

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**O.O.C.J.****WRIT PETITION (L) NO.3718 OF 2020**

Dhaval Diyora	]	
G-144, AshirwdPalace,	]	
Near Mangalam Chowk,	]	
B/H Jeevkar Nagar, Bhattar Road,	]	
Surat, Gujrat-395007	]	...Petitioner

Versus

1. Union of India	]	
represented by Secretary	]	
Department for Promotion of Industry	]	
And Internal Trade (DPIIT)	]	
Earlier known as Department of	]	
Industrial Policy & Promotion,	]	
at Rafi Ahmed KidwaiMarg,	]	
Rajpath Road Area, Central Secretariat,	]	
Delhi 110011	]	
2. Intellectual Property Appellate Board	]	
Guna Complex Annexe-I, 2 nd Floor,	]	
443 Anna Salai, Teynampet,	]	
Chennai-600 018	]	
3. The Controller of Patent & Designs	]	
BoudhikSampada Bhavan,Antop Hill,	]	
S. M. Road, Mumbai-400 037	]	
4. Pfizer Products Inc	]	
Eastern point Road, Groton,	]	
Connecticut06340, U.S.A.		...Respondents

Dr. V. V. Tulzapurkar, Senior Advocate a/w Hiren Kamod, Mr. Tarun Khurana, Mr. Abhijeet Deshmukh, Mr. Abhishek Pandurangi, Mr. Shon Gadgil and Ms. Niharika Sanadhya i/by Khurana & Khurana Advocates & IP Attorneys for the Petitioner.

Mr. Adwait Sethna a/w. Mr. Anil Yadav for the Respondent No.1

Mr. Venkatesh Dhond, Senior Advocate a/w. Ms. Priyanka Khimani, Ms. Chaitrika Patki and Ms. Preeta Panthaki i/by Anand & Anand Khimani for Respondent No.4.

**CORAM : NITIN JAMDAR &
MILIND JADHAV, JJ.**

**DATE : 5 November 2020.
(Through Video Conferencing)**

Judgement (Nitin Jamdar J)

1. Rule. Rule made returnable forthwith. Respondents waive service. Taken up for hearing by consent of the parties.

2. The Intellectual Property Appellate Board allowed the appeal filed by Respondent No.4-Pfizer Products Inc and set aside the order passed by the Controller of Patent and Designs refusing to grant the patent as applied for to Respondent No.4. The Appellate Board directed the Controller to issue patent to Respondent No.4-Pfizer. The Petitioner has filed this petition making a grievance that the order was passed without giving an opportunity to the Petitioner of being heard regarding his pre-grant opposition.

3. A brief overview of the statutory scheme governing the pre-grant opposition under the patent law would place the facts of the case and the arguments in a better context.

4. The Patent Act was enacted in the year 1970 to amend the law relating to patents in India. The earlier law was enacted in the year 1911, and there were substantial changes in the political and economic conditions of the country, and therefore a comprehensive law was brought in. The Act has undergone amendments in the year 2002 and 2005. Chapter I of the Act defines the terms in the Act. Patent is defined under the Act as patent for any invention granted under the Act. The patent generally is a right, an intellectual property, related to inventions. By grant of a patent, the Government for a specified period gives exclusive right to the patentee. The authorities under the Act are the Controller General of Patent, Design and Trade Marks and the Appellate Board. Controller General appointed under section 3(1) of the Trade Marks Act 1999 is the Controller of Patent for this Act. The office of the Controller is known as the Patent Office. Under Section 77 of the Act, the Controller has powers of the Civil Court such as enforcing the attendance of witnesses, discovery and production of documents, reviewing decisions and setting aside ex-parte order. The Controller has powers to receive evidence, and Section 18 confers certain discretionary powers on the Controller. Section 116 of the Act states that the Appellate Board established under section 83 of the Trade Marks Act to be the Appellate Board to exercise powers and

functions of the Appellate Authority under the Act. Appeals to the Appellate Board are provided under section 117-A of the Act.

