



2024: DHC: 2840



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\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

*Reserved on : 4 December 2023*

*Pronounced on : 9 April 2024*

+ CS(COMM) 229/2019

NOVARTIS AG & ANR. .... Plaintiffs

Through: Mr. Hemant Singh, Ms. Mamta Rani Jha, Mr. Siddhant Sharma, Mr. Abhay Tandon, Mr. Rishabh Paliwal and Ms. Garima Mehta, Advs.

versus

NATCO PHARMA LIMITED .... Defendant

Through: Mr. J. Sai Deepak, Mr. Afzal B. Khan and Mr. Samik Mukherjee, Mr. Dominic Alvares, Mr. Avinash K. Sharma, Mr. Vishal Nagpal Advs.

**CORAM:**

**HON'BLE MR. JUSTICE C.HARI SHANKAR**

**J U D G M E N T**

**09.04.2024**

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**IA 4636/2023 (Order XXXIX Rule 4 of the CPC)**

1. This judgment disposes of IA 4636/2023 filed by the defendant Natco Pharma Limited, seeking vacation of the interim relief granted by this Court *vide* judgment dated 9 January 2023 in IA 6384/2019 in the present suit instituted by Novartis AG against Natco.

**The issue in controversy**

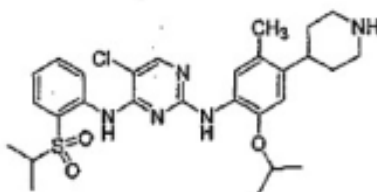
2. The dispute in CS (COMM) 229/2019, in which the present application has been filed, revolves around Indian Patent IN 276026



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(“IN’026”) (also referred to as “the suit patent”), titled “Novel Pyrimidine Compounds and Compositions as Protein Kinase Inhibitors”. Claims 1, 4 and 5 in the suit patent claim a compound bearing the IUPAC name Ceritinib. Claim 1 claims a Markush formula on which, by effecting suggested select substitutions, it is possible to arrive at Ceritinib, which is claimed as Claim 4 in the suit patent. Ceritinib is specifically exemplified as Example 7 in the complete specifications of the suit patent. Ceritinib bears the following molecular structure:



3. The defendant undisputedly manufactures and sells Ceritinib in the open market. Inasmuch as the defendant was, thus, exploiting the suit patent without obtaining a license from the plaintiff, even while the suit patent was valid and subsisting, the plaintiff sought, by the suit, a decree of permanent injunction, restraining the defendant from exploiting the suit patent. The plaintiff also filed IA 6384/2019, seeking interlocutory injunction, restraining the defendant from exploiting the suit patent, pending disposal of the suit.

4. By my judgment dated 9 January 2023, I have allowed IA 6384/2019 and have, therefore, restrained the defendant pending disposal of the present suit, from exploiting the suit patent. The defendant has, therefore, filed the present application IA 4636/2023



under Order XXXIX Rule 4<sup>1</sup> of the CPC, seeking vacation of the interim order of injunction.

### Gist of the order granting injunction

5. The defendant Natco contested the suit essentially on the ground that a suit patent was vulnerable to invalidity as it was anticipated both by prior claiming as well as by prior disclosure and was obvious from the prior art, which was existing on the priority date of the suit patent. The prior art cited by Natco for this purpose were IN 252653 (IN'653) and IN 240560 (IN'560) of the plaintiff, US 7153964 (US'964) of AstraZeneca and US 8188276 (US'276), US 8835430 (US'430), US 9018204 (US'204) and US 9416112 (US'112) of Rigel.

6. The salient features of the reasoning adopted by me in the judgment dated 9 January 2023, whereby interim injunction as sought was granted to Novartis, may be enumerated thus :

(i) A Markush claim in a genus patent could be said to disclose only those compounds which could be synthesised by a person skilled in the art ('PSA' hereinafter) from the teachings contained in the genus patent. The disclosure was required to be

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<sup>1</sup>4. **Order for injunction may be discharged, varied or set aside.**—Any order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order:

Provided that if in an application for temporary injunction or in any affidavit supporting such application, a party has knowingly made a false or misleading statement in relation to a material particular and the injunction was granted without giving notice to the opposite party, the Court shall vacate the injunction unless, for reasons to be recorded, it considers that it is not necessary so to do in the interest of justice:

Provided further that where an order for injunction has been passed after giving to a party an opportunity of being heard, the order shall not be discharged, varied or set aside on the application of that party except where such discharge, variation or setting aside has been necessitated by a change in the



enabling in nature. A PSA, with knowledge of the Markush formula, the suggested substitutions, the properties of the product that he desired to synthesise and in possession of common general knowledge, had to be in a position to arrive at the claim in the suit patent from the Markush formula in the genus patent. Thus, obviousness from prior art was the determinative criterion on the basis of which the Court would ascertain whether the claim in the specie patent was obvious from the teachings in the genus patent.

