



Sharayu Khot.

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INTERIM APPLICATION (L) NO. 161 OF 2024

IN

COMMERCIAL MISCELLANEOUS PETITION (L) NO. 36305 OF 2023

AIC246 AG & Co. KG

...Applicant/
Petitioner

Versus

The Patent Office of India & Ors.

...Respondents

Mr. Amey Nargolkar, Ms. Nisha Austine and Mr. Dhiren Karania i/by
Khaitan & Co. for the Petitioner.

Mr. Rashmin Khandekar, Mr. Anand Mohan a/w Ms. Vandita
Malhotra Hegde, Mr. Rishi Mody, Ms. Archi Gala i/by VMH &
Associates for the Respondent No. 3.

CORAM : R.I. CHAGLA J

DATE : 19 August 2024

ORDER :

1. By this Petition, the Petitioner is seeking condonation of
91 days in filing the Petition/Appeal.

2. The Applicant has in paragraph 3 of the Petition stated
that there is delay of 91 days in filing the Petition/Appeal which is

inadvertent and neither willful nor wanton. The Applicant has further stated that it is a foreign Company based in Germany and soon after the receipt of the impugned order, the Applicant engaged in consultations with their Indian Counsel for advice on the reasons for the rejection of the Application and the available course of action for seeking suitable relief. It is stated by the Applicant that the subject matter of the patent Application is highly technical and the rejections in the impugned order included complex technical issues including lack of novelty, lack of inventive step and non patentability under Section 3(d) of the Patents Act, and further it took time to evaluate the reasons. The Applicant has also stated that he referred the case and related technical issues to the inventors and technical experts team for their opinion and inputs on the novelty inventive step and Section 3(d) issues. The Applicant has further engaged in discussions with their Indian Counsel for advice on procedural grounds of denial of an opportunity to be heard on objections raised by the Controller and insufficient reasoning for the rejections in the impugned order and after several rounds of deliberation and consultation, the grounds of Appeal were finalized.

3. The draft Appeal was thereafter sent to the

Applicant/Petitioner in Germany and after obtaining their suggestions, the Appeal/Petition was accordingly, amended. The Petition was finalized for filing and delay caused in the filing of the Petition/Appeal is stated to be inadvertent and beyond the control of the Applicant.

4. Mr. Nargolkar, the learned Counsel appearing for the Applicant has referred to certain list of dates and events, which do not appear in the averments in the Petition. The impugned order dated 26th June 2023 was admittedly issued by Respondent No. 2 and received by the Indian Counsel of the Petitioner. Thereafter, instructions were issued by the Applicant's German Counsel to the Indian Counsel on 12th September 2023 to proceed with the preparation of the Miscellaneous Petition. Further, dates and events are with regard to preparation of the Miscellaneous Petition and inputs provided by the Applicant's German Counsel to the Indian Counsel, who drafted the Petition. There were revisions in the draft Petition. On 3rd November 2023, the Power of Attorney in favour of the Constituted Attorney was prepared by the Indian Counsel and sent to the Applicant's German Counsel for execution and notarization. The execution and notarization of Power of Attorney in

Germany took time and the Power of Attorney in original was received by the Indian Counsel through the Applicant's German Counsel on 14th December 2023. There was co-ordination with the Constituted Attorney and execution of documents by the Constituted Attorney between 15th December 2023 to 27th December 2023, on which date, the Miscellaneous Petition was filed via e-filing module.

5. Mr. Nargolkar has referred to the decision of the Supreme Court in **Mool Chandra Vs. Union of India & Anr.**¹, wherein the Supreme Court has held that it is not the length of delay that would be required to be considered while examining the plea for condonation of delay, but it is the cause of delay which has been propounded which will have to be examined. If the cause of delay would fall within the four corners of "*sufficient cause*", irrespective of the length of delay, the same deserves to be condoned.

6. Further in paragraph 22 of the said decision, the Supreme Court has held that if negligence can be attributed to the Applicant, then necessarily the delay which has not been condoned by the Tribunal and affirmed by the High Court deserves to be

¹ CA/8435 – 8436 of 2024

accepted. However, if no fault can be laid at the doors of the Appellant and cause shown is sufficient, then the Supreme Court was of the considered view that both the Tribunal and the High Court were in error in not adopting a liberal approach or justice oriented approach to condone the delay.

