

TROPICAL HERBS PVT LTD AND TWO OTHERS

v.

LINK NATURAL PRODUCTS LTD

(Case No. 1)

COURT OF APPEAL
UDALAGAMA, J.
NANAYAKKARA, J.
C.A.L.A. 151/2001
D.C. COLOMBO 5859/SPL
JULY 17TH, 2000

High Court (Special Provisions) Act 10 of 1996 - S. 2(1), S. 2(3) - Code of Intellectual Property Act 52 of 1979 - S. 142(2), 142(2)(a) - Unfair competition - Alternative cause of action - Exclusive jurisdiction in the High Court, Western Province - Jurisdiction of the District Court?

The Plaintiff Respondent sought and obtained an enjoining order preventing the Defendant Petitioner from using or disclosing directly or indirectly a technology described as scientifically optimised process protocol which is said to be used in the manufacture of the Plaintiffs product - "Samahan", in producing launching, selling or marketing, offering for sale the product called "Suvane" and restraining the Defendant Petitioner from using or stimulating either directly or indirectly get up, design, packaging, marketing and other means which bears similarity or resemblance to that of the Plaintiffs in marketing "Suvane".

On leave being sought the Defendant-Petitioner challenged the jurisdiction of the District Court, Colombo to entertain the Plaintiff's action.

Held :

- (1) Section 2(1) of Act No. 10 of 1996 has empowered the Minister to nominate any High Court to exercise exclusive jurisdiction in regard to matters stipulated in the 1st schedule of the Act.

The Minister is also empowered under S. 2(3) to nominate the High Court of the Western Province to exercise the jurisdiction in respect of matters referred to in the 2nd schedule to the Act.

The Minister has by gazette notification No. 943/12 dated 01. 10. 96 nominated the High Court of the Western Province in terms of the said Act to exercise the jurisdiction in respect of the matters stipulated in the said schedule.

- (2) The averments in the Plaintiff show that, the acts of unfair competition take place in Colombo, and further that the launching of the Defendants herbal product takes place in Colombo and the cause of action based on the Code of Intellectual Property Act relates to the provisions of S. 142(1), S. 142(2) and any action based on unfair competition, which takes place in Colombo has to be filed in the High Court of Colombo, in view of the provisions of Act 10 of 1996.

APPLICATION for Leave to Appeal from the Order of the District Court of Colombo.

Gamini Marapana, P.C., with Navin Marapana for Defendant Petitioner.
K. Kanag-Iswaran P.C., with G. Alagaratnam, P. Jayawardena and B. Illlangatilaka for the Plaintiff Respondent.

Cur. adv. vult.

August 23, 2001.

NANAYAKKARA, J.

The plaintiff-respondent (Plaintiff) is a limited liability company incorporated under the laws of Sri Lanka which is primarily engaged in the business of manufacturing, selling and exporting of Ayurvedic Pharmaceuticals and other herbal products. They instituted action in the District Court of Colombo in respect of one of their herbal products called "Samahan" which is said to be an instantly soluble Ayurvedic drug, against the first defendant - company, (first defendant - petitioner) which is also an incorporated company under the Companies Act No. 17 of 1982 and the second and the third defendants (petitioners) seeking, inter alia, the following reliefs :-

- (a) An injunctive relief preventing the defendants from using or disclosing directly or indirectly a technology described as "scientifically optimised process protocol" which is said to be used in the manufacture of the plaintiff's product called "Samahan", in producing, launching, selling or marketing offering for the sale produce called "suvane".

- (b) An injunctive relief restraining the defendants from using or stimulating either directly or indirectly get up design, packaging, marketing and other means which bears similarity or resemblance to that of the plaintiff's in marketing the produce called "Suvane", until the final determination of the District Court action.

After the institution of the action, on an ex parte application made to Court, the learned District Judge on 30.04.2001 issued an enjoining order against the defendants in terms of the prayers (a) and (f) of the plaint, enjoining the defendants from the very acts in respect of which the plaintiff had sought reliefs by way of interim/ permanent injunctions in their plaint. The defendants filed their objection to the enjoining order by way of petition and affidavit challenging the jurisdiction of the court to entertain, hear and determine the plaintiff's action and praying for the suspension of the enjoining order issued and also for the dismissal of the plaintiff's action.

The learned District Judge who held an inquiry into the objections raised by the defendants delivered an order on the 27th April 2001, rejecting the preliminary objections raised by the defendants against the enjoining order. It is against this order of the District Judge that the defendants have preferred this application for leave to appeal in this court.

