

\$~A-6

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

+ W.P.(C) 3847/2020

NATCO PHARMA LTD.

..... Petitioner

Through Mr.Parag P.Tripathi, Sr.Adv. with
Ms.Rajeshwari H. and Mr.Saif
Rahman Ansari, Adv.

versus

UNION OF INDIA & ORS.

..... Respondents

Through Mr.Ajay Digpaul, CGSC for R-1/
UOI.
Mr.Hemant Singh, Ms.Mamta Jha and
Mr.Ankit Arvind, Adv. for R-3/
Novartis AG.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

ORDER

%

01.07.2020

CM APPL. No.13777-13778/2020(exemptions)

Applications are allowed subject to all just exceptions.

W.P.(C) 3847/2020 & CM APPL. No.13776/2020

1. This hearing is conducted through video conferencing.

2. This writ petition is filed seeking following reliefs:

“A) Direct the Respondent No. 2 to proceed with the hearing in OA No.20/2019 only with a properly and jurisdictionally constituted Bench which necessarily has to include the Technical Member/Member (Plant Variety) and a Technical expert qualified in the field of pharmaceuticals and once such a bench is constituted to proceed with the hearing de novo;

B) Issue a writ in the nature of Certiorari staying the hearing

of O.A. No.20/2019 until a Technical Member or Technical Advisor is appointed;

- C) Direct the Chairman, IPAB to decide the Miscellaneous petition of the Petitioner as a preliminary issue before proceeding with any further hearing of the matter.”

3. The controversy centres around patent IN 276026 that was granted to respondent No.3 on 28.09.2016. The petitioner filed post-grant opposition in respect of the said patent. In the meantime, respondent No.3 on 02.05.2019 filed a suit for infringement of the patent being CS(COMM) No.229/2019 against the petitioner alleging infringement of the said patent. Interim orders were passed in favour of respondent No.3 restraining the petitioner from manufacturing, ceritinib till the next date of hearing.

4. Subsequently, on 06.08.2019, the Controller of Patents passed an order invoking the said patent IN 276026 of respondent No.3.

5. Respondent No.3 has now filed an appeal before the Intellectual Property Appellate Board (*hereinafter referred to as the ‘IPAB’*) in August, 2019 alongwith an application for interim orders. The matter has been heard on 13.03.2020 and 16.03.2020. The matter was heard also on other dates. The matter is pending for arguments.

6. Learned senior counsel appearing for the petitioner has urged that the IPAB is hearing the matter without the Technical Member. It is pointed out that this court in ***Mylan Laboratories Ltd. v. Union of India***, W.P.(C) 5571/2019, has on 08.07.2019 passed directions stating that in case the post of Technical Member is lying vacant, IPAB can proceed to hear the urgent matters and the orders passed would not suffer from invalidity on the ground of lack of quorum. Stress is made on the observations of the court that in

case Technical Member (Plant Verities Protection) is not available for any reasons or recuses, Chairman, IPAB can proceed to hear the urgent matters. It has been strongly urged that the issue involved complex technical matters and that it would be proper for the IPAB to hear the matter alongwith Technical Member (Plant Verities Protection).

7. An alternate submission is also made by the learned senior counsel for the petitioner, namely, that the petitioner has moved an application before the IPAB dated 17.02.2020 praying that the Tribunal may appoint a Technical Expert to assist the Hon'ble Board on technical aspects arising in the present appeal. It is pleaded that these requests of the petitioners including the said application dated 17.02.2020 be heard first by the IPAB before the matter proceeds.

8. Learned counsel appearing for respondent No.3 has strongly opposed the present petition. My attention has been drawn to the order of the IPAB dated 21.08.2019, where both the parties had agreed to argue the matter in view of the order passed by this court in ***Mylan Laboratories Ltd. v. Union of India***(supra). The plea of the learned counsel for the petitioner herein was also noted regarding the expert opinion of the scientific advisor. The court had also noted the submissions of the learned counsel for respondent No.3 herein that expert opinions by both the parties were already placed on record before the patent office. The IPAB had observed that after going through both the expert opinions, if required, appropriate orders would be passed regarding expert opinion of a scientific advisor.