7. Mr. Nargolkar has also referred to the decision of the Supreme Court in **Municipal Council, Ahmednagar and Anr. Vs. Shah Hyder Beig and Ors.**², which has also been relied upon in the Judgment of the Supreme Court in **Mool Chandra** (supra). The Supreme Court in that decision held that the real test for sound exercise of discretion by the High Court is not the physical running of time as such but the test is whether by reason of the delay, there is such negligence on the part of the Petitioner so as to infer that he has given up his claim or where the Petitioner has moved the writ Court, the rights of the third parties have come into being which should not be allowed to be disturbed unless there is reasonable explanation for the delay.

8. Mr. Nargolkar has submitted that in the present case,

² 2000 (2) SCC 48

there is no negligence on the part of the Applicant and that sufficient cause is shown for the delay and accordingly, delay be condoned.

9. Mr. Khandekar, the learned Counsel appearing for the Respondent No. 3 has submitted that there are no reasons which have been given in the present Application filed for condonation of delay. He has referred to paragraph 3 of the Application, wherein no particulars have been given of the delay which has now sought to be presented to this Court by way of list of dates. He has submitted that it is provided in Rule 16 of the Intellectual Property Appellate Board (Patents Procedure) Rules, 2010 that the Appellate Board (now replaced by the Court) may extend the time, if it is satisfied that there is sufficient cause for extending the time and this is subject to such conditions as it may deem fit to impose. He has submitted that in the event, the Court is inclined to extend the time for filing of the Petition, costs are required to be imposed, particularly, the circumstances of the present case.

10. I have considered the submissions. In my view, the Patent's Act, 1970 and in particular, Section 117A(4) thereof has provided for a period of three months from the date of impugned

order of the Controller of Patents for filing of Appeal or within such further time as the Appellate Board may in accordance with the Rules allow. The relevant Rule being Rule 16 of the Intellectual Property Appellate Board (Patents Procedure) Rules, 2010. Under the said Rule, extension of time may be granted provided sufficient cause has been shown for extending time and that too, subject to conditions as this Court may impose for extending the time.

11. The cause for the delay in the present case is that the Applicant is a German company and due to which extra time was taken for receiving instructions from the Applicant is German Counsel and thereafter, the Petition could be prepared. In my view, the aforementioned provisions of law in the Patent Act, 1970 is applicable to all companies irrespective of whether they may be Indian or German. There is a three months period prescribed for filing of Appeals from the impugned orders of Controller Patent.

12. The present Application is bereft of particulars as to the delay in filing of the Petition. There does appear to be a delay of 91 days i.e. twice the statutory period which is prescribed under the Patent's Act, 1970. Although the dates and events have been

furnished by Mr. Nargolkar on behalf of the Applicant, these dates and events find no place in the Interim Application as filed. Further, from these dates, it appears that there has been no urgency shown by the Applicant to have the present Petition filed within the statutory period of time. The delay is merely due to time taken for instructions from the Applicant's German Counsel, input from the German Counsel and execution and notarization of the Power of Attorney in Germany by the Applicant.

13. Accordingly, this Court considers it fit to extend the time only upon imposition of costs under Rule 16 of Intellectual Property Appellate Board (Patents Procedure) Rules, 2010 read with 117A(4) of the Patent's Act, 1970. This Court is not impressed with the argument of Mr. Nargolkar that the fact of the Applicant being a German company should be taken into account and/or it takes time in Germany for execution and notarization of Power of Attorney and accordingly, there has been delay. This does not explain why instructions were received by the Applicant through its German Counsel only on 12th September 2023 i.e. over almost two and half months after the impugned order dated 26th June 2023 was passed.

14. Accordingly, following order is passed.:-
- (i) Delay of 91 days in filing of the Petition/Appeal is condoned, subject to payment of costs of Rs. 1,00,000/- (Rupees One Lakh only) which shall be paid by way of Pay Order to Baldeodas Bhagirathi Shah Trust (Indian Bank A/c No: SB – 416093029, IFSC No: IDIB000N052, Branch : Mittal Tower, Nariman Point, MICR: 400019020), within a period of two weeks from the date of this order.
 - (ii) Registry shall accept the filing of the present Petition/Appeal.
 - (iii) Interim Application is accordingly, disposed of.

[R.I. CHAGLA J.]