

(2022) 10 BOM CK 0090
In the Bombay High Court
Case No : Writ Petition No. 2939 Of 2017

Safex Chemicals India Ltd

APPELLANT

Vs

Controller Of Patents & Designs And Others

RESPONDENT

Date of Decision : 13-10-2022

Acts Referred:

Constitution Of India, 1950 — Article 226

Patent Act, 1970 — Section 11A, 25(1), 25(2), 57, 57(1), 57(3), 57(4), 58, 59, 64

Citation : (2022) 10 BOM CK 0090

Hon'ble Judges : S.V.Gangapurwala, J;Madhav J. Jamdar, J

Bench : Division Bench

Advocate : J. P. Sen, Alankar Kirpekar, S. K. Bansal, Ajay Amitabh Suman, Shekhar Bhagat, Neel G. Helekar, Kanhaiya S. Yadav, Govind Prajapati, Dushyant Kumar, Venkatesh Dhond, Rohan Kadam, Shriraj Dhruv, Mitesh Naik, Ronak Shah

Final Decision : Disposed Of

Judgement

S.V. Gangapurwala, J

1 The Petitioner challenges the order passed by the Controller of Patents dated 11th April 2017 thereby dismissing the pre grant opposition Applications filed by the Petitioner and other opponents and has allowed Respondent No.2's Application for patent titled a "Novel Agricultural Composition" that increases crop yields.

2 Mr. Sen, the learned Senior Advocate for the Petitioner eruditely canvassed the following submissions:

According to Mr.Sen, the learned Senior Advocate, the amendment Application filed by Respondent No.2 was allowed and the Petitioner was not intimated about the allowance of the amendments. The Petitioner was not given an opportunity to file an appropriate pre grant opposition to the amended claims and to advance oral arguments. This constitutes blatant denial of natural justice. The learned Controller of Patents allowed the 5th amendment Application filed on 26th July

2016 vide order dated 9th September 2016. The said order ought to have been informed to the Petitioner thereby directing them to file amended pre grant opposition. The learned Controller of Patents nor Respondent No.2 informed the Petitioner that the Controller of Patents had already allowed the amendment Application on 9th September 2016 till the date of hearing on 24th February 2017. Even on that day, no copy of the order allowing the amendment Application was furnished to the Petitioner. It was only during pendency of the Writ Petition, the Petitioner could get a copy of the said order. The original patent Application was filed by Respondent No.2 in the year 2007. The Petitioner had filed its pre grant opposition Application in the year 2013. The allowance of the 5th amendment Application of Respondent No.2 ought to have been informed to the Petitioner so as to file an amended pre grant opposition. The Petitioner was deprived of the opportunity. The same is in flagrant violation of principles of natural justice. The order, as such, granting patent is bad in law and deserves to be set aside.

The learned Senior Advocate further submits that the Petitioner requested the learned Controller to decide the amendment Application first and then allow the Petitioner to advance its arguments on the basis of final claims as found satisfactory by the Controller of Patents. It was always a case of the Petitioner that the Petitioner shall be informed about the final amended Application if the amendment is allowed by the Controller in order to enable the Petitioner to file amended pre grant opposition and argue the matter. The learned senior Advocate submits that, initially, the patent Application was filed on 8th January 2007 with 1 to 15 claims by Respondent No.2. On 6th May 2008 first amendment Application was filed in response to the examiner report with 13 claims. On 9th June 2008 second Application was filed with 11 claims. On 17th July 2009, third amendment Application was filed with 10 claims. Initially, on 24th October 2009, the Controller of Patents allowed the pre grant opposition. The same was confirmed by the IPAB under its order dated 4th April 2012. On 23rd August 2013 the Petitioner filed a Notice of Opposition. On 13th April 2016 this court set aside the orders of the IPAB on the ground of violation of principles of natural justice. Thereafter on 21st April 2016 the IPAB set aside the order of the Controller and the matter was remanded back to the Controller of Patents. On 5th July 2016 fourth amendment Application with 9 claims was filed. On 26th July 2016 fifth amendment Application with 9 claims was filed. Under letter dated 6th September 2016 the Controller of Patents informed the Petitioner that in view of the hearing held on 22nd August 2016, with mutual consent of the parties, the matter got adjourned for arguments on amendment Application on Form 13 and Opposition, both. Under letter dated 7th September 2016 the Petitioner informed the Controller of Patents that it was never agreed that the amendment Application and the pre grant opposition be decided together. The Petitioner always insisted for adjudication of amendment Application first. On 8th September 2016, interlocutory petition was filed by the Petitioner vide email seeking disposal of the amendment Application first. On 9th September 2016 the