5.1 Chapter IV deals with the publication and examination of applications for patents. The application for patent is published under Section 11-A of the Act. Sub-section (1) states that save as otherwise provided, no application for patent shall ordinarily be open to the public for such period as prescribed. The applicant may, in the prescribed manner, request the Controller to publish the application at any time before the expiry of the period prescribed under sub-section (1) and subject to the provisions of sub-section (3), the Controller shall publish such application as soon as possible. The publication of every application under this section shall include the particulars of the date of application, number of application, name and address of the applicant identifying the application and an abstract. The applicant is not entitled to institute any proceedings for infringement until the patent has been granted. Section 11-B regulates the requests for an examination of the patent application. The request for examination is to be made in the prescribed manner within the prescribed period. Under Section 12, when a request for examination is made regarding an application for a patent the Controller calls for a report from an examiner as to whether the application and the specification and other documents relating thereto are in accordance with the requirements of the Act and the Rules made thereunder; whether there is any lawful ground of objection to the grant of the patent under the Act in pursuance of the

application and the result of investigations made under section 13. Section 13 deals with the search for anticipation by previous publication and by a prior claim. The examiner shall investigate to ascertain whether the invention claimed has been anticipated by publication before the date of filing of the applicant's complete specification in any specification filed in pursuance of an application for a patent made in India or is claimed in any claim of any other complete specification published on or after the date of filing of the applicant's complete specification, being a specification filed in pursuance of an application for a patent made in India and dated before or claiming the priority date earlier than that date. The examiner shall ascertain whether the invention has been anticipated by publication in India or elsewhere in any document other than those mentioned earlier.

5.2 Consideration of the report of the examiner is made by Controller under Section 14. If the report of the examiner is adverse to the applicant or requires any amendment of the application the Controller, before proceeding to dispose of the application shall communicate the gist of the objections to the applicant and give him an opportunity of being heard. Section 15 grants power to the Controller to refuse or require amended applications. If the Controller is satisfied that the application does not comply with the requirements of this Act or any rules the application may be refused or may require the application, to be amended.

5.3 Section 25 of the Act deals with opposition for patent application. Subsection (1) and (2) deal with two different types of opposition. Sub-section (1) permits 'any person' to file opposition before granting of the patent. This is therefore referred to as the pre-grant opposition. The challenge to the grant of a patent under subsection (2) is restricted to persons interested. Section 25(1) lays down the grounds on which pre-grant opposition can be maintained. The procedure for making an application under section 25(1) is laid down under Rule 55 of the Patent Rules of 2003. Rule 55 provides that the application will have to be made as per Form-7 A appended to Rules with statement, evidence and request for hearing the applicant, if so desired. No patent is to be granted within six months from the date of publication of an application under section 11-A. The Controller upon consideration of statement and evidence, either may reject the application, grant or refuse the patent. Section 43 deals with grant of Patent and when the said is found in order; the Controller is obliged to grant and seal the same expeditiously and make entries in the register. An appeal is provided to the Appellate Board, and Section 117-D states that copies of the orders of the Appellate Board are to be communicated to the Controller to give effect to the orders. This is in short the scheme of the pre-grant opposition.

6. Respondent No.4 filed an International Patent Application on 29 May 2020 (PCT Appl. PCT/IB02/01905) in respect of invention titled "*Optical Resolution of (1-Benzyl-4-Methylpiperidin-3-YL) Methylamine and the use thereof for the preparation of Pyrrolo*

2, 3-Pyrimidine Derivatives as Protein Kinases inhibitors" that claimed priority from two US Patent Applications No.60/294, 775 dated 31 May 2001, and No.60/341, 048 dated 6 December 2001. National Phase Application was filed on 10 June 2002 regarding the compound *3-(4-methyl- 3[methyl-[7H-pyrrolo[2,3-d]pyrimidin-4-yl)- amino] - piperidin - 1 - yl)- 3 - oxo-propionitrile* is disclosed in example 14 of WO0142246. Priority date of WO0142246 was 10 December 1999. On 27 October 2003, Respondent No.4 filed National Patent Application for the invention titled *Chiral Salt Solution*, subject of this Petition, PCT Appl. PCT/IB02/01905, along with necessary documents issued by the European Patent office. On 16 March 2007 National Patent Application 991/MUMNP/2003 was published under Section 11-A of the Act in India.

