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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 19.06.2024	Pronounced on: 05.07.2024

CORAM:

THE HON`BLE MR.JUSTICE P.B.BALAJI

(T) CMA (PT) No.202 of 2023

FRITO-LAY TRADING COMPANY-GMBH,
Spitalgasse 2cH-3011, Bern,
Switzerland

.. Appellant

..Vs.

The Assistant Controller of Patents and Designs,
The Patent Office,
Intellectual Property Rights Building,
GST Road, Guindy,
Chennai – 600 032.

.. Respondent

Prayer: This appeal came to be numbered by transfer of IPAB Case SR.No.22/2017/PT/CHN from the file of the Intellectual Property Appellate Board, Chennai praying to allow the present Appeal and set aside/quash the impugned order dated November, 30th 2016 passed by the Respondent in Indian Patent Application No.4698/CHENP/2010; and to direct the grant of patent in respect thereof the said Indian Patent Application No.4689/CHENP/2010.

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For Appellant : Mr.Shatadal Ghosh and
Mr.K.Muthuselvam &
M/s.K & S Partners.

For Respondent : Mrs.M.E.Saraswathi,
Senior Panel Counsel

J U D G M E N T

This Appeal has been preferred under Section 117-A of the Patents Act, 1970, challenging the order dated 30.11.2016, passed by the respondent, refusing to grant a Patent in respect of the Patent Application of the Appellant in Patent Application No.4689/CHENP/2010.

2. The Patent Application pertains to an invention relating to food products containing table salt formulations.

3. The respondent has rejected the Appellant's Patent Application on the grounds that it lacks inventive steps (Section 2(1)(ja)) and that the claim is only a mixture of two types of inorganic salts (Section 3(e)).

4. I have heard learned counsel Mr.Shatadal Ghose, assisted by Mr.K.Muthu Selvam, learned counsel for the Appellant and Mrs.ME.Saraswthi, learned counsel for the respondent.

5. The learned counsel for the Appellant would attack the impugned

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order of the respondent on the ground that the respondent has fundamentally misunderstood the claim of the Appellant and resultantly, misdirected himself and failed to appreciate the inventive steps shown by the Appellant as also misapplied Section 3(e) of the Indian Patents Act, 1970 to the instant Application. He would take me through the impugned order and the various annexures that have been filed, along with other relevant records.

6. The learned counsel for the Appellant would submit that the respondent has also not considered the amended claims of the Appellant in a proper perspective and has also ignored material portions of the specifications in coming to an erroneous conclusion that the claim is only a mere admixture of two types of inorganic salts.

7. The learned counsel would further submit that the reference to prior art, D1 was also misleading, since D1 actually teaches away from the concept of agglomeration or aggregation which is the foundation of the claim of the Appellant. Equally, he would refer to prior art, D2 and contend that even D2 did not disclose aggregates of primary particles. He would also take me through the various examples and also the prior arts and submit that citric acid was used an enhancer and that in the claim of invention, no citric

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acid is used and therefore, the prior arts were in a different direction altogether. Further, the appellant had achieved the result by formation of aggregates and in act the teachings of prior arts were diametrically opposite to the Appellant's claim, especially since the Appellant was able to achieve smoother, smaller size particles when compared to the prior arts.

8. The learned counsel would also invite my attention to 'Patent Law' by Prathiba M. Singh (Vol.1) where the learned Author, referring to Chisum on Patents held that if a prior art reference teaches away from the invention, then the objection as to obviousness would not apply. In the said context, it would be relevant to extract Chisum on Patents:

> "*A reference may be said to teach away when a person of ordinary skill, upon reading the reference, would be discouraged from following the path set out in the reference, or would be leading a direction divergent from the path that was taken by the applicant. The degree of teaching away will of course depend on the particular facts; in general, a reference will teach away if it suggests the line of development flowing from the reference's disclosure is unlikely to be productive of the result sought*."

