

MANU/DE/0772/2018

Equivalent Citation: MIPR2018(2)1



IN THE HIGH COURT OF DELHI

IA 9585/2017 in CS (Comm.) 556/2017

Decided On: 21.02.2018

Appellants: **UPL Limited**

Vs.

Respondent: **Pradeep Sharma and Ors.**

Hon'ble Judges/Coram:

Mukta Gupta, J.

Counsels:

For Appellant/Petitioner/Plaintiff: Amit Sibal, Sr. Adv., Rajeshwari, Aditya Gupta, Tahir A.J. and Kumar Chitranshu, Advs.

For Respondents/Defendant: J. Sai Deepak and Avinash K. Sharma, Advs.

Case Note:

Patents - Infringement of Patents - Relief of interim injunction - Whether claim of Plaintiff regarding infringement of its three patents and prayer for an order of interim injunction in its favour pending hearing of suit was liable to be allowed? Held, composition of products for registration of herbicidal composition of Plaintiff and Defendant were same. Claims of Plaintiff's suit patents comprise of 5-10 per cent metsulfuron methyl and Defendants 5 per cent weight of metsulfuron methyl. Plaintiff's suit patents claimed 70-80 per cent by weight of sulfosulfuron and Defendant's product registration consisted of 75 per cent weight of sulfosulfuron. Q.S. filler (precipitated silica) was also noted in Plaintiff's claim besides, 1 per cent weight of silicon defoamer. Moreover claim of Defendant was that, its product contained polyoxyethylene Sorbitan, which was also there in Plaintiff's suit patent IN 551, fatty acid ester which is missing in Defendant's product is also missing in Plaintiff's suit patent IN 551. Thus, even as per Defendant, only difference between Plaintiff's and Defendant's product was absence of a stabilizer which could not be an essential ingredient. A comparison of claim of Plaintiff's suit patent and Defendant's product revealed that, prima facie Defendant's product registration related to suit patent of Plaintiff. It was not the case of Plaintiff and Defendant that, composition was not a stable compound and an addition of 1 to 10 per cent weight of stabilizer being added further would not make compound as a different compound not infringing Plaintiff's patent, as all essential ingredients with their requisite composition and percentage were same. Further it is to be noted that main ground on which Defendant sought revocation of suit patent of Plaintiff is study by Dr. C.P. Singh. Finding of Dr. C.P. Singh was that, a combination of sulfosulfuron and metsulfuron is not effective and sulfosulfuron, when used sequentially with metsulfuron offers maximum grain yield followed by sulfosulfuron solo, sulfosulfuron mixed with metsulfuron and metsulfuron solo. No doubt, Dr. C.P. Singh's research paper was a prior art, however findings of same were contrary to

product of Plaintiff and study of Dr. C.P. Singh being contra indicative to product of Plaintiff could not be used to come to conclusion that, invention of Plaintiff was obvious and not a novelty. Differences between claim in US 301 and suit patents were too many and US 301 nowhere suggested a combination as prepared by Plaintiff's product and could not be thus treated as a prior art to reject claim of Plaintiff as not novel or obvious. Defendants claim that, Plaintiff was not entitled to an interim injunction for concealment of facts and material variations deserve to be rejected for reason even if there has been amendment in plaint, present Court had to construct claim on basis of what was claimed in patent documents. Further, Insecticides Registration Committee had no jurisdiction to decide on patent registration as held in decision reported as Shogun Organics Ltd. v. Union of India. Hence it was concluded that Defendant, its directors, employees, officers, servants, agents were restrained from making, selling, distributing, advertising, importing, offering for sale, and in any other manner, directly or indirectly, commercializing or dealing in any product that infringed Plaintiff's registered patents, as prayed for in application.

JUDGMENT

Mukta Gupta, J.

1. The plaintiff which is a company engaged in the manufacture and sale of insecticides, fungicides, herbicides, weedicides, fumigant, PGR and rodenticides claims that it is the owner of the patent IN 206130 (in short IN 130), IN 194225 (in short IN 225) and IN 244551 (in short IN 551). In the present suit, the claim of the plaintiff is infringement of its three patents and seeks an order of interim injunction in its favour pending hearing of the suit.

2. IN 225 titled "a process of preparing a chemically stable synergistic herbicidal composition" is a process patent, and IN 130 titled as "a chemically stable synergistic herbicidal composition" is a product patent whereas IN 551 titled as "a stable synergistic herbicidal composition" is both a product and process patent.

