

Dhanpat Seth and ors. Vs. Nil Kamal Plastic Crates Ltd.

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Court : Himachal Pradesh

Decided On : Aug-03-2006

Reported in : 2006(33)PTC339(NULL)

Judge : Surjit Singh, J.

Acts : [Patents Act, 1970](#) - Sections 2, 13(4), 48, 64, 107(1), 107(2) and 113(4); Patents (Amendment) Act, 2002; Trade Mark Act - Section 28; [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 94 and 151 - Order 39, Rules 1 and 2

Appeal No. : OMP No. 530 of 2005 in Civil Suit No. 69 of 2005

Appellant : Dhanpat Seth and ors.

Respondent : Nil Kamal Plastic Crates Ltd.

Advocate for Def. : Amarjeet Singh and; Shipla Sood, Advs.

Advocate for Pet/Ap. : Vinay Kuthiala and; Vandana Kuthiala, Advs.

Disposition : Petition dismissed

Judgement :

Surjit Singh, J.

1. The present petition, under Order 39 Rules 1 & 2 read with Section 94(e) and 151 of the Code of Civil Procedure, for grant of temporary injunction, has been

moved by the plaintiffs in Civil Suit No. 69 of 2005.

2. Facts, relevant for the disposal of this petition, may be noticed. The plaintiff/petitioners have filed a suit seeking grant of permanent prohibitory injunction restraining the defendant/respondent from infringing Patent No. 195917, in respect of a device of manually hauling of agriculture produce, granted in their favour on 11.7.2005. It is alleged that the invention was conceptualized visualized by the plaintiff/petitioners in the year 1999. The application for grant of patent was moved on 24.5.2002 and the patent, after making all the necessary inquiries and observance of the procedure, prescribed under the Patents Act and the rules framed thereunder, was granted on 11.7.2005. The patented device is an improvement over a local product known as 'Kilta' made of bamboos. The plaintiffs' device or product or invention, per plaint, has the following description/specification:

A device for hauling agriculture produce comprising a container of synthetic polymeric material defined by a hollow frusto-conical body open at the top and closed at the based and tapering from the operative open at the top and closed at the based and tapering from the operative open top to the base with perforated walls said perforations being essentially quadrilateral in configuration and reducing in dimensions from the operative top to the base; said wall having a contour adapted to proximate the back of a human body; and removable harnessing means secured to the container in the upper perforations, said harnessing means having straps and buckle formations adapted to be irremovably secured in and around the perforations in the said walls and looping means around the back and the shoulders of an individual, said straps and buckle components of the harnessing means being adjustable to permit the harnessing means to be secured to the container at varying locations on the wall of the container in the perforations and the looping means adapted to be adjusted to accommodate individuals of different heights and body structure.

3. According to the plaintiffs/petitioners, in the year 2005 the defendant/respondent infringed the patent by producing similar device/item and supplied it to the Department of Horticulture, Government of Himachal Pradesh and some private

parties. The plaintiffs/petitioners have sued the defendant/respondent for damages as also for issuance of mandatory injunction, directing it not to infringe the patent and for seizure, forfeiture and distribution, without payment of any compensation of the duplicate of the patented device, supplied by the defendant to the Horticulture Department and some private persons. Through the present petition temporary injunction is sought restraining the defendant/respondent from manufacturing or selling the duplicate version of the invented device of the plaintiffs or from committing any act which may infringe the patent granted to the plaintiffs.

4. Detailed written reply to the O.M.P. has been filed by the defendant/respondent. Written statement has also been filed by it. The defendant has also filed an application for revocation of the patent, which according to the defendant, is in the nature of counter-claim. Various preliminary objections have been raised in the reply as also the written statement. The ones, relevant for deciding the present application, are:

(i) the so-called 'device', got patented by the plaintiffs, is not an invention within the meaning of Section 2(j) of the Patents Act, because it is not a new product; and

(ii) that the suit is hit by the doctrine of anticipation.

5. On merits it is alleged that the alleged patented invention is nothing but imitation of traditional 'Kilta', the only difference being that the traditional 'Kilta' is made of bamboos, while the product of the plaintiffs is made of synthetic polymeric material. It is alleged that as a matter of fact the very name of the product is deceptive inasmuch as it is not a device for manual hauling, as it is named, but is only a long basket (Kilta) meant for collection of fruits and other agriculture produce while the person doing the job remains in standing posture and the carrying of the fruit/produce, so collected to the collection centre. It is further stated that as a matter of fact the defendant/ respondent had prepared the design of its product, which too is a 'Kilta', in the year 2001 and submitted the drawings of the said design to Arries Moulding Co. Ltd. Taiwan in December 2001 for their advice and soon after receipt of their advice, with some technical modifications, the production started and the product was introduced in the market. It is alleged that

the defendant/respondent manufactured and marketed the product much before the filing of the application for patenting of its product by the plaintiffs with the concerned authorities.

