

\$~1

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **FAO(OS) (COMM) 90/2017, CAV.386-387/2017 & C.M.**
APPL.15126-15127/2017

NATCO PHARMA LIMITED Appellant
Through : Sh. Anand Grover, Sr. Advocate with
Sh. Gaurav Barathi, Ms. Priyam Lizmary Cherian
and Sh. Vikramjeet, Advocates.

versus

F HOFFMAN-LA-ROCHE LTD & ANR Respondents
Through : Sh. Guru Krishna Kumar, Sr. Advocate
with Sh. Shrawan Chopra, Sh. N. Mahabir, Ms.
Prachi Agarwal and Sh. Pundreek Dwivedi,
Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE YOGESH KHANNA

ORDER
% **26.04.2017**

1. Issue notice. Sh. Gaurav Barathi, Advocate accepts notice. With consent this appeal was heard.
2. The defendant/counter claimant is aggrieved by the ruling of the learned Single Judge dated 02.02.2017. By the impugned order, the learned Single Judge declined to interfere with the order of the Joint Registrar in the chamber appeal. The appellant had counter claimed seeking cancellation of the plaintiffs' patent (hereafter referred to as "Hoffmann"). Hoffmann had relied upon the deposition of one expert Dr. Alexander James Bridges [hereafter referred to as

“Dr. Bridges”]. Objecting to the deposition, the present appellant urged in an application that part of the evidence was led, especially dealing with toxicity and polarity, which went beyond the pleadings. The Joint Registrar – empowered to decide such objections, accepted Hoffmann’s objections and permitted the documents concerned to be placed on the record. The appellant preferred a chamber appeal. The learned Single Judge after tracing the history of the litigation so far as it concerned this issue observed as follows and proceeded to dismiss the chamber appeal:

“42. However the fact remains that the present controversy is a result of there being no clarity on procedure, partly owing to absence of Rules and owing to the erroneous framing of issues without crystallising the real controversy and owing to Dr. Bridges deposing as a witness on the validity of the patent on behalf of Hoffmann even before Natco, on whom the onus of the issue qua validity rests, leading its evidence. The counsels inform that not only are there no rules framed but there does not appear to be any judgment till now on the said aspect. For this reason, I am inclined to not deprive Hoffmann of an opportunity to defend the patent in its favour on the grounds urged for the first time in the deposition of Dr. Bridges.

43. It is also well nigh possible that if Natco had led its evidence first, Hoffmann, with the report/deposition of Dr. Bridges in its hand, may have cross-examined the witnesses of Natco on the aspect of ‘polarity’ and ‘toxicity’. The scope of cross-examination is certainly much larger. (See Section 138 of the Evidence Act). If the witnesses of Natco had deposed on the aspects of ‘polarity’ and ‘toxicity’, then Hoffmann would have been entitled to counter with the opinion of Dr. Bridges.

Hoffmann cannot be placed in a disadvantageous position owing to the error in the procedure which has occurred.

44. Rather, from the hearing it also transpires that the real issue in these proceedings is the claim of Natco for revocation of the patent and if Natco fails, therein it would axiomatically be liable for infringement. There was thus no reason for Hoffmann, though plaintiff in both the suits, to commence leading its evidence first.

45. For all the aforesaid reasons, IAs No.10698/2016 & 10685/2016 as well as OA No.13/2017 & OA No.14/2017 are dismissed.”

3. The appellant urges that the learned Single Judge recognized that the peculiarity in procedure led to the situation where Hoffmann was possibly prejudiced. Therefore, the appellant's right to have the evidence (that went beyond the pleadings) foreclosed as in the impugned order could not have been done in such manner. Hoffmann, on the other hand, urges that the appellant did not object to the affidavit evidence when it was filed and urged that the deposition of Dr. Bridges be excluded, much later. It is urged that in the interregnum, the appellant has led affidavit evidence on the issue.

4. This Court is aware of its limited role in such matters at the appellate stage; review is ordinarily impermissible. In the circumstances, having regard to the totality of circumstances, the Court is of the opinion that whilst the learned Single Judge cannot be faulted for making the observations that he did, the sequitur also should have been factored in that the issue of inclusion or exclusion

of the evidence dealing with toxicity and polarity as deposed by Dr. Bridges and the permissibility of such evidence should be gone into only in the final stage so as not to prejudice either party. Therefore, in accordance with the learned Single Judge's orders, the appellant shall be permitted the opportunity to cross-examine Dr. Bridges; if necessary, through video conferencing. The appellant submits that the said witness would not be cross-examined beyond 90 minutes. Hoffmann submits that the onus of proving this issue is upon the appellant.

5. The parties are, therefore, at liberty to urge on the permissibility or otherwise, of the evidence concerning toxicity and polarity, at the final hearing stage. All rights and contentions of the parties to make appropriate submissions at the final stages on this aspect are kept open. The appeal is disposed off in these terms.

S. RAVINDRA BHAT, J

YOGESH KHANNA, J

APRIL 26, 2017/ajk