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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 29th April and 3rd June, 2010
Decision on: 15th July, 2010

W.P. (C) No. 3517 of 2007

DR. (Miss) SNEHLATA C. GUPTE ..... Petitioner
Through: Mr. Pravin Anand and Mr. J. Sagar with Mr. Sagar Chandra, Advocates.

versus

UNION OF INDIA & ORS. ..... Respondents
Through: Mr. Ruchir Mishra with Mr. Rahul Jain, Advocates for R-1 to R-4.
Ms. Pratibha M. Singh, Advocate for R-5.

CORAM: JUSTICE S. MURALIDHAR

ORDER
15.07.2010

In terms of the common judgment rendered today in Writ Petition (Civil) 3516/2007 titled "***Dr. (Miss) Snehlata C. Gupte v. Union of India & Ors***" along with seven connected writ petitions, this writ petition is dismissed with costs of Rs. 20,000/- which will be paid by the Petitioner to Respondent No.5 J. Mitra & Co. within a period of four weeks.

A copy of the judgment passed in W.P. (C) No. 3516 of 2007 be placed forthwith on the file.

S. MURALIDHAR, J

JULY 15, 2010
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Signature Not Verified
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Certify that the digital file and physical file have been compared and the digital data is as per the physical file and no page is missing.

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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 29th April and 3rd June, 2010
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W.P. (C) No. 3516 of 2007

DR. (Miss) SNEHLATA C. GUPTE ..... Petitioner
Through: Mr. Pravin Anand and Mr. J. Sagar with Mr. Sagar Chandra, Advocates.

versus

UNION OF INDIA & ORS. ..... Respondents
Through: Mr. Ruchir Mishra with Mr. Rahul Jain, Advocates for R-1 to R-4. Ms. Pratibha M. Singh, Advocate for R-5.

W.P. (C) No. 3517 of 2007

DR. (Miss) SNEHLATA C. GUPTE ..... Petitioner
Through: Mr. Pravin Anand and Mr. J. Sagar with Mr. Sagar Chandra, Advocates.

versus

UNION OF INDIA & ORS. ..... Respondents
Through: Mr. Ruchir Mishra with Mr. Rahul Jain, Advocates for R-1 to R-4 Ms. Pratibha M. Singh, Advocate for R-5.

W.P. (C) No. 5422 of 2007

DR. GIRISH J. RINDANI ..... Petitioner
Through: Mr. Pravin Anand and Mr. J. Sagar with Mr. Sagar Chandra, Advocates.

versus

UNION OF INDIA & ORS. ..... Respondents
Through: Mr. Ruchir Mishra with Mr. Rahul Jain, Advocates for R-1 to R-4. Ms. Pratibha M. Singh, Advocate for R-5.

W.P. (C) No. 5423 of 2007

DR. (Miss) SNEHLATA C. GUPTE ..... Petitioner
Through: Mr. Pravin Anand and Mr. J. Sagar with Mr. Sagar Chandra, Advocates.

versus

UNION OF INDIA & ORS. ..... Respondents
Through: Mr. Ruchir Mishra with
Mr. Rahul Jain, Advocates for R-1 to R-4.
Ms. Pratibha M. Singh, Advocate for R-5.

W.P. (C) No. 10399 of 2009

ZEPHYR BIOMEDICALS ..... Petitioner
Through: Mr. Sanjeev Kumar Tiwari,
Advocate.

versus

LALIT MAHAJAN & ANR. ..... Respondents
Through: Mr. Maninder Singh, Senior
Advocate with
Ms. Saya Chaudhary and
Mr. Jaspreet Singh, Advocate for R-1.
Mr. A.S. Chandhiok, ASG with
Mr. Jatan Singh, CGSC for R-2.

W.P. (C) No. 10400 of 2009

ZEPHYR BIOMEDICALS ..... Petitioner
Through: Mr. Sanjeev Kumar Tiwari,
Advocate.

versus

LALIT MAHAJAN & ANR. ..... Respondents
Through: Ms. Saya Chaudhary and
Mr. Jaspreet Singh, Advocate for R-1.
Mr. A.S. Chandhiok, ASG with
Mr. Jatan Singh, CGSC for R-2.

W.P. (C) No. 10450 of 2009

ZEPHYR BIOMEDICALS ..... Petitioner
Through: Mr. Sanjeev Kumar Tiwari,
Advocate.

versus

LALIT MAHAJAN & ANR. ..... Respondents
Through: Mr. Maninder Singh, Senior
Advocate with Ms. Saya Chaudhary and Mr.

Jaspreet Singh, Advocate for R-1.
Mr. A.S. Chandhiok, ASG with Mr. Jatan Singh, Advocate for R-2.

AND

W.P. (C) No. 1020 of 2010

TIBOTEC PHARMACEUTICALS ..... Petitioner
Through: Mr. Rajiv Nayyar and Mr. Sudhir Nandrajog, Senior Advocates with Mr. Pragyan Pradip Sharma and Mr. Rupesh Gupta, Advocates.

versus

THE ASSISTANT CONTROLLER OF PATENTS, DESIGNS & TRADE MARKS & ORS. ..... Respondents
Through: Mr. A.K. Bhardwaj with Ms. Jagrati Singh, Advocates for R-1 & R-2.
Mr. S. Majumdar with Mr. Saurabh Banerjee, Advocate for R-3.

CORAM: JUSTICE S. MURALIDHAR

1. Whether reporters of local paper may be allowed to see the judgment? ✓
2. To be referred to the reporter or not? ✓
3. Whether the judgment should be referred in the digest? ✓

JUDGMENT

1. The short but interesting question of law common to all these petitions: When can a patent be said to be granted under the Patents Act, 1970 ('Act')? The question arises in the context of the dismissal of pre-grant oppositions by the Controller of Patents ('Controller') on the ground that they were time-barred under Section 21 of the Act.

2. The factual background in each set of petitions is necessary to be set

out in order to appreciate how the question arises for determination in each of them.

Writ Petition (C) Nos. 3516, 3517, 5422 and 5423 of 2007 (1st Set of Petitions)

3. J. Mitra & Company Respondent No.5 in W.P. (C) No. 3516 of 2007 filed two patent Application Nos. 590/Del/2000 and 593/Del/2000 in the Office of the Controller on 14th June 2000. The patent specifications involved in the two applications were published in the official gazette on 20th November 2004 in terms of Section 11A of the Act. At that stage, Section 25 of the Act had not been amended. Under Section 25 of the pre-amended Act, an opposition to the grant of patent had to be filed within four months from that day i.e., the date of advertisement (publication) which period could be extended by one month upon the Controller being satisfied by the reasons given for such delay.

