MANU/KA/2739/2011

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

O.S. No. 1 of 2004

Decided On: 09.12.2011

Appellants: **Natural Remedies Private Limited and Ors.**
Vs.
Respondent: **Indian Herbs Research & Supply Co. Ltd. and Ors.**

Hon'ble Judges/Coram:
N. Kumar,J.

Counsels:
For Appellant/Petitioner/Plaintiff: Sri K.G. Raghavan, Senior Counsel for Sri G. L. Vishwanath, Sri Shayam Sunder -M/s. Fox Mandal & Associates, Advocates

For Respondents/Defendant: Sri Sajan Poovaiah, Smt. Sheila Rao and Sri Manu Kulkarni for M/s. Poovaiah & Co., Advocates for defendants Sri N. S. Sangolli appointed as Court Commissioner)

JUDGMENT

Hon'ble Mr. Justice N. Kumar

1. The plaintiff has filed this suit for a decree of permanent injunction restraining the defendants from manufacturing, producing or selling of the product Livoliv-250 by infringing the plaintiff's protected Patent rights under Patent No. 186857 of 20th April 1998 in the market and for other consequential reliefs.

PLEADINGS

The plaintiff is a Private Limited Company incorporated under the Companies Act, 1956. The case of the plaintiff is that it is a pioneer in the business of Ayurvedic Veterinary products credited with integrating a Scientific approach to the search of medicines and health supplements ensuring purity, safety and affordability. The plaintiff was formerly known as M/s. Indian Herbs Private Limited. It was founded in 1951, by late Sri. Ramlal Agarwal, an entrepreneur with profound knowledge of herbs and their medicinal benefits.

2. The defendant is a Public Limited Company incorporated under the Companies Act, 1956. The plaintiff and defendants had been operating the defendant company together upto 1996 under the name of M/s. Indian Herbs Research and Supply Company Limited. In 1996, the Company was divided into two separate entities or two separate divisions within the same company, namely M/s Indian Herbs Research and Supply Company, Saharanpur and M/s Indian Herbs Research and Supply Company, Bangalore. Over the years the plaintiff has diversified with its solutions that blend the understanding of the benefits of medicinal herbs with modern science to develop and provide herbal veterinary medicines, human health supplements and standardized herbal extracts. The plaintiff has also been awarded a number of patents and has also filed Patent Co-operation Treaty (PCT) applications for this purpose. A list of Patents obtained and applied by the plaintiff is produced along with the plaint. Copies of patents awarded to the plaintiff company by the Patent Office, Government of India are also produced.

3 . The Chairman and Managing Director of the plaintiff is one Ravindra Kumar Agarwal. The Managing Directors of the first defendant is the second defendant, Mr. Susheel Kumar Agarwal, and the third defendant is Sudhakar Agarwal. Ravi Kumar Agarwal, Susheel Kumar and Sudharkar Agarwal are all sons of late Sri. Ram Lai Agarwal.

4 . The specific case pleaded by the plaintiff was that it had developed a product named Zigbir, a natural performance enhancer for broilers in the year 1998. It was invented by Mr. Amit Agarwal, who had assigned all his interest and rights in favour of the plaintiff Company. The plaintiff applied for a Patent titled "A method of preparing a herbal hepatoprotective and antlhepatotoxic composition" as an Assignee with the Patent Office, Chennai for the process of manufacturing said product Zigbir. The application was filed on 20th April 1998 and it was allotted an Application No. 079/MAS/98. The plaintiff had launched their production in the market in the year 1998 under the Trade Mark "Zigbir". The application of the plaintiff for the grant of Patent was duly examined in accordance with the provisions of the Patents Act, 1970, for short, hereinafter referred to as the 'Act' and after being fully satisfied that the invention satisfied all the requirements for the grant of a patent, the plaintiff was granted a Patent (bearing Patent No. 186857) for the invention titled, "A method of preparing a herbal hepatoprotective and antihepatotoxic composition" dated 5th July 2002 by the Controller of Patents, India for a term of seven years from 20th April 1998 which was initially valid upto 20th April 2005. However, with the enactment of the Patents (Amendment) Act, 2002 and the framing of the Patent Rules, 2003, the plaintiff's patent bearing No. 186857 has been subsequently extended for a period of twenty years from 20th April 1998 which expires on 20th April 2018. The certificate bearing No. 186857 evidencing the granting of Patent in favour of the plaintiff issued by the Controller of Patents, Government of India dated 5th July 2002 is produced. The plaintiff has paid the renewal fees and the patent is in force.

5 . The main embodiment of the plaintiffs invention resides in the process of preparation of the herbal composition being synergistically effective in curing the ailments of the liver. The plaintiffs invention is novel and significantly effective in optimizing the liver functions. The plaintiffs invention is a process directed to specifically producing a liver stimulating agent and has been derived from certain selected plants which synergise one another's activity. The plaintiff has been using the above patented method to manufacture and sell herbal poultry feed supplement under the trade mark Zigbir which is being sold all over India and also exported to other countries including but not limited to Malaysia, Korea, Bangladesh, Japan and Italy. Copies of certain invoices showing the export of the product to Japan, Malaysia and Italy are produced. The plaintiff has enjoyed remarkable success as the manufacturer and seller of the said product and within a very short span of time the said product of the plaintiff has become freely available in the market all over India. The business of the plaintiff had been increasing every year since the plaintiff launched its product in the market in the year 1998 in India until the first defendant's company launched its product Livoliv-250 in the year 2002 by copying the patented process of the plaintiff. Copies of invoices and sales turnover of the said product Zigbir for the year since 1998 to March 2003 which bear testimony to this fact, are also produced.

6. The plaintiff states that in or around 2002 the defendants have launched a product under the name Livoliv-250 with similar dose, indications , feed inclusion rates etc, which are similar to that of the plaintiffs product. Even the physical paramteres like colour, smell, taste are similar. The defendants do not appear to have done any research and development work in developing their product but have misappropriated and mis-utilised the patented process of the plaintiff. The products of the plaintiff

and the defendant are similar, have similar chemical compositions and have the same commercial use. The defendants have intentionally lowered the price of their product Livoliv-250 as compared to Zigbir and started marketing and selling their product at a much lower price all over India. This has resulted in huge loss to the plaintiff. Further, it has come to the knowledge of the plaintiff-company that the defendants marketing team has been approaching most of the major customers of the plaintiff and selling their product to them at a much cheaper rate as compared to that of the plaintiffs product by representing to them that the defendant's product is same as that of the plaintiffs. The marketing personnel of the defendants have been claiming that the said invention was jointly developed by the plaintiff and the 1st defendant prior to 1996 and thus their product Livoliv-250 is the same as Zigbir in terms of efficacy, but is priced much lower than Zigbir. By such illegal and dishonest practices, the defendant is attempting to capture the plaintiff's market and deprive it of its legitimate rights under the Patent granted to it, thereby causing far-reaching economic loss to the plaintiffs product in addition to infringing the plaintiff's rights as a Patent holder. The plaintiff has set out the details of the total sales of its product Zigbir annually from the date of its launch as under:

Sl. No.	Year	Sales volume of ZIGBIR (in kgs)	Annual growth (%)
	-99 (year of launch)	,600	
	-2000	,35,000	
	-2001	,68,000	
	-2002	,87,000 (2,11,680)*	
	-2003	,20,000 (2,66,710)*	-36 (negative growth)

*-These figures are calculated @26% Annual growth.

Based on the above sales figures, it is amply clear that the annual sales growth of the plaintiff has declined considerably after the launch of Livoliv-250 in the market. This fact, by itself, proves the detriment and damage caused to the plaintiff by the infringement of its Patent rights by the defendants.

7. The plaintiff further states that on receiving the information that the defendants are selling a product under the name of Livoliv-250 which is similar to the plaintiffs product Zigbir, the plaintiff conducted various physical and chemical analysis tests by using different modern analytical methods which are accepted in national and international pharmacopoeias to compare herbal products. An in-house study was carried out by the R&D Centre of the plaintiff to compare Zigbir and Livoliv-250 using different analytical methods. These analytical methods prove beyond doubt that Livoliv-250 is manufactured by misappropriating and unlawfully using the patented process of the plaintiff. Chromatography is universally accepted as a process for quality control of herbs/medicinal plants and the products derived from them. Three major types of chromatography which are almost routinely used for plant analysis are:

(1) Thin layer chromatography (TLC)

(2) High performance thin layer chromatography (HPTLC)

(3) High performance liquid chromatography (HPLC)

8. The chromatographic profiles obtained by adopting the three separate methods have all confirmed the fact that Zigbir and Livoliv-250 are similar. Copy of the analytical report and a detailed explanation of the methodology adopted are produced along with the plaint. These findings are further corroborated by tests carried out by the Foundation for Revitalisation of Local Health Traditions (FRLHT), a scientific research organisation which is nationally and internationally recognised. The report submitted by FRLHT clearly reflects that the Co-ordinator who issued the report is an expert in the field. Further the said report certifies that from the analytical studies conducted at the FRLHT laboratory using HPLC and HPLTC, it appears that the three samples Zigbir, Livoliv-250 and the standard sample prepared by FRLHT are similar in their major chemical profiles. It can be concluded that in all probability the chemical composition of Zigbir and Livoliv-250 is similar to the chemical composition of the standard sample prepared by FRLHT in accordance with Claim 1 of Patent No. 79/MAS/98 dated 12th January 1998. This finding clearly and categorically establishes the fact that the defendant's product Livoliv-250 has been manufactured by using the plaintiff's patented process. Therefore, the same amounts to infringement of the plaintiffs Patent (bearing Patent No. 186857). Therefore, the plaintiff was constrained to issue a legal notice dated 9th September 2003 to the defendants calling upon them to cease and desist manufacturing and selling of Livoliv-250 with immediate effect. However the defendants have failed and neglected to comply with the demands. They sent a reply dated 19th September 2003 raising various untenable and frivolous grounds.

9. The plaintiff further submits that the commercial uses of the respective products of the plaintiff and the defendants are also the same. They are poultry feed supplements. These facts are evident on a bare perusal of the product brochures of the plaintiff and defendants produced along with the plaint. Both the products are used to optimise liver functions, improve Feed Conversion Ratio (FCR), weight gain and egg yield; production and performance and to attain sexual maturity of birds. Since the market for both the products is same, infringement of the plaintiff's Patent by the defendants resulted in depriving the plaintiff of its market share and has thereby caused substantial injury and prejudice to it.

10. The cumulative effect of the facts narrated above makes it amply clear that the defendants have infringed the plaintiffs statutorily conferred rights as a patent holder. The plaintiff has not given any permission or licence, express or implied, to the defendants, to use its Patent. The plaintiff has exclusive right to use the patented method; any unauthorised use of the same in manufacturing a similar or identical product, without obtaining the permission of the plaintiff company, amounts to an infringement of plaintiffs Patent rights under the Act. In this case the defendants, without taking any authorization from the plaintiff, have been using the manufacturing process which has been patented in the plaintiffs name and as a result have violated the stipulation given under the Act. Therefore, the plaintiff has filed this suit for injunction restraining the defendants from manufacturing, producing or selling the product Livoliv-250 and for a direction to the defendants to destroy all Livoliv-250 products and other related materials and also for a mandatory injunction to render accounts to the plaintiff of the revenue, gains and profits earned by the defendant by the manufacture and sale of Livoliv-250 and to pay damages. They have also sought for other consequential reliefs.

