

(1990) 07 MAD CK 0050

In the Madras High Court

Case No : Writ Appeal No's. 526 and 527 of 1990

M/s. Wander Ltd., Bombay and etc.

APPELLANT

Vs

M/s. Antex India Pvt. Ltd. Bangalore and others

RESPONDENT

Date of Decision : 19-07-1990

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 23

Constitution of India, 1950 — Article 226

Drugs and Cosmetics Act, 1940 — Section 17

Trade and Merchandise Marks Act, 1958 — Section 105, 106

Citation : AIR 1991 Mad 109

Hon'ble Judges : Dr. A. S. Anand, C.J;Raju, J

Bench : Division Bench

Advocate : M.R. Narayanaswamy for C. Franc Louis and R. Alagar, for the Appellant; V. Sridevan, Spl. Govt. Pleader, U.N.R. Rao and C. Daniel, for the Respondent

Judgement

Raju, J.—The above two writ appeals arise out of the order of the learned single Judge dated 6-4-1990 in W.P. No. 5398 of 1989 filed by

M/s. Antex India (P) Ltd. Bangalore 80 whereunder the learned Judge while quashing the impugned order dated 2-12-1989 issued by the State

Drug Controller, Tamil Nadu in his reference No. 7771/IW/ 1/89, further directed the said Authority to pass orders by exercising the powers for

cancellation of the licence issued to the appellant in W. A. No. 527 of 1990 (Alfred Berg & Company (I) Private Ltd. Madras-7) to manufacture

a drug under the brand name Cal-De-Ce", in the light of the observations contained in the judgment, after affording a fair and reasonable

opportunity to the appellants in W.A. Nos. 526 and 527 of 1990. The appellant in W.A. No. 526 of 1990 is the third respondent in the writ

petition (M/s Wander Limited, Bombay-18) and the appellant in W. A. No. 527 of 1990 is the second respondent in the writ petition.

2. It is necessary to set out certain facts in detail which will go to show that the course adopted by us in the disposal of the writ appeals will be the proper and appropriate one on their peculiar nature.

3. The appellant in W.A. No. 526 of 1990 hereinafter referred to as ""Wander"" and the writ petitioner hereinafter referred to as "Antex" entered

into an agreement dated 28-3-1986 under which the writ petitioner was authorised to manufacture a pharmaceutical product and affix the trade

mark "Cal-De-Ce" which is the trade mark that was being used by Wander subject to certain terms and conditions specified therein. The sum and

substance of this agreement is that Antex shall manufacture the product in accordance with the standards and specifications given by Wander and

supply to them the product at such price as shall mutually be agreed upon by them, that the patent used by Wander shall at all times remain

Wander's exclusive and absolute right, that Wander reserves the right to revoke the authority to affix the said trade mark given to Antex at its

discretion without assigning any reason, and that nothing in the agreement shall be deemed to preclude Wander from arranging for the manufacture

or purchase of the said products by or from any other party. The other terms are not necessary for the purpose of the controversy between the

parties before us. Thereupon, Antex made an application to the Drug Controller, Karnataka State who, on 20-6- 1986, informed Antex that their

application can be considered only if Wander surrender the permission granted to them and authorise Antex to use the trade name. It was further

insisted that Wander will have to give an undertaking to the effect that they will not simultaneously manufacture the said product nor authorise

anyone else to use the trade name. The undertaking, as required of Wander, was given by them on 21 -6-1986. The Drug Controller, Karnataka

State thereupon granted the permission on 10-7-1986 to Antex to manufacture the additional product ""Cal-De-Ce"" tablets (registered trade mark

of M/s. Wander Ltd. Bombay) under the manufacturing loan licence in form No. 28A, after specifying the formula etc.

