

(2011) 08 IPAB CK 0008

In the Intellectual Property Appellate Board

Case No : M.P. No. 265/2009 In ORA/248/2009/TM/CH And ORA/248/2009/TM/CH

M/s. Vee Excel Drugs & Pharmaceuticals (P) Ltd., G-16, 3rd Floor, Preet Vihar, Vikas Marg Delhi – 110092 **APPELLANT**

Vs

M/s. Aurochem Pharmaceuticals (India) Private Limited, 334, Gundecha Industrial Complex, 3rd Floor, Akurli Road, Kendiveli, Mumbai - 400101 And M/S. Vega Pharmaceuticals Pvt. Ltd., 21, Gandhi Nagar, Namakaal - 637 002, Tamil Nadu **RESPONDENT**

Date of Decision : 08-08-2011

Acts Referred:

Constitution Of India, 1950 — Article 14
Trade Marks Act, 1999 — Section 21, 21(2), 21(3)

Citation : (2011) 08 IPAB CK 0008

Hon'ble Judges : Prabha Sridevan, J;S. Usha, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Prabha Sridevan, J

1. This application has been filed for rectification of the trade mark VEGA under No. 732414 in Class 5. On 29.07.2011, both the miscellaneous petition and the main matter were listed. The counsel for the applicant made his submissions but there was no representation on behalf of the counsel for the Respondent No. 1. Originally Shri Chandrakant M. Joshi had filed Vakalathnama for the respondent, Mr. Nainar Dayakar was present and he submitted that the 2nd respondent had also actually filed a Vakalathnama but it was without his signature. Therefore he sought time so that he could file the Vakalathnama in proper form and also make his submissions. We asked what date would be convenient to him. On his request, it is listed

today. There is no appearance on his behalf but at the same time it must be recorded, there is no Vakalathnama in his favour either. It is clear from the records that notice has been served on both the counsel for the respondent No. 1 and the respondent No. 2 since there is an acknowledgment card signed by Mr. Chandrakant M. Joshi and there is a letter written by the respondent No. 2 stating that the Managing Director has an urgent work and they would not be able to appear on 29th July 2011. No Form-5 was filed and yet on the basis of the request by Mr. Narnar Dayakar who had not filed a Vakalathnama in his favour, we thought, we must give a fair opportunity. We adjourned the matter to today. The Form-C had been returned with the endorsement ""Left without intimation"". The Registry had asked Mr. Narnar Dayakar whether he would take the Form-C. Perhaps because there was no proper Vakalathnama, he has not taken the Form-C. In these circumstances, we think, the respondent has been given enough opportunity to appear before us and since they have not availed of the opportunity, they are set ex parte.

2. The submissions made by the counsel for the applicant are as follows:

The applicant is engaged in the business of manufacturing and marketing of pharmaceutical and medicinal preparation in 2000. The applicant adopted the mark VEGA and they have also created artistic labels with the device of Rocket. In 2002, the applicant adopted VEGA, VEGA 100 and VEGA ASIA. In 2003 they adopted these marks alongwith device of Rocket. They claim that they export their products in India and abroad. They also have a valid and subsisting drug licence. They applied for registration of VEGA ASIA on 08.02.2002 and it is registered. They have also registered the artistic work namely VEGA 100 and VEGA. The applicant had acquired these rights from one M/s. Ma Gayathri vide license agreement dated 21.07.2009. The respondent No. 1 fraudulently obtained registration in the mark VEGA. The applicant filed C.S.(O.S) No. 1851 of 2008 before the Hon'ble Delhi High Court. M/s. Ma Gayathri filed a notice of opposition against the impugned Trade Mark No. 732414 in Class 5. No counter statement was filed, so by order dated 13.09.2005, it was stated to be abandoned. The learned counsel submitted that when it had been abandoned, it is not understood how it could have subsequently been granted registration. He produced Exhibit-V by which the registration was granted in favour of

Respondent No. 2 on 23.7.2007 almost two years after the order of abandonment. He referred to the legal user certificate which shows that pursuant to the request on Form TM-24 dated 30.07.2007 and the order dated 24.08.2007, the respondent No.

