

# INTELLECTUAL PROPERTY APPELLATE BOARD

Guna Complex, Annexe-I, 2<sup>nd</sup> Floor, 443, Anna Salai,  
Teynampet, Chennai – 600 018

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**Review Petition No. 1/2013 in  
Miscellaneous Petition No. 33/2013 in ORA/15/2010/PT/DEL**

WEDNESDAY THIS, THE 13<sup>TH</sup> DAY OF NOVEMBER, 2013

**HON'BLE MS. S. USHA** - **VICE-CHAIRMAN**  
**HON'BLE SHRI D.P.S. PARMAR** - **TECHNICAL MEMBER**

Mylan (Previously Matrix) Laboratories Limited  
A Company Registered under the Companies Act 1956  
Having its registered office at Plot No.564/A/22, -- Applicants  
Road No.92, Jubilee Hills,  
Hyderabad – 500 033.

(By Advocate Mr. S. Majumdar & Mr. Dominic Alvares)

**Vs**

Pfizer Inc., a US Corporation having office  
At Eastern Point Road, Groton,  
Connecticut 06340, USA, -- Respondent 1  
Having address for service in India  
At their Patent Agent's office at  
DePenning & DePenning, 120 Velachery Main Road,  
Guindy, Chennai 600 032.

OSI PHARMACEUTICALS INC.  
A US Corporation having office at suite 110,  
58 South Service Road, Melville, NY 11747, USA,  
Having address for service in India -- Respondent 2  
At their Patent Agent's Office at  
De Penning & De penning, 120 Velachery Main Road,  
Guindy, Chennai 600 032.

F. HOFFMAN-LA ROACHE LTD,  
A Swiss Company having its place of business  
at Grenzacherstrasse 124, CH-4070 Basel,  
Switzerland having address for service in India -- Respondent 3  
at their Patent Agent's Office at  
DePenning & DePenning,  
120 Velachery Main Road, Guindy, Chennai 600 032.

The Controller of Patents, The Patent Office,  
Intellectual Property office,  
Intellectual Property Office Building, -- Respondent 4  
Plot No.32, Sector 14, Dwarka,  
New Delhi-110 075.

(By Shri P.S. Raman, Sr. Advocate, Shri N. Mahabir, Mr. Darban Wadhwa,  
Mr. Shrawan Chopra, Ms. Prachi Agarwal and Ms. Krutika Bhatia)

**ORDER (No. 257 of 2013)****HON'BLE MS. S. USHA, VICE-CHAIRMAN:**

This Review Petition is filed by the respondents 2 & 3 in the main application against the order dated 14/05/2013 passed by this Board in Miscellaneous Petition No. 33/2013 in ORA/15/2010/PT/DEL.

The facts of the case is that:

2. The original application is for revocation of the Patent No. 196774 under the provisions of the Patents Act, 1970 as amended by the Patents (Amendment) Act, 2005.
3. The applicant herein filed a Miscellaneous Petition No. 33/2013 for taking on record 12 additional documents. The respondents filed their counter affidavit objecting to the Miscellaneous Petition being allowed. This Board heard the matter and passed an order dated 14/05/2013 allowing the Miscellaneous Petition as hereunder:-

“11. Whenever documents are produced either at the proper time or belatedly and they are received by the judicial authority, it is always subject to proof, admissibility and relevance. The fact that they are received does not mean that they are accepted. They will be examined in accordance with law and the authority will decide whether they support the case of the party who produces the evidence.”

“12. In this case, the Petitioner claims that these documents would show that the duty under Section 8 of the Patents Act was breached by the Respondent. After Justice Ayyangar’s report, when this Act came into force, the law makers have made the failure to disclose the information required by Section 8 as a ground for revocation. It stands on the same footing as anticipation or obviousness, no less. If anticipation and obviousness would vitiate the claim of innovation and result in revocation of the patent, non-disclosure of the information would also result in revocation. This is what the law says. If that is so, then the ratio in (1994) 4 SCC (cited supra) applies to this case. If they prove the Petitioner’s case then these documents are essential for rendering justice. We do not see why we should shut the documents out merely because they have been filed with delay.”

“13. Candor and honesty is the *sine qua non* for a person who claims a monopoly and no patent which has been acquired by breaching this duty of candor shall remain. The patent litigation is imbued with public interest. We are surprised that the party who has not allegedly disclosed the documents which he was bound in law to disclose, should complain of suppression on the part of the other who is placing the same before us. The fact that the Petitioner has brought these documents may be belatedly, will not prevent us from receiving them. All that the Patentee can expect is an opportunity to rebut, which the Patentee shall have. However, we feel that there is a great laxity on the part of the parties to the patent litigation in bringing the documents and filing

them at the earliest juncture. Whoever the party is, early filing of documents would be fair, except of course in rare cases. So we want to convey a message to the litigants and the members of the Bar that there is a duty to act with diligence and alacrity too, if a document is known to them. Therefore, we impose terms on the Petitioner as a condition for receiving the documents.”