11. After service of summons, the defendants entered appearance and filed detailed

written statement denying the claim of the plaintiff.

12. The defendants contend that prior to the incorporation of the plaintiff company, the family of the parties to the suit possessed wide and extensive experience and expertise in the science of ayurvedic and herbal medicines. This was inherited from the Karta of the family, i.e., Late Mr. Ram Lal Agarwal and the knowledge base is the common heritage of both the plaintiff and the defendants. The plaintiff company is a newly incorporated company which cannot claim inherent knowledge in ayurvedic medicine as its proprietary asset. The legacy of Mr. Ram Lal Agarwal was inherited by the parties and other family members. The claim of developing a natural performance enhancer for broilers is denied. They also deny that Mr. Amit Agarwal invented the said natural performance enhancer for broilers. As a fact, the so called method of preparing the herbal hepato-protective and anti-hepato-toxic composition is not a patentable invention within the meaning of the Act. The patent was obtained on false suggestion/representations and misleading specification statement. The specification/statement itself shows that the so called invention was developed based on human liver functions and no assertions whatsoever are made as regards its use for poultry. The allegation of assignment is false. No assignment document has been filed with the plaint and such action is in violation of the mandates under Order VII Rule 14 of the Code of Civil Procedure 1908. The failure to produce the assignment document as per Section 68 of the Act is fatal to the plaint and consequently, the plaint ought to be rejected under Order VII Rule 11 of CPC. Though the patent has been claimed to be for a method of preparing a herbal hepato-protective and anti-hepato-toxic composition, the invention resides in the herbal composition synergically aimed at curing the ailments of the liver. Consequently, it is submitted that the patent ought not to have been granted. The alleged invention is based on common indigenous ayurvedic herbs which have curative and/or prophylactic properties. The thrust of the claim leads towards a medicine or a drug and consequently the patent as sealed is contrary to law.

13. The assignment claimed by the plaintiff of the patent is ineffective being not in conformity with Section 68 of the Act and therefore the suit is not maintainable. Patent No. 186857 for the so called invention was obtained by false suggestions, misrepresentation and by misleading statements in specification. The alleged method of preparing a herbal hepato-protective and anti-hepato-toxic composition, is not patentable under the Act, as it is not an invention by any stretch of legal logic. The extension was also obtained by false suggestion/misrepresentation. The patent relied on in the plaint is not an invention as the process claimed by the plaintiff does not involve an inventive step. The claim does not qualify as non-obvious to a person skilled in the art. The invention as claimed in the plaint does not qualify as an invention in law and does not involve any novelty. As such, it is not patentable under the Act. The claim as major features of the so called process puts the product within the meaning of drugs/medicines and consequently the plaintiff would not be entitled to exclusive marketing rights.

14. Livoliv-250 of the defendants is a result of their own intellectual pursuits in their R&D Centre. The defendants have standardized the ayurvedic (indigenous) herbs, standardizing the formulation and traditional use by developing and upgrading it in modern scientific norms. The assertion that the composition of the defendants' Livoliv-250 and plaintiffs Zigbir is same, is not correct and refuted. Even assuming that the uses of the defendants Livoliv-250 may in some manner be similar to many other products in the market including that of the plaintiff, Zigbir, the plaintiff cannot claim exclusive rights of their product legally and factually. The defendants have not infringed the alleged patent of the plaintiff. It is wrong to allege that Mr. Amit Agarwal has invented the process of preparation of the product Zigbir. As a fact, it is

not an invention known to law. The so-called assignment by him in favour of the plaintiff is not filed and appears to be legally ineffective and bad in law. Basis of the suit is assignment by Mr. Amit Agarwal in favour of the plaintiffs company. No assignment deed is filed along with the plaint.

15. The alleged invention is a herbal composition being synergistically effective in curing and preventing the ailments of liver. Another embodiment of the plaintiff's invention resides in the process for preparation of the herbal composition. This and other related assertions of the plaintiffs indicate that the product Zigbir Is a Drug/Medicine within the definition as contained in Section 2(1) of the Patent Act read with Section 3(a) of the Drugs & Cosmetics Act. 1940. This basic feature of the claim of the plaintiffs attracts Chapter IV-A of the Drugs & Cosmetics Act. As prima facie, the plaintiff had not complied with the requirements of Chapter IV-A (Section 33B to Section-33O) of Drugs & Cosmetics Act, 1940 and related rules for manufacture/sale of Ayurvedic Drugs/Medicines, Zigbir being a medicine/drug, before granting Patent No. 186857, the claim of so called invention should have been dealt with in accordance with Chapter IV-A vide Section 5(2) of the Act. Consequently, the grant of Patent is void, ab initio and as such Zigbir is being illegally manufactured and sold without proper Drug Licence and under the said patent, which is void ab initio, therefore the suit itself is not maintainable and the plaint is liable to be rejected on this score also.

16. In the specifications the claim about invention as Hepatoprotective and Anti-Hepato-toxic composition is not supported by empirical clinical experimentation and data related to it. The whole specification consists of assumptions and presumptions. This is clear misrepresentation, false statements and fraud on the Authority. The plaintiff avers that the composition and uses of the plaintiffs product Zigbir and defendant's product Livoliv-250 is same. It is submitted that in this respect the composition and ingredients of the two products contain the following:

Plaintiffs' Zigbir	Defendants LivoLiv-250
Phyllanthus amarus (Bhuiamla) 20-30%	% (Phyllanthus niruri - also called (Bhuiamla)
Solanum nigrum (Makoh) 20-30%	%
Andrographis paniculata (Kalmegh) 25-35%	%
Boerrhavia diffusa (Punarnava) 15-25%	Nil
Other herbs Nil	%

17. The defendants are using only the first three herbs namely Phyllanthus nuriri, Solanum nigrum and Androgpahis paniculata. The defendants are not using Boerrhavia diffusa. This herb is claimed by the plaintiff as synergistic. As defendants are not using this Boerrhavia diffusa, there can be no infringement of the alleged patent. The plaintiff itself in the specifications submitted to the Controller of Patents have written Boerrhavia diffusa is commonly grown and commonly used through India and it is known to act synergistically with the other herbs like phyllanthus. So the plaintiff cannot claim any exclusive use of this herb. Defendants are only using Bhuiamla, Makoh and Hara Chiraita along with 70% other herbs which they are not bound to disclose as such composition is protected by law as a proprietary and trade

secret. The four herbal ingredients used by the plaintiff are household herbs, generally used in Indian villages, farmhouses and are simple household remedies used by even illiterate villagers, cattle keepers and poultry raisers. It is a common feature in India that the Indian villagers domesticate poultry and cattle and they commonly use these herbs in various ways and in different situations for mitigating the health problems of their poultry/cattle. These herbs are in traditional use in rural India for improving digestion, metabolism and production performance, etc. in poultry and cattle. In various parts of India, these herbs are used in different compositions/ratios according to the domestic and climatic conditions of their regions. Plaintiff cannot claim monopoly of any type about the use of these ingredients in any way. The plaintiff cannot also claim marketing monopoly of their product Zigbir in law or in equity.

18. The proportion/ratio of the herbal ingredients used in the composition of Zigbir and Livoliv-250 are not identical, as stated above. Moreover the quantities of these herbs used in Livoliv-250 are beyond the range of these herbs claimed in the so-called process patent of Zigbir by the plaintiff. The plaintiffs own admission is that these herbs are commonly found and grown throughout India. As such these herbs are used in various proportions/ratios according to their conventional/traditional use based on folk experience and ancient wisdom. Ayurveda/ Unani/Siddha indigenous system is based on mass experience and ancient wisdom used traditionally from generation to generation. The above mentioned herbs are known all over Indian households, in farms and are used in the cattle and poultry* fanning community in different formulations in different regions of the country. Variations in ratios of these herbs are practised by rural men and women traditionally. Zigbir, the product of plaintiff, is only the conversion of these herbs in powder form, i.e., mere admixture of known substances resulting only in the aggregation of properties of the components thereof, presented for sale in contemporary packaging without inscribing the names and quantities of herbal ingredients. Further in relation to the process claimed by the plaintiff as an invention, it is not an invention in any way, i.e., it is not at all a new process involving an inventive step. Converting these herbs into powder form, in any way, by any method or mechanism, is not material to support the claim of an invention.

19. Cleaning, cutting, chopping them in a chopping machine to obtain mesh of 5 to 20 number size, powder in a hammer mill to have a sieve size of 30-40 number, cleaning and crushing is the process involved in preparing Zigbir. This is a commonly used process and is not an inventive step in any way. Conversion of these herbs into powder form can be done in various ways, by traditional/home appliances or modern machines. It makes no difference in pharmacology, therapeutic or medicinal, curative or preventive prophylactic properties. In households, dawakhanas or aushdhalayas, the powder of herbs is made to conform to various mesh sizes. Even Linen cloth or malmal is used in households by the common man, by hakims and vaids and in industry. As such, this aspect of malting a powder of herbs by passing through sieves of various mesh is not an invention at all. The specification submitted to the Patent Office speaks of qualitative analysis of herbs but no details of analysis are given. Further it makes no difference in the chemical composition of these herbs if they are powdered in a hand Havan Dasta, the traditional home appliance of powdering Herbs or in a kitchen mixie or in a hand run grinder/hammer machine or in industrial grinder. The so-called inventive process speaks of cleaning, cutting and chopping. This aspect is not or cannot be an invention as it is a basic postulate for using indigenous herbs by Vaids/Hakims and even in household cures for common ailments by the common man. Powdering of herbs in grinding machine or by beating them in hammer mill or in Havan Dasta makes no difference in the resultant herbal powder or in its therapeutic properties. Haldi, Dhaniya, Mirch, Sonth etc., are herbs and are

powdered in various ways in household use medicinal use by Vaids/Hakims and in industry. Further the powder of herbs is made to conform with various mesh size in households by the common man and in industry. As such, this aspect does not support the claim of invention and further is not non-obvious. The invention in the present case must result in a new substance (having features which should not be obvious to a person skilled in Ayurvedas).

20. Zigbir of the plaintiff is the powdered form of well known herbs extensively grown throughout India, traditionally used by Vaids/Hakims and traditional village veterinarians and the common man for purposes as claimed in Zigbir literature/pack. Therefore, the composition of herbs and process of powdering them in usable form is not a patentable invention in any way. The Patent as relied upon in the plaint was obtained by false suggestions/misrepresentation and by submitting misleading specification, and is as such revocable.

21. Process of manufacturing Livoliv-250 of defendant and the Zigbir of plaintiff are not the same in any way. The process patented by the plaintiff under No. 186857 is not a new process involving inventive steps. The process claimed by the plaintiff is not so unique that makes it not obvious to a person skilled in herbs/processing herbs in traditionally known and used ways (as household remedy or medicines or feed supplements). The herbs, their use and process are known to farmers, villagers and rural Indian households using the herbs by powdering them in accordance with their traditional knowledge and ancient vedic wisdom. Further the process claimed by the plaintiff is prima facie frivolous, having no worth if put to the test of Ayurvedic pharmaceutical principles. The commonly used process of powdering herbs has been raised to a fictitious pedestal by the plaintiff. It is simply the use of commonly known herbs and process for powdering them in usable form. The arrangement of mixing the ground herbs is not an invention or inventive step in anyway. Therefore the process of manufacturing Zigbir was not patentable and the patent as relied upon in the plaint was obtained wrongly on false suggestions/misrepresentations, it being not an invention within the meaning of the Act. It was not a new process but a false claim of invention of a process publicly known and used in rural India.

