

(2009) 09 MAD CK 0174

Madras High Court

Case No: Application No's. 2114 to 2116 of 2009 in C.S. No. 651 of 2005

Vittal Mallya Scientific
Research Foundation

APPELLANT

Vs

Indfrag Limited

RESPONDENT

Date of Decision: Sept. 14, 2009

Acts Referred:

- Patents Act, 1970 - Section 115(2)

Hon'ble Judges: K. Chandru, J

Bench: Single Bench

Advocate: C. Saravanan, for the Appellant; P.N. Swaminathan, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

K. Chandru, J.

Heard both sides. These three applications were filed by the applicant/plaintiff.

2. The applicant has filed a suit in C.S. No. 651 of 2005 for various reliefs including permanent injunction restraining the defendant from using the soluble double metal salt of HCA in violation of the plaintiff's process Patent Nos. 182487, the anti obesity beverages in market in violation of the plaintiff's process patent No. 182488, the soluble double metal salt of HCA in market in violation of the plaintiff's process patent Nos. 182489, 182490, 182810 and 183849 and the US product patent Nos. 6160172 and 6395296 B1 and for further reliefs of delivery to the plaintiff for destruction all offending materials, stocks, booklets and other materials including raw material, inputs, work in progress finished goods manufactured by the defendants in violation of plaintiff's process patents for double metal salt of HCA and also for a direction to defendant to render true account of profits made by them on sale of double metal salt of HCA.

3. Pending the suit, the applications in O.A. Nos. 730 to 737 of 2005 were taken out. This Court, by an order, dated 21.6.2006 directed the analysis of the process of the product called Double Metal Salt of Hydroxycitric Acid of either party be done by the Indian Institute of Science, Malleshwaram, Bangalore. Subsequently, the order came to be modified as there were objections regarding the IIS from analysing the same. After making several queries with reference to suitability of various other research institutes, by an order, dated 21.11.2007, this Court directed the Indian Institute of Technology, Madras, Department of Chemistry to examine/analyse the products of the plaintiff and the defendant and submit a report to the court as to the nature of the manufacturing process involved and whether the defendant's claim that it was manufacturing the product using a different process from the six patented process of the plaintiff. It was clearly stated that the cost of the examination/analysis shall be borne by both the plaintiff and the defendant. On 17.12.2007, this Court further directed the defendant to comply with the order.

4. Thereafter, the Registry of this Court communicated the decision of this Court, with a covering letter, dated 2.1.2008. It was also indicated that the cost of the examination shall be borne by both the plaintiff and the defendant and the matter will be listed during January, 2008.

5. In the meanwhile, the applicant took out these three applications. A. No. 2114 of 2009 is filed seeking for a direction to give supplementary instruction to IIT, Madras to examine whether the manufacturing process disclosed by the respondent pursuant to the direction, dated 21.11.2007 of this Court is genuinely different from that of the applicants process in any manner or it is just a superficial obvious alteration resulting in commercially viable Double metal salt of HCA for the process adopted for certificate of analysis for batch No. GCPP 08009 EOU sold to Ju Yeong NS Co. Ltd. Pursuant to latter's purchase order No. P1 16.10.2008 enclosed with the affidavit D. No. 10016/09 has been manufactured using any other process other than the one the patented process of the applicant vide Patent Nos. 182487, 182488, 182489, 182490, 182810 and/or 183849.

6. A. No. 2115 of 2009 is filed seeking for a direction to give supplementary instruction to IIT, Madras to examine whether the sample enclosed and certificate of analysis batch No. GCPP 08009 EOU sold to Ju Yeong NS Co. Ltd. pursuant to latter's purchase order No. P1 16.10.2008 enclosed with the affidavit D. No. 10016/09 and the sample submitted by the respondent to IIT, Madras, pursuant to the direction dated 21.11.2007 as modified are Double Metal salt of Hydroxy citric acid.

7. A. No. 2116 of 2009 is filed seeking for a direction to respondent to produce all note books containing experiments/batch sheets detailing the raw materials used, process adopted for making the product, yields of all samples submitted to IIT, Madras to give its opinion for the sample already submitted to IIT, Madras by the respondent pursuant to the direction, dated 21.11.2007 of this Court for the consignment covered by Certificate of Analysis for batch No. GCPP 08009 EOU sold

to Ju Yeong NS Co. Ltd. pursuant to latter's purchase order No. P1 16.10.2008 and sample enclosed along with the affidavit.

8. Thereafter, the matter was adjourned to await report from IIT(M) from time to time and at the instance of the parties. In these applications, the respondent had also filed a counter affidavit making allegations against the plaintiff.

9. When the matter came up again to this Court, the Professor of Department of Chemistry, IIT, Madras sent a report in a sealed cover containing its analysis as well as the report about certain developments that took place in the meanwhile. A specific request was made by the said Professor, IIT(M) which may be extracted below:

Specific prayer to the Hon. High Court of Judicature at Madras from Professor R. Dhamodharan of IIT Madras, the person who analyzed the sample, the patents and typed this report when requested on 26.06.2009 by the Deputy Registrar (O.S.) that this may be given before 29.06.2009.

i) It is respectfully submitted that Professor R. Dhamodharan, the Head of Department of Chemistry had to analyze all the patent and process information given by the plaintiff, the defendant and that available in the open literature along with samples and scrutinize/analyze the same for arriving at some meaningful scientific conclusions, which may be of interest to the Court. He is an expert in the academic research related to surface properties of plastics and possess no instant knowledge to resolve this dispute. Under the directions of the High Court, given the above stated constraints, sample analyses have been carried out with instruments available within the department (NMR, Mass, UV-Visible, FT-IR) as well as those available within Chennai (HPCL, elemental analysis, etc., for service on payment basis).

ii) The petitioner and the defendant have been requested vide letter dated 08.01.08 (copies enclosed) to make the necessary payments, as approved by the IC&SR of IIT Madras, for usage of time within the Institute, for procured services and for analyzing the patents and procedure provided by them. The Court may direct them to do so and produce proof of the same to get the court order. This is of utmost importance as our specific directions and mandate is to train human resources and therefore there is no specific budget provision for paying for procured services outside the scope of IIT Madras. Further, it would be a Herculean task for Professors to pay for the procured services from their pocket because of the specific directions of the Court and then approach the Court for payment that is due, through a petition that would require the services of a lawyer.