(ii) The fact that, though the genus patent had remained in existence for a number of years, the specie patent was not synthesised by anyone, *prima facie* indicated that the specie patent was not obvious from the teachings in the genus patent.

(iii) Examining the aspect of anticipation and obviousness of the Ceritinib from the teachings contained in the cited prior art, individually, I found that the defendant had, in respect of each of the prior art patents cited by it to allege obviousness of the suit patent therefrom, arrived at the molecular structure of Ceritinib by cherry-picking selected radicals from the several substituents suggested in the individual prior art patents onto the Markush moiety claimed in each such cited prior art, to arrive at the molecular structure of Ceritinib.

(iv) There was no specific averment, in the written statement filed by the defendant, in the oral submissions advanced at the



Bar or in the written submissions tendered in support thereof, to indicate why the defendant was, in each case, choosing the select substituent from the several substitutions suggested in the prior art patent. In other words, the defendant had failed to establish, in the case of each prior art patent, that the complete specifications relating to the prior art contained the requisite teaching as would enable a PSA, armed with common general knowledge to arrive, from the teachings in the prior art, to Claim 1 in the suit patent, i.e., Ceritinib.

(v) The defendant's submission that there was no distinction between coverage and disclosure was rejected. I observed, in this context, that this aspect had already been dealt with, by me, at length, in the judgment in *FMC Corporation v. Best Crop Science LLP*<sup>2</sup> as well as in *Novartis AG v. Natco Pharma Ltd.*<sup>3</sup>.

(vi) It is only if the claim in the suit patent is obvious to a PSA from the teachings contained in the complete specifications in the prior art, that the suit patent can be regarded as vulnerable to invalidity on the ground of anticipation and obviousness.

(vii) The plaintiff's contention was that the inventive step, in synthesizing Ceritinib from known prior art, was in the tri-substituted N<sup>2</sup>-phenyl ring (linked to the core pyrimidine moiety

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<sup>2</sup> 2021 SCC OnLine Del 3647

<sup>3</sup> 2021 SCC OnLine Del 5340



by an amine linkage) in which one of the substitutions at R<sup>8</sup> or R<sup>9</sup> (as suggested in the Markush formula) is the pyrrolidinyl or piperidinyl or azetidiny ring, linked to the N<sup>2</sup>-phenyl ring by a carbon-carbon bond. None of the prior art patents cited by the defendant disclosed any linkage of a pyrrolidinyl, piperidinyl or azetidiny ring to the N<sup>2</sup>-Phenyl ring by a carbon-to-carbon bond. No such assertion was to be found in the written submissions filed by the defendant or in the written submissions tendered during and after the arguments.

(viii) The defendant's principal submission was, rather, that the study on ALK-inhibitors as Non Space Cells Lung Cancer (NSCLC) therapy was a subject matter of ongoing study and that there were earlier patents which claimed inventions which were useful in that regard. I did not find this contention sufficient to discredit the plaintiff's claim that, in arriving at Ceritinib from known prior art, an inventive step within the meaning of Section 2(1)(ja)<sup>4</sup> of the Patents Act, was involved.

(ix) Moreover, the plaintiff has also sought to contend that, over other drugs which acted as ALK-inhibition therapy, Ceritinib possessed the advantage of fewer side effects. This, even by itself, constituted an inventive step *vis-à-vis* prior art, as suppression of adverse side effects is a matter of vital importance in chemotherapy.

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<sup>4</sup>(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



(x) For all these reasons, the claims in the suit patent, specifically Claims 1, 4 and 5 were found to be novel and inventive, satisfying Section 2(1)(j)<sup>5</sup> and 2(1)(ja) of the Patents Act.

(xi) The defendant's submission that the plaintiff was bound to disclose the X-ray diffraction pattern of the claims in the suit patent and of Ceritinib was also found to be without substance in view of the decision of the Division Bench of this Court in *Merck Sharp & Dohme Corporation v. Glenmark*<sup>6</sup> which holds that, at the stage of adjudication of an application under Order XXXIX Rules 1 and 2 of the CPC, the Court cannot examine X-ray diffraction patterns.

