

2022 LiveLaw (Del) 326

IN THE HIGH COURT OF DELHI AT NEW DELHI

CORAM: JUSTICE PRATHIBA M. SINGH

12th April, 2022

Patents Act, 1970; Section 64 (2)(b) - Limitation Act, 1963; Section 137 - Filing of a revocation petition could be done at any point in time when such a person's interest either arises or continues during the life or term of the Patent. (Para 18)

C.O. (COMM.IPD-PAT) 3/2021 & I.As. 13644/2021, 3420/2022

DR. REDDYS LABORATORIES LIMITED & ANR. versus THE CONTROLLER OF PATENTS & ORS.

PETITIONERS Through: Mr. J. Sai Deepak, Advocate with Mr. Avinash Kumar Sharma, Mr. Ankur Vyas & Mr. Shahid Khan, Advocates (M:7289036972)

RESPONDENTS Through: Mr. Harish V. Shankar, CGSC with Ms. S. Bushra Kazim, Mr. Srish Kumar Mishra, Advocates for R-1/UOI; Mr. Sandeep Sethi, Sr. Adv. with Mr. Sanjay Kumar, Ms. Arpita Sawhney, Mr. Arun Jamai, Mr. Harshit Dixit, Mr. Priyansh Sharma, Mr. Abhay Tandon, Advocates for R-2.

C.O.(COMM.IPD-PAT) 1/2022 & I.A. 3570/2022

THYSSENKRUPP ROTHE ERDE GERMANY GMBH versus THE CONTROLLER OF PATENTS & ANR.

PETITIONER Through: Mr. Pranaynath Jha, Mr. Mahesh Kumar, Mr. Nilanshu Shekhar, Mr. Shubham Gupta, Advocates.

RESPONDENTS Through: Mr. Harish V. Shankar, CGSC with Ms. S. Bushra Kazim, Mr. Srish Kumar Mishra, Advocates for R-1/UOI; Mr. MS Bharath, Mr. Ayush Sharma Advocates for Respondent no.2, Ms. Rajeshwari H., Advocate

1. This hearing has been done through hybrid mode.

I.A. 5674/2022 in C.O.(COMM.IPD-PAT) 3/2021

2. This is an application by the Petitioners seeking to place on record affidavits of the expert, Dr. Jeffrey A. Stafford. The said affidavits, annexed to the present application, are taken on record, subject to any objections of the Petitioners, who may wish to controvert the same by way of their own affidavits, if required.

3. Accordingly, **I.A. 5674/2022** is disposed of.

I.A. 3419/2022 in C.O.(COMM.IPD-PAT) 3/2021

4. This is an application seeking dismissal of the present revocation petition on the ground that it is barred by limitation. The patent in this case of which revocation is sought is Indian Patent 268846 (*hereinafter "IN'846"*) titled '*Glucopyranosyl-substituted Benzenol derivatives, drugs containing said compounds, the use thereof and method for the production thereof*' granted on 18th September, 2017 and published in the official gazette by the Patent Office, on 25th September, 2017. The present petition was filed on 16th October, 2021.

5. The submission of Mr. Sethi, Id. Senior Counsel appearing for the Defendant-Patentee is that the time period for the post grant opposition expired on 25th September, 2018 and the time period to file the revocation petition expired on 25th September, 2020, by applying Section 137 of the Limitation Act, 1963 (*hereinafter "Limitation Act"*). He relies

upon the decision of the Calcutta High Court in **Bayer AG v. Controller of Patents, AIR 1982 Cal 30**, to argue that in such a case, the limitation period as per the Limitation Act would commence once the cause of action has arisen, and the Petitioner cannot choose to approach the Court at any time during the life of the patent.

6. On the other hand, Mr. Sai Deepak, Id. Counsel appearing for the Petitioner, submits that the only two pre-conditions for filing of the revocation petition under Section 64 (2)(b), of the Patents Act, 1970 (*hereinafter "Patents Act"*) are (i) that the person who approaches the Court is a 'person interested' and (ii) that the patent continues to remain on the Patent Register. If these two conditions are satisfied, the revocation petition under Section 64 can be filed any time during the life of the patent.

