

\$~J-

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

*Judgment Reserved on:* 02.06.2021

%

*Judgment Pronounced on:* 18.06.2021

+ CS(COMM) 474/2020

WILLOWOOD CHEMICALS PVT LTD

..... Plaintiff

Through Mr.Hemant Singh, Ms.Mamta Jha,  
Mr.Ankit Arvind and Ms.Mamta  
Bhadu, Advs.

versus

INDO-SWISS CHEMICALS LTD & ANR.

..... Defendants

Through Mr.Akhil Sibal, Sr.Adv. with Mr.Ajay  
Amitabh Suman, Mr.Nikhil Chawla  
and Ms.Shriya Misra, Advs.

**CORAM:**

**HON'BLE MR. JUSTICE JAYANT NATH**

**JAYANT NATH, J. (JUDGMENT)**

**IA No.6331/2021**

1. This application is filed by the defendants seeking permission to sell the existing stock of the subject matter product as stated in this application.
2. It is pleaded that on 23.10.2020 this court passed an *ex-parte* injunction restraining the defendants, their directors etc. from manufacturing, selling, offering to sell, using, exporting, importing, directly or indirectly dealing in fungicidal composition which is the subject matter of IN 004 thereby amounting to infringement of the plaintiff's right. The said interim order continues to operate. It is pleaded that this order is liable to be vacated on various grounds raised by the defendants in their application

under Order 39 Rule 4 CPC.

3. It is further stated that by a common order dated 28.04.2021 passed by the Division Bench of this court in FAO(OS)(COMM) 38/2021 and other connected appeals, the appeals filed by the defendants were disposed of with liberty to the defendants to pursue the remedy seeking permission to sell the subject matter product before this court. Hence, the present application.

4. It is further pleaded that the defendants stopped manufacturing and selling the subject matter product from the date of execution of the local commission, which was carried out pursuant to the order of this court dated 23.10.2020. A detailed chart is given in the application of the amount of the product that was manufactured prior to the injunction order stating that some of the stock is about to expire as the product has a shelf life of two years. Further the product is sold in the paddy season and if the defendants miss the relevant time, the same cannot be sold as shelf life would expire. This would result in huge financial loss to the defendants. As per the chart filed with the application, the defendants claim to have a pending stock of 13,622 litres valued at Rs.27,74,509. The total stock including that of the defendants in other two connected suits is said to be 63,931 liters.

5. It is the stand of the defendants that till the application of the plaintiff under Order 39 Rules 1 and 2 CPC and the defendants' application under Order 39 Rule 4 CPC are adjudicated upon, the defendants may be permitted to dispose of the existing stock.

6. The plaintiff has strongly opposed the present application. In reply, the following pleas have been raised to oppose this application:

i) The plaintiff issued a legal notice on 18.05.2019 to the defendants before grant of the patent to which no reply was received. The defendants

have ignored the legal notice and had gone ahead and manufactured the said goods. Further a pre-grant opposition to the patent was filed by Haryana Pesticides Manufactures' Association of which the defendant is also a member. The said opposition was rejected on 20.07.2020. Despite the said facts, the defendant continued to manufacture the infringing product with impunity at its own risk.

ii) It is further pleaded that the defendants have sold 2,48,255 liters of infringing product for a value of Rs.16,97,95,804 since April, 2020 preceding the grant of the injunction order dated 23.10.2020 passed by this court. Hence, it is pleaded that the defendants have taken the risk of manufacturing the infringing product despite being aware that the same infringes the suit patent and is objected to by the plaintiff. The defendants cannot now complain and seek relief on any ground of equity.

iii) It is further pleaded that any further violation of the rights of the plaintiff would be in violation of section 48 of the Patent Act. It is pointed out that this court has already taken a *prima facie* view about the infringement committed by the defendants while issuing interim injunction dated 23.10.2020.

iv) It is pleaded that the defendants have caused irreparable damage to the plaintiff as they have sold infringing product worth Rs.16,97,95,804 in the period 2020. The figures of 2019 are not available and have not been disclosed by the defendants. The defendants cannot be permitted to continue to violate the rights of the plaintiff.

7. I have heard learned senior counsel appearing for the defendants/applicants and learned counsel for the plaintiff.

8. It is pleaded by the learned senior counsel for the

defendants/applicants that they (including defendants in connected matters) have stock of about 63000 liters which are worth at Rs.1.29 crore at sale price of approximately Rs.3 crores. It is stated that the defendants/applicants commenced production of the product in question in 2019. The post-grant opposition in question that is referred to by the plaintiff was dismissed on 20.07.2020.

