

## **IN THE HIGH COURT OF SINDH AT KARACHI**

Judicial Miscellaneous No.08 of 2021  
[M/s. Getz Pharma (Pvt.) Limited vs. Novartis AG and another]

**along with**

Miscellaneous Appeal No.68 of 2018  
[Highnoon Laboratories Limited vs. Novartis AG and another]

Miscellaneous Appeal No.71 of 2018  
[M/s. Getz Pharma (Pvt.) Limited vs. Novartis AG and another]

Miscellaneous Appeal No.73 of 2018  
[Tabros Pharma (Pvt.) Ltd. vs Novartis AG and another]

**and**

Miscellaneous Appeal No.74 of 2018  
[Pharmevo (Pvt.) Limited vs. Novartis AG and another]

Date of hearings : 09.04.2021, 19.04.2021,  
28.04.2021, 04.05.2021,  
25.05.2021 and 27.05.2021.

### **Judicial Miscellaneous No.08 of 2021**

Applicant  
[M/s. Getz Pharma (Pvt.) Limited] : Through M/s. Faisal  
Siddiqui, Saad Fayaz and  
Amna Anjum, Advocates.

Respondent No.1  
[Novartis AG] : Through M/s. Amna  
Salman Ahmed, Shahjahan  
Khan and Muhammad  
Shaikh, Advocates.

Respondent No.2  
[Controller of Patents] : Nemo

Intervener  
[Pharmevo (Pvt.) Limited ] : Through M/s. Mirza  
Mehmood Baig and Hanya  
Haroon, Advocates.

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**Miscellaneous Appeal No. 68 of 2018**

Appellant  
[*Highnoon Laboratories Limited*] : Through M/s. Khurram Gul Ghory and Saira Sheikh, Advocates.

Respondent No.1  
[*Novartis AG*] : Through M/s. Amna Salman Ahmed, Shahjahan Khan and Muhammad Shaikh, Advocates.

Respondent No.2  
[*Controller of Patents*] : Nemo

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**Miscellaneous Appeal No. 71 of 2018**

Applicant  
[*M/s. Getz Pharma (Pvt.) Limited*] : Through M/s. Faisal Siddiqui, Saad Fayaz and Amna Anjum, Advocates.

Respondent No.1  
[*Novartis AG*] : Through M/s. Amna Salman Ahmed, Shahjahan Khan and Muhammad Shaikh, Advocates.

Respondent No.2  
[*Controller of Patents*] : Nemo

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**Miscellaneous Appeal No. 74 of 2018**

Appellant  
[*Pharmevo (Pvt.) Limited*] : Through M/s. Mirza Mehmood Baig and Hanya Haroon, Advocates.

Respondent No.1  
[*Novartis AG*] : Through M/s. Amna Salman Ahmed, Shahjahan Khan and Muhammad Shaikh, Advocates.

Respondent No.2  
[*Controller of Patents*] : Nemo

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## **Miscellaneous Appeal No. 73 of 2018**

Appellant  
*[Tabros Pharma (Pvt.) Ltd* : Through M/s. Mirza  
 Mehmood Baig and Hanya  
 Haroon, Advocates.

Respondent No.1  
*[Novartis AG]* : Through M/s. Amna  
 Salman Ahmed, Shahjahan  
 Khan and Muhammad  
 Shaikh, Advocates.

Respondent No.2  
*[Controller of Patents]* : Nemo

### **ORDER ON CMAs [Civil Miscellaneous Applications] NO.4875 AND 4205 OF 2021 IN J.M. NO.8 OF 2021.**

#### **Case law cited by learned counsel for Applicant/Petitioner**

1. PLD 1976 Supreme Court 57  
*[Islamic Republic of Pakistan through Secretary, Ministry of Interior and Kashmir Affairs, Islamabad vs. Abdul Wali Khan, M.N.A. Former President of Defunct National Awami Party).*
2. AIR 1997 RAJASTHAN 250  
*[Mukesh Kumar Ajmera and others vs. State of Rajasthan and others].*
3. The Patents Act, 1970  
*As Amended by the Patents [Amendment] Act, 2005*
4. United Kingdom Statute  
*Patents Act, 1977 [UK]*
5. W.P No.15736 of 2015 [In the High Court of Madras]  
*[Novartis A.G. vs. Union of India and others]*
6. 2006 CLD 960 [Karachi]  
*[Syed Akbar Ali vs. Mamun Ali Bumasuk (PVT.) Ltd and others]*
7. 2002 CLD 120 [Karachi]  
*[Atco Lab. (Pvt.) Limited vs. Pfizer Limited and others]-Pfizer case.*
8. *Equivalent citation: 148 (2008) DLT 598, MIPR 2008 (2) 35 [F. Hoffmann-La Roche Ltd. and another vs. Cipla Limited on 19 March, 2008]-Author: SR Bhat (Dehli High Court)-Cipla case.*
9. *Equivalent citations: 1999 IIIAD Delhi 849, 79 (1999) DLT 507, 1999 (49) DRJ 630*

