
(2014) 210 DLT 591 : (2014) 59 PTC 124

Delhi High Court

Case No: FAO (OS) 144/2014

Teva Pharmaceutical
Industries Ltd. and
Others

APPELLANT

Vs

Natco Pharma Limited

RESPONDENT

Date of Decision: May 30, 2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) – Order 43 Rule 1(a), Order 7 Rule 10#Patents Act, 1970 – Section 48(b)

Citation: (2014) 210 DLT 591 : (2014) 59 PTC 124

Hon'ble Judges: G. Rohini, C.J; Rajiv Sahai Endlaw, J

Bench: Division Bench

Advocate: Parag P. Tripathi and Mr. Sudhir Chandra, Sr. Advocates, Mr. Pravin Anand, Mr. Nischal Anand, Ms. Savitha Suresh and Mr. Aman Taneja, Advocate for the Appellant; Chetan Sharma, Sr. Advocate, Ms. H. Rajeshwari, Mr. Tahir Abduljabbar and Ms. Sudipa Dasgupta, Advocate for the Respondent

Final Decision: Allowed

Judgement

Rajiv Sahai Endlaw, J.

This appeal under Order 43 Rule 1(a) of the CPC 1908 impugns the order dated 28th February, 2014 of the

learned Single Judge (exercising ordinary original civil jurisdiction) of allowing IA No. 10390/2012 of the respondent/defendant under Order 7

Rule 10 of the CPC and returning the plaint in CS(OS) No. 3193/2012 filed by the three appellants/plaintiffs for presentation in the appropriate

Court.

2. Notice of the appeal was issued and owing to the urgency expressed by the appellants on the ground that the protection afforded by the US

Supreme Court to the appellants qua the patent to which the suit pertains is till 24th May, 2014 only, hearing was expedited. We have heard the

counsels for the parties.

3. The suit from which this appeal arises was filed by the appellants/plaintiffs for the relief of permanent injunction restraining the

respondent/defendant from manufacturing, selling, offering for sale, exporting or registering the product that has been held by the United States

District Court to infringe the appellants/plaintiffs Indian Patent No. 190759 and for ancillary reliefs of rendition of accounts and damages,

pleading:-

(i) that the appellant/plaintiff no. 2 Yeda Research and Development Co. Ltd. Israel is the holder of Patent No. 190759 dated 23rd May, 1995 in

respect of ""a method for manufacturing Co-polymer I fraction"";

(ii) that the appellants/plaintiffs using the patented method are manufacturing drug under the trademark COPAXONE for treatment of relapsing,

remitting multiple sclerosis;

(iii) that the appellants/plaintiffs earlier filed CS(OS) No. 1708/2007 in this Court against the respondent/defendant for restraining infringement of

the said Patent No. 190759;

(iv) that the respondent/defendant in the previous suit aforesaid made a statement that the process employed by the respondent/defendant for

manufacturing the drug Glatiramer Acetate is different from the process which had been patented by the appellants/plaintiffs;

(v) that in view of the aforesaid statement of the respondent/defendant, the appellants/plaintiffs did not press their application for interim relief in the

previous suit;

(vi) however it was reported in the news article published on 17th January, 2012 that the respondent/defendant will work with Mylan

Pharmaceuticals Inc. (MPI) to launch Glatiramer Acetate for the treatment of multiple sclerosis;

(vii) that the appellants/plaintiffs on making enquiries learnt that MPI had signed an agreement with the respondent/defendant relating to

development and marketing of Glatiramer Acetate in the United States and in pursuance thereof MPI submitted to the US FDA an Abbreviated

New Drug Application seeking approval to manufacture and sell MPI's proposed Glatiramer Acetate;

(viii) that the appellants/plaintiffs instituted a suit in the US District Court against MPI and the respondent/defendant for infringement of the US

Patents of the appellants/plaintiffs;

(ix) after trial, the US Court found that the Glatiramer Acetate product that MPI and the respondent/defendant were seeking to sell in the United

States infringes the claims of US Patent 430 and 898 (corresponding to Indian Patent 190759) of the appellants/plaintiffs;

(x) that the US Court's decision leads to an incontrovertible conclusion of infringement of rights of the appellants/plaintiffs in Indian Patent 190759

based on the manufacture of Glatiramer Acetate by the respondent/defendant for export and sale in the United States; and,

(xi) ""that the acts of the defendant in manufacturing the Glatiramer Acetate product for sale in the United States and elsewhere amount to a clear

infringement of the registered Patent No. 190759.

