

(2013) 09 IPAB CK 0012

In the Intellectual Property Appellate Board

Case No : Review Petition No. 1/2013 In Miscellaneous Petition No. 33/2013 In
ORA/15/2010/PT/DEL

Mylan (Previously Matrix) Laboratories Limited

APPELLANT

Vs

Pfizer Inc. & Ors.

RESPONDENT

Date of Decision : 13-09-2013

Acts Referred:

Patents Act, 1970 — Section 8
Trade Marks Act, 1999 — Section 64(1)(j)
Code Of Civil Procedure, 1908 — Order 47 Rule 1

Citation : (2013) 56 PTC 490 (IPAB)

Hon'ble Judges : S. Usha, J; D.P.S. Parmar, Technical Member

Bench : Division Bench

Advocate : S. Majumdar, P.S. Raman, N. Mahabir, Darban Wadhwa, Shrawan Chopra, Prachi Agarwal, Krutika Bhatia

Final Decision : Dismissed

Judgement

S. Usha, J

1. This Review Petition is filed by the respondents 2 & 3 in the main application against the order dated 14/05/2013 passed by this Board in

Miscellaneous Petition No. 33/2013 in ORA/15/2010/PT/DEL.

The facts of the case is that:

The original application is for revocation of the Patent No. 196774 under the provisions of the Patents Act, 1970 as amended by the Patents

(Amendment) Act, 2005.

2. The applicant herein filed a Miscellaneous Petition No. 33/2013 for taking on record 12 additional documents. The respondents filed their counter

affidavit objecting to the Miscellaneous Petition being allowed. This Board heard

the matter and passed an order dated 14/05/2013 allowing the

Miscellaneous Petition as hereunder:--

11. Whenever documents are produced either at the proper time or belatedly and they are received by the judicial authority, it is always subject to

proof, admissibility and relevance. The fact that they are received does not mean that they are accepted. They will be examined in accordance with

law and the authority will decide whether they support the case of the party who produces the evidence.

12. In this case, the Petitioner claims that these documents would show that the duty under Section 8 of the Patents Act was breached by the

Respondent. After Justice Ayyangar's report, when this Act came into force, the law makers have made the failure to disclose the information

required by Section 8 as a ground for revocation. It stands on the same footing as anticipation or obviousness, no less. If anticipation and obviousness

would vitiate the claim of innovation and result in revocation of the patent, non-disclosure of the information would also result in revocation. This is

what the law says. If that is so, then the ratio in (1994) 4 SCC (cited supra) applies to this case. If they prove the Petitioner's case then these

documents are essential for rendering justice. We do not see why we should shut the documents out merely because they have been filed with delay.

13. Candor and honesty is the sine qua non for a person who claims a monopoly and no patent which has been acquired by breaching this duty of

candor shall remain. The patent litigation is imbued with public interest. We are surprised that the party who has not allegedly disclosed the documents

which he was bound in law to disclose, should complain of suppression on the part of the other who is placing the same before us. The fact that the

Petitioner has brought these documents may be belatedly, will not prevent us from receiving them. All that the Patentee can expect is an opportunity

to rebut, which the Patentee shall have. However, we feel that there is a great laxity on the part of the parties to the patent litigation in bringing the

documents and filing them at the earliest juncture. Whoever the party is, early filing of documents would be fair, except of course in rare cases. So we

want to convey a message to the litigants and the members of the Bar that there is a duty to act with diligence and alacrity too, if a document is

known to them. Therefore, we impose terms on the Petitioner as a condition for

receiving the documents.

14. The question whether the Petitioner gave up Section 64(1)(j) or not will be decided when the revocation is heard. This is not the stage when we

should decide that issue. This MP is primarily concerned with the reception of additional documents. The MP is allowed on condition that the

Petitioner pays a sum of Rs. 10,000/- as cost within a week from today failing which the application will be dismissed as regards all the documents

except US '221. The Respondent will have three weeks to file their response to these documents and the Counsel shall consult with each other and

communicate to the Registry the date convenient to them for hearing the matter at Chennai, preferably before 30th June, 2013, because the Hon'ble

Delhi High Court has asked the IPAB to hear the main matter in close proximity after this petition is disposed of.