Controller allowed the amendment Application of Respondent No.2. On 24th February 2017 hearing of the Petitioner's pre grant opposition was held by the Controller of Patents. On the said date, the Petitioner insisted for disposal of its interlocutory petition and requested the amendment Application be decided first. On the said date, the Petitioner was never informed that the amendment Application has already been allowed vide order dated 9th September 2016. Even copy of the said order was not given to the Petitioner. The Petitioner, again on 28th February 2017 requested for hearing and disposal of the amendment Application first, as he was not aware that the amendment Application was allowed on 9th September 2016. On 11th April 2017 the Controller rejected the pre grant opposition and granted impugned patent. The Petitioner, on 24th February 2017 submitted that it was unclear as to which amendment Application was being argued. The Controller of Patents approbated and reprobated at the same time in the impugned order by saying that the amendments are already allowed and there is no point in making submissions on amended claims, while in the said order, the Controller says that the Petitioner has been directed by the Controller to argue the pre grant opposition on the basis of original patent Application as filed in the year 2007, original pre grant opposition as filed by the Petitioner in the year 2013 and the amendment is allowed by the Controller on 9th September 2016 but never informed about the same to the Petitioner. The Controller observed that he had allowed the amendment Application, hence directed the Petitioner to argue the pre grant opposition without allowing the Petitioner to carry out the amendments subsequent to the amendment of patent Application. The order impugned dated 11th April 2017 was passed on interlocutory Application and the Petitioner's request for hearing the amendment Application is pending. The Petitioner was never given an opportunity to argue its case on amendment Application nor was given an opportunity to prosecute its amendment Application for pre grant opposition with respect to the already allowed alleged amendment Application. The impugned order is in clear violation of principles of natural justice, as such, deserves to be set aside.

The learned Senior Advocate for the Petitioner further submits that the post grant opposition under section 25(2) is not an alternate remedy to the proceedings under section 25(1), if the order of pre grant opposition is challenged by way of Writ Petition. Reliance is placed by the learned Senior Advocate on the Division Bench judgment of this Court in the case of Neon Laboratories Pvt. Ltd. Vs. Troikaa Pharma Ltd. 2011 (45) PTC 357 The learned Senior Advocate for the Petitioner further relies on the judgment of the Division Bench of the Madras High Court in the case of Indian Network of People living with HIV/AIDS Vs. Union of India 2009 (39) PTC 468 to submit that pre grant opponent is entitled to a hearing and in the event the patent Application is allowed, then on the claims as amended. It is also settled law that post grant hearing is no substitute for a pre grant hearing and an opportunity to file a post grant opposition under Section 25(2) is not an alternate remedy that would affect in any way the maintainability of the Writ Petition filed by the opponent

challenging the dismissal of his pre grant opposition under Section 25(1). The learned Senior Advocate also relies upon the judgment on similar legal proposition in case of the Glochem Industries Ltd. Vs. Cadila Healthcare Ltd. & Ors. 2010 (44) PTC 363 (Bom) and judgment of this Court in the case of TATA Chemicals Ltd. Vs. Union of India & Ors. Judgment dated 08-10-2013 in Writ Petition No.6561 of 2013 5 1998 (8) SCC 1. The learned Senior Advocate also relies on the judgment of the apex court in the case of Whirlpool Corporation Vs. Registrar of Trademarks, Mumbai & Ors.⁵ to contend that the availability of alternate remedy would not be a bar for this Court to entertain the Writ Petition .

The learned Senior Advocate further relies upon the judgment of the learned single Judge of Delhi High Court in case of Best Agro Life Ltd. Vs. Dy. Controller of Patents Judgment dated 07.07.2022 in W.P.(C) IPD 11/2022 and submits that in the said Writ Petition it has been held that pre grant opposition can never be equated with the post grant opposition or revocation petition under Section 64 of the Patent Act, 1970. The impugned judgment deserves to be set aside.

