

(2014) 04 IPAB CK 0001

In the Intellectual Property Appellate Board

Case No : M.P. No. 2/2014 In OA/13/2010/PT/CH

Hindustan Unilever Limited

APPELLANT

Vs

Controller of Patents & Designs, The Deputy Controller Of
Patents & Designs And Forbes Aquatech Ltd

RESPONDENT

Date of Decision : 04-04-2014

Acts Referred:

Patent Rules, 2003 — Rule 55A, 57, 58(1), 58(2), 129, 137
Patents Act, 1970 — Section 25, 25(2), 25(3)(a), 25(4), 117A, 137

Citation : (2014) 2 MIPR 197

Hon'ble Judges : K.N. Basha, J;D.P.S. Parmar, Technical Member

Bench : Division Bench

Advocate : P.S. Raman, S. Majumdar, Dominc Alwaris, K. Duraiswamy, M.K. Chakraborty, N. Ramasamy

Final Decision : Dismissed

Judgement

K.N. Basha, J

1 . The petitioner who is the respondent No. 3 in the appeal preferred this Miscellaneous Petition raising a preliminary objection questioning the maintainability of the appeal preferred by the appellant/respondent No. 3 herein.

2 . It is seen that at the time of preferring the appeal this Board granted an order of stay in Miscellaneous Petitioner No. 70/2010 seeking for the relief of stay and in Miscellaneous Petition No. 71/2010 seeking for the relief of urgent hearing of the matter on 07.12.2011. This Board observed in that order that the impugned order was stayed by the order dated 07.12.2011 in the absence of the respondent who in spite of knowing that the date of hearing has chosen not to be present before the Board. Thereafter, the respondent No. 3/petitioner herein preferred a Miscellaneous Petition No. 46/2012 for vacating the stay order dated 07.12.2011 and the said petition is pending as on date. Meanwhile, the Respondent No. 3/Petitioner preferred this Miscellaneous Petition No. 2/2014 raising a preliminary objection of maintainability of the appeal.

3 . Mr. K. Duraisami, the learned senior counsel appearing for the petitioner/respondent No. 3 would vehemently contend that the appeal preferred by the appellant itself is not maintainable on the ground of non compliance of Section 25(2) of the Patents Act, 1970 (hereinafter referred to as Act) and on the ground of violation of mandatory provision of Rules 55A, 57, 129 and 137 of the Patent Rules, 2003 (hereinafter referred to as Rules).

4. It is contended that as per provision of the Section 25(2) of the Act, the appellant has filed the post grant opposition as per Form No. 7 without written statement and they have filed a written statement subsequently on 17.11.2005 which is in violation of Rule 57 as Form No. 7 and the written statement along with the evidence must be filed by the opponent together and copies to be sent to the Patentee simultaneously. It is contended that in view of violation of Rule 57 the post grant opposition is liable to be dismissed which was not done by the Patent Office. The learned senior counsel would point out that the said lapse was admitted by the appellant as they have stated in their letter dated 31.03.2006 sent through their counsel to the Controller of Patents that the written statement and evidence ought to have accompanied the notice of opposition as per provision under Rule 57 and therefore there has been a procedural irregularity. It is contended that similar statement was made by the appellant in the petition filed under Rule 137 praying for condoning the irregularity of procedure by exercising the discretionary powers.

5 . The learned senior counsel would contend that the Assistant Controller passed an ex-parte order without affording opportunity of hearing to the petitioner/respondent No. 3 and condoned the irregularity of procedure as contemplated under Rule 57. The learned senior counsel would contend as per provision under Rule 137, the Controller may condone the irregularity in the procedure without detriment to the interest of any person and the petitioner being the patentee he would have been afforded opportunity to be heard before passing the order condoning the irregularity of procedure and regularizing the same as per order dated 21.04.2006.