6. During the course of the hearing of the matter, learned Counsel representing the defendant/respondent produced, for being shown to the Court, the traditional 'Kilta' made of bamboos, as has been in use since times immemorial, the patented 'device' of the plaintiffs and the article manufactured and marketed by the defendant, allegedly by infringing the patent granted to the plaintiffs. Just visual comparison of the three things indicated that the patented device of the plaintiffs and the product of the defendant are nothing but imitations of the traditional 'Kilta'. On being asked by the Court as to what is new about the 'device' got patented by the plaintiffs, when apparently it is like the traditional 'Kilta', the learned Counsel representing the plaintiffs/petitioners submitted that the 'device' is light weight, it has adjustable nylon straps with buckle fitted to it and that these straps are a novelty in the sense that the traditional 'Kilta' is supported on the forehead by means of a rope, while the weight of the 'patented device' rests on the shoulders and this protects the user against the hazards of bearing the weight of 'Kilta' on the forehead.

7. It is a matter of common knowledge that even the traditional 'Kilta' is supported by the users on their shoulders, of course, by means of ropes or the straps and the users have by the experience of their forefathers learnt how to adjust it on their backs so that they remain comfortable, while plucking the fruits or collecting the agriculture produce and then walking with it to their destinations.

8. An invention is defined to mean a new product or process involving an inventive step and capable of industrial application, per Section 2(j) of the Patents Act. The case in hand is in respect of a product and not a process involving an inventive step and capable of industrial application. As demonstrated hereinabove, the patented 'device' is not a new product. It is just an imitation of the traditional Kilta' and hence prima facie not an invention.

9. The 'device' is made of synthetic polymeric material, which had been invented long back. The process by which the substance is moulded into various articles

like baskets, buckets, mugs, jugs, furniture and so many other articles, is also too well-known. Thus, there is nothing new about the so-called 'device'.

10. As a matter of fact, the basket, got patented by the plaintiffs, is not a 'hauling device' as it is named. A 'hauling device' means something, which is meant for transportation by means of pulling, dragging, drawing etc. The patented article of the plaintiffs is nothing but a long tapering basket with the upper side open and broad and the lower end being quite narrow and it is carried on the shoulders by means of nylon straps having buckles.

11. The defendant/respondent's plea of anticipation is also borne out from the plaintiffs' own documents. They have filed a document A-7, according to which a conference was held at Shimla at Hotel Cecil on 4.4.2002 for launching of 'Kilta', i.e. the patented article of the plaintiffs. With this, there is another document at page 45 of the file, containing the documents submitted by the plaintiffs, in which there is a photo of the patented article. At page 62 of the same file there is a letter, written by the plaintiffs to the Managing Director of National Horticulture Board, wherein it is claimed that the plaintiffs have launched plastic 'Kilta' in Shimla on 4.4.2002 with the help of Reliance in presence of Minister of Horticulture Department, Himachal Pradesh and that the product was appreciated and approved by all, who were present at such launching. Then there is another letter dated 19.4.2003 at page 68. This letter is also addressed by the plaintiffs to the National Horticulture Board in which it is claimed that the plaintiffs had been marketing the 'Kilta', i.e. the patented 'device' for the last one year and the product was well accepted by the framers of Himachal Pradesh. This letter of April 2003 clearly suggests that the patented article had been in the market at-least since April 2002. The application for getting the article patented was made on 24.5.2002. The aforesaid documents of the plaintiffs thus show that the patented article had been manufactured and introduced in the market more than a month prior to the making of the aforesaid application.

12. Learned Counsel representing the plaintiffs/petitioners submitted that a very rigorous and cumbersome procedure is prescribed in the Patents Act, for inquiring into the claim of an applicant, seeking patenting of his invention and it is only after

the concerned authorities are satisfied by making thorough inquiry, that the patent is granted. He, therefore, urged that presumption is required to be drawn that the patented product is a new product and it had not been anticipated, In support of this argument, he placed reliance upon *American Cyanamid Co. v. Ethicon Ltd.* (1975) 1 All ER 504.

