

IN THE HIGH COURT OF SINDH, KARACHI

Suit No.786 of 2014

GETZ Pharma (Pvt.) Limited

Vs.

Servier Laboratories (France) & another

Before: Mr. Justice Zulfiqar Ahmad Khan

Date of Hearing : 15.08.2016

Date of Order : 15.08.2016

Plaintiff : Through Mirza Mehmood Baig, Advocate

Defendant : Through Ms. Amna Salman, Advocate

JUDGMENT

Zulfiqar Ahmad Khan, J.:- Pursuant to the order of this Court dated 08.08.2016, the plaintiff's counsel came fully prepared to argue his case and to discharge the initial burden as to the maintainability of the instant suit.

The learned counsel submits that per paragraph-21, the cause of action arose on April 22, 2014 when the plaintiff obtained drug registration for a pharmaceutical composition branded as 'sivab' from the Drug Regulatory Authority of Pakistan (DRAP) consisting of the same active ingredient which is the subject matter of the patents allegedly granted to the defendants. The counsel further contended that having acquired the said drug registration from DRAP, anticipating that if the said drug was put to sale, the patent holder might initiate legal proceedings against the plaintiff for the infringement of its respective patents therefore this suit was filed, wherein at page 17, a prayer is also made that the patents (belonging to the defendants) relating to the instant

molecule, chemical composition and active ingredients were illegally granted and as such these patents should be revoked.

At this point, the learned counsel was queried as to how the said registration of drug (for which the application was made by the plaintiff itself) in its own name would amount to be a hurt caused or wrong committed by the defendants and propel the cause of action against the present defendants? The counsel had no satisfactory answer as to how this court could exercise its judicial powers to come in aid of the plaintiff for an act done by the plaintiff itself, of which the defendants had no remote possibility of knowing.

Further, regarding court's powers in patent revocation matter, the learned counsel's attention was drawn to section 46 of the Patent Ordinance, 2000 wherein a person can request High Court's indulgence in a patent revocation matter provided, the requirements laid down in the said section are met. Section 46 enables any person to approach a High Court on a counter claim in a suit or to attack an action filed against him by the defendant for the infringement of latter's patent, unless there are no adversarial relationship between the parties and the revocation application is purely made for academic or scientific reasons by an ordinary person (which is not the case at hand).

Also one has to keep in mind that in the instant case, when patent was granted on 16.02.2012, the drug authorities should not have issued the registration in respect of an identical compound or molecule on 22.04.2014 under the Drugs (Licensing, Registering and Advertising) Rules, 1976 since a patent was already granted in the name of another person (the present defendants) and where such drug registration would only amount to facilitate infringement of patent holder's rights, since grant of patent under the Patents Ordinance is solely aimed to restrict other

persons from, inter alia, making and selling the same product or composition.

Be that as it may, if the plaintiff had a bona fide grievance in respect of the patents acquired by the defendants under the provisions of the Patents Ordinance, it should have been more vigilant and should have filed appropriate opposition when the patents were open for the public opposition, or should not have missed the second opportunity to file appropriate revocation proceedings before the Patent Office under section 47 of the Patents Ordinance (to which the learned counsel contended that he has already initiated these revocation proceedings as JMs along with this suit before the High Court), therefore in my view the plaintiff has clearly missed boat twice of availing timely remedies which the Patent Ordinance provides and the instant suit is merely filed to give undesirable legitimacy to the revocation actions filed as JMs.

Those who are well versed in the intellectual property rights jurisprudence know its established principle that granted patents are incorporeal possessions having property rights granted under the doctrine of *jus ad rem* with a notification to the public at large that after following the due process of law, a patent has been granted thereby making the patentee the prima facie owner and beneficiary of all the rights arising therefrom and restricting public at large to use the patented method or invention and that patent laws confer absolute rights unto the patentee to initiate infringement proceedings against all trespassers of patentee's such rights. Being intellectual properties in nature (not always tangible) patents also confer *jus in re propria*, which grants full ownership to this kind of intangible asset to its owner.

Further, Pakistan is a member of the World Trade Organization, which requires Pakistan through the Agreement on Trade Related Aspects of Intellectual Property Right, 1994 to protect all forms of intellectual

property (including patents, designs, trade marks, copyright and integrated circuits) to the least acceptable international standards. Beside for the said international covenant, protection of such creators' right is considered worthy of special protection because it is seen as benefiting society as a whole and stimulating further creative activity and competition in the public interest. If we read such necessity of protection of intellectual property rights in conjunction with Article 24 of the Constitution, it is not very hard to imagine that the protection granted by the Constitution which extends to all forms of property, includes intellectual property also, therefor no person can be deprived of his intellectual property also, except in accordance with law (which in the instant case is the Patents Ordinance, 2000).

While I am at this juncture, it is also not out of place to refer to the scholarly work of Silvia Beltrametti on the legality of intellectual property rights under the Islamic law (The Prague Yearbook of Comparative Law 2009 Mach, T. et al. (Eds). Prague, 2010. pp. 55-94) where the writer reaches to the conclusion that intellectual property, though seemingly unregulated by the (Islamic) sources is not incompatible with Shari'a. Also of great influential value are the writings on copyright laws by Mufti Muhammad Taqi Usmani (Al-Rasheed, Published by Jamiatul Ulama - Transvaal).

Coming back to the instant suit. For the reasons mentioned in the foregoing, in my view the plaintiff has attempted to eclipse the long established rights of the patent-holders who, in the instant case, neither challenged nor attacked the plaintiff (on the date of filing of the present suit) thus making the action of the plaintiff fail for want of the requisites of section 46 of the Patents Ordinance, as well as, making the instant suit hopelessly opportunistic, groundless and unwarranted, considering that alternative remedies were available to the plaintiff to file opposition and/or revocation proceedings before the Patent Office at the appropriate

times. Regarding the prayer seeking a declaration as to invalidity of a granted patent from a Court, while an alternate and specialist forum (of the Patent Office) was timely available, in my view, is a question of *forum non conveniens* and being of highly technical in nature, be left to the technical experts at the Patent Office to be handled at its best.

I, therefore, order that the revocation proceedings which have been filed pursuant to this suit be transferred to the Patent Office, which proceedings (if the same are not time-barred under Section 47 of the Patents Ordinance at the date of filing of the instant suit) should be decided within 90 days.

Accordingly, the instant suit being groundless and constituting blatant misuse of legal process is dismissed with special cost of Rupees One Hundred Thousand only (Rs.100,000).

Judge