(xii) The reliance of the defendant on the fact that, in its application for patent term extension (PTE) for the US'592 patent, the plaintiff had stated that US'592 claimed Ceritinib was also found to be without substance. A holistic reading of the PTE application filed by the plaintiff in respect of US'592 indicated that the statement that US'592 claimed Ceritinib was made only because, by effecting select substitutions from the suggested substitutions in the Markush moiety claimed in US'592, one could reach Ceritinib. In other words, all that was stated was that Ceritinib was covered by the Markush claim in

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<sup>5</sup> (j) "invention" means a new product or process involving an inventive step and capable of industrial application

<sup>6</sup> (295) 63 PTC 257 (Del) (DB)



US'592.

(xiii) The defendant also sought to rely on the fact that the prior arts cited by it were mentioned in the application filed by the plaintiff for obtaining New Drug Approval (NDA) for ZYKADIA, which was the brand name under which Ceritinib was sold in the US. This was done because U.S.C. § 355(b)(1) required the applicant to file, with the NDA application, the number and expiry dates of all patents with respect to which the holder of the prior art could maintain a claim for infringement if the drug, for which NDA was being sought, was manufactured or sold by anyone without obtaining a licence from the holder of the prior art patent. As such, the reference to the prior art in the NDA was also indicative of coverage of Ceritinib in the prior art.

7. For all these reasons, the submission of the defendant that the suit patent was vulnerable to invalidity within the meaning of Section 107<sup>7</sup> read with Section 64 of the Patents Act was found to be *prima facie* bereft of substance. Accordingly, the defendant was restrained, pending disposal of the suit, from exploiting the suit patent or manufacturing or selling Ceritinib without obtaining a licence from the plaintiff.

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<sup>7</sup> 107. **Defences, etc. in suits for infringement —**

(1) In any suit for infringement of a patent, every ground on which it may be revoked under Section 64 shall be available as a ground for defence.

(2) In any suit for infringement of a patent by the making, using or importation of any machine, apparatus or other article or by the using of any process or by the importation, use or distribution of any medicine or drug, it shall be a ground for defence that such making, using, importation or distribution is in accordance with any one or more of the conditions specified in Section 47.





The defendant's stand in the present application

8. *The present application under Order XXXIX Rule 4 of the CPC does not contest, on merit, the correctness of any of the aforesaid findings on the basis of which interlocutory injunction has been granted and IA 6384/2019 has been allowed.*

9. The only ground urged in the present application is that the plaintiff had filed a Divisional Application, being IN 5338/DELNP/2014, in respect of some of the claims in the suit patent, on an objection being raised by the Controller of Patents regarding unity of claims in the application for the suit patent.

10. It is submitted by Mr. J. Sai Deepak that the objections raised by him, to contest the validity of the suit patent – which stand rejected, *prima facie*, by the order dated 9 January 2023 – were raised by the patent office in the FER objecting to the Divisional Application filed by the plaintiff. Mr. Sai Deepak submits that, as the Divisional Application was finally refused, it was incumbent on the plaintiff to disclose the filing of the Divisional Application as well as the fact that it was finally refused, as that would seriously impact *prima facie* case that the plaintiff seeks to urge to obtain an interim injunction.

11. To support his submission, Mr. Sai Deepak took me through the original complaints in the Divisional Application as well as the claims



as reduced consequent to objections raised by the Controller, to point out that the claims which survived were the same as the claims in the suit patent. Even after reduction of claims, he points out that the Controller, in its FER issued in response to the reduced 16 claims, reiterated the objections against the original claims. Thereupon, the plaintiffs intimated the Controller that it did not wish to pursue its Divisional Application. The Divisional Application was, therefore, rejected by the Controller as refused *vide* order dated 16 December 2022.

**12.** Mr. Sai Deepak submits that, inasmuch as the refusal was under Section 15<sup>8</sup> of the Patents Act, it would not tantamount to abandonment of the Divisional Application but has to be treated as a decision on merits. In these circumstances, he submits that (i) the Divisional Application and the FER issued by the Controller to the Divisional Application, (ii) the Divisional Application as reduced to 16 claims, (iii) the FER issued in response to the said reduced claims and (iv) the final order rejecting the Divisional Application under Section 15 of the Patents Act, were all relevant documents which stand concealed in the plaint.

