

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 25.11.2005

C O R A M

THE HON'BLE MR. JUSTICE M. KARPAGAVINAYAGAM
and
THE HON'BLE MR. JUSTICE S.R. SINGHARAVELU

**O.S.A. No. 232 of 2005
and O.S.A. Nos. 233 and 234 of 2005**

Wockhardt Limited,
Wockhardt Towers, Bandra-Kurla Complex,
Bandra (East), Mumbai – 400 051,
and also at 94-B Abhiramapuram 4th Street,
Alwarpet, Chennai – 600 018.

... Appellant in all appeals

– Vs –

1. Hetero Drugs Limited,
Hetero House, H.No. 8-3-166/711, Errangadda,
Hyderabad – 500 018.
2. Nicholas Piramal (India) Limited,
New No. 99, Ashok Nagar 4th Avenue, Chennai – 600 083.
3. Adyar Drug House,
123/1, Dr. Muthulakshmi Road (L.B. Road),
Adyar, Chennai – 600 020.

... Respondents in all appeals

For appellant	Mr. P.S. Raman, Senior Counsel, for Mr. A.A. Mohan
For respondent No. 1	Mr. R. Krishnamoorthy, Senior Counsel, for Mr. S. Sethuraman
For respondent No. 2	Mr. V. Ramasubramanian
For respondent No. 3	Mr. K.M. Santhanagopalan

*Appeals under Order XXXVI Rule 11 of Original Side Rules, read with Clause 15 of Letters
Patent.*

J U D G M E N T

M. KARPAGAVINAYAGAM, J.

Wockhardt Limited, a pharmaceutical company, appellant herein, is the holder of Process Patent, EMR and Drug Licence for the manufacture of pharmaceutical preparation, namely, Nadifloxacin 1% Cream.

2. Hetero Drugs Limited, first respondent herein, infringing the Patent and EMR granted to the appellant, started manufacturing the same product and selling in the market. On coming to know of the same, appellant filed a suit in C.S.No.456 of 2005 for permanent injunction, restraining Hetero Drugs Limited, Nicholas Piramal (India) Limited and Adyar Drug House, respondents 1 to 3, from infringing the (i) Patent No.188847; (ii) EMR granted to it and (iii) restraining the respondents from manufacturing or in any way using the composition, which the appellant invented, for manufacture of Nadifloxacin 1% Cream.

3. Pending the suit, similar orders of ad-interim injunction were sought for in O.A.Nos.544 to 546 of 2005 and, by an order dated 31.05.2005, interim injunction was granted in O.A.Nos.544 and 545 of 2005.

4. The respondents, on receipt of notice, filed applications to vacate the interim injunction. A learned single Judge, after hearing the counsel for the parties, by an order dated 08.09.2005, vacated the interim injunction and dismissed the O.A.Nos.544 to 546 of 2005. Aggrieved by the same, the appellant has filed these appeals before this Division Bench.

5. The case of the appellant/plaintiff is as follows:

"(i) Appellant is a public limited company, which manufactures various medicinal and pharmaceutical products from the year 1963. On 08.05.2000, the appellant applied for Process Patent for benzoquinoliziness, on the ground that it had invented the admixture composition. After thorough examination by the Controller of Patents, Process Patent was granted to the appellant on 06.06.2003 with effect from the date of application, namely, 08.05.2000.

(ii) Under the Patents Act,1970, Process Patent alone was contemplated in respect of medicinal preparations. After the TRIPS Agreement, the patent laws were amended by introducing a provision, for grant of Product Patent as well. Therefore, on 28.03.2002, the appellant made an application for Product Patent, which was treated as a mail box application. The appellant also obtained manufacturing licence for the pharmaceutical preparation Nadifloxacin 1% Cream from the Drugs Controller General of India on 27.04.2002. The appellant, thereafter, started commercially marketing the said product since 2002.

(iii) On 17.07.2003, under Section 24-A of the Patents Act,1970, he applied to the Office of the Controller of Patents and Designs for grant of Exclusive Marketing Right (EMR) in respect of the product of the aforementioned invention.

