



2024:DHC:3451-DB



IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 01.05.2024

+ **LPA 257/2024 & CM No.19528/2024**

RICH PRODUCTS CORPORATION Appellant

Versus

THE CONTROLLER OF PATENTS & ANR. Respondents

Advocates who appeared in this case:

For the Appellant : Mr. Peeyush Kalra, Mr. Debashish Banerjee, Mr. Ankush Verma, Mr. Tanveer Malhotra & Mr. Rohan J. Kapoor, Advs.

For the Respondents : Mr. Harish Vaidyanathan Shankar, Mr. Srish Kumar Mishra, Mr. Alexander Mathai Paikaday, Mr. Lakshay Gunawat & Mr. Krishnan V., Advs. for R-1.
Ms. Vindhya S. Mani, Mr. Prashant Philips, Ms. Surbhi Nautiyal, Ms. Harshita Agarwal, Mr. Bhuvan Malhotra, Mr. Devesh Aswal, Ms. Naina Gupta & Mr. Ritwik Sharma, Advs. for R-2.

CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

HON'BLE MS. JUSTICE TARA VITASTA GANJU

JUDGMENT

VIBHU BAKHRU, J

1. The appellant, Rich Products Corporation (hereafter *RPC*) has filed the present intra-court appeal impugning an order dated 06.02.2024 (hereafter *the impugned order*) passed by the learned Single



Judge in W.P.(C)-IPD No.8/2024 captioned ***Rich Products Corporation v. The Controller of Patents & Anr.*** The appellant has filed the afore-mentioned writ petition impugning an order dated 04.09.2023 passed by the Joint Controller of Patents and Designs (hereafter *the Controller*) rejecting RPC's pre-grant opposition to the application filed by respondent no.2 – Tropilite Foods Pvt. Ltd. (hereafter *TFPL*) – for grant of a patent captioned “An artificial liquid cream for utilization in unsweetened cooking and whipping applications”.

2. The First Examination Report (hereafter *FER*) in respect of the said application was issued on 27.07.2018 and the same was responded to by TFPL's agent. RPC filed a pre-grant opposition under Section 25(1) of the Patents Act, 1970 (hereafter *the Act*) on 21.08.2017. RPC filed further documents on 23.08.2017. RPC's opposition was communicated to TFPL along with FER.

3. RPC opposed the grant of patent on several grounds covered under clauses (b) to (g) of Section 25(1) of the Act. RPC's pre-grant opposition was rejected by the Controller by an order dated 04.09.2023.

4. RPC assailed the said order in the writ petition [being W.P.(C)-IPD No.8/2024]. The learned Single Judge did not entertain the said writ petition on the ground that RPC had recourse to an effective mechanism for assailing the grant of patent under the Act. Thus, the learned Single Judge relegated RPC to take recourse to other remedies as available, if so advised.



SUBMISSIONS

5. Mr. Peeyush Kalra, learned counsel has advanced submissions on behalf of RPC. Although, several grounds were urged by RPC in its application for pre-grant opposition under Section 25(1) of the Act, Mr. Kalra confined the challenge in the present appeal to the rejection of RPC's opposition on the ground under Section 25(1)(b) of the Act – anticipation by prior art. He submitted that the invention claimed by TFPL was covered by the earlier patent (D1) granted in RPC's favour (referred to as '*D1*'). He submitted that the said patent had expired and it was apparent that the claim made by TFPL was covered under the complete specifications of the earlier patent granted in RPC's favour. He referred to a tabular statement set out in the written submissions filed before the Controller and submitted that TFPL's claims were fully subsumed in the claims made in the prior art, D1. He contended that the Controller's order rejecting RPC's contention that TFPL's claim was not patentable on the ground that it was disclosed in the prior art is, *ex facie* erroneous. He submitted that the learned Single Judge had grossly erred in not entertaining the petition on the ground of availability of alternative remedies. He submitted that the nature of remedies available post grant of patent are materially different. He contended that the order passed by the Controller rejecting the pre-grant opposition is *ex facie* erroneous and therefore, RPC's recourse to challenge the same by way of a writ petition could not be denied on the ground that RPC had a right to challenge the patent after it was granted. He referred to the decision of the Bombay High Court in ***Glochem***



***Industries Ltd. v. Cadila Healthcare Ltd. & Ors.*¹** and on the strength of the said decision submitted that if the Controller had committed a manifest error, the fact that RPC may have the remedy to oppose the post-grant opposition could not be the basis to non-suit RPC in pursuing its challenge to the dismissal of its pre-grant opposition.