9. Learned senior counsel for the defendants/applicants further states that they are willing to give a bank guarantee for a sum of Rs.50 lakhs, if so, directed by this court, which may be subject to the further orders of this court.

10. Learned counsel for the plaintiff has pleaded as follows:

i) It is reiterated that products worth Rs.16,97,95,804 have already been sold by the defendants which have caused damage to the rights of the plaintiff. It is reiterated that despite knowing about the objection of the plaintiff to the production by the defendants which was in violation of the patent of the plaintiff, the defendants took the risk and continued manufacturing the infringing product. The defendants are entitled to no relief in equity.

ii) Reliance is also placed on the report of the learned local commissioner, who was appointed pursuant to the order of this court dated 23.10.2020 to visit the premises of the defendants. It is pleaded that quantity of stock available with the defendants was suppressed and hidden deliberately by the defendants from the learned local commissioner. The conduct of the defendants itself justifies dismissal of the present application.

iii) Further reliance is placed on the judgment of a Co-ordinate Bench of this court in the case of *FMC Corporation vs. Best Crop Science LLP &*

*Anr.*, passed on 19.05.2021 in IA No.5801/2021 in CS(COMM) 69/2021, to plead that no relief can be granted to the defendants as sought for.

11. Learned senior counsel for the defendants/applicants in rejoinder pleaded as follows:

i) It is pleaded that just because patent was registered does not give it validity. Reliance is placed on a judgment of a Co-ordinate Bench of this court in *Ten XC Wireless Inc & Anr. v. Mobi Antenna Technologies (SHENZHEN) Co.Ltd, 2011 SCC OnLine Del 4648* to reiterate the above submissions. Hence, it is pleaded that there is no reasons why the defendants be not permitted to sell the pending stock.

ii) Regarding the contention of the plaintiff that records were hidden from the local commissioner, it is pleaded that the local commissioner did not visit the factories of the defendants where the full records were there. It is reiterated that the defendant is a substantial producer in the market and is subject to GST. All supporting documents are intact. Further, it is pleaded that a certificate of chartered accountant regarding the availability of the stock has been placed on record and the same cannot be doubted.

iii) Reliance is also placed on an order of a Co-ordinate Bench of this court in the case of *Sulphur Mills Limited vs Dharmaj Crop Guard Limited & Anr*, passed on 20.12.2020 in IA No.15244/2018 in CS(COMM) 1225/2018 whereby the court allowed the defendant therein to sell the offending product subject to furnishing bank guarantee of Rs.50 lakhs.

12. On 23.10.2020, this court passed the following order:

“xxx

6. Case of the plaintiff is that the plaintiff had filed an application for grant of patent on 31st December, 2013 in respect of its indigenous product ‘Hexaconazole

5%+Validamycin 2.5%'. The said application for patent was subjected to pre-grant opposition on 11th January, 2019 by Haryana Pesticides Manufacturers' Association of which the defendant Safex Chemical India Ltd. is a member. The said pre-grant opposition was rejected on 20th July, 2019 and on the same day plaintiff was granted the suit patent being India patent No. 342004 (in short IN 004). On 24th July, 2020 the suit patent was published under Section 43 (2) of the Indian Patent Act, whereafter the plaintiff issued notices to the defendants on 6th August, 2020 asking them to cease and desist from infringing the suit patent and CS(COMM) Nos.474/2020, 475/2020 & 476/2020 discontinue with their activities of manufacturing, marketing and selling the impugned products which infringed the suit patent IN 004.

7. As per the plaintiff, the plaintiff's suit patent IN 004 is a novel and inventive synergistic fungicidal composition comprising of active compounds Hexaconazole and Validamycin wherein Hexaconazole is present in an amount of 2.50-5.00% and Validamycin is present in an amount of 1.50-3.00% and is manufactured by the plaintiff under the brand 'VALXTRA'. While rejecting the pre-grant opposition to the plaintiff's suit patent, the Controller of Patents held that the pleas of the objector in relation to product being obvious, anticipated or disclosed by the prior arts had no merit.

8. Grievance of the plaintiff, in the present suits is that despite the plaintiff having been granted the patent IN 004 and thereafter the plaintiff having issued notices to the defendants from desisting to infringe the patent and cease to manufacture and sell the product, the defendants continue to manufacture and sell the products infringing plaintiff's rights in the suit patent. The defendant No.1/Indo-Swiss Chemicals Ltd. in CS (COMM) 474/2020 is selling the infringing product under the brand name 'SPONSOR' and the defendant/Safex Chemicals India Ltd. in CS (COMM) 475/22020 is manufacturing and selling the impugned infringing product under the brand name 'RUNNER'. The defendant No.1/Smith N Smith Chemicals

Ltd. in CS (COMM) 476/2020 is marketing the said product under the brand name 'Super BOSS'.