4. Span Diagnostics Ltd. ('SDL') filed a pre-grant opposition which came to be rejected by the Controller on 23rd August 2006. The operative portion of the order passed by the Controller reads as under:

> "In view of the above discussion and in consideration of the submissions of both the parties. I hereby order to grant [Patent No. 194639] on Patent Application No. 590/Del/2000 with the following condition:
>
> The Applicants shall give cross reference to the patent application no. 593/Del/2000 on page 2 of the complete specification and submit the amended/retyped page(s) within a week from the date of these order. The Opposition on Patent Application

No. 590/Del/2000 (194639) is disposed of in above terms. No order to cost."

5. In terms of Section 43 of the Act, where the application for a patent has been found to be in order for grant of patent and if the application has either not been refused by the Controller or has not been found in contravention of the Act, the patent shall be granted as expeditiously as possible "with the seal of the patent office and the date on which the patent is granted shall be entered in the Register". Under Section 43(2), upon the grant of patent, the Controller "shall publish the fact that the patent has been granted and thereupon the application, specification and other documents related thereto shall be open for public inspection". Under Rule 55(5) of the Patents Rules 2003 ('Rules'), the Controller will examine the statement and evidence filed by the applicant (for the grant of patent) and may either refuse to grant the patent or require the complete specification to be amended to his satisfaction before the patent is granted. Under Rule 55 (6), the Controller shall, after considering the representation (i.e. the pre-grant opposition, if any) and submissions made during the hearing if so requested, "proceed further simultaneously either rejecting the representation and granting the patent or accepting the representation and refusing the grant of patent on that application, ordinarily within one month from the completion of the above proceedings".

6. It is the case of the Respondent No.5 J. Mitra & Co. that when on 23rd August 2006 the Controller rejected the pre-grant opposition filed by

SDL and in fact, in the order used the words "I hereby order to grant patent...", this was simultaneous with the rejection of the pre-grant opposition in terms of Rule 55(6) of the Rules and, therefore, 23rd August 2006 was the date on which the patent was granted to J. Mitra & Company.

7. On the very next day, i.e. 24th August 2006 Dr. Snehlata Gupte, the Petitioner in W.P. (C) No. 3516 of 2007, filed a pre-grant opposition *vis-a-vis* Patent No. 194639 filed by J. Mitra & Co. According to Dr. Gupte, in terms of the amendments introduced in Section 25(1) of the Act by way of the Patents (Amendment) Act, 2005 with effect from 1st January 2005, the time period for filing a pre-grant opposition stood extended till the grant of the patent. According to the Petitioner, the patent was not granted till such time it was not sealed and entered in the Register in terms of Section 43(1) of the Act. It is stated that as on the date of the filing of the pre-grant opposition by Dr. Gupte, i.e. 24th August 2006, the patent in favour of J. Mitra & Company had not been granted since it had not yet been sealed and entered in the Register.

8. On 5th September 2006, Dr. Girish Rindani, the Petitioner in Writ Petition (C) No. 5422 of 2007 filed a pre-grant opposition vis-à-vis the patent application of J.Mitra & Co..

9. It is not in dispute that the Patent No. 194638 granted to J. Mitra & Company was entered in the Register on 22nd September 2006. Patent

No. 194639 granted to it was entered in the Register on 27th September 2006. Certified copies of the relevant entries in the Register have been placed on record. In terms of Section 43(2) of the Act, the said two petitions of J. Mitra & Company were published in the Journal of the Patent Office dated 17th November 2006.

10. On 16th October 2006, the pre-grant opposition of both Petitioners were rejected by the Controller on the ground of maintainability. This was done, however, without affording the two Petitioners an opportunity of being heard. On 31st October 2006, both Petitioners wrote to the Controller seeking a hearing before rejection of the pre-grant oppositions. On 23rd January 2007, the Controller granted the Petitioners a hearing. Thereafter on 30th April 2007 and 3rd May 2007, written statements were filed and submissions were advanced by both the Petitioners before the Controller.

11. Writ Petition (C) Nos. 3516 and 3517 of 2007 were filed by Dr. Snehlata Gupte challenging the order dated 16th October 2006 with reference to the Patent No. 194639 and 194638 respectively. On 22nd May 2007, the Controller passed fresh orders rejecting the pre-grant oppositions of the Petitioners on the ground that the oppositions were time-barred. Both Petitioners i.e. Dr. Rindani and Dr. Gupte challenged the said order dated 22nd May 2007 by filing Writ Petition (C) Nos. 5422 and 5423 of 2007 respectively.

12. The above petitions have been resisted by Respondent No. 5 J. Mitra & Co. It is contended that the order of the Controller was consistent with the correct position in law. According to Respondent No.5, the filing of the two pre-grant oppositions by Dr. Gupte and Dr. Rindani was also an abuse of the process of law. It is alleged by J. Mitra & Co. that SDL, which is in the business of sale and purchase of various pharmaceuticals products, is a habitual infringer and is deliberately and consciously violating various intellectual properties of J. Mitra & Co. SDL is alleged to be continuing to infringe the rights of Respondent No.5 with impunity. It is contended that each and every product in respect of which J. Mitra & Co. has applied for and/or has been granted a patent is either being opposed or infringed by SDL.

13. Patent No. 194368 is for an invention titled "A Device for the detection of antibodies of Hepatitis C virus in human serum and plasma". Patent No. 194639 is for an invention titled "A device for the detection of Hepatitis C virus". After the grant of the aforementioned patents in its favour, J. Mitra & Co. filed Civil Suit (OS) No. 22020 of 2006 in this Court against Kesar Mendicaments (KM) and SDL for patent infringement. By a judgment dated 22nd February 2008, this Court granted an injunction restraining KM and SDL from manufacturing, selling, offering for sale their HCV Signal or any other product which was in infringement of J. Mitra & Co's Patent No. 194638. It is stated that in the said suit SDL has filed a counter claim for revocation of the patent.

Submissions of Counsel in the 1st Set of petitions [W.P. (C) No. 3516 of 2007 etc.]