6 . The learned senior counsel would also place reliance on the provision under Rule 129 contemplating the opportunity of hearing to the patentee before exercising any discretionary power under the Act or the Rules which would affect the interest of the patent adversely. Therefore, it is contended that a non compliance of the said mandatory provisions in the instant case renders the entire post grant proceedings as vitiated.

7. The learned senior counsel would also point out that in a similar matter one Mr. K. Subramaniam of Coimbatore filed a post grant opposition with Form-7 without the written statement and evidence and without serving the same simultaneously to the patentee and the very same learned counsel on record appearing in this matter for appellant by writing letters dated 16.02.2009 and 17.02.2009 stating that the mandatory procedure as per Rule 57 was not complied and as such the Controller was requested not to consider the notice of

opposition filed by the opponent and on that basis Assistant Controller of Patents as per order dated 29.04.2009 decline to take the notice of opposition on record in view of irregularity of the procedure. Therefore the learned senior counsel for the petitioner would submit that the learned counsel for the appellant now cannot take a different stand and as such the non-compliance of the mandatory provision as per Rule 57 vitiates the entire post grant proceedings.

8 . The learned senior counsel in support of his contentions would place reliance on the following citations.

- a) (1999) 3 SCC 422-Babu Verghese and Others Vs. Bar Council of Kerala and others
- b) 1969(1) SCC 509-State of Gujarat Vs. Shantilal Mangaldas and Others
- c) (2005) 7 SCC 627-Hindustan Petroleum Corpn. Ltd. Vs. Darius Shapur Chennai and others.
- d) (1995) 6 SCC 289-M.J. Sivani and others Vs. State of Karnataka and others

9 . Per contra Mr. P.S. Raman, the learned senior counsel would strenuously contend that the present miscellaneous petition is baseless and not maintainable and put forward the following contentions.

- a) It is an appeal in disguise as the said miscellaneous petition seeks to impugn the order of the Controller of Patents dated 21.04.2006 which is not an order u/s. 25(4) of the Act.
- b) The order dated 21.04.2006 allowing the petition under Rule 137 condoning the irregularity of the procedure as per Rule 137 filed by the appellant cannot and ought not to be construed as having merged with order dated 20.01.2010 passed u/s. 25(4) of the Act and provision u/s. 117-A expressly provides for an appeal from an order u/s. 25(4) and not other order passed u/s. 25.
- c) The present miscellaneous petition is liable to be dismissed on the ground of laches and delay. The petitioner challenges the order dated 21.04.2006 only in the year 2014 and it is claimed by the petitioner that they came to know about allowing petition under Rule 137 condoning the irregularity of the procedure contemplated under Rule 57 only after receiving the impugned order in this appeal and such claim is false. The petitioner had the knowledge of passing order dated 21.04.2006 regularising the irregularity of the procedure as per provision u/s. 137 even on receipt of the notice in the Writ Petition No. 28697 of 2006 filed by the appellant.
- d) The petitioner has not raised the preliminary objection before the Controller and there is no explanation in such lapse.
- e) The petitioner has not raised the preliminary objection even after granting the relief of stay as per the order dated 07.12.2011 and the reasons stated in the present miscellaneous petition for the delay to the effect that the petitioner was

able to discover the legal position and interpretation of Rule 57 only from the similar matter of Mr. K. Subramaniam raised by the learned counsel for the appellant is unacceptable.

f) In the alleged similar case that is in the matter of Mr. K. Subramaniam no petition filed under Rule 137 to condone the procedural irregularity and as such the said case cannot be equated with the present case.

g) The petitioner is not able to state as to how he has been prejudiced in view of the order dated 21.04.2006 regularising and condoning the procedural irregularity in respect of the provision under Rule 57 as per Rule 137.

h) The Controller by order dated 21.04.2006 by Condoning the procedural irregularity issued notice to the petitioner/3rd respondent requiring them to file a reply within two months from the date of service of the order dated 21.04.2006 presumably on 27.04.2006 and in view of the non filing of any reply and evidence as per provision under Rule 58(1) within stipulated time of two months from the date of service of the order dated 21.04.2006 the patent shall be deemed to have been abandoned as per rule 58(2).