4. Since the relationship between Wander and Antex became strained for over so many reasons which are not necessary for our purpose at this

stage, Wander made arrangement with Alfred Berg & Company on 21-4-1987 for the manufacture and supply to them of the Pharmaceutical

product and affix the trade mark ""Cal-De-Ce"". Alfred Berg thereupon obtained a licence to manufacture the said product on 2-2-1987 from the

Drug Controller, Tamil Nadu and started manufacturing and supplying the product to Wander. Thereafter, Wander also terminated their

arrangement with Antex by their letter dated 30-11-1988 and by their letter dated 16-12-1988 informed the Drug Controller, Karnataka of the

same and requested him to take necessary action. At this stage, Antex filed C.S. No. 1220 of 1988 on the original side of this Court, u/Ss. 105

and 106 of the Trade and Merchandise Marks Act, 1958 for a permanent injunction against Wander and Alfred Berg and Company from

manufacturing and selling ""Cal-De-Ce"" on a parallel licence. In Application Nos. 4941 and 4942 of 1988, interim injunction though was obtained

on 23-9-1988 at the instance of Wander an Application No. 5352 of 1988 was filed for vacating the ex parte interim order and the matter was

taken up for consideration along with several other similar applications and a learned single judge, by his order dated 2-3-1989, vacated the ex

parte interim orders and dismissed Application Nos. 4941 and 4942 of 1988. Antex filed O.S. A. Nos. 111 and 112 of 1989 against the order of

the learned single Judge and a Division Bench of this Court, before whom the above appeals and other similar appeals came up for disposal, by an

order dated 19-1-1990, allowed the appeals, set aside the orders of the learned single Judge dated 2-3-1989 and directed the grant of injunction

in such terms as have been prayed for in their respective applications. On further appeal filed by Wander and Alfred Berg & Co., before the

Supreme Court of India in Civil Appeal Nos. 1892 and 1893 of 1990 with I.A. Nos. 1 and 2 of 1990 against O.S.A. Nos. 111 and 112 of 1989,

the Supreme Court of India, by its order dated 26-4-1990, allowed the appeals and set aside the order of the Division Bench dated 19-1-1990 in

so far as it pertained to C.S. No. 1220 of 1988 and restored the orders of the learned single Judge dated 2-3-1989 referred to above. The

Supreme Court further observed that, ""Having regard to the nature of the controversy, it will be appropriate for the High Court to dispose of the

suit expeditiously and we request the High Court to dispose of the suit within six months from today.

5. Matters did not stop there. In the meantime, Wander filed Civil Suit No. 3 of 1989 on the file of the District Court, Baroda against Antex and M/s. Fleming (India) for a permanent injunction restraining them from manufacturing, selling, advertising or offering for sale any medicinal pharmaceutical product under the Trade Mark ""Cal-De-Ce"" or any other mark identical or similar thereto and also for a permanent injunction restraining them from acting on the basis of any manufacturing or other licence, permit or permission issued under the Drugs and Cosmetics Act, 1940 of any other applicable laws for using the Trade Mark ""Cal-De-Ce"" (Registered No. 113972) of the plaintiffs therein and for other incidental reliefs. Ex-parte interim orders of injunction appear to have been granted on 1-4-1989 and after contest by defendants, the District Court, by its order dated 21-6-1989, confirmed the interim injunction granted on 1-4-1989 till the final disposal of the suit. On appeal to the High Court by the defendants before the District Court, Baroda, a learned single Judge of the Gujarat High Court at Ahmedabad, by an order dated 21-9-1989, confirmed the order of the District Court, after declining the request of the appellant therein for adjournment. On further appeal by Antex from the said order before the Supreme Court in Civil Appeal No. 3092 of 1990, by an order dated 26-4-1990, virtually made on consent, the Supreme Court set aside the order of the learned single Judge of the Gujarat High Court and remitted the matter to the High Court for consideration afresh of the appeal for admission after affording another opportunity to the appellant of being heard. The matter, we are told, stands at that stage.

6. In the meantime, when O. S. A. Nos. 104 to 112 of 1989 as well as W.P. No. 5398 of 1989 were pending on the file of this Court, in C.M.P.