14. Appearing for J. Mitra & Co., Ms.Pratibha Singh, learned counsel, submitted that both Dr. Snehlata Gupte and Dr. Rindani are connected to SDL. Dr. Gupte is stated to be running the Surat Raktadan Kendra, the Chairman of which is Mr. Pradeep K. Desai who is the Chairman/Managing Director of SDL. It is stated that Dr. Gupte was aware of SDL's opposition to J. Mitra & Co's patents. Ms. Singh pointed out that upon the said pre-grant opposition being rejected on 23rd August 2006 the patent had to proceed for registration. However, to continue the serial oppositions, first Dr.Gupte filed a pre-grant opposition on the very next day i.e. 24th August 2006. Dr. Rindani, who is also stated to be connected to SDL, filed a separate pre-grant opposition on 5th September 2006. It is submitted that the filing of serial oppositions by persons connected to SDL after its pre-grant opposition had been rejected was malafide and if such applications were permitted to be entertained, there would be no end to the filing of such pre-grant oppositions particularly since after the amendment to Section 25(1) in 2005, a pre-grant opposition can be filed by 'any person'. It is submitted that if the stand of the Petitioners is accepted, it would defeat the objective of the Act which is to grant a patent rather than refusing it.

15. Ms. Singh pointed out that in the rejoinder to its counter affidavit, the Petitioners do not deny that Dr. Gupte is connected to SDL. It is only stated that such averments are misleading "and that they have no bearing on the present case". It is further pointed out that the petitioners contend

in the rejoinder that "it is immaterial for the purposes of the present writ petition whether a person who files a pre-grant opposition is recorded to or not recorded who is interested in the concerned patent being opposed".

16. Referring to the decision in ***K.D. Sharma (2008) 12 SCC 481***, Ms.Singh submitted that the Petitioners have, by not disclosing their relationship with SDL, not come to the Court with clean hands and, therefore are disentitled to the reliefs prayed for in the writ petitions. Referring to the decisions in ***Bhagwanji Vishavji Thakkar v. Pravinchandra Jivanbhai Patadia (1995) 2 GLR 1438*** and ***Entertainment Network (India) Ltd. v. Super Cassette Industries Ltd. (2008) 13 SCC 30*** it is submitted that a purposive construction would have to be adopted and it has to be held that in terms of Rule 55 (6) of the Rules read with Section 43 (1) of the Act the patent is granted once an order to that effect is passed by the Controller simultaneous with the rejection of the first set of pre-grant oppositions which are decided by the Controller. It is submitted that there has to be an outer time limit for filing a pre-grant opposition which in any event cannot be beyond the date of the Controller passing an order on file granting the patent. The sealing and entering of the patent in the Register are mere ministerial acts which make no difference to the date of the grant of the patent.

17. Ms. Singh refers to an order dated 2nd March 2009 passed by the Supreme Court in SLP (Civil) No. 3522 of 2009 (***Indian Network For People with HIV/Aids v. F. Hoffmann-La Roche AG***) which arose from

an order dated 30th January 2009 passed by the Assistant Controller of Patents. This was heard with SLP (Civil) No. 29857 of 2008 filed against the judgment dated 2nd December 2008 of the Madras High Court reported as ***Indian Network For People with HIV/Aids v. F. Hoffmann-La Roche AG MIPR 2009 (2) 0036.*** By the said judgment the Madras High Court set aside an order granting Roche a patent without disposing of the pre-grant oppositions filed by the Indian Network for People with HIV/Aids under Section 25(1) of the Act. Thereafter by an order dated 30th January 2009, the Assistant Controller rejected the pre-grant opposition. The Supreme Court, without going into the merits of the contentions that the Petitioners were deprived of an opportunity of raising before the Controller numerous contentions on merits, observed that they could be given permission to file an affidavit and raise all contentions at the stage of post-grant oppositions which had already been filed and were pending before the Controller. On the strength of the above order, it is submitted by learned counsel for J. Mitra & Co. that SDL itself could file post-grant opposition before the Controller and, therefore, no prejudice was caused by the grant of patent to the Respondent No. 5 by the order dated 23rd August 2006. In any event, SDL has also filed a counter-claim in the suit seeking revocation of the patent.

18. Mr. Pravin Anand and Mr. J. Sagar, learned counsel for Dr. Gupte and Dr. Rindani, on the other hand, pointed out to the plea raised in the plaint in C.S. (OS) No.2020 of 2006 filed by the Respondent No.5 J.

Mitra & Co. there is a clear admission to the effect that the patent had been granted on 22nd September 2006. This was therefore the understanding of J.Mitra & Co. itself.

19. Learned counsel for the Petitioners also attacked the bonafides of J. Mitra & Co. alleging that it was an infringer which had applied for and obtained a plethora of patents which were in fact copies of patents and products available worldwide and in India. It is submitted that the two patents in question relate to a third and fourth generation device for the detection of HCV antibodies in the human serum and plasma. Both the patents were imitations of a patent obtained by a US company, EY Laboratories, in 1991. However, since EY Laboratories did not have a patent in India, proceedings could not be instituted against J. Mitra & Co. for infringement.

20. It is submitted by learned counsel for the petitioners that all claims of J. Mitra & Co. filed in the United States Patent Office had been rejected on the grounds of obviousness and insufficiency. It is pointed out by Mr. Anand that Respondent No. 5 had originally applied for the patents in question with 14 claims followed by reduction of claims to 7 after which the patent was published for opposition with the said 7 claims. When the patent was granted on 22nd September 2006, it was granted for 4 claims. Claim 1 of the 4 claims is stated to be different from the published Claim 1. Even after acknowledging this to be a mistake in its order dated 23rd August 2006, the Patent Office has not published the claims for

opposition. It is stated that after the order dated 23rd August 2006, the patent office was under obligation not to grant the patent within three months of the statutory period of appeal so that an aggrieved party could file an appeal. It is alleged that the entire process of grant of patent was done in a quick and clandestine manner so that no one would know about the same.

21. It is submitted by Mr. Anand that the diagnostics kit industry is a very small and close knit and "everyone knows everyone in this field". Claiming to be among the leading scientists in their field, the Petitioners state that "it is not only their duty but also their responsibility to ensure that no unscrupulous trader usurps rights of other parties or malafidely stops other parties involved in this field." It is submitted that the intention of the Petitioners is "not to stall the grant of patents but to try and ensure that no wrongful patents are granted to unscrupulous traders in the interest of the public". It is submitted that a patent is a complete monopolistic right and should be granted only after due consideration. It is for this reason that the legislature has built in various safeguards like pre-grant opposition, post-grant opposition, revocations, counter-claim for revocations and defences of revocation in a suit for infringement. It is stated that the words of the statute are clear and till such time the grant of the patent is made known by the publication in the official gazette, it cannot be said to have been granted in law. It is also pointed out that the interpretation canvassed by counsel for respondent No.5 was contrary to the current practice of the Controller's office and would lead to a great

deal of avoidable confusion.

