
(2013) 06 KL CK 0003

In the High Court Of Kerala

Case No : Writ Petition (C) No. 22380 of 2012

Shogun Organics Ltd.

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 17-06-2013

Acts Referred:

Citation : (2013) 4 ILR (Ker) 775 : (2013) 4 KHC 359 : (2013) 4 KLT 459

Hon'ble Judges : C.K. Abdul Rehim, J

Bench : Single Bench

Advocate : K. Jayakumar, Harish R. Menon, M.S. Kiran and K.T. Shyamkumar, for the Appellant; P. Parameswaran Nair, Assistant Solicitor General of India, Government Pleader, M. Gopikrishnan Nambiar, P. Gopinath, P. Benny Thomas, K. John Mathai and P. Ramachandran, for the Respondent

Judgement

C.K. Abdul Rehim, J.—Petitioner is seeking direction to restrain the 2nd respondent from granting registration u/s 9(4) of the Insecticides Act, 1968 to the 4th respondent or to any other similar applicants for manufacture of two chemicals namely, "D-trans allethrin" and "transfluthrin", by employing the manufacturing process for which the petitioner obtained patent under the Patents Act, 1970. Inter alia, the petitioner is seeking declaration that the 2nd respondent is not authorised to give registration to the 4th respondent or to any other applicants with respect to manufacture of the above said two chemicals. Question involved is, whether the authority granting registration under the Insecticides Act is bound to look into the aspect of registration of patent, for the purpose of granting registration. Procedure for registration of an insecticide for the first time is contemplated u/s 9(3) of the Insecticide Act. Section 9(4) enables any other person who is desiring to import or manufacture an insecticide for which registration has already been granted in the name of another person, to apply for registration. Such person will be allotted with a registration number and will be granted Certificate of Registration, with respect to the same insecticide, on the very same conditions upon which it was originally registered. Section 9(3) contemplates an enquiry by the authority, before granting

registration, regarding efficacy of the insecticide and its safety to human beings and animals. Proviso to Section 9(3) insists that the 2nd respondent authority should ensure safety to human beings or animals and should ensure that the use of the insecticide involves no serious risk to human beings or animals.

2. Contention of the petitioner is that, provisions of the Patents Act, 1970, especially Section 48, enumerates the rights of a patentee. Sub-section (b) of Section 48 provides that, when the subject-matter of a patent is a process, the patentee is conferred with an exclusive right to prevent third parties, who did not have his consent, from using that process and from the act of offering for sale, selling, or importing any product obtained directly by that process, in India. Precisely, contention of the petitioner is that when he holds patent with respect to manufacturing process of the two chemicals, the 2nd respondent cannot grant registration under the Insecticides Act for manufacture or sale of those chemicals, in this respect, learned Senior counsel appearing for the petitioner had drawn my attention to Section 156 of the Patents Act, 1970, which provides that the patent shall have for all intents the like effect as against the Government as it has against any person. Since the patent is binding on the Government, the 2nd respondent, being a statutory authority under the 1st respondent, cannot violate provisions of the Patents Act and shall not infringe interest of the patentee, is the contention.

3. It will be beneficial to consider the preamble of Insecticides Act. The object is mainly to take action by way of prohibition of sale, distribution, or use of any insecticides where it is found that such sale, distribution, or use is being done in such a manner as to involve risk to human beings or animals. The preamble says that it is an Act to regulate import, manufacture, sale, transport, distribution and use of insecticides with a view to prevent the risk to human beings or animals and for matters connected and related, in distinction, Patents Act, 1970 is a law relating to patents. Registration for any invention granted under the Act is termed as "patent" and the patentee is a person who is the registered grantee of such patent. By virtue of procedure contemplated under the Act patentable inventions and the registrations are in order to safe guard personal rights and interests of the person who had invented anything, for which his name is registered as a patentee. The intent and purport of both Statutes are clearly distinct. The objections and the restrictions in granting registration under the two Statutes are also distinct and different.