3. On receipt of the order, the petitioners found certain errors apparent on the face of the record and therefore filed this Review Petition on various

grounds that:--

4. The Board has not given a finding as to whether the reason given by the respondent (applicant herein) is correct or not and as to filing of the

additional documents is in time or not. The Board has concluded that the documents have been filed belatedly but still has taken on record the

documents. There is no reasoning whatsoever in allowing the documents filed after three years of the completion of pleadings. The Board has omitted

to decide and adjudicate on whether the documents which are beyond the scope of pleadings, can be taken on record.

5. The findings are contrary to the settled law as laid down by the Apex Court in Khoday's case -- MANU/SC/2361/2008 : 2008(10) SCC 723 : 2008

(37) PTC 413 [SC] -- Khoday Distilleries Limited v. Scotch Whisky Association and others -- wherein the powers of the Board for cancellation are

held to be discretionary and not mandatory depending upon the facts and circumstances of the case. The Hon'ble Board erred in postponing the

adjudication of the fact that the applicant had given up the ground of section 64(1)(j) which was in direct conflict of the Division Bench order in RFA

No. 92 of 2012. The Hon'ble Board erred in not appreciating that the applicant, having made a statement to their advantage, before the Division

Bench, could not resolve the same before the Board.

6. The Board having observed that the documents have been filed at the belated stage when they were in their possession, erred in allowing the

Miscellaneous Petition taking on record the additional documents. The judgments relied on by the applicants were not considered by the Board.

7. We heard the learned counsel Mr. S. Majumdar for the applicants and Mr. P.S. Raman, learned Senior Counsel for the respondents.

8. The learned counsel for the petitioner submitted that orders were passed in Miscellaneous Petition No. 33 of 2013 in ORA/15/2010/PT/DEL taking

on record the additional documents on 14/05/2013. The review petition was filed on 23/05/2013 within the stipulated period.

9. The US Patent '221 was relied on by the respondents herein in the Miscellaneous Petition No. 33 of 2013. There is no reason for the delay. There

is no reason as to why these documents were not filed along with the application for rectification in the year 2010, which were very much in their possession.

10. The learned counsel then relied on the order passed by this Board in Review Petition No. 1 of 2011 regarding the powers of the Board in dealing

with the Review Petitions. The Board had not granted any leave for the applicants to file any such application for additional documents. If the

additional documents are accepted, has it been relied on and pleaded in their revocation application.

11. The observation made in para 12 of the impugned order as regards section 8 of the Act was an error because of the Judgement by the Hon'ble

Delhi High Court. Except for US Patent '221 documents, the other eleven documents are irrelevant and are not supported by pleadings.

12. The learned counsel then relied on the judgement reported in MANU/SC/2361/2008 : 2008 (10) SCC 723 : 2008 (37) PTC 413 [SC] -- Khoday

Distilleries Limited v. Scotch Whisky Association and Ors. -- which deals with the delay in filing the evidence. The Board though had recorded the

statement of the respondent in the Miscellaneous Petition that no leave was granted for exchange of documents had erred in not giving any reasons

for the same.

13. The IPAB Order No. 41 of 2013 passed on 08/03/2013 in the TVS matter (Miscellaneous Petition No. 124/2012 in ORA/1/2007/PT/MUM--M/s.

TVS Motor Company Ltd. v. Bajaj Auto Ltd.) was relied on to say that documents

filed after a delay of four years cannot be taken on record.

14. ILR Supp. 5 (2007) Delhi 18 -- M/s. Gold Rock World Trade Ltd. v. M/s. Veejay Lakshmi Engineering World Ltd. -- where it was relied on to

say that there must be reason for the delay in filing the documents at a belated stage. If the additional documents are to be considered there must a

pleading to that extent in the application for revocation.

15. The parties can lead evidence limited to their pleadings and the parties while leading evidence cannot travel beyond pleadings --

MANU/DE/0107/2010 : 166 (2010) DLT 629 -- Prakash Rattan Lal v. Mankey Ram.