Writ Petition (C) Nos. 10399, 10400 and 10450 of 2009 [2nd set of petitions]

22. The relevant facts are that Lalit Mahajan Respondent No.1 in all the above writ petitions filed three patent applications for grant of patents being Application Nos. 1688/Del/2007, 1689/Del/2007 on 8th August 2007. In Application No. 1688 of 2007, the invention related to a device for analysing the presence of Dengue IgG antibodies in human serum and plasma. Application No. 1689 of 2007 related to the invention of a kit for analysing the presence of dengue IgM antibodies in the human serum or plasma. Lalit Mahajan also filed two other applications being 74/Del/2005 and 75/Del/2005 on 12th January 2005 in relation to a Pan Malaria Stix and a Tetra Malaria Stix respectively for testing of malaria.

23. Lalit Mahajan's Application No. 1688/Del/2007 was published in the Journal on 31st August 2007. The patent was granted and was also sealed on 16th October 2008. A pre-grant opposition was filed by the petitioner Zephyr Biomedicals ('Zephyr') on 12th December 2008. The pre-grant opposition was rejected on 4th March 2009. This order was challenged by Zephyr in Writ Petition (C) No. 10399 of 2009.

24. Lalit Mahajan's Application No. 1689/Del/2007 was published on 7th September 2007. The patent was granted and sealed on 16th October 2008. The pre-grant opposition was filed by Zephyr on 12th December 2008. It was rejected on 4th March 2009. This order was challenged by

Zephyr in Writ Petition (C) No. 10400 of 2009.

25. Lalit Mahajan's Applications No. 74/Del/2005 and 75/Del/2005 were published on 2nd June 2006. The patent was granted and sealed on 16th October 2008. The pre-grant opposition was filed by Zephyr on 28th November 2008. It was rejected by the Controller on 16th March 2009. This order was challenged by Zephyr by filing Writ Petition (C) No. 10450 of 2009.

Submissions in the 2nd Set of petitions (by Zephyr)

26. The arguments advanced by Mr. Sanjeev Kumar Tiwari, learned counsel appearing for Zephyr against the orders of the Controller rejecting its pre-grant application on the ground of limitation were more or less similar to the arguments advanced by counsel appearing for Dr. Snehlata Gupte and Dr. Girish Rindani in relation to the patents granted to J. Mitra & Co.

27. In resisting the petitions, it was submitted by Mr. Maninder Singh, learned Senior counsel appearing for Lalit Mahajan that after the Amendment to the Act in 2005, the time period for filing a pre-grant opposition may have been removed but a reasonable interpretation has to be given to the amended Section 25 keeping in view the context. He places emphasis on the words "unless the context otherwise requires" occurring in the opening portion of Section 2 (1) of the Act and submits that the locus to challenge a patent that has been granted gets restricted to

a person interested. He submitted that considering that the grant of a patent is a recognition of the creative work of the inventer, and has to pass a fairly rigorous examination procedure through several stages which by its very nature is time consuming, a reasonable period as opposed to an indefinite open-ended period has to be given for the filing of a pre-grant opposition, which is by any person.

28. Mr. Maninder Singh pointed out that the scheme of the Act and the Rules indicated that the several acts leading to the grant of the patent certificate were to be performed within specific time periods. Referring to Rule 74 (2) of the Rules he submitted that a patent certificate is to be ordinarily issued within seven days from the date of grant of patent under Section 43. Under Rule 24, the period for which an application for patent shall not ordinarily be open to public under Section 11A(1) shall be 18 months from the date of filing of application or the date of priority of application, whichever is earlier. In terms of Rule 24-B (1)(i) a request for examination under Section 11B of the Act is made within 48 months from the date of priority of the application or from the date of filing of the application whichever is earlier. Under Rule 24-B(2) (i), the period within which the Controller shall refer the application and specification and other documents to the Examiner where such request for examination has been made shall ordinarily be within one month from the date of its publication or within one month from the date of examination, whichever is later. Under Rule 24-B (2)(ii), the Examiner should ordinarily submit the report within one month but not exceeding

three months from the date of reference and thereafter the Controller should, in accordance with Rule 24-B (2)(iii), dispose of the report within one month of its receipt. Under Rule 24-B (3), the first examination report is sent to the applicant within six months from the date of request for examination or publication whichever is later and under Rule 24-B (4), the time for putting an application in order for grant under Section 21 shall be twelve months from the date on which the first statement of objection is issued to the applicant to comply with the requirements. It is submitted that given the specified time limits prescribed at the stage of scrutiny of the applications for grant of patent and given the fact that the grant of a patent relates back to the date on which the application is filed, the patentee actually loses much of this period for working the patent. Given the fact that an application for grant of patent can get published only after a period of 18 months and that the Controller cannot take up the application for examination for a period of six months after its publication, it is necessary to read a reasonable time limit for filing a pre-grant opposition. Reference is made to the decisions in ***Surjit Singh Kalra v. Union of India (1991) 2 SCC 87*** and ***Directorate of Enforcement v. Deepak Mahajan AIR 1994 SC 1775***.

Writ Petition (C) No. 1020 of 2010

29. The petitioner Tibotec Pharmaceuticals ('Tibotec') filed its application for grant of patent on 11th June 2004 for an invention titled 'Combination of Cytochome P_{450} Dependent Protease Inhibitors'. The

first examination report was issued on 14th March 2007. The application was published on 30th November 2007 in terms of Section 11A of the Act. After considering the response of the Petitioner in reply to the first examination report, the Controller issued a letter to the Petitioner on 28th March 2008 to the following effect:

> "Your above Application for patent has been found in order for grant. However, the Patent Certificate will be issued only after processing of the Application under Section 11(a) *[sic 11A]* and completion of the statutory limit and disposal of pre-grant opposition, if any, under Section 25(1) of the Act."

30. The petitioner's case is that on 30th May 2008, the mandatory period of six months in terms of Rule 55(1-A) of the Rules and the three conditions in the aforementioned letter stood satisfied. According to the Petitioner, the patent was deemed to have been granted from such date.

31. On 26th June 2008, Cipla Ltd. filed a pre-grant representation/ opposition. This was notified to the Petitioner from the Delhi Office of the Controller. The Petitioner, by its letter dated 21st October 2008, pointed out to the Controller that the pre-grant opposition was time-barred. The Petitioner also filed an interlocutory petition dated 10th November 2008 praying for issuance of a patent certificate in its favour and for rejecting the opposition filed by Cipla Ltd. Thereafter the Petitioner also filed an affidavit of evidence on 7th January 2009 of one Professor David John Back.