10. Letters of correspondence between the IIT Madras and the counsel for the applicant was also produced. It was stated in the letter, dated 6.2.2008 that proposed closure of the project was on 23.1.2008 and since the parties have not paid the project cost, a time extension was sought for. On 18.3.2008, a letter was

addressed to the counsel for the plaintiff. It was stated by the IIT that the IIT was not interested in making such an analysis for others as its valuable time will be lost. Some analysis will have to be done outside which requires money of IIT to be used. The IIT never wanted to be a scientific advisor to the Court. It is only because of the directions of this Court, the present work has been undertaken.

11. This letter was written pursuant to the letter written by the counsel for the plaintiff, dated 17.03.2008. It was stated that since they had agreed to share the expenses, they will have to pay only half of the amount and the other half will have to be recovered from the defendant. They are trying to ascertain the contents of the court's order and after getting clarification from the court, they will get back to them on the question of payment of money to the IIT. If the counsel had stopped only with that, it is understandable.

12. Thereafter, the counsel in his letter to the IIT had written as follows:

You may also please note that as per Section 115(2) of the Patents Act, 1970, remuneration for the scientific adviser has to be fixed by the court and may include cost of making report and a proper daily fee for any day on which the scientific adviser may be required to attend before the Court, and such remuneration shall be defrayed out of moneys provided by the Parliament by Law for the aforesaid purpose. Since we did not wish to deliberate on the "laws of the Parliament" from which the remuneration has to be defrayed for testing of the sample, it was agreed that the amount for examination will be shared equally by the plaintiff and the defendant.

The plaintiff had been stonewalling from making payments and preventing the IIT(M) from submitting the report in time. The attitude of the counsel for the plaintiff has brought unnecessary embarrassment for the court which appointed an expert body to give a report to this Court on the contentious questions raised in the suit.

13. The unsolicited reference by the plaintiff's counsel to Section 115(2) of the Patents Act, 1970 is misconceived. The said section may be reproduced below:

115. Scientific advisers.-(1)In any suit for infringement or in any proceeding before a Court under this Act, the Court may at any time, and whether or not an application has been made by any party for that purpose, appoint an independent scientific adviser, to assist the Court or to inquire and report upon any such question of fact or of opinion (not involving a question of interpretation of law) as it may formulate for the purpose.

(2) The remuneration of the scientific adviser shall be fixed by the Court and shall include the costs of making a report and a proper daily fee for any day on which the scientific adviser may be required to attend before the Court, and such remuneration shall be defrayed out of moneys provided by Parliament by law for the purpose.

14. In the present case, it is on the request made by the parties, a report was called for and it was not the intention of this Court to appoint IIT, Madras as the Scientific Adviser to assist the court in the suit. If that is accepted, then any appointment made by the court, amounts will have to be paid as per the Law of Parliament. In the present case, the parties had accepted the order passed by this Court, wherein a specific direction was given that the amounts will have to be shared by both plaintiffs and the defendant.

15. If for some reasons, they were not willing to bear the costs, they should have brought it to the notice of this Court and sought for clarification from this Court with reference to making payments. The luxury to have a litigation at the expenses of the State may suit the plaintiff but it cannot be done by misusing or misinterpreting the orders passed by this Court.

16. A perusal of the letter written by the counsel for plaintiff clearly shows that he had unnecessarily insinuated the experts of the IIT by referring to getting payments in terms of Section 115(2) of the Patents Act, and it is clearly unwarranted. The attitude of the counsel by sending such correspondence to a court appointed expert, then in future, the court can never get the assistance from any reputed institutions.

17. Ultimately, in the suit filed by the applicant/plaintiff, they will have to establish infringement of his Patent right. The court need not undertake the task of finding out as to how far there was an infringement by appointing an Expert. The petitioner themselves can approach any expert laboratories and the chemicals examined and get a report and conduct their case. They need not utilize the machinery of the court for establishing their right in the suit.

18. The pleadings in the suit are not complete. Even at the stage of an interim application, it is unnecessary to appoint an expert and get a report. If necessary, the parties can move laboratories for getting such reports and put forth their case. After getting the appointment by this Court, the IIT(M) to send a report, the applicant/plaintiff have filed these three applications for further directing the IIT(M) to further conduct certain other tests. This Court is not inclined to order any one applications. The present applications are a clear abuse of the process of the court by the plaintiff.

19. Therefore, this Court is of the opinion that the initial request made before this Court to call for a report from the IIT, Madras itself was not required at this juncture, as the trial is yet to take place in the suit. However, a report done by the IIT(M) is already available. The matter can be disposed of on the basis of the pleadings of the parties and available materials. Hence these three applications stand dismissed. No costs.

20. The parties are directed to comply with the earlier orders of this Court and make payments to IIT, Madras regarding the expenses incurred by them in preparing the

Report and it shall be complied with without fail within two weeks from the date of receiving this order.

21. The court places on record the services already rendered by the IIT, Madras with appreciation and will ensure that in future no such embarrassment will be done to them by the acts of parties to the litigation.

22. Post the other application before the appropriate court.