Indian Network For People Living With ... vs Union Of India on 2 December, 2008

Equivalent citations: AIR 2009 (NOC) 839 (MAD.), 2009 (3) ABR (NOC) 503 (MAD.)

Author: F.M.Ibrahim Kalifulla

Bench: F.M.Ibrahim Kalifulla

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 02.12.2008

Coram:

The Hon ble Mr.A.K.GANGULY, CHIEF JUSTICE
and
The Hon ble Mr.Justice F.M.IBRAHIM KALIFULLA

Writ Petition No. 24904 of 2008
and
M.P.Nos. 2 & 3 of 2008
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1. Indian Network for People living with HIV/AIDS,
Rep. by its President,
Flat No.6, Kash Towers,
93, South West Boag Road,
T.Nagar, Chennai 17.

2. Tamil Nadu Networking People with HIV/AIDS,
Rep. by its President,
No.391/30, 8th Street, K.K.Nagar,
Near Mahatma Montessori School,
Madurai 625 020. Petitioners

Vs.
1. Union of India,
Rep. by the Secretary,
Department of Industrial Policy and Promotion,
Ministry of Industry and Commerce,

Udyog Bhavan,
New Delhi 110 011.

2. Controller General of Patents & Designs,
Bhoudhik Sampada Bhavan,
S.M.Road,
Near Antop Hill Head Post Office,
Antop Hill, Mumbai 400 037.
3. Assistant Controller of Patents & Designs,
Intellectual Property Office,
G.S.T.Road, Guindy,
Chennai 600 032.

4. F.Hoffmann-La Roche AG,
124, Grenzacherstrasse CH 4200,
Basle, Switzerland. . Respondents

Petition filed under Article 226 of the Constitution of India praying for the issue of a

For Petitioner ::: Mr.Anand Grover, Senior Counsel
for Ms.R.Vaigai.

For Respondents
1 to 3 ::: Mr.Haja Mohideen Gisthi

For Respondent 4 ::: Mr.A.L.Somayaji, Senior Counsel
for M/s.T.K.Baskar

O R D E R

THE HON BLE CHIEF JUSTICE Both the petitioners in this writ petition are registered societies under the Tamil Nadu Societies Registration Act, 1975 and they are providing support to people living with HIV/AIDS (herein after referred to as PLHIV). The petitioners try to lend support to PLHIV in critical areas such as access to medicine and treatment and also for removal of discrimination facing PLHIV in Indian society. Members of the petitioner organizations are citizens of India.

2. F.Hoffmann-La Roche AG, the 4th respondent herein, is a pharmaceutical company registered in Switzerland having its office at 124, Grenzacherstrasse CH 4200, Basle, Switzerland. It filed a Patent Application titled -(2-Amino-1, 6-Dihydro-6-oxo-purin-9-yl)-methoxy-1,3-propanediol Derivative , which was allocated No.959/MAS/1995, for a patent relating to Valganciclovir, which is a drug used to treat CMC retinitis. The 4th respondent s Patent Application No.959/MAS/1995 was filed on 27.07.1995, and the 2nd respondent published the said application on 25.02.2005 in Issue No.06/2005 in the Official Journal of the Patent Office.

3. Thereafter, on 12.07.2006 the petitioners filed a representation by way of opposition at a pre-grant stage to the Patent Application of the 4th respondent under Section 25(1) of the Patents Act, 1970 (herein after referred to as the said Act). In the said application it was contended by the

petitioners that the Indian Patents (Amendment) Act, 2005 was passed to make the said Act compliant with the obligations under TRIPS. TRIPS, signed in 1995, required India to effect a product patent regime after ten years. From 1995, it became clear that India would adopt a product patent regime by 2005. Prior to the Patents (Amendment) Act, 2005 the said Act only granted patents for processes but not for products. Therefore, the petitioners contention is that all inventions relating to products that were disclosed prior to 1995 were in the public domain, and remains so even today, even after the passing of the said Amendment Act. The petitioners objected that any product patent application in respect of an invention which was in public domain prior to 1995 must therefore be rejected on the grounds that the subject matter of invention lacks novelty.

4. Inter alia on the basis of the aforesaid contentions, the petitioners filed their representation opposing the grant of patent to the 4th respondent under the provisions of Section 25(1)(f) and 25(1)(h) of the said Act. In the said representation, which is filed by the petitioners by way of opposition, they gave grounds of opposition and specifically demanded hearing under Rule 55(1) of the Patents Rules, 2003 (herein after referred to as the said Rules).

5. In November, 2006 the General Secretary of the 1st petitioner received a letter dated 15th November, 2006 from the office of the 3rd respondent to the effect that on the basis of the opposition filed by the petitioners, notice has been given to the agent of the 4th respondent to file statement and evidence if any in support of the patent application within three months from the date of the said notice under Rule 55(4) of the said Rules.

6. Pursuant thereto, a reply was filed by the 4th respondent on 30th November, 2006 against the grounds raised by the petitioners in their patent application. The petitioners were not informed of anything about the fate of their objection, nor were they informed of the date of hearing in respect of their objection, though they made a specific request for such a hearing. From page 7 of the typed set filed by the 4th respondent it appears that the 3rd respondent addressed a communication to the 4th respondent on 12th April, 2007 to the following effect:

> Your above said application for patent has been found in order for grant. However, patent will be granted after disposal of pre-grant opposition by way of third party representation, if any, under Section 25(1) of the Act and found in favour of the application. In this connection, you may note that you can initiate infringement proceedings only after grant.