7. The Patent Office prepared the first examination report on 30 March 2008 in respect of the application. Respondent no.4 filed a reply to this report on 27 January 2009. Notice was issued by the Controller of India on 14 March 2011 to Respondent No.4 stating that two groups of inventions cannot be included in the same application and the claims were not novel. Written submissions were filed along with the amended claim by Respondent No.4-Pfizer on 9 June 2011. The Patent Office refused Respondent No.4's application on the ground that Respondent No.4 had not disclosed European Patent Office action and the compound was the same as the subject matter of another. Patent office held that the patent had no enhanced efficacy

and was not novel. On 9 August 2011 Respondent No.4 filed a review. The Review was dismissed on 27 March 2014. Respondent No.4 filed an appeal before the Appellate Board on 26 June 2014. On 27 October 2014, the European Opposition Division order was issued which declared that claim compound was novel and invented. On 31 October 2014, the Appellate Board passed an order directing the Patent Office to consider the matter afresh. The hearing was held on 22 January 2015 by the Patent office. The amended claim was filed by Respondent No.4 on 30 January 2015. On 3 February 2015 written submissions were filed. The Controller held that the invention was not patentable and rejected the application by order dated 3 September 2015.

8. Respondent No.4 filed an appeal before the Appellate Board on 14 September 2015. The Appellate Board concluded the hearing on 10 August 2020. On 18 August 2020, the Petitioner filed pre-grant opposition. On 18 August 2020, the Petitioner's advocate sent an e-mail to the Appellate Board about the pre-grant opposition. On 18 August 2020, the advocate of Respondent No.4 replied that the application was not maintainable. The Appellate Board pronounced the order on 21 August 2020 granting the patent to Respondent No.4. The contentions raised by the Petitioner was rejected holding that once the appeal is kept for pronouncement of reasons, application to the effect that order should not be pronounced cannot be entertained. The Petitioner approached this Court by this petition, on 22 September

2020. Reply affidavit has been filed by Respondent Nos.1 and 3 through the Assistant Controller of Patent and Designs.

9. We have heard Dr. V. V. Tulzapurkar, Senior Advocate for the Petitioner, Mr. Venkatesh Dhond, Senior Advocate for Respondent No.4 and Mr. Advait Sethna for Respondent Nos.1 and 3. Respondent No.2 is the Appellate Board.

10. The contentions of the Petitioner briefly are as follows. The Appellate Board has directed the Controller to grant the patent to Respondent No.4 even though it knew the existence of pre-grant opposition by the Petitioner. Any person has right under section 25(1) to oppose the grant of a patent where an application has been published, and the patent has not been granted. First the Controller concludes that the patent is in order and then grants the patent and thus the patent is not automatically granted. The phrase "patent shall be granted" in Section 43 of the Act clarifies that the order passed does not *ipso facto* result in the grant of a patent, and the date on which the patent is granted is registered in the register. Thus unless the patent is entered in the register, it is not granted. Even assuming the appeal was allowed on 10 August 2020, the patent did not automatically stand granted, and before the patent is sealed as provided in section 43 of the Act, an application could be filed. The finding of the Tribunal that no pre-grant application can be filed when the application for patent is rejected by the Controller is contrary to the scheme of the Act. The

appeal against the rejection of the application by the Controller is a continuation of the proceeding. If interpreted otherwise, it would lead to anomalous position. It was for the Appellate Board to decide and comment upon the pre-grant opposition. The application is not time-barred. Even till today, a patent under section 43 has not been granted. There is no reason to doubt the bonafides of the Petitioner. The Petitioner has filed many applications, some have been allowed, some have been disallowed and some are pending. The details of the Petitioners bonafides have been placed on record. Section 25(1) of the Act confer right on any person to file pre-grant opposition and it is unnecessary to show any interest in the subject matter of patent. The impugned order, therefore, needs to be set aside and application for pre-grant opposition should be heard on merits.

11. The Respondents have contested the Petition contending as follows. Paragraph 59 of the impugned order shows that the appeal was allowed, there was due application of mind, the Controller's order was set aside and the patent was directed to be issued. The contingency specified under the first part of section 43 was already over, and only ministerial act remained to issue the patent. Section 116 and 117 of the Act confer wide powers on the Appellate Board. As per section 117-D(2) of the Act the orders passed by the Appellate Board have to be implemented by the Controller. 117-D(2) pertain to amendment of entries and therefore order of Board is an order granting the patent. The Appellate Board has granted the patent. The date of grant of a

patent will be the date of order of the Appellate Board. Section 25(1) clarifies that it applies only to the Controller or the Assistant Controller. Therefore there is no error in the view taken by the Tribunal that once the Controller had rejected the application, there was no question of a pre-grant opposition. Rule 55 of the Patent Rules of 2003 clarifies the scheme of opposition to the patent. Section 25(1) applies only at the stage when patent is pending before Controller and not when Controller has decided the application and the appeal is pending. Even otherwise, there were various opportunities where the Petitioner could have applied. The contentions of the Petitioner and the conduct are irresponsible. The Tribunal has disapproved the instances of *Benami* oppositions. That applications are filed by the Petitioner only means that he is a habitual strawman for others. The petition deserves to be dismissed with costs.

