IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on	21.12.2023
Judgment pronounced on	05.07.2024

CORAM:

THE HON'BLE MR. **JUSTICE SENTHILKUMAR RAMAMOORTHY**

(T) CMA (PT) No.146 of 2023

[OA/32/2020/PT/CHN]

M/s.The Zero Brand Zone Pvt. Ltd.
And Anand, Jayashree
Represented by Director,
S.Kalyanaraman, having office at
506, 5th Floor, Srishiti
Plaza, Off Saki Vihar Road, Powai,
Maharastra, Mumbai 400 072. ... Appellant

v.

1. The Controller of Patents & Designs
Chennai Intellectual Property Building
G.S.T.Road, Guindy,
Chennai-600 032.

2. Assistant Controller of Patents,
Patent Office, Intellectual Property Office Building,
G.S.T.Road, Guindy,
Chennai-600 032. ... Respondents

PRAYER: This Civil Miscellaneous Appeal filed under Section 117-A of the Patents Act, 1970, prays (i) that this Court may be pleased to set aside the order dated 12.03.2020, passed by the 2nd Respondent herein in Application No.201721043812 dated 06.12.2017 and consequently prayed to direct to issue patent; and (ii) to pass such further and other order or orders as this Court may be deemed fit and proper in the circumstances of the case and thus render justice.

For Appellants : Mr.C.V.Ramachandra Murthy
Mr.A.Rajaraman

For Respondent : Mr.A.R.Sakthivel, SPC

JUDGMENT

Background

The appellant filed Patent Application No.201721043812 on 06.12.2017 for the grant of patent for an invention titled 'Eco-friendly lamp made up of composition based on panchagavya with the combination of leaves used in traditional herbal medicine'. The said application was published on 22.06.2018. Based on a request for examination, the First Examination Report (FER) was issued on 29.06.2018. The appellant filed a response thereto on 08.08.2018. A pre-grant opposition was filed by Mr.R.A.Swaminathan on 22.08.2018. The appellant replied thereto on 23.10.2018. By

communication dated 22.07.2019, a hearing was fixed on 04.09.2019. While the appellant attended the hearing, the pre-grant opponent failed to attend the hearing. The application was heard and rejected by impugned order dated 11.04.2020 in the above facts and circumstances.

Counsel and their contentions:

2. Oral arguments on behalf of the appellant were submitted by Mr.C.V.Ramachandramurthy and on behalf of the respondents by Mr.A.R.Sakthivel, learned SPC. Both the appellant and the respondents also filed written submissions.

3. Although there was a pre-grant opposition before the patent office, the appellant did not implead the pre-grant opponent as a party to this appeal on the ground that such pre-grant opponent did not participate in proceedings culminating in the impugned order.

4. Learned counsel for the appellant submitted that the claims are in respect of a single-use lamp and the process for producing

such lamp. He also pointed out that the product and process satisfies all the requirements of Section 2(1)(j) of the Patents Act, 1970 (the Patents Act). With reference to the prior art documents cited in the impugned order, learned counsel submitted that D1 and D2 deal with mosquito repellents. Consequently, he contended that they are not analogous or relevant prior arts. He further submitted that the ingredients in the claimed invention are not the same as in the cited prior arts. Although 53 ingredients are used in prior art D1, learned counsel submitted that such ingredients are not the same as those used in the claimed invention. As regards prior art D2, he submitted that there is only one common ingredient. With regard to prior art D3, learned counsel submitted that it is non-patent literature published on or about 12.10.2017. Since the patent application was filed on 06.12.2017, which is not later than 12 months from the date of publication of D3, he contended that the claimed invention should not have been rejected by reference to prior art document D3. Learned counsel also submitted that the report of SGS Laboratories was disregarded while issuing the impugned order.