7. It appears that the 3rd respondent unilaterally took a decision for grant of patent in favour of the 4th respondent though the objections filed by the petitioners were not disposed of till then. Thereafter, the Patent Office granted the patent to the 4th respondent and the same was published in the Official Journal of the Patent Office on 29.06.2007. Immediately after coming to know of the same the petitioners issued a legal notice dated 29.10.2007 complaining of the fact that the petitioners right of hearing in respect of their opposition under Section 25(1) of the said Act read with Rule 55(1) of the said Rules was denied and the petitioners did not receive any communication from the Patent Office intimating the date of hearing or any intimation that their objections have been rejected. As such, the said legal notice prayed that the patent granted should be withdrawn or

cancelled, failing which appropriate proceedings would be initiated.

8. To the said legal notice of the petitioners, a reply was sent from the 3rd respondent Patent Office on 12th November, 2007 informing that the grounds of objections raised by the petitioners in their representation under Section 25(1) of the said Act were considered and it was found that the objections raised by the petitioners were met by the 4th respondent. The exact text of the said letter is set out herein below.

With reference to your letter dated 01/11/2007, I would like to bring it to your notice that the two grounds of opposition by way of representation under Section 25(1) of the Patents Act, 1970, as amended, have been carefully considered and found that the said issues have been met by the applicant. Having the objections, raised by you, were met and by applying my mind, I came to the conclusion to expedite the prosecution of application for patent in question. However, if you are interested, you may file Post-Grant Opposition under Section 25(2) of the Patents Act, 1970, as amended, as your request to withdraw/cancel the grant of patent is not permissible under the provisions of the Patents Act, 1970, as amended.

9. Thereafter, on behalf of the petitioners a further legal notice was sent on 28th November, 2007 to the 3rd respondent Patent Office praying for furnishing them the following documents:

> (a) Copy of all documents submitted by the Patent Applicant or their agent to your letter dated 16th November 2006 intimating the Patent Applicant of the representation by way of opposition filed by our clients;
>
> (b) Copy of the file notings pertaining to the opposition by way of opposition filed by our clients; and
>
> (c) Copy of the decision disposing of the representation by way of opposition filed by our clients and the grant of patent.

10. But, no reply to the said letter dated 28th November, 2007 was given by the 3rd respondent. Thereafter, this writ petition has been filed on 15.10.2008 with the following prayer:

> For the reasons mentioned in the accompanying affidavit, it is prayed that this Hon ble Court may be pleased to issue any appropriate writ, order or direction and in particular, a writ in the nature of Certiorarified Mandamus calling for the records of Patent Application No.959/MAS/1995 and Patent No.207232 and after going through the same, quash Patent No.207232 granted by the office of the Respondent Nos.2 and 3 in Patent Application No.959/MAS/1995 filed by Respondent No.4 and consequently, direct the Respondent Nos.2 and 3 to consider Patent Application No.959/MAS/1995 after hearing the petitioners as per Section 25 of the Patents Act, 1970 read with Rule 55 of the Patent Rules, award costs and pass such other orders or directions as are necessary and proper to meet the ends of justice.

11. In the background of these facts, the question which arises is whether the petitioners, who filed their pre-grant opposition and who have been given under Section 25(1)(k) of the said Act read with Rule 55(6) of the said Rules a right of hearing, if such hearing is requested, and admittedly such a request has been made, can be denied the right of hearing by the third respondent in violation of the statute. In other words, the precise question is whether by denying the petitioners their statutory right of hearing under Section 25(1)(k) of the said Act read with Rule 55(6) of the said Rules, which are also statutory in nature, the Controller can purport to reject the petitioners objections to the grant of patent at a pre-grant stage and a patent, which has been granted in violation of the aforesaid statutory provisions is valid in the eye of law.

12. Under the amended provisions of the said Act, which has been brought about by Patents (Amendment) Act, 2005, it is provided in Section 25(1) of the said Act where an application for patent has been published, but the patent has not been granted, any person may in writing represent by way of opposition to the Controller against the grant of patent on certain grounds enumerated under Section 25(1) (a to k) of the said Act. Since in this writ petition we are not concerned with the merits of the order granting patent to the 4th respondent we need not go into those grounds. Section 25(1) of the said Act is as follows: -

> 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: - (underlined for emphasis)

13. Here the expression such person would mean any person, who has given the right to oppose the grant in writing under Section 25(1) of the said Act. Under Section 25(1)(k) of the said Act, it is provided as follows: -

> 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. (underlined for emphasis)

14. Here the expression manner as prescribed has been explained under Section 2(u)(C) of the said Act as prescribed by the Rules made under this Act.

15. Under Section 159 of the said Act Rules have been framed and the relevant rule is Rules 55(1) to (6), which would apply in respect of right of objection to pre-grant of patent as given under sub-section (1) of Section 25. Those Rules are set out below: -

> Rule 55. Opposition to the Patent.
>
> (1) Representation for opposition under sub-section (1) of Section 25 shall be filed at the appropriate office and shall include a statement and evidence, if any, in support of the representation and a request for hearing if so desired.

(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 application to that effect along with a copy of such representation.

(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.

(5) On consideration of the statement and evidence filed by the applicant, the Controller may either refuse to grant a patent on the application or require the complete specification to be amended to his satisfaction before the patent is granted.

(6) After considering the representation and submission made during the hearing if so requested, the Controller shall proceed further simultaneously either rejecting the representation and granting the patent or accepting the representation and refusing the grant of patent on that application, ordinarily, within one month from the completion of above proceedings. (underlined for emphasis)

16. A perusal of the Rules will show that on consideration of the representation from the objectors, if the Controller is of the opinion that the application for patent shall be refused or the complete specification requires amendment, under Rule 55(4) he shall give notice to the applicant to that effect along with the copy of such representation. In the instant case, the 3rd respondent gave such notice to the 4th respondent. So it cannot be said that the grounds of objection raised by the petitioners are frivolous. Thereafter, under Rule 55, the applicant filed its statement in support of the application within the time specified under sub-rule(4) of Rule 55. Under sub-rule (5) of Rule 55, it is provided that on consideration of the statement and evidence filed by the applicant, the Controller may either refuse to grant the patent on the application or require the complete specification to be amended to his satisfaction before the patent is granted. Under sub-rule (6) of Rule 55, it is provided that after considering the representation and submission made during the hearing, if so requested, the Controller shall proceed further simultaneously either rejecting the representation and granting the patent or accepting the representation and refusing the grant of patent on that application, ordinarily, within one month from the completion of such proceedings.