3. Claim of the plaintiff is that Metsulfuron Methyl and Sulfosulfuron are compounds which are used to control weeds without affecting the main crop. Metsulfuron controls grassy weeds but has no control on broad leaf weeds, whereas Sulfosulfuron has no control on grassy weeds but controls broad leaf weeds. Further, the two compounds are not physically and chemically compatible, hence no single composition containing both the compounds was available. Plaintiff claims having developed a composition comprising of these compounds along with suitable excipients such as inert fillers, stabilizer (0.1-1 wt%), defoamer (0.1-1 wt%), wetting and dispersing agents. The composition is in the form of wettable granules (WG). The uniqueness of the composition is that it is effective against both grassy as well as broad leaf weeds.

4. On 6th January, 2003 the petitioner filed its patent application 15/MUM/2003 titled "A Process For Preparing Chemically Stable Synergistic Herbicidal Composition" whereon the process patent IN 225 was granted. On 18th January, 2004 plaintiff filed its patent application 664/MUM/2004 titled "A Chemically Stable Synergistic Herbicidal Composition" as a divisional application of Indian Application 15/MUM/2003. Pre-grant opposition was filed by Gharda Chemicals Ltd. in respect of the application 664/MUM/2004 challenging the novelty and inventive steps of the invention which was dismissed vide order dated 25th January, 2007 by the patent office resulting in the plaintiff being granted the product patent IN 130. Gharda

Chemicals filed a writ petition before the High Court wherein the order dated 25th January, 2007 was set aside and the Controller of patents was directed to dispose of the application of Gharda Chemicals afresh within a reasonable period. The said application was dismissed on 29th November, 2007. On Gharda Chemicals filing a writ petition challenging the two patents IN 225 and IN 130 before the High Court of Mumbai, which were transferred to Intellectual Property Appellate Board (in short the IPAB) under Section 117G of the Patents Act, parties entered into a settlement on 3rd October, 2008 wherein Gharda acknowledged plaintiff to be the owner of IN 225 and IN 130 and agreed not to infringe the two suit patents. Plaintiff thus claims that a pre-grant opposition of a party challenging the novelty and inventive steps of the invention not having been sustained, the defendant cannot now challenge the same by taking the defence under Section 107 of the Patents Act. Various companies including Nagarjuna Agrochem Ltd. Shriram Fertilizers, Tata Chemicals Ltd., Coromandal International Ltd., Gharda Chemicals Ltd. and New Chemi Industry have already been granted licenses by the plaintiff in respect of its patents. Plaintiff claims that it came to know from the market sources and field executives that defendants are participating in a tender floated by Directorate of Industries & Enterprises Promotion, U.P. for manufacture and supply of Sulfosulfuron(75%) + Metsulfuron Methyl (5%) WG. It was further revealed that defendants have applied for registration under Section 9 of the Insecticides Act 1968 for the composition of Sulfosulfuron (75%) + Metsulfuron Methyl (5%) WG which is the composition as per the patents of the plaintiff. The plaintiff alone having right to manufacture and sell Sulfosulfuron (70-80%) + Metsulfuron Methyl (5-10%) WG i.e. wettable granules meaning that composition is in the form of granules, the defendant is liable to be injuncted from infringing the plaintiff's patents.

5. Rebutting the contentions of learned counsel for the defendant challenging the novelty and inventive steps of the plaintiff's patents, plaintiff claims that uniqueness of the composition of the plaintiff's patents is that the composition is affective against both grassy as well as broad leaf weeds. The claim of the defendant that its product is different for the reason it contains sorbitan ester and HMT/ammonium sulphate does not make a difference for the reason the two are minor ingredients and their absence do not make any difference. The defendants claim that the plaintiff is not the inventor of the suit patent but Dr. C.P. Singh whose publication is a prior art deserves to be rejected for the reason Dr. C.P. Singh only suggested that Metsulfuron and Sulfosulfuron be used one after another and not as a combination whereas plaintiff's inventions use the two compounds synergistically. Further the findings of Dr. C.P. Singh are entirely different from the inventions claimed in the suit patents IN 130, IN 551 and IN 225. Dr. C.P. Singh has never contested the plaintiff's patents till date. Defendant cannot also claim lack of novelty in view of the prior art US 182 for the reason US 182 did not anticipate suit patent and disclosed composition comprising a singular chemical compound with a surfactant and does not disclose the composition of metsulfuron and sulfosulfuron together with adjuvants as claimed. A combined reading of US 182, US 301, Annual report of ICAR 2001 as well as report of Dr. Singh does not render the invention of the suit patents obvious.

