

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on: 30.01.2015

+ **WP(C) 687/2015 and CM No.1222/2015**

GILEAD PHARMASSET, LLC

..... PETITIONER

VERSUS

UNION OF INDIA & ANR

..... RESPONDENTS

Advocates who appeared in this case:

For the Petitioner : Ms. Pratibha M. Singh, Sr. Advocate with Mr. Sanjeev Kumar Tiwari, Ms. Valini Panta, Mr. Prateek Sehrawat and Mr. Amrish Tiwari, Advocates

For the Respondents: Mr. Manik Dogra, Sr. Govt. Counsel with Mr. Krishanu Barua and Mr. Nitya Sharma, Advocates for R-1
Mr. Anand Grover, Sr. Advocate with Ms. Geetanjali Sharma, Advocate for the opponent – SANKALP REHABILITATION TRUST
Mr. Rajeshwari H. Advocate for opponents – BDR PHARMA and NATCO PHARMA
Mr. Rajshekhar Rao, Ms. Tanya Verma and Mr. Rajeshwar Nandan, Advocates for opponent - IMAK

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER,J

1. The instant writ petition has been filed to assail the order dated 13.01.2015, passed by respondent no.2. There is also a prayer made that the matter be remanded to the aforementioned authority so that the petitioner's application for grant of patent can be considered afresh along with pre-grant

oppositions filed qua the patent in issue.

2. The limited ground on which challenge is laid to the impugned order for the moment is that there has been a complete breach of principles of natural justice in as much as in passing the impugned order, respondent no.2 has taken into account the grounds of opposition and material supplied by parties which had submitted applications for pre-grant opposition.

2.1 Notice in this writ petition was issued on 22.01.2015. Mr. Dogra, who appeared for the respondents on that date accepted notice and sought time to take instructions in the matter. It was made clear that if he were to receive instructions, to resist the petition, he would file a counter affidavit, on behalf of the respondents, before the next date of hearing. Accordingly, a short affidavit-in-reply was filed on behalf of respondent no.2.

2.2 Apart from Mr. Dogra, Mr. Anand Grover, Sr. Advocate along with Ms. Geetanjali Sharma, Advocate; sought to intervene for Sankalp Rehabilitation Trust. Similarly, Ms. Rajeshwari H. Advocate, sought to represent BDR Pharma and NATCO Pharma. Mr. Rajshekhar Rao, Ms. Tanya Verma and Mr. Rajeshwar Nandan, Advocates sought to intervene on behalf of IMAK. None of these entities, are arrayed as parties to the petition. In so far as NATCO Pharma and IMAK are concerned, they had filed pre-grant oppositions with respondent no.2, as noticed in the impugned order. In so far as other entities are concerned, they appear to be those, which intend to file or have filed, in the interregnum, applications under Section 25 of the Patents Act, 1970 (in short the Patents Act), to oppose grant of patent to the petitioner.

3. In support of the petition, arguments on behalf of the petitioner were addressed by Ms. Pratibha M. Singh, while arguments on behalf of the respondents were addressed by Mr. Dogra. Both counsels made their

submissions, in line with, the stand taken, in their respective pleadings.

3.1 Broadly, it was Ms.Singh's submission that in passing the impugned order, respondent no.2 had taken recourse to the material and objections, which were placed on record by the applicants, who had filed their applications to oppose the grant of patent to the petitioner, under Section 25 of the Act. Ms. Singh submitted that this aspect, was clearly demonstrable from the fact that, not only the grounds taken in opposition and documents cited were considered, while passing the impugned order, but even, the typographical errors contained in the applications, filed under Section 25 of the Act, got incorporated in the said order.

3.2 It was, therefore, Ms.Singh's submission that once, notice was issued to the petitioner for a hearing under Section 14 of the Act, to consider, whether it ought to be granted a patent as requested, respondent no.2, should also have heard the petitioner qua objections raised in the applications filed, under Section 25 of the Act. The learned counsel contended that, while documents in opposition filed by the entities, which had preferred applications under Section 25 of the Act were supplied, no opportunity, was given, to meet the objections raised by them.

