

IN THE HIGH COURT OF SINDH, KARACHI

M.A.No.19 of 2011 & M.A.No.20 of 2011

Pakistan Pharmaceutical Manufacturers' Association

Vs.

The Controller of Patents and another

Before: Mr. Justice Zulfiqar Ahmad Khan

Date of Hearing : 21.09.2016.

Appellant : Through Mr. M. Mehmood Baig, Advocate

Respondents : Through Mr. Salim Ghulam Hussain,
Advocate for Respondent No.1.

J U D G M E N T

Zulfiqar Ahmad Khan, J.:- These twin appeals arise out of the single order passed by the Controller of Patents dated 02.05.2011 (the impugned order) wherein the Controller refused the opposition filed by the Appellant against grant of patents to the Respondent No.2 on the ground that the opposition was time barred since it was filed after the expiry of the statutory period of four months commencing the date of Gazette in terms of which advertisement of acceptance of the above referred patent applications was published.

Brief facts of the case are that Respondent No.2 filed application for the grant of patent before the Respondent No.1, which application after passing through the due process of examination was accepted and as the Patents Ordinance, 2000 (the Ordinance) requires, in terms of section 23 and under Rule 17 of the Patent Rules 2003, the application was advertised for the purposes of filing of opposition by any person against the grant of the said patent.

It is pertinent to mention that notifications related to patents are advertised in Part-V of the Federal Government Gazette, which are published on weekly basis, in terms of which information with regards filing, acceptance and sealing of patents, etc. are advertised. Worth noting are the provisions of Section 2(e) of the Ordinance which defines “date of advertisement” to mean *the date on which the relevant Part-V of the Official Gazette is actually made available to the public.*

In the instant case, application was advertised in the official Gazette dated 29.09.2010, therefore in the normal course, the statutory period of filing opposition expired after four months’ period on 28.01.2011. The case of the Appellant is that the date from which the period of four months would commence is the date on which the Gazette was made available at the Patent Office rather than the date on which Gazette was published (or made available to public at large), he therefore, contended that the opposition filed on 07.04.2011 (after the statutory limit of four months) was still within time since the said Gazette was only received at the Patent Office on 07.03.2011, wherefrom he took notice of the said application and filed opposition.

For full understanding of the applicable provisions of the Ordinance and the Rules, it is pertinent that one examines the relevant sections 21 and 23 of the Patent Ordinance as well as does consider the applicable Rule 17. These are reproduced hereunder:

“21. *Acceptance of complete specification.*- On the acceptance of a complete specification, the Controller shall give notice thereof to the applicant and shall advertise in the official Gazette the fact that specification has been accepted and thereupon the application and

the specification, and the priority documents, if any, filed in pursuance thereof shall be open to public inspection.

“23. *Opposition to the grant of patent.* (1) At any time within four months from the date of advertisement of the acceptance of a complete specification under this Ordinance, any person may give notice to the Controller of opposition to the grant of patent on any of the following grounds, namely:-

- (a) that the applicant for the patent obtained the invention or any part thereof from him or from the person of whom the opponent is the legal representative, assignee, agent or attorney;
- (b) that the invention is not a patentable invention within the meaning of this Ordinance;
- (c) that the specification does not disclose the invention in a manner clear and complete enough for it to be carried out by a person skilled in the art;
- (d) that the claims are not clear or extend beyond the scope of the disclosures in the complete specification as originally filed; and
- (e) that the complete specification describes or claims an invention other than that described in the provisional specification and that such other invention either forms the subject of an application made by the opponent for a patent which if granted would bear a date in the interval between the date of the application and the leaving of the complete specification, or has been made available to the public by publication in any document in that interval.

(2) Where a notice is given under sub-section (2), the Controller shall give notice of the opposition to the applicant, and shall, before deciding the case, give to the applicant and the opponent an opportunity of being heard.”

Rule 17 of the Patent Rules, 2003.

“17. *Advertisement of application:-* (1) The Controller shall advertise the acceptance of every application in the Official Gazette.

(2) Within thirty days from the date of receipt of the notice of acceptance of the application, the applicant shall send a copy of the abstract of the complete specification ‘as accepted’ to the institutions at the addresses mentioned in the Fourth Schedule to these rules by registered post.

As stated hereinabove, once an application is accepted, is to be ‘advertised’ under Section 21 in the official Gazette, thus it would be

prudent to take a look at the Black's Law Dictionary which defines the word 'advertised' to mean "*to advise, announce, apprise, command, give notice of, inform, make known, publish and to call a matter to the public attention by any means whatsoever*". Also of relevance is to examine Section 3 (39) of the General Clauses Act, 1897 where the term "Official Gazette or Gazette" is defined to mean "*the Gazette of Pakistan, or, as the case may be, the official gazette of a province*". Since the learned counsel for the Appellant is essentially questioning the very essence and functions of official Gazette, the questions which surface are (a) what is an Official Gazette, (b) under what authority it is published, and (c) from which date the notification published in an official Gazette is to take effect?