**13.** Mr. Sai Deepak submits that Ceritinib was claimed as Compound 66 in the amended claim. By abandoning the Divisional Application, Ceritinib became available in the public domain. The

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<sup>8</sup> 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.



failure to disclose these facts, submits Mr. Sai Deepak, vitiates the order dated 9 January 2023, which was passed by this Court in ignorance of these facts.

**14.** This sole fact, submits Mr. Sai Deepak, justifies vacation of the order dated 9 January 2023.

**15.** In response, Mr. Hemant Singh draws attention to Section 16 of the Patents Act, which requires a Divisional Application, in order for it to survive, to contain claims which are not identical to those in the parent application. The rejection of the plaintiffs' Divisional Application, he submits was because the plaintiffs did not choose to prosecute it. It could not be treated as a rejection on merits. He submits that, in law, it is the suit patent which could invalidate the Divisional Application and not *vice-versa*. The fate of a Divisional Application can have no bearing on the suit patent.

**16.** Moreover, he submits that the order dated 9 January 2023 was not impacted, in any manner, by the fate of the Divisional Application.

**17.** Mr. Hemant Singh further submits that suppression and concealment cannot be a ground for seeking vacation of the interim order under Rule XXXIX Rule 4 CPC, where the order of interim injunction was granted after hearing the parties. He relies, for this purpose, on the judgment of a Full Bench of the High Court of Madhya Pradesh in *Ravi Shankar v. VII Additional District Judge*<sup>9</sup>.

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<sup>9</sup> (1994) MPLJ 783



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Nor can the defendant seek to plead undue hardship as the possibility of irreparable loss was one of the factors which was taken into consideration by this Court while passing the order dated 9 January 2023, granting interim injunction to the plaintiff. Undue hardship, within the meaning of Order XXXIX Rule 4 of the CPC must, therefore, necessarily refer to hardship which arose after the passing of the order of interim injunction.

**18.** Mr. Hemant Singh proceeded to trace the sequence of applications and decisions thereon, culminating in the order dated 16 February 2022 passed in the Divisional Application. He submits that, in the original PCT application, filed by the plaintiff on 19 June 2008, there were 20 claims. Of these, seven claims were granted, which were included in the suit patent. In the FER dated 12 November 2013, issued by the Controller, in response to the application for the suit patent, an objection regarding absence of unity of the invention and consequent violation of Section 10(5)<sup>10</sup> of the Patents Act was taken in para 2. The FER also relied on three prior arts, namely WO'454, WO'894 and WO'940 which have already been considered by this Court in the order dated 9 January 2023, while granting the interim injunction. The plaintiffs, in their reply dated 3 June 2013, to the FER of the Controller, without accepting the validity of the grounds for rejection contained in the FER, agreed to revise the pending claims under Section 57(6)<sup>11</sup> of the Patents Act. The claims were, therefore,

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<sup>10</sup> 10. **Contents of specifications—**

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(5) The claim or claims of a complete specification shall relate to a single invention, or to a group of inventions linked so as to form a single inventive concept, shall be clear and succinct and shall be fairly based on the matter disclosed in the specification.

<sup>11</sup> **57. Amendment of application and specification or any document related thereto before**



reduced to 13. Subsequently, in its written submission dated 19 November 2015, the plaintiffs reduced the claims to 7, which were ultimately granted.

**19.** In the Divisional Application dated 26 July 2014, points out Mr Hemant Singh, all 20 PCT claims were filed. The FER to the Divisional Application was issued by the Controller on 25 April 2018, whereas the suit patent had been granted on 28 September 2016. In the FER, one of the objections was that the subject matter of Claims 1 to 20 of the Divisional Application conflicted with the parent application and therefore, could not be allowed under Section 16 of the Patents Act. The FER once again cited the very same prior art patents, as was cited in the FER issued in response to the original patent application, and which have already been considered by this Court while passing the order dated 9 January 2023, viz. WO'454, WO'894 and WO'980. The plaintiffs, in their reply to the FER, agreed to reduce the claims to 16, so that they would not clash with the claims in the suit patent. However, as both originated from the same PCT claim, the reduced claim included Ceritinib.