22. The defendants have also put forth a counter claim and sought for revocation of the patent granted to the plaintiff under Section 64 read with Section 104 of the Act on the ground that Patent No. 186857 was not patentable under Chapter II of Patents Act 1970 and that the said patent was granted on the application of the plaintiff without it being entitled for patent under the provisions of the Act.

23. In support of their counter claim, the defendants contend that the so called invention is not invention as defined under Section 2 of the Act. The so called inventive process was and continues to be known publicly in rural India by farmers, households, common Hakims/Vaids/Ojhas and as such is not an invention. The so called invention of process does not involve an inventive step in any manner. The end product generated by the alleged inventive process is a drug/medicine as defined in Section 2(1) of the Act and Section 3(a) of Indian Drugs and Cosmetics Act, 1940. This end product is manufactured illegally without a license under Drugs & Cosmetics Act and contrary to relevant Rules relating to the manufacture of Ayurvedic Drugs and is being sold as feed supplement and so it was not patentable. Thus the patent obtained by them by false representation is liable to be revoked. In the guise of patent, absolute monopoly in the market is not permissible in law. Therefore the defendants sought for revocation of the patent also.

24. The plaintiff filed his written statement to the said counter claim. The plaintiff reiterated all the averments made in the plaint. It was contended that defendant has

not placed any evidence in support of his claim for revocation of the patent validly granted to the plaintiff. It is clear from the documents produced by the plaintiff that the defendant has copied the process of the product manufactured by the plaintiff and the defendants are marketing that product by infringing the plaintiffs patent. Apart from the fact that the ingredients being used by the defendants are similar to that in the plaintiffs product, even the physical parameters like colour, smell, taste and chemical composition are similar. The defendant's product Livoliv-250 was launched after the launch of Zigbir, which is the product of the plaintiff. Both the products are used as poultry feed supplements to optimize liver function in chickens, which in turn enhances their growth. The plaintiff has not given any permission or licence to the defendants to use its patent. They denied all the allegations made in the counter claim.

25. The plaintiff developed the product Zigbir being a natural performance enhancer in 1998. The original invention of the process was by one Amit Agarwal who assigned all his rights in favour of the plaintiff company. The invention is based on a process to prepare a synergistic composition with ingredients known for their curative and prophylactic properties, which is novel and useful. The patent has been granted for the process of preparing this synergistic composition comprising specific herbs in specific proportions and in their precise blending. Even though the individual ingredients of the synergistic composition may have been known for their prophylactic/curative properties, the novelty of the patent lies in their selection, percentages and in the manner and method in which they are blended. In the circumstances, the invention of the plaintiff is patentable under the Act and allegations to the contrary made in the counter claim are denied as false and baseless.

26. Poultry/cattle feed supplements for animals do not come within the purview of the Drugs and Cosmetics Act as alleged by the defendants. As such the plaintiff is not required to obtain any manufacturing licence from the Drug Controller. The allegation that the patent if allowed to stand would create absolute monopoly in the market in favour of the plaintiff is false. The defendants do not appear to have done any research or any development work prior to marketing their product Livoliv-250 but have misappropriated and mis-utilised the patented process of the plaintiff thereby being liable for the offence of infringement.

27. The defendants in their written statement have admitted that three out of four ingredients being used by them in the manufacture of their product are similar to those being used by the plaintiff for their product. In so far as the 4th ingredient is concerned, the defendants allege that the herb Phyllanthrus Niruri is being used by them. The said herb is not native to India and it is not available in abundance. Generally in the Indian market the herb Phyllanthrus Amarus is passed off and sold in the name of Phyllanthrus Niruri. The defendants have not produced any document to show that they are using Niruri and not Amarus. Further the defendants are trying to mislead the Court by saying that they are using some other herb which allegedly constitutes 70% in the manufacture of their product. This is not supported by any evidence. The chemical analysis of the two products Livoliv-250 and Zigbir conducted by FRLHT would show that the chemical composition of the two products are so similar that they are almost identical. The product Zigbir is made by making use of only 4 herbs, among several hundred herbs known for their prophylactic curative properties. These four herbs identified by the plaintiffs are synergistically blended. There are several hundred herbs having prophylactic curative properties, but the plaintiff through research and development at the cost of several lakhs of rupees has identified certain specified herbs which are mixed in proper percentages to produce the synergistic composition. The research of the plaintiff has enabled it to identify

four out of several hundred herbs to evolve this product. In these circumstances, even if the knowledge of the herbs may be common to all villagers, farmers and cattle keepers the combination of herbs, their percentages and manner of blending is unique and novel and not known to anybody. The said product derived from a synergistic composition and blending of herbs is a new product not known to anybody which is prepared by the patented process. The patent process is not a conventional process of cutting, chopping, mixing or pulverizing as alleged by the defendants. The plaintiff has exclusive right to exploit the patent and to market its product without any act of infringement by the defendants.

28. The counter claim of the defendants is not maintainable either in law or on facts. No evidence is produced by the defendants to revoke the patent granted to the plaintiff. On the other hand the act of infringements by the defendants of the patented process is apparent from the document produced by the plaintiff. Therefore the plaintiff contends that defendant is not entitled to the relief claimed in the counter claim.

29. Section 104 of the Act deals with jurisdiction. It provides that no suit for a declaration under Section 105 or for any relief under Section 106 or for infringement of a patent shall be instituted in any Court inferior to a District Court having jurisdiction to try the suit. Therefore, the suit was initially filed in the District Court. However, the proviso to Section 104 provides that, where a counter-claim for revocation of the patent is made by the defendant, the suit, along with the counter-claim, shall be transferred to the High Court for decision. In the instant case, apart from contesting the claim of the plaintiff, the defendant has also filed a counter claim for revocation of the patent. Therefore, the District Court before which the suit was instituted transferred the suit to the High Court for decision. Section 107 of the Act provides that, 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. Therefore, as is clear from the written statement of the defendant, the very same grounds which are available under Section 64 of the Act for revocation of the patent is urged as a ground for defence to the claim of the plaintiff. Therefore, it is in this background, the issues are framed in the suit.

30. On the aforesaid pleadings, the following issues are framed:

> **1.** Whether the plaintiff proves that the product 'Livoliv 250' produced and marketed by the defendant violates the registered patent rights of the plaintiff in respect of their producer 'Zigbir'?
>
> **2.** Whether the plaintiff is entitled to seek accounts of the profits made by defendant by selling Livoliv 250 for ascertaining the damages payable for violation of the patent rights? If so, what is the quantum of damages the plaintiff is entitled to?
>
> **3.** Whether the defendant proves that the product of the plaintiff 'Zigbir' is not legally a patentable product and the registration of patent is illegal? If so, is the registration of the Plaintiffs patent to be cancelled?

31. By order dated 11.08.2005, Sri. N.S. Sangolli, Retd. District Judge, was appointed as Commissioner to record evidence.

32. The plaintiff in support of his case examined Ravindra Kumar Agarwal, Chairman of the plaintiff company as P.W-1. Through him Ex.P-1 to P-39 were marked. The plaintiff also examined Dr. Amit Agarwal, the original inventor of the product Zigbir, as P.W-2. Through him, they have marked Exs. P-40 to P-50.

33. On behalf of defendants, Sudhakar Agarwal was examined as D.W-1. Through him, Exs.D-1 to D-15 were marked. The defendants also examined Dr. Muruganandam, a qualified Scientist who was working in defendant's company as its Chief Scientist and R&D Incharge, as D.W-2. Through him Exs.D-1 to D-13 were marked.

34. Thereafter, the arguments of the learned Counsel were heard.

RIVAL CONTENTIONS

35. Sri. K.G. Raghavan, learned Senior Counsel submitted that the invention resides in the process of preparation of herbal composition being synergistically effective in curing and preventing the ailments of liver. The plaintiff's invention resides in the process of preparation of the herbal composition. The said process lies in selecting certain plants which synergise one another's activity. Therefore when the plaintiff uses four products in a particular proportion, it results in synergy and it is only they who are exclusively entitled to use the said process, i.e., the proportion in which the products were used, to the total exclusion of others because of the registration of the patent relating to the process in their name. In support of his contention, he relied on the FRLHT Laboratory report, which is marked as Ex.P-31 in the case. As the defendants have not filed any objection to this report, the said report was marked and being a report of an expert, it becomes part of substantive evidence in the case. The said report fully supports the case of the plaintiff when it categorically states that in all probability, the chemical composition of Zigbir and Livoliv is similar to the chemical composition of the standard sample prepared by FRLHT. Once the product of the plaintiff, Zigbir, and the product of the defendants, Livoliv-250, are similar or identical, then, in view of Section 104A of the Act, the burden of showing the process with which the defendants manufacturer their product shifts on the defendants. The defendants have not come out with any evidence to show the process through which their product is manufactured and therefore, when once both the products are identical and when the defendants have failed to prove that the process adopted by them is different from the patented process of the plaintiff, the case of infringement made out by the plaintiff is fully established.

36. Per contra, Sri Sajan Poovayya, the learned Counsel appearing for the defendants contended that the condition precedent for attracting Section 104A is, the product of the plaintiff and the product of the defendants should be identical. The defendants have disputed the same. The FRLHT Laboratory report on which the plaintiff relies to establish the identity of the two products clearly demonstrates that the similarity is in chemical composition and not in product. Nowhere it is stated that the products are identical. Once the products are not identical, Section 104A is not attracted. Therefore the burden of proving that the defendants are manufacturing their product through the patented process squarely lies on the plaintiff which burden they have not discharged. Therefore no case of infringement of a registered patent is made out, on the contrary he contended that there is no invention in the process adopted by the plaintiff in manufacturing its product Zigbir. The said process is not new. It was well known in rural India. There is no inventive step. The specification admittedly does not sufficiently and fairly describe the invention. The patent is obtained by false suggestion and representation and therefore it is liable to be revoked.

37. The earliest law in India was the Patent and Designs Act, 1911. Since then there have been substantial changes In the political and economic conditions of the country, and the present Patents Act, 1970 came to be enacted. The said enactment was further amended to bring it in conformity with the Trade Related Aspects of Intellectual Property Rights to honour international obligations. It is in this

background, it is necessary to have a clear picture of what a patent is, what an invention means and how it has been defined under the Act and the changes brought about to the definition from time to time.

PATENT

38. A patent is a right of monopoly for the exclusive use of invention. The underlying purpose of the patent system is the encouragement of improvements and invention. The rationale behind the grant of such right by the sovereign power is full disclosure of the invention for the public good and interest of the society. In return, for making known one's improvement to the public, the inventor receives the benefit of a period of monopoly during which the inventor becomes entitled to prevent others from performing his invention except by his licence.