32. The Petitioner and Cipla Ltd. were heard by the Assistant Controller of Patents on 9th January 2009 and written submissions were filed by them on 27th March 2009. By an order dated 30th March 2009, the Assistant Controller allowed the pre-grant opposition and refused to the Petitioner the grant of the patent on the ground of lack of inventive step. The Controller's order dated 30th March 2009 has been challenged by Tibotec in this petition. Among the grounds raised in this petition is that the pre-grant opposition filed after 30th May 2008 was not maintainable.

Submissions of Counsel in Tibotec's petition

33. Mr. Rajiv Nayyar, learned Senior counsel appearing for the Petitioner Tibotec submitted that there was a distinction between the 'issuance' of a patent certificate under Rule 74 and the 'grant' of patent for the purposes of Section 43. He also referred to the impugned order passed by the Assistant Controller where it was observed that "there was no impediment on 30th May 2008 to the issuance of the patent certificate and that the Patent Office should have done so within seven days of 30th May 2008 as the application was published on 30th November 2007 and six months period was over on 30th May 2008". It was further observed in the impugned order that the grant of patent by the Controller and the subsequent issuance of letters of patent have taken more time than it could have taken ordinarily but that did not preclude the filing of a pre-grant opposition. It is accordingly submitted that for all practical purposes the effective date of grant of the patent should be 30th May 2008 or the very next day thereafter.

34. Mr. Majumdar, learned counsel appearing for Cipla Ltd. submitted that at the stage of filing of the application and its examination in initial phase by the Controller, there was no third party. The Controller acts as a fact finding authority. Section 3 of the Act sets out the grounds for refusal. If the patent is refused, the order is relatable to Section 15 of the Act. The Controller could ask for an amendment to be made even at that stage. The intimation that the patent is in order is not by itself a grant of patent. This is an order relatable to Section 15 of the Act. According to him, the stage of Section 43 for grant of patent is reached only after completion of the processes envisaged by Section 15 of the Act. Under Section 45, the date of patent is already a fixed date since under Section 45 (1) "every patent shall be dated as of the date on which the application for patent was filed". It is this date that is entered in the Register. He pointed out that under Rule 80 to keep a patent in force, the renewal fees specified in the First Schedule shall be payable at the expiration of the second year from the date of the patent and the period for payment of renewal fees may be extended up to six months. So the date of patent becomes critical for the payment of renewal fees. Where an applicant has not paid renewal fees, it means that he is aware that he has not been granted a patent.

35. Mr. Majumdar pointed out that Under Rule 122, the Controller can correct clerical errors. Likewise, under Section 146 the Controller can call for information regarding the commercial working of the patent within two months from the date of such notice. Notwithstanding this,

under Section 146(2) every patent holder has to furnish statements in such manner and form and in not less than six months as may be prescribed as to the extent to which the patented invention has been worked on a commercial scale in India. If no such reports are filed, then it is plain that no patent has been granted. The working of the patent arises only where it is granted. Mr. Majumdar pointed out that under Rule 130 an application for review of the Controller's order has to be made within one month from the date of communication of the decision to the applicant.

36. It is submitted by Mr. Majumdar that in the instant case there was no presumption of grant of patent only on the basis of the letter dated 28th March 2008 as it was only an informal intimation to the Petitioner which was in fact not required to be made in law. It is only as a long standing practice that the Controller has been issuing such communications but there is no guarantee that patent would be granted only on account of such communication. Secondly, without the completion of the procedure envisaged under Section 25(1) and Section 11A, there can be no grant of a patent. It is submitted that for the purposes of the Act "the date of grant of the patent is the date on which the Respondent authorities pass the order of grant. It is only after such an order is passed, that a patent is treated as granted no matter when the certificate of grant is issued or when the grant is recorded or notified." It is accordingly submitted that as on the date of the filing of pre-grant opposition, no grant of patent had taken place as envisaged by the Act.

37. The writ petition is also resisted on the ground of laches. It is stated that the Petitioner chose to challenge the order dated 30th March 2009 only on 22nd January 2010. Reliance is placed on the judgment of the Supreme Court in ***State of M.P. v. Nandlal Jaiswal (1986) 4 SCC 566***.

When can a patent be said to be granted?

38. The common question that arises in all these petitions is when can it be said that a patent has been granted? Section 2 (1) of the Act opens with the words "unless the context otherwise requires". This has to be read with Section 2 (1) (m) which defines a 'patent' as "a patent for any invention granted under this Act". The date of grant of patent is critical for determining the time within which a pre-grant opposition has to be filed in terms of Section 25(1) of the Act. After the amendment to the Act and in particular to Section 25 (1) with effect from 1st January 2005, a significant change has been brought in this regard. Prior to its amendment, under Section 25(1) the pre-grant opposition had to be filed within four months from the date of advertisement of the acceptance of the complete specification. This advertisement in the official gazette of the acceptance of complete specification was under Section 23 of the Act, prior to its amendment. A further maximum period of one month could be allowed by the Controller for making the pre-grant opposition. Such pre-grant opposition could be made only by a "person interested".

39. The significant change brought about by the amendment to Section 25 in 2005 is that the pre-grant 'representation' (or opposition) against

the grant of patent can be made by "any person". The publication of the complete specification now takes place under Section 11A of the Act. Under Rule 24 of the Patent Rules 2003 the publication happens not earlier than 18 months from the date of filing of the application or the date of priority of the application, whichever is earlier.

40. There are specific time limits for the steps to be taken for the acceptance of the complete specification for publication by the Controller. This is followed by a request made by the applicant for examination in terms of Section 11-B of the Act. This is followed by the examination of the application under Section 12 of the Act which has to take place within the specified time limit as prescribed in Rule 24-B of the Rules. Without going into the specific details of this time period, for the purposes of the present petitions it is sufficient to note that where it is intended that there should be a specific time limit within which a step has to be taken either by the applicant for the grant of patent or by the Controller then such time limit is clearly indicated in the Act and the Rules.

41. There is another provision which is relevant in this context. Under Rule 55(1-A), no patent shall be granted before the expiry of a period of six months from the date of publication of the application under Section 11A. As a result, at least for a period of 2 years after filing of the application for grant of patent, no patent can be granted. It is during this period that the steps for examination of the patent in terms of Section 12

and thereafter the consideration by the Controller of the report of the Examiner under Section 14 followed by amendments, if any, are all undertaken. It is during this time also that the pre-grant opposition is expected to be filed.

42. The fact of the acceptance of the complete specification, as indicated by the applicant for grant of a patent, having been accepted for publication is evident from the advertisement of such specification in the Patents Journal in terms of Section 11A of the Act. Therefore, any person who is seeking to object to the grant of the patent is expected to keep the track of publication of such complete specification. This Court has been informed that publication also takes place on the website, in addition to being published in the Journal.

