
(1970) 09 CAL CK 0039
In the Calcutta High Court
Case No : Appeal No. 112 of 1968

Biswanath Prasad Radhey Shyam

APPELLANT

Vs

The Controller of Patents and Designs and Another

RESPONDENT

Date of Decision : 11-09-1970

Acts Referred:

Constitution of India, 1950 — Article 133(1)

Patents and Designs Act, 1911 — Section 64, 64(5)

Citation : AIR 1971 Cal 421

Hon'ble Judges : P.N. Mookerjee, J;Amiya Kumar Mookerji, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

P.N. Mookerjee, J.—This Is an application for a certificate for leave to appeal to the Supreme Court against our decision, dated 5th January, 1970, in the connected appeal No. 112 of 1968. The matter relates to proceeding for rectification of the register of patents in respect of Patent No. 46368, on an application, filed by the present petitioners u/s 64 of the Indian Patents and Designs Act, The application was dismissed by the Joint Controller of Patents and the petitioner's appeal against the said decision was dismissed by us by our above judgment Hence this application for a certificate for leave to appeal to the Supreme Court. The application has been under Article 133(1) of the Constitution of India,

2. The facts, leading to this litigation, may be shortly stated as follows: The patent in question was granted on 13th December, 1951. Necessary entry was made in the relevant Register, but thereafter, on 3rd May, 1957, in a proceeding between the parties concerned, the patent was revoked by Oak J. of the Allahabad High Court. In consequence of the said revocation, the relevant patent register was amended on 12th November, 1957. Thereafter, upon respondent's appeal, a Division Bench of the Allahabad High Court reversed and set aside Oak J.'s above judgment on 12th January, 1966. In pursuance of this judgment and

on production of a certified copy of the same before the appropriate authority, the necessary entry was made in the Patent Register on 25th March, 1966, and renewal fees for the patent in question for the 9th to 16th year, which had not been received in the meantime by the patent office on account of the revocation, made by Oak J., as noted above, was paid, received and accepted on the said date. Thereafter, on 13th April, 1966, the present application was made by the appellants u/s 64 of the above Act for rectification of the Patent Register by making a note therein that the above patent had ceased by reason inter alia of non-payment of renewal fees in time. It is to be noted here that, in spite of revocation of the patent in question by Oak J., as stated hereinbefore, renewal fees for the 5th to 8th years were paid and accepted by the patent office but, when, on 11th December, 1969, renewal fees for the 9th year was tendered, the patent office refused to accept the same and also rejected the respondent's prayer for keeping the amount in question in suspense account. Thereupon, no further payment was made until after the Appellate Court's judgment, mentioned hereinbefore, dated the 12th January, 1966, setting aside the revocation of the patent in question, and necessary and consequent rectification of the patent register on 25th March, 1966. In the above state of facts, the joint controller, by his order dated March 19. 1968, dismissed the appellant's application u/s 64 of the above Act and the said decision was affirmed by us by our judgment and order dated 5th January, 1970. Against our said decision, as stated hereinbefore, the present application has been made by the appellants under Article 133(1) of the Constitution.

3. Although, in the application, reference was made and certificate was prayed for under all the three clauses of the above Article 133(1) of the Constitution of India, Mr. Sen, arguing for the appellants petitioners, ultimately confined his arguments only to Clause (c) of the said Article but he made a strong plea before us that the instant case was a fit one for a certificate under the said clause.

4. It is well known that, for entitling the party concerned to a certificate under the said Clause (c), the case must be one. Involving some point of great public importance or great private importance, as laid down by the Privy Council in *Banarsi Prasad v. Kashi Krishna Narain*, (1900) 28 Ind App 11 (PC). It is obvious, therefore, that, in order to succeed in this application the petitioners must make out that the case before us would involve consideration of a point of the above description. It is to be seen from our decision, against which the intended appeal to the Supreme Court is sought to be taken, and from the related judgment of the learned joint Controller of Patents that the appellant's application u/s 64 of the above Act was dismissed primarily on the ground that it was barred under Sub-section (5) of the said section, which, in its relevant part, runs as follows:--

"Nothing in this section shall be deemed to empower the Controller (a) to rectify the register of patents otherwise than for the purpose of correcting a mistake of fact apparent from a reference either to the patent itself or to some

order of a competent authority made under any other provision of this Act"

It was the concurrent finding of this Court and the Joint Controller of Patents that, in the instant case, no mistake of fact, as required under the above subsection, could be found so as to entitle the appellant to succeed in their application u/s 64 of the above Act. That finding was made on an examination of the relevant materials on record. Two other questions; also appear to have been discussed by us and by the Joint Controller, viz.. whether the instant case is one, where Section 14 (2) of the Patents & Designs Act together with its proviso would apply, and whether, in a case of the present type. Rule 67 of the Patent Rules would entitle the Controller to extend or enlarge the time for deposit of the renewal fees.

