

O.S.A.Nos.178, 179 and 180 of 2021  
and C.M.P.Nos.8077, 8082 and 8100 of 2021

THE HON'BLE CHIEF JUSTICE  
and  
SENTHILKUMAR RAMAMOORTHY, J.

(Order of the Court was made by The Hon'ble Chief Justice)

All three appeals need to be heard together.

2. To complete the initial formalities, the appeals are admitted and notices are directed to be issued, if all the parties are not represented today.

3. The principal appeal is of the defendants in a patent infringement action where the plaintiffs claim exclusivity over the composition of a medicinal product. The exclusivity that is claimed can be summarised by paraphrasing the first two heads of claim accompanying the grant: a composition for augmenting the kidney function by using a probiotic bacterium selected from streptococcus thermophilus at about 5 billion to about 20 billion colony forming units (CFU) of at least one probiotic bacterium; the other ingredients being

selected from vitamin, mineral, carbohydrate, protein and fats. The probiotic bacterium would be a strain of streptococcus thermophilus, whether KB4, KB19 or KB25 or a combination thereof. According to the plaintiffs, such a combination when active in the gut induces increased kidney functioning and is able to deal with renal problems arising out of a malfunctioning or dysfunctional kidney. However, that relates to the efficacy of the product.

4. It appears that one of the plaintiffs had instituted an infringement action in this Court against the first defendant in 2011. As the plaint relating to the present suit says, the earlier suit, C.S.No.498 of 2011 was rejected for non-compliance with Section 599 of the Companies Act, 1956.

5. Paragraph 6.1 of the present plaint goes on to narrate that against such order of rejection of the plaint, O.S.A.Nos.68-69 of 2012 were carried by way of appeals "which were ultimately dismissed for default". The dismissal for default appears to be in the year 2016.

6. According to the plaintiffs, the real reason why the injunction was declined at the receiving stage of the appeals pertaining to the previous suit was the institution of revocation proceedings by the defendants in the previous suit in 2011. The revocation proceedings were disposed of by the Intellectual Property Appellate Board in 2013. Though the plaintiffs had initially claimed patent in respect of both the process and composition, what came to be upheld was the patent in respect of the composition.

7. The plaintiffs say that immediately upon the patent in respect of the composition being upheld by the IPAB, a writ petition was filed before this Court challenging the order. Ultimately, such writ petition was dismissed, the appeal therefrom rejected and the resultant special leave petition also dismissed. The plaintiffs claim that it is evident that there can be no doubt about the exclusivity that the plaintiffs claim and it would not lie in the defendants' mouth to question the same. The plaintiffs suggest that in view of the claim made by the defendants in advertisement material pertaining to the defendants' similar

products, it is evident that it is the composition patent of the plaintiffs which is infringed.

8. The present suit was filed in the year 2019 and the parties completed the three rounds even at the ad interim stage. By the judgment and order impugned dated April 1, 2021 the interlocutory application has been finally disposed of and an injunction granted restraining the defendants from manufacturing or selling three of their products which apparently infringe the plaintiffs' patent.

9. The defendants assert that the judgment preceding the order impugned does not render any finding as to the extent of infringement by the defendants of the plaintiffs' patent. Indeed, the defendants suggest that there is no prima facie finding of infringement rendered in the impugned judgment. The defendants also maintain that the aspect of balance of convenience has been completely glossed over in finally considering whether an interlocutory injunction was appropriate.

10. Of the material that the plaintiffs cited in alleging

infringement on the part of the defendants, one was a brochure pertaining to a medicine by the name Cudo Forte. Such medicine is described by the defendants to be a unique composition of probiotics intended to reduce the load of nitrogenous toxins in the body. Even a layperson, not tutored in medicine, would realise that the product is claimed to augment kidney functioning. As to the composition of the product, the brochure indicates a cocktail of three bacteria – streptococcus thermophilus, lactobacillus acidophilus and bifidobacterium longum – going into the product. The preparation apparently generates 90 billion CFUs which is claimed to augment kidney functioning.

11. The defendants say that in view of Section 3(c) of the Patent Act, 1970, no patent can be claimed over a discovery and, as such, the fact that a bacterium may have first been discovered by the plaintiffs or a strain thereof delineated would amount to a matter of discovery and not entitle the discoverer to any exclusivity over the same. Similarly, the defendants assert that there cannot be any exclusivity claimed over minerals or vitamins or other material, though the

unique proportions used to arrive at a composition may be exclusive, particularly in the light of the process patent as claimed by the plaintiffs not being recognised.