6. Ms. Vindhya S. Mani, learned counsel appearing for TFPL countered the aforesaid submissions. She supported the order dated 04.09.2023 passed by the Controller and submitted that the decision to reject RPC's pre-grant opposition was duly supported by reasons. Thus, the same was not amenable to judicial review under Article 226 of the Constitution of India. She submitted that TFPL's invention provided for an alternate to dairy milk cream, which could be utilized in cooking, as well as whipping applications. The product could be stored at an ambient temperature of 25⁰ Celsius and has a longer shelf-life. She contended that TFPL's invention is stable at higher temperatures and also has less than 2% trans-fat. She submitted that although, D1 discloses large numbers of ingredients, its specifications did not disclose the specific composition of the stabilizer system comprising of Xanthan Gum and Hydroxypropyl Methyl Cellulose (HPMC) in the combination as claimed. She claimed that it also did not disclose the method of preparing the same.

¹ 2009 SCC OnLine Bom 1701



7. She pointed out that the Controller had noted that the composition of RPC's product sold in the market under the mark "Double Dream" – which RPC claimed was based on D1 – was not disclosed.

8. She also referred to the decision of this Court in **UCB Farchim SA v. Cipla Ltd.**² and submitted that the remedy available to an interested person whose pre-grant opposition is rejected is entitled to file a post-grant opposition under Section 25(2) of the Act and if unsuccessful, to file an appeal under Section 25(4) of the Act.

REASONS & CONCLUSION

9. The controversy involved in the present appeal is in a narrow compass. The only question to be addressed is whether the decision of the learned Single Judge to not entertain the writ petition against an order of the Controller rejecting RPC's pre-grant opposition is erroneous, and, warrants any interference in this appeal.

10. It is well settled that a pre-grant opposition under Section 25(1) of the Act is a part of the examination process and is to aid³ the Controller in considering an application for the grant of a patent. Undisputedly, if an authority passes an order which suffers from jurisdictional errors, the person aggrieved would have a recourse to invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India. However, it is necessary to note that the

² 2010 SCC OnLine Del 523

³ Regents of the University of California v. Union of India & Ors.:2019 SCC OnLine Del 8590 and Novartis AG v. Natco Pharma Ltd. & Anr.: 2024 SCC OnLine Del 152.



remedy under Article 226 of the Constitution of India is a discretionary remedy and the Court can decline to exercise the same if there is an efficacious, alternate and statutory remedy.

11. In the present case, we are unable to accept that the order dated 04.09.2023 passed by the Controller, which was impugned by RPC in the writ petition, discloses any jurisdictional or manifest error which would warrant any interference in a proceeding under Article 226 of the Constitution of India.

12. RPC had opposed the grant of patent on several grounds. It claimed that TFPL's invention was anticipated by prior art D1. This contention was rejected by the Controller. The Controller found that D1 did not disclose the composition with a stabilizer system comprising of Xanthan Gum and HPMC and the specific weight percentage range for this combination as was cited in TFPL's amended Claim 1. The Controller noted that D1 used Guar Gum and Locust Bean Gum as stabilizers. The Controller further held that D1 did not make any disclosure of the composition as claimed in TFPL's amended Claims 1 to 16 and therefore, the same was required to be considered as novel and not be contained in any specifications filed earlier. RPC's claim that TFPL's invention was claimed in an earlier claim of the complete specification was also rejected as the Controller found TFPL's invention was novel.

