

(2015) 02 MAD CK 0447

In the Madras High Court

Case No : Writ Petition Nos. 17539 to 17541 of 2011, W.P. Nos. 31133 to 31135 of 2013 and W.P. No. 31137 of 2013

Aloys Wobben

APPELLANT

Vs

Intellectual Property Appellate Board and Others

RESPONDENT

Date of Decision : 02-02-2015

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2015) 64 PTC 1

Hon'ble Judges : Sanjay Kishan Kaul, J;M.M. Sundresh, J

Bench : Division Bench

Advocate : P.S. Raman Senior Counsel for M.S. Bharath, for the Appellant

Final Decision : Allowed

Judgement

Sanjay Kishan Kaul, J.—The present writ petitions seek to assail the order passed by the IPAB granting the plea of revocation made by the private respondents/ parties. We may notice that the petitioner had filed civil suits before the Delhi High Court in which the respondents filed counter claims. The question of maintainability of both the revocation petitions and the counter claims came to be adjudicated and while the Division Bench opined in favour of the private respondents, the ultimate view taken by the Honourable Supreme Court was in favour of the petitioner. The principle laid down by the Honourable Supreme Court in Civil Appeal No. 6718 of 2013 decided on 02.06.2014 is that whichever of the two - the revocation petition or the counter claim is filed first would continue as the party cannot pursue both the remedies and would have to elect one. The only exception to this is, if by consent, the learned counsel for the parties agreed to continue one of the two proceedings, which may be the one instituted in a later point of time.

2. Since the very same dispute arising from the same parties were decided by the Honourable Supreme Court, it is common ground that the relevant portion is in paragraph-28 which is extracted hereunder:

"28...Based on the factual position noticed at the beginning of the instant order, it is apparent, that the appellant has filed at least 19 A infringement suits", and the respondents have filed at least 23 "revocation petitions". The respondents have also filed "counter-claims" to the "patent infringement suits" filed by the appellant. In the present facts and circumstances, even though the challenge to the same patent, by our above determination, has been limited to a specific singular challenge, as against multiple challenges as at present, yet the same are to be pursued before different for a. In the instant case, the disputation is of the same nature, and between the same parties. As such, it would be convenient for the parties concerned, to agree to resolve the same, before a singular adjudicatory authority. That will also be convenient for the concerned adjudicatory authority. Accordingly, for convenience of the parties concerned, it would be open for them by consent, to accept one of the remedies, out of the plural remedies, which they would have to pursue in the different cases, pending between them, to settle their dispute. Having consented to one of the available remedies postulated under law, it would not be open to either of the consenting parties, to seek redressal from a forum in addition to the consented forum. We, therefore hereby affirm, that the consent order passed by the High Court on 01.09.2010, being on the subject of procedure, and being before a forum which had the statutory jurisdiction to deal with the same, was fully justified in the facts and circumstances of the present case."

3. We may notice that in the suit proceedings before the Delhi High Court, once again it is common ground that there was an agreement to proceed with the trial of the counter claim, though learned counsel for the respondents state that the same was in the context of an understanding on the question of interim relief and hope of an expedite trial. Be that as it may, the facts remain that all these facts stands transpired prior to the decision of the Honourable Supreme Court and thus the parties cannot plead otherwise.

4. The petitioners filed a memo for disposing of these writ petitions in view of the Judgment of the Honourable Supreme Court and for setting aside the impugned order of the IPAB as the lis would now be decided in the counter claim and the suit filed before the Delhi High Court. This is however being opposed by the learned counsel for the private respondents. The ratio of the Judgment of the Honourable Supreme Court is not disputed, and could not have been disputed. The principal ground is that the counter claims were confined to the aspects which were raised in the suit, while the scope of the revocation petitions were larger in some of these cases i.e., WP.Nos. 17539 and 17541 of 2011, W.P. Nos. 31135 and 31137 of 2013. There can be really no serious objections qua the others.

5. Learned Senior Counsel for the petitioner on the other hand has produced before us, the legal submissions as submitted before the Honourable Supreme Court more specifically paragraph-14 to submit that the private respondents cannot blow hot and cold as their submission was that the ground taken in the

counter claim in the suit and in the revocation petitions are identical.