*[Brawn Laboratories Ltd. vs. Rhone Poulenc Rorer S.A. & another on 01 May, 1999]-Author: S Mahajan (Dehli High Court)-**Brawn case.***

10. CS (OS) No.89/2008 and C.C. 52/2008  
*[F. Hoffmann-La Roche Ltd... vs. Cipla Ltd., Mumbai Central, ...on 7 September, 2012]-Author: Manmohan Singh (Dehli High Court)*
11. Civil Appeal No.(s).8479-8480 of 2012  
*[Cipla Ltd vs. Union of India & others on 27 November, 2012] (Supreme Court of India)*
12. 2014 CLD 897 [Sindh]  
*[Earthfactor (Private) Limited through Director vs. Patent Office, IPO-Pakistan through Controller and 2 others]-**Earthfactor case.***
13. 2016 CLD 1741 [Lahore]  
*[Iyaz-ul-Haq Chaudhry vs. NIB Bank Limited through Authorized Attorney and 4 others].*
14. PLD 2007 Lahore 300  
*[Louise Anne Fairley vs. Sajjad Ahmed Rana]*
15. 1985 CLC 2182 [Karachi]  
*[Tajuddin vs. Haji Mushtaque and another]-**Tajuddin case.***
16. PLD 1991 Karachi 252  
*[Glaxo Group Limited and 2 others vs. Evron (Private) Limited and another]-**Glaxo case.***
17. 1985 CLC 155 [Karachi]  
*[Age Telefunken Pakistan Ltd vs. Electric Concern Corporation].*

**Case law relied upon by learned counsel for Respondent No.1.**

1. 2003 CLD 407 [Karachi]  
*[MERC & CO. ING. and others vs. Hilton Pharma (PVT.) LTD.]-**Hilton Pharma case.***
2. 2005 CLD 1768 [Lahore]  
*[Khawaja Tahir Jamal vs. Messrs A.R. Rehman Glass]*
3. 1987 CLC 738 [Karachi]  
*[Messrs Tabaq vs. Registrar, Trade Marks, Karachi and another]-**Tabaq case.***
4. 2006 CLD 716 [Karachi]  
*[Smith Kline Beecham Corporation and others vs. Pharma Evo (Pvt.) Ltd.]-**Smith Kline Beecham case.***
5. 2009 CLD 1028 [Karachi]

*[Messrs H&B, General Trading Company through Director vs. Messrs International Marketing Company through Proprietor and 2 others]*

6. 1992 MLD 2226 [Karachi].  
*[Smith Kline & French Laboratories Ltd., and another vs. Ferozsons Laboratories Ltd., and another]-Ferozsons case.*
7. 2017 CLD 557 [Sindh].  
*[Big Birds Poultry Breeders (Pvt.) Ltd. vs. Director General EPA]*
8. 2016 CLD 2229  
*[Getz Pharma (Pvt.) Limited through Authorized Signatory vs. Servier Laboratories (France) and another]-Getz Pharma case.*
9. 2008 YLR 1536 [Karachi]  
*[Muhammad Aslam Mianoor and another vs. Messrs Pakistan Cables Ltd. and another]*
10. PLD 1967 Karachi 22  
*[Muhammad Ismail Zafar and others vs. Director-General, Pakistan Telegraph and Telephone Department, Government of Pakistan and others]-Ismail Zafar case.*
11. 1997 SCMR 1508 [Supreme Court of Pakistan]  
*[Islamic Republic of Pakistan through Secretary, Establishment Division, Islamabad and others vs. Muhammad Zaman Khan and others]-Zaman Khan case.*
12. 1998 SCMR 376 [Supreme Court of Pakistan]  
*[Regional Commissioner of Income-Tax Corporate Region, Karachi and 2 others vs. Shafi Muhammad Baloch]-Shafi Baloch case.*
13. 2004 MLD 1081 [Karachi]  
*[Messrs Younus Textile Mills vs. Muhammad Fazal Tayyab]*
14. 1993 CLC 882 [Karachi]  
*[Pakistan Engineering Consultants vs. Pakistan International Airlines Corp. and BCCI and others]*
15. 2002 CLD 1223 [Karachi]  
*[Kohinoor Soap and Detergents (Private) Ltd., through Chief Executive of the Company vs. Basra Soap Factory and 4 others]*
16. 2008 CLD 1026 [Karachi]  
*[Canon Kabushiki Kaisha through Authorized Signatory vs. Registrar of Trade Marks and another]*
17. 1984 CLC 781 [Karachi]  
*[Standard Finis Oil Company and others vs. National Detergents Ltd. and 2 others]*

**Other Precedents:** (1) **2011 SCMR 1560**  
*[Dr. Muhammad Anwar Kurd and 2 others vs. the State through Regional*

*Accountability Bureau, Quetta]-  
Dr. Kurd case.*

- (2) **2002 CLD 120 [Karachi]**  
*[Atco Lab. (Pvt.) Limited vs. Pfizer Limited and others]-Pfizer case.*
- (3) **2019 CLC 1592 [Sindh]**  
*[Tariq Hussain vs. Subhan Ali and 6 others]-Tariq Hussain case.*