3 Mr.Dhond, learned Senior Advocate for Respondent No.2 in his usual lucid style put-forth the following submissions:

The Petitioner has suppressed that it has already availed of an alternate and efficacious remedy by filing the post grant opposition proceedings under section 25(2) of the Patents Act, 1970. Having so elected and availed of remedy, thereafter suppressed the same from this Court. The Petitioner has no right to invoke this Court's discretionary jurisdiction under Article 226 of the Constitution of India. The Petitioner vigorously prosecuted those post grant opposition proceedings whilst this petition remained pending for admission. It is only when the Petitioner learnt that the technical report of the Board who is to advise the Controller was adverse to it, that the Petitioner has revived this petition. The proceedings before the Controller are ripe for final hearing. Hearings were scheduled and deferred at the Petitioner's instance citing the pendency of the present Writ Petition.

The learned Senior Advocate submits that the Petitioner was intimated well in advance that Respondent No.2's amendment Application and the merits of Respondent No.2's Application for grant would be heard together. The Petitioner communicated its acceptance of these directions and then in volte face has attempted to reprobate and resile from the same. The Controller granted full opportunity of hearing on the amendment Application and upon merits of its pre grant opposition Application. The Petitioner was even granted liberty to file additional written statement in the main matter. Despite having been given full and fair opportunity, the Petitioner deliberately refused to argue on merits. The Petitioner did not avail of the liberty granted by the Controller to file written submissions and on its own accord confined its argument only to the amendment Application made by Respondent No.2. In these circumstances, the Petitioner cannot submit that the principles of natural justice are violated. The conduct of the Petitioner dis-entitles it from invoking this Court's jurisdiction under Article

226 of the Constitution.

The learned Senior Advocate submits that the Petitioner already instituted post grant opposition proceedings five months before filing of the present Writ Petition. It has even vigorously pursued the post grant opposition proceedings. The Petitioner could raise all these grounds in the post grant opposition proceedings. The fact that five months before filing of the Writ Petition the Petitioner filed its post grant opposition proceedings, is suppressed by the Petitioner in the present Writ Petition. The Petition deserves to be dismissed on the ground of suppression of facts. Moreover, in a post grant opposition proceedings, the opposition Board issued recommendation on the present Respondent No.2's patent upholding its validity and rejecting all the grounds of post grant opposition proceedings on 6th November 2019. On 19th February 2020, the Petitioner and other opponents filed interlocutory petition seeking constitution of a new Opposition Board. On 8th July 2021, the Controller allowed the Petitioner and other opponent's Application constituting a new Opposition Board. On 14th June 2022, the new Opposition Board issued fresh recommendation on Respondent No.2's patent. On 27th June 2022, the Controller fixed final hearing dates. It is submitted that once the post grant opposition proceedings have proceeded further this writ now may not be entertained. Even after losing in post grant opposition proceedings, the party can file an appeal under Section 11A of the Patents Act to the High Court. It is not only the case that the Petitioner has alternate remedy but in fact it has availed of the alternate efficacious remedy and thereafter has filed the Writ Petition. The learned Senior Advocate relies upon the judgment of the Apex Court in the case of *Alloys Wobben Vs. Yogesh Mehra* 2014 15 SCC 360. In the said case, the Apex Court held that the person who availed of and elected the remedy of post grant opposition proceedings under section 25(2) was precluded by his election from availing the remedy of revocation petition and/or counter claim under section 64. The fundamental principle of law that the apex court laid down was that in patent cases, objectors had to elect their choice of remedies and where they did so, they would be held to their election. The same principle applies here. The Petitioner's conduct of prosecuting the post grant opposition proceedings evidences purposeful availment and active election. The Petitioner, now, cannot abandon the post grant opposition proceedings at the fag end. In a post grant opposition proceedings, the Petitioner even sought and obtained the reconstituted Opposition Board because it was unhappy with the findings of the earlier Board. Now, to its discomfiture, the new Board has also given findings which it does not like. If, now, these post grant opposition proceedings are to be abandoned, the same would amount to abuse of process of law which this Court would not entertain. The judgments relied on by the Petitioner to contend that the remedy to challenge the order in the pre grant opposition proceedings can still be availed of with the remedy of post grant opposition proceedings, may not apply in the present case. In the present case, the Petitioner has already availed of the post grant opposition proceedings and has vigorously pursued it. Five

months thereafter has filed the Writ Petition.