17. Here, admittedly, the Controller has not given the petitioner any chance of hearing even though the petitioner admittedly requested for the same. Therefore, concededly the petitioner s statutory right of making submission during hearing was denied. But the patent was granted to the 4th respondent by denying the petitioner any chance to make submission on his representation. The petitioner was not informed of the grant of patent to the 4th respondent till the petitioner came to see the publication of the patent in the Patent Journal.

18.In the background of the aforesaid statutory provisions, to justify the grant of patent, it has been argued by the learned counsel for the 4th respondent that the proceedings before the Controller at the pre-grant stage are not quasi-judicial and the Controller merely acts in an administrative capacity and in such a situation he does not decide any lis . The hearing is optional even if it is requested and the words Controller shall hear used in Section 25(1)(k) of the said Act are to be construed directory and similarly, the requirement of hearing under Rule 55(6) should also be treated directory.

19. It has also been argued on behalf of the fourth respondent that by a mere denial of hearing, even though statutorily provided, the resultant decision does not become bad, unless the person who have been denied such hearing proves that he has suffered a prejudice and in this case the petitioners did not suffer any prejudice. Since the petitioner did not suffer any prejudice, the order granting the patent cannot be invalidated. Apart from that it has been stated that the petitioners have a liberty of challenging the grant even at a post-grant stage under Section 25(2) of the said Act. It has also been stated that the Delhi Network of the Positive People has actually filed an opposition at the post-grant stage. However, it may be mentioned that the Delhi Network of Positive People are not parties to this writ petition. Learned counsel for the 4th respondent also stated that the 4th respondent filed a suit, being Suit No.2869 of 2008, before the Bombay High Court against Cipla Limited alleging infringement, and in that suit an impleading petition has been filed by the present writ petitioners. Therefore, they have an alternative remedy, which remedy they are pursuing. It has been stated that in view of that the present writ petition should not be entertained.

20. It has further been stated that there is a delay on the part of the petitioners in approaching this writ Court, and on the ground of delay, which has not been explained, this writ petition should be dismissed.

21. This Court is unable to accept the aforesaid submissions for various reasons. Section 77 of the said Act makes it clear that subject to any rules made, the Controller in any proceedings before him under the Act shall have the powers of a Civil Court while trying a suit under the Code of Civil Procedure, 1908 in respect of certain matters. Those matters are as follows: -

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of any document;

(c) receiving evidence on affidavits;

(d) issuing commissions for the examination of witnesses or documents;

(e) awarding costs;

(f) reviewing his own decision on application made within the prescribed time and in the prescribed manner;

(g) setting aside an order passed ex parte on application made within the prescribed time and in the prescribed manner;

(h) any other manner which may be prescribed.

22. Learned counsel for the 4th respondent has however argued that those provisions of Section 77 of the said Act would only apply to proceedings before the Controller at the post grant stage.

23. This Court is unable to accept the said contention in view of the clear provisions of the said Act and the Rules framed there under. Rule 55(6) of the said Rules, which is confined only to a pre-grant stage clearly characterize the pre-grant exercise by the Controller as proceedings . The word proceedings have not been defined in the definition clause, namely, Rule 2 of the said Rules. But under Rule 2(g), it has been stated that the words and expressions used, but not defined in these rules, shall have the meanings respectively assigned to them in the Act. Therefore, the word proceedings in Rule 55(6) of the said Rule will have the same meaning as the expression proceedings occurring in Section 77 of the said Act. Section 77 of the said Act also makes it clear that the said Section will apply to any proceedings before the Controller under the Act. Any would include all. Thus, the pre-grant opposition proceedings come within the sweep of any proceedings under Section 77 of the said Act.

24. The Controller, before whom the proceedings takes place, is endowed with some of the powers of a Civil Court, and whose order or costs are executable as a decree of a Civil Court, is thus having the trappings of a Civil Court. Proceeding before such an authority are obviously a quasi-judicial proceedings. In a pre-grant stage, the Controller is also deciding a controversy, which is raised by the objector opposing the grant of patent and the applicant who applies for the grant.

25. From the statutory provisions discussed above, it is clear that if the pre-grant opposition is upheld, the patent will be refused, which is clear from the provisions of Rule 55(5) and Rule 55(6). Therefore the Controller will have to take a decision of either refusing to grant the patent by accepting the pre-grant opposition or grant the patent by rejecting the opposition. So he has to decide this controversy between the applicant s right to get the patent and the objector s right to defeat the claim of patent. The objector may not be a rival in trade of the person claiming the patent. But the objector can raise his objection on much wider grounds of public policy and public interest. That is why the right to raise pre-grant objection has been advisedly given to any person . The Hon ble Supreme Court construing the pre-grant and post-grant proceedings under the said Act held in J.Mitra & Co. Pvt. Ltd. Vs. Assistant Controller of Patents & Design (2008 (11) SCALE 524) held that the provision of pre-grant under Section 25(1) is wider than the provisions of post-grant under Section 25(2). So, the concept of lis has to be construed in the context of wider right given to the objector. Such objection may not stem from any business or commercial interest, but such objection can be raised on a wider concept of public health and nutrition and the issue of affordability of medicine at a reasonable rate to those persons who are affected by disease. Therefore, it cannot be said that a person opposing the grant has no interest.