**Law under discussion:**

- (1) Constitution of the Islamic Republic of Pakistan, 1973 (the “**Constitution**”)
- (2) Qanun-e-Shahadat Order, 1984.  
*[Evidence Law]*
- (3) Patents Ordinance, 2000  
*(Patents Law)*
- (4) Patents Rules, 2003  
*(P.R. 2003)*
- (5) The Code of Civil Procedure, 1908  
*[CPC]*

**Muhammad Faisal Kamal Alam, J:** Through the present Petition, Petitioner/Applicant has challenged the Sealing Order dated 12.11.2018 of Respondent No.2 (*Controller of Patents*) in respect of Patent No.142090 (*Subject Patent*) given in favour of Respondent No.1. The product in respect of which the patent is granted is “**DUAL-ACTING COMPOUND COMPRISING AN ANGIOTENSIN RECEPTOR ANTAGONIST AND AN NEP INHIBITOR**”, which is a lifesaving drug.

2. The *ad-interim* restraining order was granted on 05.03.2021 while hearing the Injunction Application-CMA No.4205 of 2021 (*of present Applicant*) where after, Ms. Amna Salman Ahmed, learned counsel representing Respondent No.1 also filed an Application-CMA No.4875 of 2021, under Order 39, Rule 4 of CPC, for vacation/recalling of above Order.

3. Ms. Amna Salman Ahmed, Advocate has argued both CMAs. It is contended that after a long drawn out procedure, impugned Sealing Order in favour of Respondent No.1 was granted by Respondent No.2. It is further contended that the Opposition(s) filed by present Applicant/Petitioner and the Appellants of title connected Appeals were dismissed after proper hearing and due process; that since patent was granted in favour of Respondent No.1 and it was continuously infringed by Applicant and other entities, thus, compelling the present Respondent No.1 to file an infringement suit (Suit No.134/IPT of 2019) before the Intellectual Property Tribunal at Lahore in which injunction was confirmed, but it was challenged by present Applicant in FAO No.12220 of 2021 [Ist Appeal against order] before the learned Lahore High Court, wherein stay has been granted. The present J.M. has been filed after a long delay of more than two years from the date of granting of Sealing Order dated 12.11.2018. No restraining order has been granted in any of the proceedings including above Appeals in favour of either present Applicant or other Pharmaceutical Companies, which could prevent present Respondent No.1 from enforcing its right in respect of Subject Patent and hence there was no justification for passing of restraining order on 05.03.2021, which has seriously prejudiced the interest of Respondent No.1 being a legitimate patentee.

4. Learned Advocate has referred to Sections 7 and 46 of the Patents Law, *inter alia*, relating to grounds on which patent can be revoked; Section 60 of the Patents Law has been referred to show that even in the above Suit filed by present Respondent No.1, Counter Claim can be filed by present Applicant seeking revocation of patent in question. She has referred to relevant record of present *Lis*, about the pending proceeding at Lahore. It is argued that Section 27 of the Patents Law is not applicable to

the present case, as invoked and interpreted by the Applicant/Petitioner, because the said Section 27 also relates to patent of addition, whereas the subject patent of Respondent No.1 is not a patent of addition but the original patent and the provisions relied upon by the legal team of Applicant with regard to grant of automatic stay once the notice of proceeding is received by the Controller of Patents-Respondent No.2, is a misconceived argument. Contended that under Section 47 of the Patents Law, Revocation could have been filed before the Controller but within a prescribed period of 12 months and since no revocation was filed within such period, which is a limitation period mentioned in the said law (Patents Law), hence the present proceeding is preferred under Section 46 of the Patents Law, which although does not specify a limitation, but filing of subject proceeding (Judicial Miscellaneous) after a delay of more than two years, shows the *mala fide* of the Applicant.

5. Mr. Faisal Siddiqui, Advocate representing the Applicant has made submissions. He contends that present proceeding has been filed because Respondent No.1 opposed the amendments in Miscellaneous Appeal No.68 of 2018 in which present Applicant wanted to make amendments to the extent of challenging the subject impugned Sealing Order. He controverted the arguments of learned counsel for Respondent No.1, that Section 27 of the Patents Law is not applicable to the present case. Learned Advocate has relied upon the Explanation to the above provision, wherein the term 'proceeding' means "*time for any appeal has not expired*". He has questioned the patentability of subject Patent by placing reliance on Sections 7 and 27 of the Patents Law and states that since drugs in question are lifesaving drugs, coupled with the fact that no novelty and invention is involved, hence, Respondent No.2 should not have issued impugned Sealing Order, particularly, when the number of Miscellaneous Appeals are *sub judice*, of which he (Respondent No.2) has due notice.

