IN THE HIGH COURT OF JUDICATURE AT NAGPUR

1951

CORAM

HIDAYATULLAH, J.

Surajmal Rambux & Others ... Appellants

v.

Laxminaryan Raghunath ... Defendants

JUDGMENT

HIDAYATULLAH J.,

This is an Application under Section 26 sub-section (1), Patents and Designs Act, 1911, for the revocation of the patent. One of the grounds of objection to the Petition is that the Applicants had opposed the grant of patent under Section 9 of the Act, and that until the Applications have exhausted their remedy under Section 9 sub-section (3) of Appeal to the Central Government the present Application is not competent.

2. This case was first placed before Justice Bose and on January 27, 1949 the learned Judged was pleased to Order that before taking action under Section 28 sub-section (1), to which parties by common consent were agreeable, this point should be decided.

3. Before me the arguments were, therefore, confined to the interpretation of Sections 9 and 26 of the Act in relation to the competency of the present Application. Having considered the matter, I am satisfied that the Application is competent.

4. The matters mentioned in Section 9 of the Act are not coterminous with those on which the High Court exercises jurisdiction under Section 26 sub-section (1). Under the former Section, the grounds on which the grant of a patent can be

opposed are five in number. It is clearly stated in the Section itself that opposition can be on those five grounds and no other. It is clear, therefore, that if Section 26 sub-section (1) is more extensive, then whatever may be the position where the two sections overlap, the present Application would be competent in respect at least of those grounds which, though falling under Section 26 sub-section (1), are outside the scope of Section 9. I am concerned only with the competency of the Application, and, to my opinion, the Application as a whole and also in its several parts falls outside the scope of Section 9 of the Act.

5. An Application under Section 26 sub-section (1) can be made either by the Advocate-General or by any person who alleges one of the three matters mentioned in Section 26 sub-section (2) clause (b). The Applicants in the present case have alleged that they had publicly manufactured, used or sold, within British India, before the date of the patent, articles manufactured in the manner claimed by the patentee as his invention. This determines their character and competency to make the application for the revocation of the patent. The provisions of Section 26 sub-section (2) clause (b) do not lay down the grounds on which revocation can be sought. These are mentioned in clauses (a) to (n) of the earlier sub-section. A person who is competent under Sub-section 2 clause (b) is not restricted to the three allegations which determine his competency to make the Application, and can allege any of the grounds mentioned in sub-section (1) of the Section.

6. The Applicants in the present case have relied upon Section 26 sub-section (1) clauses (b), (d), (e) and (i) of. These are not included in the grounds on which the grant of a patent can be opposed under Section 9 of the act. Reference in this connection was made to Section 9 sub- section (1) clause (d). That Clause deals with the public use or publication of the invention by the patentee or at his instance. This is clear from Sections 38 and 40 of the Act .

7. Further, Section 26 deals with the revocation of a patent, while Section 9 deals with opposition to the grant of a patent. These are different stages, and at least in

so far as the grounds are different and in the absence of any prohibition, it cannot be said that a person who has unsuccessfully opposed the grant of a patent cannot file an Application for its revocation.

8. It is true that under Section 70 sub-section (3) of the Act the Order of the Central Government is final, but that would manifestly be limited to those grounds which alone can be urged under Section 9 sub-section (1). The finality would not attach to anything beyond those grounds, and not certainly of Section 9 sub-section (1) but fall within Section 26 sub-section (1).

9. In the present case the Applicants had filed an Application opposing the grant of the patent. I understand that the Application was rejected as it was filed after the expiry of 4 months from the date of the advertisement. The Applicants admitted that they had not Appealed against that Order within three months, as they were required to do under Section 70 sub-section (1). This ground urges before the Controller are put before me, but examining the present Applications I find that the present grounds do not fall within Section 9 sub-section (1).

10. I hold, therefore, that the Application is competent. A date shall now be fixed for action on the Application.