Guest Keen Williams Ltd. vs Controller Of Patents & Designs on 26 July, 1984

Equivalent citations: AIR1985CAL334, AIR 1985 CALCUTTA 334

ORDER

Padma Khastgir, J.

1. The petitioner Guest Keen Williams Ltd., cany on business in manufacture and sale of divers equipments and products, connected with the operation of the railways in India and abroad. According to the petitioner, sometime before 1976 the petitioner invented a rail clip adapter for the purpose of fitting in the railway track assembly. On the 8th June, 1976 the petitioner applied for grant of a patent in favour of the petitioner in regard to the said adapter, being application for patent No. 145211 and along with the said application filed a complete specification of the said adapter. Thereafter the respondent No. 4, that is the Research, Designs & Standards Organisation of the Ministry of Railways, filed an opposition to the said application on 31st Jan., 1979 inter alia on the ground of prior public knowledge and prior public use in India of the petitioner's invention as claimed. The said opposition was filed in accordance with Rules 35 and 36 of the Patents Rules, 1972. The petitioner on 30th July, 1979 filed a reply statement in accordance with Rule 37 of the said Rules. Thereafter on 26th Sept., 1979 the Research, Designs and Standards Organisation (hereinafter referred to as RDSO) filed an affidavit through one Om Prakash as evidence in support of their opposition in accordance with Rule 38 of the Rules. The petitioner also filed an affidavit on 24th April, 1980 in support of his application through one B. K. Jagannath in accordance with Rule 39 of the said Rules. According to the petitioner, the affidavit filed on behalf of RDSO through one Mr. Pal was inadmissible in evidence in view of the specific provisions of Rule 40 and Rule 41 of the said Rules as it was not strictly confined to the matters which have been referred to in the petitioner's affidavit. Under the circumstances the petitioner contended that as for such further evidence no leave was taken by the respondent, especially by the RDSO, such evidence was not admissible. The affidavit on behalf of RDSO was filed on 28th Aug., 1980 and thereafter the matter was fixed for hearing on several dates and were adjourned at the request of the petitioner. Thereafter the hearing took place on 10th Aug., 1983. At the time of hearing of the said application before the Deputy Controller of Patents & Designs and after the RDSO closed its case, it was submitted on behalf of the, petitioner that the affidavit of Himangshu Bhusan Pal be taken off the file and leave be granted to the petitioner to file the affidavit of one Suraj Mohan Khorana affirmed on 2nd July, 1983. The petitioner sought for further leave to cross-examine the said Himangshu Bhusan Pal. The Deputy Controller of Patents & Designs rejected the aforesaid contentions of the petitioner and fixed the next date of hearing on the 6th September, 1983. The petitioner filed a formal interlocutory application before the respondent Deputy Controller of Patents & Designs reiterating the prayers made by him on 10th August, 1983 praying for leave to file an affidavit of the said Suraj Mohan Khorana, prayed for rejection of the affidavit filed by Himangshu Bhusan Pal on

behalf of RDSO and last of all prayed for leave being granted to the petitioner to cross-examine the said Himangshu Bhusan Pal. Thereafter on the second day of the hearing the Deputy Controller of Patents & Designs rejected the prayers made by the petitioner on 6th Sept., 1983. According to the petitioner no formal order was passed by the respondent but the decision of the respondent was communicated to the petitioner in writing. Thereafter on 15th September, 1983 the petitioner moved an application before this High Court under Article 226 of the Constitution challenging the said order passed by the respondent. By an order passed by Borooah J. on 4th October, 1983 the respondent Deputy Controller of Patents & Designs was directed to give detailed reasons of the said order passed by him on 6th Sept., 1983. Thereafter the respondent on 30th Nov., 1983 passed an order giving reasons in support of his order passed on 6th Sept., 1983. Thereafter the present application had been taken out and a Rule Nisi was issued by Borooah J. on the petitioner's present application.

2. Mr. Sudipta Sarkar the learned lawyer appeared in support of the petition and carved reference to the various rules including Rule 36 to Rule 41 and also to Rules 77 and 79 and submitted that in view of the Rules framed, the affidavit affirmed on behalf of the RDSO was not in conformity with the provisions of the said Rule inasmuch as new matters had been introduced and new evidence has been adduced in the affidavit which were not strictly in conformity with the Rules inasmuch as they were not confined to the evidence that had already been adduced on behalf of the claimant in the affidavit. Under the circumstances, according to Mr. Sarkar, the Deputy Controller of Patents & Designs went wrong in allowing that affidavit to be used on behalf of the opponents. Secondly, Mr. Sarkar submitted that the reasons given by the Deputy Controller of Patents & Designs, which would be evident from the Annex. 'J' to the petition, would indicate that apart from harping on the point that various adjournments had been obtained on behalf of the petitioner and in view of the fact that this objection had not been taken when the affidavit was filed on behalf of the respondents, the Deputy Controller of Patents and Designs had not given any reason whatsoever save and except stating that such objection had not been raised by the petitioner at the time when the affidavit was filed on behalf of the opponents.