6. Learned Advocate for Applicant has referred to record of the Case, to show that how the process of Patents started, by referring to page-89 (of the Court File), which is an application under Section 14 of the Patents Law (dated 07.11.2006), *inter alia*, for grant of Patent. He has referred to 11 (eleven) objections raised by the Examiner (of the Patent Office) (at page-629), which were replied to by Respondent No.1 vide their Missive of 14.04.2014, that is, after 06 years and Opposition on behalf of present Applicant (at page-663), dated 21.08.2015. It is contended that the process become lengthy for purported grant of the impugned Patent was due to the fact that Respondent No.1 itself was guilty of not complying the requisite formalities.

7. Arguments heard and record perused.

8. The impugned Sealing Order dated 12.11.2018 is at page-1125 (Annexure-M-7) with the main Petition, issued by Respondent No.2, *inter alia*, declared the Respondent No.1 as Patentee in respect of subject Patent for the term of 20 years, effective from 09.11.2005, which means for another four years, subject to the provision of the Patents Law.

9. One of the grounds (ground “G”) of the main Petition is that certain intricate questions about patentability of the alleged invention were involved and expert evidence should have been recorded, which was not done. This averment of the Applicant itself justifies that the question of patentability inclusive of novelty and ancillary issues relating thereto should be left to be decided in the main Petition as well as tagged Miscellaneous Appeals and not at this interlocutory stage.

10. Since both interlocutory applications are to be decided, therefore, only necessary facts and case law will be considered and discussed. Since interpretation of Section 27 is involved, thus it is reproduced herein under\_

**“27. Grant and sealing of patent.”-(1)** *Subject to the provisions of this Ordinance with respect to opposition and to any power of the Controller to refuse the grant, a patent sealed with the seal of the Patent Office shall, if the request is made within the time allowed under this section, be granted to the applicant or applicants within that time or as soon as may be thereafter, and the date on which the patent is sealed shall be entered in the Register.*

*(2) Subject to the provisions of this Ordinance with respect to patents of addition, a request under this section for the sealing of a patent shall be made not later than the expiration of six months from the date of the publication of the complete specification:*

*Provided that-*

*(a) where at the expiration of the said six months any proceedings in relation to the application for the patent is pending in any court or before the Controller, the request may be made within three months after the final determination of that proceeding; and*

*(b) where the applicant or one of the applicants has died before the expiration of the time within which under the provisions of this sub-section the request could otherwise be made, the said request may be made at any time within twelve months after the date of the death or at such later time as the Controller may allow.*

**Explanation.-** *Any proceedings shall be deemed to be pending so long as the time for any appeal therein has not expired, and any proceedings shall be deemed to be finally determined when the time for any appeal therein has expired without the appeal being brought.”*

11. Both learned Advocates for Applicant/Petitioner and Respondent No.1 have submitted their respective Written Arguments. The legal team of

Applicant/Petitioner has submitted a '**Brief Skeleton of only the main arguments on behalf of the Applicant on CMA No.4205 of 2021 and CMA No.4875 of 2021**', comprising of two volumes, containing relevant provisions of statutes, viz. the repealed the Patents and Designs Act, 1911, Section 64 of the Patents Act, 1970 (India) and Section 72, of the Patents Act, 1977 (United Kingdom), so also the case law. The case law cited by learned Advocates for Applicant and Respondents are mentioned in the opening part of this Decision.

12. Gist of the arguments of Applicant's counsel in support of which case law has been cited is, that Section 27(2)(a) of the Patents Law is to be given a wider meaning because it contains the words "*subject to the provisions of this Ordinance with respect to Patents of addition*", have to be read with Section 39 of the said Patents Law, and period of six months as mentioned in Section 27(2) will not override the time period in the aforementioned Section 39(4) as far as the main Patent is concerned. Since Section 46(1) of the Patents Law provides grounds for revocation of Patents, hence the grounds for revocation are not only limited to those mentioned in Sections 7, 8 to 10 but will also include Section 27 (of the Patents Law) and if it is found that any mandatory provisions of the **Patents Law** or the **PR 2003** are violated, then it justifies revocation of the subject Patent. In particular, Sections 16 and 21 read with Rules 14 and 42 (of Patents Law and PR 2003, respectively) have been violated while passing the impugned Sealing Order, hence, it has to be set aside; that the present proceeding has also involved Sections 54 and 56 of the Patents Law, relating to powers of this Court for making rectification in the Register of Patents; Patents relating to lifesaving drugs cannot be granted, as is the present case, because the purported patented drug of Respondent No.1 is used for treatment of cardiovascular diseases and Respondent No.1 is and would exploit the Patent to the detriment of public interest. Non

filing of reply / Counter Affidavit by Respondent No.2-the Controller of Patents, is the admission of averments as pleaded in the main Petition, and consequently relief as claimed be allowed, inter alia, and the subject Patent be revoked. Under Section 61 (2) (c) of the Patents Law, Court can direct the patentee to provide a sufficient security in a suit for infringement filed by the patentee under Section 60 and the same provision is not applicable to present Applicant, which has not filed the Suit but it has been filed by present Respondent No.1 at Lahore (as mentioned above), hence the latter be called upon to furnish sufficient security.

