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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **W.P.(C) 195/2017 & CM No.888/2017**

TRYTON MEDICAL INC.

..... Petitioner

Through: Mr Hemant Singh, Ms Mamta Jha,
Ms Shilpa Arora and Mr Ankit
Arvind, Advocates.

versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr Ripu Daman Bhardwaj, CGSC
with Mr T. P. Singh, Advocate for
UOI.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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10.07.2017

VIBHU BAKHRU, J

1. The petitioner has filed the present petition, *inter alia*, praying as under:-

- “(a) issue a writ of mandamus or any other appropriate writ, order or direction directing the Respondents to comply with the orders and direction dated 24th March, 2015 in O.A./10/2014/PT/DEL and 7th March, 2016 passed by the Hon'ble IPAB in OA/3/2016/PT/DEL and take on record the Petitioner's Indian National Phase Application arising from International Application

No.PCT/US/2010/040962 and proceed with the examination of the said application at the earliest.”

2. The petitioner filed its PCT application no. PCT/US/2010/040962 with the United States Patent and Trade Mark Office claiming priority from the US application nos.61/222744 dated 02.07.2009 and 61/243433 dated 17.09.2009 and accordingly, the petitioner was required to file the National Phase Application within a period of 31 months from the said date; that is, on or before 02.02.2012.

3. The petitioner filed its National Phase Application along with an application under Rule 138 of the Patents Rules, 2003 seeking condonation of delay of 8 days in filing the national phase application.

4. The Controller of Patents (respondent no.2) considered the aforesaid application and also heard the representative of the petitioner on 20.03.2012 and, thereafter, passed an order dated 02.07.2013 rejecting the petitioner's application. The petitioner's application was rejected principally on the ground that it was delayed by a period of 8 days, which according to respondent no.2 could not be condoned.

5. Aggrieved by the aforesaid order, the petitioner preferred an appeal before the Intellectual Property Appellate Board (the IPAB). The IPAB allowed the petitioner's appeal by an order dated 24.03.2015; the operative part of which reads as under:-

"16. Consequently, this matter is remanded for consideration of the office of Controller in a manner known to law by providing all opportunities as per the entitlement of the appellant/applicant for seeking the relief of examination of the

patent sought for by the appellant/applicant etc. It is made clear that the time consumed for disposal of the application for condonation of delay and extension of time and as well as the time consumed for filing of the present appeal and disposal of the same is to be excluded enabling the appellant to take steps as contemplated under provision of the Act and Rules for the examination of the claimed patent etc. It is further made clear that the application of the appellant should be disposed of as expeditiously as possible."

6. A bare perusal of the order dated 24.03.2015 indicates that the IPAB was of the view that the delay of 8 days in filing the application could be condoned.

7. Despite orders passed by the IPAB, respondent no.2 did not take any steps to comply with the directions issued by the IPAB.

8. In view of the above, the petitioner was constrained to file representations before respondent no.2 including representations dated 17.06.2015, 20.07.2015 and 07.08.2015. The petitioner was once again heard and after hearing the same, respondent no.2 passed an order dated 19.01.2016, *inter alia*, holding as under:-

"I am of the view that the instant application is time barred beyond the prescribed time limit and by operation of Rule 22 of the Patent Rules, 2003, the same has been become as deemed to have been withdrawn."

9. Aggrieved by the aforesaid order, the petitioner once again approached the IPAB as according to the petitioner, respondent no.2 had failed to comply with the order dated 24.03.2015 passed by the IPAB.

10. The IPAB considered the grievance of the petitioner and accepted the contention that respondent no.2 had failed to comply with the earlier order. Undisputedly, the IPAB's order of 24.03.2015 had expressly directed respondent no.2 to examine the petitioner's application, making it quite clear that the delay could be condoned. Notwithstanding the aforesaid order, respondent no.2 declined to accept the same and continued to adhere to its earlier stand, that is, the petitioner's application was held to be barred by time.