(iv) After necessary scrutiny and examination, the Controller of Patents granted Exclusive Marketing Right (EMR) to the appellant for a maximum period of five years i.e., from 15.12.2003 to 16.07.2008. This EMR Certificate confers an exclusive right on the appellant to sell and distribute in India the pharmaceutical composition, containing benzoquinoliziness, namely, Nadifloxacin 1% Cream under the provisions of the Patents Act,1970.

(v) In the meantime, Hetero Drugs Limited, first respondent herein, applied to the Drugs Controller General of India, for manufacturing licence, to manufacture Nadifloxacin 1%

Cream, by adopting US Patent 1981 and Japan Patent 1983, under the name NADIDERM. On 14.09.2004, the Drugs Controller General granted the said licence. Thereafter, the first respondent company started manufacturing and marketing Nadifloxacin 1% Cream.

(vi) Since the licence was granted to the first respondent without hearing the appellant, he filed a writ petition before the Delhi High Court. Though the writ petition was entertained by the Delhi High Court, it did not incline to pass interim order as against the first respondent.

(vii) On coming to know that the licence granted to the first respondent company was challenged by the appellant in the Delhi High Court, the first respondent company filed a writ petition before the Bombay High Court, challenging the EMR granted to the appellant. However, the first respondent was also not able to obtain any interim orders as against the appellant.

(viii) Under those circumstances, the appellant filed the suit before the learned single Judge of this Court against respondents 1 to 3 for permanent injunction, restraining the respondents from infringing the Patent and EMR and also restraining them from manufacturing the admixture composition, invented by the appellant."

6. The case of the respondents/defendants, in brief, is as follows:

"The appellant cannot claim invention of the product, since the first respondent obtained manufacturing licence for the product impugned on 14.09.2004 from the Drugs Controller General. As a regular marketing licence of a drug to be preceded by a trial manufacturing licence for the purpose of clinical trial, the first respondent had been manufacturing the product impugned prior to 2004 itself. The first respondent followed only the process adopted by US Patent Nos.4339134 and 4552879, granted to Otsuka Pharmaceuticals, Japan. As such, the appellant cannot claim invention of the product, as it is already known by the publication of the above US Patent numbers. That apart, the appellant cannot claim exclusive right over the EMR and the Process Patent, especially when the same is challenged in the writ petition filed by the first respondent in the Bombay High Court. Even otherwise, there cannot be any irreparable loss, if injunction is not granted, by virtue of Section 11(A) of the Patents Act, which provides only for royalty and, as such, the appellant is not entitled for injunction."

7. On the above pleas, arguments were heard by the learned single Judge, who, ultimately, dismissed the applications, filed by the appellant, holding that the manufacturing and marketing licence granted by the Drugs Controller General for NADIDERM to the first respondent was not on the basis of the admixture composition of the appellant, but was only by adopting US Patent and Japan Patent; that though a challenge to the manufacturing licence at the instance of the appellant has been made before the Delhi High Court in the writ petition, the appellant was not able to obtain any interim orders preventing the first respondent from manufacturing the said Cream.

8. Challenging the said finding, Mr.P.S.Raman, learned Senior Counsel for the appellant, would elaborately argue that the finding rendered by the learned single Judge is clearly erroneous, as the licence issued by the Drugs Controller General in favour of the first

respondent is only concerned with the product safety for human consumption and not about EMR or patent rights and further the scope of enquiry in the Delhi High Court in the writ petition, challenging the Drug Licence, is entirely different from the scope of the present suit, more particularly when the learned single Judge himself has held, *prima facie*, that the Process Patent and the EMR are valid.

