

(2015) 11 DEL CK 0094

In the Delhi High Court

Case No : I.A. Nos. 3696, 13386/2013 and 11383/2014 in CS (OS) 2680/2008

Bristol-Myers Squibb Company and Others

APPELLANT

Vs

BPS Reddy and Others

RESPONDENT

Date of Decision : 17-11-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 22 Rule 10, Order 39 Rule 4, Order 6 Rule 14-A, Order 6 Rule 17

Citation : (2016) 65 PTC 89

Hon'ble Judges : Manmohan Singh, J.

Bench : Single Bench

Advocate : Pravin Anand, Nishchal Anand and Aman, Advocates, for the Appellant; Ankur Sangal and Sucheta Roy, Advocates, for the Respondent

Judgement

Manmohan Singh, J.—The plaintiffs have filed the suit for permanent injunction restraining infringement of registered Indian Patent No. 203937, unfair competition, damages, rendition of account and delivery up etc. against the defendants.

2. By way of this order, I propose to decide the following three applications filed by the parties:-

a. Application under Order 1 Rule 10 read with Order 6 Rule 14-A and Section 151 CPC being I.A. No. 3696/2013, filed by the plaintiffs.

b. Application under Order 1 Rule 10 read with Section 151 CPC being I.A. No. 13386/2013, filed by defendant No. 1 for deletion of its name from the array of parties in the present suit.

c. Application under Order 1 Rule 10 read with Order 22 Rule 10 and Order 6 Rule 17, further read with Section 151 CPC being I.A. No. 11383/2014, filed by the applicant, Bristol-Myers Squibb Holdings Ireland.

3. Firstly, I shall take the application being I.A. No. 3696/2013 filed by the

plaintiffs.

4. The plaint was originally filed against the defendants, named Hetero Drugs Ltd. as defendant No. 2 and Mr. BPS Reddy, Managing Director of defendant No. 2 as defendant No. 1. It is stated on behalf of the plaintiffs that at the time of filing of the suit, the plaintiffs came to know that defendant Nos. 1 and 2 had filed an application for marketing approval for "DASATINIB" API before the DCGI. The plaintiffs' apprehension regarding infringement of its Patent No. 203937 was further confirmed when the plaintiffs found that the defendants were advertising and offering for sale DASATINIB API on their website <http://www.heterodrugs.com/htmls/productlist.htm> under the title "Active Pharmaceutical Ingredients" in their product list. However, subsequently in the light of defendants' averments, there was a slight confusion as regards the entity which had made an application for marketing approval before the DCGI, as on one hand the defendants in their written statement claimed that the application for marketing approval was in fact made by an associate company of defendant No. 2, namely Hetero Labs Ltd. and on the other hand the defendants in their interlocutory application being IA.No.12214/2011 averred that they had filed the application for marketing approval for DASATINIB API.

5. Counsel appearing on behalf of the plaintiffs made the statement that the defendants' counsel informed the Court on few dates that the defendants have made an application before DCGI and it was their associate company i.e. Hetero Labs Ltd. which had made such an application and in view of the oral clarification made, the plaintiffs seek to implead Hetero Labs Ltd. as defendant No. 3 in the present suit as the actions of Hetero Labs Ltd. will affect substantive rights of the plaintiffs and that this suit cannot be adjudicated without the addition of Hetero Labs Ltd.

6. It is further submitted that preliminary search reveals that both the companies Hetero Drugs Ltd. and Hetero Labs Ltd. operate from the same registered address i.e. 7-2-A2, Hetero Corporate Industrial Estate, Sanathnagar, Hyderabad, Andhra Pradesh-500018. Printout of the extract from the website of the Ministry of Corporate Affairs showing the registered office of defendant No. 2 and Hetero Labs Ltd. has been enclosed as Annexure A along with this application. Therefore, prayer is made in the application to add Hetero Labs Ltd. having its registered office at 7-2-A2, Hetero Corporate Industrial Estate, Sanathnagar, Hyderabad, Andhra Pradesh-500018, in the array of parties in the present suit, as defendant No. 3 and the plaintiffs be permitted to amend the plaint to the effect of mentioning and describing Hetero Labs Ltd. as defendant No. 3 and also amend the plaint as regards the change of corporate address of defendant No. 1 and 2.