4. Needless to state respondent/defendant contested the suit by filing a written statement. Application aforesaid under Order 7 Rule 10 of the CPC

was also filed, pleading:-

(a) that this Court does not have territorial jurisdiction to entertain the suit;

(b) no part of the alleged cause of action has accrued within the territorial jurisdiction of this Court;

(c) that the alleged cause of action as set-out in the plaint is qua the manufacture and export of Copolymer-I by the respondent/defendant;

(d) the only basis for filing the suit at Delhi is the alleged presence of an office of the respondent/defendant at Delhi;

(e) that the respondent/defendant does not have any manufacturing facility at Delhi that could possibly practice or export the product of the suit

patent;

(f) though the respondent/defendant manufactures Copolymer-I under the mark Glatiramer Acetate but not at Delhi;

(g) the respondent/defendant does not carry on any business within the territorial jurisdiction of this Court; and,

(h) that the suit is only concerned with the process patent and the appellants/plaintiffs do not claim any patent in the product manufactured by the

said process; though the appellants/plaintiffs had applied for a product patent also but the same was denied.

5. The learned Single Judge has vide impugned order allowed the aforesaid application of the respondent/defendant and held this Court to be not

having any territorial jurisdiction to entertain the suit and has resultantly ordered the plaint to be returned, finding/observing/holding:-

A. that it is the case of the appellants/plaintiffs themselves that the suit is a quia timet action in as much as the same is based on a apprehension of

the likelihood of the respondent/defendant exporting the infringing goods to US and other countries;

B. that the patent, for restraining infringement of which the suit is filed, is a process patent and not a product patent; though the appellants/plaintiffs

had applied for a product patent also but the said application was rejected;

C. that the argument of the appellants/plaintiffs was that though the respondent/defendant for producing the product Glatiramer Acetate for

marketing in India was using a different process as stated by the respondent/defendant in the first suit but the respondent/defendant for exporting

Glatiramer Acetate to MPI for sale in US was intending to use the process in which the appellants/plaintiffs held a patent;

D. that there is no averment in the plaint of the violation of the process patent of the appellants/plaintiffs within the territorial jurisdiction of this

Court; there is no averment that the process patent was being practiced/infringed by the respondent/defendant within the jurisdiction of the Court in

as much as neither had the appellants/plaintiffs pleaded nor controverted that the respondent/defendant had no manufacturing activity in Delhi and

that the manufacturing facilities of the respondent/defendant were in Hyderabad only;

E. that since the suit concerned a process patent, the pleadings as regard the product being sold in Delhi or the possibility of the product being

launched in Delhi or elsewhere cannot justify the territorial jurisdiction of this Court;

F. rather the case of the appellants/plaintiffs was that the respondent/defendant was intending to practice the process patent of the

appellants/plaintiffs for manufacturing of goods for export to US and elsewhere;

G. that there is no averment in the plaint of the product manufactured from practicing the process patent of the appellants/plaintiffs being marketed

in Delhi;

H. Thus the argument raised by the appellants/plaintiffs on the basis of Section 48(b) of the Patents Act, 1970 is misconceived;

I. the fact that the respondent/defendant may have an office in Delhi or a distributor in Delhi is not relevant to the subject matter of the suit;

J. that the argument, of the respondent/defendant having obtained approval to sell Glatiramer Acetate in India or of the respondent/defendant

selling Glatiramer Acetate manufactured by different process in Delhi, in the face of the cause of action in the instant suit of apprehension of

infringement of process patent for the purpose of export to US and elsewhere, were irrelevant; and,

K. the judgment in Bristol Myers Squibb Company and Another Vs. V.C. Bhutada and Others, . relied upon by the appellants/plaintiffs which was

concerned with a product patent and in which the defendant had already obtained approval from the Drug Controller for marketing the product

without any restriction as to territory, was not applicable.

6. The senior counsel for the appellants/plaintiffs has argued:-

I. that the learned Single Judge has misconstrued the rights attaching to a process patent; the said rights are not only in the process but also extend

to preventing others from offering for sale or selling products obtained from that process; reference in this regard is made to Section 48(b) supra;

and,

II. that the learned Single Judge has also erred in holding that the relief claimed in the suit was limited to preventing export of the product

manufactured by using/practicing the patented process of the appellants/plaintiffs to US and other countries when the averments in the plaint were

not so confined or limited.

