

(2019) 01 RAJ CK 0293

In the Rajasthan High Court

Case No : Special Appeal Civil No. 9 Of 2018 In Civil Miscellaneous Petition No. 1 Of 2006

Arihant Evergreen Agro Plast And Textiles Private Limited And Ors APPELLANT

Vs

EPC Industries Limited A Company Incorporated RESPONDENT

Date of Decision : 08-01-2019

Acts Referred:

Patent Act, 1970 — Section 2(m), 2(j), 64(1), 104, 106, 108

Code Of Civil Procedure, 1908 — Order 7 Rule 14, Order 7 Rule 14(3), Order 13 Rule 2

Citation : (2019) 01 RAJ CK 0293

Hon'ble Judges : Munishwar Nath Bhandari, J; Banwari Lal Sharma, J

Bench : Division Bench

Advocate : Suresh Sahni, G.D. Bansal, R.M. Sharma, Ashwani Gupta, Naina Saraf, Preetam Singh

Final Decision : Dismissed

Judgement

By this special appeal, a challenge has been made to the order dated 08.03.2018 passed by learned Single Judge on an application preferred by the plaintiff-respondent under Order VII Rule 14 CPC.

BRIEF FACTS OF THE CASE

It is a case where respondent- plaintiff preferred a civil suit under Section 104/106/108 of the Patent Act, 1970 to seek damages and permanent injunction against the appellants/defendants. The appellants herein submitted counter claim under Section 64(1) of the Act of 1970. The matter was transferred to the High Court in view of Section 104 of the Act of 1970. The said provision provides that whenever a counter claim is made by the defendant, suit along with counter claim shall be transferred to the High Court for its adjudication.

In view of the aforesaid, the suit was transferred to this Court. It was registered as S.B. Civil Misc. Petition No. 1/2006. The original suit was otherwise preferred

in the year 2004.

After transfer of suit, the matter was proceeded and after framing of the issues, both the parties led their evidence and on its completion, matter was kept for final hearing. At that stage, plaintiff- respondent filed an application under Order VII Rule 14 CPC for taking samples of the product on record. The application aforesaid was contested by appellants- defendants on the ground of delay and even in reference to the relevance of the evidence. The learned Single Judge found that there is delay in filing of the application but as the suit is in reference of infringement of patent right, it should be accepted in the interest of justice. Accordingly, the application was allowed to take products on record. It is by imposing cost of Rs. 10,000/-.

ARGUMENTS OF LEARNED COUNSEL FOR THE APPELLANTS- DEFENDANTS

It is stated that in a suit preferred in the year 2004 before the Civil Court and even after its transfer to High Court in the year 2006, plaintiff did not produce the product in evidence despite its availability with them. The application under Order VII Rule 14(3) CPC does not explain the delay of more than 11 years and otherwise no relevance exist to take product on record for adjudication of the suit. This Court would decide as to whether patent right have been infringed i.e. invention has been copied.

Learned Single Judge ignored the aforesaid and accepted the application. The sample of the product can not determine as to whether patent rights of plaintiff have been infringed. The resemblance of product is not relevant for violation of patent rights. As per the definition of patent given under the Act of 1970, it is nothing but registration of invention made by a party. The invention can not be used by others, if patent has been registered in favour of one party. In the suit, what would be decided is as to whether invention of the plaintiff has been copied by the defendant. The aforesaid aspect has been ignored by learned Single Judge thus prayer is made to dismiss the application.

Learned counsel for the appellants has made reference of following judgments to support his arguments :-

Parivar Seva Sanstha versus Marie Stopes International reported in 2014 (59) PTC 446 (DEL.)(DB), Dandu Bediya versus Sawana Bediya reported in 2010 (35) R.C.R. (Civil) 648, Haldiram (India) pvt. ltd. versus Haldiram Bhujawala & Anr. reported in 2009(41) PTC 788 (DEL.), Polyflor Ltd. versus A.N. Goenka & Ors. reported in 2017 (69) PTC 206 (DEL.), Asia pacific breweries versus Superior Industries reported in 2009 (40) PTC 108 (DEL.), L.T. Overseas North America inc. versus Sachdeva & Sons Pvt. Ltd. reported in 2014 (57) PTC 151 (DEL.), Gordhan Jat and others versus Jagdish Jaat and others reported in 2018(2) DNJ 561.