It is submitted that apart from the Petitioner one Jaishil Sulphur and Chemicals (Jaishil) filed pre grant proceedings against Respondent No.2, so also, one Vilas Shetty (Shetty). The Controller allowed Jaishil's pre grant proceedings on 24th October 2009. Respondent No.2 filed an appeal against the said order to IPAB. The IPAB on 4th April 2012 dismissed the appeal of Respondent No.2. Respondent No.2 filed Writ Petition No.7384/2012 in this court against the order of IPAB. During pendency of the Writ Petition, the Petitioner filed pre grant opposition proceedings on 23rd August 2013. Eventually, the order was set aside and the matter was remanded to the Controller. The IPAB directed the Controller to dispose of the matter within three months. These directions were passed in the proceedings emanating from the Jaishil's Application. The Controller was bound to decide the objections of Shetty and Jaishil. He could not have decided Jaishi's and Shetty's opposition without formally allowing the amendment. The amendment Applications were reducing the scope of Application. The Controller, thus, acted lawfully and within jurisdiction.

The learned Senior Advocate submits that the amendment Applications of the Patent Act are not akin to the proceedings seeking leave to amend filed in suit before the civil court and/or under the CPC. The Petitioner cannot claim to have legal vested right to have heard on the amendment Application made prior to the grant of patent. In Patent Act, under Sections 57 to 59 the Applicant seeking to amend can only subtract and not add. By amendment he can only restrict his claim and not broaden them. Under section 57, an amendment can be sought either before a patent is granted or after the patent is granted under section 57(3). If an amendment is sought after the grant of patent, different considerations apply. In such a case the controller is bound to publish the Application seeking leave to amend the Application for a patent and procedure is prescribed under section 57(4). Further, under Section 57(1) which provides for pre grant scenario does not envisage granting a hearing to the opponent for an amendment Application made prior to the grant of patent. In a pre grant scenario an opponent, thus, has no right of hearing of an amendment Application. Under Rule 81 also hearing is contemplated to an opponent in a post grant scenario.

The learned Senior Counsel submits that in respect of the present patent itself the Delhi High Court in the case of Sulphur Mills Ltd. Vs. Dharmaraj Crop Guard Ltd. & Anr. (2021) 282 DLT 658, prima facie, found that the Respondent No.2 had restricted its claim and not broaden them. The Court also found that the amended claims were well within the originally filed claims. In fact, the Petitioner has not suffered any prejudice. On 26th July 2016, Respondent No.2 filed its final amendment Application. This Application narrowed its claims to 9 claims. This Application superseded four previous amendment Applications. Respondent No.2 restricted its claims and did not broaden them. On 22nd August 2016 the hearing took place in the Petitioner's pre grant opposition Application.

At this hearing, the Petitioner claimed ignorance of Respondent No.2's final amendment Application. The Controller directed Respondent No.2 to serve this amendment Application and the accompanying amended claims upon the Petitioner and the matter was adjourned for hearing the amendment Application and the Petitioner's pre grant opposition Application on 14th September 2016. On 23rd August 2016, Respondent No.2 served final amendment Application along with amended claims upon the Petitioner. On 6th September 2016, the Controller addressed an email to the parties. By this email, the Petitioner was reminded that the matter had, by consent, been stood over to 14th September 2016. The Controller, further informed the Petitioner, it would argue the amendment Application along with main pre grant amendment Application. The Petitioner was, thus, put to notice that it was to get ready to argue the merits of the amendment Application. On 6th September 2016 the Petitioner responded to the Controller and had intimated the Controller that it had received final amendment Application (and final claims). It communicated its acceptance of the Controller's joint hearing direction since it conveyed that it would be a complete response in the matter and that it would attend the hearing on 14th September 2016. The fact that the Petitioner had sent this email was suppressed by it in its pleadings. Thereafter on 7th September 2016 the Petitioner attempted a volte face to resile from its acceptance of the Controller's decision to have a joint meeting. In spite of having no vested legal right, the Petitioner insisted on the amendment Application being heard, contrary to the Controller's decision. On 8th September 2016, 17th December 2016 and 8th February 2017 the proceedings were repeatedly adjourned at the Petitioner and its Advocate's instance and thereafter the matter was stood over to 24th February 2017. On 24th February 2017 the Controller finally conducted the hearing in the petitioner's pre grant opposition proceedings and Respondent No.2's amendment Application. The Controller recorded the Petitioner's arguments on the amendment Application and thereafter gave substantive and detailed reasons rejecting the same. After recording the Petitioner's arguments on the amendment Application in detail and substantive reasons for rejecting the same the Controller called upon the Petitioner to argue its pre grant opposition. The Petitioner refused to do so. The Controller further recorded that in spite of granting liberty to the Petitioner it had not filed written submissions for opposing the grant of patent in Respondent No.2's favour. It was in these circumstance that, the Controller thereafter decided the Petitioner's pre grant opposition proceedings on its merits. The Petitioner on its own accord chose not to argue on merits of the main matter. The Petitioner is guilty of suppression of facts and has weaponized the delays and to frustrate Respondent No.2's legal right of entitlement. Its conduct dis-entitles it from invoking this Court's jurisdiction under Article 226 of the Constitution.