**20.** The Section 16 objection raised by the Controller, remained in the personal hearing notice issued to the plaintiffs on 11 November 2022. It was in these circumstances that the plaintiffs in their communication dated 9 December 2022, informed the Controller that it did not wish to pursue the application. It was this decision, in turn,

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**Controller.—**

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(6) The provisions of this section shall be without prejudice to the right of an applicant for a patent to amend his specification or any other document related thereto to comply with the directions of



which led to the order dated 16 February 2022, refusing the application under Section 15 of the Patents Act.

**21.** The said refusal does not, therefore, in Mr. Hemant Singh's submission, in any manner, impact the order dated 9 January 2023 passed by this Court in the present case or make out a case for its vacation or modification.

## **Analysis**

### Division Application not refused on merits

**22.** The submission of Mr. Sai Deepak cannot be accepted, and for a very simple reason. The Divisional Application IN 5338/DELNP/2014 filed by the plaintiff was not rejected on merits. There is no adjudication by the Patent Office on the objections raised in the FER against the Divisional Application. The order passed in the Divisional Application reads thus:

“The applicants were provided with an opportunity to be heard on 12/12/2022. However, the applicant has not complied objections with and the attorney did not appear for hearing which was also confirmed by the correspondence of the applicant filed on 09/12/2022 regarding the intimation of applicant for the not attending the hearing and the applicant were stated there that does not wish to pursue the application. In view of these the application for patent 5338/DELNP/2014 is refused u/s 15 of the Patents Act. 1970.”

**23.** It is clear that the Divisional Application was, therefore, not rejected on merits, but because the applicant itself chose not to pursue

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the Controller issued before the grant of a patent.



the application. A decision not to pursue a Divisional Application cannot be regarded, by any stretch of imagination, as acknowledging the merit of the objections contained in the FER raised against the Divisional Application by the Patent Office. There may be myriad reasons why a party does not choose to pursue a Divisional Application. The decision not to pursue the Divisional Application cannot estop the plaintiff from contesting the grounds on which the validity of the suit patent was sought to be assailed by the defendant.

**24.** Mr. Sai Deepak also sought to contend that, though the order on the Divisional Application appeared to be an order passed consequent to the plaintiff deciding not to pursue the application, it was in fact an order of refusal on merits, as it was passed under Section 15 of the Patents Act.

**25.** Ergo, submits Mr. Sai Deepak, by deciding to refuse the plaintiff's Divisional Application, the objections raised by the Patent Office in the FER must be treated to have been confirmed.

**26.** The submission fails to impress.

**27.** In my opinion, no more can be read into the order of refusal on the Divisional Application than is stated therein. There is, quite clearly, no decision on merits on the objections contained in the FER raised by the Patent Office. The omission, on the part of the plaintiffs, to make reference to the Divisional Application cannot, therefore, seriously impact, in any way, the *prima facie* merits of the case. Nor



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could it be said that, had the Divisional Application and the outcome thereof, been disclosed, verdict on the plaintiff's application for interlocutory application would have been otherwise.

**28.** Plainly expressed, the entire foundation of the Order XXXIX Rule 4 application of the defendant is the Divisional Application which was filed by the plaintiff. That application was, ultimately, not pursued, and was accordingly refused. The reference to Section 15 of the Patents Act cannot convert the decision into an adjudication on merits of the claims in the Divisional Application. The Court has to take the decision on the Divisional Application for what it is, and as it reads, and, thus viewed, it is apparent that the application was "refused" not because it was found to be meritless, but because the plaintiff chose not to pursue it.

Assuming, *arguendo*, that the decision on the Division Application were to be regarded as on merits

**29.** Even if it were to be assumed, *arguendo*, that the reference to Section 15 in the order on the Divisional Application would justify the order being read as reflective of the merits of the application, I am still unable to agree with Mr. Sai Deepak that the decision would justify recall, or vacation, of the interim injunction granted to the plaintiff in the present case. It goes without saying that the decision of the Controller is not binding on the Court and, is, at the highest, a factor which the Court could take into account, *even if it were to be regarded as an opinion on merits*. When, on an independent analysis on merits, this Court has found the suit patent *not to be vulnerable to invalidity*





on any of the grounds envisaged in Section 64 of the Patents Act, the opinion of the Controller can hardly be cited as a ground for this Court to revisit, much less reverse, its decision. That would be analogous to this Court being called upon to reverse an interim order granted by it because the view adopted by it is contrary to the decision of a hierarchically lower Court, which was not brought to its notice.