Nos. 4630 to 4638 of 1989 interim order No. 2 was passed by a Division Bench on 6-10-1989 to the extent that the pendency of the

proceedings before this Court could not preclude the authority to pass any orders in any matters pending before such authorities, viz., Drug

Controller, Karnataka, Commissioner, Food & Drug Administration, Gujarat and Drug Controller, Tamil Nadu, and that it is well open to those

authorities to dispose of any of the petitions filed before them by any of the parties to these proceedings by passing suitable or appropriate orders

on its own merit after hearing the concerned parties. Pursuant to the said order, the State Drugs Controller, Tamil Nadu passed an order on 2-12-

1989 to the following effect :--

There is a dispute between the parties to the agreement/contract and parties to the contract/agreement have to settle themselves as per the

contractual obligation. In view of the above and the product in question has been permitted to be manufactured by a licensing authority under the

provisions of Drugs and Cosmetics Rules, it may not attract S. 17B of the Drugs and Cosmetics Act, 1940.

It is this order of the Drug Controller, Tamil Nadu that came to be challenged by Antex in W. P. No. 5398 of 1989, as per the amended prayer of

the writ petition, which has given rise to the writ appeals before us.

7. To make the narration of the facts behind the controversy before us complete, it is necessary to refer to two more events. One is that with

reference to the request of Wander to the Drug Controller, Karnataka requesting for cancellation of the licence in favour of Antex, he has passed

an order dated 23-10-1989 on almost the same lines as that of the Drug Controller, Tamil Nadu, referred to above in respect of licence in favour

of Alfred Berg & Company. The other is the filing of C.S. No. 972 of 1989 before the original side of this Court by Antex against Wander and

Alfred Berg (P) Ltd., praying, among other things, for a permanent injunction restraining the defendants from manufacturing any pharmaceutical

product with the name ""CAL-DE-CE"", for declaration that the agreement dated 28-3-1986 between Wander and Antex and the agreement dated

21-4-1987 between Wander and Alfred Berg (P) Ltd., to be null and void and for other incidental reliefs. Applications Nos. 5668 to 5670 of

1989 were filed for injunction. By an order dated 26-3-1990, a learned single Judge of this Court on the original side rejected the plea of Antex

for injunction and dismissed all the three applications.

8. While so, W. P. No. 5398 of 1989, which was filed by Antex originally with a prayer for a writ of Mandamus directing the Drug Controller,

Tamil Nadu to cancel the manufacturing licence issued in favour of Alfred Berg & Co. on 2-4-1987 to manufacture the drug under the brand name

of CAL-DE-CE was taken up for consideration by the learned single Judge with an amended prayer for the issue of a writ of certiorari filed

Mandamus to call for and quash the proceedings of the Drug Controller dated 2-12-1989 and consequently cancel the manufacturing licence No.

290 dated 2-2-1987 issued to Alfred Berg & Company, as above.

9. Before the learned single Judge, at the time of hearing of the writ petition, Antex, the writ petitioner appears to have contended as hereunder:--

That Antex has already been granted licence by the Drug Controller, Karnataka, which would have validity throughout India, that the validity of the

said licence had not in any manner been affected even as on that date, that Alfred Berg and Company is manufacturing an identical product and is

selling the same under the trade name ""CAL-DE-CE"" and that the Drug Controller, Tamil Nadu had no authority to authorised Alfred Berg and

Company to manufacture the said drug. On the above premise, the writ petitioner appears to have contended that the manufacturing of the product

CAL-DE-CE"", be it under the authority of the Drug Controller, Tamil Nadu under the licence granted by him, amounts to manufacturing a

"spurious drug" within the meaning of S. 17B of the Drugs and Cosmetics Act, 1940 and, therefore, the licence granted to manufacture and sell the

particular commodity in question should be ordered to be cancelled. The appellants before us appear to have contended that there is no violation

of S. 17B as pleaded by the writ petitioner and that the licence once granted can be cancelled only under and as per Rule 85 of the Drugs and