ARGUMENTS OF THE SIDE OPPOSITE

Learned counsel for plaintiff- respondent has contested the appeal. It is

submitted that the appeal is not maintainable against the interlocutory order. It is when learned Single Judge has exercised his discretionary power given under Order VII Rule 14(3) CPC. In a discretionary order, interference should not be made by the Appellate Court. It is more so when the application has been allowed for the ends of justice. It is a case where infringement of the patent rights would be determined in the pending suit and for that, sample of the product needs to be brought in the evidence.

In view of the aforesaid, learned Single Judge ignored the delay in submission of the application and allowed it for the ends of justice. The prayer is accordingly to dismiss the appeal.

It is also stated that earlier also plaintiff had preferred similar application. It was submitted in the Registry along with the product but it was not accepted. The fact aforesaid is relevant for the determination of the issue of delay. The copy of the earlier application was not available thus could not be submitted along with the present application. In any case, the fact aforesaid may be taken into consideration by this Court.

To support the arguments, learned counsel for the respondent has made reference of the following judgments :-

Raj Kumar Hardayal Singh versus Murti Mandir Sri Balaji through LR's in S.B. Civil writ petition no.459/2005 decided on 12th December, 2011, Billa Jagan Mohan Reddy versus Billa Sanjeeva Reddy reported in 1994 SCC (4) 659, Smt. Kamla Bai anr. versus Ghanshyam Shrotriya & Ors. in WP 7864/2014 decided on 8th September, 2015, Antar Singh Darbar versus Kailash Vijayvargiya & others in Election Petition No. 15/2014 decided on 11th September, 2015 and Uttaradi Mutt versus Raghavendra Swamy Mutt reported in (2018) 10 SCC 484.

The prayer is accordingly to dismiss the appeal. It is more so when there is no intention of plaintiff- respondent to delay the suit as it is otherwise filed by it only.

We have considered rival submissions of the parties and perused the record.

The brief facts of the case have been given by us in the earlier paras and they demonstrate that plaintiff preferred a suit alleging infringement of their patent rights thus to seek damages and injunction. The suit was preferred before the Civil Court in the year 2004. The appellants- defendants submitted counter claim thus pursuant to Section 104 of the Act of 1970, the suit was transferred to the High Court for its adjudication. Both the parties led evidence to prove their case and on its completion, the suit was kept for final hearing. At that stage, the application was filed by the plaintiff under Order VII Rule 14 CPC to take patented product on record. It was shown to be necessary to prove their case and, accordingly, application was allowed by learned Single Judge.

The plaintiff- respondent has raised objection about the maintainability of the appeal against the interlocutory order. Plaintiff raised other objections as well.

We are first taking up the issue about the maintainability of the appeal. The impugned order passed by learned Single Judge is in reference to the application under Order VII Rule 14 (3) CPC. It is with an observation that the product is necessary for consideration of infringement of the patent rights. An observation about resemblance of the product has also been made. The aforesaid may be observation but goes in the root of the case. It is for the reason that what has been alleged by plaintiff is infringement of the patent rights. What is patent right ? We need to refer definition of the "patent" as given under Section 2 (m) of the Act of 1970 and is quoted for reference :-

"patent" means a patent for any invention granted under this Act."

The perusal of definition shows patent is for any invention granted under the Act. To simplify the aforesaid, registration of the patent is given to the invention made by a party.

The word "invention" has also been defined under Section 2 (j) and is quoted here under for reference :-

"invention" means a new product or process involving an inventive step and capable of industrial application."