43. There is a further time restriction. Under Rule 24, the period for which an application for patent "shall not ordinarily be open to public under sub-section (1) of Section 11-A shall be 18 months from the date of filing of the application or the date of the priority of the application, whichever is earlier." In effect, therefore, it will not be possible for a person seeking to object to the grant of a patent to make 'representation' earlier than a period of 18 months after the date of the filing of such application. In any event since in terms of Rule 55(1-A) no patent can be granted before the expiry of a period of six months from the date of publication and the Controller is expected to publish the application within one month from the date of expiry of the said period, there is at

least a period of six months thereafter for the opposer to file the representation.

44. Given the above scheme, the amendment in 2005 to Section 25 of the Act was apparently made with a view to extending the time period within which an opposition to the grant of patent had to be made. Under the pre-amended Section 25, the persons interested in opposing the grant of patent had to necessarily file such opposition within four months, a period extendable only by one month, whereas under the amended Section 25 that period is clearly extended at least up to six months.

45. Given the practical aspect of the matter, no patent is usually granted immediately on the expiry of six months from the date of publication of the application. It is usually a much longer period. The amendment in Section 25 clearly, therefore, enlarges the time for filing of a pre-grant opposition.

46. The thrust of the Act is that the mere grant of patent does not ensure its validity. This is plain from Section 13(4) of the Act. Even the grant of a patent does not ensure that there will be no further challenge. Under Section 25 (2) of the Act, against the grant of a patent and the rejection of a pre-grant opposition, a post-grant opposition can be filed by any person interested before the Intellectual Property Appellate Board (IPAB). An application for revocation can be filed before the IPAB by any person interested under Section 64 of the Act. If the patent holder

files a suit for infringement the Defendant in such a suit can by way of a counter claim challenge the validity of grant of patent (Section 107 read with Section 64 of the Act).

47. The scheme of the Patents Act, therefore, is such that there are several hurdles to cross before the grant of a patent can be said to be final. There are two other provisions that require to be noticed. Under Section 53, term of every patent "shall be 20 years from the date of filing of the application for the patent". Under Section 45 "every patent shall be dated as of the date on which the application for patent was filed". Since this date cannot possibly be changed, a patent holder may end up not being able to work the patent during the time when it remains challenged, or its grant is stayed or when the patent holder is not confident to exploit it commercially till all the challenges to its validity are overcome. Since there is already a loss of time for the patent holder in the above processes, the time period envisaged by Section 25(1) of the Act for filing of a pre-grant opposition cannot possibly be liberally construed, notwithstanding that there is no specific time period mentioned therein. The outer limit is the date on which the patent is granted.

48. A careful look at Section 43 of the Act shows that in the first place an application for patent has to be found "to be in order for grant". This includes the period during which complete specification is accepted for publication in terms of Section 11A followed by the examination of the

patent which takes place within the time-frame set out in Rule 24-B of the Rules. A refusal at that stage will be governed by Section 15 of the Act. If the patent is not refused at that stage and no pre-grant opposition has been filed, the patent proceeds for registration.

49. Where any pre-grant opposition is filed in the form of a representation under Section 25(1) of the Act, then it has to be examined following the procedure outlined in Rule 55 (1). The representation should include a statement of evidence and a request for hearing. Under Rule 55 (2), the Controller is to consider such representation "only when a request for examination of an application has been filed". A notice is given to the applicant "for grant of patent" where the Controller forms an opinion, upon considering the pre-grant opposition, that the patent should be refused or amended. This happens under Rule 55 (3). The applicant for grant of patent then responds to the notice by filing his statement of evidence under Rule 55(4) within three months from the date of the notice. Under Rule 55 (5), the Controller may, on consideration of the statement and evidence filed by the applicant, either refuse to grant a patent or require the complete specification to be amended before the patent is granted.

50. Then we have Rule 55 (6) which is relied upon extensively by the learned counsel for the parties and which reads as under:

> "55(6) After considering the representation and submission made during the hearing if so requested, the Controller shall proceed further simultaneously

> either rejecting the representation and granting the patent or accepting the representation and refusing the grant of patent on that application, ordinarily within one month from the completion of above proceedings."

51. It is plain, therefore, that once the pre-grant opposition is decided, the Controller simultaneously proceeds to either reject such representation and grant the patent or accept the representation and refuse the patent. The language of Rule 55 (6) leaves no manner of doubt that these two actions i.e. the consideration of the representation and the final decision on the application for grant of patent take place simultaneously.

52. It is possible that there are more than one representations by way of pre-grant opposition. Ideally, the Controller will bunch them together, hear them sequentially and express a final opinion on each of them as far as practicable, on the same date. It is like a court hearing a batch of petitions seeking similar relief. It is possible that even after the hearing on one bunch of pre-grant oppositions has concluded and order has been reserved thereon, another pre-grant opposition or a set of oppositions is filed prior to the pronouncement by the Controller of the decision on the first set of pre-grant oppositions. Then the scheme of the Act requires the Controller to deal with such subsequently filed pre-grant oppositions as well. However, once a final decision is pronounced on the pre-grant oppositions, the Controller should, consistent with the requirement of Rule 55 (6) simultaneously pronounce the decision on the application for

grant of patent. The Controller should clearly state, simultaneously, that the application is found in order and that the patent is being granted.

53. Reverting to Section 43 (1), the language used is that "a patent shall be granted as expeditiously as possible." Therefore the patent has to be granted once it is found that either the application has not been refused in terms of Section 25(1) read with Rule 55 (6) or it has not been found in contravention of any provision of the Act. In other words, at this stage the Controller is not expected to delay the pronouncement of the final decision. The thrust of Section 43 (1) and Rule 55 (6) is that of expeditious decision making by the Controller. Section 43 (1) indicates that the "patent shall be granted.....with the seal of the patent office and the date on which the patent is granted shall be entered in the Register". When read continuously, the language of Section 43 (1) does appear to indicate that it is the decision taken by the Controller on file which is the determining event for ascertaining 'the date of grant of patent.' The sealing of the patent and the entering of the patent in the Register obviously follows the act of the Controller passing an order to the effect that the patent has been granted. In other words, the sealing of the patent and the entering of the patent in the Register are, given the language of Section 43 (1) of the Act, intended to be ministerial acts evidencing the grant of patent, which is at a stage anterior to those ministerial acts.

54. Section 43 (2) talks of the publishing by the Controller of "the fact that the patent has been granted". The language of Section 43 (2) is plain.