5. As regards rejection with reference to Section 3(p) of the Patents Act, learned counsel submitted that clause (p) applies when the invention is, in effect, traditional knowledge or is an aggregation of known properties of traditionally known compositions. While admitting that cow dung, cow urine, cow ghee, cow butter, cow milk and cow curd are part of traditional knowledge, he pointed out that the manufacturing of a single-use lamp by using these ingredients qualifies as an invention. Therefore, he contended that clause (p) of Section 3 is not applicable. He further submitted that clause (d) only applies for a new form of a known substance. Since the single-use lamp made from cow products and a mixture of leaves selected from neem tree, lemon tree and peepal tree is a new product and not a known substance, he contended that clause (d) of Section 3 is not applicable. As regards clause (e) of Section 3, he submits that it only applies to a substance obtained by a mere admixture of ingredients. According to him, clause (e) of Section 3 is inapplicable to the product claim. Even as regards the process claim, he submits that such claim is not in respect of a substance. For all the above reasons, learned counsel submitted that the impugned order is liable to be set

aside and that the appellant is entitled to grant of patent.

6. In response to these submissions, the respondents contended that the claimed invention was liable to be rejected in view of prior art documents D1 to D3. According to the respondents, all the ingredients used in the claimed invention are known ingredients, which form part of traditional knowledge. D1 contains most of the ingredients in the claimed invention. By referring to prior art D3, learned SPC pointed out that D3 deals with a lamp made of substantially the same ingredients as the claimed invention. Therefore, it was submitted that the claimed invention would be obvious to a person skilled in the art on the basis of prior art D3.

7. By way of rejoinder, learned counsel for the petitioner reiterated that prior art documents D1 and D2 pertain to mosquito repellents and, consequently, do not qualify as analogous prior arts. As regards prior art D3, after submitting that the lamp was made out of cow dung and ghee and not all the six ingredients used in the

claimed invention, he submitted that D3 teaches the production of a lamp made of a dried form of cow dung base mixture which cannot withstand high pressure [900-1100 psi] or the temperature of 100° C, which is required for moulding the lamp of the claimed invention. He also pointed out that D3 does not teach the use of cow butter which acts as a binding agent along with the specific mixture of leaves of the neem tree, lemon tree and peepal tree, thereby helping to withstand the pressure and temperature during the moulding process. Therefore, learned counsel contended that the claimed invention is not obvious from prior art D3. By pointing out that the claimed invention makes use of panchagavya + neem leaves + lemon leaves + peepal leaves, learned counsel submitted that the claimed invention emits light, does not use water and is a zero carbon product. According to him, such a value added product based of traditional knowledge is not excluded from patent protection under clause (p) of Section 3.

Discussion, analysis and conclusions:

8. The claims made by the appellant are as under:

*"**WE CLAIM**:*

1. A lamp made up of natural ingredients for one time use only comprising:

i) 40-60% Cow dung;

ii) 5-20% Cow urine;

iii)2-8% Cow ghee;

iv) 2-8% Cow butter;

v) 1-5% Cow milk

vi) 1-10% Cow curd

vii) 10-25% Mixture of leaves selected from 5% to 15% from the Neem tree (Azadirachta Indica), 5% to 10% from the lemon tree (Citrus Limon) and 5% to 15% from the Peepal tree (Ficus religiosa).

2. A Process for the preparation of lamp as claimed in claim 1 comprising the steps of:

i) Mixing wet cow dung with cow urine, cow ghee, cow butter, cow milk and cow curd to obtain a mixture;

ii)Grounding of leaves of neem tree (Azadirachta Indica), lemon tree (citrus limon) and peepal tree (Ficus religiosa) to obtain a wet paste.

iii) Adding wet paste obtained in step (ii) to

the mixture obtained in step (i) to obtain a composition which is poured into a mould to obtain a lamp by applying pressure in the range from 900 -1100 psi and temperature in the range from 80-100°C"

From the above claims, it is evident that the first is a product claim and the second a process claim. Both claims relate to a lamp made from six ingredients that originate from the cow and a mixture of leaves selected from the neem tree, lemon tree and peepal tree. The appellant has indicated the proportions in which these ingredients should be used.

