

Tenxc Wireless Inc. and anr. Vs. Andrew Llc and ors.

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Court : Delhi

Decided On : Dec-22-2010

Judge : Vikramajit Sen; G.P.Mittal, Jj.

Acts : Code of Civil Procedure (CPC) - Order XXXIX Rules 1, 2, 4

Appeal No. : FAO (OS) No.697/2010 & CM Nos.22308-09/2010 & CM No.22578/2010

Appellant : Tenxc Wireless Inc. and anr.

Respondent : Andrew Llc and ors.

Advocate for Def. : Mr. Dushyant Dave; Ms. Gayatri Roy And Ors.

Advocate for Pet/Ap. : Mr. Saikrishna Rajagopal; Mr. J. Sai Deepak, Advs.

Judgement :

1. The Appellants assail the order dated 30th November, 2010 passed by the learned Single Judge whereby the ex- parte injunction granted by the learned Single Judge vide order dated 4th October, 2010 was suspended/vacated and the case was fixed for completion of the pleadings of the parties with direction to the Respondents to file their written statements within 30 days from the date of the said order.

2. A suit for permanent injunction restraining infringement of registered Indian Patent Number 240893 for an invention entitled "Asymmetrical Beams for

Spectrum Efficiency", delivery up, rendition of account of profits and damages was filed against Respondent No.1. The matter came up for hearing on the application under Order XXXIX Rules 1 & 2 of the Code of Civil Procedure (Code). On 4th October, 2010, the learned Single Judge ordered impleadment of Defendants No.2 and 3 (Respondents No.2 & 3 herein) as it was represented on behalf of the Appellants that Respondent No.1 was in the process of selling its impugned product to Reliance Communication and Tata Teleservices Respondent Nos. 2 & 3 respectively. On information of an ex-parte injunction order passed against it, Respondent No.1 preferred an LPA which came to be disposed of by this Court on 15.11.2010. The case was remanded for compliance of provisions of Order XXXIX as laid down in the Code as well as clarified in A.Venkatasubbiah Naidu vs. S.Chellappan (2000) 7 SCC 695.

3. An application under Order XXXIX Rule 4 of the Code was moved by the Respondent No.1 which came to be disposed of by the impugned order. The grievance of the Appellants is that the order of injunction was suspended/vacated by the learned Single Judge mainly on the ground that as per the case of the Appellants the Patent Certificate by Patent Office had been given to the Appellants on 9.06.2010 yet the Appellants had deliberately not produced the specification in respect of which the product of the Appellants had been patented in as much as the Appellants instead of filing the documents annexed to the Patent Certificate dated 9.06.2010 had filed the documents in respect of the Patent which had been downloaded from the site of the Patent Office. It had also been alleged in the application under Order XXXIX Rule 4 of the Code that the Appellants had dealings with Respondent No.1 as he had entered into Agreement for using Respondent No.1's technology called "Remote Electrical Tilt" and thus the Appellants' Company was aware that the Respondent No.1 Company and its subsidiary had been using the impugned product for the last more than two years before filing of the suit.

4. Mr. Saikrishna Rajagopal learned counsel for the Appellants has tried to explain that Indian Patent Office takes anywhere between 20-40 days to supply certified copy of the granted Patent Specification and therefore, it was not feasible for Appellant No.1 to await receipt of certified copy of granted specification because it

was praying for an urgent ex-parte ad interim order. He also tried to point out as to how Appellant No.1 Canadian Attorneys had instructed the Indian Patent Agent to urgently obtain and transfer certified copy of the complete specification as granted. He explained that no information was withheld nor there was any question of any forgery or making false or misleading statement.

5. It has been submitted that the specification filed by the Appellants along with the Complaint was never represented as certified copy of the granted specification and the source from which it was obtained was prominently mentioned on the document itself. It is also the case of the Appellants that comparison of the corresponding claims between the complete specification downloaded from the official website of Indian Patent Office and the complete specification as granted was also made in the Affidavit of Mr. Rajiv Pancholy filed on 28.09.2010 (not considered by the learned Single Judge) with a view to satisfy the learned Single Judge that the Appellants had not gained any undue benefit by filing the downloaded specification as against the certified copy of the granted specification.