12. The defendants refer to parts of the judgment, particularly paragraphs 46 and 64 thereof, wherein the strain of streptococcus thermophilus applied by the defendants in their products and the different strains of the same bacterium – KB4, KB19 and KB25 – used by the plaintiffs have been noticed. The defendants suggest that when no exclusivity could have been claimed over a particular bacterium and the rival contentions as to the strains being different were also noticed, no prima facie finding could have been rendered that the defendants infringed the plaintiffs' patent.

13. It is necessary, at this stage, to notice the impugned judgment and some of the observations and findings therein. At the business end of the impugned judgment beginning paragraph 47 or thereabouts, the provisions of the statute are noticed, both pertaining to what may not be regarded as invention and revocation action.

Paragraph 56 of the judgment speaks of numerous bacteria being available and the plaintiffs' discovery apparently being a result of painstaking research and hard work. In the exact words of the judgment, "It is not a discovery made overnight." However, as the defendants appropriately suggest, whether or not much industry went into the discovery or even in isolating an appropriate strain, such factor would be irrelevant in assessing whether any exclusivity could be claimed by the patentee or any infringement had been committed by the defendants.

14. Paragraph 60 through paragraph 64 of the impugned judgment proceed on similar lines. Paragraph 60 again refers to the plaintiffs' discovery of the said bacteria, before paragraph 61 alludes to the defendants' assertion that the plaintiffs may not have been in the market till the year 2018. However, despite the impressive sales figures of the defendants placed before the Single Bench, what weighed with the Court was the explanation by the plaintiffs "that they were having a presence in India through online marketing and later in the year 2018 have entered the market by across the sale counter

through prescriptions ...". Against this, it must be appreciated that the combined turnover of the three impugned products of the defendants yield more than Rs.10 crore annually. It is also the admitted position that the defendants have been in the market with the three products for the past decade or so. At any rate, that the initial action was instituted in 2011 is testimony to the fact that the defendants had been marketing the product in one form or the other for at least eight years prior to the present suit being brought in 2019. Again, it is evident that even though the initial injunction sought in the appeal arising out of the previous suit may have been declined on the ground that the defendants' revocation application was pending and the technical aspect of the matter had to be settled first, it does not appear that any attempt was made by the plaintiffs herein to apply for injunction in the pending appeal after a substantial part of the patent was upheld by the order of the IPAB passed in 2013. From 2013 to 2016, when the appeals in the previous suit came to be dismissed for default, it does not appear that the plaintiffs prosecuted the appeals diligently or even asserted therein that a substantial part of the patent had been recognised and preserved by the IPAB.

15. More importantly, paragraph 64 of the impugned judgment refers to a distinctly different strain of DY205 of the same bacterium being used by the defendants against the claimed strains of KB4, KB19 and KB25 by the plaintiffs, but the Court went on to observe that “the very fact that streptococcus thermophilus had been used by the defendants itself shows that the defendants have followed the discovery made by the plaintiffs centering on streptococcus thermophilus as a probiotic bacteria ...”. With respect, it was completely irrelevant as to whether the bacterium was discovered by the plaintiffs and even as to whether the defendants had followed the discovery made by the plaintiffs; since neither consideration was appropriate in assessing whether the defendants' products infringed the composition patent claimed by the plaintiffs. To repeat, there could have been no claim of exclusivity on account of the discovery of a particular bacterium and there could never have been any claim as to the exclusivity pertaining to streptococcus thermophilus. Therefore, it appears that the methodology adopted for assessing the prima facie case may have been completely flawed.

16. It is also apparent from the remainder of paragraph 64 of the impugned judgment that what weighed with the Court was the defendants also concentrating on streptococcus thermophilus. The trial Court observed that the defendants would have "to explain as to how they centered on streptococcus thermophilus." Prima facie and with respect, the defendants may ignore such aspect at the trial and be none the worse. That the relevant probiotic bacterium had been hit upon by the plaintiffs first could not have been a part of the claim and was completely foreign to the assessment necessary in an action for infringement in a composition patent.

17. For the reasons aforesaid, not the least of them being the apparent inertia on the part of the plaintiffs in pursuing the previous suit or the appeals arising therefrom till 2019, prima facie, the order impugned does not appear to be justified. It appears that only upon the licence agreement of March 6, 2018 being executed between the two plaintiffs that the action came to be launched. By then, the defendants' products had been in the market for a considerable period

of time and without any break. The turnover had gone up by leaps and bounds and such considerations do not appear to have engaged the trial Court in assessing whether an interlocutory injunction ought to have been granted. *Wander Ltd v. Antox India (P) Ltd* [1990 (Supp) SCC 727] has been referred to in the impugned judgment but the principle does not appear to have been applied.