9. Against this backdrop, I first deal with the grounds of rejection under Section 3 of the Patents Act. In the impugned order, the following conclusions were recorded in this regard:

"Appellant's agent reply regarding sub-sections (e) and (p) of section 3 are not tenable. Regarding section 3(p)of the Act,applicant's agent stated that "Though individually components cow dung

(cow dung cake), cow ghee, cow butter usage as fuel, however cow urine, cow milk and cow curd are not known to be used as fuel." From page 2 of the complete specification it is clear that "Panchagavya is a term used in Ayurveda to describe five major substances obtained from cow, which include cow's urine, cow's ghee, cow's curd and cow's dung." Panchagavya is known from years. The essential components of the prior art and the present invention are same. In view of the traditional knowledge of cow dung (cow dung cake), cow ghee, cow butter usage as fule, neem/lemon leaves as insect repellent, and panchagavya usage as organic manure, the subject matter of the claims 1-2 are not patentable u/s 3(p) of the Act. Claim is not allowed u/s 3(d) of the patents act 1970 as the claiming lamp is a new form of a known substance."

The sustainability of these conclusions should be tested by closely examining clause (p) of Section 3. Clause (p) of Section 3 excludes an invention which, in effect, is traditional knowledge or which is an aggregation of known properties of traditionally known components. Clause (p) is set out below:

"Section 3:

(p) an invention which, in effect, is traditional knowledge or which is an aggregation or duplication of known properties of traditionally known component or components. "

10. The Patents (Amendment) Act, 2002 inserted clause (p) in Section 3, and this clause was enacted in terms identical to the Patents (Second Amendment) Bill, 1999. The Joint Parliamentary Committee Report on the Patents (Second Amendment) Bill, 1999, which recommended the above amendment, contained the following reason for the amendment:

"A new clause (p) has been added to protect the country's traditional knowledge from being patented."

Thus, it is evident that the object and purpose of inserting clause(p) was to prevent the creation of a monopoly over traditional knowledge, including by aggregating the known properties of traditionally known components. It should also be noticed that the expression "traditional knowledge" is not qualified by the words

"*per se*", unlike the expression "computer programme *per se*" in Section 3(k). It should, however, also be noticed that the exclusion is not intended to completely shut out inventions that draw on traditional knowledge provided the patent applicant is able to establish that the product or process can no longer be described as being, in effect, traditional knowledge. Whether the appellant has surmounted such high bar remains to be seen. The expression "traditional knowledge" is not defined in the Patents Act. The World Intellectual Property Organisation (WIPO) defines traditional knowledge as "knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity". The United Nations Educational Scientific and Cultural Organisation (UNESCO) defines traditional knowledge as under:

> *"Knowledge, innovations and practices of indigenous and local communities around the world. Developed from experience gained over the centuries and adapted to the local culture and environment, traditional knowledge is transmitted orally from generation to generation.*

It tends to be collectively owned and takes the form of stories, songs, folklore, proverbs, cultural values, beliefs, rituals, community laws, local language and agricultural practices, including the development of plant species and animal breeds. Traditional knowledge is mainly of a practical nature, particularly in such fields as agriculture, fisheries, health, horticulture, forestry and environmental management in general."

Thus, traditional knowledge derived from centuries of lived experience takes many forms and is passed on from one generation to the next. Such knowledge is commonly owned by the communities possessing the knowledge. Because of such community ownership, the legislature denies exclusive monopoly rights to inventions incorporating traditional knowledge.

11. In the Patents Act, Section 3(p) provides defensive protection of traditional knowledge by excluding inventions which are "in effect" traditional knowledge from patent eligibility. The term "in effect" in the provision ensures that there is no circumvention of

the prohibition by concealing the usage of traditionally known components or their properties in a claimed invention.

12. Cow dung, cow urine, cow ghee and other cow products along with leaves of the neem tree, lemon tree and peepal tree are animal and plant products that have been used traditionally in India. The use of these products would, therefore, form part of traditional knowledge. This leads to the question whether the combination of these products in specific proportions for the production of a lamp falls outside the scope of clause (p). This, in turn, depends on whether known properties of these products have been aggregated in the claimed invention. In the impugned order, the second respondent referred to the expression "panchagavya" in ayurveda as referring to five substances derived from the cow, namely, urine, milk, ghee, curd and dung. Reference was also made to traditional knowledge of the use of cow dung cake, cow ghee and cow butter as fuel and the use of neem and lemon leaves as insect repellents. Even assuming that urine, milk and curd from the cow were not known to be used as fuel, as contended by the appellant, since one of the known