**30.** I do not deem it necessary, therefore, to enter into the specifics of the Divisional Application, or its legality or validity vis-à-vis the original application filed by the plaintiffs which resulted in the grant of the suit patent. It has to be remembered that the prior arts which were cited by the Controller in the FER against the Divisional Application have all been considered by me in the judgment dated 9 January 2023, by which interim injunction was granted to the plaintiffs. Even were the facts relating to the Divisional Application to have been disclosed, therefore, there is no possibility of the outcome of IA 6384/2019 having been any difference. The failure on the part of the plaintiffs to disclose the aforesaid fact cannot, therefore, be regarded as sufficient to justify a revisit of the order dated 9 January 2023.

#### Second proviso to Order XXXIX Rule 4

**31.** Besides, the second proviso to order XXXIX Rule 4 of the CPC proscribes any revisit of an interlocutory injunction order under Order XXXIX Rules 1 and 2 of the CPC, where the order was passed after hearing the defendant, save and except whether the variation is



necessitated by a change in circumstance or whether the order has caused undue hardship to the defendant. Though there is an averment in the present application that it has been necessitated owing to a change in circumstances, the averment is not supported by any material whatsoever. Inasmuch as the Divisional Application and its outcome were much prior to passing of the order dated 9 January 2023, they cannot constitute “change in circumstances” within the meaning of Order XXXIX Rule 4 of the CPC.

**32.** Nor can the defendant legitimately claim that the order dated 9 January 2023 has resulted in undue hardship to it, as the order was passed after a threadbare analysis of all submissions urged by the defendant, and after expressing a *prima facie* view that, the facts and the law considered, the suit patent was not vulnerable to invalidity on any of the grounds urged by the defendant, or on the basis of any of the prior art patents which the defendant had sought to press into service.

Outcome of Divisional Application does not affect findings of fact in order dated 9 January 2023

**33.** In fact, once, after considering all these circumstances, this Court has already found the suit patent not to be vulnerable to invalidity, there can obviously be no question of revisiting the said decision merely on the basis of the submission advanced by Mr. Sai Deepak, predicated on the Divisional Application and its outcome. The findings regarding the suit patent not being vulnerable to invalidity for any of the reasons cited by the defendant would continue



to remain untouched and undisturbed, even if the Divisional Application, and its ultimate fate, were to be taken into account.

### Suppression of fact

**34.** On the aspect of suppression of material fact, to the extent it is fatal to a prayer for relief, the Supreme Court, in *SJS Business Enterprises Pvt Ltd v. State of Bihar*<sup>12</sup> has held thus:

“13. As a general rule, suppression of a material fact by a litigant disqualifies such litigant from obtaining any relief. This rule has been evolved out of the need of the courts to deter a litigant from abusing the process of court by deceiving it. But the suppressed fact must be a material one in the sense that had it not been suppressed it would have had an effect on the merits of the case. It must be a matter which was material for the consideration of the court, whatever view the court may have taken [*R. v. General Comms. for the purposes of the Income Tax Act for the District of Kensington*<sup>13</sup>].”

**35.** It is only, therefore, suppression of a fact which, if disclosed, would alter the outcome of the case, which can be regard as a material fact, as would justify a revisitation of the order of interim injunction.

### Re. plea of Ceritinib becoming available in the public domain consequent on refusal of Divisional Application

**36.** The submission that, with the refusal of the Divisional Application, Ceritinib became available for exploitation in the public domain, too, cannot be accepted. The “refusal” of the Divisional Application does not, either in fact or in law, extinguish the suit patent. The claim for a patent for Ceritinib stands granted in the suit

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<sup>12</sup> (2004) 7 SCC 166

<sup>13</sup> (1917) 1 KB 486 : 86 LJKB 257 : 116 LT 136 (CA)



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patent and, until and unless the suit patent is invalidated, the patent continues to remain valid. Any exploitation of Ceritinib by a third party, during the life of the suit patent, therefore, infringes the suit patent, and cannot be permitted. Mr. Hemant Singh put the point pithily in his submission that it is the Divisional Application which is dependent on the suit patent, and not *vice versa*.

**37.** Given the findings in the order dated 9 January 2023, the failure to disclose the facts relating to the Divisional Application cannot be regarded as such as would justify vacation of the order of injunction.

### **Conclusion**

**38.** For the aforesaid reasons, the present application fails and is dismissed.

**C.HARI SHANKAR, J**

**APRIL 9 , 2024**

*Yg/dsn/rb*

*Click here to check corrigendum, if any*