i) This Board granted an order of stay prima facie holding that the ground of deemed revocation was prima facie accepted as per the order dated 07.12.2011. The petitioner was well aware about the order dated 21.04.2006 as the same was referred in the stay order but the petitioner has not raised the present point even in the vacate stay petition filed in miscellaneous petition No. 46 of 2012. Therefore, this miscellaneous petition is liable to be dismissed on the ground of delay and laches and as baseless and devoid of merits.

10. The learned senior counsel would place reliance on the following decisions.

a) 2003 2 MLG 305-Madras High Court-K. Natarajan Vs. P.K. Rajasekaran

b) IPAB Order No. 232 of 2012 dated 03.10.2012-M.P. No. 95/2012 in OA/34/2012/PT/CH & OA/34/2012/PT/CH-Andrews Ponnuraj Vairamani Vs. The Controller of Patents, Chennai

11. We have given our careful and thoughtful consideration to the rival contentions put forward by either side and perused the entire materials available on record including the impugned order in the appeal and the order dated 21.04.2006.

12. The petitioner who is the 3rd respondent in the appeal and the patentee who has succeeded in the post grant opposition as per the impugned order suppressing and curiously filed this petition raising preliminary objection questioning the very maintainability of the appeal on the sole ground that the order dated 21.04.2006 condoning and regularizing procedural irregularity as per provision under Rule 137 without notice to them and in violation of the principles of natural justice

13. The crux of the question involved in this matter is whether Rule 57 is violated

on the ground that notice of opposition not accompanied with the written statement along with the evidence and whether the power under the Rule 137 was exercised in violation of the principles of natural justice.

14. In order to consider the above said questions, it is relevant to refer the following provisions of the Act and Rules.

The Patents Act, 1970

25. Opposition to the Patent

(2)-At any time after the grant of patent but before the expiry of a period of one year from the date of publication of grant of a patent, any person interested may give notice of opposition to the Controller in the prescribed manner on any of the following grounds, namely:-

(a)

(3)(a)-Where any such notice of opposition is duly given under subsection (2), the Controller shall notify the patentee

The Patents Rules, 2003

A. Filing of notice of opposition.-The notice of opposition to be given under sub section (2) of the Section 25 shall be made in Form 7 and sent to the Controller in duplicate at the appropriate office.

5 7 . Filing of written statement of opposition and evidence.-The opponent shall send a written statement in duplicate setting out the nature of the opponent's interest, the facts upon which he bases his case and relief which he seeks and evidence, if any, along with notice of opposition and shall deliver to the patentee a copy of the statement and the evidence, if any.

1 2 9 . Exercise of discretionary power by the Controller.-Before exercising any discretionary power under the Act or these rules which is likely to affect an applicant for a patent or a party to a proceeding adversely, the Controller shall give such applicant or party, a hearing, after giving him or them, ten days notice of such hearing ordinarily.

1 3 7 . Powers of Controller generally.-Any document for the amendment of which no special provision is made in the Act may be amended and any irregularity in procedure which in the opinion of the Controller may be obviated without detriment to the interests of any person, may be corrected if the Controller thinks fit and upon such terms as he may direct.

15. The reading of the above said provisions makes it abundantly clear that as per provision u/s. 25(2) notice of opposition to the patent may be given at the post grant stage within a period of one year from the date of publication of grant of a patent.

16. As per provision 25(3) (a) the Controller shall notify the patentee after the

notice of opposition was duly given under sub section (2) 25.

17. As per Rule 55A, the notice of opposition would be given as per Section 25(2) in Form-7 to the Controller in duplicate.

18. Rule 57 contemplates the opponent shall sent a written statement in duplicate with evidence if any along with the notice of opposition and the patentee shall be delivered with the copy of the statement and the evidence if any.