6. Further the defendant has not made out any case for invention, not being an invention under Section 3(d) and/or 3(e) of the Patents Act. The plaintiff having prima facie proved infringement and the defendant having failed to make out a case of invalidity, injunction be granted in favour of the plaintiffs. Reliance is placed on the decisions reported as Smithkline Beecham Plc V. Generics (UK) Ltd. 2001 WL 1346930; Raj Parkash v. Mangat Ram Chowdhry & Ors. MANU/DE/0152/1977 : ILR (1977) II Delhi; Shogun Organics Ltd. v. Union of India MANU/KE/1313/2013; National Development Corporation v. Delhi Cloth and General Mills Co. Ltd., (1979) SCC Online Del 206; Strix Ltd. v. Maharaja Appliances Ltd., MANU/DE/2174/2009;

Bristol-Myers Squib Co. and Ors. v. J.D. Joshi and Anr. MANU/DE/1889/2015 : 2015 (64) PTC 135; F. Hoffmann-La Roche Ltd. v. Cipla Ltd. MANU/DE/3672/2015 : 225 (2015) DLT 391 (DB); Cipla Ltd. v. Novartis AG MANU/DE/0608/2017 : 2017 (70) PTC 80 [Del] (DB); Telemecanique and Controls (I) Ltd. v. Schneider Electric Industries SA 94 MANU/DE/1264/2001 : (2001) DLT 865 (DB)[Del]; 3M Innovative Properties Ltd. and Anr. v. Venus Safety & Health Pvt. Ltd. and Anr. FAO(OS) No. 292 of 2014; Alphapharm Pty Ltd. v. Wyeth (2009) FCA 945.

7. Learned counsel for the defendant on the other hand contends that both Sulfosulfuron and metsulfuron methyl were admittedly already known and not proprietary to the plaintiff. Both substances are individually well recognized herbicides, metsulfuron methyl since 1986 and sulfosulfuron since mid-1990 and the combination of various sulfonylureas including these two have been known since 1990s. For the plaintiff to even prima facie establish infringement it has to show that every element of the impugned product/composition falls within the scope of the specific claim of any of the suit patents asserted by the plaintiff and if admittedly any essential element is missing then there can be no infringement. On a comparison of the two products, the difference between the compositions is evident. The product registration of the plaintiff necessarily requires suspending agent, and a tallow soap defoamer in addition to other defoamers and significantly high amount of wetting agents and dispersing agents. Additionally, the product registration does not contain polyoxyethylene sorbitan fatty acids ester and stabilizing agent. The claim of the defendant being outside the scope of the suit patents is supported by the finding of a technical body i.e. the Registration Committee of the Central Government Insecticides Board as far back as in 2006 when it was held that defendant's registration did not cover a composition which was allegedly prepared by a process IN 225. Plaintiff filed an appeal against this decision before the statutory authority in the year 2006 itself but did not pursue it. Plaintiffs denial that the appeal related only to the process patent IN 225 deserves to be rejected for the reason the suit relates to the three patents IN 130 being divisional to the process patent IN 225 and IN 551 being a patent of addition. The two product patents i.e. IN 130 and IN 551 do not have any existence outside the process patent IN 225 which also covers the composition. There is no claim by the plaintiff that the defendant is copying its process as per claim in IN 225. Further as noted above, there is no infringement of IN 551. The product covered by defendant's registration is outside the scope of the claims of the plaintiff's patents, since several material and essential elements of the said claim (i.e. the stabilizer, absence of tallow soap as defoamer) are missing. In addition even the amount of wetting agents, dispersing agents and suspending agent is significantly higher in the product of the defendant as compared to IN 551.

8. Learned counsel for the defendant further contends that there is no infringement of IN 551 as in the original cease & desist notice dated June 2, 2017 the plaintiff does not refer to IN 551. The suit patents are liable to be revoked, inter-alia, on the ground of lack of entitlement of the plaintiff to any rights in the alleged invention(s), anticipation by prior public use or prior public knowledge in India, anticipation by prior publication leading to lack of novelty, obviousness and lack of inventive step, patents obtained by suppression of material facts from patents office, non-patentable invention under Section 3(d) and/or Section 3(e), insufficient and unclear description, violation of Section 8 of the Patent's Act etc. The combination of the two compounds was first revealed by Dr. C.P. Singh at the G.B. Pant College of Agriculture and Dr. Singh has not been named as inventor in any of the three patents. Thus, the prior art being known, in prior public use and prior public knowledge, there being lack of novelty, and suppression of material facts, the suit patents being obvious, patent registrations are liable to be revoked.

