

Madras High Court

Madras High Court

Yahoo! Inc (Formerly 'Overture ... vs Intellectual Property Appellate ... on 29 July, 2010

DATED 29.07.2010

CORAM

THE HONOURABLE MR. JUSTICE F.M.IBRAHIM KALIFULLA

AND

THE HONOURABLE MR. JUSTICE M.M.SUNDRESH

W.P.NO.4462 OF 2010

Yahoo! Inc (Formerly 'Overture Service Inc.')

701, First Avenue, Sunnyvale

California 94089, United States of America

Rep.by its Power of Attorney

Mr.Amitabh Lal Das

General Counsel

Yahoo India Private Limited (Yahoo! India)

7th Floor, Bagmane Tridib

Block A, Bagmane Tech Park

CV Raman Nagar

Bangalore Karnataka 560 093. .. Petitioner

Versus

1.Intellectual Property Appellate Board

Rep.by its Registrar

Guna Complex Annexe-I, 2nd Floor

443, Anna Salai

Teynampet, Chennai 600 018.

2.Union of India

Rep.by its Secretary

Ministry of Commerce and Industry

Department of Industrial Policy and Promotions

Udyog Bhavan, New Delhi 110 011.

3.Assistant Controller of Patents and Designs

Patents Office, Chennai, Intellectual Property Building

GST Road, Guindy, Chennai 600 032.

4.Rediff.com India Limited

Mahalakshmi Engineering Estate

L.J.Road, No.1, Mahim (West)

Mumbai. .. Respondents

(impleaded ordered by the Court

on 05.03.2010)

PRAYER : Petition filed Under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, calling for the records of the first respondent dated 23.10.2009 in the case bearing S.R.No.236/2009/PT/IPAB and quash the same and directing the first respondent herein to take the case bearing S.R.No.236/2007/PT/IPAB on record and dispose of the same in accordance with law.

For Petitioner : Mr.Arvind P.Dattar

Senior Counsel

for Mr.Feroz Ali

For Respondents-2 & 3 : Mr.P.Mahadevan

Senior Counsel

For Respondent-4 : Mrs.Sunitha K.Sridharan

for Mr.G.K.Muthukumar

* * * * *

O R D E R

M.M.SUNDRESH, J

The issues to be decided in this writ petition are as to whether an appeal is maintainable at the instance of the applicant for patent before the Intellectual Property Appellate Board, challenging the order of the Controller in rejecting the application for patent and if so a person making the opposition is entitled to be heard in the

appeal or not?

2.Facts in Brief:-

2.1.An application was filed by M/s.Overture Services Inc., a Delaware Corporation having its place of business in U.S.A. The International Application No.PCT/US00/14753 entered the National Phase as National Phase Application No.IN/PCT/2001/01652/CHE. The invention which was originally titled as "System and method for influencing a position on a search result list generated by a computer network search engine" was later amended to "A method of operating a computer network search apparatus". The International Application was filed on 26.03.2000. The said U.S. Application was granted as U.S.Patent No.6269361 on 31.07.2001. Thereafter, the said M/s.Overture Services Inc., got merged with the petitioner namely, M/s.Yahoo! Inc.

2.2.As per Section 11-A of the Patents Act, 1970, the application was published on 20.04.2004 in Patents Journal No.16 of 2007. In pursuant to the same, M/s.Rediff.com India Limited of Mumbai filed a Pre-grant Opposition by way of representation under Section 25(1) of the Patents Act on 22.10.2007. The Controller accepted the representation and refused to grant patent by holding that the invention of the applicant does not pass the novelty and patentability test. Challenging the said order, an appeal was preferred by the petitioner before the respondent No.1 namely, the Intellectual Property Appellate Board, Chennai. 2.3.The said appeal was refused to be entertained by the respondent No.1 on the ground that in as much as no appeal would lie against an order under Section 25(1) of the Patents Act, 1970 as provided under Section 117-A of the Act the same cannot be entertained. Challenging the said order of refusal to entertain the appeal filed by the respondent No.1, the petitioner has filed the present writ petition seeking to set aside the same with a consequential relief to number the appeal and hear the same on merits and in accordance with law.