1 was registered as the subsequent proprietor. He referred to Exhibit -XXVI, the license agreement dated 29.04.2004 by which M/s. Ma Gayathri

agreed that they will not claim any proprietary rights against the applicant in the Trade Mark belonging to licensor -Appendix (1) to this agreement

mentions the trade mark VEGA. The notice of opposition was filed on 1.6.2004 therefore, the respondent had time till two months from that date to

file their counter statement. Exhibit XXV is the order of abandonment. It reads as follows :

Proceedings having been taken under Section 21 of the Trade Marks Act, 1999 by the above named Opponents to oppose the registration of trade

mark applied for by the above named Applicants and whereas the Applicants having failed to file the counter statement within the prescribed period

under sub-section 2 of Section 21 of the Trade Marks Act, 1999;

It is hereby ordered that the Application No. 732414B in class 5 is deemed to have been abandoned under sub-section (2) of Section 21 of the Act and

the opposition thereto bearing No. MAS-178276 abates;

This is dated 13.09.2005.

3 . Exhibit-H filed along with the reply is the order dated 21.09.2006 by which the respondent forwarded the counter statement to the applicant herein.

According to this the counter statement was filed on 16.03.2005. A small note in script is found in this order which says that ""The applicant have filed

counter statement within prescribed time. In view of the above, this office under section 21(3) abandoned order dated 18.5.2006 is treated as

withdrawn, the same being issued inadvertently.

4 . The learned counsel submitted that originally M/s. Ashok Kumar JDoga appeared and filed an application for registration and the counter

statement to be filed to the notice of opposition was sent to M/s. Ashok Kumar J Doga by notice dated 20.1.2005. Form TM-6 is filed by Vishesh &

Associates on 15.03.2005 and it is filed into to the Registry on 16.03.2005 vide Exhibit-I. There is nothing to show that TM-6 has been taken on record

as the application was treated as abandoned on 13.09.2005 itself. The notice to

file the counter statement Exhibit-H referred above is further issued to Vishesh & Associates. Though the order treating the application as abandoned is dated 13.09.2005, in the order dated 21.09.2006, it is referred to as 18.05.2006 and the counsel submitted that the registry could not have withdrawn the order of abandonment without notice to the applicant herein. He relied on 1997 PTC (17) (DB) - K.L. Rajakrishnan Vs. Parthas Textiles, Kottayam

5. In this case these are the following indisputable facts:

1. The order dated 13.09.2005 states as on that date no counter statement is filed therefore the application is treated as abandoned. Notice of this

order communicated to the applicant herein since he had filed the notice of opposition.

2. This order is communicated on 18.09.2005.

3 . On 21.09.2006, all of a sudden, the Trade Marks Registry discovers that counter statement was actually filed on 16.03.2005 and issued a notice for calling upon the applicant to file the evidence in support of opposition.

4. This order seems almost like an after thought since words are inserted in writing that the abandonment order is withdrawn.

5 . There is nothing to show when and in what manner it was withdrawn. A withdrawal order that takes away the right that had accrued in favour of

the applicant cannot be withdrawn without notice to the applicant.

6. The circumstances mentioned above clearly shows that there is a total violation of principles of natural justice. The order treating the application as

abandoned ought not to have been withdrawn after one year and that too without giving an opportunity to the applicant. The learned counsel also

submitted that the order dated 21.09.2006 was not issued to him, so he could not file any evidence and the impugned application proceeded to

registration on 23.07.2007 positively on the basis that the opposition was deemed to have been abandoned.

7. The entire proceedings have been conducted in an arbitrary manner.

In 1997 PTC (17) (DB) (cited supra) the following passages are relevant

In (1981) 1 SCC 664 (Swadeshi Cotton Mills vs. Union o India), their Lordships of the Supreme Court had occasion to consider the scope of 'natural

justice' and held thus:

A quasi-judicial or administrative decision rendered in violation of the audi

alteram partem rule, wherever it can be read as an implied requirement of the law is null and void. In the facts and circumstances of the instant case, there has been a non-compliance with such implied requirement of the audi

alteram partem rule of natural justice at the pre-decisional stage. The impugned Order, therefore, could be struck down as invalid on that score alone.