9. The suit patents also give unclear description as per the requirement of Section 10(4) of the Patents Act. The plaintiff has failed to comply with the requirement of Section 8 of the Patents Act disentitling it to an interim injunction. A perusal of the plaint and replication makes it evident that the pleadings of the plaintiff are inconsistent in respect of the claims of the suit patent. Though in the plaint the plaintiff claims that the suit patents protect a herbicidal composition consisting of a mixture of the sulfosulfuron and metsulfuron, however as per the replication plaintiff does not claim exclusivity over the combinations of sulfosulfuron and metsulfuron methyl but on the combination of the active ingredients together with the excipients as designed by the plaintiff. The change of the stand of the plaintiff is for the reason defendants have been able to demonstrate in the written statement that there is not even prima facie infringement. Plaintiff thus cannot now seek to employ the doctrine of equivalence or the pith and marrow doctrine or the doctrine of immaterial variants in the light of specificity of the claim of the suit patents. Reliance is placed on the decisions reported as S.P. Chengalvaraya Naidu v. Jagannath MANU/SC/0192/1994 : AIR (1994) SC 853; Bishwanath Prasad Radhey Shyam v. Hindustan Metal Industries MANU/SC/0255/1978 : (1979) 2 SCC 511; TenXC Wireless v. Mobile Antenna Technologies CS(OS) No. 1989/2010; TVS Motor Company v. Bajaj Auto (OSA Nos. 91 and 92 of 2008); UCB Farchim SA v. Cipla Ltd. & Ors. MANU/DE/0297/2010 : 2010 (42) PTC 425; Warner Jenkinson Co. v. Hilton Davis MANU/USSC/0021/1997 : 520 U.S. 17 (1997); Jeniric/Pentron Inc. v. Dillion Company (MANU/USFD/0160/2000 : 205 F.3d 1377); F. Hoffman-LA Roche Ltd. v. Cipla Ltd. FAO(OS) 188/2008 and TecXC Wireless V. Mobile Antenna Technologies CS(OS) No. 1989/2010 and Franz Xaver Huemer v. New Yash Engineers MANU/DE/0015/1997 : AIR 1997 Delhi 79.

10. This Court in the decision reported as F. Hoffmann-La Roche Ltd. & Anr. v. Cipla Ltd. MANU/DE/3672/2015 : 225 (2015) DLT 391 (DB) culled out the principles to construct a claim as under:

"67. For the above conspectus, pithily put, principles of claim construction could be summarized as under:-

- (i) Claims define the territory or scope of protection (Section 10(4) (c) of the Patents Act, 1970).
- (ii) There is no limit to the number of claims except that after ten claims there is an additional fee per claim (1st Schedule of the Act).
- (iii) Claims can be independent or dependent.
- (iv) The broad structure of set of claims is an inverted pyramid with the broadest at the top and the narrowest at the bottom (Manual of Patents Office - Practice and procedure).
- (v) Patent laws of various countries lay down rules for drafting of claims and these rules are used by Courts while interpreting claims.
- (vi) One rule is that claims are a single sentence defining an invention or an inventive concept.
- (vii) Different claims define different embodiments of same inventive concept.
- (viii) The first claim is a parent or mother claim while remaining claims are referred to as subsidiary claims.

(ix) If subsidiary claims contain an independent inventive concept different from the main claim then the Patent office will insist on the filing of a divisional application.

(x) Subject matter of claims can be product, substances, apparatus or articles; alternatively methods or process for producing said products etc. They may be formulations, mixtures of various substance including recipes. Dosage regimes or in some countries methods of use or treatment may also be claimed.

(xi) Where claims are 'dependent' it incorporates by reference 'everything in the parent claim, and adds some further statement, limitations or restrictions'. (Landis on Mechanics of Patent Claim Drafting).

(xii) Where claims are 'independent' although relating to the same inventive concept this implies that the 'independent claim stands alone, includes all its necessary limitations, and is not dependent upon and does not include limitations from any other claim to make it complete An independent Claim can be the broadest scope claim. It has fewer limitations than any dependent claim which is dependent upon it'. (Landis on Mechanics of Patent Claim Drafting)

(xiii) For someone wishing to invalidate a patent the said person must invalidate each claim separately and independently as it is quite likely that some claims may be valid even while some are invalid.

(xiv) At the beginning of an infringement action the Courts in the United States conduct what is known as a 'Markman hearing' to define the scope of the claims or to throw light on certain ambiguous terms used in the claims. Although this is not technically done in India but functionally most Judges will resort to a similar exercise in trying to understand the scope and meaning of the claims including its terms.

In the case of MANU/USFD/0015/1995 : 52 F.(3d) 967 : 517 US 370, Herbert Markman v. Westview the Courts held that an infringement analysis entails two steps:-

(a) First step is to determine the meaning and scope of the patent claims asserted to be infringed.