7. Per contra the senior counsel for the respondent/defendant has argued:-

(i) that the suit is indeed confined to prohibiting export to US by the respondent/defendant of the product manufactured from the patented process;

the appellants/plaintiffs have otherwise filed the first suit for prohibiting the respondent/defendant from marketing the products manufactured from

the patented process in India; if the scope of the second suit were to extend to marketing the goods in India, then the same would in any case be

not maintainable for the reason of the pendency of the first suit;

(ii) that the fact that the present suit is confined to prohibiting export by the respondent/defendant of products manufactured by the patented

process to US becomes clear from the replication filed by the appellants/plaintiffs to the written statement of the respondent/defendant where the

appellants/plaintiffs have repeatedly stated that the second suit is confined to apprehensions of export to US only;

(iii) thus as far as the second suit is concerned, as per the averments of the appellants/plaintiffs also, no cause of action has accrued at Delhi in as

much as neither was the patented process going to be practiced/used in Delhi nor was the product manufactured therefrom to be marketed in

Delhi; and,

(iv) in the judgment in Bristol Myers Squibb, quia timet action was held maintainable since the defendant had already obtained the sanction of the

Drug Controller while that is not the plea of the appellants/plaintiffs in the second suit.

8. In view of the aforesaid arguments, we, during the course of hearing enquired from the senior counsel for the respondent/defendant whether the

respondent/defendant was willing to make a statement that the products manufactured from the process in which the appellants/plaintiffs claim

patent will be only for export and not for the Indian market. Though the senior counsel for the respondent/defendant responded by first contending

that the respondent/defendant was not required to make such statement as the question of territorial jurisdiction was to be adjudicated on the basis

of the averments in the plaint itself but subsequently on instructions stated that the respondent/defendant has no intention to market the products to

be manufactured in its plant at Hyderabad for export to US, in India or in Delhi.

9. We further enquired from the senior counsel for the respondent/defendant whether any permission was required for such export and whether

such permission had been obtained.

10. The senior counsel replied in the affirmative but stated that as of now the respondent/defendant does not have the permission for export to US.

11. We further enquired from the senior counsel for the respondent/defendant whether the permission from the Drug Controller was required qua a

product only or also qua the process of manufacture of the product and whether the respondent/defendant has such permissions.

12. The senior counsel on instructions informed that permission from the Drug Controller is required for process also and the respondent/defendant

as of today has no such permission either.

13. Though in view of the aforesaid we enquired as to what survives in the suit, in as much as the respondent/defendant as per its own statement,

as of today does not appear to be in a position to indulge in the acts, from doing of which it is sought to be prohibited, but the senior counsel for

the appellants/plaintiffs contended that the respondent/defendant have not taken the said stand neither in the pleadings nor in the arguments and the suit thus has to proceed.

14. The senior counsel for the appellants/plaintiffs in rejoinder contended:-

(a) that for the purposes of Order 7 Rule 10, only the averments in the plaint are to be seen and the replication which is in response to the written

statement cannot be seen in as much as for comprehending the replication the written statement will necessarily have to be seen and which is not to

be seen;

(b) that the appellants/plaintiffs, on the basis of the replication cannot be said to have given up any part of the case as made out in the plaint and it

was not so pleaded by the respondent/defendant in the application under Order 7 Rule 10 of the CPC also though filed after the filing of the

replication; and,

(c) that the focus in the replication was on the interim relief and not to the prayer in the plaint.

15. We have considered the rival contentions;

16. The same learned Single Judge who has passed the impugned order is the author of Bristol Myers Squibb also where quia timet action has

been held to be maintainable on apprehension of marketing of the patented product in Delhi. What has however prevailed with the learned Single

Judge in the impugned order to hold this Court to be not having territorial jurisdiction is the factum of the subject suit being confined to prohibiting

export to US of the products manufactured from the patented process. It is for this reason only that the learned Single Judge has held that the

question of the sale/marketing of products manufactured from the patented process within the territorial jurisdiction of this Court does not arise.

The learned Single Judge thus cannot be said to have misconstrued Section 48(b) of the Act, as has been argued by the appellants/plaintiffs.

17. So the only question to be considered is, whether the suit of the appellants/plaintiffs as per averments therein is limited to prohibiting export to

US.