3.3 It was Ms. Singh's submission that, the impugned order, had created a peculiar situation whereby, while it had returned a finding that the claims presented by the petitioner represented "novelty and inventive steps", it sustained, the challenge, under Section 3 (d) of the Act, though the applicants, which had opposed grant of patent, had raised objections, on both counts.

3.4 It was Ms. Singh's contention that the stand taken by the respondents, in their counter affidavit, that the, impugned order, was passed without relying upon the objections and / or the material filed by the applicants

opposing the grant of patent, was not only factually incorrect but also legally untenable.

3.5 The learned counsel submitted that the fact that, the said material, was available to respondent no.2, had itself the potentiality of introducing a bias qua the petitioner, and thus would vitiate, the entire proceedings.

3.6 It was further submitted that the impugned order contained internal contradictions, in as much as, while respondent no.2 has observed that the applications filed under Section 25 of the Act had been rendered infructuous, in view of rejection of the request for grant of patent, the said order also alludes to the fact, that the pre-grant opposition is “disposed off in favour of the opponent”.

4. Mr. Dogra, on the other hand, not only challenged the maintainability of the writ petition but also emphasised the fact that the exercise carried out by respondent no.2, under Section 14 and 15 of the Act, is quite different, from that, which he carries out while hearing applications filed under Section 25 of the Act. It was Mr. Dogra’s submission that, while the material and / or objections filed by entities, which had preferred applications under Section 25 of the Act, was supplied to the petitioner, respondent no.2 did not rely upon the same, while passing the impugned order. In sum, Mr. Dogra sought to defend the manner, in which, respondent no.2, had proceeded to pass the impugned order.

REASONS

4.1 I have heard the learned counsel for the parties. It is not in dispute that the petitioner had filed an application for grant of patent qua which it had been issued a priority date of 30.05.2003. The said application, was filed, on 27.12.2005. Upon the petitioner making a request for examination, in terms of Section 11B of the Act; a First Examination Report (in short

FER), was generated by the patent office, on 06.04.2009.

4.2 Qua the FER, a detailed response was prepared and filed by the petitioner, on 18.03.2010.

4.3 While the petitioner was following with respondent no.2, for grant of hearing for consideration of the FER, two entities by the name of NATCO Pharma Ltd. (in short NATCO) and Delhi Network of Positive People + IMAK (in short IMAK) filed their applications for pre-grant opposition, under Section 25 of the Act; these applications were filed on 13.03.2014 and 17.03.2014 respectively.

4.4 On 07.05.2014, a notice was received from the patent office, fixing a hearing in the matter on 30.05.2014. The petitioner, however, made a request for rescheduling the date of hearing vide a communication sent by its attorney dated 14.05.2014. The hearing was rescheduled for 01.07.2014.

4.5 It is the petitioner's case that they became aware for the first time that, a pre-grant opposition had been filed when, they received a letter dated 17.06.2014, from the attorneys of IMAK. As a matter of fact, in the said letter, an objection was raised that grant of hearing to the petitioner under Section 14 of the Act would be in contravention of the statute, in view of the pendency of its application, under Section 25 of the Act. In other words, IMAK was also seeking a simultaneous hearing qua proceedings under Sections 14 and 25 of the Act.

4.6 It is in this context that respondent no.2, rescheduled the hearing in the matter to 24.07.2014. Evidently, no notice was issued to the petitioner by respondent no.2 in the pre-grant oppositions filed by NATCO and IMAK.

4.7 Post the hearing, the impugned order was passed, as indicated above, on 13.01.2015, after more than five (5) months had elapsed since the date of hearing.

5. In the background of the aforesaid facts, in so far as the present writ petition is concerned, two aspects need to be adjudicated upon and addressed by me.

5.1 First, whether the writ petition would be maintainable in view of the remedy of appeal being available under Section 117A of the Act.