“14. The question whether the Petitioner gave up Section 64(1)(j) or not will be decided when the revocation is heard. This is not the stage when we should decide that issue. This MP is primarily concerned with the reception of additional documents. The MP is allowed on condition that the Petitioner pays a sum of Rs.10,000/- as cost within a week from today failing which the application will be dismissed as regards all the documents except US '221. The Respondent will have three weeks to file their response to these documents and the Counsel shall consult with each other and communicate to the Registry the date convenient to them for hearing the matter at Chennai, preferably before 30<sup>th</sup> June, 2013, because the Hon'ble Delhi High Court has asked the IPAB to hear the main matter in close proximity after this petition is disposed of.”

4. On receipt of the order, the petitioners found certain errors apparent on the face of the record and therefore filed this Review Petition on various grounds that:-

5. The Board has not given a finding as to whether the reason given by the respondent (applicant herein) is correct or not and as to filing of the

additional documents is in time or not. The Board has concluded that the documents have been filed belatedly but still has taken on record the documents. There is no reasoning whatsoever in allowing the documents filed after three years of the completion of pleadings. The Board has omitted to decide and adjudicate on whether the documents which are beyond the scope of pleadings, can be taken on record.

6. The findings are contrary to the settled law as laid down by the Apex Court in Khoday's case – 2008(10) SCC 723 -- Khoday Distilleries Limited vs. Scotch Whisky Association and others – wherein the powers of the Board for cancellation are held to be discretionary and not mandatory depending upon the facts and circumstances of the case. The Hon'ble Board erred in postponing the adjudication of the fact that the applicant had given up the ground of section 64(1)(j) which was in direct conflict of the Division Bench order in RFA No. 92 of 2012. The Hon'ble Board erred in not appreciating that the applicant, having made a statement to their advantage, before the Division Bench, could not resolve the same before the Board.

7. The Board having observed that the documents have been filed at the belated stage when they were in their possession, erred in allowing the Miscellaneous Petition taking on record the additional documents. The judgments relied on by the applicants were not considered by the Board.

8. We heard the learned counsel Mr. S. Majumdar for the applicants and Mr. P.S. Raman, learned Senior Counsel for the respondents.

9. The learned counsel for the petitioner submitted that orders were passed in Miscellaneous Petition No. 33 of 2013 in ORA/15/2010/PT/DEL

taking on record the additional documents on 14/05/2013. The review petition was filed on 23/05/2013 within the stipulated period.

10. The US Patent '221 was relied on by the respondents herein in the Miscellaneous Petition No. 33 of 2013. There is no reason for the delay. There is no reason as to why these documents were not filed along with the application for rectification in the year 2010, which were very much in their possession.

11. The learned counsel then relied on the order passed by this Board in Review Petition No. 1 of 2011 regarding the powers of the Board in dealing with the Review Petitions. The Board had not granted any leave for the applicants to file any such application for additional documents. If the additional documents are accepted, has it been relied on and pleaded in their revocation application.

12. The observation made in para 12 of the impugned order as regards section 8 of the Act was an error because of the Judgement by the Hon'ble Delhi High Court. Except for US Patent '221 documents, the other eleven documents are irrelevant and are not supported by pleadings.

13. The learned counsel then relied on the judgement reported in 2008 (10) SCC 723 – Khoday Distilleries Limited Vs. Scotch Whisky Association and Ors. – which deals with the delay in filing the evidence. The Board though had recorded the statement of the respondent in the Miscellaneous Petition that no leave was granted for exchange of documents had erred in not giving any reasons for the same.

14. The IPAB Order No. 41 of 2013 passed on 08/03/2013 in the TVS matter (Miscellaneous Petition No.124/2012 in ORA/1/2007/PT/MUM – M/s. TVS Motor Company Ltd. Vs. Bajaj Auto Ltd.) was relied on to say that documents filed after a delay of four years cannot be taken on record.

15. ILR Supp. 5 (2007) Delhi 18 – M/s. Gold Rock World Trade Ltd. Vs. M/s. Veejay Lakshmi Engineering World Ltd. – where it was relied on to say that there must be reason for the delay in filing the documents at a belated stage. If the additional documents are to be considered there must be a pleading to that extent in the application for revocation.

16. The parties can lead evidence limited to their pleadings and the parties while leading evidence cannot travel beyond pleadings – 166 (2010) DELHI LAW TIMES 629 -- Prakash Rattan Lal Vs. Mankey Ram.

17. Fraud has to be pleaded with cogent evidence.

18. In reply, the learned counsel for the respondent submitted that the main issue is only with regard to the failure to disclose the information required under section 8 of the Act for revocation. The same has been recorded at para 12 of the impugned order. The petitioners allegation that the documents were with the respondents in 2009 itself is false.

19. The judgement in TVS matter (Supra) is not relevant to this case on hand. Evidence beyond the scope of pleadings is not correct. The prayer in the Review Petition is contrary to the prayer sought for in the Writ Petition filed before the Hon'ble Delhi High Court. Documents when found necessary to decide the real issue, the court will receive the document in [1994] 1SCR 429 – Billa Jagan Mohan Reddy and Anr. Vs. Billa Sanjeeva Reddy and Ors.