9. In reply to the above submissions, Mr.R.Krishnamoorthy, learned Senior Counsel appearing for the first respondent, would submit that the appellant cannot claim exclusive right, as EMR and Process Patent are challenged in the Bombay High Court; the respondent is following only the process adopted by US Patent granted to Otsuka Pharmaceuticals, Japan; the respondent has a valid manufacturing licence, issued by the Drugs Controller; the appellant cannot claim invention of the said product and, as such, the appellant would not be entitled to interim injunction, in the light of Section 11(A) of the Patents Act, which provides for royalty.

10. Learned counsel for the second respondent adopted the arguments of the learned Senior Counsel for the first respondent.

11. Learned counsel for the third respondent would strenuously contend that the third respondent is not at all a necessary party.

12. Both the learned Senior Counsel for the parties would cite number of authorities, to substantiate their pleas.

13. We have heard the learned Senior Counsel, who argued at length, and given our thoughtful consideration to their rival contentions.

14. The following are the points for determination :

(i) Whether the order of the learned single Judge would suffer from any infirmity; and

(ii) Whether the appellant is entitled to the grant of interim injunction, pending the suit ?

15. Before dealing with the above issues, it would be beneficial to refer to various principles, laid down by this Court as well as the Supreme Court, while granting interim injunction, pending the suit. They are as under :

(i) (1994) 4 SCC 225 (Morgan Stanley Mutual Fund v. Kartick Das), wherein the Supreme Court laid down the following factors, which should weigh with the Court, while a request for injunction comes up for consideration :

(a) Whether the refusal of injunction would involve greater injustice than the grant of it would involve ;

(b) the Court would expect a party applying for injunction to show utmost good faith in making the application; and

(c) the general principles like prima facie case, balance of convenience and irreparable loss would also be considered by the Court.

(ii) 1990 (Suppl.) SCC 727 (Wander Ltd. v. Antox India P.Ltd.), in which the Supreme Court has observed as under :

"Usually, the prayer for grant of an interlocutory injunction is at a stage when the existence of the legal right asserted by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence..... The interlocutory remedy is intended to preserve in status quo, the rights of parties which may appear on a prima facie case."

(iii) When a similar issue is raised before this Court between the same parties, in respect of another product, a learned single Judge has granted interim injunction, which is reported in 2004 (29) PTC 108 (Novartis AG v. Adarsh Pharma) as follows :

"Going by the balance of convenience and public interest, it is not disputed at the Bar that the infringing product of the defendants has come to be marketed only after the plaintiffs' introduced their product in the market. The plaintiffs have an "EMR" valid for a period of five years or till the disposal of the patent claim one way or the other, whichever is earlier and the Statute protects such rights..... When the Statute protects such rights, in my opinion, the balance of convenience loses its significance, especially when the parties in opposition do not have a legal ground in their favour at this stage...."

This decision of the learned single Judge has been confirmed by a Division Bench of this Court, reported in (2005) 1 M.L.J. 309 (INTAS LABORATORIES PRIVATE LIMITED, AHMEDABAD, v. NOVARTIS A.G., SCHWARZWALDALLEE).

(iv) (2005) 10 SUPREME COURT CASES 11 (AJENDRA PRASADJI NARENDRAPRASADJI PANDEY v. SWAMI K.NARAYANDASJI), wherein the Supreme Court has held as under :

"12. It is needless to note that while deciding the issue of injunction the courts have to consider the cumulative factors i.e., prima facie case, balance of convenience and irreparable loss. Definite findings have to be given on these aspects, on a prima facie basis...."

16. The above observations of the Supreme Court would make it clear that the following guidelines have to be taken into consideration, while dealing with the issue of grant of an interlocutory injunction during the pendency of legal proceedings, which require the exercise of the discretion of the Court. While exercising the said discretion, the Court applies the following tests :

(a) Whether the plaintiff has a prima facie case ;

(b) Whether the balance of convenience is in favour of the plaintiff; and

(c) Whether the plaintiff would suffer an irreparable injury, if his prayer for interlocutory injunction is disallowed.

17. Relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial.

18. We have to bear the above principles in mind, while dealing with the main issue, which has been dealt with by the learned single Judge. Let us first look into the order of the learned single Judge.