5.2 Second, if the answer to the first issue is, in favour of the petitioner, whether the procedure adopted by respondent no.2, was in, violation of the principles of natural justice.

5.3 In so far as the first issue is concerned, in my view, it is really dependent on the answer to the second issue in as much as if, there is breach of principles of natural justice then, notwithstanding the availability of an alternative remedy by way of an appeal, this court would have jurisdiction to entertain the instant writ petition preferred under Article 226 of the Constitution. The fact that an aggrieved party has an adequate remedy available to it in law, which in a given case may, persuade the court not to intervene in the matter and relegate such a party to the remedy available under a statute is, a rule of policy, convenience and / or discretion rather than a rule of law. [See *State of Uttar Pradaesh Vs. Mohammad Nooh, 1958 (1) SCR 595, ABL International Ltd. and Anr. Vs. Export Credit Guarantee Corporation of India Ltd. and Ors., (2004) 3 SCC 553*].

5.4 As regards the second issue, what has come to fore and in respect of which, there is no dispute, is that, while petitioner's request for a hearing under Section 14 of the Act was pending, two pre-grant oppositions were filed; one by NATCO and the other by IMAK. Though, the documents filed by the opponents were supplied to the petitioner, no notice was issued to the petitioner with regard to the applications filed under Section 25 of the Act. Therefore, in one sense, when hearing under Section 14 was finally granted

to the petitioner on 24.07.2014, there was no clarity as to the extent and scope of objections, which it was required to meet while pressing ahead with its request for grant of patent. The petitioner, at best, would have prepared itself to rebut the objections raised in the FER.

5.5 The submission of Mr.Dogra that respondent no.2 had not taken recourse to the objections and / or the material supplied by the opponents, does not impress me as the availability of the material at hand has in my view the potentiality of injecting bias in the proceedings conducted by respondent no.2. The court has no means of discerning whether in actuality respondent no.2 was influenced by the material placed on record by NATCO and IMAK. The test, therefore, can only be, whether the circumstances which obtained in this case, would throw up the possibility of the final outcome being influenced, by virtue of availability of material on record, which is undoubtedly inimical to the interest of the petitioner.

5.6 Ms. Singh has in this behalf taken me through the impugned order; a perusal of which, does indicate that not only the presence of typographical errors in the impugned order, which find a reflection in the opponents application, but also that, certain parts of the opponents application have been lifted and incorporated in the impugned order. Reference, in this regard has been made to pages 32, 37, 38, 41, 42, 352 and 353 of the paper book. The reading of the impugned order thus suggests that there was every possibility, or, in the very least, the potential of respondent no.2, being influenced by the material placed on record by NATCO and IMAK. In that sense, the presence of typographical errors and lifting of para and verse from opponents application, is a tertiary point (though it is a measure of influence), as it was sought to be explained as happy coincidence. What is critical though, is the availability of the material on record.

6. Therefore, in my view, the better course of action, which could have been followed by respondent no.2, in the facts of this case, would have been to issue notice in the applications filed under Section 25 of the Act, and thereafter, proceed to grant hearing both, in the proceeding under Section 14 and 25 of the Act. Such a procedure would have not only saved respondent no.2, time and effort, but would have also, kept at bay, the allegations of bias.

7. Having regard to the aforesaid circumstances, the impugned order is set aside. The matter is remanded for a fresh decision by respondent no.2. Respondent no.2 shall, accordingly, fix a date of hearing both for Sections 14 and 25 proceedings. In this behalf, he shall issue notice in all pending applications under Section 25 of the Act, and those, that may be filed hereafter. Respondent no.2 will send written communication in this respect to all concerned parties including the petitioner. Respondent no.2 shall also ensure that all concerned and affected parties are given access to the objections and material filed by their opponents.

8. Writ petition and the pending application are disposed of in the aforesaid terms.

RAJIV SHAKDHER, J

JANUARY 30, 2015

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