When this matter was taken up for support in Court on 17.07.2001 learned Counsel vehemently objecting to the extension of the enjoining order issued by the District Judge made extensive submissions challenging the jurisdiction of the Court to entertain the plaintiff's action. Basing his submissions on the question of the alleged cause of action, which is said to have accrued to the plaintiff to institute action in the District Court, Counsel argued that the action should have been dismissed in limine, as the District Court lacked jurisdiction to entertain the plaintiff's action. He submitted that lack of jurisdiction to entertain the plaintiff's case becomes evident on an examination of the provisions of the Code of Intellectual

Property Act, under which the plaintiff has filed his action, in conjunction with the provisions of the High Court (Special Provisions) Act No. 10 of 1996. It was further contended by Counsel for the defendants that in as much as the plaintiff had sought to invoke the jurisdiction of Court, under the provisions of the Intellectual Property Act No. 52 of 1979, the jurisdiction to entertain, hear and determine the alleged cause of action, which is said to have accrued to the plaintiff, is vested exclusively in the High Court of Colombo of the Western province, under the provisions of the High Court (Special Provisions) Act No. 10 of 1996, established for that purpose. Developing his argument further the learned Counsel for the defendants contended as the action is based on unfair competition as envisaged by section 142 of the Code of Intellectual Property Act, the plaintiff's action should have been instituted in the High Court of Colombo, which is vested with exclusive jurisdiction particularly in situations where unfair competition takes place as alleged by the plaintiff in his plaint. Making reference to the averments in the plaint filed in the District Court, Counsel argued the averments in the plaint makes it abundantly clear that the plaintiff attempts to restrain the defendants from launching, marketing and selling their products in Colombo, thereby lending support to his argument, that the unfair competition takes place in Colombo.

Responding to submissions advanced by learned Counsel for the defendants, Counsel for the plaintiff submitted that the defendants had made use of the knowledge they acquired of the technology called the scientifically optimised process, used in the manufacture of herbal product called "Samahan" during their employment under the plaintiff and they had made use of that scientific knowledge in the manufacture of the herbal product called "Suvène", after resigning from the plaintiff company. Therefore in view of this the plaintiff had to institute action in the District Court of Colombo on alternative causes of action, one based on the contract of employment entered into in Colombo by the defendants with the plaintiff and the other based on the infraction of the provisions of the Code of

Intellectual Property Act and that the plaintiff's action is not based on "passing of" as pointed out by the Counsel for the defendant but on unfair competition as contemplated by the Code of Intellectual Property Act.

At this stage, it is important to examine the validity of the argument advanced by both Counsel who appeared for the plaintiff and the defendants. It is common ground that this is an action on alternative cause of action, one is based on contract of employment while the other is based on Code of Intellectual Property Act. As far as the action, based on the contract of employment is concerned it is admitted by both parties that the contract of the employment had been entered into in Colombo by the defendant with the plaintiff and the plaintiff's registered office is also situated in Colombo although there is no specific averment as to where the contract was entered into. As far as the other cause of action is concerned it is also an admitted fact that it is based on an infraction of certain provisions of the Intellectual Property Act relating to unfair competition.

To determine the question whether the District Court of Colombo has jurisdiction to entertain, hear and determine the plaintiff's action, it will be necessary to have a close look at the averments in the plaint which has been filed in the District Court. A careful examination and analysis of the averments contained in the plaint will make it abundantly evident and clear that the acts of unfair competitions complained of by the plaintiff take place in Colombo. This fact is further strengthened by the averments contained in paragraphs 24 and 31 of the plaint when it says that the launching of the defendants' herbal product takes place in Colombo and the cause of action based on the Code of Intellectual Property Act relates to the provisions of section 142(1) & 142(2) (a) of the Act and any action based on unfair competition, which takes place in Colombo has to be filed in the High Court of Colombo in view of the Provisions of the High Court (Special Provision) Act No. 10 of 1996. Section 2(1) of the High Court (Special

Provisions) Act No. 10 of 1996 has empowered the Minister to nominate any High Court to exercise exclusive jurisdiction in regard to matters stipulated in the first schedule of the Act. The Minister is also empowered under section 2(3) to nominate the High Court of the Western Province to exercise the jurisdiction in respect of matters referred to in the second schedule of the Act. Accordingly, the Minister has by a Gazette notification dated 01. 10. 96, No. 943/12 nominated the High Court of the Western Province in terms of section 2(1) of the said Act to exercise the jurisdiction in respect of the matters stipulated in the said schedule of the Act.

Therefore for the reasons stated above, I am of the view that the objection taken by the petitioner should succeed, and his application to reject the plaint on the basis of the lack of jurisdiction be upheld and the enjoining order issued on 30. 04. 2000, be varied. The petitioner is also entitled to costs in a sum of Rs. 10000/-.

UDALAGAMA, J. - I agree.

plaint rejected.

application allowed.