19. At the outset, it shall be pointed out that the learned single Judge himself has given a categorical finding, with reference to the prima facie case in regard to the rights of the appellant over EMR and Process Patent, in various paragraphs in his order. It would be worthwhile to quote the observations, made by the learned single Judge, which are as follows :

"As on today, the applicant has got the process patent for benzoquinoliziness and claims that it is an invented admixture composition. The applicant has also applied for product patent and the same is still pending. The applicant also obtained the manufacturing licence for Nadifloxacin 1% cream and the applicant was also granted with EMR upto 16.7.2008. The above facts are not in dispute. Whether the EMR granted to the applicant is valid or not is not a matter for this Court to adjudicate and decide, as the grant of EMR is not questioned before this Court by the first respondent company..... The process patent given in favour of the applicant is also not questioned by the first respondent company and the same is also in force. Equally, the applicant had also obtained the manufacturing licence for Nadifloxacin 1% cream on 27.4.2002 and that the said manufacturing licence is also in force. For the grant of EMR, as already referred to, an applicant should have a process patent, should have filed a product patent application and should have a valid manufacturing licence. All the above three conditions are satisfied by the applicant. From the above, it is seen that the applicant, by virtue of the grant of EMR coupled with the grant of manufacturing and marketing licence, is entitled to manufacture and market Nadifloxacin 1% cream...."

20. The above observation would clearly indicate that the learned single Judge has found, prima facie, that the appellant has fulfilled all the conditions to use the EMR and, thereby, he is entitled to manufacture and market Nadifloxacin 1% Cream.

21. Such being the conclusion, there was no necessity for the learned single Judge to go beyond that and then hold that since the Drug Licence granted in favour of the first respondent company by the Drugs Controller General had not been stayed through the interim order of the Delhi High Court in the writ petition filed by the appellant, it would not be proper to restrain the first respondent company from manufacturing and marketing the product impugned and, as such, the appellant would not be entitled to the grant of injunction. This reason for rejection for the grant of injunction, in our view, does not sound well.

22. To put it clearly, we fail to understand as to how the mere fact that the appellant/plaintiff, as a writ petitioner before the Delhi High Court, failed to obtain the interim order in the writ petition seeking for cancellation of licence granted in favour of the first respondent would be a ground to reject the claim of the appellant in the suit, seeking for protection of its rights, as the holder of Process Patent and EMR.

23. The scope of the present suit is completely different from that of the writ petition pending before the Delhi High Court. In other words, the issue before the Delhi High Court is entirely different from the one before this Court, where alone the civil rights of EMR and Process Patent can be decided. Further, this reason given by the learned single Judge runs counter to his conclusion arrived at to the effect that the Process Patent, EMR and Drug Licence in favour of the appellant are in force and the same cannot be questioned at this stage.

24. It cannot be debated that the Drugs Controller, exercising power under the Drugs and Cosmetics Act, is only concerned with the product safety for human consumption and not about EMR, patent rights or such other intellectual properties or other civil rights of the parties. In other words, the pendency of the writ petition or the appellant's inability to obtain a stay order from the Delhi High Court over the issue of Drug Licence would neither prevent the Civil Court to go into the civil rights nor disentitle the appellant from seeking the relief of protection, on the basis of the civil rights conferred on him, as the holder of Process Patent and EMR.

25. The above aspect can be viewed from yet another angle. On coming to know that the appellant filed a writ petition before the Delhi High Court, challenging the licence issued by the Drugs Controller to the first respondent for manufacture of the product impugned, the first respondent rushed to the Bombay High Court and filed a writ petition, challenging the validity of EMR, granted to the appellant. Pending the writ petition, he sought for stay. But, the Bombay High Court, though entertained the writ petition and issued notice to the appellant, was not inclined to grant stay of manufacturing and marketing of the product impugned by the appellant.