9. Considering the fact that the plaintiff's suit patent has been subjected to pre-grant opposition by the Haryana Pesticides Association of which the defendant in CS (COMM) 475/2020 is a member and the manufacturers, CS(COMM) Nos.474/2020, 475/2020 & 476/2020 that is, defendant No.2 in CS (COMM) 474/2020 and CS (COMM) 476/2020 are the subsidiaries of Safex Chemicals India Ltd., the defendant in CS (COMM) 475/2020 and that they are well aware of the rights of the plaintiff, this Court finds that the plaintiff has made out a prima facie case in its favour and in case no ex-parte ad-interim injunction is granted, the plaintiff would suffer an irreparable loss. Balance of convenience also lies in favour of the plaintiff.

10. Consequently, an ex-parte ad-interim injunction is granted in favour of the plaintiff and against the defendants, restraining the defendants, their Directors, Group Companies, Associates, assignees, licensees, franchisees, agents, servants, distributors and dealers from manufacturing, selling, offering to sell, using, exporting, importing, directly or indirectly dealing in fungicidal composition which is the subject matter of IN 004 thereby amounting to infringement of the plaintiff's right, till the next date of hearing."

13. Hence, the court while passing the said order concluded taking into account that the plaintiff's suit patent had been subjected to pre-grant opposition by the Haryana Pesticides Manufacturers' Association of which the defendant in CS (COMM) 475/2020 was a member. Further the manufacturers, that is, defendant No.2 in CS (COMM) 474/2020 and CS (COMM) 476/2020 are the subsidiaries of Safex Chemicals India Pvt. Ltd., the defendant in CS (COMM) 475/2020 that they were aware of the rights of the plaintiff.

14. Arguments on the applications under Order 39 Rules 1 and 2 and under Order 39 Rule 4 CPC are continuing.

15. The question is can the aforesaid interim order of this court dated 23.10.2020 be modified to permit the defendants to sell their stock which is as per market price worth about Rs.3 crores which allegedly was manufactured by the defendants prior to the interim order passed by this court. It is the claim of the defendants that the expiry period of the said product is only two years and some of it would expire in 2021. It is also claimed that the season for use of the pesticides is in vogue and hence the urgency.

16. In my opinion, no grounds are made out to allow the present application.

17. The reasons why I come to the above conclusion are as follows:

i) Firstly, the defendants have already sold infringing products worth Rs.16.97 crores in the year 2020. They have taken this step despite the knowledge that the pre-grant opposition was dismissed on 20.07.2020. It would hardly be appropriate to allow the defendants to further flood the market with stocks worth Rs.3 crores as is sought to be done by the present application. Introducing such a large stock in the market will surely damage the rights of the plaintiff.

ii) In this context reference may be had to the judgment of a Co-ordinate Bench of this court in *FMC Corporation vs. Best Crop Science LLP & Anr.*(supra). This court held as follows:

“12. CTPR, points out Mr.Subramaniam, is an agricultural insecticide, which is specifically used during the kharif season, which is due to come to an end in July, 2021. If, therefore, the defendant is not permitted to manufacture or sell its CTPR

product, it would lose its entire business for this year and would be denied the right to exploit the IN 978 patent even after it has expired.

...

16. Mr. Sai Deepak has further adverted, at length, to the course of hearings in the present proceedings, in an effort in submitting that the plaintiffs have been guilty of unduly protracting the proceedings by filing misconceived applications. He submits that, even at the stage of rejoinder, the plaintiffs have delayed the matter, thereby subjecting the defendants to needless prejudice. Mr. Sai Deepak professes to exhibit greater generosity than Mr. Subramaniam, by undertaking, on instructions, to furnish a bank guarantee for 5 crores, even though the damages computed in the plaint are only to the tune of ₹ 2 crores. Mr. Sai Deepak has also placed reliance on Section 144 of the CPC, whereunder the plaintiffs could always seek restitution at a later stage. He submits that no further justification exists, to restrain the defendants from exercising their legitimate rights by exploiting the genus patent IN 978 and releasing their CTPR products in the market.

...