39. The object of Patent Law is to encourage scientific research, new technology and industrial progress. Grant of exclusive privilege to own, use or sell the method or the product patented for a limited period, stimulates new-inventions of commercial utility. The price of the grant of the monopoly is the disclosure of the invention at the Patent Office, which, after the expiry of the fixed period of the monopoly, passes into the public domain.

40. The fundamental principle of Patent Law is that a patent is granted only for an invention, which must be new and useful. That is to say, it must have novelty and utility. It is essential for the validity of a patent that it must be the inventor's own discovery as opposed to mere verification of what was already known before the date of the patent. It must also be useful. The invention must show novelty. There must be an inventive step. There cannot be an inventive step without novelty. Not every improvement is invention; but to entitle a thing to protection it must be the product of some exercise of inventive faculties and it must involve something more than what is obvious to persons skilled in the art to which it relates.

41. Under the American Law a patent is granted to the process, composition of matter as well as to the product separately. In American Law, Section 101 of the U.S. Code Title 35 provides for process, machine, manufacture or composition of matter to be patentable. Therefore, a clear distinction has to be made between process and composition of matter. Under American Law, the process and composition of matter both can be patented separately. The process does not include composition of matter. There is no such distinction in the Indian Law. However, the said right is subject to the limitations imposed under Section 5 of the Act. The 1911 Act did not provide for product patent at all as it was confined only to manner of new manufacture. In so far as India is concerned prior to the amendment of the Act, what is patentable was governed by Section 5 of the Act. The Section made it very clear that no patent shall be granted in respect of claims for the substance themselves. But, claims for their methods or process of manufacture shall be patentable. However, in the 1970 Act, invention included substance produced by manufacture, thereby providing for patent for a substance apart from the process or manner of manufacture. Under the 1970 Act, patent was granted to products also. But, in respect of substances intended for use or capable of being used as food, medicine or drug or substances prepared or products manufactured by chemical process, patent was not granted in respect of claims for the substance themselves. A product patent was available even under the 1970 Act in respect of products falling outside the scope of Section 5. It is only a substance such as food, medicine or drug or an alloy which was hit by Section 5 for being patented. But, the claims for the methods or process of manufacture of such substance was not hit by Section 5. If the substance was not an invention in terms of Section 3, if the process by which such substance was manufactured was also not an

invention and not patented. A substance may not be patentable because of Section 5 but the process by which such a substance was manufactured could still be patented. The word "manufacture" was also defined under Section 2(10) which included any art, process or manner of producing, preparing or making any article, and also any article prepared or produced by manufacture". Section 3 of the Act deals with what are not inventions. Sub-clause (e) in the said section states that a substance obtained by a mere admixture resulting only in the aggregation of the properties of the components thereof or a process of producing such substance are not inventions within the meaning of the Act and therefore, no patent can be granted. In other words, a mere admixture resulting in a product and the process of the admixture both are not patentable. A mere admixture and the process of that admixture is not patentable. If it is something more than an admixture, the resultant product and the process of achieving that product, both are patentable subject to Section 5.

INVENTION

42. Invention is a concept; a thing evolved in the mind; it is not a revelation of something which exists and was unknown, but is creation of something which did not exist before, possessing elements of novelty and utility in kind and measure different from and greater than what the art might expect from skilled workers. Invention is the act or operation of finding out something new; the process of contriving and producing something not previously known or existing, by the exercise of independent investigation and experiment. Inventive skill has been defined as the intuitive faculty of the mind put forth in the search for new results, or new methods, creating what had not before existed or bringing to light what lay hidden from vision.

43. Under the Indian Patents and Designs Act, 1911, invention is defined as under:-

> "invention" means any wanner of new manufacture and includes an improvement and an alleged invention.

The definition of the word "invention" has undergone a considerable change in the Patents Act, 1970 where it is defined as under : -

> (1)(J) "invention" means any new and useful
>
> (i) art, process, method or manner of manufacture;
>
> (ii) machine, apparatus or other article;
>
> (iii) substance produced by manufacture, and includes any new and useful improvement of any of them and an alleged invention.

By way of amendment, by Amendment Act, 2002 the word "invention" reads as under :-

> 2(1)(j) "invention" means a new product or process involving an inventory step and capable of industrial application.

Invention as defined under Section 2(1)(j) makes it clear that it means any new and useful process. A process which was hitherto in practice either is given up or improved upon and such a process should be new and useful and that is also to be stated in describing the invention. Section 5 of the 1970 Act was omitted by the Amendment Act, 2005 with effect from 1st January 2005. Section 5 restricted the grant of patents only to methods or process of manufacture. The definition of invention now includes product as well as a process.

44. Section 3 of the Act specifically provides what are not inventions within the meaning of the Act. Clause (e) of Section 3 categorically states that a substance obtained by a mere admixture resulting only in the aggregation of the properties of the components thereof or a process for producing such substance would not constitute an invention within the meaning of the Act. Similarly, clause (j) provides that plants and animals in whole or any part thereof other than microorganisms but including seeds, varieties and species and essentially biological processes for production or propagation of plants and animals also do not constitute an invention within the meaning of the Act. Further clause (p) makes it clear that, an invention which, in effect, is traditional knowledge or which is an aggregation or duplication of known properties of traditionally known component or components also does not constitute an invention within the meaning of the Act. Thereafter, Chapter III deals with applications for patents. Section 6 provides for the persons entitled to apply for patents. Section 7 deals with form of application. Section 8 deals with information and undertaking regarding foreign applications and Section 9 provides for provisional and complete specifications.

APPLICATION FOR GRANT OF PATENT - CONTENTS

45. Section 10 deals with contents of specification. In particular sub-section (4) of Section 10 mandates that every patent application shall contain complete specification fully, in particular describing the invention and its operation or use and the method by which it is to be performed. It reads thus :

> Section 10 : Contents of specifications.- (1) Every specification, whether provisional or complete, shall describe the invention and shall begin with a title sufficiently indicating the subject-matter to which the invention relates.
>
> (2) Subject to any rules that may be made in this behalf under this Act drawings may, and shall if the Controller so requires, be supplied for the purposes of any specification, whether complete or provisional; and any drawings so supplied shall unless the Controller otherwise directs be deemed to form part of the specification, and references in this Act to a specification shall be construed accordingly.
>
> (3) If, in any particular case, the Controller considers that an application should be further supplemented by a model or sample of anything illustrating the invention or alleged to constitute an invention, such model or sample as he may require shall be furnished (before the application is found in order for grant of a patent), but such model or sample shall not be deemed to form part of the specification.
>
> (4) Every complete specification shall-
>
> > (a) fully and particularly describe the invention and its operation or use and the method by which it is to be performed:
> >
> > (b) disclose the best method of performing the invention which is known to the applicant and for which he is entitled to claim protection; and
> >
> > (c) end with a claim or claims defining the scope of the invention for which protection is claimed;
> >
> > (d) be accompanied by an abstract to provide technical information on the invention:

Provided that -

(i) the controller may amend the abstract for providing better information to third parties; and

(ii) if the applicant mentions a biological material in the specification which may not be described in such a way as to satisfy clauses (a) and (b), and if such material is not available to the public, the application shall be completed by depositing the material to an international depository authority under the Budapest Treaty and by fulfilling the following conditions, namely:-

(A) the deposit of the material shall be made not later than the date of filing the patent application in India and a reference thereof shall be made in the specification within the prescribed period;

(B) all the available characteristics of the material required for it to be correctly identified or indicated are included in the specification including the name, address of the depository institution and the date and number of the deposit of the material at the institution;

(C) access to the material is available in the depository institution only after the date of the application of patent in India or if a priority is claimed after the date of the priority;

(D) disclose the source and geographical origin of the biological material in the specification, when used in an invention.

(4A) In case of an international application designating India, the title, description, drawings, abstract and claims filed with the application shall be taken as the complete specification for the purposes of this Act

(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.

(6) A declaration as to the inventorship of the invention shall, in such cases as may be prescribed, be furnished in the prescribed form with the complete specification or within such period as may be prescribed after the filing of that specification.

(7) subject to the foregoing provisions of this section, a complete specification filed after a provisional specification may include claims in respect of developments of, or additions to, the invention which was described in the provisional specification, being developments or additions in respect of which the applicant would be entitled wider the provisions of section 6 to make a separate application for a patent.

46. It was contended that in order to claim any right, the novelty claim should form part of the specification as prescribed under Section 10 of the Act which is to be filed

with the Controller. On being disputed, it is not open to the plaintiff to produce by way of evidence in the course of trial those new inventive steps in which novelty is claimed if the same is not clearly set out in the application for grant of patent. To decide the rights of the plaintiff in so far as new inventive step in which novelty is claimed, no external aid would be pressed into service. In this background, it is necessary to note what the Supreme Court has said in the case of M/s. Bishwanath Prasad Radhey Shyam -vs- M/s. Hindustan Metal Industries (MANU/SC/0255/1978 : AIR 1982 SC 1444), wherein it was held thus:

> : The object of Patent Law is to encourage scientific research, new technology and industrial progress. Grant of exclusive privilege to own, use or sell the method or the product patented for a limited period, stimulates new inventions of commercial utility. The price of the grant of the monopoly is the disclosure of the invention at the Patent Office which, after the expiry of the fixed period of the monopoly, passes into the public domain.
>
> : The fundamental principle of Patent Law is that a patent is granted only for an invention which must be new and useful That is to say, it must have novelty and utility. It is essential for the validity of a patent that it must be the inventor's own discovery as opposed to mere verification of what was already known before the date of the patent.
>
> : 'Invention' means any manner of new manufacture and includes an improvement and an allied invention", (Section 2(8) of 1911 Act). It is to be noted that unlike the Patents act, 1970, the Act of 1911 does not specify the requirement of being useful in the definition of 'invention'. But Courts have always taken a view that a patentable invention, apart from being a new manufacture must also be useful The foundation for this Judicial interpretation is to be found in the fact that Section 26(1)(f) of the 1911 Act recognized lack of utility as one of the grounds on which a patent can be revoked.
>
> : It is important to bear in mind that in order to be patentable an improvement on something known before or a combination of different matters already known, should be something more than a mere workshop improvement; and must independently satisfy the test of invention or an "inventive step". To be patentable the improvement or the combination must produce a new result, or a new article or a better or cheaper article than before. The combination of old known integers may be so combined that by their working inter-relation they produce a new process or improved result. Mere collection of more than one integers or things, not involving the exercise of any inventive faculty, does not qualify for the grant of a patent. It is not enough said Lord Davey in Rickmann v. Thierry (1986 14 RPC 105) (HL) (Sic) that the purpose is new or that there is novelty in the application, so that the article produced is in that sense new, but there must be novelty in the mode of application. By that I understand that in adopting the old contrivance to the new purpose, there must be difficulties to be overcome, requiring what is called invention, or there must be some ingenuity in the mode of making the adoption'. As Cotton L.J. put in Blakey and Co. v. Lathem and Co. (1889) 6 RPC 184 (CA), (Sic) "to be new in the patent sense, the novelty must show invention". In other words, in order to be patentable, the new subject matter must involve 'invention' over what is old. Determination of this question, which reality is a crucial test, has been one of the most difficult aspects of patent law, and has led to considerable conflict of judicial opinions.