12. First, we will deal with the factual assertion of the Petitioner. The Petitioner submitted that there is no reference to the appeal being allowed on 10 August 2020 in the roznama or by any handwritten endorsement on record. Therefore this part of the Appellate Board order not being supported by record, should not be considered and the appeal should be considered as allowed only on 21 August 2020. The Petitioner contends that since the order was pronounced by the Appellate Board on 21 August 2020 and not on 10 August 2020, the application was prior to the rendering of the decision. Respondents submit that observations in a judicial order as to what

transpired in the court has to be accepted. Reliance is placed on the decision of the Supreme Court in the case of *Commr. Customs Mumbai v. Bureau Veritas & Ors.*¹

13. The Appellate Board noted that the application was pending since 2016. It was taken up, and it was orally allowed on 10 August 2018 and order was reserved for giving reasons on merits. In paragraph 61 of the impugned order, the Appellate Board has stated that the hearing was concluded on 10 August 2018, after hearing and the appeal was allowed, and it was fixed for pronouncing the reasons on 21 August 2018. It is laid down by the Supreme Court in *Bureau Veritas & Ors* that when the court records as to what transpired in the court, it is conclusive of the fact stated. It cannot be controverted in such a casual manner as said to be done by the Petitioner. Except raising vague suspicions, nothing is placed before us to hold that the Tribunal has erroneously recorded that it had indicated that the appeal is allowed and it was kept for pronouncement of reasons on 21 August 2018. The Assistant Controller of Patent and Designs has filed an affidavit and has asserted that on 10 August 2018 the hearing concluded. The statement in the judgment that on 10 August 2020 appeal was orally declared as allowed and the matter was taken up on 21 August 2020 for declaration of reasons, must be accepted.

14. On law, the gist of contention of the Petitioner is that any person has right under section 25(1) of the Act to oppose the grant of a

1 2005 3 SCC 265.

patent where an application has been published, but the patent has not been granted. A patent is not granted until it is sealed as per Section 43. Therefore the Appellate Board could not have directed the Controller of Patent and Design to grant patent even though it was made aware of the existence of pre-grant opposition and the Controller could not have observed that it cannot entertain the application under section 25(1) of the Act.

15. The response of the Respondent, in brief, is that pre-grant opposition under section 25(1) of the Act cannot be made to the Controller after he has disposed of the proceedings for grant of patent. Secondly, after the Appellate Board has allowed the appeal and has directed the Controller to issue the patent, only ministerial actions remain, and no pre-grant opposition can be filed.

16. First aspect is the stage at which the pre-grant opposition under Section 25 of the Act can be filed. Several combinations of factual situations can arise under the Act and Rules regarding the pre-grant opposition. Our discussion on the legal position is in respect of the facts in this case.

17. Section 25(1) envisages opposition by any person appearing before the grant of patent. Section 25(1) reads thus:

“(1) Where an application for a patent has been published but a patent has not been granted, any person may, in writing, represent by way of opposition to the Controller against the grant of patent on the ground -

(a) that the applicant for the patent or the person under or through whom he claims, wrongfully obtained the invention or any part thereof from him or from person under or through whom he claims;

(b) that the invention so far as claimed in any claim of the complete specification has been published before the priority date of the claim -

(i) in any specification filed in pursuance of an application for a patent made in India on or after the 1st day of January, 1912; or

(ii) in India or elsewhere, in any other document;

Provided that the ground specified in sub-clause (ii) shall not be available where such publication does not constitute an anticipation of the invention by virtue of sub-section 92) or sub-section (3) of section 29;

(c) that the invention so far as claimed in any claim of complete specification is claimed in a claim of a complete specification published on or after the priority date of the applicant's claim and filed in pursuance of an application for a patent in India, being a claim of which the priority date is earlier than that of the applicant's claim;

(d) that the invention so far as claimed in any claim of the complete specification was publicly known or publicly used in India before the priority date of that claim.