22. It is not – and, indeed, it cannot be – disputed that, were these applications to be allowed, nothing substantial would survive for consideration in IA 2084/2021 and IA 15352/2019, filed in these suits under Order XXXIX of the CPC. Once allegedly infringing products are in the market, there can obviously be no stay against the infringement and even if any stay were to be granted, the exercise would be fundamentally chimerical in nature. It is also a well settled position in law that damages are entirely insufficient as panacea for the holder of a valid patent, which is infringed by another. Intellectual property has its own sanctity. The prejudice caused even by a single day's infringement of intellectual property is, in principle, incalculable. It is fundamentally incongruous, therefore, to suggest that, even while the applications for injunction, preferred by the plaintiff in the suits under Order XXXIX of the CPC, are being heard by this Court and are, in fact, at the stage

of rejoinder, the defendants should be allowed to launch the allegedly infringing CTPR products.

...

24. I posed a specific query to Mr. Sai Deepak as to how, if this Court were to find that there was, prima facie, infringement of the plaintiff's suit patent by the defendants and that, therefore, a prima facie case for grant of the relief in IA 2084/2021 and IA 15352/2019, filed by the plaintiff under Order XXXIX of the CPC existed, any meaningful order could be passed, if the defendants were to be allowed to release the allegedly infringing CTPR products in the market in the interregnum. Despite attempting to answer the query with the considerable legal acumen at his command, I am constrained to observe that no satisfactory response was forthcoming. Rather, Mr. Sai Deepak, with characteristic candour, acknowledged that it was not his case that damages were adequate recompense for a plaintiff who had suffered infringement of its intellectual property. Once this position is admitted, there can be no reasonable justification for permitting the defendants, even while the arguments in the plaintiff's applications under Order XXXIX of the CPC are at the stage of rejoinder, to allow the defendants to release the allegedly infringing CTPR products in the market, thereby effectively rendering the applications under Order XXXIX of the CPC infructuous.

25. In view thereof, I am of the opinion that no case for grant of the prayer for permitting the defendants to release their allegedly infringing CTPR products in the market, can be said to exist at this stage."

iii) Hence, this court had clearly noted that damages are entirely insufficient as a panacea for the holder of a valid patent which is infringed by another. Intellectual property has its own sanctity. In the present case as noted above, this court while granting an interim order has recorded a *prima facie* satisfaction. The defendants cannot be permitted to flood the market in the manner as is being sought and damage the rights of the plaintiff.

iv) Further, the report of the Local Commissioner in CS (COMM) 475/2020, titled '*Willowood Chemicals Private Limited vs. Safex Chemical India Limited*' does not make a very happy reading. No inventory was found in the premises which was said to be the head office of the defendants. It was claimed that there were no stock registers available as the same are maintained in the factories of the defendant. It was confirmed that the goods with 'Hexaconazole 5%+Validamycin 2.5%' have been sold since 2019 but the record could not be provided as it is not retrievable at that moment. Record was provided to the local commissioner for the period 01.04.2020 to 29.10.2020. However when the Local Commissioner was about to leave the premises, the local Commissioner was asked to return the copies of the sales statement provided by the defendants which has already been signed by the local commissioner with respect to the brands 'RUNNER', 'SUPER BOSS' and 'SPONSOR'. The local Commissioner was only permitted to take photographs of the said sales statement. There is no proper explanation why the sales figures for the year 2019 were not provided and why the sales figures for the period 01.04.2020 to 29.10.2020 were asked to be returned. The conduct of the defendants does not warrant seeking equity from this court.

v) I also cannot help noticing that a perusal of the chart filed by the defendants in the present application regarding existing stock shows that lot of production of the impugned product took place also after 20.07.2020 when the pre-grant opposition filed by the Haryana Pesticides Manufacturers' Association was dismissed and the patent was granted. The production that has continued thereafter was obviously at their own risk that

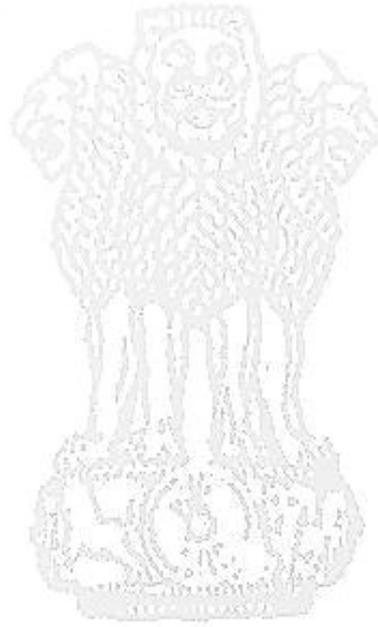
the defendants undertook. Defendants cannot be permitted to now turn around and claim equity as is sought.

18. There is no merit in the present application. The same is dismissed.

**JUNE 18, 2021/v**

**JAYANT NATH, J.**

HIGH COURT OF DELHI



भारतमेव जयते