
(1914) 08 MAD CK 0033
In the Madras High Court

Bhathey Sundara Rajan and Others

APPELLANT

Vs

A.A. Kuppusami Iyer and Another

RESPONDENT

Date of Decision : 20-08-1914

Acts Referred:

Citation : (1914) 27 MLJ 573

Hon'ble Judges : John Edward Power Wallis, J;Hannay, J

Bench : Full Bench

Judgement

John Edward Power Wallis, Kt. Officiating C.J.

1. These are appeals from the judgment of the District Court of Madura in several connected cases in which the plaintiffs sued for an infringement

of a patent taken out by the 1st plaintiff in the year 1902 for the "" Amp hill Patent Loom,"" The District Judge has found that the infringement has

been proved and has given judgment for the plaintiffs.

2. Under the Patents Act of 1888 ("The Invention and Designs Act V of 1888") a defendant in an action for infringement is not allowed to set up

by way of defence all the grounds on which the grant of the Patent Could be opposed, grounds which are to be found in Section 20 of the Act.

One of those grounds is that invention was not a new invention. u/s 29(4) a defendant is not allowed to set Up the defence that the invention was

not new, ""unless the defendant or some person through whom he claims, has, before the date of the delivery of the application for leave to file the

specification, publicly or actually used in some parts of British India or of the United Kingdom the invention with respect to which the exclusive

privilege is alleged to have been infringed.

3. Now, it has been sought, in the argument before us, to escape from the operation of this section on two grounds; it has been contended for the Appellants that the defendant is not precluded from pleading that the alleged invention was not the proper subject-matter of a patent, or that there was no subject-matter for the patent. It is quite true that in English patent cases it has been the custom to plead, not only that the alleged invention was not new, but also, that it was not the proper subject-matter for a patent; and accordingly, in many text-books this matter is treated as distinct from the question whether the invention is new, whereas other text-book writers analysing the matter have pointed out that there is no real distinction. This objection was taken before me sitting on the original side last year (in O.S. No. 178 of 1911) and I disallowed it. It is quite clear from a perusal of the (Patents Act of 1888 and the same conclusion follows from a perusal of the present Patents Act, (the Indian Patents and Designs Act II of 1911) that the framers of these Acts did not intend that there should be any separate defence to the grant of a patent on the ground of want of subject-matter as distinguished from want of novelty.

4. The grounds upon which the grant of a Patent may be opposed are set out in Section 20 of the Act of 1888, and they contain no mention of any defence of want of subject-matter. The Legislature, if I may say so, I think, rightly took the view that any defence which had been raised under that head might appropriately be brought under the head of want of novelty. Consequently, we are of opinion that it is not open to the appellants in these cases to raise any defence of want of subject-matter as distinguished from want of novelty, and if they wish to rely upon want of novelty, then of course they are bound by the restrictions in Section 29(4).

5. A second attempt was made to escape these embarrassing provisions. It was pointed out that there is no such restriction on the defendants under the Act of 1911. Under that Act, as in England, any of the statutory grounds for opposing the grant of the Patent may be pleaded in answer to an action for an infringement of a patent. It was argued that, although this provision was not in force at the time that this suit was tried and decided in the Lower Court, we were a Court not only of appeal but of re-hearing also and that we ought to apply the law as it at present exists to apply the Statute of 1911 rather than the Statute of 1888, and we were referred

to a case in *Kanakayya v. Janardhane Padhi* (1910) 21 M.L.J.

31. That decision of the Full Bench is not authority for any such extensive proposition; that decision is entirely limited to the construction of the

word final" in a certain section of the Madras Estates Land Act (Madras Act I of 1908). Even as to that, the learned Chief justice who presided,

entertained some doubt as to the correctness of the ruling, but in any case that decision is no authority for any broad proposition as to the

retrospective operation of Statutes. However, it is unnecessary to, deal with this question on grounds of general principle because it is most clearly

dealt with by one of the provisions of the General Clauses Act (X of 1897) which deals with cases "" where any Act of the Governor-General made

after the commencement of this Act, repeals an enactment hitherto made."" The Act II of 1911 has repealed the Act V of 1888 and therefore it is a

clear case for the application of the section. Now, Section 6(e) provides that ""unless a different intention appears, the repeal shall not affect"" ""any

investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, or liability, penalty, forfeiture or punishment as

aforesaid."" And the words ""legal proceeding"" are sufficiently wide to cover a suit for infringement. It is however expressly provided that any such

legal proceeding or remedy may be continued or enforced as if the Repealing Act had not been passed. It is therefore clear that this objection also

must be over-ruled. It only remains then to see whether the District Judge has arrived at a correct conclusion with regard to the limited defence to

which the defendants are restricted so far as regards want of novelty.

6. Under S.,29(4) it is for the defendant to show that either he or some person through whom he, claims, before the date of delivery or receipt of

the application has publicly or actually used the invention. The District Judge has found that none of the defendants in these appeals has discharged

that burden and as regards all but one of them the learned Vakil for the appellants has been unable to contend even that they have discharged it,

because they have failed to produce any evidence of prior user on their own part or on the part of those through whom they claim and therefore

these appeals must fail. As regards one of the appeals (No. 143) the defendant in the Lower Court has adduced some evidence but the District

Judge has found that he has not discharged the burden. In this connection the

District Judge has called attention to the provisions of Section 37 of the Act which require that both the defendant should deliver "" a written statement of the particulars of the grounds, if any, upon which he means to contend that the plaintiff is not entitled to an exclusive privilege..." There is a further provision that no evidence at the trial shall be allowed to be given in proof of any breach of the conclusive privilege, or of any ground impeaching the validity of that privilege, or of any objection or ground affecting such a privilege, unless such breach or other matter as aforesaid has been stated in the particulars delivered under this section.