In (1993) 3 SCC 259 (B.K. Yadav vs. J.M.A. Industries Ltd. also their Lordships considered the scope of 'natural justice' wherein it was held thus:

The duty to give reasonable opportunity to be heard will be implied from the nature of the function to be performed by the authority which has the

power to take punitive or damaging action. Even executive authorities which take administrative action involving any deprivation of or restricting on

inherent fundamental rights of citizens, must take care to see the justice is not only done but manifestly appears to be done. They have a duty to

proceed in a way which is free from even the appearance of arbitrariness, unreasonableness or unfairness. They have to act in a manner which is

patently impartial and meets the requirements of natural justice. It is not so much to act judicially but is to act fairly. The rule of procedure laid down

by law comes as much within the purview of Article 14 of the Constitution as any rule of substantive law. The substantive and procedural laws and

action taken under them will have to pass the test under Article 14. The test of reason and justice cannot be abstract. They cannot be divorced from

the needs of the nation. The tests have to be pragmatic otherwise they would cease to be reasonable. The procedure prescribed must be just, fair and

reasonable even though there is no specific provision in a statute or rules made thereunder for showing cause against action proposed to be taken

against an individual which affects the right of the individual.

(Emphasis supplied)

It is well settled that where exercise of a power results in civil consequences to citizens, unless the statute specifically rules out the principles of

natural justice would apply. It is not permissible to interpret any statutory instrument so as to exclude natural justice unless the language of the

instrument leaves no option to the Court. Procedural fairness embodying natural justice is to be implied whenever action is taken affecting the rights of

parties.

When the third respondent was informed about a patent illegality committed by

it, it was duty-bound to rectify the mistake. When an order is passed without complying with the provisions of natural justice, it follows that the Authority has passed an illegal order and when that illegality was brought to its notice, there is an obligation on its part to correct its mistake.

In taking this view, we are supported by a recent decision of the Supreme Court reported in MANU/SC/0382/1996 : JT 1996 (3) SC 597 (Union of India and another vs. M/s. Jesus Sales Corporation) wherein, their Lordships have held thus:

The High Court has primarily considered the question as to whether denying an opportunity to the appellant to be heard before his prayer to dispense

with deposit of the penalty is rejected, violates and contravenes the principles of natural justice. In that connection, several judgments of this Court

have been referred. It need not be pointed out that under different situations and conditions the requirements of compliance of the principle of natural

justice vary. The courts cannot insist that under all circumstances and under different statutory provisions personal hearings have to be afforded to the

persons concerned. If this principle of affording personal hearing is extended whenever statutory authorities are vested with the power to exercise

discretion in connection with statutory appeals, it shall lead to chaotic conditions. Many statutory appeals and applications are disposed of by the

competent authorities who have been vested with powers to dispose of the same. Such authorities which shall be deemed to be quasi-judicial

authorities are expected to apply their judicial minds over the grievances made by the appellants or applicants concerned, but it cannot be held that

before dismissing such appeal or applications in all events the quasi-judicial authorities must hear the appellants or the applicants, as the case may be.

When principles of natural justice require an opportunity to be heard before an adverse order is passed on any appeal or application, it does not in all

circumstances mean a personal hearing. The requirement is complied with by affording an opportunity to the person concerned to present his case

before such quasi-judicial authority who is expected to apply his judicial mind to the issues involved. Of course, if in his own discretion if he requires

the appellant or the applicant to be heard because of special facts and circumstances of the case, then certainly it is always open to such authority to

decide the appeal or the application only after affording a personal hearing. But

any order passed after taking into consideration the points raised in the appeal or the application shall not be held to be invalid merely on the ground that no personal hearing had been afforded... ..

(Emphasis supplied)

The Registrar discharges a quasi-judicial duty.

8. Since the order dated 13.09.2005, was communicated on 18.08.2006 has not been set-aside in a manner known to law, we have no option but to set

aside the said order. The order by which the application was deemed to have been abandoned was withdrawn without notice. Therefore the order of

withdrawal must be set aside. If the order of abandonment is not set aside in accordance with law, the legal consequences must follow. So the

application for rectification will have to be allowed and the registration of trade mark expunged. The Registrar is therefore directed to remove the

trade mark registered under No. 732414 B in class 5 from the register of Trade Marks.