26. The word lis has been defined in Black s Law Dictionary (8th Edition) as a piece of litigation, a controversy or dispute . In a judgment of the Court of Appeal rendered in the case of B.Johnson & Co. (Builders) Ltd., v. Minister of Health reported in 1947 All.E.R 395), it has been held by Lord Greene, the Master of Rolls, as follows: -

> Lis, of course, implies the conception of an issue joined between two parties. The decision of a lis, in the ordinary use of legal language, is the decision of that issue

27. The same principles have been laid down by the Hon ble Supreme Court in its Constitution Bench Judgment in Kihoto Hollohan v. Zachillhu, 1992 Supp. (2) SCC 651. At paragraph-99 (page 707 of the report), Justice M.N.Venkatachaliah, (as His Lordship then was), speaking for the majority held:

> Where there is a lis an affirmation by one party and denial by another and the dispute necessarily involves a decision on the rights and obligations of the parties to it and the authority is called upon to decide it, there is an exercise of judicial power. That authority is called a Tribunal, if it does not have all the trappings of a Court

28. Following the aforesaid test, as we must, this Court holds that the third respondent functions as a quasi-judicial tribunal and has to decide the lis namely, the right of the objector raised on a wider perspective as against the claim of patent by the fourth respondent.

29. The present structure of the pre-grant and post-grant procedure vide Sections 25(1) and 25(2) of the said Act has been brought about by the Patent Amendment Act, 2005 (hereinafter referred to as the said Amendment). A perusal of the Statement of Objects and Reasons of the said amended Act would clarify the legislative intent of giving right of objection to any person , whereas prior to the said amendment such right of opposition at a pre-grant stage was only given to any person interested. The reason for giving the said right to any persons appears from Statement of Objects and Reasons behind the same amendment. Paragraph 4 of the said objects and reasons runs under:

> Given the importance of the issues, the Government undertook broad-based and extensive consultations involving different interest groups on aspects critical to the changes which were necessary in the Patents Act, 1970. These included country-wide interactive sessions with various interest groups, including scientists, academicians, economists, representatives of various industry sectors (such as pharmaceutical, biotech, and software), chambers of commerce, private and public sector units, journalists, non-governmental organizations, representatives of State Governments, lawyers and attorneys and other interest groups and extensive inter-Ministerial consultations.

30. From those objects and reasons it is clear that changes brought by the said amendment were done consciously and after thorough interaction with various cross sections of society, and those amendments are based on a broad consensus of public interest relating to nutrition and public

health.

31. On those objects and reasons it was decided to modify the provisions relating to opposition procedure with a view to streamline the system by having both pre-grant and post-grant opposition in the Patent Office . (Paragraph-7(d) of the Statement of Objects and Reasons).

32. Therefore, advisedly right to object at a pre-grant stage has been given to any person by the said amendment. This is an illustration of statutorily broadening the concept of locus standi and widening the scope of objection procedure by giving access to any person , who has a concern for public interest in the area of public health and nutrition, to raise an objection. The grant of patent is virtually a grant of monopoly right against the whole world and that is why such wide ranging right of objection has been designedly given at a pre-grant stage.

33. The petitioners in this writ petition are asserting their rights and voicing their concern on a broad public interest angle. So, it cannot be said if their right is denied they will not suffer any prejudice by denial of an opportunity of hearing to them to establish their rights. A right is a legally protected interest. Therefore when law consciously confers right on a person to object at a pre-grant stage that right must be protected in the way it has been granted, namely the right to object with a right of hearing. For a Court to dilute the said right on the basis of an interpretative process and by looking at it from a rather narrow angle, would, in our judgment, be a travesty of justice.

34. The argument advanced on behalf of the fourth respondent that the expression the Collector shall hear in Section25(1)(k) of the said Act should mean the Collector may hear is not sound in law. Here we may refer to the provision for hearing which existed prior to the said amendment. Under the pre-amended Section 25(2) the provision relating to hearing is couched in the following words:

> 5(2) Where any such notice of opposition is duly given, the Controller shall notify the applicant and may, if so desired, give to the applicant and the opponent an opportunity to be heard before deciding the case. (emphasis supplied)

35. Therefore, it is clear that the expression may give the opponent an opportunity to be heard has been replaced by the word shall hear . Where legislature itself makes such alteration, making its intention clear in specific term, no option is left except to follow the strict letter of law.

36. Almost similar position was considered by the Supreme Court in the case of Jaywant S.Kulkarni and Others Vs. Minochar Dosabhai Shroff and Others reported in (1988) 4 SCC 108. In paragraph 5 at page 113 of the report, the learned Judges observed as follows:-

> It may be instructive in this connection to note that in sub-section (3)(a), the expression court shall pass a decree was substituted for the words court may pass a decree by an amendment passed in 1963, making it mandatory to pass the decree. When the legislature had made its intention clear in specific terms, there was no scope for Shri Bhasme s appeal to the spirit of the law and not to the strict letter

of the law.

37. In my judgment, the aforesaid principle will apply with full force in the present case in view of the statutory amendment which has been made. Apart from that one of the important canons of construction is when words are plain and simple, they must be given their natural meaning. In the instant case, there is no ambiguity in the words used in Section 25(1)(k) about the mandatory duty cast on the Controller to hear the objector. The said duty, which is cast in Section 25(1)(k) is also reiterated in Rule 55(6) of the said Rules, which has been set out herein before. Therefore, when the meaning of the words is plain it is not the duty of the Courts to busy themselves with supposed intentions . That is how Lord Atkin, speaking for the Judicial Committee of the Privy Council, explained this principle of construction in Pakala Narayana Swami Vs. Emperor (reported in AIR 1939 Privy Council 47), at page 51 of the report.

