

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO (OS) 367/2007**

Date of Decision : 08<sup>TH</sup> FEBRUARY, 2008

EUREKA FORBES LTD. & ANR. .... Appellants  
Through : Mr. Valmiki Mehta, Sr. Adv. with Mr.C. Mukund,  
Ms. Neeraj, Advs.

versus

HINDUSTAN UNILEVER LTD. .... Respondent  
Through : Mr. Sudhir Chandra, Sr. Adv. with Ms. Swathi  
Sukumar, Mr. Dhruv Anand, Advs.

**CORAM:**  
**HON'BLE MR. JUSTICE T.S. THAKUR**  
**HON'BLE MS. JUSTICE VEENA BIRBAL**

1. Whether reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

**Per THAKUR, J.**

A learned Single Judge sitting on the original side of this Court had declined to reject the plaint in a suit for infringement of a patent and dismissed the application filed by the defendant under Order VII Rule 11 of the Code of Civil Procedure. The present appeal assails the correctness of that order.

2. The legal position as to the approach that the Courts have to adopt while dealing with applications under Order VII Rule 11 of the CPC is well settled by a series of judicial pronouncements including those by the Supreme Court. Before we refer to some of those decisions, we may extract Order VII Rule 11 of the CPC for ready reference. It reads :

11. **Rejection of plaint.** - The plaint shall be rejected in the following cases:-

- (a) where it does not disclose a cause of action;
- (b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;
- (c) where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;
- (d) where the suit appears from the statement in the plaint to be barred by any law;

[Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature for correcting the valuation or supplying the requisite stamp-paper, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.]

3. It would appear from the above that a plaint may be rejected on anyone of the grounds enumerated under clauses (a) to (f) of Rule 11 supra which include the ground that the plaint does not disclose a cause of action. The expression “cause of action” has not been defined by the Code but judicial decisions have universally understood that expression to mean the bundle of facts which the plaintiff must prove in order to obtain the reliefs prayed for in the suit. Whether or not the plaint discloses a cause of action would depend upon whether the averments made in the plaint if proved at the trial would entitle the plaintiff to the relief prayed for by him. What is noteworthy is that the Court has for purposes of answering that question to presume the averments in the plaint to be factually correct. It is only if no relief can at all be given to the plaintiff even if the averments are taken as admitted that the Court may declare that the plaint does not disclose any cause of action. We at this stage refer to a few decisions on the subject before proceeding further.

4. In *Vijai Pratap v. Dukh Haran Nath* **AIR 1962 SC 941**, the Court was dealing with a petition under Order 33 of the CPC, Rule 5(d) whereof

empowers the Court to decline permission to sue as an indigent person if the petition does not show a cause of action. Their Lordships held that while applying Order 33 Rule 5(d), the Court does not have to see whether the claim made by the petitioner is likely to succeed. It has simply to see whether the petitioner would be entitled to the reliefs prayed if the averments made in the plaint are all taken to be true. The Court observed :

“By the express terms of r.5, cl.(d), the court is concerned to ascertain whether the allegations made in the petition show a cause of action. The court has not to see whether the claim made by the petitioner is likely to succeed; it has merely to satisfy itself that the allegations would entitle the petitioner to the relief he claims. If accepting those allegations as true no case is made out for granting relief no cause of action would be shown & the petition must be rejected. But in ascertaining whether the petition shows a cause of action the court does not enter upon a trial of the issues affecting the merits of the claim made by the petitioner. It cannot take into consideration the defences which the defendant may raise upon the merits; nor is the court competent to make an elaborate enquiry into doubtful or complicated questions of law or fact. If the allegations in the petition, *prima facie*, show a cause of action, whether the allegations are true in fact, or whether the petitioner will succeed in the claims made by him. By the Statute, the jurisdiction of the Court is restricted to ascertaining whether on the allegations a cause of action is shown: the jurisdiction does not extend to trial of issues which must fairly be left for decision at the hearing of the suit.”

5. To the same effect is the decision of the Supreme Court in *D. Ramachandran v. R.N. Janakiraman & Ors.* **(1999) 3 SCC 267** where the Court held that in a preliminary objection based on Order VII Rule 11 of the CPC, the averments made in the petition have to be assumed to be true. The Court has then to see whether the said averments disclose a cause of action or triable issue.

6. In *Liverpool & London S.P. & I. Assn. Ltd. v. M.V. Sea Success I* **(2004) 9 SCC 512**, the Court reviewed the case law on the subject and declared that in ascertaining whether the plaint shows a cause of action, a Court is not required to make an elaborate enquiry into the doubtful or complicated questions of law or fact. The Court observed:

“146. It may be true that Order 7 Rule 11(a) although authorises the court to reject a plaint on failure on the part of the plaintiff to disclose a cause of action but the same would not mean that the averments made therein or a document upon which reliance has been placed although discloses a cause of action, the plaint would be rejected on the ground that such averments are not sufficient to prove the facts stated therein for the purpose of obtaining reliefs claimed in the suit. The approach adopted by the High Court, in this behalf, in our opinion, is not correct.