3. This application was opposed to by Mr. Mukharjee on behalf of the Deputy Controller of Patents & Designs. According to Mr. Mukharjee this grant of the patent had been opposed to on behalf of the respondent on two grounds of prior use and also of prior public knowledge and under the circumstances the grant of the patent had been opposed to inasmuch as it has been claimed by the respondent that the railway clip adapter, which had been claimed to be invented by the petitioner, had been in use long prior to the application made by the petitioner for grant of patent in respect thereof. Moreover, Mr. Mukharjee submitted that the affidavit-in-opposition had been filed by the respondent in Aug., 1980 whereas the hearing took place on the 10th Aug., 1983 and during this long 3 years the petitioner had not taken any objection as to the use and filing of the said affidavit. It was only after the hearing and submissions had been made and concluded on behalf of the respondent that for the first time the petitioner had taken this objection with an ulterior motive, as a last resort. Moreover, Mr. Mukharjee on behalf of the respondent 1 further submitted that in view of the provisions contained in Section 79 of the Patents Act, 1970 ample discretion had been given to the Controller under the said section whereunder the said discretion had been exercised by the Controller in the instant case.

4. Section 79 provides that in any proceeding before the Controller evidence shall be given by affidavit in the absence of directions by the Controller to the contrary. In a case in which the Controller thinks it right to do so, he may take oral evidence in lieu of or in addition to evidence by affidavit or may allow any party to be cross-examined on the contents of his affidavit. Under the circumstances no party can claim as a matter of right to call for evidence, cross-examine witnesses and also insist on oral evidence being taken unless the Controller thinks it fit to do so. Under the circumstances once such discretion had been exercised by the Controller, this Court would not sit over appeal from the decision of the Controller. By way of interlocutory application this Court should not interfere and exercise its writ jurisdiction, more so in a case of issuing a writ of certiorari, unless a strong case had been made out, the party should be relegated to adhere to the alternative remedy provided for. There had been no averment in the petition itself of any instant injury which should call for this Court's exercise of the jurisdiction under the writ of certiorari. In the case reported in (1935) 39 Cal WN 573 : (ILR 62 Cal 596) where the learned Judges sitting in a Division Bench in a similar matter were of the view that the fact of there being another specific legal remedy, such as a right of appeal, was not conducive to issuing such writs or orders where the want of jurisdiction or refusal or illegality complained of was not based upon the breach of a fundamental principle of justice, where such remedy may not be adequate. The alternative procedure prescribed may be more speedy or more convenient or less costly. From the averments made in the petition it would not indicate that the order made by the Deputy Controller of Patents & Designs was perverse or the reasons given by such authority were unreasonable or that there was want of jurisdiction or there was refusal or that there was illegality complained of, nor there had been any breach of any fundamental principle of justice. Under the circumstances this Court should not interfere with an order passed on an intealocutory application, inasmuch as all the points raised by the petitioner could also be gone into and decided by the Controller at the time of final hearing. Undoubtedly the Controller of Patents and Designs have powers, similar to the powers given under the Civil Procedure Code, to issue subpoena to witnesses on the application of the parties. But it is the discretionary power given to the Controller and such discretion having been used and the reasons having been given for such refusal on the part of the Controller, this Court should not interfere, sitting over an appeal, with such decision of the Controller. In a proper case the existence of such a right of appeal may not be adequate but in the facts and circumstances of this case this Court is of the view that no ground has been made out for interference by this Court with the order passed in interlocutory stage by the Controller. In para 15 of Annex. 'J' to the petition, where the order of the Controller has been set out from page 23 onwards, the respondent has stated that in spite of repeated adjournments taken by the petitioner, the petitioner had not taken any objection to the filing of the affidavit nor till the submissions were made on behalf of the opponents, such prayer had been made on behalf of the petitioner. The Controller had referred to in the order itself that although the affidavits were filed in accordance with the Rules no such objection had been taken by the petitioner for three years and it was only after the hearing and submissions were made on behalf of the respondents, such prayer had been made for recalling Mr. Pal and cross-examining him and also for rejection of the affidavit filed on behalf of the respondent. Even if such objection was taken at the time of the hearing, the Controller had the discretion to reject it on the facts and circumstances of the case. Apart from that an affidavit of Mr. Khorana sought to be relied upon by the applicant, although affirmed one year earlier, had not been filed by the petitioner in time. Mr. Chakravorty, appearing on behalf of the applicant through M/s. Depenning & Depenning, according

to the respondent wished to use the said affidavit during the course of the hearing without following the usual procedure and particularly without following the procedure laid down under Rule 41. He failed to give any satisfactory reply. The respondent had commented upon the lack of due diligence and bona fides of the applicant at the time of the hearing. The respondent had quoted the various rules and had given reasons for exercising his discretionary powers against the petitioner. In any event the petitioner was entitled not only to appeal from the order, as provided under the Act itself and the rules framed thereunder but is also entitled to challenge the final decision of the respondent.

5. Under these circumstances, this Court is of the view that this Court should not interfere with the interlocutory order passed by the respondent. As a result, this application is rejected. All interim orders are vacated. There will however be a stay of operation of this order for a fortnight from date.