11. Given this approach of respondent no.2, IPAB in its order dated 07.03.2016, observed as under:-

“10. At the outset, we are constrained to state that the perusal and reading of the impugned order dated 19/01/2016 passed by the Assistant Controller of Patents & Designs, New Delhi demonstrates that it is a classic case of blatant, flagrant, wilful and deliberate violation of the principles of judicial discipline by deliberately misreading and misinterpreting the findings rendered by this Bench in its order dated 24/03/2015 in OA/10/2014/PT/DEL.

11. In our order dated 24/03/2015 we have incorporated the provisions under the Rules 20, 22 and 138 existing at the relevant period of instant case and thereafter held hereunder:-

“11. Reading the above said provisions would make it abundantly clear that the Controller undoubtedly vested with the power to extend the time after condoning the delay after expiry of prescribed period of 31 months for submitting the National Phase Application. It is pertinent to note that the impugned order, the Controller placed reliance on the provision under Rule 20 and 22 holding that the prescribed time limit of 31 months as already been expired and as a result as per

Rule 22 the International Application shall be deemed to be withdrawn that the non consequence under Rule 20. At this stage, we are constrained to state that the Controller not at all assigned any reason for overlooking the provision under Rule 138 which provides for the Extension of a period of one month after expiry of the period of 31 months.

We have also further held in the said order that Rule 138(2) existing at the relevant point of time of the instant application was also clearly interpreted by the Madras High Court in the decision of **Nokia Corporation** case which we have placed reliance in the later portion of this order. Added to the said factors we have also recorded the fair submission of the learned counsel for the appellant in respect of the subsequent amendment made to Rule 138 as hereunder:

“15. The learned counsel for the appellant also fairly submit that the provision under Rule 138 underwent an amendment subsequent to the relevant period in the instant case which came into force from 15/10/2013 where Chapter III and as a result there is no provision as on date to seek the relief of condonation of delay or extension of time beyond the extended period of 31 months as per Chapter III of the Rules. This amendment makes it clear that the legislature may intend to change for fixing the prescribing time once for all without providing any extension of time. But as far as the instant case is concerned there is a specific provision under rules as per Rule 138.

Thereafter, we have ultimately held as hereunder.

“But as far as the instant case is concerned there is a specific provision under ruled as per Rule 138 and as such **there is no justification for the Controller to overlook or brush aside the said provision and to reject the relief sought for by the appellant for extension of time** (emphasis supplied by us). In view of

the aforesaid reasons, we are constrained to set-aside the impugned order dated 02.07.2013.

12. The above said findings rendered by us makes it abundantly clear that we have condoned the delay of eight days and extended the time and consequently set aside the order passed by the Assistant Controller of Patents and Designs dated 02/07/2013 and as such the finding of the Assistant Controller of Patents that this Bench has only set-aside the earlier order of the Controller but not condoned the delay is not only factually incorrect but also it would amount to wilful and deliberate misinterpretation of our finding. Added to that findings we have given a specific direction to the Assistant Controller in our order dated 24/03/2015 as here under:-

“Consequently, this matter is remanded for consideration of the office of Controller in a manner known to law by providing all opportunities as per the entitlement of the appellant/applicant for seeking the relief of examination of the patent sought for by the appellant/applicant etc. (emphasis supply by us). It is made clear that the time consumed for disposal of the application for condonation of delay and extension of time as well as the time consumed for filing of the present appeal and disposal of the same is to be excluded enabling the appellant to take steps as contemplated under provision of the Act and Rules for the examination of the claimed patent etc. (emphasis supplied by us).”

12. Accordingly, the IPAB set aside the order dated 19.01.2016 passed by respondent no.2 and directed respondent no.2 to take on record, the National Phase Application derived from the International Application no. PCT/US/2010/040962. The operative part of the said order reads as under:-

“21. In view of the aforesaid reasons, we are constrained to set aside the impugned order dated 19/01/2016 passed by the

Assistant Controller of Patents and Designs, Patent Office, Delhi and direct the Assistant Controller of Patents and Designs, Delhi to take on record the Indian National Phase Application derived from International Application No.PCT/US/2010/040962 of the appellant and proceed with the examination of the said application by affording adequate and reasonable opportunity for the applicant/appellant to put forth their case. Once again it is made clear that the time consumed for disposal of the application for condonation of delay and extension of time as well as the time consumed for filing of the present appeal and disposal of the same is to be excluded enabling the appellant to take steps as contemplated under provision of the Act and Rules for the examination of the claimed patent. It is made further clear that the application of the appellant shall be disposed of as expeditiously as possible.