16. Fraud has to be pleaded with cogent evidence.

17. In reply, the learned counsel for the respondent submitted that the main issue is only with regard to the failure to disclose the information required

under section 8 of the Act for revocation. The same has been recorded at para 12 of the impugned order. The petitioners allegation that the

documents were with the respondents in 2009 itself is false.

18. The judgement in TVS matter (Supra) is not relevant to this case on hand. Evidence beyond the scope of pleadings is not correct. The prayer in

the Review Petition is contrary to the prayer sought for in the Writ Petition filed before the Hon'ble Delhi High Court. Documents when found

necessary to decide the real issue, the court will receive the document in [MANU/SC/0748/1994 : 1994 1 SCR 429 -- Billa Jagan Mohan Reddy and

Anr. v. Billa Sanjeeva Reddy and Ors.

19. The petitioner herein were granted opportunity to file their reply evidence and therefore no error.

20. Section 8 -- discretionary power is not correct.

21. MANU/SC/0705/1999 : AIR 2000 SC 84--Ajit Kumar Rath v. State of Orissa & Ors. -- Except an attempt to correct an apparent error any other

attempt not based on any ground set out in Order 47 would amount to abuse of the liberty given to the Tribunal under the Act to review its judgement.

22. OA/17/2012/PT/DEL (IPAB Order No. 263 of 2012 -- Astrazenceca U.K. Limited v. Natco Pharma Limited and Ors.) was relied on and

submitted that as observed by the Apex Court in Satyanarayan's Case (MANU/SC/0169/1959 : AIR 1960 SC 137 -- Satyanarayan Laxminarayan

Hegde and Ors. v. Mallikarjun Bhavanappa Tirumale) -- an error apparent has to be established and such error cannot be cured by a writ.

23. In rejoinder, the learned counsel for the petitioner submitted that the respondents are the petitioner in the Miscellaneous Petition for taking on record additional documents have not given any reason for the delay nor have they stated the date of knowledge of these documents. The prayer in the writ petition was as a safeguard though the review petition was filed earlier.

24. We have heard and considered the arguments of both the counsel.

25. The main grounds of review is that though it has been stated to be a belated filing of additional documents no reason given for allowing the documents filed at the belated stage. The documents filed are beyond the scope of pleadings and therefore, cannot be taken on record. The Board erred in considering the provisions of section 8 of the Act.

26. The provisions of Order 47 Rule 1 is reproduced below:--

1. Application for review of judgment--(1) Any person considering himself aggrieved,--

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court or Small Causes,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or

could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of

the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of

judgment to the Court which passed the decree or made the order.

27. The orders of this Board can be reviewed no doubt as it has been held by our recent judgement dated 08/07/2013. It however does not mean that

all the matters are to be reviewed giving an opportunity to the parties and hearing them on merits of the matter which will be an appeal in disguise.

28. The provision of Order 47 CPC is very clear that only on discovery of a new evidence or after exercise of due diligence or which was not within

his knowledge when the order was passed or on account some mistake apparent

on the face of the record may apply to the court to review the order.

29. The only grievance of the review petitioner is that the documents filed at a belated stage shall not be taken on record and when it is said to be a

belated filing. The Board had to have given reasons for accepting such delayed documents. We think in such a case there is no error. The documents

have been taken on record giving an opportunity to the other side to file documents.

30. In this case on hand, we do not find any error apparent on the face of the record. The order is clear which reads as follows:--

11. Whenever documents are produced either at the proper time or belatedly and they are received by the judicial authority it is always subject to

proof, admissibility and reliance. The fact that they are received does not mean that they are accepted. They will be examined in accordance with law

and the authority will decide whether they support the case of the party who produces the evidence.

14. The Respondent will have three weeks to file their response to these documents and the Counsel shall consult with each other and communicate to

the Registry the date convenient to them for hearing the matter at Chennai, preferably before 30th June, 2013, because the Hon'ble Delhi High Court

has asked the IPAB to hear the main matter in close proximity after this petition is disposed of.

31. With these circumstances, we do not find, there is any error in the impugned order to be reviewed. It is also important to note that the petitioner

herein is also given time to file their response to the documents. Accordingly, the review petition is dismissed as there is no merits, the review

petitioner shall file their document if any within three weeks from the date of receipt of this order.