:This aspect of the law relating to patentable inventions as prevailing in Britain, has been neatly summed up in Encyclopaedia Britannica, Vol 17 p. 453. Since in India, also, the law on the subject is Substantially the same, it will be profitable to extract the same hereunder:

> A patent can be granted only for manner of new manufacture' and although an invention may be 'new' and relate to a 'manner' of new manufacture'- it may be only a normal development of an existing manufacture. It is a necessary qualification of a craftsman that he should have the knowledge and ability to vary his method to meet the task before him - a tailor must cut his cloth to suit the fashion of the day - and any monopoly that would interfere with the craftsman's use of his skill and knowledge would be intolerable.

: A patentable invention, therefore, must involve something which is outside the probable capacity of a craftsman - which is expressed by saying it must have 'subject matter' or involve an 'inventive step'. 'Novelty' and 'subject matter' are obviously closely allied... Although these issues must be pleaded separately, both are invariably raised by a defendant and in fact 'subject matter' is the crucial test, for which there may well be novelty not involving as 'inventive step', it is hard to conceive how there can be an 'inventive step' without novelty.

: Whether an alleged invention involves novelty and an 'inventive step' is a mixed question of law and fact, depending largely on the circumstances of the case. Although no absolute test uniformly applicable in all circumstances can be devised, certain broad criteria can be indicated, whether the "manner of manufacture" patented, was publicly known, used and practised in the country before or at all the date of the patent? If the answer to this question is 'Yes', it will negative novelty or 'subject-matter'. Prior public knowledge of the alleged invention which would disqualify the grant of a patent can be by word of mouth or by publication through books or other media. "If the public once becomes possessed of an invention", says Hindmarch on Patents (quoted with approval by Fry L. J. in Humpherson v. Syer, (1887 4 RPC 407) "by any means whatsoever, no subsequent patent for it can be granted either to the true or first inventor himself or any other person: for the public cannot be deprived of the right to use the invention... the public already possessing everything that he could give.

: The expression "does not involve any inventive step" used in S.26(1) (e) of the Act and its equivalent word "obvious", have acquired special significance in the terminology of Patent Law. The 'obviousness' has to be strictly and objectively judged. For the determination several forms of the question have been suggested. The one suggested by Salmond L.J. in Rado v. John Tye and Son Ltd., (1967) RPC 297, is apposite. It is :

> Whether the alleged discovery lies so much out of the Track of what was known before as not naturally to suggest itself to a person thinking on the subject, it must not be the obvious or natural suggestion of what was previously known.

: As pointed out in Arnold v. Bradbury, (1871) 6 Ch A 706, the proper way to construe a specification is not to read the claims first and then see what the full description of the invention is but first to read the description of the invention, in order that the mind may be prepared for what it is, that the

> invention is to be claimed, for the patentee cannot claim more than he desires to patent In Parkinson v. Simon, (1894) 11 RPC 463 (CA), Lord Esher M.R. enumerated that as far as possible the claims must be so construed as to (sic) effective meaning to each of them but the specification and the claims must be looked at and cons trued together.

Section 10(4)(a) contemplates three steps.

> (1) Fully and particularly describe the invention.
>
> (2) Its operation or use.
>
> (3) The method by which it is performed.

It has to be read conjunctively. All the three characteristics have to be specified.

47. Therefore, it is not enough that the purpose is new or that there is novelty in the application, so that the article produced is in that sense new, but there must be novelty in the mode of application. By that, we understand that in adopting the old contrivance to the new purpose, there must be difficulties to be overcome, requiring what is called invention, or there may be some ingenuity in the mode of making the adoption. To be new in the patent sense, the novelty must show invention. In other words, in order to be patentable, the new subject matter must involve 'invention' over what is old, Determination of this question, which in reality is a crucial test, has been one of the most difficult aspects of patent law, and has led to considerable conflict of judicial opinions. This aspect of the law relating to patentable inventions is prevailing in Britain. In India also, the law on the subject is substantially the same. A patent can be granted only for 'manner of new manufacture' and although an invention may be 'new' and relate to a 'manner of manufacture' it is not necessarily a 'manner of new manufacture' - if may be only a normal development of an existing manufacture. It is a necessary qualification of a craftsman that he should have the knowledge and ability to vary his method to meet the task before him - a tailor must cut his cloth to suit the fashion of the day - and any monopoly that would interfere with the craftsman's use of his skill and knowledge would be intolerable. The proper way to construe a specification is not to read the claims first and then see what the full description of the invention is but first to read the description of the invention, in order that the mind may be prepared for what it is, that the invention is to be claimed, for the patentee cannot claim more than he desires to patent. As far as possible the claims must be so construed as to given an effective meaning to each of them, but the specification and the claims must be looked at and construed together.

48. When the Registrar Is a processee, in an application for patent for a process under Section 5 of the Act, what he has to consider is the inventive step or newness in the process of manufacture of product and not the newness or inventive step in the product. Independent of the product, he should find out whether the process is patentable or not. Scope of enquiry should be limited to the process and process alone. He should not look into the product which is the result of the process.

49. The argument that in understanding the patent, the Court has to adopt the purposive interpretation was the law before the law stepped in setting out clearly what the specification should contain. Once the law declares what are the particulars which the specification shall contain, if the specification does not contain those particulars, by adopting purposive construction the specifications cannot be read to include what is not mentioned in the specification. Therefore. the rule of purposive construction in the light of the statutory provisions has no application to the patent's case.

50. After the application is filed for patent, Chapter IV deals with publication and examination of applications. Chapter V deals with opposition proceedings to grant of patents. Chapter VI deals with anticipation by previous publication. Chapter VII deals with provisions for secrecy of certain inventions and Chapter VIII deals with grant of patents. The said Chapter contains various provisions dealing with date of patent, form, extent and effect of patent, conditions subject to which patent is granted, rights of patentees, rights of co-owners of patents, term of patent, etc., Chapter IX deals with patents of addition. Chapter X deals with amendment of applications and specifications. Chapter XI deals with restoration of lapsed patents. Chapter XII deals with surrender and revocation of patents. Section 64, in particular, deals with revocation of patents. It clearly sets out the grounds on which a patent which is granted either before or after the commencement of the Act, may be revoked on a petition of any person interested or of the Central Government by the Appellate Board or on a counter-claim in a suit for infringement of the patent by the High Court. The grant and sealing of patent or the decision rendered by the Controller in the case of opposition does not guarantee the validity of the patent which can be challenged before the High Court on various grounds in revocation or infringement proceedings. That validity of the patent is not guaranteed by the grant is now provided in Section 13(4) of the Patents Act, 1970. Subsection (4) of Section 13 reads as under:

> The examination and investigations required under Section 12 and this section shall not be deemed in any way to warrant the validity of any patent, and no liability shall be incurred by the Central Government or any officer thereof by reason of or in connection with, any such examination or investigation or any report or other proceedings consequent thereon.

51. Therefore, it Is clear that there is no presumption in favour of the validity of the patent merely because it is granted or sealed.

REVOCATION OF PATENT

52. Section 64 of the Act deals with revocation of patents. A patent which is granted before or after the commencement of the Act may be revoked on a petition of (a) any person interested, (b) the Central Government and (c) by way of a counter claim in a suit for infringement of patent. In the case of (a) and (b), it is the Appellate Court which is vested with the power of revocation of patent. In the case of (c), it is the High Court which is vested with the power of revocation. In the instant case, the grounds urged as a counter claim in the suit for infringement of revocation of patent are as provided in Clauses (b), (e) and (f) of Section 64(1) of the Act, which reads as under :

> Section 64 (1)(b): that the patent was granted on the application of a person not entitled under the provisions of this Act to apply therefore:
>
> Clause (e): that the invention so far as claimed in any claim of the complete specification is not new, having regard to what was publicly known or publicly used in India before the priority date of the claim or to what was published in India or elsewhere in any of the documents referred to in section 13 :
>
> Clause (f) : that the invention so far as claimed in any claim of the complete specification is obvious or does not involve any inventive step, having regard to what was publicly known or publicly used in India or what was published in India or elsewhere before the priority date of the claim.

In addition to that the defendant also relied on clause (h) of sub-section (1) of

Section 64 of the Act, which reads as under :

> Clause (h): that the complete specification does not sufficiently and fairly describe the invention and the method by which it is to be performed, that is to say, that the description of the method or the instructions for the working of the invention as contained in the complete specification are not by themselves sufficient to enable a person in India possessing average skill in, and average knowledge of the art to which the invention relates, to work the invention, or that it does not disclose the best method of performing it which was known to the applicant for the patent and for which he was entitled to claim protection;

53. The Supreme Court in the case of Monsanto Company -vs- Coramandal Indag Products (P) Ltd., (MANU/SC/0317/1986 : AIR 1986 SC 712), held thus :

> : We, therefore, see that Butachlor which was the common name for CP 53619 was discovered, even prior to 1968 as a Herbicide possessing the property of nontoxic effect on rice. The formula for the Herbicide was published in the report of the International Rice Research Institute for the year 1968 and its common name Butachlor was also mentioned in the report of the International Rice Research Institute for the year 1969. No one patented the invention Butachlor and it was the property of the population of the world. Before Butachlor or for that matter any Herbicide could be used for killing weeds, it had to be converted into an emulsion by dissolving it in a suitable solvent and by mixing the solution with an emulsifying agent. Emulsification is a well-known process and it no one's discovery. In the face of the now undisputable fact that there is no patent for or any secrecy attached to Butachlor, the solvent or the emulsifying agent and the further fact that the process of emulsification is no new discovery, the present suit based on the secrecy claimed in respect of the active agent Butachlor and the claim for the process of emulsification must necessarily fail Under sec. 61(1) (d), a patent may be revoked on the ground that the subject of any claim of the complete specification is not an invention within the meaning of the Act Under sec. 64(e), a patent may be revoked if the invention so far as claimed in any claim of the complete specification is not new, having regard to what was publicly known or publicly used in India before the date of the claim etc., Under sec. 64(1)(f), a patent may be revoked if the invention so far as claimed in any claim of the complete specification is obvious or does not involve any inventive step having regard to what was publicly known or publicly used in India or what was published in India before the priority date of the claim (the words "or elsewhere" are omitted by us as the patents in the present case were granted under the Indian Patents and Designs Act, 1911 i.e., before the Patents Act 1970).
>
> It is clear from the facts narrated by us that the Herbicide CP 53619 (Butachlor) was publicly known before patent Number 125381 was granted. Its formula and use had already been made known to the public by the report of the International Rice Research Institute for the year 1968. No one claimed any patent or any other exclusive right in Butachlor. To satisfy the requirement of being publicly known as used in clauses (e) and (f) of sec. 64(1), it is not necessary that it should be widely used to the knowledge of the consumer public. It is sufficient if it is known to the persons who are engaged in the pursuit of the knowledge of the patented product or process either as men of science or men of commerce or consumers. The section of the public who, as men of science or men of commerce, were interested in

knowing about Herbicides which would destroy weeds but not rice, must have been aware of the discovery of Butachlor, There was no secret about the active agent Butachlor as claimed by the plaintiffs since there was no patent for Butachlor, as admitted by the plaintiffs. Emulsification was the well-known and common process by which any Herbicide could be used. Neither Butachlor nor the process of Emulsification was capable of being claimed by the plaintiffs as their exclusive property. The solvent and the emulsifier were not secrets and they were admittedly not secrets and they were ordinary market products. From the beginning to the end, there was no secret and there was no invention by the plaintiffs. The ingredients, the active ingredients the solvent and the emulsifier, were known : the process was known, the product was known and the use was known. The plaintiffs were merely camouflaging a substance whose discovery was known throughout the world and trying to enfold it in their specification relating to patent Number 125381. The patent is, therefore, liable to be revoked. We do not think that it is necessary for us to go into the various questions of law so carefully and meticulously argued by Mr. Chellaswamy. The questions were no doubt interesting and arose for the first time. But we desire to keep our interest purely academic and within bounds. So we do not pronounce upon those questions. The appeal is dismissed with costs. Appeal dismissed.