The learned Senior Advocate for Respondent No.2 submits that the Petitioner had filed Writ Petition No.2606/2017 before the Delhi High Court for a direction restraining the Controller from proceeding with the matter. The High Court did

not grant interim relief. Same was filed on 10th March 2017. On 11th April 2017 the Controller dismissed pre grant opposition filed by the opponent and granted the patent. On 1st May 2017 the Petitioner withdrew the Writ Petition bearing No.2606 of 2017 filed before the Delhi High Court. The Delhi High Court dismissed the Writ Petition as withdrawn. Thereafter on 19th May 2017 the Petitioner filed post grant opposition proceedings (Form 7) under Section 25(2) of the Patents Act.

The learned Senior Advocate submits that the matter does not require interference of this Court. The post grant opposition proceedings are at the final stage. The Writ Petition may not be entertained.

4 We have considered the submissions canvassed by the learned Senior Advocates for the parties.

5 Following dates and events placed on record by the Respondent No.2 does not seem to be a matter of debate:

Sr.

No.

Date

Event

1

08.01.2007

2nd Respondent filed the patent Application No.40/MUM/2007 (being Complete Specification (Form 2) along with claims 1-15 dated 06.01.2007) for a Novel Agricultural Composition before the Controller of

Patents.

2

08.01.2007

2nd Respondent filed a request for examination by filing

Form No.18 bearing Request No.42/RQ-MUM/2007

3

02.02.2007

Application published in the Patent Office under Section 11(A) of the Patents Act having Journal Issue

No.05/2007.

4

17.05.2007

Patent Office issued the First Examination Report wherein 2nd Respondent was requested to comply with

the requirements of the report within 12 months.

5

15.06.2007

1st Opposition u/s. 25(1) of the Patents Act is filed by Jaishil Sulfur & Chemicals Industries (Jaishil) with a

request for a hearing.

Additionally, another Opposition was filed by Vilas Shetty (Shetty).

6

06.05.2008

Pursuant to the observations of the FER issued by the Patent Office, 2nd Respondent filed a response to FER along with 1st amendment Application to amend the claims via letter of Mr. C. M. Joshi dated 05.05.2008

along with Claims No.1 – 13 dated 06.01.2007.

7

06.06.2008

filed on 07.06.2008

Reply statement filed by 2nd to the pre grant opposition

filed by Jaishil with amended claims dated 6th January 2007.

8

09.06.2008

2nd amendment Application filed by 2nd Respondent

along with Claims No.1-11.

9

24.04.2009

Hearing held on Jaishil's pre grant opposition.

10

08.05.2009

Written note of arguments submitted by Jaisheel.

11

25.05.2009

Intermediate reply filed by 2nd Respondent in the matter of the Pre Grant Opposition filed by Jaisheel.

12

20.07.2009

2nd Respondent filed affidavit dated 17.07.2009 to overcome the objections raised by the Examiner.

3rd Amendment Application filed by 2nd Respondent along with Form 13 dated 17th July 2009 with Claims No.1 – 10.

13

20.07.2009

Final reply filed by 2nd Respondent in the matter of the pre grant opposing filed by Jaisheel.

14

24.10.2009

The Assistant Controller allowed the Opposition and decided not to proceed with the grant of the patent

Application No.40/MUM/2007

15

23.01.2010

2nd Respondent filed an appeal before the Intellectual Property Appellate Board (IPAB) bearing No.OA/13/2011/PT/MUM challenging the Assistant Controller's Order dated 24.10.2009.

16

04.04.2012

By order No.76 of 2012, the IPAB dismissed the Appeal No.OA/13/2011/PT/MUM.

17

Writ Petition No.7384 of 2012 filed by the 2nd Respondent in this Hon'ble Court

challenging the Order

dated 04.04.2012 passed by the IPAB.