7. Heard and perused the record. The issue that arises in this application is whether revocation petitions are subject to any limitation period under the Limitation Act. At the outset, this Court notes the procedure for revocation. In the scheme of the Patents Act, the patent application once filed and examined, is granted under Section 43. Upon the grant of the patent, the exclusive rights vest in the Patentee in terms of Section 48 of the Patents Act. The term of the patent however, is for a period of 20 years from the date of priority or date of application in terms of the provisions of the Patents Act. The patent continues to remain in the register for the entire period of the life of the patent which is 20 years.

8. Upon the grant of a patent, there are various remedies available to a person interested for seeking to challenge the grant of the Patent. The first remedy would be a post grant opposition which could be filed within the time prescribed under Section 25(2) of the Patents Act read with the Patent Rules, 2003 (*hereinafter "Patents Rules"*). The second remedy, is under Section 64 of the Patents Act. Under Section 64, any 'person interested' can prefer a revocation petition in the following manner:

1. As an independent petition seeking revocation.
2. By way of a counter claim in a suit for infringement.

9. In both these circumstances, the 'person interested' would be permitted to seek revocation on any of the grounds mentioned in Section 64, so long as such a person is in some way 'interested' if the patent continues on the register. Section 2(1)(t) of the Patents Act defines a 'person interested' as:

(t) "person interested" includes a person engaged in, or in promoting, research in the same field as that to which the invention relates;

10. On the definition of a 'person interested', the Supreme Court in **Aloys Wobben & Ors. v. Yogesh Mehra & Ors., (2014) 15 SCC 360**, observed as under:

"20...Simply stated, a "person interested" would include a person who has a direct, present and tangible interest with a patent, and the grant of the patent, adversely affects his above rights. A "person interested" would include any individual who desires to make independent use of either the invention itself (which has been patented), or desires to exploit the process (which has been patented) in his individual production activity.

Therefore, the term "any person interested" is not static. The same person, may not be a "person interested" when the grant of the concerned patent was published, and yet on account of his

activities at a later point in time, he may assume such a character or disposition. It is, therefore, that Section 64 of the Patents Act additionally vests in "any person interested", the liberty to assail the grant of a patent, by seeking its revocation. The grounds of such challenge, have already been enumerated above."

11. Therefore, the trigger for a person to file a revocation petition could arise in various circumstances including:

- a. If the person interested wishes to manufacture or sell the patented product or a product using the patented process.
- b. If a suit for infringement is filed against the person interested.
- c. If a person is 'interested' in the invention covered by the patent in any other manner whatsoever.

12. The said interest in the patent could arise at any point of time during the period when the patent remains in the register till the term of the patent expires.

13. Since the interest in seeking revocation could arise at any time, it is notable that there is no specific limitation period prescribed for seeking revocation under Section 64. By contrast, under Section 25(2), a specific period of limitation has been prescribed for oppositions. Section 25(2) of the Patents Act reads as under:

*"(2) At any time after the grant of patent but before the expiry of a period of **one year from the date of publication of grant** of a patent, any person interested may give notice of opposition to the Controller in the prescribed manner on any of the following grounds, namely:-..."*

14. The reason for prescribing a time period in Section 25(2) but not using any such language in Section 64 is not far to seek in as much as the public policy in India dictates that at any point in time, if any person or even the Central Government wishes to seek revocation, it ought to have a remedy to avail of, in accordance with law. To read Article 137 of the Limitation Act, into Section 64 of the Patents Act, would be in effect rewriting the said provision, which would not be permissible by judicial interpretation. Moreover, the fact that a 'person interested' can file a counter claim under Section 64 seeking revocation shows that the trigger for the filing of the counter claim may not arise until and unless the suit itself is filed. This itself shows that the limitation of three years cannot be read into the period for filing the revocation petition.

15. This position is also supported by the IPAB decisions in **Ajanta Pharma Limited v. Allergen Inc. & Ors., 2013 (56) PTC 146 (IPAB)**, and **Tata Global Beverages Limited vs. Hindustan Unilever Limited and Anr., [Order No: 240 of 2012 dated 18/10/2012 in TRA/1/2007/PT/MUM]**, where in **Ajanta (supra)**, the IPAB observed as under:

"8. The counsel for the Applicant submitted that the Law of Limitation is applicable to Courts and the Hon'ble IPAB is not a Court but a techno-legal quasi-judicial authority having certain trappings of a Court. This Hon'ble Board in the case of Tata Global Beverages Limited vs. Hindustan Unilever Limited and Anr. - Order No: 240 of 2012 dated 18/10/2012 in TRA/1/2007/PT/MUM; was pleased to has held that Limitations Act, 1963 does not apply to an application under section 64 of the Patents Act filed before the Appellate Board. The relevant paragraph from the aforesaid case law is reproduced below for ready reference:

...