With regards the first question as to what an official Gazette is and how does it function, I would like to consider this question at little more length to reach to a satisfactory answer of the moot question (c) arrayed in the above paragraph. A Gazette is generally understood to be an official Government publication containing public notices, notifications and other prescribed matters. The Chambers Dictionary defines Gazette to mean "*an official newspaper containing list of government appointments, legal notices, dispatches etc.*" The earliest statute from our legal history regarding gazette could be found in the shape of Official Gazette Act, 1863 (Act No. XXXI of 1863), which was passed by the Governor-General of India in Council and which received the assent of the Governor-General on 16.12.1863. Since it is a brief piece of historical legislation, I reproduce its full text in the following:

“ACT No. XXXI of 1863

Passed by the Governor-General of India in Council

(Received the assent of the Governor-General on the 16th December 1863)

An Act to give effect to the publication of certain orders and other matters in the Gazette of India.

Whereas the Governor-General of India in Council has resolved to publish an Official Gazette to be called the Gazette of India containing such orders, notifications, and other matters as the Governor-General of India in Council shall direct to be inserted therein; It is enacted as follows:

- I. *Publication in the Gazette of India to have the effect of publication in any other Gazette in which publication is prescribed by any law now in force.* When in any Regulation or Act now in operation, or in any Rule having the force of law, it is directed that any order, notification or other matter shall be published in the Official Gazette of any Presidency or place, such order, notification or other matter shall be deemed to be duly published in accordance with the requirements of the law, if it be published either in the Gazette in which it would have appeared but for the passing of this Act, or in the Gazette of India under the directions of the Governor-General of India in Council.”

While traversing history, it could also be seen that Section 3 of the Government of India (Adaptation of Indian Laws) Order, 1937 issued under Section 293 of the Government of India Act, 1935 is also of relevance, thus reproduced hereunder:

- Section 3. The Indian laws mentioned in the Schedule to this Order shall, until repealed or amended by a competent Legislature or other competent authority, have effect subject to the adaptations and modifications directed by those Schedules to be made therein or, if it is so directed, shall cease to have effect.

The study of the Schedule mentioned in the above referred 1937 Order depicts that Official Gazettes Act, 1863 was included in the said Schedule. Also of relevance is the fact that through the

Repealing Act 1938 (Act No. I of 1938), the whole of the Official Gazettes Act, 1863 stood repealed.

While there may be confusion arising out of repeal of the Official Gazettes Act of 1863, but a close examination of the said Act shows that the 1863 Act only created a mechanism in terms of which publication as prescribed by any law, if made in the Gazette of India was competent to satisfy the requirement of publication in the Gazette. Thereafter it could be understood to be the legal position that the Official Gazettes have been published under the resolution of the Governor-General of India in Council given in the preamble to the said 1863 Act which is the authority for the publication of the Official Gazettes.

With regards Pakistan, Gazettes were historically published by the department of Stationery and Forms, which was the attached department of the Cabinet Division and was established before the partition with the nomenclature of “Printing and Stationery Department, India”, but after the independence, the department continued to function with the inherited functions but was renamed as “Stationery and Printing” with headquarters at Karachi. Consequent upon the creation of Printing Corporation of Pakistan with effect from 01.01.1969, the Government presses along with their assets, liabilities and employees were transferred to the said Corporation but the department continued to function and at the moment it is operating through the Deputy Controller, Stationery and Forms.

While the Department does print a number of standard forms and registers, it also has the mandate of stocking and sale of official

publications and Gazettes of Pakistan, which (Gazettes) are of two types namely extraordinary and weekly. Extraordinary gazettes are of three types, wherein in Part-I, Act, Ordinances, President's Orders and Regulations are printed; in Part-II Statutory Notifications, SROs are printed, and in Part-III other Notifications and Orders etc. are printed. Weekly gazettes are of six types ranging from Part-I upto Part P-VI, wherein of importance is the Part-V wherein Notifications etc. issued by the Patents Office are advertised. An examination of the Gazette Part-V shows that at its very top, date of the Gazette is given, which is construed to be the date of notification of the advertisements published in the said Gazette.

Before proceeding further, it is important to understand meaning of the word "Notification", which in ordinary parlance means *an act of notifying or giving notice as given in words or anything which communicated information*. Concise Oxford Dictionary defines "Notification" to mean the act of notifying which is to *"make known, announce, reiterate, inform, give notice to"*. Also of importance is to understand the word "publish", which according to the New Webster's Dictionary means *"to cause to be printed and offer for sale to the public, as a newspaper, book, magazine, or the like; to make public; to make known to public in general; to promulgate"* and according to the Concise Oxford Dictionary, word "publish" means *"make generally known; announce formally; promulgate; issue copies of (book, engraving, etc.) for sale to the public"*. To satisfy the above requisites, the notification are to be in writing and published in the official Gazette.