7. Now, in his written statement this defendant did not give any particulars--and he does not seem to have been called upon to give any

particulars--it was only at the trial it was discovered that he ought to have been called upon to deliver particulars. He was however a party to an

affidavit which was put in at an early stage of the case on behalf of himself and the other defendants (Exhibit T 7) and I think this affidavit may be

treated as particulars. That affidavit says that "" Obla Munisami Iyer started his loom 15 years ago and worked it through Sambu Ramaswami

Naicker, Hanumanta's son Alagiriswami and others." At the trial this defendant did not even attempt to prove this, and it was disproved. Obla

Munisami was called as the 14th witness and he said he was a weaver and purchased goods from others, but he denied he had started this system.

He said he got some of these cloths with borders with animal patterns, the first of them in 1900. It is not necessary to pursue this part of the case

further, because it is not the case on which this defendant relied at the trial. Assuming that he was at liberty to go into it--if he was to be allowed to

go into it--the particulars ought to have been amended as provided in the Act. His defence was that he learnt the process from one Ghose

Krishnier of Tanjore the 26th witness. We agree with the learned judge that this, story is most unsatisfactory and cannot be accepted. Ghose

Krishnier says he learnt this system from Benares but, as the District Judge points out, no one was called who could speak with any authority as to

whether such a system was known in Benares at all. On the other hand, there is evidence that such knowledge as this man Krishnier had of this

system, he acquired in Madura, and apparently through the instrumentality of this defendant, so that it was this defendant who taught Krishnier

rather than Krishnier taught this defendant and after the. date of the application. Exhibit 35 (d)(p. 176 of the printed papers) is an entry in

Krishnier's account showing the expenses incurred in going to Madura to work "Adaipet." Exhibit Y of the 18th June 1901 is another entry in the

accounts of the 13th witness. T.K. Venkatarama Aiyar a cloth merchant in Madura showing that he paid Balian, that is to say, this defendant,

remuneration for preparing an Adaipet harness on Ghose Kriahnier's account, so that in 1901 after this patent had been applied for--we find

Krishnien going to Madura to learn to work "Adaipet" and getting on Adaipet harness prepared--a phrase which covers the plaintiffs invention. All

this evidence points to Krishnien first becoming acquainted with process of this kind in 1901, so that he. cannot have taught it to the defendant in

1897 as alleged in the defendant's evidence. As pointed out by the District Judge there is another part of the evidence which discredits Krishnien's

story. According to his own evidence, he first met Baliah at the house of the 13th witness T.K. Venkatarama Aiyar and the 13th witness then

mentioned that this defendant Baliah was about to work for him. Exhibit 28 which is the agreement under which, Baliah, the defendant, worked for

the 13th witness is dated the 26th of May 1900, so that the first meeting between Krishnien and Baliah would be in 1900. That again disproves the

story that the, defendant Baliah learnt the process from Krishnien in 1897. Now, it is not the present defendant's case, and there is no evidence,

that he learnt this process in any other way. Nor is there any satisfactory evidence that he used it before the date of the plaintiff's application.

8. In argument in appeal, reliance was placed on Exhibit 28; it is dated 26th May 1900. This is the agreement that I have just referred to. All this

agreement says is "" we shall bring you what we have weaved newly."" There is no express reference to weaving by ""Adaipet."" Assuming that the

defendant in June 1900 was producing borders with animal patterns, it does not follow that he was doing so by the plaintiff's process or anything

like it. In June 1900 he is found purchasing Vulties in considerable quantities Vulties, as explained in the judgment of the District Judge are the

reeds which were used before, the plaintiff's invention and which under the plaintiff's invention were discarded in favor of twines. His evidence is

that he would not, use Vulties when working in the Adaipet system. Therefore, the only inference is that they Vulties which he bought in June 1900

were to be used on something very like the old system, and there is further evidence which the District Judge has accepted, that it was possible, with this vulty system to produce animal patterns though it was a much more troublesome thing than under the plaintiff's system. The evidence goes to show that the plaintiff's invention was complete in 1900 and that in that year he "shewed it to Mr. Chatterton, the Director of Industries, when, he visited Madura; and, it was only material that it should have, at any rate in a general sort of way, got known to the weaving community in Madura, and it may well be that attempts were made to copy it, even at that very early stage.

9. There is rather a suggestive piece of evidence in this respect which was put in by the defendants, Exhibit 10 series. That shows that there was a suit brought by a cloth merchant against a weaver who had obtained an advance from him on a promise to make an Adipet machine and had failed to do so. Then we have Exhibit 32 which is dated 2nd March 1901- that is after the application. That is a post card to the present defendant, Baliah from his cousin in which the cousin asks "can the adipet you are now using be used for the border only or for the whole cloth"? This may show that the defendant had got wind of the plaintiffs invention and was using something of the same sort, but it certainly does not show that the defendant had been using this particular process before the date of the plaintiff's application. The meaning of this post card would have been much clearer if the letter to which it is a reply had been produced and it, is very significant that it has not been produced.

10. As regards the evidence not directly connected with the present defendant the District Judge observes, and the evidence appears to bear him out, that there is no satisfactory evidence of the manufacture of these animal borders in Madura before 1900, before the time when the plaintiff was making this invention, but it is not. necessary to go into the general aspects of the invention, and it is undesirable to do so, because they are the subject matter of an application for revocation which will have to be dealt with on the original side of the court. For the purpose of disposing of these appeals, it is sufficient to say that in our opinion the District Judge was right in holding that the defendant had failed to discharge the burden of showing that this process was used either by the defendant himself or by those through whom he claims before the date of the plaintiff's

application.

11. The result is that the appeals fail and are dismissed with costs.

Hannay, J.

12. I agree.