3.Submissions of the Petitioner:-

3.1.Mr.Arvind P.Dattar, learned senior counsel appearing for the petitioner submitted that the order passed by the Controller will have to be construed as the one passed under Section 15 of the Patents Act, 1970. He further submitted that the provisions of the Patents Act, 1970 are so exhaustive with an inbuilt mechanism provided for, challenging the order of an authority before the Appellate Forum namely, the respondent No.1. According to the learned senior counsel even though the order impugned is one passed under Section 25(1) it is in effect a decision relatable to and one passed under Section 15 of the Patents Act.

3.2.In support of the said contention, the learned senior counsel has made a strong reliance upon the order passed by the High Court of Delhi in W.P.(C)No.332 of 2010 etc., wherein the learned single Judge has taken the view that an order passed under Section 25(1) of the Act will have to be construed as the one passed under Section 15 of the Act, in a case where a Pre-grant Opposition is accepted and as a consequence the application for grant of patent is refused. Mr.Arvind P.Dattar further argued that an order passed by the High Court of Delhi against the first respondent is binding and therefore the first respondent will have to be directed to take the appeal on file and decide the same on merits.

4.Submissions of the Respondent No.4:-

Mrs.Sunitha K.Sridharan, learned counsel appearing for the respondent No.4 fairly submitted that in as much as there is no way for the petitioner to challenge the order of the Controller, the reasoning assigned by the learned single Judge of the Delhi High Court sounds proper. However the learned counsel submitted that in such an eventuality the respondent No.4 also will have to be heard in the appeal in as much as it is only at its instance the order was passed by the Controller.

5.Heard Mr.Arvind P.Dattar, learned senior counsel appearing for the petitioner and Mr.P.Mahadevan, learned standing counsel appearing for the respondent Nos.2 and 3 , as well as Mrs.Sunitha K.Sridharan, learned

counsel appearing for the respondent No.4 and perused the affidavit filed in support of this writ petition and also the counter affidavit filed by the respondent No.4.

6. In order to appreciate the issue involved in this writ petition, we deem it necessary to consider the ambit and scope of various provisions particularly with reference to the right of appeal of an applicant seeking to patent his invention.

7. Scope of Section 15 of the Patents Act, 1970:-

Section 15 of the Patents Act, 1970 is hereby extracted for a better appreciation of the issues involved:-

“15. Power of Controller to refuse or require amended applications, etc., in certain cases.- Where the Controller is satisfied that the application or any specification or any other document filed in pursuance thereof does not comply with the requirements of this Act or of any rules made thereunder, the Controller may refuse the application or may require the application, specification or the other documents, as the case may be, to be amended to his satisfaction before he proceeds with the application and refuse the application on failure to do so.”

A reading of the above said section would show that the Controller will have to be satisfied to the extent that the application filed by an applicant does not comply with the requirements of the Act and Rules. The section further states that the Controller may also require the application to be amended to his satisfaction. Therefore Section 15 is substantially procedural in nature. However Section 15 mandates that the Controller will have to be satisfied that the requirements of the Act and Rules are complied with. In other words, if the Controller is of the opinion that an application does not satisfy the requirements of the Act and Rules, then he has to refuse the application. That is the reason why an appeal has been provided under Section 117-A of the Act against such an order of refusal by the Controller.

8. Scope of Section 25(1) of the Act and Rule 55 of the Patents Rules, 2003:-

Chapter-V of the Patents Act, 1970 deals with opposition proceedings to grant of Patents. Section 25(1) deals with an Opposition to a Pre-grant Patent. The grounds on which such an opposition can be made and the procedure to be followed while dealing with Pre-grant Opposition have been dealt with under Section 25(1) of the Act read with Rule 55 of the Patents Rules, 2003. The above said provisions are extracted for better appreciation:- “25(1). Opposition to the patent.-(1) Where an application for a patent has been published but a patent has not been granted, any person may, in writing, represent by way of opposition to the Controller against the grant of patent on the ground- (a) that the applicant for the patent or the person under or through whom he claims, wrongfully obtained the invention or any part thereof from him or from a person under or through whom he claims; (b) that the invention so far as claimed in any claim of the complete specification has been published before the priority date of the claim-