properties of other ingredients is their use as fuel, the claimed invention would fall within Section 3(p). Indeed, a Google search is sufficient to establish the conventional use of cow dung as fuel, in combination with neem and lemon leaves (for fragrance and as insect repellents), and to make lamps during festivals, such as Diwali. In the claimed invention, the lamp is produced from the mixture of these components and, upon being lit, it has the effects of, *inter alia*, emitting light, acting as a mosquito repellent and not leaving a carbon footprint. The usage of such traditional knowledge, including by using known properties of the ingredients, therefore, falls within the exclusion in Section 3(k). For reasons set out above, I see no reason to depart from the conclusions of the second respondent on Section 3(p) of the Patents Act. This conclusion, on its own, is sufficient to reject this appeal. Nonetheless, since conclusions on other exclusions under Section 3 and on lack of inventive step were recorded in the impugned order, the same are also discussed.

13. As regards clause (d), it applies *inter alia* to the mere discovery of a new form of a known substance or to the mere

discovery of any new property or new use for a known substance. Given the fact that the claim is in respect of a lamp made of multiple ingredients and not for a new form of a known substance, it cannot be construed as a mere discovery of a new form of a known substance. Therefore, clause (d) of Section 3 is not applicable. Clause (e) of Section 3 excludes from patent protection a substance obtained by a mere admixture of components or ingredients. This clause was interpreted in *Novozymes v. Assistant Controller of Patents and Designs, 2023/MHC/4261,* as applicable to a composition claim unless the patent applicant establishes synergy between the ingredients constituting the composition. The claim in the present case is not in respect of a composition; it is for a product and a process for making such product. Hence clause (e) of Section 3 is also not applicable.

Alleged non-consideration of documents

14. Before embarking on obviousness analysis, it is necessary to deal briefly with the appellant's contention that several documents were not taken into consideration by the respondents. The documents relied on by the appellant were i) Chinese Science Bulletin Article

"Climatic and environmental implications from *n*-alkanes in glacially eroded lake sediments in Tibetan Plateau: An example from Ximen Co"; ii) SGS Report; iii) 2011 Census Data; and iv) China Publication No. 17771045 Announcement No. 100475221. On examining the record of patent prosecution, it appears that the appellant had not placed documents labelled as i), iii) and iv) above before the respondents. Therefore, those documents cannot be considered at the appellate stage. The SGS report, however, was submitted along with the reply to the FER. I deal with this document in course of discussion on inventive step.

Obviousness analysis

15. Section 2(1)(j) and Section 2(1)(ja), which define invention and inventive step, respectively, are set out below:

" 2. Definitions and interpretation.- (1) In this Act, unless the context otherwise requires,-

> *[(j) "invention" means a new product or process involving an inventive step and capable of industrial application;*
>
> *[(ja) "inventive step" means a feature of an*

invention that involves technical advance as compared to the existing knowledge or having economic significance or both and that makes the invention not obvious to a person skilled in the art;]

In the above statutory context, whether the claimed invention would be obvious to a person skilled in the art based on the cited prior art falls for consideration next. In the impugned order, after examining prior arts D1 to D3, the following conclusions were recorded:

"In view of the documents cited, herbal compositions made of cow dung, ghee, milk, butter, neem, lemon, peepal tree are known in the art. Present invention lacks technical advancement as compared to the existing knowledge and is obvious to a person skilled in the art. Also, in effect of the traditional knowledge cow dung (cow dung cake), ghee, butter usage as fuel, neem/lemon leaves as insect repellent and panchagavya usage as organic manure is known. Considering the prior art documents already described cow dung, ghee, milk, butter, nem, lemon, peepal tree for the same purpose, optimizing by adding further

ingredients (cow urine, butter) is normal routine work for the skilled person and cannot be considered inventive as such unless such additional ingredients endow additional surprising effects with respect to the prior art. Hence, claims 1-2 lack inventive step under Section 2(1)(j)(a) of the Patents Act, 1970."

