
(1974) 05 CAL CK 0017
In the Calcutta High Court
Case No : Matter No. 92 of 1973

Poysha Industries Co. Ltd.

APPELLANT

Vs

Dy. Controller of Patents and Designs

RESPONDENT

Date of Decision : 28-05-1974

Acts Referred:

Patents Act, 1970 — Section 25
Patents and Designs Act, 1911 — Section 9

Citation : AIR 1975 Cal 178

Hon'ble Judges : Dipak Kumar Sen, J

Bench : Single Bench

Advocate : D.K. Dey, for the Appellant; Somnath Chatterjee, for the Respondent

Final Decision : Dismissed

Judgement

Dipak Kumar Sen, J.—The alleged invention which is the subject-matter of this appeal from a Patent's order is (a) a pil-ferproof closure for a container comprising a top ring seamed to the body of the container, and aperture in the top ring of substantially smaller dimensions than the dimensions of the said top ring, a diaphragm covering the said aperture and a lid adapted to fit over the aperture, characterised in that the lower free edge of the wall of the aperture is crimped with the free edge of the diaphragm; (b) a closure as claimed hereinabove further characterised in that the upper edge of the wall of the aperture is curled, (c) a closure as claimed above wherein the flange of the lid is adapted to rest on the said curled upper edge of the aperture in the closed position, (d) a closure as claimed wherein the diaphragm is adapted to be cut along an edge adjacent to the said crimp.

2. The Metal Box Company of India Ltd.. of Barlow House. 59, Chow-ringhee. Calcutta 20, an Indian Company, the respondents herein applied under Sections 3 and 4 of the Indian Patents and Designs Act, 1911 for a patent of the aforesaid invention, in the office of the Patents and Designs on or about 16th April, 1969.

3. Poysha Industrial Company Ltd. of Bombay, also an Indian Company, the appellants herein intended to oppose the said application for patent and filed a written statement of opposition on or about 24th July, 1970.

4. In the said opposition the appellants, objected to the grant of patent u/s 9(d) of the Indian Patents and Designs Act, 1911, on the sole ground that the invention has been publicly used in a part of India or has been made publicly known in any part of India.

5. In support of the said ground it was alleged on behalf of the appellants that they have been manufacturing and selling tin containers with crimped diaphragms to Messrs. Com Products Co. (India) (P.) Ltd. since February 1960 and also to Messrs. Zandu Pharmaceutical Works Ltd. since March 1969. It was further alleged in the said opposition the alleged claim for patent by the respondents as regards improvement in container closure was neither novel nor new but an application and utilization of the known technique of crimping commonly used by the appellants for closure of container tops and that the method used by the applicant for crimping the top portion of the container was common and known to the industry and did not require any particular technique or skill.

6. As evidence in support of the opposition the appellants relied on an affidavit of one Hooseini A. Barodavala of Bombay, a director of Zenith Tin Works Private Ltd. affirmed on the 12th August, 1971 wherein it was alleged that the improvement in the container closure claimed by the respondents was a common technique known on the deponents company and that such pilferproof diaphragms had been manufactured and supplied by the deponents' company for many years past. It was alleged that the claim for patent rights in respect of the improvement in the container closure was neither novel nor ingenious but had been known to the industry in general and the technique the patent for which was applied for was identical with technique used by the deponents' company. In another affidavit of one Gopal Krishna Subbunji Kadbet a person in charge of quality control of the appellants products, affirmed on 10th August, 1971, it was alleged that in July 1960 the deponent had occasion to negotiate with Messrs. Hindustan Lever Ltd. pursuant where to about 3,700 containers where the opening of the container tops was smaller than the opening of the wall and the diaphragm or taggar had been fitted to the smaller opening in respect of the whole wall of the container were delivered. The respondents in turn relied on an affidavit of one Ram Bachan Pandey affirmed on 16th June 1972 where it was alleged that pilferproof closures for containers as claimed in the application were not known prior to the date of the filing of the application, i.e. 16th April 1969 and it was also alleged that there had been no manufacture or sale of such closures as claimed in the said application.