13. The arguments of Applicant's counsel with regard to the fact that process involved in Subject Patent is known since 1990, as mentioned under the captioned Argument No.5, cannot be considered at this interlocutory stage, as it requires a deeper probe. Similarly, the reported decisions about rectification of register under Section 56 and power and authority of Respondent No.2 is similar to the one mentioned in Section 152 of the erstwhile Companies Ordinance 1984 (relating to the rectification of register), are not relevant for deciding the present interlocutory applications.

14. Crux of the case law relied upon by Counsel of the Applicant is as follows\_\_

In the *NAP case (ibid)* the Hon'ble Supreme Court has interpreted the phrase '*subject to the provisions of subsection (2)*' of the then Political Parties Act, 1962, *inter alia*, stating that when such a phrase is used in the statute, it means that the first provision is conditional upon the performance of what is required by the provision referred to; such a phraseology is used to make a provision conditional upon / dependent upon other provision(s). The argument of learned counsel of Applicant, from this case law is, that Section 27 of the Patents Law cannot be read in isolation only for the

‘Patent of addition’, but other provisions of the Patents Law pertaining to the grant of a patent generally, will also be applicable here, in particular, a restraint on the power of Respondent No.2 as mentioned in proviso (a) for not passing the order if a proceeding is pending to the Sub Section (1) of Section 27.

In the *Pfizer case (supra)*, learned Division Bench of this Court has vacated the *ad-interim* orders operating in favour of Pfizer, which filed a suit against respondents (of the reported case) for infringement of patent. It was observed on the basis of record that Pfizer is exploiting the monopoly in respect of its patent and selling the medicine, which was used for treatment of high blood pressure, at an exorbitant price and much higher than the other defendants. It was also observed that Pfizer was selling the same medicine in neighbouring country on a lesser price. With these background facts, it was held that neither balance of convenience lies in favour of *Pfizer* nor the latter will suffer irreparable loss in case of refusal of injunction. Defendants (of the reported case) were directed to maintain account and submit a monthly statement; whereas, the application of defendants seeking suspension of the patent (of Pfizer) was declined by the learned Bench, on the ground that the prescribed period of patent was already coming to an end (at the relevant time) coupled with the fact that factual controversy raised by the parties could not be resolved without recording of evidence.

In *Cipla case (ibid)*, the learned Delhi High Court refused the injunction in favour of plaintiff, because it was of the view that in such type of cases, ingredients of balance of convenience and irreparable loss are equally important, besides, *prime facie* case. Since both plaintiff and defendant (of the reported decision) were manufacturing drugs for patients suffering from lung cancer, it was held, that the public interest should be

given more importance. However, while refusing injunction to plaintiff, defendant was also put to terms, *inter alia*, to pay damages if the suit of plaintiff is decreed.

Injunction was refused to plaintiff in *Tajuddin case*, because registered design in respect of bronze coffee pots was registered *ex-parte*, under the erstwhile the Patents and Designs Act, 1911. This reported Decision is distinguishable from the present case, as admittedly, no *ex-parte* proceeding is done while passing the impugned Sealing Order of 12.11.2018.

In *Glaxo case*, it is held, that if it is found that a monopoly is being exploited or such privilege, as arises upon the sealing of patent, is being mis-used in disregard of public interest then such equitable relief of injunction can be refused. Consequently, the order of *ad- interim* injunction was recalled, requiring the defendant to furnish his monthly accounts.

In *Earthfactor case (ibid)*, this Court while exercising Appellate jurisdiction in a patent appeal, allowed the same and the impugned order granting patent in favour of respondent 3 was set-aside. Court dilated upon the term 'invention' and 'novelty' as mentioned in Section 7 of the Patents Law, and held, *inter alia*, that since technology regarding dual number SIM, was already in use in different countries, hence patent was wrongly granted in favour of respondent No.3. This judgment is not relevant at this interlocutory stage, because, issue of patentability can only be decided after a thorough security of record in the connected Miscellaneous Appeals and the present main *Lis*.

The two reported decisions of learned Lahore High Court relating to non-filing of Counter Affidavit and filing of Written Statement, averments whereof are evasive and does not dispute a claim in a specific manner as required under the relevant provisions of Civil Procedure Code, entailing

adverse consequences, that is, the pleadings of a plaintiff/petitioner is deemed to be admitted, is a settled rule and does not require further elaboration in this Order. However, these two decisions do not lend any support to the case of present Applicant/Petitioner, because the latter's claim has been disputed by the Respondent No.1 in its Counter Affidavit, besides, preferring, subsequently, another application (under Order XXXIX Rule 4 of CPC) for vacation/recalling of the *ad-interim* order dated 05.03.2021, operating in favour of present Applicant.