9. He would also place reliance on the decision of the Delhi High Court, in *Bristol-Myers Squibb Holdings Ireland Unlimited Company and others v. BDR Pharmaceuticals International Pvt. Ltd. and another*, in *CS (Comm) 27/2020*, dated 30th January, 2020. In the said decision, the learned

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Judge of the Delhi High Court, after discussing various case law, formulated certain principles which pertain to whether an invention is obvious or not. Some of the relevant principles are extracted for easy reference:

> *"a) A hindsight reconstruction by using the patent in question as a guide through the maze of prior art references in the right way so as to achieve the result of the claim in the suit, is required to be avoided.*
>
> *b) There should be no teachings away from the patent in question in the prior art.*
>
> *c) Though mosaic of prior art documents may be done in order to claim obviousness, however, in doing so, the party claiming obviousness must be able to demonstrate not only prior art exists but how the person of ordinary kill in the art would have been led to combine the relevant components from the mosaic of prior art."*

10. The learned counsel, relying on the above decision would contend that there is no teachings away as contemplated under the various decisions and hence the respondent ought not to have refused the grant of patent in favour of the Appellant. The learned counsel would further refer to certain procedural lapses and irregularities committed by the respondent in not considering example 7 which answers objection number 4; objection regarding Section 3 was taken only at the hearing notice and not in the FER stage etc.

11. He would finally conclude his submissions stating that the claim had all the advantages of the prior art and at the same time, did not possess

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the disadvantages suffered by the prior arts and in any event the respondent having not discussed and concluded as to how prior arts D1 and D2 were relevant, the order suffers and was therefore liable to be set aside.

12. Per contra, the learned counsel for the respondent would support the findings of the respondent and state that the invention is not patentable under Section 3(e), since there is no difference from the object of prior art D1. With regard to use of citric acid, she would state that in D2 prior art, citric acid is not the enhancer and the mixture of components were different. She would also submit that the claim of the Appellant to have achieved smaller size particles cannot be an invention and the Appellant has not been able to substantiate or explain as to how the aggregates were formed and in in such view of the matter, no synergistic effect has also been shown and consequently the application was rightly refused.

13. The learned Counsel would also refer to the decision in *Bristol*'s case, (referred herein supra) which has been placed before me by the learned Counsel for the Appellant and contend that in terms of the principle laid down there that '*the patent challenger must demonstrate the selection of a lead compound based on its promising useful properties and not a hindsight*

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driven search for structurally similar compounds,' the Appellant's claim being only a combination of two inorganic salts and the same already being available in the prior arts, there is obviousness and therefore the Patent was rightly refused.

14. She would also place reliance on the following decisions:

14.a) In *Galeta Ltd. v. The Controller of Patents* in *(T) CMA (PT) No.19 of 2023, dated 15.04.2024,* where this Court held that Patent Laws are intended to foster inventiveness and not grant Patents for the discovery or identification of something existing, even if buried or tucked away, in the prior art or something obvious on the basis of the prior art.

14.b) *M/s.Bishwanath Prasad Radey Shyam v. Hindustan Metal Industries,* reported in, *(1979) 2 SCC 511*, where the Apex Court held that a Patent should be granted only when the invention is new and useful, having novelty and utility and in order to be patentable, an improvement on something more than a mere workshop improvement.

15. The learned counsel for the Respondent would therefore submit that there is no inventiveness exhibited in the claim and the grant was rightly

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refused/rejected and she would pray for dismissal of the Appeal.

16. I have carefully considered the rival contentions put forth by the learned counsel on either side. I have gone through the entire records, the impugned order as well as the decisions on which reliance is placed on by the learned counsel on both sides.

17. The claim relates to dry food products containing table salt formulations with an object to give the same salt perception, i.e. retaining the salty flavour and at the same time, do away with the harmful effects of high sodium levels in salt.

18. The respondent has cited prior arts D1 and D2 and held that the claim lacks inventive step and the formulation as claimed is only a mixture of two types of particles and it is obvious to a person skilled in the art.