7. By his decision dated the 4th of January 1973 the Deputy Controller of Patents and Designs held that prior public knowledge and user in India had not been established by the appellants and as such the opposition to the grant of the

patent on the said application was dismissed with costs.

8. The Patents Act 1970 came into force on or about 21st of September, 1970 and Rules thereunder were published sometime on 20th April, 1972. At the time of hearing of the application the new Act and the Rules thereunder were in force and the earlier Act had been repealed. The application however, was opposed on the only ground as laid down in Section 9 (d) of the earlier Act. To succeed on that ground the appellants had to establish that the invention for which the patent was being claimed namely the container and closure had been publicly used or was publicly known in India prior to the filing of the said application. From the evidence adduced before the Deputy Controller of Patents and Designs it appears that the appellants failed to establish the ground. What was established that the technique used by the appellants in manufacturing the container and closure namely the crimping of a diaphragm in the edge of the aperture in the container was known. But no patent was being claimed for this technique. The alleged supply of identical containers and closures to M/s. Hindustan Lever Ltd. was admittedly after the application for patent was filed.

9. Mr. D.K. Dey learned counsel appearing on behalf the appellants has sought to contend that the container and closure for which the patent was applied for was not an invention at all but was only an obvious use of known techniques which did not call for any inventiveness. What the respondents had done was to make the closure smaller than the mouth of the container and the diaphragm fitted over the smaller opening by the known process of crimping and curling. Leading English Authorities were cited by Mr. De in support and he contended that the subject-matter of this application not being an invention at all a patent should not have been granted. This appears to me to be a new ground altogether and it seems that under the earlier Act the application could not have been opposed on such a ground. Under the earlier Act, in a petition for revocation of patents under Sub-sections (d) and (e) of Section 26 it could be contended that--

(d) That the invention was not, at the date of the patent a manner of new manufacture or improvement:

(e) That the invention does not involve any inventive step, having regard to what was known or used prior to the date of the patent.

10. In the subsequent Act of 1970 which came into existence during the pendency of this application the grounds for opposition to the grant of a patent have been extended. Sub-sections (e) and (f) of Section 25 of the new Act read as follows :--

(e) That the invention so far as claimed in any claim of the complete specification is obvious and clearly does not involve any inventive step having regard to what was used in India before the priority date of the applicant's claim;

(f) That the subject of any claim of the complete specification is not an invention within the meaning of this Act, or is not patentable under this Act.

11. No authority was cited on behalf of the appellants to show that the new ground urged in this appeal could be agitated under the specific ground of prior public user as laid down in Section 9 (d) of the old Act.

12. It was possibly open to the appellants to amend their opposition filed before the Deputy Controller of Patents and Designs after the new Act of 1970 came into force and include this new ground of opposition but the same was not done and therefore the only ground which was agitated and which could be considered in this appeal is whether the alleged invention had been publicly used or publicly known prior to the application for a patent.

13. As discussed before, it is clear from the evidence adduced that such prior public user has not been established and the appellants have not shown that the identical containers with closures were manufactured or sold or used prior to the application to the patent. Therefore. this appeal fails.

14. From the decision of the Deputy Controller of Patents and Designs impugned herein there are observations from which it may be contended it was also decided that the container with closure was a patentable invention. It has been held that the container closure, as claimed by the respondent, is a different combination of known techniques and that such a combination not known before has to be regarded as novel.

15. I make it quite clear that I have come to no finding whether this particular container closure amounts to an invention within the meaning of the Indian Patents and Designs Act, 1911, or the Patents Act, 1970. The only ground on which this appeal is being decided is that the alleged invention for which the application for patent was filed was not publicly used or publicly known in India before. It will be open to the parties, if so advised, to agitate the question whether the alleged invention is ,an invention at all within the meaning of the Act in appropriate proceedings.

16. It has been fairly conceded by Mr. Somnath Chatterjee, learned counsel appearing on behalf of the respondents, that it will not be disputed in future proceedings, if any, that the appellants are persons interested within the meaning of Section 64 of the Patents Act, 1970.

17. In the premises, this appeal is dismissed with costs.