15. Précis of the case law relied upon by the legal team of Respondent No.1 is as follows\_

*Hilton Pharma case (supra)*; this Court while disagreeing with the contention of defendant's counsel, about prior knowledge, use and lack of novelty of plaintiff's patents, granted the injunction for enforcement of the patent. It is held, that defendant in the same proceeding can also take grounds for revocation of a patent, but till such controversy is decided by some competent forum, the presumption of its [patent] validity and exclusive right of use the patented product will subsist in favour of plaintiff.

In *Smith Kline Beecham case (supra)*, this Court was of the view that where it is shown that plaintiff has incurred heavy investment upon the invention, process of manufacturing and its marketing, then, factors of balance of convenience and irreparable loss lies in favour of plaintiff and justifies grant of injunctive relief.

In *Ferozsons case*, Court granted the temporary injunction and disagreed with the argument that grant of injunction against defendant would operate against public interest as the price of plaintiff's drug is

exorbitant as compared to the price at which the defendants are selling their drug, by ruling, that it is not a relevant consideration.

The decision of *Hilton pharma* (2017 CLD 557 – Sindh) handed down in appeal against the dismissal of opposition, has been relied upon by Respondent 1, to substantiate the contention that after grant of Patent, an inventor enjoys the monopoly; ***“having made the disclosure to the public, which disclosure goes into public domain and people at large are free to use this information, except to reproduce the product or to use the process for commercial gains or in any manner violating the scheme envisaged by the patent laws”***. Similarly well-known decision given in the *Tabaq case (supra)* by the Hon’ble Supreme Court is relied upon to fortify the argument that once a trademark, copyright or patent is registered then the basic ingredients for grant of *ad-interim* injunction, that is, *prima facie* case, balance of inconvenience and likelihood of an irreparable injury weighs in favour of the holder of the intellectual property; which in the present case is Respondent No.1. In the *Tabaq case*, besides discussing the concept of **“passing of”**, learned Supreme Court upheld the decision of learned District Judge, granting the injunction to the holder of Trademark of *Tabaq case*, while setting aside the order passed by the learned Lahore High Court. In *Getz Pharma case* (coincidentally of present Applicant/Petitioner), its suit was dismissed for revocation of the patent in favour of defendant. Learned Judge has explained the importance of intellectual property rights jurisprudence, *inter alia*, that granted patents ***“are incorporeal possessions having property rights granted under the doctrine of jus ad rem”***; further ruled, ***“making the patentee a prima facie owner and beneficiary of all the rights arising therefrom and restricting public at large to use the patented method or invention.....”***. While expounding Article 24 of the Constitution of Pakistan, it is held that the term ‘*property*’ mentioned in the said Article extends to all forms of

property, including intellectual property. In *Ismail Zafar case (ibid)*, learned division Bench of this Court has ruled that mere filing of writ petition would not automatically stay the departmental proceeding, as there is no concept of an automatic stay, as contended by the appellant's counsel (of the reported decision). Decision of the Apex Court handed down in *Shafi Baloch case (supra), inter alia*, reiterating the well settled rule about *status quo*, that it can be maintained between the parties in accordance with the situation as it obtains at the time of the institution of the suit and not to a point of time prior thereto. This decision is relied upon by counsel of present Respondent No.1, in support of her argument, that by virtue of the *ad-interim* order of 05.03.2021, an altogether new situation has been created, as the Respondent No.1, which is the patentee in respect of the aforesaid subject product, has been restrained to enjoy its statutory right arising out of and flowing from the Subject Patent, which violates the settled principle laid down in numerous decisions, including the afore referred case.

The cited reported decisions, which explain the scope of Order XXXIX, Rule 4 of CPC (relied upon by counsel of Respondent No.1), do not require detail discussion, crux of which is, that this provision can be invoked, seeking vacation of previous injunction order, when it is unduly harsh and or unworkable, or where the injunction order sought to be recalled is ex-parte.

16. Learned Advocate for Respondent No.1 in response to a query put during proceeding has submitted a Statement dated 28.05.2001, as to how a public interest can be protected if a patentee, which is a multinational company abruptly discontinues its operation or production in Pakistan. Learned counsel in her above Statement has relied upon Rule 30 of the Drugs (Licensing Registering and Advertising) Rules, 1976, which

prescribes certain conditions, *inter alia*, for maintaining a sufficient quantity of production of medicines to ensure its regular and adequate supply in the market; and the manufacturer of any drug shall not without the prior approval of the competent authority, can discontinue the production, which can cause shortage.

17. Adverting to the arguments addressed on the Section 27 of the Patents Law. Learned counsel for the Applicant/Petitioner has referred to the Bailiff's Report of 19.10.2018 and Report/Receipt of TCS (courier service) dated 24.10.2018, to show that Respondent No.2-Controller of Patents was duly served and he knew about pendency of Misc. Appeal proceedings in this Court, wherein, though no restraining order was granted, but in terms of the Section 27, particularly proviso (a), since 'proceeding' in the shape of Misc. Appeals were/are pending, the impugned Sealing Order should not have been granted by Respondent No.2 to Respondent No.1, as the said Section 27, envisages a restraint upon grant of Sealing Order when a proceeding is pending.