XXXXX  
XXXXX  
XXXXX

151. In ascertaining whether the plaint shows a cause of action, the court is not required to make an elaborate enquiry into doubtful or complicated questions of law or fact. By the statute the jurisdiction of the court is restricted....”

152. So long as the claim discloses some cause of action or raises some questions fit to be decided by a judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out. The purported failure of the pleadings to disclose a cause of action is distinct from the absence of full particulars.”

7. There is in the light of the above authoritative pronouncements, no gainsaying that in an application seeking rejection of the plaint under Order VII Rule 11 of the CPC, the Court examines the matter only on a prima facie basis. It does not embark upon a detailed examination of the merits of the case set up by the plaintiff or the defendant. It assumes the averments in the plaint to be true and then examines whether the relief prayed for can still be declined to the plaintiff. It is only when the answer to that question is in the affirmative on an ex-facie basis that the Court may consider the plaint to be disclosing any cause of action and not otherwise. Complicated issues of fact and law are the strength or weakness of the cases of the parties are matters that the Court would not go into at the stage of examining a preliminary objection or a prayer for rejection of the plaint under Order VII Rule 11 of the CPC.

8. Let us now examine the present case in the above background. The

plaintiff's case, as set out in the plaint, is that it is engaged in the manufacture of various kinds of soaps, detergents, cleaning preparations, beverages etc. and has diversified in various other fields and areas of technology such as the field of water purification system and appliances. It claims to have built up a dedicated research team of R&D in the area of water purification system and has developed several technologies relating to such systems. It claims to have developed and invented a gravity fed water purification system after extensive study and research and development involving substantial investment. This system is, according to the plaintiff, an ideal solution to pure drinking water problems as the same delivers filtered drinking water with a high degree of microbiological purity. In para 4, the plaintiff claims to have filed an application for a patent in India in June, 2002 which was notified for opposition purposes in May, 2005. Since no opposition was entered by any third party, the patent office proceeded to grant a patent for the said invention under Patent No. 198316 which continues to be subsisting. Copies of the patent specification and the grant certificate have also been enclosed with the plaint.

9. In para 5 of the plaint, the plaintiff refers to an international application made under No. PCT/EP03/05468 published on 31<sup>st</sup> December, 2003. In the said application, the European Patent Office was elected as the Searching Office. The plaintiff's case is that the search report issued by the European Patent Office dated 29<sup>th</sup> August, 2003 and the International Preliminary Examination Report dated 16<sup>th</sup> September, 2004 did not indicate any prior art that would affect novelty or inventive steps which are the crucial ingredients for the grant of a patent. The plaintiff also claims to have made applications for the same invention in Australia, Canada and Brazil

which are under process. The plaint sets out the claims of the plaintiff's patent and the unique features which it has in ensuring effective purification of water by killing the micro organism in the same. The plaintiff claims to have invested Rs.50 crores in the research, development, manufacture, marketing and other activities leading to the launch of its invented product. The commercial manufacture and marketing of the gravity fed water purifying system is sold under the brand name 'Pureit'. Copies of some of the invoices evidencing the sales between April, 2004 to October, 2005 have also been enclosed. The plaintiff also claims to have promoted by advertising the said product extensively in newspapers and by circulation of promotional material. The plaint then alleges infringement of the patent by the defendants who have around September, 2004 launched a new storage water purifier under the name "Forbes Aquasure". The plaint draws a comparison of the components of the two products and alleges that the product of the defendant falls squarely within the claims of the plaintiff's patent No. 198316. The plaintiff on that basis alleges infringement of its patent claiming exclusive right to prevent third parties from using, offering for sale, selling or importing for those purposes a patented product in India. Para 14 of the plaint is in this regard relevant :

14. In the light of the above facts, it is apparent that the Defendants product "Forbes Aquasure" directly infringes the substance of the Plaintiff's patent claims. As a patentee, the plaintiff has the exclusive right to prevent third parties, who without his consent, make, use, offer for sale, sell or import for those purposes that product in India. The Defendants have clearly and blatantly infringed the Plaintiff's patent no. 198316, by making, using, offering for sale and selling, for the purposes of water purification, the Plaintiff's patented product."

