

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

WPA No. 8691 of 2023

**Gunjan Sinha @ Kanishk Sinha and another
Vs.
The Union of India and another**

Petitioner in person : Mr. Kanishk Sinha

Intervenor in person : Ms. Lipika Das Sinha

For the
respondent nos. 1 & 2 : Mr. Sukumar Bhattacharyya,
Mr. Avinash Kankani

Hearing concluded on : 30.04.2024

Judgment on : 07.05.2024

Sabyasachi Bhattacharyya, J:-

1. The petitioner has challenged the *vires* of Section 53 of the Patents Act, 1970 (for short, “the Patents Act”).
2. The primary ground of challenge is that as per Section 53(1), the term of every patent granted after the commencement of the Patents (Amendment) Act, 2002 and the term of every patent which has not expired and has not ceased to have effect on the date of such commencement, shall be twenty years from the date filing of the application for the patent.
3. It is argued that as per the provisions of the Patents Act, the patent confers rights on the patentee to institute litigation for infringement and have all other rights of a patentee only from the date of grant of patent. Section 11-A, introduced by the 2002 Amendment with effect

from May 20, 2003, under sub-section (7) thereof, provides that on and from the date of publication of the application for patent and until the date of grant of patent, the applicant shall have the like privileges and rights as if a patent for the invention had been granted on the date of publication of the application. The proviso thereto says that the applicant shall not be entitled to institute any proceedings for infringement until the patent has been granted.

4. The petitioner no. 1, appearing in person, submits that as the full rights conferred by a patent commence only from the grant thereof and certain limited rights are conferred on the date of publication, the stipulation in Section 53 that the term of the patent commences from the date of application of the patent is inherently contradictory to the rest of the statute.
5. It is argued that the patentee does not enjoy the rights of the patent from the date of application till its publication at all, whereas other rights apart from the right to institute proceedings for infringement are conferred between the date and publication and the grant of the patent. Hence, it is unreasonable that the term of the patent is to be counted from the date of the application, whereas during the period between the application and the publication only limited rights are conferred, and full rights are conferred only upon grant.
6. The inter-play between Section 53 and Section 11-A of the Act ensures that the patentee loses valuable time between the date of the application and the grant. It is, thus, contended that the period between the application and the grant of the patent ought not to be

counted within the term of the patent, since the said interregnum is not of any practical benefit to the patentee insofar as the assertion of rights on the basis of the patent is concerned. The twenty years' tenure of a patent ought to commence from the date of its grant, or at least its publication, it is argued.

7. The petitioners argue that in a previous writ petition, the petitioners' challenge to the expiry of the patent was turned down on the ground that as per the existing law, the same had to be counted from the date of the application. Hence, the *vires* of the statute was not decided.
8. Moreover, in review against the said order, leave was granted by this Court to the petitioners to prefer a challenge to the *vires* of Section 53 by observing that the dismissal of the review application would not debar such a challenge to the *vires*. Thus, the present challenge is not barred by the principle of *res judicata*.
9. Thirdly, it is argued that the petitioners have not occasioned delay in preferring the present writ petition, since the term of the patent has not yet expired.
10. Learned counsel appearing for the respondent-Authorities argues that the writ petition is barred by delay. If a challenge was to be preferred by the petitioners, the same had to be done at the juncture when the application was made, at least before the patent was granted. Having not done so and enjoyed the fruits of the patent till now, the petitioners cannot now come up on the verge of expiry of the tenure of the patent and challenge the *vires* of the statute, thereby seeking to extend the tenure.