13. The precedent, relied upon by the learned Counsel, is of no avail to the plaintiffs/petitioners for the simple reason that the statutory law prevailing in India is contrary to the law laid down therein. Section 13(4) of the [Patents Act, 1970](#) says that the validity of the patent is not warranted by the grant. The Hon'ble Supreme Court in *Bishwanath Prasad Radhey Shyam v. Hindustan Metal Industries* : [1979]2SCR757 has held as follows, vide para 33 at page 1450:

33. It is noteworthy that the grant and sealing of the patent or the decision rendered by the Controller in the case of opposition, does not guarantee the validity of the patent, which can be challenged before the High Court on various grounds in revocation or infringement proceedings. It is pertinent to note that this position, viz., the validity of a patent is not guaranteed by the grant, is now expressly provided in Section 13(4) of the [Patents Act, 1970](#). In the light of this principle, Mr. Mehta's argument that there is a presumption in favour of the validity of the patent cannot be accepted.

14. It was then argued by the learned Counsel for the plaintiffs/petitioners that Section 48 of the Patents Act, as amended by Patents (Amendment) Act, 2002, confers upon the patentee the exclusive right to prevent third parties, who do not have his consent, from making, using, offering for sale, selling or importing the patented product and that in view of this provision, so long as the said patent is not revoked, nobody else can make, use, offer for sale etc. the patented product. He urged that the implication of this statutory provisions is that the patentee is entitled to the relief of injunction by mere proof of the fact that the product is patented and that the patent has not been revoked. He further urged that in case the provision is interpreted in some different manner, that will render it nugatory.

15. The argument advanced by the learned Counsel for the plaintiff/petitioners cannot be accepted, because per 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. It is one of the grounds for revocation of a patent, under Section 64 of the Act, that the patented product is not an invention, which in the present case means a new product. Now, if in a suit for infringement of a patent it is denied by the defendant that the patented item is an invention and prima facie it appears from the material placed on record that the patented product is not a new product, but just an imitation of some traditional product, cast in a different material (synthetic polymeric material in this case), in that event the patentee will not be entitled to the relief of injunction, neither permanent for temporary. If the argument of the learned Counsel for the plaintiffs/petitioner is accepted, that would mean that every patentee will get injunction from the Court just on filing a suit claiming therein that his product is patented and the patent has not been revoked. In other words, the Court would be acting just like a rubber stamp and granting relief without application of mind.

16. The above stated position apart, Section 48 of the Patents Act, as amended by the Act of 2002, has not given the right to the patentee to seek injunction for the first time. Even before this amendment, the Court had the power, per Section 113(4) of the Patents Act, which provision remains untouched by the Amendment Act of 2002, to grant injunction in fact the amendment to Section 48, made by Amending Act of 2002, is in a different context. Prior to the amendment the patentee had the exclusive right by himself, his agents, or licensees to make, use, exercise, sell or distribute the patented article or substance in India. That meant that the persons, other than the patentee, his agents, or licensees, could not make, use, exercise, sell or distribute the patented article or the substance in India. In other words, the law itself prevented the persons, other than the patentee, his agents, or licensees, to make, use, exercise, sell or distribute the patented article or substance in India. Now, after the amendment, the patentee has been given exclusive right to prevent third parties, who do not have his consent, from the act of making, using, offering for sale, selling or importing the invented product, meaning thereby that the third parties cannot make, use etc. the invented product, only if the patentee exercises his exclusive right to prevent them from doing so.

17. Learned Counsel for the plaintiffs/petitioners made one more submission. According to him, once a patent is registered, the patentee, complaining of infringement by filing a suit for permanent prohibitory injunction, should normally be granted a temporary injunction. In support of this submission he placed reliance upon *Midas Hygiene Industries (P) Ltd. and Anr. v. Sudhir Bhatia and Ors.* : 2004(28)PTC121(SC) . He urged that though the relied upon precedent pertains to a case where infringement of registered trade mark was alleged, yet looking to the similarity of the provision of Section 28 of the Trade Marks Act with Section 48 of the Patents Act, as amended by Amendment Act of 2002, the same was applicable by analogy.

18. The argument has been noticed only to be rejected. What the Hon'ble Supreme Court has said in this case is that in cases of infringement, either of trade mark or of copy right, normally an injunction must follow. It is a matter of common knowledge that registered trade marks and copy rights stand on different footings than a patent. Patent is granted in respect of an 'invention' or a 'new invention' and even after the grant of patent, there is no warranty about the validity of the patent, per Section 13(4) of the Patents Act. Again, claim to an invention can be challenged, even after it is patented, on a number of grounds enumerated in Section 64 of the Act. Not only this, all these grounds are available as defences to a defendant, in a suit filed by the patentee alleging infringement of patent, per Section 107(2) of the Act.

19. From the above discussion, it is clear that the plaintiff/petitioners do not have a prima facie case. Now, when they do not have a prima facie case, the question of balance of convenience being in their favour or their suffering any irreparable loss, does not arise. Consequently the O.M.P. is dismissed. The interim order dated 28.12.2005 is vacated. Observations made hereinabove, shall have no bearing on the merit of the suit.