7. The prayer made in I.A. No. 3696/2013 is opposed by the learned counsel for the defendants stating that the application is liable to be dismissed as it has been filed after five years from the date of knowledge. No reason for the delay has been explained in the application. The issues were framed on 8th February, 2013

and the suit is at the advanced stage. Entertaining the said application would tantamount to wastage of time and the same has been filed solely relying upon an oral clarification given on behalf of the defendants in open court as pleaded in para 4 of the present application. Otherwise, there is no plea whatsoever to the effect as to whether Hetero Labs Ltd. is a necessary or proper party. It is trite law that only a necessary or proper party is added.

8. It is submitted that there are no specific averments in the present application under Order 1 Rule 10 CPC as to how the actions of Hetero Labs Limited will affect substantive rights of the plaintiffs.

9. Reply has been filed on behalf of Hetero Labs Ltd./proposed defendant. It is admitted that Hetero Labs Ltd/proposed defendant, is a Public Limited Company engaged in the manufacture and marketing of human pharmaceutical products. It is submitted that the application is filed with an attempt on the part of the plaintiffs to add a new cause of action and widen the issues. The other part of the reply is same as filed by the defendants.

10. Learned counsel for the defendants has referred a few decisions in support of his submission with regard to the plea of delay.

11. Mr. Pravin Anand, counsel for the plaintiffs has denied that there has been any delay in filing the present application leave alone a delay of 5 years. After hearing both the counsel of the parties, it appears that there is a force in the submissions of Mr. Anand that application could not be filed earlier due to the contradictory stands taken by the defendants in their own pleadings before this Court. In their written statement, they state that the application for marketing approval to the DCGI has been made by the proposed defendant No. 3. However, in their application being I.A. No. 12214/2011 under Order XXXIX Rule 4 CPC, they state that the application was made by the defendant No. 2. It was only subsequent to an oral clarification being given by the counsel for the defendants in Court, did the correct facts emerge and thereafter the present application has been filed. Cogent reasons are given for which the proposed defendant No. 3 is sought to be impleaded, as it is a necessary and proper party to the suit.

12. The Supreme Court in the case of A.K. Gupta and Sons Vs. Damodar Valley Corporation, has held as under :

"It is not in dispute that at the date of the application for amendment, a suit for a money claim under the contract was barred. The general rule, no doubt, is that a party is not allowed by amendment to set up a new case or a new cause of action particularly when a suit on new case or cause of action is barred; *Weldon v. Neale*, (1887) 19 QBD 394 . But it is also well recognized that where the amendment does not constitute the addition of a new cause of action or more than a different or additional approach to the same facts, the amendment will be allowed even after the expiry of the statutory period of limitation. See *Charan Das and Others vs. Amir Khan and Others* AIR 1921 50 (Privy Council) and *Charan Das and Others vs. Amir Khan and Others* AIR 1921 50 (Privy Council)

8. The principal reasons that had led to the rule last mentioned are first that the object of Courts and rules of procedure is to decide the rights of parties and not to punish them for their mistakes (*Cropper v. Smith*. (1884) 26 Ch D700 (710-711) and secondly that a party is strictly not entitled to rely on the statute of limitation when what is sought to be brought in by the amendment can be said in substance to be already in the pleading sought to be amended (*Charan Das and Others vs. Amir Khan and Others*AIR 1921 50 (Privy Council) , approved in *Charan Das and Others vs. Amir Khan and Others*AIR 1921 50 (Privy Council) .

10. "Now, how does the present case stand on these principles? Does the amendment introduce a new cause of action or a new case? We do not think it does. The suit was on the contract. It sought the interpretation of a clause in the contract only for a decision of the rights of the parties under it and for no other purpose. It was the contract which formed the cause of action on which the suit was based. The amendment seeks to introduce a claim based on the same cause of action that is the same contract. It introduces to new case of facts. Indeed the facts on which the money claim sought to be added is based are not in dispute. Even the amount of the claim now sought to be made by amendment, was mentioned in the plaint in stating the valuation of the suit for the purpose of jurisdiction. The respondent had notice of it. It is quite clear that the interpretation of the clause was sought only for quantifying the money claim. In the written statement the respondent specifically expressed its willingness to pay the appellant's legitimate dues which could only mean such amount as might be due according to the rates applicable on a proper interpretation of the clause. The respondent was fully aware that the ultimate object of the appellant in filing the suit was to obtain the payment of that amount. It was equally aware that the amount had not been specifically claimed in the suit because the respondent had led the appellant to believe that it would pay whatever the court legitimately found to be due. It in fact said in the written statement. If there was any case where the respondent was not entitled to the benefit of the law of limitation, the present is that one. The Respondent cannot legitimately claim that the amendment will prejudicially affect his right under the law for really he had no such right. It is a case in which the claim for money was in substance in the plaint from the beginning though it had not formally been made."