20. The petitioner herein were granted opportunity to file their reply evidence and therefore no error.

21. Section 8 – discretionary power is not correct.

22. AIR 2000 SC 84 – Ajit Kumar Rath Vs. State of Orissa & Ors. – Except an attempt to correct an apparent error any other attempt not based on any ground set out in Order 47 would amount to abuse of the liberty given to the Tribunal under the Act to review its judgement.

23. OA/17/2012/PT/DEL (IPAB Order No. 263 of 2012 – Astrazenceca U.K. Limited Vs. Natco Pharma Limited and Ors.) was relied on and submitted that as observed by the Apex Court in Satyanarayan's Case (AIR 1960 SC 137 – Satyanarayan Laxminarayan Hegde and Ors. Vs. Mallikarjun Bhavanappa Tirumale) – an error apparent has to be established and such error cannot be cured by a writ.

24. In rejoinder, the learned counsel for the petitioner submitted that the respondents are the petitioner in the Miscellaneous Petition for taking on record additional documents have not given any reason for the delay nor have they stated the date of knowledge of these documents. The prayer in the writ petition was as a safeguard though the review petition was filed earlier.

25. We have heard and considered the arguments of both the counsel.

26. The main grounds of review is that though it has been stated to be a belated filing of additional documents no reason given for allowing the

documents filed at the belated stage. The documents filed are beyond the scope of pleadings and therefore, cannot be taken on record. The Board erred in considering the provisions of section 8 of the Act.

27. The provisions of Order 47 Rule 1 is reproduced below:-

“1. Application for review of judgment.—(1) Any person considering himself aggrieved,—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court or Small Causes,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.”

28. The orders of this Board can be reviewed no doubt as it has been held by our recent judgement dated 08/07/2013. It however does not mean that all the matters are to be reviewed giving an opportunity to the parties and hearing them on merits of the matter which will be an appeal in disguise.

29. The provision of Order 47 CPC is very clear that only on discovery of a new evidence or after exercise of due diligence or which was not within his

knowledge when the order was passed or on account some mistake apparent on the face of the record may apply to the court to review the order.

30. The only grievance of the review petitioner is that the documents filed at a belated stage shall not be taken on record and when it is said to be a belated filing. The Board had to have given reasons for accepting such delayed documents. We think in such a case there is no error. The documents have been taken on record giving an opportunity to the other side to file documents.

31. In this case on hand, we do not find any error apparent on the face of the record. The order is clear which reads as follows:-

“11. Whenever documents are produced either at the proper time or belatedly and they are received by the judicial authority it is always subject to proof, admissibility and reliance. The fact that they are received does not mean that they are accepted. They will be examined in accordance with law and the authority will decide whether they support the case of the party who produces the evidence.”

“14. The Respondent will have three weeks to file their response to these documents and the Counsel shall consult with each other and communicate to the Registry the date convenient to them for hearing the matter at Chennai, preferably before 30<sup>th</sup> June, 2013, because the Hon'ble Delhi High Court has asked the IPAB to hear the main matter in close proximity after this petition is disposed of .”

32. With these circumstances, we do not find, there is any error in the impugned order to be reviewed. It is also important to note that the petitioner herein is also given time to file their response to the documents.

33. Accordingly, the review petition is dismissed as there is no merits. the review petitioner shall file their document if any within three weeks from the date of receipt of this order.

**(D.P.S. PARMAR)**  
**TECHNICAL MEMBER**

**(S. USHA)**  
**VICE-CHAIRMAN**

Reportable: Yes / No

AVN

1.	Case No.	Review Petition No. 1/2013 in Miscellaneous Petition No. 33/2013 in ORA/15/2010/PT/DEL
2.	Order No.	No. 257 of 2013
3.	Date of Order	13/11/2013
4.	Petitioner/Appellant's Name	Mylan (Previously Matrix) Laboratories Limited A Company Registered under the Companies Act 1956 Having its registered office at Plot No.564/A/22, Road No.92, Jubilee Hills, Hyderabad – 500 033.
5.	Respondent's Name	<p>Pfizer Inc., a US Corporation having office At Eastern Point Road, Groton, Connecticut 06340, USA, Having address for service in India At their Patent Agent's office at DePenning &amp; DePenning, 120 Velachery Main Road, Guindy, Chennai 600 032.</p> <p>OSI PHARMACEUTICALS INC. A US Corporation having office at suite 110, 58 South Service Road, Melville, NY 11747, USA, Having address for service in India At their Patent Agent's Office at De Penning &amp; De penning, 120 Velachery Main Road, Guindy, Chennai 600 032.</p> <p>F. HOFFMAN-LA ROACHE LTD, A Swiss Company having its place of business at Grenzacherstrasse 124, CH-4070 Basel, Switzerland having address for service in India at their Patent Agent's Office at De Penning &amp; De Penning, 120 Velachery Main Road, Guindy, Chennai 600 032.</p> <p>The Controller of Patents, The Patent Office, Intellectual Property office, Intellectual Property Office Building, Plot No.32, Sector 14, Dwarka, New Delhi-110 075.</p>
6.	Patent No.	No. 196774