26. In this context, it would be worthwhile to refer to some of the averments, contained in the said writ petition filed before the Bombay High Court; in which, the appellant has been shown as fifth respondent. The said averments are as follows :

".....The Petitioner (Hetero Drugs Limited) further states that EMR being granted to Respondent No.5 (Wockhardt Limited), the Petitioner has been deprived of its valuable rights to sell or distribute the said article or substance in India. The Petitioner states that the petitioner will suffer irreparable loss and damages on execution of such an erroneously granted EMR.

For the act of Respondent No.1 to Respondent No.3, which has granted such an exclusive right in favour of Respondent No.5 without giving an opportunity of being heard to petitioner, if imposed on the Petitioner will deprive the petitioner to sell and distribute said pharmaceutical composition. Hence, the Petitioner shall suffer an irreparable loss and damages, if the execution of said EMR is not stayed....."

27. The above wordings in the affidavit, filed along with the writ petition before the Bombay High Court, would indicate that the first respondent herein itself would admit and assert that it is manufacturing the same product, which is being manufactured by the appellant herein in pursuance of the EMR, and, unless it is stayed, the first respondent herein, namely, the writ petitioner in the Bombay High Court would be deprived of, from selling and distributing the pharmaceutical composition of the product impugned.

28. Admittedly, interim prayer was not granted by the Bombay High Court. As such, there was no stay as against the appellant to exercise exclusive marketing right (EMR), as the holder of EMR, by any other Courts in India. On the other hand, the claim of the first respondent herein, made in the writ petition before the Bombay High Court, was, that unless the exclusive marketing right, granted in favour of the appellant herein, is stayed, it would deprive of their right of selling and distributing the product impugned in the market in India. The fact that no injunction order was obtained against the appellant would indicate that the Bombay High Court has not prevented the appellant herein from exercising its right over the Process Patent and the EMR and, on the other hand, declined to grant the interim relief sought for by the first respondent herein to allow it to manufacture and market the product impugned.

29. Thus, it is clear that the Civil Court at Chennai is not barred to go into the prima facie case with reference to the rights of the appellant for manufacturing and marketing the product impugned, on the basis of Process Patent and EMR, which are granted in favour of the appellant. It is also clear that the learned single Judge simply took into consideration the failure of the appellant to obtain stay order in the writ petition before the Delhi High Court, challenging the licence granted to the first respondent herein, but, he had failed to take into consideration the failure of the first respondent to obtain an injunction order as against Process Patent and EMR, granted to the appellant, from the Bombay High Court. In our view, even though the issue relating to Drug Licence and EMR is pending before the other High Courts, they were not inclined to pass any interim orders affecting the rights of the parties and, therefore, the learned single Judge should have appreciated the sanctity, attached to the Exclusive Marketing Right and Process Patent, granted to the appellant.

30. It is not in dispute that the appellant is the holder of Process Patent and EMR, for manufacture of Nadifloxacin 1% Cream under the trade mark NADOXIN. At the same time, the first respondent is also manufacturing identical Nadifloxacin 1% Cream under the trade mark NADIDERM, in violation of Process Patent and EMR, granted to the appellant, even though the first respondent has not been able to obtain any order of stay or injunction from the Bombay High Court, with reference to the said Process Patent and EMR.

31. EMR is a short term arrangement. The right on the EMR is limited only for a period of five years from the date of grant i.e., from 15.12.2003 to 16.07.2008. There is no dispute in the fact that Process Patent was granted to the appellant on 06.06.2003 with effect from the date of application, namely, 08.05.2000. After introduction of the Patent Amendment Act, the appellant, on 28.03.2002, made an application for Product Patent and he obtained manufacturing licence

for pharmaceutical preparation Nadifloxacin 1% Cream on 27.04.2002 from the Drugs Controller General of India. Thus, it is clear from the records that it is not seriously disputed that the appellant started manufacturing and marketing the said product since 2002.