18

23.08.2013

Petitioner filed pre grant opposition as per Section 25(1) of the Patent Act against the Patent Application.

19

07.10.2013

Haryana Pesticides Manufacturers Association filed pre grant opposition as per section 25(1) of the Patent Act against the patent Application.

20

13.04.2016

This Hon'ble Court set aside the order dated 4th April 2012 passed by the IPAB. The matter was remanded to the IPAB and the IPAB was directed to hear the matter afresh expeditiously on merits and in accordance with law.

21

21.04.2016

IPAB set aside the order of the Assistant Controller dated 24.10.2009 and remanded the matter back to the Patent Office.

22

05.07.2016

2nd Respondent filed reply statement to Safex's pre grant opposition.

23

05.07.2016

2nd Respondent filed 4th amendment Application to amend the claims while responding to pre grant opposition filed by the Haryana Pesticides and other opponents along with Claim Nos.1-9.

24

26.07.2016

2nd Respondent filed 5th Amendment Application to amend the claims by filling Form-13 along with claims 1-9.

25

26.07.2016

Swati Petrochem Pvt. Ltd. filed pre grant opposition as per section 25(1) of the Patent Act against the Patent Application.

26

27.07.2016

& 29.07.2016

Pre grant oppositions under Section 25(1) filed by Jaisheel and Shetty were heard

27

28.07.2016

Petitioner filed written statement dated 26.07.2016 to the reply statement dated 05.07.2016 of 2nd Respondent.

28

30.07.2016

Jailakshmi Sulphur and Chemical Industries filed pre grant opposition as per Section 25(1) of the Patent Act against the patent Application.

29

19.08.2016

Excel Crop Care Ltd. filed pre grant opposition as per Section 25(1) of the Patent Act against the patent Application.

30

22.08.2016

Hearing took place in the matter of Petitioner's pre grant opposition. The matter was adjourned to 14th September 2016 and the 2nd Respondent was directed to furnish the amendment Application.

31

23.08.2016

In compliance with the direction of 1st Respondent passed on hearing held on 22nd August 2016, by his email, the 2nd Respondent forwarded the following to the Petitioner :

(i) Final Amendment Application dated 26th July 2016 (Form 13) along with amended claims No.1-9 dated 26.07.2016.

(ii) Form 3 dated 6th January 2007, 8th January 2007 and 3rd May 2010 and 22nd June 2016 respectively along with Petitions dated 23rd June 2016 and 28th July

2016 for condoning a delay in filing Form 3.

32

06.09.2016

Email addressed by the Dy. Controller of Patents and

Designs addressed to the Petitioner informing that, by consent, the next date of hearing was scheduled on 14th September 2016. The Petitioner was directed to argue the main opposition along with amendment

Applications.

33

06.09.2016

Email addressed by Petitioner's Advocate to the Dy. Controller of Patents and Designs informing that :

a. the Petitioner shall attend the hearing on 14.09.2016.

b. the Petitioner received pleadings;

c. the Petitioner shall file complete response.

34

07.09.2016

The Petitioner's Advocate addressed an email to the Dy. Controller of Patents and Designs contending that;

a. it was never decided that the matter would be heard and argued

simultaneously on the main opposition Application and amendments thereto;

b. it was their submission that the issue of amendments in the claims be decided first;

c. the Petitioner did not receive all the amendments from the 2nd Respondent.

35

08.09.2016

Interlocutory petition filed by the Petitioner before the Controller of Patents and Designs praying that the Controller to first decide on the amendment

Application filed by 2nd Respondent.

36

09.09.2016

Controller of Patents disposed of two pre grant oppositions filed by Jasihil Sulphur (Opposition No.1) and Villas Shetty (Opposition No.2). However, the final decision on patent Application was not taken as other

oppositions were still pending hearing.

Whilst disposing these oppositions, the Controller also allowed the 2nd Respondent's final amendment.

37

14.09.2016

Since the Petitioner filed the interlocutory petition, the hearing was adjourned to 22nd December 2016.

38

10.10.2016

2nd Respondent filed reply to the Petitioner's interlocutory petition.

39

The Controller then fixed up a hearing on 22nd December 2016,

40

17.12.2016

Petitioner's Advocate filed a request before the Controller to adjourn the hearing

which was scheduled on 22nd December 2016 by at least 30 days as he was occupied with a marriage ceremony of a close relative in the family in Aligarh, Uttar Pradesh. The hearing

was adjourned to 13th February 2017.