Explanation – For the purposes of this clause, an invention relating to a process for which a patent is claimed shall be deemed to have been publicly known or publicly used in India before the priority date of the claim if a product made by that process had already been imported into India before that date except where such importation has been for the purpose of reasonable trial or experiment only;

(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 the matter published as mentioned in clause(b) or 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;

(g) that the complete specification does not sufficiently and clearly describe the invention or the method by which it is to be performed;

(h) that the applicant has failed to disclose to the Controller the information required by section 8 or has furnished the information which in any material particular was false to his knowledge;

(i) that in the case of a convention application, the application was not made within twelve months from the date of the first application for protection for the invention made in a convention country by the applicant or a person from whom he derives title;

(j) that the complete specification does not disclose or wrongly mentions the source or geographical origin of biological material used for the invention;

(k) that the invention so far as claimed in any claim of the complete specification is anticipated having regard to the knowledge, oral or otherwise, available within any local or indigenous community in India or elsewhere, but on no other ground, and the Controller shall, if requested by such person for being heard, hear him and dispose of such representation in such manner and within such period as may be prescribed.

The procedure for making an application under Section 25(1) is regulated by Rule 55 of the Patent Rules. Application is to be made in form 7A appended to the Rules. Rule 55 reads thus:

(1) Representation for opposition under sub-section (1) of section 25 shall be filed in Form 7(A) at the appropriate office with a copy to the applicant, and shall include a statement and evidence, if any, in support of the representation and a request for hearing, if so desired.

(1A) Notwithstanding anything contained in sub-rule (1), no patent shall be granted before the expiry of a period of six months from the date of publication of the application under section 11 A.

(2) The Controller shall consider such representation only when a request for examination of the application has been filed.

(3) On consideration of the representation if the Controller is of the opinion that application for patent shall be refused or the complete specification requires amendment, he shall give a notice to the applicant to that effect.

(4) On receiving the notice under sub-rule (3), the applicant shall, if he so desires, file his statement and evidence, if any, in support of his application within three months from the date of the notice, with a copy to the opponent.

(5) On consideration of the statement and evidence filed by the applicant, the representation including the statement and evidence filed by the opponent, submissions made by the parties, and after hearing the parties, if so requested, the Controller may either reject the representation or require the complete specification and other documents to be amended to his satisfaction before the patent is granted or refuse to grant a patent on the application, by passing a speaking order to simultaneously decide on the application and the representation ordinarily within one month from the completion of above proceedings.

18. Section provides 25(1) lays the grounds on which pre-grant opposition can be filed. These grounds are: prior publication of the invention in India or elsewhere, that the invention is wrongfully obtained; lack of inventive step; prior public use or knowledge; non-

patentability; unclear insufficient description and such other grounds as specified. The pre-grant opposition has to be in Form 7A and should include a statement. The opposition is considered only after a request for examination of the patent application is filed. Upon consideration of the opposition, the Controller gives notice to the applicant along with a copy of the opposition. In reply, the applicant may file his statement and evidence supporting the application. The opponent may be heard by the Controller, provided a prior request in that regard has been made. Finally, upon considering the applicant's statement, the Controller may accept the opposition and refuse to grant the patent or may require amendment in the patent application or the Controller may reject the opposition and grant the patent.

19. The position is made further evident by Rule 55(5) of the Rules. The Rules lays down that on consideration of the statement and evidence filed by the applicant, the representation including the statement and evidence filed by the opponent, submissions made by the parties, and after hearing the parties, the Controller may either reject the representation or require the complete specification and other documents to be amended to his satisfaction before the patent is granted or refuse to grant a patent on the application, by passing a speaking order. Most crucially it directs that the application and the opposition are to be simultaneously decided. Therefore scheme of section 25(1) read with Rule 55 postulates that both the applications seeking patent and pre-grant opposition are to be heard by the

Controller simultaneously. The language and intent are clear. There is no separate hearing on the pre-grant application. The right under section 25(1) of pre-grant opposition starts when the Patent is published and continues till the matter is decided by the Controller but no further.

20. There is a reason for restricting the pre-grant oppositions before the Controller. The Patents (Amendment) Act, 2005, amended Section 25(1) to permit *Any Person* to oppose the grant of a patent where an application for a patent has been published, but a patent has not been granted. Earlier this right was restricted to the person interested. By enlarging the *locus standi* under Section 25(1), the legislature intends to bring transparency in the proceedings before the Controller. Patents confer a monopoly of use. Some monopolies could be detrimental to welfare measures for the masses. The widened *locus standi* now permits any person, which can include researchers, non-governmental organisation, to oppose a patent application by submitting information to the Controller in the interest of the society. As observed by the learned Single Judge of the Delhi High Court in the case of *UCB Farchim Sa v. Cipla Ltd & Ors.*², the object of the pre-grant opposition is to assist the Controller in deciding the patent application. Once the Controller decides the proceedings the scheme ends as far as pre-grant opposition is concerned.