38. Same principles have been reiterated by Justice Gajendragadkar (as His Lordship then was) in Kanai Lal Sur Vs. Paramnidhi Sadhukhan reported in AIR 1957 SC 907 in paragraph 6 at page 910 of the report. The exact language of His Lordship was as follows:-

> If the words used are capable of one construction only then it would not be open to the Courts to adopt any other hypothetical construction on the ground that such hypothetical construction is more consistent with the alleged object and policy of the Act.

39. Subsequently, Justice Subba Rao (as His Lordship then was) speaking for the Constitution Bench of the Supreme Court in State of Uttar Pradesh and Others Vs. Dr.Vijay Anand Maharaj reported in AIR 1963 SC 946 put the principle in the following words:

> When a language is plain and unambiguous and admits of only one meaning, no question of construction of a statute arises, for the Act speaks for itself. (para 7, page 950 of the report)

40. Therefore, the Court cannot read the word shall hear as may hear in the context of the statutory provision falling for consideration in this case.

41. The learned counsel for the 4th respondent in support of his contention relied on a judgment of the Supreme Court in the case of State of Haryana and Another Vs. Raghubir Dayal reported in (1995) 1 SCC 133 wherein the learned Judges have held that though the word shall is used both in Section 4(1) and Section 6(2) of the Land Acquisition Act, but it must be read as directory in Section 6(2) of the Land Acquisition Act. The learned Judges held that normally the word shall is to be construed as mandatory, but it may sometimes be interpreted as directory depending upon the consequence which flows from construing it as mandatory. The learned Judges made it very clear that by holding it to be mandatory, serious general inconvenience is caused to the innocent persons or general public, without furthering the object of the Act. That is why shall may be considered as may . In the instant case, by the word shall the legislature has conferred a right of hearing on the objector and by granting him a right of hearing no inconvenience is caused to any innocent person

or general public. On the other hand while denying him the right of hearing, the general public interest in the matter of raising objections is defeated. Therefore, the considerations which weighed with the learned Judges in the case of Raghubir Dayal are not present here.

42. Learned counsel for the fourth respondent cited some judgments on the question that even if a decision is taken in violation of the natural justice, the said decision cannot be set aside by the Court, unless the person complaining of natural justice shows that he suffered a prejudice. In support of that, several judgments have been cited. One was rendered in the case of Aligarh Muslim University v. Mansoor Ali Khan, reported in AIR 2000 SC 2783, and the other one was rendered in the case of Harayana Financial Corporation v. Kailash Chandra reported in Manu/SC/7804/2008.

43. In so far as the decision of the Supreme Court in the case of Aligarh Muslim University is concerned, this Court finds that is a case relating to service matter, in which the respondent overstayed on his leave and the service regulation of the University provided that if an employee overstays on his leave beyond the period, it will be deemed that the person concerned has vacated the office. Proceeding on the basis of such regulation, the University terminated the services of the respondent. The challenge of the respondent was that his service was terminated without giving him an opportunity. On those facts, the Supreme Court held that since only one conclusion is possible, namely that the respondent has vacated his office in view of his admitted overstay on leave ignoring the University warning, no purpose would have been served by giving him the notice. No other conclusion is factually possible.

44. We are unable to apply the ratio of this case to the facts of the present case. Here we cannot say that if the petitioners are given an opportunity of hearing and to explain their objection before the Controller who is supposed to apply his mind and consider everything objectively, a different conclusion cannot be reached since the objections are based on grounds of public interest and grounds of public health and nutrition. Here the right of the objector is not an individual right as it is in the case of an employee in Mansoor Ali Khan s case. Here the petitioners are association of HIV affected persons who want treatment in respect of life threatening disease at an affordable cost. In the affidavit filed in support of the writ petition itself in page 20 ground (D) (iii), it is specifically pleaded that persons who suffer from CMV retinitis have to approximately spend Rs.1040/- per tablet as per the maximum retail price and thus have to spend approximately Rs.2,74,560/- for a treatment course consisting of an induction therapy of 21 days and maintenance therapy of three months. Similarly, patients who receive organ transplants have to spend approximately Rs.1,87,200/- for a treatment course starting within 10 days of transplant to the 100th day of post-transplant period. This price is inevitable in view of the grant of patent to the fourth respondent, who enjoys monopoly status as a result of the said grant. If the patent is not granted to the fourth respondent, the said medicine is otherwise available in the market at a much lower price. That is why the infringement suit has been filed by the fourth respondent against CIPLA. So, the prejudice here is on a different level and not on a personal level. In fact, the averments in ground (D) (iii) about prejudice made in the writ petition have not been denied by the fourth respondent in its counter. The concept of prejudice is not a static concept and is not comparable to the facts in Mansoon Ali Khan.

45. The other decision, which has been rendered in Haryana Financial Corporation (supra), is also not applicable for the same reason. That was also a case of dismissal of an employee for non-supply of the report of the enquiry officer. In that case, the employee was exonerated by the enquiry officer. Thereafter, a clarification was sent by the Managing Director, and then the enquiry officer found the respondent guilty. Thereafter, a show cause notice was issued, personal hearing was granted and the respondent was dismissed from service. Thereupon, an appeal was filed before the Board of Directors and the same was also dismissed. On those facts, the Hon ble Supreme Court held that supply of copy of the enquiry officer s report is required if the enquiry officer is other than the disciplinary authority. But failure of supply of report would not ipso facto result in proceedings being declared null and void. It is for the employee to plead and prove that such non-supply has caused prejudice. As already explained above, the concept of prejudice of an employee in so far as individual grievance is concerned, stands on a totally different footing from the concept of prejudice, which takes place on a broad principle of public interest, which is involved in this case. Therefore, the ratio in the aforesaid two decisions is not applicable to the facts of the present case in understanding the concept of prejudice.