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

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

Provided that the ground specified in sub-clause (ii) shall not be available where such publication does not constitute an anticipation of the invention by virtue of sub-section (2) or sub-section (3) of section 29; (c) that the invention so far as claimed in any claim of the complete specification is claimed in a claim of a complete specification published on or after the priority date of the applicant's claim and filed in pursuance of an application for a patent in India, being a claim of which the priority date is earlier than that of the applicant's claim; (d) that the invention so far as claimed in any claim of the complete specification was publicly known or publicly used in India before the priority date of that claim.

Explanation.-For the purposes of this clause, an invention relating to a process for which a patent is claimed shall be deemed to have been publicly known or publicly used in India before the priority date of the claim if a product made by that process had already been imported into India before that date except where such importation has been for the purpose of reasonable trial or experiment only; (e) that the invention so far as claimed in any claim of the complete specification is obvious and clearly does not involve any inventive step, having regard to the matter published as mentioned in clause (b) or having regard to what was used in India before the priority date of the applicant's claim; (f) that the subject of any claim of the complete specification is not an invention within the meaning of this Act, or is not patentable under this Act;

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

(h) that the applicant has failed to disclose to the Controller the information required by section 8 or has furnished the information which in any material particular was false to his knowledge; (i) that in the case of convention application, the application was not made within twelve months from the date of the first application for protection for the invention made in a convention country by the applicant or a person from whom he derives title; (j) that the complete specification does not disclose or wrongly mentions the source or geographical origin of biological material used for the invention;

(k) that the invention so far as claimed in any claim of the complete specification is anticipated having regard to the knowledge, oral or otherwise, available within any local or indigenous community in India or elsewhere, but on no other ground and the Controller shall, if requested by such person for being heard, hear him and dispose of such representation in such manner and within such period as may be prescribed."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. (1-A) Notwithstanding anything contained in sub-rule (1), no patent shall be granted before the expiry of a period of six months from the date of publication of the application under section 11-A. (2) The Controller shall consider such representation only when a request for examination of the application has been filed.

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

A reading of the above said provisions would clearly show that an opposition for Pre-grant Patent can be made by "any person" contrary to what has been mentioned under Section 25(2) of the Act which restricts the opposition in so far as the Post-grant Patent is available only to "person interested". Therefore a wider scope has been imported into Section 25(1) to the extent of enabling anybody to make the opposition. Under Section 25(1) the grounds upon which the opposition can be made have been clearly spelt out. The Controller shall, if a representation is made for being heard, hear the person concerned and dispose of the representation. The Controller will have to consider the evidence submitted and the arguments at the time of hearing while considering the representation. If he is of the opinion that the application of Patent should be refused based upon the representation made by the objector, he will have to give notice to that effect to the applicant for patent.

Thereafter the applicant can file his statement and evidence in support of his application and the Controller after considering the statement and evidence produced both by the applicant and the opposition will have to proceed further either to refuse or grant the patent by rejecting or accepting the representation. Rule 55 mandates the Controller to consider the materials. The Controller will have to form an opinion under Section 25(1) of the Act read with Rule 55 of the Patents Rules, 2003 and if such an opinion is formed that the patent shall be refused then he shall proceed to issue notice to the applicant. An order of refusal is preceded by accepting the representation. Therefore Section 25(1) read with Rule 55 speak about the opposition to patent and its procedure.

9.Scope of Section 117-A of the Patents Act, 1970:-

Section 117-A of the Patents Act, 1970 deals with the appeals to the Appellate Board. Sub-section (1) of Section 117-A deals with the decisions which are not appealable. In other words, sub-section(1) of Section 117-A is an exclusion clause specifying certain actions from the purview of the Appellate Board. Section 117-A(2) speaks about the appeal to the Appellate Board from any decision, order or direction of the Controller of Central Government. Therefore it is seen under Section 117-A(2) an appeal would lie not only against the decision but also an order or direction of the Controller. A reading of the above said provisions would clearly show that an order of the Controller which in effect is the decision, order or direction made by the Central Government alone is exempted in so far as the applicant seeking a patent is concerned. Hence, Section 117-A is exhaustive to include the orders passed by the Controller, in refusing an application for patent.