² 2010 SCC Online Del 523

21. Chapter IV and Chapter V of the Act form a Scheme to deal with the pre-grant opposition to be followed before the Controller. The Act does not postulate that same procedure should be followed before the Appellate Board. This cannot be incorporated by analogy as sought to be done by the Petitioner. The contention that appeal is a continuation of proceedings is also not correct. These proceedings are not akin to a civil suit between plaintiff and a defendant. In the present case admittedly when the Petitioner filed his pre-grant opposition, there was no application pending before the Controller. Therefore the Controller could not have entertained the pre-grant opposition as there was no application for grant of a patent before it. The Respondents are right in contending that the Controller had become *functus officio*.

22. The Petitioner then contends that Section 43 postulates that the patent is granted when it is sealed and when the act of sealing has not taken place even as of today, the application was maintainable. Based on section 43 it was contended that first the Controller concludes that the patent is in order, then proceeds to grant the patent, and the patent is not automatically granted. It is contended that the phrase "patent shall be granted" makes it clear that the order passed does not ex-facto result in a patent, and the date on which the patent is granted is registered in the register. Petitioner contends that assuming the appeal was allowed on 10 August 2020, the patent did not automatically stand granted and before the patent is sealed as provided in section 43 of the Act, the application was filed. Reference is made to

the decision of learned Single Judge of Delhi High Court in the case of *Snehlata C. Gupte vs. Union of India (UOI)*³. It is submitted that this decision lays down that till patent is actually sealed under section 43, pre-grant opposition under section 25 can be filed. The contention of the Petitioner is that Section 43 is in two parts. First, the application for patent is found to be in order. The second part is that it shall be sealed. The Petitioner contends that these are two different phases, and even between these two phases, an application pre-grant opposition can be filed. A conjoint reading of Section 117 and Section 43 would show that not only this interpretation is contrary to the scheme of the Act but will lead to an anomalous situation.

23. Section 43 deals with grant of patent and the rights conferred. It reads thus:-

(1) Where an application for a patent has been found to be in order for grant of the patent and either—

(a) the application has not been refused by the Controller by virtue of any power vested in him by this Act; or

(b) the application has not been found to be in contravention of any of the provisions of this Act, the patent shall be granted as expeditiously as possible to the applicant or, in the case of a joint application, to the applicants jointly, with the seal of the patent office and the date on which the patent is granted shall be entered in the register.

(2) On the grant of patent, the Controller shall publish the fact that the patent has been granted and thereupon the

³ 2010(43) PTC 813 (Del)

application, specification and other documents related thereto shall be open for public inspection.

Where application for patent is found in order for grant of patent, the patent has to be granted as expeditiously as possible and the date on which the patent is granted shall be entered in the Register. Section 45 deals with date of patent and it lays down that subject to other provisions contained in the Act, every patent shall be dated as of the date on which application is filed.

24. Chapter 9 of the Act confers certain powers on the Appellate Board. Section 117-D provides that certified copy of every order or judgment of the Appellate Board relating to a patent shall be communicated to the Controller by the Board and the Controller shall give effect to the order of the Board.

117-D. Procedure for application for rectification, etc., before Appellate Board.—

(1) An application for revocation of a patent before the Appellate Board under section 64 and an application for rectification of the register made to the Appellate Board under section 71 shall be in such form as may be prescribed.

(2) A certified copy of every order or judgment of the Appellate Board relating to a patent under this Act shall be communicated to the Controller by the Board and the Controller shall give effect to the order of the Board and shall, when so directed, amend the entries in, or rectify, the register in accordance with such order.

Section 117-D provides that certified copy of every order or judgment of the Appellate Board relating to a patent shall be communicated to the Controller by the Board and the Controller shall give effect to the order of the Board.

25. The contention of the Petitioner that Section 117-D is restricted to rectification only is not correct. Title of this Section includes a phrase “etc”. Therefore rectification applications and others are included. Reference under Section 117-D (2) is not only to an application for rectification, but to every order or judgment relating to patent under the Act.