11. Learned counsel also argued that petitioner no. 1 (who was the sole petitioner then before addition of the petitioner no. 2) had no *locus standi* to prefer the instant writ petition in view of the patent having been assigned in favour of the petitioner no. 2. Although arguments were initially advanced by both parties on such issue, the same has subsequently been rendered academic in view of the application filed by the petitioner for addition of the petitioner no. 2-assignee as a writ petitioner being allowed.
12. Thus, such question of *locus standi* need not be gone into any further.
13. The next argument advanced on behalf of the respondents is that Sections 11-A and 53 of the Patents Act are independent on each other, being applicable at different stages. As such, there cannot be any comparison between the two.
14. It is argued that Section 11-A(7) has introduced certain additional, though limited, rights to an applicant which cannot be a ground for challenging the *vires* of Section 53.
15. Learned counsel for the respondents contends that the Section 11-A was introduced subsequently in terms of the TRIPS Agreement which cast an international obligation on India, which is a signatory thereto, to make its laws compliant with international laws. Article 33 of the said Agreement provides that the period of twenty years in respect of the term of protection shall be counted from the date of filing.
16. It is next argued that Section 53 comes into play after the right of an applicant is crystallized and there is no doubt regarding the innovation of the applicant. On the other hand, Section 11-A(7)

operates in the interregnum, before the patent is granted. Thus, the two operate at two different stages.

- 17.** Learned counsel for the respondents argues that Parliament in its wisdom amended Section 11-A, which cannot be challenged since there is no arbitrariness or unreasonableness behind it.
- 18.** The provisions of Section 11-A and Section 53, it is argued, propound the correct proposition of law in consonance with the purpose and object sought to be achieved by the statute.
- 19.** No patentee, it is contended, loses any time as the period of patent is twenty years from the date of application.
- 20.** After being granted full rights under Section 53, a patentee cannot rely on Section 11-A(7). Section 53, it is argued, cannot be interpreted from the prism of Section 11-A(7) as Section 53 comes into operation upon the culmination of right and when finality is derived.
- 21.** The right of a patentee as defined under Section 48 of the Patents Act comes into operation from the date of the application and the patentee is entitled to seek all damages on account of infringements of its right from the date of application of the patent.
- 22.** The stipulation of the period of twenty years from the date of commencement falls within the legislative domain of the Parliament which is in the best interest of the public at large.
- 23.** Learned counsel for the respondent-Authorities next argues that this is the second attempt on behalf of the petitioners to seek extension of their patent, which was previously turned down by the writ court.

24. It is argued that a mere observation by the Court while dismissing the petitioners' review application, that the said decision would not preclude the petitioners from challenging the *vires* of Section 53, does not confer any right on the petitioners to do so.
25. It is argued that the issue is, thus, barred by the principle of *res judicata*.
26. Although two judgments on *locus standi* were cited by learned counsel for the respondent-Authorities, those are not being taken into consideration in view of the issue of the *locus standi* being resolved by impleadment of petitioner no. 2, who is the assignee of the patent, as a co-petitioner along with petitioner no. 1.
27. The first ground of challenge thus is the delay in preferring the present challenge against the *vires* of Section 53. The plinth of such argument is that the petitioners continued to enjoy the fruits of the patent throughout its tenure and ought to have preferred the challenge, if aggrieved, contemporaneously with the publication of the patent.
28. However, the challenge to the *vires* of the Section stands on a higher footing than a challenge to Executive action taken in terms thereof. That apart, the cause of action for such challenge is a continuing cause of action, in view of the term of the patent of the petitioners having not yet expired.
29. Since Section 53 fixes the tenure of the patent at twenty years from the date of the application, until and unless the term expires, it

cannot be said that the petitioners have lost the right to challenge the *vires* of the Section fixing such tenure.

30. The challenge of the petitioners is not against Section 11-A but to Section 53, which stipulates the term as twenty years from the date of the application. Such period having not yet expired, it cannot be said that the writ petition is bad on the ground of delay.
31. The second issue is that of *res judicata*. Insofar as the previous writ petition was concerned, the judgment and order rendered therein was on the very premise of the existing Sections of the Patents Act, 1970. It was observed, *inter alia*, that in view of the statute providing as it does, there was no scope for extension of the petitioners' patent term.
32. The present challenge, however, is to the *vires* of Section 53 itself, insofar as it stipulates as the starting point of the term of patent the date of the application for it. As opposed to the previous challenge, which was on the very premise of the statute, the present challenge assails the *vires* of the relevant provision of the statute itself and thus, cannot be said to be confined to the Section. Hence, the cause of action of the present challenge can be said to have ripened only after the previous dismissal on the basis of the very same Section which has now been assailed on the ground of *vires*.
33. Although the observation in the order of review to the effect that the petitioner was not precluded from challenging the *vires* of Section 53 does not, by itself, confer any right to so challenge, such right is not curbed by the previous dismissal of the earlier writ petition of the

petitioners. Thus, it cannot be said that the present writ petition is barred by the principle of *res judicata*.