10.A Conjoint Reading of the Provisions:-

10.1.The cumulative and conjoint reading of the above said provisions would show that an order passed under Section 25(1) read with Rule 55 of the Patents Rules, 2003 is an order of adjudication after considering the materials and other evidence produced by both the applicant and the opposition. A thorough and detail procedure has been contemplated in the sense the Controller has to apply his mind and form an opinion before notifying the applicant and after doing so has to examine the entire materials placed on record for coming to the final conclusion. Thereafter in a case where the application was refused by accepting the representation made by way of opposition the Controller has no other option except to refuse the application under Section 15, since Section 15 specifically states that the applicant will have to comply with the requirements of the Act and Rules. It is needless to state that when an application was refused by accepting the representation the same is presumed to be done as per the Act and Rules against the applicant. 10.2.Therefore under those circumstances, the Controller has no other option except to refuse the application. Hence the words "complying with the requirements of this Act" or "in Rules made therein" would also include an order passed under Section 25(1) read with Rule 55. If the power exercised under Section 15 is wholly procedural in nature then there is no necessity for an appeal against the decision made therein. Therefore a decision made under Section 25(1) of the Act read with Rule 55 will have to be read into and to be made relatable to Section 15 of the Act. Hence in as much as the decision made under Section 25(1) read with Rule 55 of the Patents Act, 2003 is in the nature of an adjudication, such an order which is relatable to Section 15 is appealable by treating the same as one under the said section. 10.3.Section 25(1) specifically states that the Controller shall dispose of the representation as per Rule 55 of the Patents Rules, 2003. Therefore the said Section mandates that the Controller will have to assume the role of an adjudicator. It is also seen on a comparative study of Section 25(1) and 25(2) both operate on distinct, separate and different fields. One cannot be substituted for another. The statute gives remedy for the applicant for a patent by filing an appeal at the pre-grant stage. When such an appeal is provided for a procedural error committed by the Controller it cannot be said that the legislature has not thought fit to provide for an appeal against the order on merits after hearing the opposition.

10.4.Further as discussed above, Section 117-A of the Act which provides for an appeal excludes only certain decision, order or direction and not otherwise particularly with reference to the rejection of a patent in

exercise of the power under Section 25(1) of the Act. Therefore on a construction of the provisions mentioned above, we are of the considered opinion that an appeal would lie against the refusal of the patent under Section 25(1), since the same is relatable to an order passed under Section 15 of the Act which in effect is one appealable under Section 117-A of the Act.

11. Interpretations of the Provisions:-

It is a well settled principle of law that a provision cannot be read in isolation. In order to understand and appreciate the object of a provision the other provisions will have to be read together. Therefore on a reading of the above said provisions, we are of the opinion that in the instant case an appeal is maintainable at the instance of the petitioner. Further the construction that would lead to absurdity and give rise to practical inconvenience by making the provisions nugatory and otiose will have to be eschewed.

12. In a recent judgment in ZAMEER AHMED LATIFUR REHMAN SHEIKH v. STATE OF MAHARASHTRA [(2010) 5 SCC 246], the Hon'ble Apex Court has observed as follows:

"74. Before we proceed to analyse the provisions of the two statutes in order to ascertain whether they are repugnant or not, we may note that it is well settled that no provision or word in a statute is to be read in isolation. In fact, the statute has to be read as a whole and in its entirety. In RBI v. Peerless General Finance & Investment Co. Ltd. [(1987) 1 SCC 424], this Court while elaborating the said principle held as under: (SCC p.450, para 33) "33. Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place."