41

08.02.2017

Petitioner's Advocate again requested for an adjournment of a hearing which was scheduled on 13th February 2017 as he was unavailable due to a prescheduled family function for Advocate's daughter.

42

13.02.2017

Notice issued by the Controller of Patents and Designs adjourning the hearing to 24.02.2017.

43

24.02.2017

Hearing held before the Controller of Patents and Design.

The Petitioner's Advocate argues the amendment Application but did not address the Controller on the opposition Application.

The Controller gave an opportunity to the Petitioner to file their written submissions in 10 days.

44

28.02.2017

The Petitioner addressed a letter for issuance of notice & for hearing of the interlocutory Petition.

45

10.03.2017

The 2nd Respondent replied to the above letter dated 28th February 2017.

46

10.03.2017

The Petitioner filed Writ Petition (C) No.2606 of 2017 in the Hon'ble Delhi High Court for a direction restraining the Controller from proceeding with the

matter.

47

11.04.2017

Respondent No.1 dismissed pre grant oppositions filed by the Opponents and granted patent.

48

01.05.2017

After the grant of patent by the Controller of Patents, the Hon'ble Delhi High Court dismissed the Writ Petition (C) No.2606 of 2017 as withdrawn.

49

19.05.2017

Post grant opposition (Form 7) filed by the Petitioner under Section 25(2) of Patents Act.

50

27.10.2017

The Petitioner filed this Writ Petition.

It had filed a post grant opposition before the Patent office challenging the order dated 11th April 2017 which is impugned in this Writ Petition .

6 It would appear that the litigation between the parties is a chequered one. Respondent No.2 had filed the Patent Application on 8th January 2007 along with 15 claims for Novel Agricultural Composition before the Controller of Patents. Amendment Applications were made reducing the claims. The fifth amendment Application superseded all the earlier amendment Applications restricting to 9 claims. The first opposition Application was filed on 15th June 2007 by the Jaishil under Section 25(1) of the Patents Act. Subsequently, another opposition was filed by one Mr. Shetty. The opposition application of Jashil and Shetty came to be allowed on or about 24th October 2009. At that time the third amendment Application was already filed. The order of the Assistant Commissioner dated 24th October 2009 allowing the opposition Application was assailed by Respondent No.2 before the IPAB. The appeal was dismissed. Respondent No.2 filed Writ Petition bearing No.7384 of 2012. During pendency of the said Writ Petition filed by Respondent No.2 challenging the order of IPAB, the present Petitioner filed opposition Application on or about 23rd August 2013 resorting to

Section 25(1) of the Patents Act. Subsequently, on 7th October 2013 Haryana Pesticides Manufactures Association also filed pre grant opposition. On or about 13th April 2016, this Court set aside the order of IPAB remitting the matter. The IPAB, in turn, allowed the Appeal and again remanded the matter to the Assistant Controller on or about 21st April 2016. On 5th July 2016, Respondent No.2 filed reply to the pre grant opposition and also the fourth amendment Application. Subsequently, on 26th July 2016 Respondent No.2 filed 5th amendment Application to amend the claims by filing Form No.13 and restricting the claims to 9. On or about the same time i.e. on 26th July 2016 one Swati Petrochem Pvt. Ltd. filed pre grant opposition.

7 The pre grant opposition filed under Section 25(1) by Jashil and Shetty were heard on 27th and 29th July 2016. There were other pre grant oppositions filed by other companies / persons. It would appear that there were many pre grant oppositions filed and eventually, Respondent No.1 on 11th April 2017 dismissed the pre grant oppositions filed by the opponents and granted Patent on 11th April 2017.

8 It appears from the record that the Petitioner was served with fifth amendment Application on or about 23rd August 2016. On the said date, Respondent No.2 forwarded to the Petitioner final amendment Application dated 26th July 2016 (Form 13) along with amended claims 1 to 9. The Petitioner was informed through email by the Dy. Controller of Patents on or about 6th September 2016 that the hearing in the matter was adjourned to 14th September 2016 by consent and the Petitioner was directed to argue the main opposition along with the amendment Application. It appears that on 6th September 2016 the Petitioner forwarded email to the effect that the Petitioner shall attend the hearing on the scheduled date and that the Petitioner received pleadings and would file response in the matter. On the subsequent date i.e. 7th September 2016 another email was sent by the Petitioner's advocate to the Dy. Collector of Patents stating that it was never decided that the matter would be heard and decided simultaneously on the main Application and the amendment Application.