34. Coming to the merits of the challenge, India entered into the Agreement on Trade-Related Aspects of Intellectual Property Rights (in brief, “the TRIPS Agreement”). The said Agreement was Annexure 1C to the Marrakesh Agreement establishing the World Trade Organization (WTO) signed on April 15, 1994. The same was given effect to on and from January 1, 1995. Thus, the said agreement is binding on India.
35. Article 33 of the TRIPS Agreement provides that the term of protection available shall not end before the expiration of a period of twenty years counted from the filing date.
36. It is to be noted that although Article 33 used the expression “shall not end *before*”, leaving it open for the tenure to be twenty years or more, the Indian Parliament, in its wisdom, has chosen to strictly apply the said Article by fixing the term of patent to a period of twenty years from filing. Such implementation is perfectly within the legislative competence of the Parliament and in consonance with the TRIPS Agreement as well. Thus, there is no scope of interference by the Courts on such count.
37. A salient feature in the present case is that Section 53 of the Patents Act, 1970, as it stands now after the amendment of 2002 (with effect from May 20, 2003), is not mutually exclusive or inherently contradictory with Section 11-A of the Act. Section 11-A(7) confers certain additional privileges on an applicant for a patent in the

interregnum between the filing of the application and publication. During such period, Section 11-A(7) has introduced a legal fiction that the applicant shall have the like privileges and rights as if a patent for the invention had been granted on the date of publication of the application. The only rider is that the applicant shall not be entitled to introduce any proceeding for infringement until the patent has been granted. Such rights have been conferred as additional rights over and above that which were given to the petitioner originally before the introduction of the said provision.

- 38.** The principle laid down in *Nasima Naqi Vs. Todi Tea Company Limited and others*, reported at AIR 2019 CC 991 is applicable in the present case. It is possible to eclipse general law by according protection to a particular class of persons under any statute.
- 39.** The statute as it originally stood conferred no additional right on an applicant for the period from the date of publication till grant of patent but equated the periods between date of application and publication on the one hand and date of publication and grant on the other.
- 40.** Such conferment of additional rights on publication, which are limited in nature inasmuch as no litigation for infringement can be instituted, is entirely within the domain of legislative discretion. It has to be remembered that the legislature is comprised of elected representatives of the citizens whereas the courts are not. Thus, legislative wisdom cannot be readily interfered with by the courts merely because a different perspective is, in the opinion of the court, possible. The standard of interference with legislation stands on a

much higher footing of constitutionality than an administrative action, since the starting point of such an adjudication is a presumption of constitutionality of a statute. The court's notions of unreasonableness cannot be sufficient ground for holding a statute to be *ultra vires*. In the domain of legislation, the wisdom of the Parliament has primacy and cannot be substituted by the court's perception.

41. Since the legislature, in its wisdom, has decided to confer certain additional limited rights on an applicant from the date of publication till the date of grant of probate by introduction of Section 11A, such conferment of limited rights *ipso facto* cannot be a ground for demanding further rights from the date of the application.
42. The three stages of a patent operate in different spheres. The first stage is that between the date of filing of the application and the date of publication. At best, the applicant gets a preference in consideration of the application over subsequent applicants during the stage between filing of the application and publication of the same. Moreover, upon the grant of probate, the rights of the petitioner relate back to the date of the application in terms of Section 53 of the Patents Act, thus entitling the patentee to sue for infringement even for the period between the application and the grant.
43. An analogy can be drawn to registration of documents under the Registration Act, where after the registration of a document, the document takes effect retrospectively from the date of its execution. Similarly patents, when granted, relate back to the date of the application.