13. In BANGALORE WATER SUPPLY v. A. RAJAPPA [AIR 1978 SC 548], the Hon'ble Apex Court has observed as follows:

"Perhaps with the passage of time, what may be described as the extension of a method resembling the "armatures rule" in the constitution of wills. Judges can more frankly step into the shoes of the legislature where an enactment leaves its own intentions in much too nebulous or uncertain a state."

14. In CHANDRA MOHAN v. STATE OF UTTAR PRADESH [1967 (1) SCR 77 (AIR 1966 SC 1987)], the Hon'ble Apex Court has observed that:

"The fundamental rule of interpretation is that in construing the provisions of the Constitution or the Act of the Parliament, the Court "will have to find out the express intention from the words of the Constitution or the Act as the case may be" and eschew the construction which will lead to absurdity and give rise to practical inconvenience or make the provisions of the existing law nugatory."

15. JUSTICE FRANKLIN IN GUISEPPI v. WALLING, 144F (2d) 608 (pp 620), has observed as follows:

"The necessary generality in the wordings of many statutes, and ineptness of drafting in others frequently compels the Court, as best as they can, to fill in the gaps, an activity which no matter how one may label it, is

in part legislative. Thus the Courts in their way, as administrators, in their way perform the task of supplementing statutes. In the case of Courts we call it 'interpretation' or 'filling the gaps'; in the case of administrators we call it 'delegation' or authority to supply the details.

16.JUSTICE G.P.SINGH IN PRINCIPLES OF STATUTORY INTERPRETATION, 12th EDITION AT P.298 SAYS THUS:

'... a statute must be read as a whole as words are to be understood in their context. Extension of this rule of context permits reference to other statutes in pari materia i.e. statutes dealing with the same subject-matter or forming part of the same system.'

17.The said observations of the Justice G.P.Singh was quoted with approval by a recent judgment of the Apex Court in S.NAGARAJ v. B.R.VASUDEVA MURTHY [(2010) 3 SCC 353] while construing the principle of harmonious construction.

18.A literal interpretation is not the only way of interpretation. One has to consider the circumstances under which a provision of law has been made to find out the actual meaning. In this connection, the following passage in R.L.ARORA v. STATE OF U.P. [AIR 1964 SC 1230] is extracted hereunder:

'9. ... Further, a literal interpretation is not always the only interpretation of a provision in a statute and the court has to look at the setting in which the words are used and the circumstances in which the law came to be passed to decide whether there is something implicit behind the words actually used which would control the literal meaning of the words used in a provision of the statute. It is permissible to control the wide language used in a statute if that is possible by the setting in which the words are used and the intention of the law-making body which may be apparent from the circumstances in which the particular provision came to be made.'

The said ratio laid down by the Hon'ble Apex Court has been quoted with approval in SURJIT SINGH v. MAHANAGAR TELEPHONE NIGAM LIMITED [(2009) 16 SCC 722].

19.CRAIES in his book on STATUTE LAW has observed as follows:

'... It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed' .. that in each case you must look to the subject-matter, consider the importance of the provision and the relation of that provision to the general object intended to be secured by the Act, and upon a review of the case in that aspect decide whether the enactment is what is called imperative or only directory.'

20.OLIVER WENDELL HOLMES has stated thus:

'It is sometimes more important to emphasise the obvious than to elucidate the obscure.'

21.The said principles have also been approved in JENANY J.R. v. S.RAJEEVAN AND OTHERS [(2010) 5 SCC 798]. In SPECIAL LAND ACQUISITION OFFICER v. KARIGOWDA AND OTHERS [(2010) 5 SCC 708] it is held as follows: '30.At the cost of some repetition, we may notice that the provisions of Sections 23 and 24 of the Act have been enacted by the legislature with certain objects in mind. The intention of the legislature is an important factor in relation to interpretation of statutes. The statute law and the case law go side by side and quite often the relationship between them is supplementary. In other words, interpretation is guided by the spirit of the enactment. Interpretation can be literal or functional. Literal interpretation would not look beyond *litera legis*, while functional interpretation may make some deviation to the letter of the law. Unless the law is logically defective and suffers from conceptual and inherent ambiguity,

it should be given its literal meaning. Where the law suffers from ambiguity, it is said: (Peerless General Finance Case, SCC p.450, para 33) "33. Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say that if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted."