26. In the case at hand the Appellate Board by the impugned order held that the appeal is allowed, the order of the Controller is set aside and that the Controller will proceed further for grant of patent. This was a clear direction which had to be enforced by the Controller by virtue of section 117-D (2). Under 117-D (2) when a certified copy of the order passed by the Appellate Board is communicated to the Controller, the Controller is duty bound to give effect to the order of the Appellate Board.

27. Further after the Controller rejects the patent application, the Appellate Board allows the appeal and directs the Controller to issue the patent, the matter proceeds beyond the first part of section 43, and the patent stands granted. By virtue of Section 117-D (2) the

Controller is duty-bound to make necessary entries and seal the patent. After the order of the Appellate Board, this only ministerial act remains. If after the order of the Appellate Board, which is to be implemented by the Controller, the Controller entertains pre-grant applications, it may give rise to an endless series of oppositions. This would mean, after the order of the Appellate Board but before the patent is sealed, one more pre-grant opposition can be filed seeking fresh hearing. If that is entertained and the patent is rejected and the appeal is allowed, again, one more pre-grant application can be filed. Such interpretation will do violence to the scheme of the Act. Therefore the contention that the order passed by the Appellate Board was at the most finding that the patent was in order and it did not grant the patent, is not correct. The Controller rightly refused to entertain the Petitioner pre-grant opposition.

28. The Petitioner relied upon the observation made in paragraph No.73 of the decision in the case of *Snehlata Gupte* to contend that after the finding that the patent is in order and before its sealing, an application for pre-grant opposition is maintainable. According to the Petitioner, the learned Single Judge from the observation that communication by the Controller to the petitioner therein on 28 March 2008 was not an order granting patent and therefore pre-grant opposition filed on 26 June 2008 was maintainable under section 25(1), the legal position is established. Petitioner's reliance on the observations made by the learned Single Judge is out of

context from the facts of that case. Paragraph 73 of the decision has to be read with paragraph No.29, where facts are narrated. The communication dated 28 March 2008, though had stated that the application for the patent was found in order, it was made subject to further conditions. Therefore on facts learned single judge held that the communication was not a grant of patent. On the contrary, the learned judge in paragraph No.53 held that sealing of patent and entry of patent in the register are ministerial acts.

29. The learned counsel for the Petitioner has circulated certain documents including orders passed by the Appellate Board to contend that the Board has interpreted section 43 to mean that the objections can be considered even after the grant. We find no such reference in the orders annexed. One document annexed is communication and Form-13. Except tendering the documents, no passage is pointed out where such legal position is considered as a settled practice.

30. Learned counsel for the Controller sought to contend that there is a time limit of six months for opposition under section 25(1) to be filed. He submitted that though there is no such specific provision, from the scheme of the Act, such time limit can be inferred. A bare perusal of the provision indicates there is no such limitation. Since the patent is not to be granted for a period six months from the publication, it is a safe period within which a pre-grant application can be filed. However, we do not wish to conclude this issue finally as it does not

find a reference in the written submissions or reply filed by the Controller, and since the Petition is being decided on other points.

31. The Petitioner contends that not allowing a pre-grant opposition if the appeal is to be allowed would create a dichotomy. According to the Petitioner if the Controller rejects the patent without pre-grant opposition and it is to be granted by the Appellate board then denying the right of pre-grant opposition will defeat the scheme and object of pre-grant objections. We do not agree. It is not the question of grant or refusal of a patent by the Controller. It is the disposal of proceedings before the Controller. The pre-grant opposition is to be filed before the Controller who decides the patent application. In the present case, the Petitioner did not file pre-grant opposition from the date of publication. The object of the pre-grant application is to assist the Controller.

32. Now we turn to conduct of the petitioner since he has invoked the writ jurisdiction of the Court. It is settled that a party requesting intervention of the Writ Court must give the Court a complete picture to satisfy its conscience. Article 226 of the Constitution of India not only confers a discretion but a duty to be cautious in exercising the writ jurisdiction. The Writ Court has to keep in mind the conduct of the party who invokes the jurisdiction of the Court.

33. The Legislative intent to widen the *locus standi* under the amended Section 25(1) is not to create individual right as such but to provide access to any person to assist the controller in taking a correct decision. The legislature has not conferred this right to be abused.