19. The Appellant's fulcrum of the invention is only that the desired result is achieved by not mere an admixture of two inorganic salts but by adopting a process of producing building blocks in a flame spray process and by feeding the resulting salt containing off gas from the reactor, i.e. the

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aerosol directly onto a dry food product. The process of using flame spray is not unknown and hence the same has no inventiveness. However, the formation of aggregates from the primary particles by heating or compaction or exposure to diluted steam or a combination thereof is something that has not been used earlier, at least not in the prior arts D1 and D2. Therefore, now it remains to be seen, if this formation of aggregates is obvious to a person skilled in the art and whether there is any novelty in the process adopted by the Appellant.

20. In prior art D1, it is a method of making the taste modifier by subjecting an organic or inorganic taste modifying material to a flame spray pyrolysis, electro-spraying, evaporation/condensation, sputtering, sol-gel process or ball milling. In the claim made by the Appellant, also this step is used after which there is isolation of particles obtained and then there is an additional formation of aggregates by applying heat and/or pressure and/or exposure to diluted steam to the obtained primary particles. The Appellant is not claiming any invention with regard to the use of flame spray but only on the formation of the aggregates and particles of much smaller size. I find from D1 that the process seeks to avoid formation of aggregates or rather minimises the same. Hence there is merit in the claim of the Appellant that

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the teachings of D1 prior art D1 are entirely different and there can be no question of obviousness made out from the same, in order to put it against the Appellant's claim.

21. In prior art D2, the claim is that by adding citric acid to the food product, the amount of salt that would be normally added can be reduced by about 35% and the method adopted is also completely different from the claimant's. The claimant's process is not based on use of citric acid at all, but only on formation of aggregates that achieve the desired results. Hence, I do not find prior art D2 also coming in the way of the Appellant's claim.

22. Now, it is to be further seen as to whether the claim is hit by Section 3. Initially, in the First Examination Report, this objection was not taken and only a the time of the hearing notice, it was raised. In response to the objections to the notice of hearing dated 09.10.2014, the Appellant, in its written arguments dated 11.11.2014, has in detail, explained the synergistic effect being achieved by the formulation comprising primary particles form sintered aggregated particles which are not only easier to handle but also result in increased salt perception, at lower costs. The respondent has clearly

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misdirected himself in coming to a conclusion that the formulation is only a combination of two types of salts with varied degree of primary particle sizes with the said particles exhibiting their own properties. In the process, the respondent has failed to see that even in example 7, where the Appellant has clearly exhibited considerable sodium level reduction and thereby a synergistic effect.

23. On applying the ratio laid down by the Courts, concisely formulated by way of principles in *Bristol*'s case, (referred herein supra) it is apparent that the respondent has adopted a hindsight approach of reconstruction which is to be avoided in matters relating to grant of patents. There is no quarrel with the ratio laid down by the Hon'ble Supreme Court in *Bishwanath Prasad*'s case (referred herein supra) and this Court in *Galeta Limited*'s case (referred herein supra), either of the prior arts, there is nothing buried or tucked away in as much as it does not involve anything to do with formation of aggregators or large sized primary particles. I also do not find any obviousness from the prior arts and hence, the Appellant is entitled to a grant of the patent. I have no hesitation in holding that the prior arts only disclose a process or technique that is incompatible with the Appellant's claim and thus the prior arts clearly teach away from the

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claimed invention which exhibits not only novelty but also non-obviousness.

24. In fine, the Appeal is allowed and the impugned order passed by the respondent is set aside and resultantly, the Appellant is entitled to a grant of Patent in Indian Patent Application No.4689/CHENP/2010. However, there shall be no order as to costs.

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Index : Yes/No
Speaking/Non-speaking order
rkp

To

The Assistant Controller of Patents and Designs,
The Patent Office,
Intellectual Property Rights Building,
GST Road, Guindy,
Chennai – 600 032.

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