In the suit, what would be decided, is about alleged infringement of the patent rights. It could not be made clear by the plaintiff- respondent that as to how by bringing product in evidence would decide the alleged violation of patent- rights. The product may have resemblance but merely for that reason, it cannot be inferred that there is violation of patent rights unless it is proved that what was invented by the plaintiff, has been copied by other party.

The appellants have challenged the impugned order as discretion has not been exercised judiciously.

We find that the application for taking product on record was filed after lapse of almost 13 years of filing of the suit and otherwise 11 years of its transfer to the High Court. The application does not explain delay in its filing. The delay in the instant case is not of one or two years but of 11 years and is fatal for exercise of discretionary jurisdiction unless it is properly explained. Since no explanation exists, therefore delay of 11 years should not have been ignored by learned Single Judge. It is more so when evidence was available to the plaintiff at the time of filing of the suit. Order VII Rule 14(3) CPC cannot be invoked in a casual manner. The legislation omitted Order XIII Rule 2 CPC to allow evidence at a later stage. The sanctity to the amendment has to be attached. It is true that subsequently amendment was made under Order VII Rule 14 (3) CPC. This Court, however, cannot ignore the object for which Order XIII Rule 2 CPC was deleted.

In view of the above, whenever leave is to be granted by the Court, it should be only in deserving cases. It is when delay is properly explained. It can be when the evidence was not earlier available or where evidence was earlier available but

party was not aware about it thus could not submit it along with the plaint or in evidence. There can be such other justification but not in a case where, despite availability of the evidence, if not produce in evidence, to be accepted at a belated stage without explanation of delay.

The Apex Court in the case of Uttaradi Mutt (supra), while considering similar provision for acceptance of evidence at the appellate stage, referred to another judgment in the case of Union Of India vs. Ibrahim Uddin And Anr. It was held that an application to accept evidence cannot be moved at belated stage. The criteria has also been laid down. This includes adjudication of the issue about relevance of evidence and circumstances under which it could not be produced.

The para 47 and 48 of the judgment in the case of Ibrahim Uddin (supra) are reproduced herein :-

"47. Where the additional evidence sought to be adduced removes the cloud of doubt over the case and the evidence has a direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record such application may be allowed.

48. To sum up on the issue, it may be held that application for taking additional evidence on record at a belated stage cannot be filed as a matter of right. The court can consider such an application with circumspection, provided it is covered under either of the prerequisite condition incorporated in the statutory provisions itself. The discretion is to be exercised by the court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the court below and as to whether the applicant had prosecuted his case before the court below diligently and as to whether such evidence is required to pronounce the judgment by the appellate court. In case the court comes to the conclusion that the application filed comes within the four corners of the statutory provisions itself, the evidence may be taken on record, however, the court must record reasons as on what basis such an application has been allowed. However, the application should not be moved at a belated stage."

We are cautious about the fact that the judgment in the case of Ibrahim Uddin was for submission of evidence at the appellate stage, but has propounded a ratio and applies to the similar provision. We find that the application for acceptance of evidence at the belated stage could not have been accepted without explanation of delay of 11 years.

At this stage, it would even be relevant to deal with the factual aspect raised by counsel for the respondents. It is even regarding submission of similar application earlier also. We do not find any averment to this effect in the application under Order VII Rule 14(3) CPC. No details of the earlier application exist thus the oral submission of counsel for the respondent is without pleading and even no document has been produced. In absence of it, the oral submission of counsel for the respondent cannot be accepted.

We are accordingly find merit in the appeal to cause interference in the order passed by learned single Judge, the application under Order VII Rule 14 (3) was accepted at the stage when matter was to be heard finally and that too when learned Single Judge found that there is delay on the part of the plaintiff to produce patented item. If no justification of delay exists, the Court should not have exercised its discretionary jurisdiction. It is settled law that discretionary jurisdiction has to be exercised judiciously.

In view of the above, we set aside the impugned order dated 08.03.2018 while accepting the appeal and, accordingly, special appeal is allowed. With the aforesaid and the impugned order is quashed and set aside and the application submitted by respondent- plaintiff under Order VII Rule 14 (3) CPC is dismissed.