- 44.** The second stage is that between publication and the actual grant of patent, during which period, pursuant to Section 11-A(7) of the Patents Act, 1970, the applicant enjoys like rights and privileges as a patentee except for the right to institute any proceedings for infringement, for which the patentee still has to wait till the grant of patent, after which it relates back to the second stage as well.
- 45.** The third stage is from grant of patent to the expiry of its term. During such period, the patentee enjoys full rights and privileges as conferred under the Patents Act, 1970, including the right to sue for infringement.
- 46.** The said gradation was intended by the Parliament and there being no patent arbitrariness in the same, such discretion cannot be interfered with in judicial review.
- 47.** A careful perusal of the scheme of the Patents Act, as reflected in Sections 45 and 53, shows that the date of patent in sub-section (1) of Section 45, akin to Section 53(1), is the date on which the application for patent was filed. There is no contradiction between Sections 45 and 53 as both contemplate, in consonance with each other, that the date of commencement of a patent shall be the date of the application and the term of the patent is twenty years from the date of such filing of the application.
- 48.** Since the TRIPS Agreement binds our country as a signatory thereto, the introduction of twenty years' term was in tune with the same.
- 49.** Exploring the issue further, prior to its amendment by the 2002 Amendment Act with effect from May 20, 2003, Section 53(1) provided

two categories of terms of patent. Under sub-clause (a), in respect of an invention claiming the method or process of manufacture of a substance where the substance is intended for use or is capable of being used as food or as medicine or drug, the patent was for five years from the date of sealing of the patent or seven years from the date of the patent, whichever period was shorter.

- 50.** Under sub-clause (b) of the unamended sub-section (1) of Section 53, in respect any other invention, the patent would be for fourteen years from the date of the patent.
- 51.** The said pre-amendment regime has been altered by the 2002 Amendment, granting uniform patent rights to all patentees for twenty years from the date of the application.
- 52.** In fact, the present twenty-year tenure is an enlargement of the previous term as per the unamended Section 53, which provided three categories of patents, for five years, seven years and fourteen years respectively from the points of commencement as stipulated therein. Thus, from the perspective of the patentee, the amended Section 53 is an improvement inasmuch as the term of patent has been increased substantially in line with the TRIPS Agreement. Hence, there cannot be found any irrationality in the Legislature, in its discretion, having extended the term of patent uniformly for all types of patents to twenty years from the date of the application, while, on the other hand, conferring certain limited additional rights to an applicant for patent from date of publication to the grant of patent under Section

11-A(7) of the Act. There is thus no conflict between the two Sections at all.

- 53.** We also have to keep in mind that patent is not a fundamental right guaranteed by the Constitution of India but one conferred by statute. As such, the Legislature, in its wisdom, can selectively confer certain rights from different points of time, at different stages of the process of grant of patent. The gradation of the stages and the associated rights for each stage is not unreasonably discriminatory, thus fulfilling the test of Article 14 and Constitutional viability in general.
- 54.** Over and above, the amended provisions of Section 53 are not entirely unreasonable as the right of an applicant freezes from the date of the application and he gets priority of consideration over subsequent applicants even before the patent is published or granted. Moreover, the petitioner has a right under sub-section (2) of Section 11-A to request the Controller to publish his/her application at any time before the expiry of the period prescribed under sub-section (1) and subject to the provisions of sub-section (3) of the said Section upon which the Controller shall publish such application as soon as possible. Even otherwise, the outerlimit of publication and grant of patent has also been stipulated under Chapter IV of the Patent Rules, 2003.
- 55.** In the scheme of things discussed above, this Court does not find any discrepancy or inherent contradiction in Section 53 vis-à-vis Section 11-A of the Patents Act.

- 56.** Thus, no ground has been made out by the petitioner to strike down Section 53 or any part thereof on the ground of *ultra vires*. The constitutionality of the said Section, as discussed above, is itself the protection of the said provision from being so struck down.
- 57.** In such view of the matter, the present writ petition fails.
- 58.** Accordingly, WPA No. 8691 of 2023 is dismissed on contest by holding that Section 53 of the Patents Act, 1970 is *intra vires* the Constitution.
- 59.** There will be no order as to costs.
- 60.** Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)