The act of publication clearly follows the grant of patent. Per force the grant of patent is anterior to the publication and has to necessarily be at a point earlier to the publication. It is, therefore, not possible to agree with the submissions made on behalf of the pre-grant opposers in the present batch of cases that the patent cannot be said to have been granted till this fact is published in the official gazette. Given that the interpretation of the provision has to be contextual, this Court holds that the date of grant of patent is the date on which the Controller passes an order to that effect on the file. This Court now proceeds to deal with the apprehended practical problems that the office of the Controller may face on account of the interpretation placed by this Court on Section 43 of the Act.

Previous announcement of the date of pronouncement of orders

55. It was submitted that an order does not become effective till such time it is communicated or made known, because it then gives valuable rights to both the holder of the patent as well as any person interested in opposing the grant of patent. While it is correct that the knowledge of an order granting a patent is important from the point of view of both the applicant for grant of patent and the opposer, it is unlikely that the applicant is not present, either in person or through a representative, on the date on which an order is passed by the Controller or the Assistant Controller granting the patent. In order to obviate any difficulty on this score, this Court would like to impress upon the Controller and the Assistant Controllers to list cases for pronouncement of orders and make

that fact known by publishing a 'cause list' of such cases under the heading "for pronouncement of orders" the previous evening both on the website as well the notice Board of the Office of the Controller, just as it happens in the Courts. Therefore both the applicant for grant of patent as well as the pre-grant opposer would be aware of the date on which the orders are to be pronounced. Since it will be at least the previous evening on which the list is available on the website and also placed on the notice board of the Office of the Controller, there will be sufficient notice to such parties.

Dealing with Review Petitions

56. If an approach similar to that followed by courts in hearing cases and passing orders thereon is adopted, much of the problems faced by the Controller can be resolved. For instance, once a final order is pronounced on a petition by the Court, then no further applications whether for intervention, impleadment, opposition or any other relief is entertained by such court. The only exception is the filing of a review application by a party to the case. Likewise, once a final order granting patent is passed by the Controller on the file, there is no question of thereafter entertaining a pre-grant opposition as it is barred under Section 25 (1) with no discretion given to the Controller. If a review petition is filed under Section 77 (1) (f) read with Rule 130, it will be by those who are parties to the order of the Controller or the Assistant Controller the review of which is sought. If such review petition is entertained, and the order is recalled then as it happens with judicial orders by courts, the

clock is put back to the stage where the original order was passed and all legal consequences would flow. This by no means alters the fact that the date of the grant of patent is the date on which the Controller or Assistant Controller passes an order on file granting the patent.

Wording of the final order granting patent

57. There is one other aspect which requires to be adverted to, which is the wording of the order granting patent. The Controller should pass the 'final order' saying that "the patent is hereby granted" only after all amendments have been carried out to the satisfaction of the Controller by the applicant. The Controller will, therefore, not dispose of the application or pass a final order till such time the Applicant has not carried out the amendments to the satisfaction of the Controller. It will have to be a time-bound order for that purpose. A failure to carry out the amendment to the specification as directed by the Controller or Assistant Controller within the time granted might result in rejection of the patent which contingency is covered under S. 15 of the Act.

Placing the digitally signed orders on the net

58. In order to minimise any unnecessary time-gap between the signing by the Controller or Assistant Controller of the final order granting patent and the 'publishing' of such order, it is directed that every final order granting the patent passed by the Controller or the Assistant Controller, as the case may be, should be digitally signed by the Controller or the Assistant Controller and placed on the website of the

Controller on the very same day without any unnecessary delay. The procedure in this regard be streamlined for being followed uniformly by all the officers and necessary instructions/practice directions should be issued by the Controller.

Rights of post-grant opposers protected

59. The rights of such of those post-grant opposers who are persons 'interested' are sufficiently protected under Section 25(2). Since the period of limitation for filing a post-grant opposition is one month "from the date of publication of grant of a patent", the legislature has, therefore, already taken care of the interests of the post-grant opposers and made the period of limitation run only from the date of publication of the grant of patent which is expected to take place in terms of Section 43 (2) of the Act.

60. It must be understood that prior to the amendment in Section 25 in the year 2005, even a pre-grant opposition could be filed only by any person 'interested'. It is only after the amendment in 2005 that any person can now file the pre-grant opposition. The Act, therefore, makes a distinction between an opposer at the stage of pre-grant opposition, who could be 'any' person, and the opposer at the post-grant stage, who could only be a 'person interested'. The legislative intent is that the right to file a post-grant opposition under Section 25 (2) is restricted to any person interested. The fact that the restriction of the time to file a pre-grant which results from the interpretation given by this court may

impact the two classes of pre-grant opposers differently is consistent with the above distinction.

61. While restricting the time period for filing a pre-grant opposition to the time when such patent is granted may inconvenience "any person" who wishes to file a pre-grant opposition, it is certainly not going to inconvenience a "person interested". Even if such 'interested' person misses the bus at the pre-grant stage, the right of such person to oppose at the post-grant stage is preserved under Section 25 (2) of the Act. Therefore, the interpretation placed by this Court certainly cannot prejudice a person interested in opposing the grant of patent. As regards any person, other than a person interested, the legislative intent appears to restrict the scope of such person confined to the stage of pre-grant. It would be necessary, therefore, for such person (who may not be an 'interested' person) to be vigilant and to watch out for the date of advertisement of the complete specification and understand that the limitation for filing a pre-grant opposition begins to run from that date onwards.

Need to discourage filing of serial oppositions

62. Accepting the submissions of pre-grant opposers in the present batch of cases that till such time the grant of patent is not entered in the Register, and notwithstanding that an order has already been passed on file by the Controller granting a patent, they can continue to file the pre-grant representations in terms of Section 25 (1) might result in the

phenomenon of 'serial oppositions', as has happened in the case of the applications filed opposing the patents applied for by J Mitra & Company. Within a day after the Controller rejected the pre-grant opposition filed by SDL, Dr. Gupte filed a pre-grant opposition. Soon thereafter Dr. Rindani filed his pre-grant opposition. In other words, if this Court were to hold that the date of the grant of patent is only the date on which the factum of such grant is entered in the Register, then there would be no end to filing of pre-grant oppositions as long as on account of some delay on the administrative side the factum of grant of patent is not entered in the Register. Given the scheme of the Act, and the number of hurdles an applicant for grant of a patent has to overcome, even if the application is found to be 'in order for grant', it is not possible to accept the interpretation put forth by the pre-grant opposers.