13. This Court in the case of *Charan Das and Others vs. Amir Khan and Others*AIR 1921 50 (Privy Council) held that the plaintiff in the present case is not setting up a new case on new cause of action; it was merely a mistake and the plaintiff cannot be penalized in view of technical objection raised by the other side. The issue raised by the plaintiff has to be determined after the trial. The suit cannot be thrown out at this stage without trial.

14. It is also settled law that as a general rule, the Court should not decline the amendments if fresh suit otherwise is maintainable which is not barred by limitation. In the present case, the plaintiffs have already challenged the documents in question by stating the partition deed being forged and fabricated.

Thus, amendment cannot be declined. At this stage, conclusion cannot be drawn as to whether said averments are correct or incorrect. But if averments in the plaint are made, the party has a right to lead evidence and to claim the relief which may or may not be correct.

15. It is a matter of fact that the present suit has been filed on a quia timet basis due to the actions of the defendants/proposed defendant in making an application for marketing approval of a drug which is covered by the claims of the plaintiffs' Patent No. IN 203937, giving rise to the apprehension that the defendants shall launch the drug in question in violation of the plaintiffs' rights. In fact, it is the defendants who created the confusion by taking the contrary stand.

16. In view of the above, the prayer made in the application is allowed. Hetero Labs Ltd. is impleaded as defendant No. 3. The plaintiffs are allowed to amend the plaint accordingly.

17. In the second application, being I.A. No. 13386/2013, the prayer is made to delete the name of defendant No. 1, Dr. BPS Reddy, from the array of the parties on the reason that there is no specific allegation made against him in the plaint that would render him liable in his personal capacity. The defendant No. 2 is a public limited company and defendant No. 1 is a Managing Director in the board of directors of the defendant No. 2 and discharges his duties in accordance with the constitution of the company. Hence, he is neither a necessary nor a proper party in the present matter. It is submitted that the defendant No. 1 has not done any act in his personal capacity which would make him liable to pay any amount, whatsoever, to the plaintiffs.

18. As far as the deletion of defendant No. 1 is concerned, the prayer is not opposed by the plaintiffs. Thus, the same is allowed. The name of defendant No. 1, Dr. BPS Reddy is deleted from the array of parties.

19. In the third application being I.A. No. 11383/2014, it is stated that Bristol-Myers Squibb Holdings Ireland, a company incorporated under the laws of Ireland, having its office at Neuhofstrasse 6, CH- 6340 Baar, Switzerland have been assigned, transferred and conveyed, by the plaintiff No. 1, its rights, title and interests in the suit patent by virtue of a Deed of Assignment dated 1st October, 2012. A request under Form-16 for recordal of the title of the applicant to the suit patent has already been filed on 7th November, 2013. The said request is currently pending before the Indian Patent Office and the same will be placed on record in due course. A copy of the Form 16 request as filed before the Indian Patent Office has been filed as Annexure-A along with this application. It is argued that as a consequence of the aforesaid assignment, the applicant is the rightful owner of the suit patent by virtue of devolution of rights, title and interests. The applicant therefore, is a necessary and proper party for the effective and complete adjudication upon the questions involved in of the present suit.

20. The prayer at the time of hearing is not opposed by the learned counsel appearing on behalf of the defendants. A similar prayer has also been granted in other pending suits filed by the plaintiffs against the different defendants. Even otherwise, no prejudice will be caused to the defendants if the prayer of the application is allowed by this Court as the plaintiffs have to prove their case as pleaded. Therefore, in light of the above, the prayer made in the application is allowed. The applicant namely, Bristol-Myers Squibb Holdings Ireland is impleaded as plaintiff No. 3 in the present suit.

21. The plaintiffs to file the amended memo of parties in view of the orders passed in the abovementioned three applications.

22. No order as to cost.

CS(OS) 2680/2008

List this matter before the Joint Registrar on 23rd February, 2016 for further proceedings. In the meanwhile, the newly added defendant namely, Hetero Labs Ltd. is granted four weeks time to file written statement.