13. RPC's opposition under Section 25(1)(d) of the Act to the effect that the invention was publicly known as its product "Double Dream"



was in the market, was also rejected on the ground that the exact composition of the product “Double Dream” was not disclosed. RPC’s claim for lack of inventive step under Section 25(1)(e) of the Act was also rejected by the Controller after detailed examination. The Controller examined the claimed method for preparing the invention and found that the prior art D1 failed to provide any enabling disclosure for a composition comprising of a stabilizer system comprising of Xanthan Gum and HPMC in a weight percentage range of 0.15% - 0.5%. The Controller noted that D1 provided a laundry list of approximately 10 stabilizers which included Xanthan Gum and HPMC. However, there was no motivation for a person skilled in the art to choose a combination of at least Xanthan Gum and HPMC. It also noted that the preferred stabilizers in D1 are ‘Guar Gum, Locust Bean Gum and Xanthan Gum’. The Controller noted that the cream composition claimed by TFPL could be stored at an ambient temperature of 25⁰ Celsius for upto six months and therefore, the same showed a technical advancement as well as economic significance. Additionally, the Controller also found that the process for preparing the invention was in two phases, which were not taught by D1. The Controller noted that the method taught by D1 was to dissolve the components in a single step.

14. It is not apposite for this Court to undertake a merits review of the aforesaid decision. It is apparent from the above that the order passed by the Controller does not suffer from any jurisdictional error, which would warrant any interference.



15. In *Glochem Industries Ltd. v. Cadila Healthcare Ltd. & Ors.*¹, the Bombay High Court had rejected the contention that the petitioner had an equally efficacious remedy against rejection of its pre-grant opposition in the given facts of that case. The Bombay High Court observed as under:

“12. Having considered the rival submissions, we would deal with the last objection first. Although the Petitioners may have remedy of post grant opposition or of seeking suo moto revocation as well as filing of a counter claim as is suggested by the Respondents that by itself can be no basis to non-suit the Petitioners, if the Petitioners were right in their grievance that the authority has committed manifest or jurisdictional error while considering the representation by way of opposition or for that matter decided the objections on palpable misreading and misapplication of the relevant provisions of law. This is so because the law provides for remedy of pre-grant opposition by virtue of Section 25(1) of the Act. If such a remedy is provided, the authority is obliged to consider the representation by way of pre-grant opposition under Section 25(1) keeping in mind the parameters of law by observing principles of natural justice. It is not necessary for us to examine the argument of the Petitioners that the remedy of pre-grant opposition is qualitatively different than the remedy of post-grant opposition. According to the Petitioners, in the pre-grant opposition, the onus is on the patent applicant to show that the alleged invention would result in enhancement of the known efficacy of the stated substance; whereas in the post-grant opposition, the onus will be on the objector to show that the alleged invention does not result in enhancement of the known efficacy of the stated substance. Suffice it to observe that the preliminary objection raised by the Respondent No.1 does not mean that this Court has no jurisdiction to entertain writ petition under Article 226 of the Constitution of India against the decision of the authority on the opposition under Section 25(1) of the Act. It is a matter of prudence and discretion as to whether the Court should entertain the writ petition or not. In the facts of the present case, we think



that it would not be proper to non-suit the Petitioners at the threshold on this count.”

[Emphasis added]

16. There is no cavil that in case where it is apparent that the Controller has committed a jurisdictional error, the Court may entertain a petition under the Article 226 of the Constitution of India.

17. The learned Single Judge has not dismissed RPC’s petition on the ground that the Court does not have jurisdiction to entertain a petition against an order of the Controller rejecting the pre-grant opposition preferred under Section 25(1) of the Act. The learned Single Judge had decided not to entertain the petition as the Court found that RPC’s challenge laid did not qualify the threshold of a manifest jurisdictional error, to warrant entertaining the same under Article 226/227 of the Constitution of India. In **UCB Farchim SA & Ors. v. Cipla Ltd.**², this Court considered the scheme of pre-grant opposition and post grant opposition under Section 25 of the Act and observed that any person could file a representation under Section 25(1) of the Act for opposing the grant of patent on the grounds as set out in the various clauses of Section 25(1) of the Act. The person interested would have the remedy of filing a post-grant opposition under Section 25(2) of the Act. Thus, a person interested has two remedies – remedy to file a pre-grant opposition as well as post-grant opposition. In addition, the interested person also has a right to appeal against an order rejecting its post-grant opposition. The Court had also noted the decision of the Bombay High



Court in ***Glochem Industries Ltd. v. Cadila Healthcare Ltd. & Ors.***¹.