Cosmetics Rules, 1945. Further, the appellants appear to have contended that the remedy of the writ petitioner is only to sue for damages and this

plea did not find favour of acceptance with the learned Judge. The learned single Judge, purporting to draw inspiration from the decision of the

Supreme Court of India reported in Medimpex (India) Pvt. Ltd. v. Drug Controller-cum-Chief L.A. came to the conclusion that the licence

granted by the Drug Controller, Tamil Nadu to Alfred Berg & Company to manufacture an identical product as manufactured by the writ petitioner

has been obtained contrary to the provisions of the Act, meaning thereby the provisions of S. 17B(a) of the Act. Even at this stage, we may state

that the decision of the Supreme Court did not consider the scope of S. 17B of the Act and the passage extracted by the learned Judge is found to

occur in the portion of the judgment narrating the factual background of the case. When we pointed out this, Mr. U. N. R. Rao, learned counsel

for Antex, had to accept the position that it is not the ratio decided in the case with reference to the scope of S. 17B of the Act. The learned Judge

also came to the conclusion that Rule 85 will be attracted even to a case where there was a disqualification to obtain the licence on account of any contravention of the Act even at the initial stage. Finally, the learned single Judge, while setting aside the order of the Drug Controller, Tamil Nadu dated 2-12-1989, remitted the matter to the Drug Controller, Tamil Nadu with a direction to the said authority to pass orders by exercising the powers under Rule 85 referred to above for cancellation of the licence issued to Alfred Berg & Company to manufacture and sell the product under the brand name ""CAL-DE-CE"", after affording fair and reasonable opportunity to Wander and Alfred Berg & Company to state their respective cases.

10. Before us, Mr. M. R. Narayana-swami, learned counsel appearing for the appellants in W. A. No. 526 of 1990, after taking us through the relevant facts of the case and the various proceedings between the parties, both concluded and pending, submitted even at the threshold of his submissions that though the matter had been remitted to the Drug Controller, Tamil Nadu with a direction to give fair and reasonable opportunity to the appellants in W.A. Nos. 526 and 527 of 1990 to state their respective cases and exercise the powers under Rule 85 of the Rules in respect of the licence, the findings rendered by the learned Judge on the scope of the provisions of S. 17B(a) and certain factual assumptions made left virtually as discretion in him to consider the issues objectively, as is expected of him, and, therefore, they are constrained to file these appeals and agitate the matter before the Division Bench instead of facing the authority to whom the matter stood remanded. Mr. R. Alagar, learned counsel appearing for the appellant in W.A. No. 527 of 1990, while adopting the submission of the learned counsel for the appellant in W.A. No. 526 of 1990, attempted to make submissions on the merits of the case. Mr. U. N. R. Rao, learned counsel appearing for the writ petitioner-Antex also sought to argue the matter on merits and invited us to render a decision on all the issues raised. The learned counsel further contended that there is nothing wrong in the learned Judge declaring the scope of S. 17B(a) and expressing his views on the matter before him while remitting the matter for the consideration of the Licensing Authority under the Act.

11. In view of the fact that we do not see any reason to interfere with the

directions of the learned single Judge to remit the matter for fresh consideration by the Licensing Authority to exercise his powers under R. 85 after affording a fair and reasonable opportunity to the appellants, we have made it clear to all the counsel appearing that it may not be fair to deal with the matter on merits ourselves and express our views on one issue or the other and thereby limit the scope of exercise of powers and discretion of the Licensing Authority, conferred upon him under the statutory rules. Further, having regard to the pendency of the various civil litigations between the parties on the original side of this Court and the District Court, Baroda in Gujarat State, we feel justified in dissuading ourselves from entering upon the merits of the issues sought to be raised, lest the conclusions of ours on such issues are bound to have a definite impact on those pending litigations and impair a free trial and fair disposal of those cases by the Civil Courts which could go into the issues in a comprehensive manner and in greater detail.