19 . As far as the case on hand is concerned, it is seen that the appellant having realized that the written statement and evidence have not been accompanied with the notice of opposition as per provision Rule 57 and therefore there has been the procedural irregularity and accordingly they have filed a petition under Rule 137 to regularize the irregularity of the procedure by paying a prescribed fee of Rs. 4000/-. The said fact is evident from the letter of the counsel for the appellant dated 31.03.2006 and on the same day they have also preferred the petition under Rule 137. The Assistant Controller of Patents & Designs as per the order dated 21.04.2006, condoned the procedural irregularity and as per provision u/s. 25(3)(a) the notice of opposition was sent to the patentee calling upon petitioner/3rd respondent herein to file the reply statement and evidence, if any, within two months from the date of despatch of the notice.

20. The material is produced before this Bench reveals that the notice of opposition was duly served along with the written statement and evidence to the petitioner/3rd respondent herein. It is not the case of the petitioner/3rd respondent that they have been served only notice of opposition without written statement and evidence. The petitioner/3rd respondent has not expressed any grievance that they have not been duly served with the notice of opposition along with written statement and evidence. The fact remains that the Controller have sent the notice of opposition as contemplated u/s. 25(3)(a) of the Act as per the order dated 21.04.2006 after condoning the procedural irregularity of procedure under Rule 57 as per provision under Rule 137 and the Controller sought for the reply statement and evidence if any from the patentee within two months from the date of despatch of the notice. Therefore we have no hesitation to hold that there is no violation of Rule 57 and the procedural irregularity have been cured as per the order dated 21.04.2006 passed by the Controller by allowing the petition under Rule 137.

21. The next question falls for our consideration is whether the Controller exercises his power under Rule 137 in violation of the principles of natural justice.

22. As we have already pointed out that the Controller by exercising his power under Rule 137 has condoned the procedural irregularity on the basis of the petition filed by the appellant. The reading of the provision under Rule 137 has incorporated earlier in this order makes it crystal clear that the Controller is vested with the power to eliminate any procedural irregularity and accordingly he as obviated the procedural irregularity of the procedure contemplated under Rule

57 as per order dated

21. 04.2006. The provision under Rule 137 empowers the Controller to exercise such power without detrimental to the interest of any person.

23 . As far as the instant case is concerned, the petitioner/3rd respondent has not whispered a word in the affidavit filed for raising preliminary objection stating that the order of the Controller dated 21.04.2006 was passed detrimental to the interest of the petitioner/3rd respondent.

24. The learned senior counsel for the petitioner/3rd respondent also place reliance on the provision under Rule 129 contemplating opportunity to be given to the applicant for a patent or a party to a proceeding which would likely to affect adversely against the petitioner/3rd respondent. By no stretch of imagination it could be stated that the interest of the petitioner/3rd respondent has been adversely affected by curing the procedural irregularity of provision under Rule 57 as per provision under Rule 137 by passing an order dated 21.04.2006 by the Controller.

25. The petitioner made a feeble attempt to place reliance in the matter of one Mr. K. Subramaniam of Coimbatore. In the said case, a post grant opposition was filed with Form-7 and in the said case, the counsel on record, the appellant herein has raised the objection that Form-7 was not filed and served on the patentee with the written statement and evidence. It is seen that the Controller has been declined to take the notice of opposition on record on the ground of procedural irregularity as per the order dated 29.04.2009 in respect of patent No. 223959 in the matter of K. Subramaniam. In the said case, the opponent has not filed any petition under Rule 137 to cure the irregularity of the procedure. As far as the case on hand is concerned, the appellant preferred a petition as per Rule 137 and prayed for curing the irregularity of the procedure contemplated under Rule 57. Therefore, the above said case of Mr. K. Subramaniam cannot be equated with the present case as in the instant case, notice of opposition was duly served on the patentee/petitioner/3rd respondent along with the written statement and evidence.