16. With specific reference to D3, the second respondent considered the submissions made by the appellant to distinguish the claimed invention from D3 and, thereafter, recorded findings. The relevant extracts as set out below:

"As regards to D3, applicant stated that D3 is acknowledged prior art which teaches a lamp made up of cow dung, ghee and essential oil (lemon grass). It is submitted that D3 teaches a lamp made up of dry form of cow dung based mixture which will not be able to withstand the pressure (900-1100 PSI) and temperature of 100° C during the moulding process for making the lamp of the present invention. D3 does not comprise cow butter which acts as a binding

agent and along with specific mixture of leaves of Neem tree (Azadirachta indica) lemon tree (Citrus Limon) and Peepal tree (Ficus religiosa) helps to withstand the pressure (900-1100PSI) and temperature of 100° C during the moulding process for making the lamp of the present invention. It is submitted that the Dry form of cow dung based mixture of D3 will not be able to withstand the pressure (900-1100PSI) and temperature of 100° C. Hence the lamp of the present invention is different from the lamp made up of dry cow dung based mixture of D3 and inventive over D3."

"D3 discloses diyas prepared with cow dung, ghee and essential oil (lemon grass) which can be used as a fertilizer and can also use as mosquito repellents. D3 further states that

"The fragrance coming from these lamps not only sparks fragrance around you, but also the negativity surrounding this fragrance will be removed. The scent of lemon, mint and lavender will give you complete rest by relaxing your nerves. You can illuminate your Diwali in many ways with the light of these lamps. Thee lamps

are easily available in the market of Diwali, made of cow dung and pure ghee in a cow shed away from the city..."

Thus D3 also discloses the mosquito-repelling lamps made up of cow dung, cow ghee and essential oils and the utility is also the same as mentioned in the above Para. Here the inventiveness of the claimed composition when compared with D3 is not demonstrated. Hence the subject matter of claims are known in view of D3.

17. Eventually, upon considering the appellant's contention that the ingredients were combined in specific proportions and that the lamp was made by using specific pressure and temperature ranges, the following conclusions were drawn:

"Selection of known ingredients with a particular ratio in a composition is obvious and can only be regarded as inventive if the claimed composition shows unexpected effect. Since no such effect is indicated and supported in the application, the subject mater of claim 1 and 2 does not involve an inventive step. Thus in combined view of the cited documents D1, D2 and D3, it is obvious to the person skilled in the art to

construe the claimed composition from D1 comprises cow dung, neem paste, cow ghee, cow milk, Neem and Pipal tree bark and from the available knowledge of D2 and D3 therefore render the claims obvious.

Hence claims 1 and 2 do not involve any technical advance as compared to the existing knowledge with reference to the cited documents and there is no inventive ingenuity and obvious to try for a person skilled in the art when he knows the use of the cow products from D1 and obvious combine with other documents to bring out with the claimed subject matter."

In effect, the respondents concluded that the claimed invention lacks technical advancement compared to existing knowledge and would be obvious to a person skilled in the art.

18. Whether the alleged failure to consider the SGS report vitiates the above findings warrants a brief discussion. The SGS report specifies that the samples were not collected by SGS. In that

factual context, materiality and weight cannot be attached to the results reported therein. Without prejudice to the above, even assuming that the below detection level carbon emissions, as indicated in the SGS report, does constitute a technical advancement, it has to be examined whether it would be obvious to PSITA. The claimed invention makes use of ingredients which are not only traditionally known, but known to have carbon neutral effects. Therefore, the reduced carbon footprint due to the usage of these ingredients in the lamp is merely incidental and is because of the known properties of the ingredients used therein. Therefore, the SGS report does not advance the cause of the appellant. Consideration of the prior art documents is necessary to test the tenability of the above conclusions.

19. Prior art document D1 was published on 10.06.2017. It discloses a composition of cow dung, cow milk, cow ghee, neem and peepal tree barks. It is a method for preparing a herbal mosquito repellent. While there is commonality in some of the ingredients used in prior art D1, prior art D1 does not deal with a lamp. On

examining prior art D1, it cannot be concluded that there is a coherent thread leading from the said prior art to the claimed invention. In other words, solely on the basis of D1, it cannot be said that the claimed invention would be obvious to the PSITA.