The relevant extract of the decision in ***UCB Farchim SA & Ors. v. Cipla Ltd.***² is set out below:

“15. In the first eventuality, where the pre-grant opposition is rejected, it is apparent from the decision in J. Mitra and from a reading of Section 25 with Section 117A that as long as the person who has filed that opposition happens to be a person interested, he would, after 1st January, 2005 [the date with effect from which Section 25 (2) came into force although the provision was introduced only on 4th April, 2005] have the remedy of filing a post-grant opposition. He can, after 2nd April, 2007, also file an application before the IPAB under Section 64 of the Patents Act for revocation of the patent. In other words, as explained by the Supreme Court in J. Mitra & Co. as long as that person is able to show that he is a person “interested”, he is not without a remedy after his pre-grant opposition is rejected. He in fact has two remedies. Even if his post-grant opposition is rejected, he can thereafter file an appeal to the IPAB under Section 117A. Against the decision of the IPAB in either event he will have the remedy of seeking judicial review in accordance with law by filing a petition in the High Court. At this juncture it may be noticed that in an order dated 2nd March, 2009 in SLP (C) No. 3522 of 2009 (Indian Network for People with HIV/AIDS v. F. Hoffman-La Roche) the Supreme Court permitted the unsuccessful pre-grant opposer, who had challenged the rejection of his opposition by the Controller, to participate in the post-grant stage.

16. The law is well settled that notwithstanding that a High Court has the power and the jurisdiction under Article 226 of the Constitution to interfere with the orders of any statutory authority which is of a quasi-judicial nature, it will decline to exercise such jurisdiction where there is an efficacious alternative statutory remedy available to the aggrieved person.

17. Counsel for the parties have drawn the attention of this Court to a recent decision of the Division Bench of the Bombay High Court in *Glochem Industries Ltd. v. Cadila Healthcare Ltd.*, (its decision dated 6th November, 2009 in Writ Petition No. 1605 of 2009). Although in that case the petitioner whose pre-grant



opposition had been rejected was obviously a person interested, the High Court overruled the objections as to maintainability since it took the view that the Controller's order in that case suffered from obvious jurisdictional errors. The Bombay High Court nevertheless noted that “it is a matter of prudence and discretion as to whether this Court should entertain the writ petition or not” and that in the facts and circumstances of that case it was “not proper to non-suit the petitioners at the threshold on this count.” To this Court it appears that the settled law as explained in several decisions of the Supreme Court (which incidentally have not been adverted to by the Bombay High Court in *Glochem*) makes it clear that this Court should not entertain the writ petition, not because it does not have the power or jurisdiction, but because the petitioner has an efficacious alternative statutory remedy to exhaust.”

18. The aforesaid decision was also referred to with approval by the Division Bench of this Court in *Novartis AG v. Natco Pharma Ltd. & Anr.*⁴

19. In *Mylan Laboratories Limited v. Union of India and Others*⁵, the learned Single Judge of this Court after referring to the earlier decision of this Court in *UCB Farchim SA & Ors. v. Cipla Ltd.*² observed as under:

“6. In the opinion of this Court, the pre-grant opposition was, therefore, decided on merits and following the scheme of the Act, as laid down in *UCB Farchim* (supra), the remedy of the Petitioner would be to either file a post-grant opposition or an application for revocation. Thus, the present petition would not be liable to be entertained.”

⁴ 2024 SCC OnLine Del 152

⁵ 2019 SCC OnLine Del 10319



20. The appellant, in effect, seeks a merit's review of the decision of the Controller. In the given facts, we concur with the conclusion of the learned Single Judge that it would not be apposite to entertain the petition filed by RPC challenging the rejection of its post-grant opposition. This is not because the Court does not have the jurisdiction to entertain petition against an order of the Controller rejecting the pre-grant opposition but for the reason that we find no manifest or jurisdictional error warranting exercise of jurisdiction under Article 226 of the Constitution of India. As noted above, the Controller has examined the objections raised by RPC on merits and it would not be apposite to undertake a merits review in a proceeding under Article 226 of the Constitution of India. Thus, RPC must be relegated to availing of its other remedies as provided under the Patents Act, 1970, if so advised.

21. The appeal is, accordingly, dismissed. Pending application is also dismissed.

VIBHU BAKHRU, J

TARA VITASTA GANJU, J

MAY 01, 2024

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