9. The learned counsel for the Applicant submitted that it was at a higher pedestal than this case, as there was an impending infringement action that was filed by the Respondent. Due to this, the period of limitation ought to be construed along the lines of infringement limitation determination, wherein every instance of infringement gives rise to a fresh cause of action.

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11. We have already dealt with issue of limitation in IPAB order 240/2012 in TRA/1/2007/PT/MUM we find same is applicable here.

The right to revoke patent any time after the grant of patent under section 64 cannot be extinguished after three years from the date of the publication of the grant by applying limitation of three years under Article 137 of the Limitation Act. This will run contrary to the scheme of the patent law. It is immaterial as to when the applicant for revocation came to know about the existence of patent or when the right to revoke the patent accrued. Thus the application for revocation can be filed before Appellate Board any time after the grant of a patent. This application is therefore not time barred. This revocation application is not time barred."

16. Moreover, the Supreme Court has also observed that when a provision does not prescribe a limitation period, the same cannot be read into the statute. The relevant observations in **Ajaib Singh v. The Sirhind Co-Operative Marketing Cum-Processing Service Society Limited and Ors., AIR 1999 SC 1351**, are as under:

"11...Reliance of the learned Counsel for the respondent management on the full bench judgment of the Punjab and Haryana High Court in Ram Chancier Morya v. State of Haryana (1999) 1 SCT 141 is also of no help to him. In that case the High Court nowhere held that the provisions of Article 137 of the Limitation Act were applicable in the proceedings under the Act. The Court specifically held "neither any limitation has been provided nor any guidelines to determine as to what shall be the period of limitation in such cases." However, it went on further to say that "reasonable time in the cases of labour for demand of reference or dispute by appropriate government to labour tribunals will be five years after which the government can refuse to make a reference on the ground of delay and latches if there is no explanation to the delay." We are of the opinion that the Punjab and Haryana High Court was not justified in prescribing the limitation for getting the reference made or an application under Section 37C of the Act to be adjudicated. **It is not the function of the court to prescribe the limitation where the Legislature in its wisdom had though if fit not to prescribe any period. The courts admittedly interpret law and do not make laws. Personal views of the Judges presiding the court cannot be stretched to authorise them to interpret law in such a manner which would amount to legislation intentionally left over by the Legislature. The judgment of the Full Bench of the Punjab and Haryana High Court has completely ignored the object of the Act and various pronouncements of this Court as noted hereinabove and thus is not a good law on the point of the applicability of the period of limitation for the purposes of invoking the jurisdiction of the courts/boards and tribunal under the Act.**"

17. Mr. Sethi had placed reliance upon the decision of the Calcutta High Court in **Bayer AG (supra)**. A perusal of the said decision shows that in the said case, the Calcutta High Court was dealing with a case where the patentee itself was aggrieved by the order of the Patent Office, treating a particular invention as a 'weedicide' and fixing a shorter term for the said patented product. The matter before the High Court of Calcutta, arose out of an application filed under Section 71 of the Patents Act seeking rectification of the register, and not Section 64 of the Patents Act. Thus, the Court held the Limitation Act to be applicable. The decision in **Bayer AG (supra)** is completely distinguishable from the facts in the present case. This decision was also placed before the IPAB, in **Ajanta**

(*supra*) and was not applied to revocation petitions under Section 64.

18. In Section 64 of the Patents Act, since there is no limitation which is prescribed either in the Patents Act or under the Patents Rules, this Court holds that a limitation period cannot be read into the provision. In the light of the above cited judicial pronouncements and the dynamic/broad definition of 'persons interested', filing of a revocation petition could be done at any point in time when such a person's interest either arises or continues during the life/term of the Patent. This application is thus devoid of merit and is liable to be dismissed.

19. Accordingly, ***I.A. 3419/2022*** is dismissed.

C.O.(COMM.IPD-PAT) 3/2021 & I.As. 13644/2021 & 3420/2022

C.O.(COMM.IPD-PAT) 1/2022 & I.A. 3570/2022

20. List on 18th April, 2022 for further submissions, on top of Board.

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