47. Learned counsel for the fourth respondent also relied on the decision in the case of Dhirendra Nath Gorai v. Sudhir Chandra Ghosh reported in AIR 1964 SC 1300. The case of Dhirendra Nath Gorai was in the context of interpreting Section 35 of the Bengal Money Lenders Act. Section 35 of the Act was a provision relating to contents of the sale proclamation and its effect is to amend or supplement Order 21 Rule 66 of the Civil Procedure Code which directs the Court to specify in the sale proclamation the property to be sold. Any defect regarding non-compliance under Section 35 in not specifying the property to be sold is a defect in the sale proclamation. The objection that the sale proclamation did not conform to Section 35 of the Bengal Money Lenders Act is not available to the judgment debtor in that case in an application under Order 21 Rule 90 of the Code of Civil Procedure as he did not raise any such objection at the time nor did he do so, after receiving the notice, avail the opportunity of being present when the sale proclamation was drawn up. On those facts, the Hon ble Supreme Court held that for non-compliance with Section 35 of the Act no substantial injury would be caused to the judgment debtor especially when despite notice in one case, he did not file objection at all and in the other case, though he filed objection, did not attend at the time of drawing up of proclamation. (See para-8 at page 1305 of the repot). The aforesaid facts clearly distinguish that case from the facts of the present case.

47. The question, which cropped up in Dhirendra Nath Gorai was whether it is open to the party to waive the objection, and if the party has waived it, in that case non-compliance with that requirement of law will not render the decision null and void. Here, the petitioner has never waived his right to get a hearing. Rather, he insisted on getting a hearing. Despite that he has been denied the right of hearing. Therefore, the ratio laid down in the case of Dhirendra Nath Gorai does not at all help the case of the fourth respondent. On the other hand, it makes it clear that where hearing was statutorily provided and demanded, but has been denied by the respondent, the resultant decision is a nullity.

48. The other decision on this point rendered in the case of State of U.P v. Harendra Arora reported in AIR 2001 SC 2319 was also in the context of a departmental enquiry on the question of furnishing

of a copy of the enquiry officer s report. It was held that though furnishing of such report is obligatory on the part of the employer as per Rule 55A, non-furnishing does not vitiate the order. In the aforesaid case, after submission of the enquiry report, show cause notice was sent to the delinquent officer. To that, the officer had shown cause and the disciplinary authority after considering the same passed an order of dismissal. In the said show cause notice, the employee did not raise the question of prejudice in the absence of the enquiry officer s report. Neither before the Tribunal nor before the High Court, the question of prejudice was raised. So, the Supreme Court held that in view of these facts, it is not possible for the Court to come to a conclusion that because of non-submission of the enquiry report any prejudice has been caused (See paragraph 23 at page 2327 of the report).

49. As explained above, the concept of prejudice in a disciplinary enquiry is different from the concept of prejudice in the present case. Grant of patent virtually confers the right of monopoly, which is a right in rem granted in favour of the fourth respondent. Before such a right is granted, law has provided that right of objection to any person. As the patent right is a right in rem, law by the 2005 Amendment confers right of objection also on very wide terms on any person. Law further mandates when objection is raised, the objector must be allowed to place his objection in a proceeding in which he should be personally heard. That is the language of Rule 55(5) and 55(6) of the Rules, which are quoted herein before.

50. Therefore, when monopoly right of patent is granted in favour of the fourth respondent ignoring the aforesaid procedure, it is clear that it has been granted with some incurable defects in the procedure namely, by non-compliance with the provisions of statute and statutory rule. Such grant is inherently defective, since grant here is grant of right in rem. The prejudice in this case has been pleaded, as stated herein above, and has not been denied in the counter filed by the fourth respondent. Therefore, the decision in Harendra Arora does not help the case of the fourth respondent in any way.

51. There is another age old principle which enjoins when statutes provides for dong something in a certain manner, it has to be done in that manner alone, all other modes of performance are necessarily forbidden. Following the said principle in the instant case it is clear that the grant of patent to the fourth respondent has been made in blatant violation of statutory procedure by the statutory authority, which is acting in a quasi-judicial capacity. Such a grant is not legally sustainable.

52. Reliance was placed by the learned counsel for the 4th respondent on the decision of the Hon ble Supreme Court in Province of Bombay Vs. Kusaldas S.Advani and Ors (AIR 1950 SC 222). Particularly, reliance was placed on paragraph 173 of the said judgment where the Apex Court discussed the question about which authority can be held to exercise quasi-judicial function in respect of a lis. It was held if a statute empowers an authority, not being a Court in the ordinary sense, to decide disputes arising out of a claim which is opposed by another party and to determine the respective rights of the contesting parties who are opposed to each other, there is a lis and prima facie in the absence of anything in the statute to the contrary, it is the duty of the authority to act judicially and the decision of the authority is a quasi-judicial act.

53. This ratio fully supports the case of the petitioner. Here the third respondent who has been statutorily invested with the powers of a Civil Court under Section 77 of the Act is bound to determine the issue raised at the instance of the petitioner as against the fourth respondent in a quasi-judicial manner as there is a lis. Statute provides that this is to be decided in a particular manner viz., after giving an opportunity of personal hearing as asked for by the petitioner, the role of the third respondent is therefore undoubtedly a quasi-judicial one. There is no reason for contending that the decision of the third respondent is merely an administrative one and cannot be interfered by this Court. The decision in Kusaldas (supra) actually supports the petitioner s case.

54. In the decision reported in (2005) 1 MLJ 435 (Tamilnadu State Transport Corporation (Villupuram Division II) Ltd., Vs. Durai and another) a Division Bench of this Court held when there is an alternative efficacious remedy under the provisions of the Motor Vehicles Act by way of filing an appeal under Section 89 against the order of the Regional Transport Authority a writ petition is not maintainable. Reliance was placed by the learned counsel for the fourth respondent on the said decision for contending that as against the grant of patent by the third respondent, the petitioner has got a remedy of post-grant opposition under Section 25(2), apart from the right of revocation under Section 64 and a right of review under Section 77 and therefore, the writ petition should not be entertained. This contention cannot be accepted for the simple reason that when the very exercise of power by the third respondent under Section 25(1) is not in conformity with the statute and in violation of natural justice, such a decision is ultra vires the said Act and the rules, and can be challenged in a writ petition (See Whirlpool Corporation Vs.Registrar of Trade Marks, (1998) 8 SCC 1).