5. It was argued by Mr. Sen that. In the facts and circumstances of the instant case, all the above three questions would be sufficient to satisfy the requisite test under Clause (c) of Article 133(1) of the Constitution, as laid down in the above leading decision of the Judicial Committee. On behalf of the respondents, both Mr. Basak and Mr. Dey contested the above submission of Mr. Sen. Mr. Basak on his part, took further a preliminary objection that the instant case would not come at all under Article 133 of the Constitution and he relied for this purpose, on the decision of this Court, reported in *Farbenfabriken Bayer Aktiengesellschaft Vs. Joint Controller of Patents and Designs and Another*, and *Hanskumar Kishanchand Vs. The Union of India (UOI)*, . It was Mr. Basak's submission that in the Instant case and cases of the present type, this Court, sitting in appeal over the competent authority, really acted as a persona designate in the light of the above authorities and, accordingly, the decision, complained against, would not come within the purview of Art 133(1) of the Constitution. In answer to Mr. Basak's above argument, Mr. Sen drew our attention to the recent decision of the Supreme Court, reported in *Collector of Varanasi Vs. Gauri Shankar Misra and Others*, . Even before our attention was drawn to the above authority of the Supreme Court, we had pointed out to Mr. Basak that the idea of this Court, acting as a persona designata. would be somewhat abhorrent to fundamental concepts and opposed to fundamental principles. We are relieved to find that the same view had been expressed by the Supreme Court in their above decision, *Collector of Varanasi Vs. Gauri Shankar Misra and Others*, . explaining or explaining away the earlier decision of the same Court, in *Hanskumar Kishanchand Vs. The Union of India (UOI)*, , upon which the decision of this Court, in *Farbenfabriken Bayer Aktiengesellschaft Vs. Joint Controller of Patents and Designs and Another*, . on which the appellants relied, was based on the point. In the premises, the preliminary objection, raised by Mr. Basak, must be overruled. The same also would be the fate of his other submission that, for purposes of all clauses of Article 133(1). there must be a Court below this Court and this result will follow even from the decision, cited by Mr. Basak himself, viz., *Farbenfabriken Bayer Aktiengesellschaft Vs. Joint Controller of Patents and Designs and Another*, . We hold, therefore, that the

instant application of the appellants under Article 133(1) of the Constitution cannot be dismissed in limine as contended for by Mr. Basak.

6. On the merits, however, we are inclined to think that the instant case is not one. which would satisfy the requisite test for a certificate under Clause (c) of the above Article. We base our conclusion on this point upon the finding, concurrently made by ourselves and the Joint Controller of Patents, that, in the instant case, there was no mistake of fact, apparent from a reference, either to the patent itself or to some order of a competent authority, made under any other provisions of the relevant Act Even, on the arguments, made by Mr. Sen, for finding out the mistake, if any, one has to travel beyond the patent and beyond the order or orders of competent authorities under the Act. In such circumstances, the appellant's application u/s 64 would, obviously, be barred under Sub-section (5) of the said section and would not raise any question either of great public importance or great private importance to entitle the appellant to a certificate under Clause (c) of the above Article. We are also of the opinion that none of the other two questions, viz., whether Section 14 (2) would apply to the case of a revoked patent as distinguished from a ceased patent, as contemplated under the statute, so as to attract the proviso thereto or whether, in spite of the said proviso, the Controller's power of enlargement or extension of time under Rule 67 would be available, in appropriate circumstances, to the case of a revoked patent, would be questions of such importance as to justify grant of certificate under the above clause.

7. In the above view, we reject this application and refuse the certificate, prayed for by the petitioner. In the circumstances of this case, however, we direct the parties to bear their own costs in this proceeding,

Amiya Kumar Mookerji, J.

8. I agree.