20. Having concluded the above, it is pertinent to examine whether D1 combined with other prior arts would make the invention obvious to PSITA. Prior art D2 is non-patent literature, namely, an article authored by Mandavgane titled "Development of cow dung based herbal mosquito repellent" and was published by the Department of Chemical Engineering, Priyadarshini Institute of Engineering and Technology, on 11.04.2005. It is also a herbal mosquito repellent composition. Out of the ingredients contained in the claimed invention, it is evident from table 1 of D2 that D2 also contains cow dung and neem. However, the other ingredients of the claimed invention are not present in D2.

21. As regards D3, it is non-patent literature disclosing the preparation of eco-friendly lamps/diyas from cow dung. Learned

counsel for the appellant relied on Sections 29(2) and 31(d) of the Patents Act to contend that the said provisions shield the claimed invention against rejection in light of D3. This contention is fallacious for more than one reason. First, both Sections 29 and 31 pertain to anticipation, and not to obviousness. Secondly, in order to claim the benefit of Section 29(2), the appellant should prove that the matter published was obtained from him. Although the appellant makes such assertion, the appellant has failed to prove that the material for D3 was so obtained. In addition, Section 31(d) applies only if the the true and first inventor provided a description of the invention in a paper read by him in a learned society or published with his consent by said society and such inventor applies for a patent not later than twelve months thereafter. Such is clearly not the case as regards D3. Therefore, D3 is pertinent for the obviousness analysis.

22. D3 discloses the production of lamps from cow dung, ghee and essential oils. While it is true that prior art documents D1 and D2 do not teach, motivate or suggest the production of lamps from cow dung, cow urine and cow ghee and the like, D3 clearly discloses

the production of diyas from cow dung, ghee and essential oils. Undoubtedly, on comparison of D3 and the claimed invention, all the ingredients are not common. The relevant question, however, is not whether there are differences between the cited prior art and the claimed invention but whether the claimed invention would be obvious to a person skilled in the art based on the prior art.

23. The person skilled in the art would be a person with the requisite skill set to produce lamps from natural / traditional ingredients such as cow dung. The question that falls for consideration is whether such person would be able to arrive at the claimed invention, without the benefit of hindsight, on the basis of the cited prior art. Both D1 and D2 disclose the use of traditional ingredients such as cow dung in the manufacture of mosquito repellents. D3 discloses the use of cow dung, ghee and essential oils in the production of lamps/diya. Knowledge of the cited prior art

should be imputed to the person skilled in the art. Common general knowledge should also be imputed to such person. The appellant claims that each ingredient is required to be used in specific proportions within the ranges indicated in the claims. In discussing whether such routine experimentation could be considered inventive, it was held in *Genentech Inc v Hospira, 946 F.3d 1333* that *"when the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation"*. Thus, once the ingredients are part of traditional knowledge, working out the optimum ranges and proportions is a matter of routine experimentation and cannot be construed as inventive. I am bolstered in this conclusion because D3 discloses, not merely the use of some common ingredients, but also their use in the production of diyas. Therefore, when armed with the knowledge of D1 to D3, in my view, the claimed invention would be obvious to the person skilled in the art.

24. In light of the conclusions that the claimed invention is patent ineligible under Section 3(p) and would be obvious to a person skilled in the art on the basis of the cited prior art and common

general knowledge, there is no infirmity in the order rejecting the patent application. Therefore, I am not inclined to interfere with the impugned order.

25. For reasons set out above, (T)CMA(PT) No.146 of 2023 is dismissed without any order as to costs.

05.07.2024

Index : Yes / No
Internet : Yes / No
Neutral Citation : Yes / No

To
1. The Controller of Patents & Designs
Chennai Intellectual Property Building
G.S.T.Road, Guindy,
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2. Assistant Controller of Patents,
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SENTHILKUMAR RAMAMOORTHY,J

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Pre-delivery judgment made in
(T)CMA(TM) No.40 of 2023

05.07.2024