18. Section 27 of **Patents Law** is examined. This provision has two categories. The first category is Sub Section (1), which deals with power of the Respondent No.2-(Controller), in respect of Opposition filed by those, who are opposing the grant of Patent, *inter alia*, as envisaged in Section 23 (*of the Patents Law*); the Controller after hearing the parties, can decide the Opposition and either refuse the grant of Patent to an Applicant, or decline / dismiss the Opposition (Notices of Opposition) as mentioned in Section 23 (*ibid*). In case, the Opposition is dismissed, as is done in the present *Lis*, it is followed by sealing of Patent and shall be entered in the Register, maintained in terms of the *Patents Law* and *P.R Rules, 2003*, which is impugned in the present proceeding.

Since this Sub Section (1) does not mention the term '*Patents of Addition*', which is mentioned in Sub Section (2), therefore, this Sub Section (1) is for the patent granted (sealed) in respect of main invention. The word used in Sub Section (1)-'*subject to the provision of this Ordinance...*' (as strenuously emphasised by counsel for Applicant / Petitioner) is to be read with regard to the power and authority of Respondent No.2, concerning Opposition, refusal or grant of patent in respect of the main invention, as mentioned in the Patents Law (*the Patents Ordinance, 2000*). No express provision of the Patents Law has put a restraint (bar) on the power of Respondent No.2, to refuse or stay the grant of patent (Sealing of Patent) in respect of main invention, merely because some other proceeding is *sub judice*, without there being a specific restraining order (stay order) operating in that *sub judice* proceeding.

19. The second category of Section 27, is mentioned in its Sub Section (2) with regard to '*Patents of Addition*', envisaging that if a request is made for a '*Patent of Addition*' and at the relevant time any proceeding(s) is also pending, then upon final determination of that proceeding (*final decision in that proceeding*), the request can be entertained or decided by the Controller, subject to other conditions mentioned in the said Section 27.

20. Sub Section 2 ends with a colon (: ) followed by two provisos (a) and (b). In the present case, proviso (a) is invoked by the Applicant's Advocate in support of his arguments. These provisos (*reproduced in the preceding paragraphs*) create an exception to Sub Section (2) of Section 27 and does not affect power and authority of Respondent No.2/Controller as mentioned in Sub Section (1), for rejecting an application for patent or granting Sealing Order for a patent.

21. The two reported decisions of Hon'ble Supreme Court and this Court handed down in *Dr. Kurd case-2011 SCMR 1560* and *Pfizer case-*

*2002 CLD 120 [Karachi] [ibid]* are relevant. The Hon'ble Supreme Court in *Dr. Kurd case* has interpreted the proviso of Sub-Section (3) of Section 25 of the National Accountability Ordinance (1999). The proviso in the said Section 25 is also mentioned under Sub Section (3) after colon (:) and the Apex Court has treated the said proviso as that of sub Section 3 only and has held that the said Sub Section is controlled and regulated by its proviso. Similarly, this Court in above *Pfizer case*, which also primarily relates to Section 22 of the Patents Law, has highlighted the limitation of proviso added to a Section, which creates an exception to the main provision and has to be construed strictly and any repugnancy between the two ought to be avoided.

The above discussion on Section 27 is also covered by the principle of interpretation of statute-*'expressio unis est exclusio alterius (express enactment shuts the door to further implication)'* and *'casus omissus'*. The reported decision of this Court in *Tariq Hussain Case (2019 CLC 1592)* is referred and necessary portion therefrom is reproduced herein under\_

***“...The intentional omission by legislature as is obvious in the SLGA and its Election Rules (supra), cannot be filled up by this Court by declaring or holding that non-disclosure or erroneous disclosure of assets and liabilities by a contesting candidate while submitting his nomination paper, is a disqualification under SLGA or Election Rules framed thereunder. The principle of 'casus omissus' is attracted here.*”**

***“... when a statute directs a thing to be done in a particular manner, or by certain persons, then it should be done in the manner and by the persons so mentioned. In afore-mentioned Hasnat Khan's Case, the Honourable Supreme Court while reiterating the rule of interpretation of statute has held that, “no word used by***

*lawmakers is either redundant and can be subtracted, substituted, added or read in a piece of legislation or a document,.....” (Underlying is done for emphasis).”*

22. Section 27 is bifurcated into two different categories, is also substantiated by reading Section 39, which clearly explains ‘*Patents of Addition*’, as an improvement in or modification of the main invention. This is further clarified by reading Sub Section (4) of Section 39, which is reproduced herein under\_

*“(4) A patent of addition shall not be sealed before the sealing of the patent for the main invention, and if the period within which, but for this provision, a request for the sealing of a patent of addition could be made expires before the period within which a request for the sealing of the patent for the main invention may be so made, the request for the sealing of the patent of addition may be made at any time within the last-mentioned period.”*

*[Underlined for emphasis].*

Similarly patent of addition is defined in Sub Section (n) of Section 2, as a patent of addition granted in accordance with Section 39. Sections 40 and 41 also separately deal with the patent of addition, vis-à-vis the tenure of its enforceability and the patentability of patent of addition.