10. The plaintiff further alleges that the defendants have in a brochure issued by them claimed that they used a patented *bio-stat carbon block*. A

search through patent gazettes and journals did not disclose to the plaintiff any such patented *bio-stat carbon block*. The plaintiff however appears to have traced a patent application filed in the name of Defendant No.3 in respect of an alleged invention entitled “A water purification cartridge and a gravity fed water filter involving the same”. The said application is said to have been made after the plaintiff's patent application was published, to which the plaintiff appears to have filed its pre-grant opposition. The plaintiff was then informed by the patent office in September, 2005 that a patent had already been granted in favour of the defendant under No. 195421 dated March 29, 2004. The plaintiff then filed a post grant opposition which is pending. In para 22 of the plaint, the plaintiff claims that the patent granted in favour of the defendant stands revoked although the Patent Office appears to have extended in favour of the defendant time for filing a reply and evidence before the competent authority. The plaintiff in the above backdrop alleges that the acts of the defendant are blatantly malafide so as to entitle the plaintiff relief by way of injunction. Para 24 of the plaint reads :

“24. The acts of the Defendants are blatantly mala fide. The Plaintiff states that the Plaintiff's said application No. 539/MUM/2002 was published on or about December 31, 2003 and the entire application was laid open to the public and the Defendants have made their product and their patent virtually identical to the Plaintiff's patent. Further the Defendants have been involved in the business of making water filters, and obviously have knowledge of the Plaintiff's patent. The Defendants acts clearly amount to dishonest adoption of the Plaintiff's invention, as demonstrated by their patent claim as well as their product.”

11. It is evident from the averments made in the plaint which shall have to be assumed to be correct that the plaintiff has pleaded the requisite facts as also alleged violation of its rights under the patent granted in its favour by the defendants. If the plaintiff company does have a patent in its favour

which fact is admitted even by the defendant appellant before us, the question whether the defendant appellant is committing any infringement of the said patent would give rise to a triable issue, no matter the defendant appellant may in its defence claim the right to manufacture its water purifying apparatus by reference to the patent granted in its favour. Whether or not the two designs are similar and if so, whether the grant of a patent in favour of the defendant would entitle it to use the said design for manufacture and marketing of its product are serious questions of fact and law that would require adjudication by the Court trying the suit. The learned Single Judge has examined, at some length, the nature of the right which a patentee has in regard to its patent and come to the conclusion that the right of a patentee is an exclusionary right. The Court has in that regard placed reliance upon the following passage appearing in “Patents For Chemicals, Pharmaceuticals and Bio Technology” (IV Edition) by Phillip W. Grubb :

***“Exclusionary Right***

It is important to realise that the rights given by the patent do not include the right to practice the invention, but only to exclude others from doing so. The patentee's freedom to use his own invention may be limited by legislation or regulations having nothing to do with patents, or by the existence of other patents. For example, owning a patent for a new drug clearly does not give the right to market the drug without permission from the responsible health authorities, nor does it give the right to infringe an earlier existing patent. In the very common situation where A has a patent for a basic invention and B later obtains a patent for an improvement to this invention, then B is not free to use his invention without the permission of A, and A cannot use the improved version without coming to terms with B. A patent is not a seal of government approval, nor a permit to carry out the invention. We very often hear 'This patent allows Company X' to do something or other. It does not, it only allows them to stop someone else from doing it. The right to prevent others from carrying out the invention claimed in a patent may be enforced in the courts; if the patent is valid any infringed the court can order the infringer to stop his activities, as well as providing other remedies such as damages.”

12. The Court has also examined whether action for infringement of patent

can lie against another patentee and held that such an action is not forbidden. The Court has discussed the true scope of Section 107, 107A and 108 of the Patents Act and come to the conclusion that there was a fundamental difference between Designs Act, 1911 and the Patents Act inasmuch as claims under a patent with an earlier priority date have specific protection against any claim for patent having a later priority date. The Court has on that interpretation repelled the contention urged on behalf of the appellant that no suit was maintainable against another patent and that the plaint in the instant case was liable to be rejected for want of disclosure of cause of action.

13. We do not think that it is necessary for us in this appeal to examine those aspects at length. As held by the Supreme Court in Liverpool's case (*supra*), the Court while dealing with an application under Order VII Rule 11 is not required to make an elaborate enquiry into debatable, doubtful or complicated questions of law or fact. What is the legal effect of the grant of patent in favour of the defendant and how far it can entitle the defendant to continue the manufacture and marking of its product and whether the said product is at all similar in design to the one patented in favour of the plaintiff respondent herein are all questions that would need to be addressed at the trial by the Court in the course of and at the conclusion of the trial. While no final opinion on those aspects need be expressed by us, the fact remains that the plaint discloses the cause of action and raises issues of fact and law of considerable importance that need to be adjudicated upon by the Court. Having said so, we may make it clear that the opinion expressed by the learned Single Judge on different aspects touching the merits of the cases set up by both the parties shall not be treated to be the expression of a final

opinion on those aspects which the Court shall be free in the ultimate analysis to determine at the conclusion of the trial. Beyond that, it is neither necessary nor proper for us to say anything lest we re-judge the issues that arise for consideration in the suit or prejudice the case of one or the other party in the same. With the above observations, this appeal fails and is hereby dismissed with costs assessed at Rs.5,000/-

**T.S. THAKUR  
(JUDGE)**

**VEENA BIRBAL  
(JUDGE)**

FEBRUARY 08, 2008  
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