PUBLIC USER

54. What is the meaning of "public user". In Carpenter v Smith (1842) 152 E R 127 (G) the "public use and exercise" of an invention, which inhibited it from being called new, was discussed and it was laid down by Lord Abinger, C.B., that "the public use and exercise of an invention means a use and exercise of an invention in public, not by the public", that is to say that it should become a knowledge not confined to the claimant but to others. A better definition of this is to be found in a decision of the House of Lords in Patterson vs Gas Light & Coke Company (1877) 3 A C 239 at page 244(H) in the speech of Lord Blackburn. This is what the noble Lord stated :

> It is not necessary that the invention should be used by the public as well as known to the public. If the invention and the mode in which it can be used has been made known to the public by a description in a work which has been publicly circulated.

55. The patent is revocable under section 64 (1)(e) and Section 64 (1) (f) of the Act if the patent is publicly known. Publicly known does not mean that it should be widely used and to the knowledge of the consumer public. It is sufficient if it is known to the persons who are engaged in the pursuit of the knowledge of the patented product or process either as men of science or commerce or as a consumer. In particular clause (f) makes it obligatory for the patentee to give the complete specification of the invention which is not obvious. If it is obvious or if it does not involve any inventive step, having regard to what was publicly known or publicly used in India or what was published in India or elsewhere before the priority date of the claim, a case for revocation is made out. Similarly clause (h) says, if the complete specification does not sufficiently and fairly describe the invention and the method by which it is to be performed, that is to say, that the description of the method or the instructions for the working of the invention as contained in the complete specification are not by themselves sufficient to enable a person in India possessing average skill in, and average knowledge of, the art to which the invention relates, to work the invention, or that it does not disclose the best method of performing it which was known to the applicant for the patent and for which he was entitled to claim protection. Therefore, it is not the person who is skilled in the art to

whom this patent is addressed. It is addressed to a person in India who is possessing average skill in and average knowledge of the art. Therefore, not only by the method by which it is to be performed, what is to be set out is the very description of the invention. If the description of the invention is not there and merely the method by which that invention is to be performed is set out, that would not satisfy the requirement of the law and on that ground alone a patent could be revoked. Similarly clause (L) states about the scope of a claim. The scope of any claim of the complete specification is not sufficiently and clearly defined or that any claim of the complete specification is not fairly based on the matter disclosed in the specification, that also would constitute a ground for revocation of a patent. Therefore, the invention is not to be left to the inference of the persons skilled in the art. It should be understandable by a person who is possessing average skill and average knowledge.

INFRINGEMENT OF PATENTS

56. Chapter XVIII deals with suits concerning infringement of patents. Section 104 deals with jurisdiction and Section 104A deals with burden of proof in case of suits concerning infringement. Section 107 deals with defences, etc., in suits for infringement. Section 108 deals with reliefs in suits for infringement. Till 1st January 2005, Indian Law on Patents did not recognise grant of patent in product. However, process patent was granted.

57. The subject matter of the suit is a process patent. It was obtained by the plaintiff on 20.4.1998. The suit was filed in the year 2004 complaining of the infringement of the said registered patent. Section 104A of the Patents Act, 1970 was inserted by way of Patent Amendment Act, 2002 with effect from 20.5.2003. The same is applicable to the present suit.

BURDEN OF PROOF

58. Section 104Aprovides for burden of proof in case of suits concerning infringement, which reads as under:

> Section 104A. Burden of proof in case of suits concerning infringement- (1) In any suit for infringement of a patent, where the subject matter of patent is a process for obtaining a product, the court may direct the defendant to prove that the process used by him to obtain the product identical to the product of the patented process, is different from the patented process if,-
>
> (a) the subject matter of the patent is a process for obtaining a new product; or
>
> (b) there is a substantial likelihood that the identical product is made by the process, and the patentee or a person deriving title or interest in the patent from him has been unable through reasonable efforts to determine the process actually used:
>
> Provided that the patentee or a person deriving title or interest in the patent from him first proves that the product is identical to the product directly obtained by the patented process.
>
> (2) In considering whether a party has discharged the burden imposed upon him by subsection (1), the court shall not require him to disclose any manufacturing or commercial secrets, if it appears to the court that it would be unreasonable to do so.

59. The aforesaid provision deals with burden of proof in case of suits concerning infringement of process patent. When the plaintiff approaches the Court complaining of infringement of his registered patent, if the allegations are denied, it is for the plaintiff to prove those allegations. The burden of proof lies on the plaintiff. He has to prove the process from which a particular product is obtained. Merely because the plaintiffs patent was registered, it does not confer any advantage to him. If he got a process patented on the ground of any novelty in the said process in manufacturing a product, when the registration of the patent is challenged on any one of the grounds mentioned in Section 64 of the Act, the burden of proving the novelty in the process is squarely on the plaintiff.

60. Now by amended Act and by virtue of introduction of Section 104A of the Act, the burden is sought to be shifted on the defendant. That is the purpose and object of insertion of Section 104A of the Act. A reading of the aforesaid provisions makes it very clear that, in a suit for infringement of a process, if the patentee proves that the product of the defendant is identical to the product of the patented process, then the burden of proving that the process used by the defendant in obtaining his product is different from the patented process lines on the defendants. Therefore, the condition precedent for application of the provisions is that the product of the plaintiff and defendant should be identical. If the products are not identical, a suit for infringement of a patent of the process would not lie and Section 104A of the Act Is not attracted. Once the plaintiff proves that his product and the product of the defendant are identical, then, the Court may direct the defendant to prove that the process used by the defendant to obtain the product is different from the patented process. Therefore, in the event of the product of both the plaintiff and the defendant being identical, the burden shifts on the defendant to prove that the process adopted by him to obtain the product is totally different from the process adopted by the plaintiff in obtaining his product. The word used is identical and not similar. The definition of identical' in Oxford Dictionary is, similar in every detail; exactly alike. Therefore, the meaning of the word 'identical' means being the same, exactly equal and alike having such a close similarity or resemblance as to be essentially equal or interchangeable. Matching, equal, twin, equivalent, synonymous, coinciding exactly when superimposed. Two things are identical if one can be substituted for the other without affecting the truth. However, the definition of 'similar' in Oxford Dictionary means, having a resemblance in appearance, character, or quantity, without being identical. Showing resemblance in qualities, characteristics, or appearance; alike but not identical. Resembling or similar; having the same or some of the same characteristics; often used in combination; expressing closely related meanings. Meaning the same or nearly the same.

61. Therefore, from the aforesaid meaning attributed to these two words, similar is not identical. The word used in Section 104A is identical and not similar. Therefore, unless the two products are identical, Section 104A is not attracted. The products being identical is sine quo non for applicability of Section 104A of the Act.

62. In so far as Section 104A is concerned, it is not a weapon in the hand of the plaintiff. It is a shield in the hand of the defendant. The question of the defendant disclosing the process by which his product is manufactured in defence to a claim for infringement for a patent would not arise either at the stage of pleadings or at the stage of evidence. It arises only when this Court holds the patent is valid and consequently it comes to the conclusion that there is an identical product manufactured by the defendant similar to that of the plaintiff and then the Court can call upon the defendant to produce the particulars of the process by which his product is manufactured. It is only then, if the defendant refuses to furnish the particulars of the process, the Court may draw adverse inference and invoke Section

104(a). If the Court comes to the conclusion that the plaintiffs patent is valid and the product of the defendant is identical with that of the plaintiff the Court may call upon the defendant to disclose the process by which his product is manufactured and the defendant may be ready and willing to place the process before the Court subject to the Court protecting the trade secret of the defendants. The trade secrets in India are protected under the common law. There is no statute as such, protecting that right. In either case, if the defendant has to disclose either in the written statement or by way of evidence through trial, the process by which he manufactures his product that would violate the protection, which is given to the defendant, under the common law and, therefore, any interpretation to be given by this Court, should bear in mind, that when the plaintiffs interest is protected under the statute and the defendant interest is also protected by common law. These two have to be harmoniously interpreted so that either of the parties are not put to disadvantage. Otherwise the protection given to the defendant under common law is completely taken away. It is in this background the amendment to Section 104(a) which overrides the provisions of the Indian Evidence Act contained in Sections 100 to 104 of the Evidence Act is to be understood and construed.

63. Keeping in mind these legal principles let us analyse the facts of the case, as set out in the pleadings, the documentary evidence as well as oral evidence on record.

ON FACTS

64. The plaintiff and defendants had been operating the business together up to 1996 under the name M/s Indian Herbs Research and Supply Co. Limited. In fact, it was founded in 1951 by late Sri. Ramlal Agarwal, an entrepreneur with profound knowledge of herbs and their medicinal benefits. In 1996, the Company was divided into two separate divisions, namely plaintiff and defendant. Ravindra Kumar Agarwal, the Chairman and Managing Director of the plaintiff, Mr. Susheel Kumar Agarwal, the Managing Director of first defendant and Sudharkar Agarwal, the Director of the 1st defendant are all sons of Sri. Ramlal Agarwal. In fact, it is a family business. When they were carrying on business under the name M/s Indian Herbs Research and Supply Co. Limited, they were dealing with the product known as Livoliv Classic. They know the ingredients of the product. The plaintiff and the defendant have separated and started doing business separately. The specific case pleaded by the plaintiff was that it had developed a product named Zigbir, a natural performance enhancer for broilers in the year 1998. It was invented by Mr. Amit Agarwal, who had assigned all his interest and rights in favour of the plaintiff company. The plaintiff had launched their product in the market in the year 1998 under the Trade Mark "Zigbir". The application of the plaintiff for the grant of Patent was duly examined in accordance with the provisions of the Act and after being fully satisfied that the invention satisfied all the requirements for the grant of a patent, the plaintiff was granted a Patent (bearing Patent No. 186857) for the invention titled, "A method of preparing a herbal hepatoprotective and antihepatotoxic composition" dated 5th July 2002 by the Controller of Patents, India. The main embodiment of the plaintiff's invention resides in the process of preparation of the herbal composition being synergistically effective in curing the ailments of the liver. The plaintiff states that in or around 2002 the defendants launched a product under the name Livoliv-250 with similar dose, indications , feed inclusion rates etc., which are similar to that of the plaintiff's product. Even the physical parameter like colour, smell, taste are similar. The defendants do not appear to have done any research and development work in developing their product but have misappropriated and mis-utilised the patented process of the plaintiff. The products of the plaintiff and the defendant are similar, have similar chemical compositions and have the same commercial use. The defendants have intentionally lowered the price of their product Livoliv-250 as

compared to Zigbir and started marketing and selling their product at a much lower price all over India. This has resulted in huge loss to the plaintiff. The question is in manufacturing Zigbir by using the very same ingredients, what is the new or inventive process which the plaintiff has adopted so as to claim patent in respect of the process of the manufacture.