55. The remedy at the post-grant stage cannot be equated with the remedy at the pre-grant stage. The insufficiency of the opportunity of hearing at the pre-grant stage cannot be made good by grant of opportunity at the post-grant stage. Since, statute has given remedy at both the stages, it must be made available at both the stages. One cannot be a substitute for the other. An unfair trial cannot be cured by a fair appeal. (See Institute of Chartered Accountants of India Vs. L.K.Ratna, AIR 1987 SC 71).

56. The learned counsel for the fourth respondent placed reliance upon the decision reported in AIR 1979 Sc 1628 (Ramana Dayaram Shetty Vs. International Airport Authority of India and Ors.) for the proposition that while holding that the action of the State in having accepted the tender of the fourth respondent in Airport Authority was violative of the equality clause of the Constitution as well as the rule of administrative law inhibiting arbitrary action, it held that the writ petition was filed more than five months after the acceptance of the tender of the fourth respondent and that the fourth respondent had incurred considerable expenditure aggregating to about Rs.1,25,000/- in pursuance of his acceptance of the tender and on that ground the Court declined to interfere with the order accepting the tender of the fourth respondent in that case. The submission of the learned counsel was based on the principles of equity. The learned counsel contended while the patent came to be published by the third respondent on 29.06.2007, and the petitioner was informed by the third respondent in his letter dated 12.11.2007, expressing his inability to set aside the grant of patent, the present writ petition came to be filed nearly after 11 months i.e., in October, 2008 by which time certain valuable rights accrued in favour of the fourth respondent and therefore the grant of patent

should not be interfered with. The learned counsel contended that at best even if it were to be held that the petitioner s pre-grant opposition should be considered and disposed of by the third respondent, only after affording a personal hearing, such a step could be directed to be made without interfering with the grant of patent.

57. At the outset it will have to be held that the decision in Ramana Dayaram Shetty can have no application to the facts of this case, inasmuch as that case related to acceptance of a tender of one party by the State in an arbitrary manner as against the personal and commercial interest of another party. In the case on hand, as discussed earlier, the issues raised by the petitioner at the pre-grant opposition are objections raised on a much wider perspective and cannot be equated with the commercial interest of running a restaurant. It is well known that for invoking writ jurisdiction there is no prescribed time limit. There can be only laches or inaction of the petitioners which are organizations of HIV affected people who are battling for life against the dreaded disease. They can take a reasonable time to organize themselves to fight a litigation against a multinational company. Judged in this context, a period of eleven months is not fatal to bar relief to the petitioners whose fundamental right under Article 14 namely, protection under the law i.e., a statutory right of hearing has been denied. Their fundamental right to life under Article 21 is also affected inasmuch as their access to treatment become illusory in view of grant of patent to the fourth respondent, which escalates the costs of medicine beyond their reach. For the very same reasons we do not find any scope to apply the ratio of the decision reported in AIR 2006 SC 1581 (Karnataka Power Corporation Limited Vs. K.Thangappan and another).

58. Reliance was then placed upon the decision of a learned single Judge of this Court reported in (1990) 2 MLJ 324 (Indian Bank Vs. R.S.Thiruvengadam) for the proposition that in exercise of the equitable jurisdiction under Article 226 of the Constitution of India, the Court should examine the conduct of the parties instead of being carried away by narrow technicalities. That was a case where the writ petitioner raised the plea of lack of jurisdiction of the competent authority under Section 41(2) of the Tamil Nadu Shops and Establishments Act, 1947. In that context, the learned Judge held that the writ petitioner in that case having failed to raise the plea of lack of jurisdiction at the earliest opportunity viz., before he concerned competent authority it cannot be permitted to raise the said plea at the stage of a writ petition. Here the complaint has been raised at the earliest stage. So, the decision has no application.

59. On behalf of the petitioners, though several decisions were cited, we only refer to such of them, which have a bearing on the issues involved herein.

60. The learned counsel placed reliance on the decision reported in (2008) 4 SCC 144 (Bhikhubhai Vithalbhai Patel and others Vs. State of Gujarat and another) for the proposition as to how the expression consideration as provided under Rule 55(6) can be applied. The Hon ble Supreme Court in paragraph 25 of the said decision held as under:

> "25. .....The expression: as considered necessary is again of crucial importance. The term consider means to think over; it connotes that there should be active application of the mind. In other words the term consider postulates consideration

> of all the relevant aspects of the matter. A plain reading of the relevant provision suggests that the State Government may publish the modifications only after consideration that such modifications have become necessary....."

Again in paragraph 26, the Hon'ble Supreme Court held as under :

> "26. The formation of the opinion by the State Government should reflect intense application of mind with reference to the material available on record that it had become necessary to propose substantial modifications to the draft development plan."

In view of those principles the third respondent is required to act with a greater application in view of the specific stipulations for consideration contained in Rule 55(6), read along with Section 25(1)(k) of the Act. So by denying a personal hearing to the petitioner before deciding the petitioner s objection, the third respondent acted wholly without jurisdiction in its order of grant of patent in favour of the fourth respondent. The grant of patent is thus as non est in law and consequently is liable to be set aside.