The point of determination thus can now be summarized as to whether the notifications advertised in the official Gazette (Part-V) dated 29.09.2010 would take effect from the date of the said Gazette or from 07.03.2011 (or any other date) when the Appellant acquired knowledge of the Gazette after having visited the Patent Office?

In this regard the rule of thumb and consistency mandates that a Gazetted notification bearing a particular date be presumed to be published on the date indicated thereon unless proved otherwise. If by leading evidence it can be shown by any interested party that the Gazette was actually published (or made available to public) on a date subsequent to the date indicated on the Gazette, then that subsequent date would be taken as the date of actual publication (i.e. the act of making it public) which will be rendered as the relevant date from which the Gazette would come into force. This view finds support from the case reported as A.M. Sheikh Vs. National Refinery Limited (1990 CLC 479) where the Court while contemplating on the issue regarding the specified date from which a notification was to operate held that *if a notification was to operate commencing from a specified date, the period could not be computed from any date other than which had been specified in the notification itself, however, if the notification had been silent as to the date of the commencement of the period, the same would be reckoned from the date when the notification was made available to the public and not from the date of publication of notification in the Gazette.* Similar dictum is also laid down by the Indian Supreme Court in the case of Union of India Vs. Ganesh Das Bhoraj (2000 (116) ELT 431) wherein, the court specifically ruled that a notification would come into operation as soon as it is published in the gazette i.e. the date of

publication of the gazette and no further publication is contemplated. Similar are the findings given in the case of Metro Exporters (P) Ltd. Vs. Collector of Customs (1997 (94) ELT 427 Tri Del) where it was held that the normal presumption is that the date printed on the Gazette Notification is the date of its publication unless proved otherwise, and therefore it is from this date that it becomes effective and comes in force irrespective of whether (or if and when) a particular person came to know about it or could obtain it.

With the above legal position, now when we consider the arguments of the learned counsel for the Appellant that his client could not file opposition since the Gazette in question was not made available at the Patent Office, such assertion holds no ground. First of all, there are no provisions under the Patent laws that the Gazettes have to be provided at the Patent Office or supplied to interested persons. The legal model under the Patent laws is different from other statutes, for example under Section 7 of the West Pakistan Waqf Properties Ordinance, 1961 the property being declared as Waqf need not only to be notified in the Gazette, a copy of the said notification has to be served on the person in possession of the property being declared Waqf itself.

Also of importance is the fact that the patent being advertised in the Gazette remains open to opposition for the longish period of four months from the date of the advertisement and one does not need to be an aggrieved person to oppose a patent. Thus not only the window offered by the Gazette is long, it is also statutorily wide. A review of the court decisions in such matters shows that similar

questions (as to date and availability of Gazettes) have arisen mostly in respect of custom duties and taxation matters where parties have alleged that the sudden change in the tariff (with immediate effect) as notified by the Gazettes was not in the knowledge of the effected parties as the Gazettes were not made available to the public. In support of such contentions, the aggrieved persons have submitted correspondence with the Printing and Stationery Department as to when the Gazette in question was printed and when it was made available to the public. Throughout the research of Pakistan and Indian cases, not a single matter surfaced where such a contention surfaced in respect of Patent Gazettes which give a very long period of four months for the filing of any opposition. Be that as it may, as stated above, the Appellant has also failed to provide any proof of communication with the Department as to the delay in making available the Gazette to the Public, notwithstanding therewith, it is also worth noting that the Applicant has been regularly filing oppositions to patent applications (and according to the documents attached it has filed over 500 such oppositions in the past) thus the novel proposition agitated in the instant cases that the Applicant had to go to the Patent Office to find the Gazettes is unconceivable, with such active opposition filing practice, the Applicant would have ensured that it had subscribed to the Gazette Part-V from the Department of Stationery and Forms or having been provided with such watch services by third parties. Even if that is not the case ignorance of law is no excuse and if everyone would come forward with their own excuses to not have found the Gazette Notifications and attempting condonation of delays in filing any actions effectuating from the date of the Gazette, the very purpose of Gazette

notification will be frustrated and no uniform legal system can ever operate.

Additionally, if one were to agree with the contentions of the learned counsel for the Appellants that even in the cases when the Gazette notification provides a period to reckon not from the date of the Gazette, rather from the date on which any person has received a copy of that Gazette, I cannot imagine the amount of legal chaos as there would be no firm expiry date for any statutory period stipulated in the respective Gazette notification, rather it would be upon the sweet will of every person to calculate the period from the date he received the Gazette or found the same in a public library or discovered over the internet, such an untenable possibility is surely beyond the scope of any law and if it so allowed to happen then the very purpose of the date mentioned on the notification would be defeated, meaning thereby the intent of the notification that an act that has to be performed in a specified manner within specified time would be frustrated and every new person will bring a different reason as to date on which a notification becomes effective.

For the aforesaid reasons, I do not find any reason to differ from the view taken by the Controller of Patents in the impugned order and hereby dismiss the instant appeals.

Karachi: 30.11.2016

Judge