63. Then we have one more situation as in the case of Tibotec. The mere communication by the Controller to the applicant for grant of patent that the application has been found in order subject of course to the decision on pre-grant opposition, if any filed, cannot be construed as the official decision of the Controller granting the patent. There has to be an order on file passed by the Controller holding that the patent has been found in order and that patent is granted. Until and unless such an order is passed on file, it cannot be said that the patent has been granted.

64. In adopting the above interpretation of Section 43 and other related provisions of the Act this Court has kept in view the following

observations of the Supreme court in ***Entertainment Network (India) Ltd. v. Super Cassette Industries Ltd. (2008) 13 SCC 30,*** in paras 137 and 139, which though made in the context of the Copyright Act may well apply to the present cases as well:

> "137. Furthermore, the court while interpreting a statute will put itself in the armchair of the reasonable legislature, all statutes must be presumed to be reasonable. It is now trite law that literal interpretation should be avoided when it leads to absurdity.....
>
> 139. In this case, however, the meaning of the statute is neither clear nor sensible. It is a statute where a purposive construction is warranted. It is a case where sub-section (2) should be kept confined to clause (a) for that purpose. The statute has to be read down. It is not a case of improper interpolation so as to take away a primary purpose of the legislative intent. It is expedient to give effect to the intent of the statute. This itself says that creases can be ironed out. While undertaking the said exercise, the Court's endeavour would be to give a meaning to the provisions and not render it otiose.... "

65. This court, for the aforementioned reasons, holds that for the purposes of Section 43 (1) of the Act, the patent is 'granted' on the date on which the Controller passes a final order to that effect on the file.

Conclusions: First set of petitions

66. The facts in the first set of petitions have already been discussed. In the first set of petitions, the order dated 23rd August 2006 passed by the

Controller, while dismissing the pre-grant opposition that "I hereby order to grant patent (Patent No. 194638) on batch Application No. 593/Del/2000" must be taken to be the date on which the patent was granted. Although, as pointed out by learned counsel for the Petitioners, the said order requires the applicant (J.Mitra & Co.) to amend the specification to include a cross reference, it does not materially affect the factum of the grant of patent. The fact that it was entered in the Register on 22nd September 2006 would not make any difference to this position. Further the statement by J.Mitra & Co. in the plaint in C.S. (OS)No.2020 of 2006 that the patent was granted on 22nd September 2006 would also not make a difference to the position in law. The date of the grant of the patent in question to J.Mitra & Co. should be taken as 23rd August 2006.

67. Consequently, any pre-grant opposition filed after 23rd August 2006 was clearly barred under Section 25 (1) of the Act. Therefore the impugned orders of the Controller rejecting the pre-grant oppositions filed by the petitioners are valid and do not call for interference.

68. Notwithstanding the above conclusion, this Court also holds that the filing of pre-grant opposition by Dr. Gupte and Dr. Rindani subsequent to 23rd August 2006 was, apart from being not maintainable in law, also an abuse of the process of law. This Court is not convinced of the bonafides of either of the Petitioners. There has not been any effective denial of the fact that both Petitioners were associated with SDL in some capacity or the other. It is impossible to comprehend that either of these

Petitioners was unaware of the fact that the filing of the pre-grant opposition by SDL or of the fact that it has been taken up for consideration by the Controller of Patents or of the fact that the order on such pre-grant opposition were pending.

69. Even according to these Petitioners, the community of those interested in the development of the test kits is a small one and every step taken by each competitor would be known to the other. This itself belies the fact that either Dr. Gupte or Dr. Rindani was unaware of the pre-grant oppositions already filed by SDL in relation to the patent applications of J. Mitra & Company. Given the long history of litigation between the parties, it creates further doubts on the bonafides of these two Petitioners.

70. For all of the above reasons, this Court finds absolutely no merit in the four Writ Petition (C) Nos.3516, 3517, 5422 and 5423 of 2007 in the first set and they are dismissed with costs of Rs.20,000/- each which will be paid by each of the Petitioners to J. Mitra & Co. within a period of four weeks.

Conclusions: Second set of petitions

71. In the second set of petitions by Zephyr, the patent in favour of Talit Mahajan was granted and sealed on 16th October 2008 whereas the pre-grant opposition was filed in one case on 28th November 2008 and in two other cases on 12th December 2008. There can be no manner of doubt that the filing of such pre-grant opposition was subsequent to the grant of

patent and was barred under Section 25(1) of the Act. There is absolutely, therefore, no error in the orders passed by the Controller rejecting the pre-grant oppositions.

72. The three Writ Petition (C) Nos. 10399, 10400 and 10450 of 2009 are dismissed with costs of Rs. 20,000/- each which will be paid by the Petitioner Zephyr to Respondent No.1 Lalit Mahajan within four weeks from today.

Conclusions in Writ Petition (C) No. 1020 of 2010

73. In view of what has been held above, the communication dated 28th March 2008 written by the Controller to the Petitioner cannot be held to be the date of grant of the patent. It was merely a communication stating that the application has been found in order for grant. It is not an order to grant patent. Therefore, when the pre-grant opposition was filed by Cipla Ltd on 26th June 2008 there was no grant of patent by that date and, therefore, such application was maintainable in terms of Section 25(1) of the Act. Although there is an observation by the Controller that after 30th May 2008 there was no legal impediment in the Controller passing an order for grant of patent because on that date there was no pre-grant opposition, the fact remains that on file no such order was passed. It cannot, therefore, be said that the filing of the pre-grant opposition on 26th June 2008 by Cipla was time barred.

74. There is yet another ground for not entertaining the plea of the

Petitioner. The challenge is to an order refusing the grant of patent which is relatable to Section 15 of the Act. This is appealable before the IPAB under Section 117A of the Act as has been held by this Court in ***UCB Farchim Sa v. Cipla Ltd. 167 (2010) DLT 459***.

75. For the aforementioned reasons, the writ petition is dismissed with costs of Rs.20,000/- which will be paid by the Petitioner to Respondent Cipla Ltd. within four weeks.

Directions to the Controller of Patents

76. The Controller of Patents will, within a period of two weeks from today issue necessary practice directions/instructions to all officers and concerned authorities in terms of this judgment and particularly in terms of what has been held by this Court in paras 55 to 58 thereof. Such practice directions/ instructions will also be placed simultaneously on the website of the Controller of Patents. They will be prospective in the sense they will not result in the reopening of orders granting patent that have attained finality.

77. A certified copy of this order will be delivered to the Controller of Patents by a special messenger forthwith for compliance.

S. MURALIDHAR,J.

JULY 15, 2010
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- Fresh CM 10281/10 for extension of time (p- 433)