31. The principle of construction of law is stated by HOLMES, J. as under:

"You construe a particular clause or expression by construing the whole instrument and any dominant purposes that it may express. In fact, intention is a residuary clause intended to gather up whatever other aids there may be to interpretation besides the particular words and the dictionary."

22. It is further seen that the legislature in its wisdom has not consciously fixed an uncontrolled unguided and unfettered power on a Controller in order to make his decision as final under the Act. As observed earlier if that is the reason no appeal would be provided against an order of refusal on the ground of procedural violation as against the order passed on adjudication. Therefore based upon the above said discussion and after a proper analysis of the relevant provisions, we are of the considered opinion that a refusal of an application for a grant of patent based upon the acceptance of a representation would come under the purview of Section 15 of the Patents Act, 1970 and hence amenable for an appeal under Section 117-A of the Act.

23. Right to be heard in the Appeal:-

It is not in dispute in the present case on hand that only at the instance of the opposition the patent was refused for the petitioner. In other words, it is the respondent No.4 herein who is the person responsible for the order passed by the Controller dated 27.03.2009. It is a well settled principle of law that an appeal is a continuation of the proceedings. If an appeal is a continuation then the parties to the original proceedings will have to take their litigation to the Appellate Forum. The respondent No.4 has acquired an accrued right in pursuant to the order of the Controller dated 27.03.2009. In as much as the order of the Controller is based upon the opposition of the respondent No.4, in our considered view it is a proper and necessary party to the appeal.

Considering the scope of Section 25(1) which provides for an opposition by any person such a person is also entitled to be heard at the appellate stage. Further if in pursuant to a publication under Section 11-A of the Act any person is entitled to be heard then it cannot be said that at the appellate stage, he cannot be heard because the position continues to be the same if not better in so far as the said person is concerned. In other words, when a person can be allowed to place his opposition on a pending application, the same cannot be refused when such an application has been rejected and the same is appealed against the order obtained in his favour.

24. Principles of Natural Justice:-

Being the person who was responsible for the order passed against the petitioner, the respondent No.4 is entitled to be heard in law on the principles of natural justice. When an order is passed behind the back of a person whose presence is a necessity, it has got civil consequences. If the appeal is allowed then such an order would be a nullity against him in the eye of law. The Hon'ble Division Bench in INDIAN NETWORK FOR PEOPLE LIVING WITH HIV/AIDS v. UNION OF INDIA [(2009) 3 MLJ 791] has observed as follows: "61. In this context, it will also be beneficial to refer to the decision of the Hon'ble Supreme Court STATE BANK OF PATIALA v. S.K.SHARMA AIR 1996 SC 1669 : (1996) 3 SCC 364 : 1996-II-LLJ-296. The Hon'ble Supreme Court of India after referring to number of its earlier decisions has laid down the principle as under at p.309 of LLJ: "29....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 v. S.K.SHARMA (supra) we hold that the decision to grant patent is a nullity and not an irregularity which is to be cured."

25.Applying the said ratio, we are of the opinion that the respondent No.4 will have to be heard in the appeal filed by the petitioner. Further if the appeal is allowed without hearing the respondent No.4 then the very purpose of the enactment of Section 24(1) of the Act which provides for Pre-grant Opposition itself would become redundant. Therefore, we hold that the respondent No.4 has got a legal right to be heard in the appeal filed by the petitioner.

26.In fine, the writ petition is allowed by setting aside the order of the respondent No.1 and consequentially a direction is issued to the respondent No.1 to number the appeal and decide the same on merits and in accordance with law, within a period of three months, from the date of receipt of a copy of this order, after affording an opportunity to the respondent No.4 and by considering its opposition. No costs.

sri

To

1.The Registrar

Intellectual Property Appellate Board

Guna Complex Annexe-I, 2nd Floor

443, Anna Salai

Teynampet, Chennai 600 018.

2.Union of India

Rep.by its Secretary

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3. Assistant Controller of Patents and Designs

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