6. The second limb of objection of learned counsel for the respondents is that the Judgment of the Hon'ble Supreme Court would not impact the decision in the revocation petition by the IPAB as they were in earlier point of time.

7. As far as the second plea is concerned, learned Senior Counsel for the petitioner has rightly drawn our attention to the Judgment of the Division Bench of this Court in Lakkaju Satyanarayana Vs. Majati Venkatarattamma and Another, AIR 1951 Mad 1044 : (1952) ILR (Mad) 308 : (1951) 64 LW 905 : (1951) 2 MLJ 477 , wherein it was observed that a cause is said to be pending in a Court of justice where any proceeding can be taken in it and that would be the test. Thus petition under Article 226 of the Constitution of India seeking quashing the order of the Sub-ordinate Court would be continuing proceedings. The relevant portion is extracted as under:

"3. We are clear, however, that S.20 applies to this case, because we agree with Mr. Ramachandra Rao that the appeal preferred to the Subordinate Judge must be deemed to be pending so long as the application to quash the order is pending in this Court, In Halsbury's Laws of England Vol.9, page 838 (Sec.1420), the nature of a writ of certiorari is thus set out:

"The writ of certiorari issues out of a superior Court and is directed to the Judge, or other officer of an inferior Court of record. It requires that the record of the proceedings in some cause of matter depending before such inferior Court to be there dealt - with, in order to insure that the applicant for the writ may have the more sure and speedy justice."

See also Short and Mellor's Crown Practice (2nd Edn.) Page 14. The rule nisi in this case in terms calls upon the Subordinate Judge of Tenali to send for the use of this Court all the records with all things touching the same as fully and perfectly as they have been made by the learned Judge. It is obvious that the decision in the appeal is again set at large, as it lost its finality the moment this Court issued the rule nisi. This Court can on this application for certiorari set aside by quashing the order in the appeal. Surely, in such circumstances, it must be said that the appeal is pending. In *In re Clagett's estate*, *Fordham v. Clegett*, (1882) 20 Ch.d.637 at p.653, *Jessel M.R.* When discussing the question when an insolvency can be treated as pending observed thus:

"What is the meaning of the word "pending"? In my opinion, it includes every insolvency in which any proceeding can by any possibility be taken. That I think is the meaning of this word "pending". A cause is said to be pending in a Court of justice where any proceeding can be taken in it. That is the test. If you can take any proceeding it is pending. "Pending" does not mean that it has been tried. It may have been tried years ago."

In our opinion, therefore, S.20 of the Madras Act viii of 1951 applies to this case."

8. In *P.V. George and Others Vs. State of Kerala and Others*, AIR 2007 SC 1034 :

(2007) 113 FLR 21 : (2007) 2 JT 394 : (2007) 2 LLJ 522 : (2007) 2 SCALE 262 : (2007) 3 SCC 557 : (2007) 1 SCC(L&S) 823 : (2007) 3 SCL 262 : (2007) 1 SCR 1198 : (2007) AIRSCW 826 : (2007) 1 Supreme 996 , it was unequivocally held that the law declared by a Court will have a retrospective effect, if not otherwise stated to be so specifically.

9. Thus, the plea sought to be advanced by the learned counsel for the respondents is devoid of merit more so as the adjudication took place between the same parties.

10. As far as the first aspect is concerned, though there is some merits in the contention of the learned Senior Counsel for the petitioner, we would not like to shut out the private respondents from obtaining adjudication on the aspect in the counter claim, if for some reason, it has been urged in the revocation petition, but not in the counter claim. However, the remedy in such a situation would be by seeking to amend the counter claim. Naturally the private respondents would have to satisfy the learned Judge on the original side of the Delhi High Court that there is in fact an aspect of patent which did form part of the revocation application, but does not form a part of the counter claim. As far as the issue of lapse of period of time is concerned, in view of the continuing proceedings, there can hardly be any apprehension on this account.

11. We are, thus of the view, the impugned orders are liable to be set aside on account of what we have observed aforesaid, and the private respondents are permitted to get adjudicated their relief in the counter claim as it exists as it is permitted to be amended.

12. The writ petitions are allowed in the aforesaid terms, leaving the parties to bear their own costs.