23. Although the argument of Applicant’s counsel is correct to this extent that pending of connected Miscellaneous Appeals in respect of the order rejecting the opposition of those appellants including the present Applicant / Petitioner, do fall within the ambit of the term ‘any proceeding’ as used in the Explanation of Section 27, but, this argument can be accepted for the proceeding concerning the ‘*Patent of Addition*’.

24. It is undisputed that the Sealing Order is with regard to Patent of main invention and not Patents of addition, thus the arguments of legal

team of Applicant / Petitioner is misconceived in nature, that Respondent No.2 should have stayed his hands, upon service of notice of connected Appeals and should not have sealed the main patent of Respondent No.1, vide Impugned Order dated 12.11.2018.

25. In view of the above discussion, the decision of learned Division Bench of this Court in *Ismail Zafar case (ibid)* is relevant, wherein it was held that de-confirmation order notified by the department during pendency of Writ Petition in this Court, was not a nullity in the eyes of law, because mere filing of writ petition would not automatically stay the departmental proceeding, as there is no concept of an automatic stay, as contended by the appellant's counsel (of the reported decision). Rule laid down by Hon'ble Supreme Court in the case of *Zaman Khan (1997 SCMR 1508)* that an interlocutory order or *status quo* cannot be passed, which amounts to granting of main case without the trial, is also applicable here, because, in the present *Lis*, whether the Respondent No.2 acted illegally or within the parameters of law and rules, is yet to be determined; and till such time it is decided, in my considered view, the impugned Order cannot be suspended. More so, undisputedly, present *Lis* has been filed after two years from the date of passing of the impugned Sealing Order and whether the present proceeding is hit by laches or not, is left to be determined in the main case, but fact of the matter is, that in the intervening period no restraining order has been passed in connected Misc. Appeals, filed after the dismissal of Opposition by an earlier order of Respondent No.2 dated 02.08.2018, coupled with the fact that present Applicant and Respondent No.1 are also contesting their respective interest in litigation at Lahore by instituting the afore mentioned suit in the IPT Tribunal and before the learned Lahore High Court, in which *status quo order has been granted* (*already mentioned in the preceding paragraphs*).

26. Legal team of Applicant / Petitioner has referred to the record of litigation, which was initiated by present Respondent No.1 against the Applicant / Petitioner at Lahore and presently the same is *sub judice*. Perusal of various orders passed in cases at Lahore, lends support to the arguments of learned counsel for Applicant, that the present *Lis-Judicial* Miscellaneous No.8 of 2021, has not been filed with any *mala fide*.

It is also an undeniable fact that patent was sealed vide impugned order dated 12.11.2018 after publication, inviting objections, providing opportunity of hearing to all the parties concerned, where after the order rejecting the objections was passed, which is the subject matter of connected Misc. Appeals. *Prima facie*, it appears that the fundamental requirement has been completed before issuance of the above impugned Sealing Order, which was being enjoyed by the Respondent No.1 for couple of years up till 05.03.2021, when a restraining order was passed in the present proceeding. Even otherwise, in terms of Articles 129 Clause (e) of the Qanoon-e-Shahadat Order, 1984, there is a presumption, that official acts are regularly performed. Unless the act of Respondent No.2 in Sealing the subject Patent of Respondent No.1, is declared to be illegal, in the present proceeding, the said impugned sealing order coupled with the above discussion and in the attending circumstances, should not have been suspended.

27. In view of the above undisputed factual aspect of the case, ingredients of balance of convenience and irreparable loss are also in favour of present Respondent No.1, because the rights and interests arising out of the subject Patent, in favour of Respondent No.1, are seriously affected,

resulting in causing inconvenience to Respondent No.1 and would sustain losses.

28. In view of the above, the *ad-interim* order dated 05.03.2021 is vacated / recalled. Application-CMA No.4205 of 2021 (*under Sections 94 and 151 of CPC*), filed by learned counsel for Applicant/Petitioner is dismissed and Application-CMA No.4875 of 2021 (*under Order XXXIX Rule 4 of CPC*), filed by learned counsel for Respondent No.1 is disposed of accordingly.

29. It is clarified that any observation mentioned in this order shall not *prejudice* the final determination of this *Lis*.

30. Looking at the pendency of Intellectual Property cases in this Court, involving time bound issues, it is suggested that a Special Bench may be established for hearing those Intellectual Property cases, which fall within the jurisdiction of this Court and the remaining cases be transferred to the Intellectual Property Tribunal(s) established under the Intellectual Property Organization of Pakistan Act, 2012.

Copy of this order be communicated to the learned Registrar of this Court for his further necessary and immediate action.

**JUDGE**

**Karachi.**  
**Dated: 02.09.2021.**  
M.Javaid.PA