18. Accordingly, there will be a stay of the operation of the judgment and order impugned, unconditionally for a period of a week from today. This does not imply that no case was made out by the plaintiffs or that the plaintiffs are not entitled to any exclusivity at all. All that it implies is that the plaintiffs could not make out a prima facie case of infringement by the defendants. However, since this order is made at the receiving stage of the appeals without dealing with the matter in greater detail and looking at all other aspects of the impugned judgment and order, the defendants must be put on terms. The unconditional stay will continue for a period of a week from today, but the stay will continue thereafter only upon an initial deposit of Rs.1 crore being made by May 6, 2021; whereupon the stay will continue

on the basis of such deposit till May 20, 2021 by which time a further deposit of Rs.2 crore has to be made. Thus, the defendants are required to make a total deposit of Rs.3 crore over the next three weeks for the stay granted by the present order to continue. In addition, the defendants will maintain accounts pertaining to the three impugned products and furnish the accounts on a two-monthly basis by the 15<sup>th</sup> day of third month; that is to say, that the accounts for the months of May and June, 2021 should be furnished by July, 15 and so on till the completion of the suit or further orders of Court, whichever is earlier. The deposit will be made in any nationalised bank having its branch within the vicinity of this Court and it will be in the name of the Registrar-General of this Court and stand to the credit of the suit. The deposit will be by way of an auto-renewable fixed deposit. If the fixed deposit is not automatically renewed by the relevant bank, steps should be taken to keep the fixed deposit alive and accruing interest till directed otherwise. The fixed deposit receipts should be made over to the Registrar-General within a week of the re-opening of the Court following the summer vacation. Copies of the fixed deposit receipts should be forwarded to advocate for the plaintiffs within two

days of the issuance thereof in either case.

19. The interim applications in the appeals, being C.M.P.Nos.8077, 8082 and 8100 of 2021, stand disposed of and the appeals will now be heard on the basis of the papers used before the trial Court.

20. The appeals will appear six weeks after the summer vacation on 15.07.2021.

(S.B., CJ.) (S.K.R.,J.)  
29.04.2021

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Note:

Mark a copy of the order to:  
The Registrar-General,  
Madras High Court.

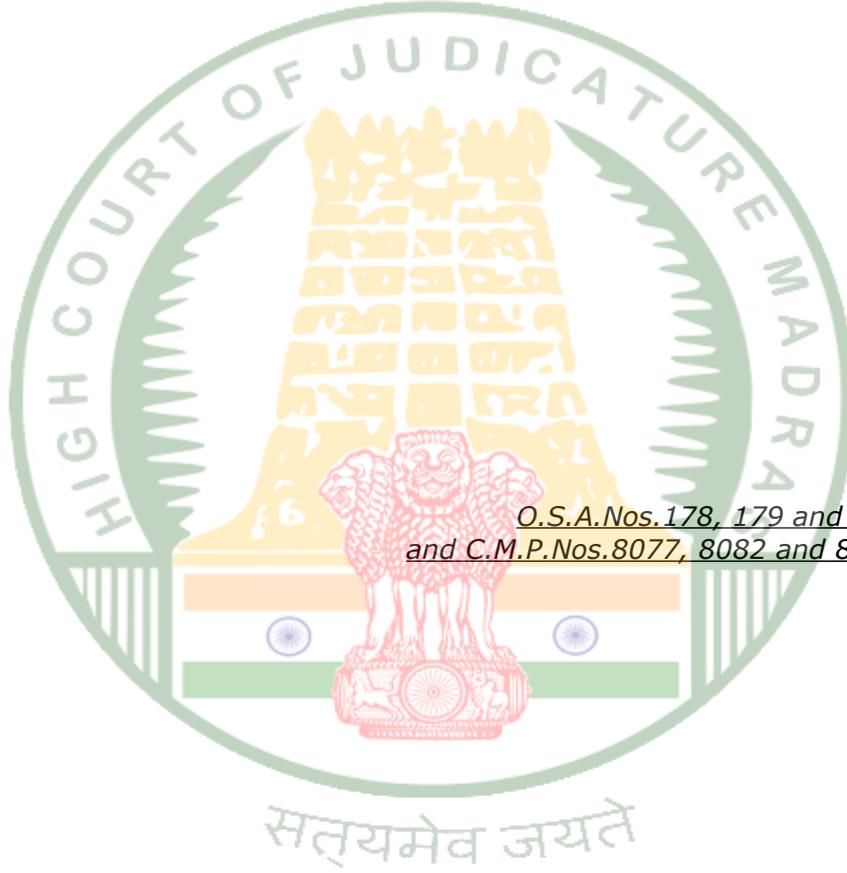
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