34. When the Petitioner had mentioned the matter before the Appellate Board, the Respondent no.4 had objected that the Petitioner is only a strawman for someone else and an impostor. Therefore when the Petitioner invoked the writ jurisdiction, and we questioned his credentials in the background of this allegation, he was under obligation to state the details. In the Petition, the Petitioner has only stated that he is an individual who has filed an opposition. There is absolutely no reference to any details. His address is given of Surat, Gujrat The Petitioner claims that his fundamental right under Article 21 was infringed. Despite adjourning the petition to place the credentials on record, the Petitioner has not amended the Petition nor has filed a statement on oath. What is placed is not a statement on oath, but a compilation of documents wherein DIN of the Petitioner and the MCA master Data documents are placed. Number of pre-grant oppositions filed by the Petitioner is given. Details of the orders passed in the application are annexed. In the written submission filed by the counsel, bonafide of the Petitioner are stated. It is stated that Respondent no.4 has produced no documents to show that the Petitioner is a frontman. It is stated that the Petitioner is a public-spirited person and locus of the Petitioner is not relevant as any person

under section 25(1) can apply. The Petitioner relies on the decision of the Division Bench of Madras High Court in the case of *Indian Network for People living with HIV /AIDS and Ors. vs. Union of India (UOI) & Ors.*⁴ This decision has no application. Here the Petitioner was a registered Society providing support to people living with HIV positive. The question that arose for consideration of the Division Bench was whether the Petitioner Society who had filed pre-grant opposition and sought hearing could be denied a hearing. In this context, the Division Bench reiterated reasons for incorporating the concept of the pre-grant opposition. This decision does not examine the concept of *Benami* oppositions.

35. The Petitioner has annexed his opposition under section 25(1). The Petitioner has raised detailed grounds stating various scientific facts. The obvious question is how the Petitioner has intricate knowledge of pharmaceutical compounds when he is a businessman engaged in diamond business. We have not been informed about the educational background of the Petitioner. The Petitioner has made no statements on oath. It is argued that the Petitioner has employed a team of researchers. Particulars of these researchers and who pays the team are not given. Credential of the researchers are not informed. That the Petitioner has filed multiple oppositions does take his case further. It can also mean that he is habitual. Considering the totality of the circumstances, we have serious doubt about the credentials of the Petitioner and find merit in charge of the Respondent no.4 that the

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Petitioner is a habitual frontman put up by those who intend to only delay the grant of patents.

36. The conduct of the Petitioner in questioning what happened in the Appellate Board on 10 August 2020 would mean two things. Either the Petitioner was unaware and was not present in the Court, or he was present in the Court. If he was not present in the Court on the date when the Tribunal declared the result orally, there is no justification for the Petitioner to question the reference in the judgment. If the petitioner was present, it would mean that the Petitioner was keeping watch on the matter and the moment it was orally declared, the Petitioner rushed to prepare objection to file it before the Controller. Either of the factual situations reflect poorly on the credentials of the Petitioner. The Petitioner has not been candid with the Court, and we agree with the contention of the Respondent no.4 that the conduct of the Petitioner is an abuse of the process of law.

37. The object of the Amending Act of 2005 is to simplify and rationalize the procedure of granting patents. The Appellate Board noted that due to the delay in the proceedings number of appeals are being withdrawn either because the applicants have expired or the intervenors have lost the interest. The Appellate Board referred to cases where after the expiry of 19 years and seven months, when four months were left for expiry of the patent, the Appellate Board had granted it. The Appellate Board has also noted cases where eighteen years have

expired, and the patent is yet to be granted. The Appellate Board has cautioned against the rising tendency of filing of *Benami* oppositions to prevent the competitor from patenting its invention. Taking notes of these concerns, we are of the opinion, in view of the conduct of the Petitioner, that costs need to be imposed on the Petitioner to send a message that the valuable right given under section 25(1) of the Act must not be abused.

38. To conclude therefore the Petitioner's pre-grant opposition is not maintainable in law, therefore the challenge of the Petitioner to the impugned order cannot be entertained, and no direction can be issued to hear the application filed by the Petitioner.

39. The Writ petition is dismissed. Rule is discharged.

40. The Petitioner shall pay costs of Rs.25000/- (Twenty five thousand) to the Respondent no.4 within four weeks from today.

41. This judgment will be digitally signed by the Personal Assistant/Private Secretary of this Court. All concerned to act on production by fax or email of a digitally signed copy of this order.

(MILIND JADHAV, J.)

(NITIN JAMDAR, J.)