32. On 17.07.2003, under Section 24-A of the then Patents Act, 1970, the appellant applied for grant of Exclusive Marketing Right and, after necessary scrutiny and examination, the Controller of Patents granted EMR to the appellant for a period of five years. It cannot be denied that this EMR Certificate confers an exclusive right on the appellant to sell and distribute in India the pharmaceutical composition, containing Benzoquinolizines, namely, Nadifloxacin 1% Cream, under the provisions of the Patents Act, 1970. Process Patent and EMR have been granted by the Patent Office. The said office alone is the authority, qualified to test the validity of the claims made therein, after strenuous examination of the appellant's claim.

33. In the instant case, after strenuous scrutiny and examination of the appellant's claim, the competent authority, namely, Patent Office has granted both Process Patent and EMR in favour of the appellant. It cannot also be debated that unless they are cancelled by the authority concerned or appropriate forum, the appellant would not be disentitled to exercise its right for a period of five years. In other words, no other party is entitled to use the said formulation during the tenure of the said EMR.

34. Appellant is the only company in India to get an EMR. Patent and EMR rights are for a limited period of five years and, unless the same are exercised in the said period, it will be rendered useless. When this period of short tenure is sought to be disturbed over the rights by any other party, which has no prima facie right by virtue of Process Patent and EMR granted to the appellant, then, this Court has to necessarily prevent the other party, by affording appropriate relief in favour of the appellant/plaintiff, by granting the injunction sought for.

35. The learned single Judge, in our view, has committed another error, in concluding that the first respondent company is manufacturing and marketing the product under the trade mark NADIDERM, only on the basis of US Patent and Japan Patent and not on the basis of admixture composition of the appellant. This conclusion, in our opinion, is also wrong for two reasons, namely, (i) there is no material to show that the manufacturing and marketing the product impugned under licence is only by adopting US Patent and Japan Patent, and (ii) the patent documents, containing 10 preparation examples, would not show the cream product. As such, the conclusion, arrived at by the learned single Judge, was not on the basis of the available materials. On the other hand, the materials, which are available, would be contrary to the said conclusion.

36. As indicated above, the first respondent itself admitted in its writ petition, challenging the EMR granted to the appellant, before the Bombay High Court, that it is manufacturing the same product, for which EMR was granted to the appellant. Further, the learned single Judge has not

appreciated the contents of the affidavit of the expert, which is a vital document filed by the appellant, which would completely support the case of the appellant. The affidavit, filed by the expert, would indicate that the expert has given two following conclusions :

"5 (a) The Indian patent granted to Wockhardt under No.188847 and the pending product application under No.308/MUM/2002 are different from and is not anticipated by the US Patents granted to Otsuka, Japan, under Nos.4,399,134 and 4,552,879.

(b) It is not possible to manufacture a cream based product with the process stated in the US Patents under Nos.4,399,134 and 4,552,879."

37. As such, the clear conclusions arrived at by the expert are that the appellant's process is different from that of Otsuka's 2 US Patents and that it is not possible to manufacture a cream based product, using Otsuka's US Patents. On this basis, the specific stand taken by the appellant is, that with the aid of US Patents, it would not be possible to manufacture Nadifloxacin 1% Cream and it is only possible to manufacture Nadifloxacin 1% Ointment.

38. Hence, the first respondent, as per the Otsuka's patents, can manufacture only ointment other than cream products. As already stated, the Otsuka's patents, filed by the respondent contain 10 preparation examples, but none of them shows the manufacture of cream, as an end product. Thus, on a plain examination, for the purpose of prima facie case, the Otsuka's patents could manufacture only an ointment, film coated tablets or injectable preparations and not a cream. Admittedly, the respondent is manufacturing a cream. The EMR granted to the appellant/plaintiff is specifically for a product, namely, Nadifloxacin 1% Cream. Therefore, it is to be observed that the first respondent cannot be allowed to manufacture the cream, as long as the EMR granted in favour of the appellant is valid and subsisting.

39. As the last argument, learned Senior Counsel appearing for the first respondent would submit, that since in this case the appellant is entitled to invoke Section 11(A) (7) Proviso 3 and in the event of the appellant succeeding in the trial, ultimately, the Patent Holder of any product patent would be entitled to receive reasonable royalty from the party concerned, which is a significant investment, and, as such, the appellant would not be entitled to the grant of injunction.