26. It is pertinent to note that in the instant case, the notice of opposition was filed on 4. 10.2005 and realizing the procedural irregularity the appellant filed the written statement and evidence with the Controller by simultaneously serving copies to the petitioner/3rd respondent with the Form-7 on 17.11.2005 and the Controller condoned and cured the procedural irregularity as per order dated 21.04.2006. Therefore, the present case stands entirely on a different footing than the case relied by the petitioner in the matter of one Mr. K. Subramaniam.

27. In view of the aforesaid findings, we have no hesitation to hold that the Controller has not violated the principles of natural justice while exercising his discretionary power under Rule 137.

28. The yet another contention of the petitioner is that they have no knowledge

about the passing of the order dated 21.04.2006 till they receive the impugned order in this appeal dated 20.01.2010. We are unable to countenance such contention for the simple reasons that the petitioner is well aware about the order of the Controller dated 21. 04.2006 as the same was despatch to them and they have been called upon to sent a reply and evidence if any within a period of two months from the date of receipt of the notice. The appellant also sent a letter dated 31.10.2009 to the Controller stating about the withdrawal of the Writ Petition No. 28697 of 2006 as per the order of Hon'ble Madras High Court dated 14.09.2009 and sought for fixing early date of hearing by marking a copy to the petitioner/3rd respondent and along with the said letter enclosed Annexure-1 facts of the case narrating about passing of the order dated 21.04.2006. Therefore, the petitioner is well aware about passing of the order dated 21.04.2006 even before passing the impugned order in this appeal.

29 . The decisions relied by the learned senior counsel for the petitioner is not applicable to the facts of the instant case in view of our earlier findings.

30. We are able to see much force in the contention of Mr. P.S. Raman, learned senior counsel for the appellant to the effect that this miscellaneous petition is liable to be dismissed on the ground of delay and laches. It is to be stated that the petitioner has not raised this objection in spite of knowing the order passed on 21.04.2006 as pointed out earlier. It is seen that this Board also granted an order of stay of the impugned order by the order dated 07.12.2011 and in that order this Board specifically stated about the order dated 21.04.2006 wherein the Controller curing the irregularity of the procedure of Rule 57 and calling upon the petitioner/3rd respondent to submit their reply statement and evidence if any within a period of two months from the date of despatch of the said notice. In the said order this Board further held that two months to be calculated from 21.04.2006 and the petitioner/3rd respondent could have sent their reply statement by 21.06.2006 that in the event of default the ground of deemed revocation as per provision under Rule 58(2) is to be made out. This Board in the said stay order dated 07.12.2011 held that a prima facie case has been made out for deemed revocation. Though the petitioner filed a miscellaneous petition No. 46/2012 to vacate the stay has not raised the present ground of preliminary objection. It is to be reiterated that the petitioner has neither raised the present preliminary objection before the Controller in spite of knowing the order dated 21.04.2006 nor raised the said point in the vacate stay petition in M.P. No. 46/2012. Thereafter, suddenly filed the present petition only in the year 2014 and there is absolutely no explanation for such inordinate delay and therefore the petition is also liable to be dismissed on the ground of delay and laches.

31 . Last but not least, we are also constrained to state that the order dated 21.04.2006 passed by the Controller curing irregularity of procedure of rule 57 as per rule 137 cannot and ought not to be construed as having merged with the impugned order dated 20.01.2010 passed u/s. 25(4) of the Act. As rightly pointed out by the learned senior counsel for the appellant only an order u/s.

25(4) is appealable as per provision u/s. 117A of the Act and not other order passed u/s. 25 of the Act. The present miscellaneous petition is nothing but an appeal in disguise and as such the same is liable to be dismissed as the order dated 21.04.2006 is not an appealable order.

32. In view of the aforesaid reasons, the Miscellaneous Petition is hereby dismissed as devoid of merits.