6. Regarding impleadment of Reliance Communication, it has been pointed out that status quo order was not dictated by the learned Single Judge in the open Court and therefore the Appellants could not point out to the learned Single Judge that there was no pleading in the Suit against Respondent No.2. It has been submitted that impleadment of Reliance Communication in the Suit was not pursuant to any pleading by the Appellants and the Appellants in the circumstances had no opportunity to point out the error in the order.

7. Admittedly, notice of the application under Order XXXIX Rule 4 of the Code was not issued to the Appellants so as to get its response thereon. Respondent No.1 who was aggrieved by the ex-parte injunction order has admittedly neither filed the written statement nor any reply to the application under Order XXXIX Rules 1 & 2 of the Code.

8. Rule 4 of Order XXXIX of the Code empowers the Court to vacate an order of injunction if the party has made a false or misleading statement in relation to a material particular and the injunction was granted without giving notice to the opposite party.

9. The Appellants have a grievance against the impugned order mainly on the ground that the Appellants had not been afforded the opportunity of filing the written response to the Application under Order XXXIX Rule 4 of the Code moved by Respondent No.1 nor the Affidavit filed by Mr. Rajiv Pancholy was considered. If the learned Single Judge would have had the material, it would have been established that :-

- a. The Appellants have not knowingly presented filtered and selective information.
- b. The Appellants have not suppressed or concealed material particulars.
- c. The Appellants have not fabricated any document.
- d. The Appellants have not mis-stated any facts.
- e. There is no material difference in the principal independent claims in both versions of the complete specification; and consequently
- f. The Appellants have not gained any undue benefit by filing the complete specification downloaded from the official website of the Indian Patent Office.

10. Mr. Dushyant Dave, learned senior counsel for the Respondents, however, supports the impugned order on the ground that the Court is not to go into the merits of the case and once a party is found to have made a false or misleading statement in relation to a material particular an injunction order is bound to be vacated.

11. In the Application under Order XXXIX Rule 4 of the Code very serious allegations had been leveled against the Appellants. It was highly unfair to have condemned the Appellants and accuse it of making false statement or putting up filtered and selective information without obtaining a written response from the Appellants. Since written response of the Appellants of the Application filed under Order XXXIX Rule 4 of the Code is not on record, we are unable to appreciate the respective contentions raised on behalf of the parties and the findings reached by the learned Single Judge.

12. The Hon'ble Supreme Court has clarified that the discretion exercised by the lower Court should not be interfered with by the Appellate Court merely because it favours a differently plausible view. It has been vehemently contended before us by Mr Sai Krishna, Advocate, that despite fervent requests made to the Learned Single Judge to permit the Appellant/Plaintiff to file a Reply to the subject Application under Order XXXIX Rule 4, this request was ignored. Mr Dave, learned Senior Counsel for the Defendant/Respondent has equally vehemently submitted that such a request was not voiced by the Appellant on any of the days when the Application was listed for hearing. Unfortunately, record of the proceedings are reticent on this point. Since the pervading perception of the Learned Single Judge was that the Plaintiff had knowingly made false or misleading statements in relation to material particulars, the Plaintiff should have been afforded an opportunity to controvert the Defendant's statements. We should not be understood to find fault with the speedy dispatch with which the Learned Single Judge had decided the Application under Order XXXIX Rule 4. This is in fact what law requires. However, the interest of justice may be undermined if an opportunity to controvert or respond to vital facts is not given. It is for this reason that we have taken the present view.

13. Even if, the learned Single Judge had preferred to keep the application under Order XXXIX Rules 1 & 2 of the Code pending, it was essential to obtain a response from the Appellants in respect of serious allegations. In this view of the matter, the impugned order cannot be sustained. The same is accordingly set aside. The learned Single Judge may decide the application under Order XXXIX Rule 4 of the Code afresh after giving the opportunity as aforesaid. No costs.

14. Pending applications also stand disposed of accordingly.

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