12. The learned single Judge obviously was influenced by the fact that the order of the first respondent passed in his Reference No, 7771/1W/1/89 was a cryptic order and that the same had been issued without affording a fair and reasonable opportunity to respondents 2 and 3 to state their respective case. It was for this reason, in our opinion, that the learned single Judge deemed it necessary to remit the case to the first respondent after setting aside his order and to direct him to pass appropriate orders on the application seeking cancellation of the licence issued to the second respondent to manufacture the drug under the brand name CAL-DE-CE". We say so in view of what is recorded in the concluding paragraph of the judgment of the learned single Judge which reads thus:--

For the foregoing reasons, there will be an order in this writ petition quashing the impugned orders dated 2-12-1989 issued by the first respondent in his Reference No.7771/1W/1/89 and directing the first respondent to pass orders by exercising powers for cancellation of the licence issued to the second respondent to manufacture a drug under the brand name Cal-De-Ce in the light of the observations contained above, after affording a fair and reasonable opportunity to the second and third respondents to state their respective case. Orders in this regard should be made on or before 10th May, 1990. No costs.

13. Obviously, the learned single Judge wanted the matter to be decided afresh by the first respondent after giving a fair and reasonable opportunity to respondents 2 and 3 to state their respective case. However, while doing so, an embargo was placed by the learned single Judge on the first respondent, that he should pass orders ""by exercising powers for cancellation of the licence under S. 17B(a) of the Act""..... and ""in the light of the observations contained above. ""In our opinion, this was not a proper course to adopt. Undoubtedly, the authority exercising the powers to cancel a licence under the Act exercises quasi-judicial functions and once it is found that the order dated 2-12-1989, which was sought to be quashed through the writ petition was cryptic and had been passed without affording any opportunity to respondents 2 and 3, the matter should have been left to the first respondent to decide afresh by exercising his quasi-judicial powers and giving a fair and reasonable opportunity to the concerned parties to represent their case. By insisting upon the quasi-judicial authority to pass orders by exercising powers under S. 17B(a) and in the light of the observations made by the learned single Judge, the further observation that he should do so ""after affording a fair and reasonable opportunity"" to the parties became almost meaningless. The opportunity of hearing, which is required to be given by the Drug Controller while exercising his powers of cancellation of licence has to be real and not illusory. Of course, whatever be the decision of the quasi-judicial authority, the aggrieved party would have a right to question it, but to render the opportunity of hearing by fettering the exercise of jurisdiction by the quasi-judicial authority, where the said authority has not applied his mind to the facts of the case in the light of the statutory provision, to decide the case in accordance with the findings of the learned single Judge, would render the grant of hearing only a meaningless formality. It is for this reason that we have refrained from dealing with the submissions of the learned counsel for the party about the scope of S. 17B of the Act or Rule 85 of the Rules framed thereunder regarding the alleged violation, as any expression of opinion by us, is likely to prejudice the case of either party and would amount to influencing the exercise of power by the statutory authority, who must decide the matter before him according to his own judgment.

14. We, therefore, partly allowed these writ appeals and while upholding the order of remand, direct the Drug Controller, the statutory to decide

the application for cancellation of the licence issued to the second respondent in accordance with law, uninfluenced by the observations of the

learned single Judge or his findings on the scope of S. 17B of the Act or Rule 85 of the Rules framed thereunder, as also by the other observations

on facts. Of course, he shall also not be influenced by anything said by us in this judgment, on the merits of the controversy between the parties.

15. Considering the fact that the application for cancellation of the licence is pending before the first respondent for some time, we direct that he

shall dispose of the matter within four weeks from the date of receipt of a copy of this judgment, after notice to the parties and granting them an

opportunity of hearing and representing their case. To the above limited extent, both the writ appeals are allowed. In the circumstances, there will

be no order as to costs.

16. Appeals partly allowed.