18. The pleadings in the plaint, to say the least, are not very lucid and clear. However the senior counsel for the respondent/defendant also has not

argued on the basis of the pleadings in the plaint. He has in this regard rather relied on the replication which indeed shows that the focus of the

appellants/plaintiffs was/is on prohibiting/preventing export. We have perused the replication carefully. We tend to agree with the senior counsel for

the appellants/plaintiffs that what has been filed as a replication is indeed a cut and paste job perhaps from the rejoinder which may have been

prepared or filed to the reply to the application for interim relief. However what arises for consideration is, whether the appellants/plaintiffs are to

be penalized for the weak, not precise and ambiguous pleadings of their Advocates. We are in this context reminded of what the Courts have held

about Moffusil pleadings. It has been held that they are to be construed liberally and that only because the parties did not use the terminology

which they should have, ipso facto, would not mean that the ingredients for satisfying the requirements of statute are absent. The Supreme Court in

Kidar Lall Seal and Another Vs. Hari Lall Seal, held that the Courts would be slow to throw out a claim on a mere technicality of pleading when

the substance of the thing is there and no prejudice is caused to the other side, however, clumsily or inartistically the plaint may be worded. The

same sentiment was echoed in Ganesh Trading Co. Vs. Moji Ram, . Though the genesis of the said view was, the Moffusil lawyers being not

skilled in language and pleadings but we find the principle to have travelled till Des Raj and Others Vs. Bhagat Ram (Dead) By LRs. and Others,

and Narain Prasad Aggarwal (D) by LRs. Vs. State of M.P., , though the Supreme Court in Devasahayam (D) by LRs. Vs. P. Savithramma and

Others, also observed that different considerations on construction of pleadings may arise between pleadings in the Moffusil Court and pleadings

on the Original Side of the High Court. Alas, we find that the said difference appears to have ceased to exist--pleadings on the Original Side of this

Court are being drafted, as in the Moffusil Court.

19. However we are still of the opinion that the principle, of not allowing a litigant to suffer for such defects in pleadings should still be upheld.

From a reading of the plaint, it can undoubtedly be not said that the suit is confined to prohibiting exports. The suit is for using the patented process

of the appellants/plaintiffs for manufacturing the product for sale in US and ""elsewhere"" and from the averments of the respondent/defendant of sale

network of the respondent/defendant in Delhi, it has to be held that the averments pertain to Delhi also. We are also of the view that no prejudice is

caused to the respondent/defendant from so giving benefit of doubt to the appellants/plaintiffs inspite of defect in their pleadings, as the

respondent/defendant is already contesting the first suit in this Court. We are further of the view that the second suit for the same relief i.e. of

restraining the respondent/defendant from marketing the goods produced from infringing process in Delhi would be maintainable as the same is

based on a subsequent cause of action i.e. threat by the respondent/defendant to commence marketing goods produced from infringing process, in

Delhi, as pleaded, i.e. after having made a statement in the first suit of not using the infringing process.

20. We have also wondered whether owing to the statement aforesaid of the respondent/defendant, of not intending to market the product in India,

the territorial jurisdiction of this Court, otherwise invoked in accordance with law, can be ousted. We are unable to find any basis for holding that

though on the basis of averments in the plaint, this Court will have territorial jurisdiction, the same can be ousted on the statement of the

respondent/defendant of not doing/intending to do act, to prevent which suit is filed, within the territorial jurisdiction of this Court. We are of the

opinion that once the appellants/plaintiffs have pleaded apprehension of sale/marketing in Delhi, the Courts in Delhi would have jurisdiction to

entertain the suit and such jurisdiction cannot be ousted by the defendant by making a statement not to do any such act in Delhi, though the

defendant would be entitled to prove that there is no basis for such apprehension. If such a course of action were to be permitted, it would enable

a defendant to avoid action in a particular Court by making such a statement and indulge in forum shopping. We also find that the same was not

permitted by this Court in *Rana Steels Vs. Ran India Steels Pvt. Ltd.*, ; there, though the counsel for the defendant stated that the defendant had no

intention to sell its products in Delhi, it was held that the plaint could not be ordered to be returned on the basis of the said statement. Though the

matter was taken in appeal by way of FAO(OS) 212/2008 but was compromised.

21. Thus, we hold that the learned Single Judge erred in holding that the suit, as per averments in the plaint was confined to preventing only the

export to US of products manufactured at Hyderabad using the process patented by the appellants/defendants. The averments in the plaint extend

to apprehension of marketing by the respondent/defendant of the products manufactured by the process patented by the appellants/defendants, in

Delhi. Thus, as per dicta in *Bristol Myers Squibb (supra)*, Courts at Delhi would have territorial jurisdiction to entertain the suit.

22. Accordingly, the appeal is allowed. The order of the learned Single Judge allowing the application of the respondent/defendant under Order 7

Rule 10 of the CPC is set aside. Resultantly the suit is restored to the Board of the learned Single Judge. The parties to appear before the learned

Single Judge on 2nd July, 2014.

No costs.