65. The plaintiff had requested FRLHT to provide analysis of the chemical profiles of six samples provided by them and the sample FRLHT i.e., 7 samples in total. Further they wanted comparison of the chemical profiles of Zigbir, Livoliv and the formulation prepared by the FRLHT.

FRLHT LABORATORY REPORT

66. Ex.P-31 is the report of the FRLHT. It reads as under: -

FRLHT Laboratory Report
FRLHT

Foundation for Revitalisation of Local Traditions 74/2 Jarakabande Kaval, Attar Post Via Yelahanka Bangalore - 560064

Aim

Evaluation of Chemical Profiles of Zigbir and Livoliv and their comparison with a formulation as given by Natural Remedies Pvt Ltd., and prepared by FRLHT,

Samples Analyzed

Six samples were received from Natural Remedies Pvt Ltd., Bangalore one sample prepared according to the formulation given by NRPL using the ingredients provided by them on 10-07-03. Altogether seven samples were taken up for analysis. Details as given below:

1 . Andrographis Paniculata	Provided by NRPL
2. Boerhaaviadiffusa	-do-
3. Solanumnigrum	-do-
4. Phyllanthusamarus	-do-
5. Zigbir	-do-
6. Livoliv	-do-
7 . FRLHT (Standard sample)	Prepared by FRLHT as per the NRPL patent No. 79/MAS/98 dated 12/01/98

Analytical Tools

TLC, HPLC and HPTLC

Equipment and Methods Used

Please Refer:	

Appendix 1:	Preparation of Sample and TLC
Appendix 2:	HPTLC
Appendix 3:	HPTC
Results & Inference Appendix 4:	HPTLC data & Photo documentation
Appendix 5:	HPLC data

Conclusions

HPTLC

Chemical profiles of the three formulations Zigbir, Livoliv and the standard sample prepared by FRLHT were found to be similar as observed through the densitometric scan done 254 nm and 366 nm and also through the images obtained before and after spraying the TLC plates with anisadehyde sulphuric acid.

When the scanned HPTCL profiles (15 366 nm) of Zigbir, Livoliv and standard sample prepared by FRLHT were superimposed, there were 1-2 minor components appearing additionally in the chromatogram of standard sample.

The individual concentration of the chemical components in Zigbir, Livoliv and standard sample prepared by FRLHT were not 100% identical

HPLC

Formulations Zigbir and Livoliv were similar in their chemical composition except for the variation in the concentration, (peak heights).

The HPLC chromatogram of the standard sample prepared by FRLHT showed similar profiles to Zigbir and Livoliv except for two minor additional peaks at retention times 27.46 minutes and 28.1 minutes respectively.

Overall conclusion:

From the analytical studies conducted at FRLHT laboratory using HPLC and HPTLC, it appears that the three samples Zigbir, Livoliv and the standard sample prepared by FRLHT are similar in their major chemical profiles.

The only different between the standard sample and both the test samples (Zigbir and Livoliv) were due to the presence of two additional spots on HPTLC at the Rf: 0.37 under the wavelength of 366 nm. The same two additional compounds in the standard formulation were detected by HPLC at the retention times between 27-28 minutes under the wavelength of 205 nm.

However, since no two natural products can be 100% identical, the overall similarities of the three samples clearly outweigh the minor differences. With natural products, decisions on identity are always made based on the "extent" of similarities or differences. At FRLHT, we have analyzed several individual plant drugs using HPLC and HPTLC and found that two different samples of the same plant also show slight variations. Thus, it can be concluded that in all probability the chemical composition of Zigbir and Livoliv is similar to the chemical composition of the standard sample

prepared by FRLHT in accordance with the Claim 1 of patent No.79/Mas/98 dated 12-10-1998.

Sd/- 4/8/03
Laboratory Co-ordinator
(Dr. Padma Venkat)

Results

Appendix 4: HPTLC data and photo documentation
HPRLC Profile Summary of Zigber, Livoliv and FRLHT

Scanning at 254 nm				Scanning at 366 nm			
RF	Zigbir	Livoliv	FRLHT	Rf	Zigbir	Livoliv	FRLHT
0.20	*(9.76)	* (15.69)	* (13.97)	**0.**33	*(3.61)	*(5.69)	*(3.97)
0.24	*(10-04)	*(3.09)	*(7-83)	**0.**37	*(2.49)	*(1-10)	
0.43	*(9.30)	*(7.03)	*(6.45)	**0.**44	*(3.04)	*(3.43)	*(2.56)
0.63	* (12.99)	*(4.24)	*(3.63)	**0.**55	*(9.04)	* (12.62)	*8(13.95)
0.85	*(5.52)	* (13.54)	* (13.57)	**0.**59	*(1.98)	*(3.33)	*(3.38)
0.90	* (14.49)	* (19.09)	* (14.65)	**0.**93	* (24.59)	* (18.92)	*(35.10)

* Positive for the band at Rf against each; Figures in parenthesis: Area %

Observation

• Scanning at 254 nm showed 6 chemical entities common to all the 3 formulations. Concentration of each compound in these formulations showed variation.

• Scanning at 366 nm showed 6 chemicals entities common to all the 3 formulations. Concentration of each compound in these formulations showed variation.

Inference

• Analytical data of HPTLC profile of the three formulations showed that all the 3 exhibited presence of 6 common chemical entities at 254 and 366 nm.

• Difference in the area % observed against each peak (Rf) in each of the formulation could be due to difference in the composition of each raw drug in Zigbir, Livoliv and FRLHT formulation and/or difference in the concentration of the chemical constituents in the individual raw drug.

• HPTLC images of all the 3 formulations scanned at 254 and 366 nm as well as on spraying with anisaldehyde- sulphuric acid reagent were similar in respect of fluorescent bands and the visual bands.

SPECIFICATION OF ZIGBIR

67. Ex. P-26 is a complete specification as contemplated under Section 10 of the Act. At page 80 it is mentioned that it is a method of preparing herbal hepatoprotective and antihepatotoxic composition. However, at page 81 in the first line, it is stated that the present invention relates to a herbal hepatoprotective and antiheptotoxic composition and the last sentence in the first paragraph states that another embodiment of the present invention resides in a process for preparation of the herbal composition. In the said paragraph it is stated that the main embodiment of the present invention resides in the herbal composition being synergistically effective in curing the aliments of liver, i.e., the main embodiment of invention resides in the process. However in the claim what is mentioned is the method of preparing the composition. Therefore, what is to be shown is the inventive step in the herbal preparation in the process of preparation and not in composition. Similarly, the synergy and potency is to be shown in the preparation of the composition and not the composition itself. The specification does not sufficiently and fairly describe the inventive step in the process of preparation of Zigbir. The specification discloses that in preparing Zigbir the plaintiff has used four herbs. As is clear from the specification, all these four herbs were found commonly all over India. All of them are well known for a particular curative effect. All these four herbs were admittedly used in manufacture of Livoliv-Classic. After eliminating 14 components, to prepare Zigbir, only four out of 18 herbs are used. Having regard to the range set out in the specification, it is submitted roughly they have been used in equal proportion. There is no inventive step involved either in the preparation or composition. It may at best be called as "workshop improvement". Paragraph 1 and 2 given in the specification makes it clear that in the specification they were giving both herbal composition as well as the process for the preparation of herbal composition, thereby seeking patent both in respect of product and process. However, a reading of the entire document shows that by this herbal composition in the stated percentage, it results in enhancing the synergy and consequently, potency of the composition. Nothing is stated about synergy in the process of preparation of the composition. In substance earlier when they were using 18 substances in arriving at the said product now they are able to achieve this synergistic object by using only 4 ingredients in the stated percentages. Therefore, the synergistic energy is in the product and not in the process. The counsel for the respondent submits no where in the specification or claim there is a whisper about this dosage and the potency of the dosage. The reason being if they had only mentioned this dosage, it would have attracted a product patent as applicable to a dosage form and, therefore, deliberately they have omitted to mention the said term in the specification or in the claim with the intention of getting a patent for the process. The synergistic activity of reduction of dosage from 1 K.G to 250 K.Gm is not specifically mentioned in the specification and, therefore, there is no complete disclosure as to the nature of invention.

PROCESS OF PREPARING ZIGBIR

68. The process of preparing Zigbir is as under:

- Taking the whole plant Phyllanthus amarus 20-30%
- Taking the whole plant of Andrographis Paniculata 25% -30%
- Cleaning
- Cutting
- Chopping them in chopping machine to obtain a mesh size of 5 to 20 Nos.
- Mixing it with 20-30% of Solarium nigrum whole plant

• powdering in a hammer mill to a sieve size of 30 to 40 Nos.

• Cleaning of the roots of Boerhaavia diffusa 15-25%, then crush and then adding them

• Finally pulverizing the above composition in a grinder/pulvirizer to a mesh size of 70-100 Nos.

Out of these twelve steps the inventive step lies only in:

(a) Choice of herbs or their parts

(b) The percentage of herbs used.

69. Therefore the process described in specification as well as in the claim is: (a) taking the whole plant, (b) cleaning, (c) cutting, (d) chopping them, (e) converting them into mesh size, (f) mixing it, (g) powdering the plant in hammer mill to sieve size, (h) cleaning, (i) crushing and (J) taking these herbs in a particular percentage. Though all these constitute process, the plaintiff is not claiming any inventive step in any of these process except the last process, i.e., mixing these herbs in a particular proportion.

70. In the instant case, it is not in dispute between the parties that the products belonging to them contain the following ingredients.

Sl. No.	Ingredient	Products and percentages		
		Livoliv Classic	Livoliv 250	Zigbir
	Andrographispaniculata	**9.**9%	%	**27.**75%
	Phyllanthusniruri/ Amarus	**9.**9%	%	**27.**75%
	Solanumnigrum	**9.**9%	%	**27.**75%
	Boerrhaviadiffusa	**5.**94%	Nil	**16.**75%
	Others	%	%	Nil

71. The plaintiff has come up with this new product Zigbir which also has the very same ingredients in different proportion. When compared with Liviol Classic and Livoliv 250, the plaintiff has given up using other ingredients except the main four ingredients in their product Zigbir. It is the case of the plaintiff that though it is using very same ingredients which are used in Livoliv Classic and Livoliv 250, the novelty lies in the proportion in which the said product is manufactured. It is that particular proportion which is used by them that has given rise to synergy which is a novelty, in respect of which now they are claiming the patent The defendants started dealing with Livoliv 250. The ingredients of Livoliv 250 are the same as that of Livoliv Classic. The only difference was in the proportion in which those ingredients are used. Therefore, the process by which Livoliv Classic was manufactured was within the knowledge of the parties. When the defendants started manufacturing Livoliv 250 with different combination, the process adopted by them was the same which was used in manufacturing Livoliv Classic, the process of which was well within the knowledge of the plaintiff. The description in the specification as well as in the claim makes it clear that when these four herbs in the proportion mentioned therein are

added, it results in synergy which would in turn enhance the Potency of the composition. The synergy referred to therein is with reference to composition and the product and not synergy in the process of the adding or mixing. However, the defendants are using 18 herbs and not 4 herbs. The proportion of the 4 herbs used by them is also not the same. There is a big difference. In fact the defendants are not using one out of the 4 herbs used by the plaintiff at all, namely Boerrhavia diffusa. These facts are all clear from the documentary evidence on record.