13. Despite, unequivocal and clear directions by the IPAB, respondent nos.2 & 3 have failed to comply with the same.

14. The learned counsel for the respondents sought to oppose the present petition on the ground that the petition is not maintainable. According to him, the petitioner ought to have filed an application for contempt since the orders passed by the IPAB had not been followed; this according to him, was an equally efficacious alternate remedy available to the petitioner.

15. Secondly, he submitted that the orders passed were not acceptable to respondent nos.2 and 3 who were considering challenging the same.

16. The respondents' contention that the petitioner has an adequate alternate remedy, is plainly unmerited. Without considering the question whether the petitioner can file petition for contempt of the orders of the IPAB, it is apparent that the same would not preclude the petitioner from

filing the present petition. The petitioner is entitled to maintain this petition for ensuring that respondent nos.2 and 3 act in accordance with law and implement the orders passed by the superior tribunal (the IPAB), which they are bound to but have failed to do.

17. The contention that the respondents are desirous of challenging the orders passed by the IPAB is also no ground for the respondents to decline to implement the same. It is trite law that orders of the appellate authority are required to be followed by authorities below and subject to their rights, seek appropriate remedies. In the event, the respondents were aggrieved by the decision of the IPAB, it was always open for them to take such remedies as available. However, it is not open for them to not to implement the orders passed without securing an appropriate order from a court of competent jurisdiction staying the decision of the IPAB.

18. Mr Hemant Singh, learned counsel for the petitioner has also referred to the decision of the Supreme Court in the case of ***Union of India & Ors. v. Kamlakshi Finance Corporation Ltd.: 1992 Supp (1) SCC 443***, wherein the Supreme Court had explained the above in the following words:-

“6. Sri Reddy is perhaps right in saying that the officers were not actuated by any mala fides in passing the impugned orders. They perhaps genuinely felt that the claim of the assessee was not tenable and that, if it was accepted, the Revenue would suffer. But what Sri Reddy overlooks is that we are not concerned here with the correctness or otherwise of their conclusion or of any factual mala fides but with the fact that the officers, in reaching in their conclusion, by-passed two appellate orders in regard to the same issue which were placed before them, one of the Collector (Appeals) and the other of the Tribunal. The High Court has, in our view, rightly

criticised this conduct of the Assistant Collectors and the harassment to the assessee caused by the failure of these officers to give effect to the orders of authorities higher to them in the appellate hierarchy. It cannot be too vehemently emphasised that it is of utmost importance that, in disposing of the quasi-judicial issues before them, revenue officers are bound by the decisions of the appellate authorities. The order of the Appellate Collector is binding on the Assistant Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not "acceptable" to the department - in itself an objectionable phrase - and is the subject matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent court. If this healthy rule is not followed, the result will only be undue harassment to assessees and chaos in administration of tax laws."

19. It is an essential that orders and directions of superior courts/tribunals are followed by the subordinate authorities. Non-adherence to such discipline would be plainly debilitating to the rule of law.

20. It is also relevant to note that in the present case, the IPAB had passed the order on 24.03.2015 accepting the petitioner's application, taking a view that the delay of 8 days for filing the National Phase Application can be condoned. More than two years have elapsed and the respondents have not taken any steps to challenge the said order. In the circumstances, it is also doubtful whether any such remedy would now be available. In any view of the matter as stated above, it is not open for the respondents to merely

procrastinate and ignore the order passed by the IPAB. The conduct of respondent nos.2 and 3 in this matter is clearly contrary to the settled judicial principles.

21. In view of the above, the writ petition is allowed and respondent nos.2 & 3 are directed to comply with the orders passed by the IPAB and examine the petitioner's National Phase Application based on International Application no. PCT/US/2010/040962, claiming priority from US application nos. 61/222744 and 61/243433 in accordance with law and in terms of the orders passed by the IPAB.

22. The petition and the pending application are disposed of.

JULY 10, 2017
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VIBHU BAKHRU, J