9 Be that as it may, from the facts on record it would appear that opportunity was given to the parties. The controversy raised by the Petitioner is that it was not given opportunity to argue the pre grant opposition and that it was made aware that the fifth amendment Application was already allowed on 9th September 2016. On 9th September 2016 the Controller of Patents also disposed of two pre grant oppositions filed by one Jaishil and Shetty. However, the patent Application was not decided finally as other oppositions were pending hearing. Under the amendment Application Respondent No.2 had narrowed the claims to 9 from the original 15.

10 We may have considered the submissions of the Petitioner of not being given opportunity of hearing as contended or otherwise, however, the facts on record would dis-entitle the Petitioner from invoking the writ jurisdiction under Article 226 of the Constitution of India.

11 It would appear that during pendency of the hearing on the pre grant opposition Application the Petitioner filed Writ Petition (C) No.2606 of 2017 before the Delhi High Court seeking restraint order against the Controller from proceedings with the matter. The said Writ Petition was filed on 10th March 2017. The Petitioner could not get orders from Delhi High Court and the matter before Respondent No.1 proceeded further. Respondent No.1 dismissed the pre grant opposition filed by the Petitioner and others on 11th April 2017. In view of that the Petitioner withdrew the Writ Petition filed in Delhi High Court and the same was dismissed as withdrawn. On or about 19th May 2017, the Petitioner filed post grant opposition (Form 7) purportedly under Section 25(2) of the Patents Act and the same was prosecuted by the Petitioner. After about five months the present Writ Petition is filed challenging the rejection of pre grant opposition Application. Before instituting the present Writ Petition invoking writ jurisdiction of this Court under Article 226 of the Constitution, the Petitioner had already availed of remedy under Section 25(2) of the Patents Act raising post grant opposition. For five months the said proceedings are prosecuted by the Petitioner and thereafter has filed the present Writ Petition challenging the rejection of the pre grant opposition Application. The Petitioner has chosen the remedy under Section 25(2) of the Patents Act.

12 The availability of the remedy under Section 25(2) of Patents Act certainly would not be a bar to challenge the rejection of the pre grant opposition Application by filing the present Writ Petition, as has been observed and held in the various judgments relied upon by the learned Senior advocate for the Petitioner viz. the judgment of the Division Bench of Madras High Court in the case of Indian Network of People living with HIV/AIDS (supra), in the case of Glochem Industries Ltd. (supra) and in the case of TATA Chemicals Ltd. (supra).

13 As a general rule, the availability of an alternate remedy is not a bar to invoke the writ jurisdiction of this Court under Article 226 of the Constitution, as has been conceptualized by the apex court in the case of Whirlpool Corporation (supra). However, in the present case, the Petitioner has already availed of the alternate remedy by resorting to Section 25(2) by filing an Application for the post grant opposition prosecuted the alternate remedy for five months and thereafter has chosen to avail the present remedy under Article 226 of the Constitution.

14 We would have appreciated the present Writ Petition, had the Petitioner approached this Court challenging the rejection of the pre grant opposition Application before resorting to any remedy under Section 25(2).

15 In proceedings initiated by the Petitioner under Section 25(2) by filing post grant Application the matter is at the concluding stage. On 6th November 2019, the Opposition Board issued recommendations on Respondent No.2's patent upholding its validity and rejecting all the grounds of post grant opposition. Thereafter on 19th February 2020 the Petitioner and other opponents filed interlocutory petitions seeking constitution of new opposition board. On 8th July

2021 the Controller allowed the Petitioner and other opponent's Application and constituted new opposition board. On 14th June 2022 the new opposition board issued fresh recommendation on Respondent No.2's patent. The matter is now fixed for final hearing before the Controller.

16 From the aforesaid, it would appear that the proceedings filed by the Petitioner under Section 25(2) challenging post grant opposition Application is at the final stage. Passing any orders in the Writ Petition at this stage would be preempting the decision by the Controller. Even after remedy under section 25(2), the Petitioner still has remedy to approach this Court. The Petitioner, in all fairness ought to have disclosed about the availing the remedy under section 25(2) while filing the present Writ Petition.

17 In light of the aforesaid facts and circumstances, we are not inclined to exercise our writ jurisdiction under Article 226 of the Constitution.

18 The Writ Petition, as such, stands disposed of. No costs.