4. Can the authority under one among the Acts can have consideration of any parameters under the other Statute for the purpose of deciding eligibility for the grant of registration, is the question. I am of the considered opinion that statutory authority under the Insecticides Act is not bound to have any such consideration with respect to compliance or violation of the Patents Act, for the purpose of granting or refusing registration. This is especially because, Section 2 of the Insecticides Act provides that provisions of the said Act shall be in addition to and not in derogation of any other law for the time being in force. The two

distinct Statutes deals with separate rights. Merely because right of a person to get registered under the Insecticides Act is approved, such a person is not getting any permission or licence to violate any of the provisions of Patents Act. If such violation is there the said law provides ample remedy to prevent or to get compensated for infringement of right of the patentee. The rights of the patentee will not be affected in any manner by virtue of such registration.

5. An identical issue was decided by a Division Bench of the High Court of Delhi in Bayer Corporation and Another Vs. Union of India (UOI) and Others, In the said case the challenge was against grant of registration under the Drugs and Cosmetics Act, on the ground that the petitioner company holds patent with respect to the Drug for which the registration was applied for. Single Bench negated contention raised based on Section 156 of the Patents Act, observing that, it would be extending boundaries of Patents Act. Learned Single Judge observed that, an over broad or liberal interpretation of Section 156 would mean that wherever patents are granted all other regulatory agencies are bound and cannot even apply their standards in order to judge safety and prescribed criteria for public use etc. It is held that, the argument that once a patent is granted no application by a non-patentee for approval of such drug can ever be entertained, could not be accepted, because that is not the intention of the parliament. The Parliament never expressed any intention to place patent as to have superintendence or policing power with the Drug agencies. When there is an overlap between the provisions in the two enactments, the Court should not do violence to one and undermine its purpose. Upholding the view taken by the Single Bench, the Division Bench observed that, Section 48 of the Patents Act confers on the patentee the exclusive right to prevent third parties without permission of the patent holders. This is a negative right which is enforceable at the instance of the patent holder subject to other provisions which permit challenge to the validity of the patent, to be raised as a defence in a suit for infringement of patent. Therefore any steps that a patent holder might wish to take to protect the patent from being infringed, should resort to provisions of the Patents Act. The Bench held that, contention that the authority under Drugs and Cosmetics Act is bound by the injunction u/s 48 of the Patents Act is based on a misreading of Section 156 of the said Act The purport of Section 156 is not that the Drugs Control Authority is prevented from granting marketing approval to a non-patentee in respect of patented drug. The Court observed that, no such obligation flows from Section 156 of the Patents Act as such. The right conferred u/s 48 is essentially a private right and a negative right, which does not confer any right to market the product even by the patent holder, who also is bound to apply to the Drug Control Authority for permission. Referring to Section 2 of the Drugs and Cosmetics Act, which is in pari materia with Section 2 of the Insecticides Act, the Court observed that, "in addition to and not in derogation of any other law for the time being in force" does not mean that Drugs Controlling Authority has to enforce and protect the patent for the product for which marketing approval is sought for. But Section 156 only states that the

Government cannot also infringe a Patent. It only negatives the Government from infringing a patent, but it does not create any duty or obligation to protect the patent from infringement. I am of the considered opinion that the decision cited above applies to issue involved in the case at hand. I am in perfect agreement with the dictum laid. As such, relief by way of direction preventing grant of registration u/s 9(4) of the Insecticides Act or any declaration restraining the 2nd respondent from granting registration with respect to the two patented chemicals, cannot be issued. It is left open to the 2nd respondent to consider such application on merits in view of parameters prescribed under the Insecticides Act or under the Rules or Regulations made thereunder. At the same time it is observed that, grant of any registration u/s 9(4) to party respondents or to any other person will not in any manner infringe or hamper rights of the petitioner if any under the provisions of the Patents Act and to injunct such violation.

Under the above mentioned circumstances, the writ petition is hereby dismissed, subject to the observations contained herein above.