process in making a sweet with fructose and the alternate low glycemic sweets made in this process are known to the entire world. On the other hand until such sweets made by the plaintiff no such sweets were ever made. It is also established before me that even the defendant has started manufacturing sweets containing fructose only after plaintiff's sweets hit the market.

32. Hence I do not find any merits in the contentions of the defendant to reject the injunction applications.

33. As the plaintiff has established a prima facie case its statutory right and the injury that would be caused to him. I am satisfied, that the plaintiff is entitled to an order of injunction in both the above applications.

34. In the result, both the applications are allowed. No costs.