61. In this context, it will also be beneficial to refer to the decision of the Hon'ble Supreme Court reported in (1996) 3 SCC 364 (State Bank of Patiala Vs. S.K.Sharma). The Hon'ble Supreme Court of India after referring to number of its earlier decisions has laid down the principle as under in paragraph 28 "28. .....In our respectful opinion, the principles emerging from the decided cases can be stated in the following terms in relation to the disciplinary orders and enquiries: a distinction ought to be made between violation of the principle of natural justice, audi alteram partem, as such and violation of a facet of the said principle. In other words, distinction is between no notice / no hearing and no adequate hearing or to put it in different words, no opportunity and no adequate opportunity . To illustrate take a case where the person is dismissed from service without hearing him altogether (as in Ridge v. Baldwin). It would be a case falling under the first category and the order of dismissal would be invalid or void, if one chooses to use that expression (Calvin v. Carr). But where the person is dismissed from service, say, without supplying him a copy of the enquiry officer s report (Managing Director, ECIL v. B. Karunakar) or without affording him a due opportunity of cross-examining a witness (K.L. Tripathi) it would be a case falling in the latter category violation of a facet of the said rule of natural justice in which case, the validity of the order has to be tested on the touchstone of prejudice, i.e., whether, all in all, the person concerned did or did not have a fair hearing....."(Emphasis added) Therefore, we can safely draw the line as between cases where it was obligatory on the part of the authority to afford a fair opportunity which he fails to offer and cases where there are certain defects in affording such opportunity, in which case the extent of fairness may have to be tested vis-a-vis the extent of prejudice caused. In cases where there was total failure in affording the opportunity obligated upon, the resultant order would be a nullity. Here there is total denial of opportunity of hearing . So following the ratio in State Bank of Patiala we hold that the decision to grant patent is a nullity and not an irregularity which is to be cured.

62. In (1993) 2 SCC 703 (Dr.Kashinath G.Jalmi Vs. The Speaker, Legislative Assembly of Goa) the Hon'ble Supreme Court considered the question of laches in filing a writ petition and held as under in paragraph 34:

> "34. In our opinion the exercise of discretion by the court even where the application is delayed, is to be governed by the objective of promoting public interest and good administration; and on that basis it cannot be said that discretion would not be exercised in favour of interference where it is necessary to prevent continuance of usurpation of office or perpetuation of an illegality."

In our considered opinion the ground of laches alleged against the petitioner in preferring this writ petition should be considered on the touchstone of the above principle laid down by the Hon'ble Supreme Court.

63. The learned senior counsel appearing for the fourth respondent contended that the fourth respondent has been working the patent as evidenced by Form 27 filed by it in the Office of the second respondent dated 28.03.2008, and that if the patent granted is set aside, the suit preferred by it for infringement against Cipla Limited will get frustrated. It was further contended that if the patent is set aside it will result in all the post-grant oppositions getting allowed automatically.

64. It was also contended that there was no allegation of any impropriety on the part of the fourth respondent and it should not be made to suffer for no fault of it. It was further contended that without prejudice to the contention of the fourth respondent, the petitioner can be provided a hearing before the third respondent by not interfering with the patent granted in favour of the fourth respondent. It was also submitted that on the other hand if the patent granted is set aside it would cause irreparable economic loss to the fourth respondent.

65. By advancing such argument on equitable considerations, the learned counsel for the fourth respondent accepted that there is legal infirmity in the grant of patent by the third respondent. When patent illegality is writ large on the grant of patent, equity cannot prevail over law. We must remind ourselves of the Latin proverb: dura lex sed lex which means the law is hard, but it is law . Equity can only supplement the law, it cannot supplant or override it (See Ragunath Rai Bareja Vs. Punjab National Bank, (2007) 2 SCC 230, Paras 29 to 36 at p.p.241 & 242 of the report).

66. As rightly contended by the learned counsel for the petitioners even in the absence of grant of patent in favour of the fourth respondent, continuation of its manufacturing and marketing activities will not in any way get affected. As far as the apprehension of the fourth respondent that the setting aside of the grant of patent may open up the floodgates, we hold the same is misconceived. We restrict the scope of consideration of pre-grant opposition with reference to the petitioner s representation only which came to be filed within the stipulated time limit as provided under Section 25(1) read along with Rule 55 of the Rules. By adopting such a course, there would be no scope for other post-grant opponents to file any further representation.

67. As far as the apprehended frustration of the suit filed by the fourth respondent as against Cipla Limited, the petitioner cannot be in any way held responsible for any consequence that may result in prosecuting the said suit. The fourth respondent s suit is not against the petitioner. The right of the petitioner in working out its remedy as against the invalid action of the third respondent cannot be defeated on that consideration.

68. For the reasons discussed above, we allow the writ petition. The grant of patent in Patent No.207232 by the office of the respondents 2 and 3 in Patent Application No.959/MAS/1995 filed by the fourth respondent is set aside. The third respondent must hear only the petitioners and the fourth respondent on the petitioner s representation at the stage of pre-grant opposition filed under Section 25(1) of the Act. The third respondent need not consider any other pre-grant objection pursuant to this judgment. Such hearing should be completed by 31st January, 2009.

69. While passing the above orders we are constrained to state that it was quite unbecoming of the third respondent to have attempted to justify his order by filing a counter affidavit to this writ petition. The affidavit shows a rather biased attitude of the deponent who granted the patent to the fourth respondent. Therefore, while setting aside the grant as above, we direct the second respondent to assign the consideration of the petitioner s pre-grant opposition to any other officer in the rank of Assistant Controller of Patents, Designs & Trade Marks in the Intellectual Property Office, other than the officer who granted the Patent and published it on 29.06.2007 in Patent Application No.959/MAS/1995.

70. The writ petition stands allowed with the above specific directions to the second and third respondents. Consequently, the connected miscellaneous petitions are closed. No costs.

pv/sm/kk To

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2. Controller General of Patents & Designs, Bhoudhik Sampada Bhavan, S.M.Road, Near Antop Hill Head Post Office, Antop Hill, Mumbai 400 037.

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