72. In so far as oral evidence on record is concerned, in answer to question No. 80, P.W-1 has stated that the invention is primarily in the choice of herbs and also in the conversion of the herbs to usable form. PW2 in his evidence in chief has stated that four ingredients are used in the preparation of the product Zigbir. When these four ingredients are mixed in stated percentages, the synergistic activity results in reducing the dosage from one K.G to 250 K.Gm to a poultry feed. Before this invention both the companies were manufacturing and marketing a product by name Livol Classic which was required to be used at a minimum dosage of 1 K.G of poultry feed. All these four ingredients were used in manufacturing the said product also. In answer to question No. 13, P.W-2 stated in unequivocal terms that the process of manufacture includes drying, cutting and' chopping of the required ingredients but the novelty of the invention lies in their synergistic combination and not in the method of drying, chopping, blending, etc., Therefore, the novelty referred to is in the synergistic combination, unless the very synergetic combination itself is to be treated as a process in every novelty as set out in the process of manufacturing Zigbir. In answer to question No. 14, P.W-2 has stated that with the efficacy of Zigbir is primarily because of the process by which it is manufactured which is not given in the specification or claim.

73. At page 102 in D.W-2's evidence, the calibration spectrum of Zigbir is shown. In Page 104 the calibration spectrum of Andrographis paniculata one of the ingredients of Zigbir which shows identical calibration. Therefore, it does not mean that Zigbir is similar to Andrographis paniculata or Zigbir has only Andrographis paniculata.

74. A reading of the FRLHT report makes it clear that the individual concentration of the chemical contents in Zigbir and Livoliv and the standard sample prepared by FRLHT were not 100% identical as expressly stated so in the report. Further, formulations Zigbir and Livoliv were similar in their chemical composition except for the variation in the concentration (peak heights). The HPLC chromatogram of the standard sample prepared by FRLHT showed similar profiles to Zigbir and Livoliv except for two minor additional peaks at retention times 27.46 minutes and 28.1 minutes respectively. The final conclusion arrived at in the report is, from the analytical studies conducted at FRLHT Laboratory using HPLC AND HPTLC, it appears that the three samples Zigbir, Livoliv and the standard sample prepared by FRLHT are similar in their major chemical profiles. The only difference between the standard sample and both the test samples (Zigbir and Livoliv) were due to the presence of two additional spots on HPTLC at the Rf.0.37 under the wavelength of 366 nm. The same two additional compounds in the standard formulation were detected by HPLC at the retention times between 27-28 minutes under the wavelength of 205 nm. Thereafter the report observes that since no two natural products can be 100% identical, the overall similarities of the three samples clearly outweigh the minor differences. With the natural products, decisions on identity are always made based on the extent of similarities or differences. At FRLHT, we have analyzed several individual plant drugs using HPLC and HPTLC and found that two different samples of the same plant also show slight variations. Therefore, finally, they concluded by saying that in all probability the chemical composition of Zigbir and Livoliv is similar to the chemical composition of the standard sample prepared by FRLHT. Therefore,

nowhere in the report it is stated that the product Zigbir and Livoliv are identical. What is similar between two products is the chemical composition. In fact, in the end the inference they have drawn from the results after setting out the same in a tabular column as mentioned above is that the analytical data on HPTLC profile of the three formulations showed that all the 3 exhibited presence of 6 common chemical entities at 254 and 366 nm. The difference in the area % observed against each peak (Rf) in each of the formulation could be due to difference in the composition of each raw drug in Zigbir, Livoliv and FRLHT formulation and/or difference in the concentration of the chemical constituents in the individual raw drug. At page 287 dealing with methods and equipments used, they have referred to four solvent systems. But in the end it is stated that after a trial with all the above solvent system (b) was found efficient and used for all the HPTLC work. At page 289 where they have given results, the inference they have drawn is difference in the area percentage observed against each peak in each of the formulation could be due to composition of each raw drug in Zigbir, Livoliv and FRLHT formulation and/or difference in the concentration of the chemical constituents in the individual raw drug.

75. Therefore, the said report makes it abundantly clear that what is common between these two products is the chemical composition. In this context, it is to be noticed that plaintiff and defendant both were carrying on business together up to 1996, When they separated, they started their independent companies. Utilizing the experience which they have acquired over the years, they are manufacturing their respective products. Zigbir came to the market in the year 1998 and defendant's product Livoliv came to the market in the year 2002. Both products are meant to cater to the very same customers. Chemical composition of both the products are one and the same. It is the specific case of the plaintiff that as against 18 ingredients now they are using only 4 ingredients in a particular proportion and this is the cause for the synergy in their product. It is that component which according to them is the process which they have patented. The tabular column set out above clearly demonstrates the composition of the product Livoliv Classic, Livoliv-250 and Zigbir. The chemical composition in all the three products is similar. It is the percentage of that product utilized in manufacturing the product which is different. If the plaintiffs product results in synergy because of composition of the very same material in a particular proportion, when the proportion used by the defendant is not one and the same, it cannot be said that the defendant has committed infringement of the patent of the plaintiff. Even if the plaintiffs case is that using these well known herbs in a particular proportion by itself constitutes a process, unless plaintiff shows that defendant also uses the herbs in the same proportion, it cannot be said that the defendants have committed infringement of their patent. The said report on which reliance is placed is very clear. It says that the chemical composition is similar. Nowhere it is stated that the product is identical.

76. A perusal of the report shows that FRLHT was not requested to state whether the process employed in arriving at these two products is one and the same at all. On the contrary, they were called upon to state whether the composition of these two products is one and the same. That being the case, the conclusion arrived at by P.W-1 in paragraph 27 to the effect that the said report clearly and categorically establishes the fact that defendant's product Livoliv 250 has been manufactured by using the plaintiffs patent and process, is without any substance.

77. All the four herbs are used and well known in the field. All these four herbs are mixed with other herbs and a similar product is being manufactured. Now the inventive step which is claimed is in mixing these four herbs in a particular proportion which was not the proportion in which it was used earlier. If the invention lies in selecting the four herbs and using them in particular proportion the

specification and in particular the claim should have specifically stated so. What has been explained in the specification and the claim is the method by which those four herbs are used in getting the substance. Even if those herbs are mixed in a particular proportion, in the absence of the specification in the claim stating that the invention lies in the selection of the herbs and the proportion in which it is used, the mandate of Section 10(4)(a) is not satisfied. Coupled with the same as required under sub-clause (c) of sub-section (4) the specification shall end with a claim in defining the scope of invention for which the protection is claimed. Unless the claim is defined stating the scope of invention for which the protection is claimed it does not satisfy again the mandate of Section 10(4)(c). The claim is in the percentage of the herbs used in the manufacture of the substance. In the claim it is not specifically stated so. When they are not claiming the monopoly over the herbs chosen or the cutting, chopping, sieving, pulverizing, the process by which those herbs are converted into a substance but only for the percentage of those herbs it was obligatory on their part to have so stated in the claim and it should not be left to an inference. The philosophy behind these particulars of the invention to be stated specifically is, once it is patented others cannot manufacture the said substance or product by using that particular process for which patent is granted. In law there is no prohibition to manufacture the said product in any other mode. Therefore, unless the process which is claimed to be an invention for which the patent is sought is specifically mentioned, there are chances of others either contravening the said process or kept in doubt about the mode of manufacturing the said product. That is not the intention behind the law of patents.

78. Prior to the parties separating they had a patent for a product Zeetress. In fact the patent was not for the product but for the process. DW2 in his evidence at question No. 14 has stated Ex. D1 which relates to Zeetress, the synergistic composition of the herbs mentioned therein is the inventive step. Preparation of dry extracts of the herbs is another inventive step. The whole process involves cleaning, drying, then cutting, chopping, pulverizing and then extracting with different solvents and evaporating the solvents to give a dry extract. Though cutting, chopping, pulverizing are also selection of solvent and process of drying. In the method of drying of extract, vacuum drying, freeze drying and spray drying are used. These processes of drying are common knowledge in public domain and the inventive steps lies in the stabilisation of the active constituents. With respect to Zeetress they do not have any patent on the process of drying. A patent is in respect of selection of solvent and process of drying. The Livoliv Classic had same functions. The same four ingredients which are used in Zigbir are also found in Livoliv Classic, apart from other ingredients. Invention mainly resides in the selection of herbs. Therefore, selection of the four ingredients cannot be held to be novel or inventive step as it was already selected in Livoliv Classic, which was known to the defendants if not to the public at large. FRLHT report speaks about the composition of Zigbir, Livoliv 250 and also the product manufactured by them from the specifications of Zigbir. In the said report nowhere it is mentioned that the defendants product has the composition of Boerhaavia diffusa. What has been stated is, chromatographic analysis shows that chemical profiles of both Zigbir and Livoliv 250 are similar. Even if the composition of substance in Zigbir and Livoliv 250 is identical it does not follow that the said effect is arrived at through the very same process by which the plaintiff has produced its product Zigbir. As on the date of dispute in this country a product was not patented. There was no prohibition for the defendants to have manufactured an identical product as that of Zigbir. As long as they do not follow the same process, as that of Zigbir, in law there is no prohibition for manufacturing Livoliv 250. As stated earlier merely because the composition of two products is similar, no inference could be drawn that it was manufactured out of the very same process which is patented by the plaintiff. When once the product is not identical, Section 104A is not attracted.

Consequently, the burden of proving infringement is squarely on the plaintiff and the plaintiff has miserably failed to prove the said infringement.

79. From the aforesaid discussion, what emerges is, all the four herbs used by the plaintiff in preparation of Zigbir are found commonly all over India. All of them are well known for a particular curative effect. These four herbs are admittedly used in manufacture of Livoliv-Classic at an undisputed point of time. The main embodiment of the invention lies in the herbal composition being synergistically effective in curing the ailments of the liver. There is no inventive step involved either in the preparation or composition. In the specification what is given is the herbal composition as well as process for preparation of herbal composition. However, nothing is stated about synergy in the process of preparation of composition. It is a case of admixture. The two products are not identical. The composition of the two products is also not similar/identical. Therefore, the grounds for revocation of patent as contained in Section 64 (1) (b), (e) and (f) and clause (h) are made out. As such, the patent granted to the plaintiff is liable to be revoked as the same is obtained by misrepresentation and as there is no inventive step in the process of manufacture of Zigbir. In that view of the matter, the plaintiff has failed to establish his case of infringement. Hence, I pass the following order:

ORDER

(a) Suit of the plaintiff is dismissed;

(b) The counter claim of the defendant is decreed;

(c) The patent granted to the plaintiff in respect of ZIGBIR: Patent No. 186857 of 20th April 1998, is hereby revoked;

(d) Parties to bear their own costs.