40. But, this argument is opposed by the learned Senior Counsel for the appellant, on the ground that the import of introducing Subsection (7) to Section 11(A) is only to safeguard the interest of such parties, who made investments and already commenced production of products prior to 01.01.2005 and it does not deal with those cases where, prior to 01.01.2005, an EMR granted to a party is already in force.

41. It is also stated by the learned Senior Counsel for the appellant that the first respondent/defendant has introduced the product only in April,2005, and, as such, Section 11(A) would not apply.

42. In reply to the said submission, it is contended by the learned Senior Counsel for the first respondent that it had been pleaded by them that they have commenced manufacturing of the above product way back in September, 2004, and, hence, they are entitled to invoke Section 11(A) (7) Proviso 3.

43. We are unable to accept the contention of the learned Senior Counsel for the first respondent, especially when we feel that the short period, namely, five years, in which the appellant is allowed to exercise its right over the product impugned, is not to be disturbed, in the light of the fact that mere royalty, in our view, would not suffice to make good the loss. Similarly, we are of the view that the contention urged by the learned counsel for the third respondent need not be decided at this stage.

44. When there are prima facie materials, as found by the learned single Judge, we have no hesitation to hold that the balance of convenience is also in favour of the appellant, as it is not disputed at the Bar that the product impugned of the first respondent has come to be marketed only after the appellant introduced its product in the market.

45. As indicated above, the appellant has EMR valid for a period of five years or till the disposal of the patent claim one way or the other whichever is earlier. It is not in dispute. The statute protects such rights. When the statute protects such rights and when the parties in opposition do not have a legal ground over the exclusive marketing rights in their favour at this stage, the balance of convenience lies in favour of the appellant. Further, in our view, if the prayer for interlocutory injunction is disallowed in the instant case, the appellant would necessarily suffer an irreparable injury, considering the fact that the five year period would soon elapse and the loss likely to be experienced by the appellant would not be compensated in terms of damages or royalty, especially when the appellant disputes the applicability of Section 11(A) of the Patents Act to the present case.

46. Of course, it is true, as laid down by a Division Bench of this Court in 1998 (II) CTC 689 (MULTICHANNEL (INDIA) LTD. v. KAVITALAYA PRODUCTIONS, it is well settled that only if the discretion is not exercised applying the tests on the point, fairly or honestly or according to the rules or reason and justice, then alone, the order can be reversed by the appellate Court.

47. As indicated above, various aspects, which we have dealt with, have not been taken into consideration by the learned single Judge. On the other hand, the vital factual details have been ignored and overlooked by the learned single Judge. This would necessarily constrain us to interfere with his order.

48. Under those circumstances, the learned single Judge's order is set aside. The appellant/plaintiff would be entitled to injunction in the applications, filed in the suit. Appeals are allowed. No costs. Consequently, the connected C.M.P.Nos.15743,15744 and 15745 of 2005 are closed.

49. Before parting with this case, we make it clear that any observation or opinion expressed in this order is only for the purpose of disposal of these appeals, relating to temporary injunction, and, it shall, in no way, influence the trial Court, while deciding the issues involved in the suit. In other words, the trial Court shall decide all the issues involved in the suit, on the basis of the materials, uninfluenced by the conclusions made in these appeals.

50. SUM UP :

(i) The order of the learned single Judge, vacating the interim injunction granted in favour of the appellant, would suffer from infirmity. Hence, it is set aside.

(ii) If the injunction is not granted in favour of the appellant, who has made out a prima facie case, the appellant would necessarily suffer an irreparable injury, considering the fact that the five year period would soon elapse and the loss likely to be experienced by the appellant would not be compensated in terms of damages or royalty. Hence, there will be an order of injunction in favour of the appellant in the applications, pending the suit.

Index : Yes Internet : Yes dixit