9. I may first see the observations of the Co-ordinate Bench of this court in ***Mylan Laboratories Ltd. v. Union of India***(supra). Relevant paras read as follows:

“35. This court is of the view that the *doctrine of necessity* has to be invoked in the present case. The legislative intent is of the continuity of IPAB and not its cessation because of a vacancy in its technical membership. If the post of Technical Member is lying vacant, IPAB can proceed to hear the urgent matters and the orders passed would not suffer invalidity on the ground of lack of Coram.

36. Applying the *doctrine of necessity* and following the principles laid down in ***Election Commission of India***(supra), ***Kwality Restaurant***(supra), ***Talluri Srinivas*** (supra) and ***Bharat Bijlee Limited***(supra), this court holds that the Chairman, IPAB and the Technical Member(Plant Varieties Protection) are competent to hear the urgent matters relating to the Patents, Trade Marks and Copyright till the vacancies of other Technical Members are filled up and the orders passed would not suffer invalidity on the ground of lack of Coram.

37. If the Technical Member(Plant Varieties Protection) is not available for any reason or recuses, Chairman, IPAB can proceed to hear the urgent matters.

38. In patent matters, the Chairman, IPAB is at liberty to take the expert opinion of scientific advisor from the panel of scientific advisors notified under Section 115 of the Patents Act.

39. The Chairman, IPAB shall ensure compliance of these directions to ensure continuity of the functioning of the IPAB.”

10. Similarly, a Co-ordinate Bench of this court in W.P.(C) 11346/ 2019 on 29.01.2020 in a case filed by respondent No.3 passed the following orders:

“ Ld. counsel for the Petitioner seeks to withdraw the present petition as it is submitted that the IPAB is currently functioning and the hearing has in this matter has been fixed for 19th February, 2020. Accordingly, the petition is dismissed as

withdrawn.

It is submitted by ld. counsel for the Respondents that the Technical Member who is currently functioning in the IPAB is looking after the Protection of Plant Varieties and Farmers' Rights Act, 2001 and therefore, considering the order in ***Mylan Laboratories Limited v Union of India WP(C) 5571/2019 (Decided on 8th July, 2019)***, the Board can seek assistance of any other expert in the field of pharmaceuticals. Let a request to this effect be made to the Chairman, IPAB, who shall consider the same.

Considering the delay which has already occurred in this matter due to the non-functioning of the IPAB, it is requested that the matter be decided expeditiously.

If the IPAB is non-functional for any reason, then the parties are permitted to avail of their legal remedies.

The next date of hearing is cancelled.”

11. Clearly, this court in its order dated 29.01.2020 has allowed the respondents to make a request to the Chairman, IPAB regarding assistance of any expert in the field of pharmaceuticals. Direction is also passed for IPAB to consider the same. The court also noted the delay that had occurred due to non-functioning of the IPAB and requested that the matter be decided expeditiously.

12. In these facts and circumstances, in my opinion, it would be appropriate for the petitioner to reiterate the submissions made herein before the IPAB including the request to IPAB to deal with its application dated 17.02.2020 expeditiously. In case, such a request is made before the IPAB, the IPAB is requested to deal with the request/application expeditiously as

per law keeping in view the judgment of this court in '*Mylan Laboratories Ltd. v. Union of India*' and also the order of this court dated 29.01.2020 in W.P.(C) No.11346/2019.

13. At this stage, learned counsel for respondent No.3 submits that these requests of the petitioner may needlessly delay the disposal of the appeal on technical grounds which are being raised by the petitioner. These aspects would surely be dealt with by the IPAB while dealing with the requests of the petitioner.

14. It is needless to add that this court has not made any observations on the merits of the contentions raised by the learned senior counsel for the petitioner and the learned counsel for respondent No.3.

15. Nothing further survives in this writ petition. The same is accordingly disposed of.

JAYANT NATH, J.

JULY 01, 2020/v