(b) Second step is to compare the properly construed claim with the device accused of infringing

(xv) The parts of the claim include its preamble, transition phrase and the body. The 'transition phrase' includes terms like:-

(a) Comprising;

(b) Consisting;

(c) Consisting essentially of;

(d) Having;

(e) Wherein;

(f) Characterised by;

Of these terms some are open ended, such as 'comprising' which means that if the claim contains three elements A', 'B' and 'C' it would still be an infringement for someone to add a fourth element 'D'.

Further some terms are close ended such as 'consisting of, i.e. in a claim of three elements, A ', 'B' and 'C' a defendant would infringe if he has all three elements. In case the defendant adds a fourth element 'D' he would escape infringement.

(xvi) Each claim has a priority date so that in a group of claims in a specification you could have multiple priority dates. This only means that if a patent application with certain priority date and claims was followed by another application with different claims and different priority dates, then if they were consolidated or cognate with another application, each claim would retain the original priority date [Section 11(1)]."

11. Before proceedings further it would be appropriate to construct the claims of the plaintiff and compare the same with the product of the defendant on the principles laid down by the Division Bench in F. Hoffmann-La Roche Ltd. (supra).

12. The main claim of the plaintiff's process patent IN 194225 is as under:

"1. A process for preparation of a chemically stable synergistic herbicidal composition comprising steps:

a) Preparing a Mixture-A in the following steps:

i) Pre blending 5-10% Metsulfuron Methyl active content, 20-40% of sulfosulfuron active content and 0.1-10% of inert filler;

ii) Milling the pre blend,

iii) Post blending the milled mixture to get the Mixture-A;

b) Preparing a Mixture-B in the following steps:

i) Pre blending 30-60% of sulfosulfuron active content, 0.1-10% stabilizer, 0.01-10% inert filler, with 0.1-5% wetting and 0.1-1% dispersing agent;

ii) Milling the pre blend;

iii) Post blending the milled mixture to get the Mixture-B;

c) Making 10-40% w/w of the composition, a Spray solution by mixing 10-100 parts Polyoxyethylene Sorbitan Fatty Acid Ester along with 1-10 parts defoamer and 50-500 parts water;

d) Charging completely the Mixture-A in a Roto Granulator, having a rotor and a pan, followed by mixing it with the help of the rotor for 4-6 minutes;

- e) Spraying 20-60% of the Spray Solution, of step (c), to the mixture of step (d);
- f) Operating the Roto granulator such that the rotor's movement and the Pan's movement are in a direction opposite to each other, to get agglomerates in size range of 75 μ -200 μ ;
- g) Charging completely the Mixture-B in the Roto Granulator of step (f) and mixing both the mixtures by operating the Roto granulator for 3-5 minutes such that the pan is at a speed of 20-200 rpm and the rotor is at a speed of 500-3000 rpm, keeping movement of the rotor and that of the pan in the same direction, for layering the agglomerates;
- h) Spraying the remaining quantity (40-80%) of the Spray Solution to the agglomerates of step (g), followed by mixing for another 10-15 minutes to get granules in size range of 100 μ -1000 μ ;
- i) Drying the granules of step (h) to get granules containing moisture content less than 0.5%;
- j) Sieving the dried granules of step (i) to get 95-99% w/w yield;
- k) Conditioning the resulting granules obtained in step (j), by passing the granules through an air chamber to get chemically stable synergistic herbicidal composition.

2. A process as claimed in 1 wherein Metsulfuron Methyl is 5-7% w/w of the composition. "

13. In the plaintiff's product patent IN 206130, Claim No. 2 to 5 are similar, synergistically herbicidal composition as claimed in claim No. 1 with minor variations of metsulfuron and sulfosulfuron ranging from 5 to 10% and 75 to 80%. Claim No. 1 and Claims No. 6 to 12 of IN 206130 are as under:

"1. A chemically stable synergistic herbicidal composition comprising Metsulfuron Methyl, active content, 5 to 10% by weight of composition, and, Sulfosulfuron, active content, 70 to 80% by weight of composition, with 1 to 20% w/w of inert fillers, 1.0 to 10% w/w of Polyoxyethylene Sorbitan Fatty Acid Ester along with 0.1 to 10% w/w of a stabilizer, 0.1 to 1% w/w of a defoamer and 0 to 10% w/w of wetting and dispersing agents.

2.

6. A Chemically stable synergistic herbicidal composition as claimed in claim 1, wherein Polyoxyethylene Sorbitan Fatty Acid Ester is Sorbitan Monooleate.

7. A Chemically stable synergistic herbicidal composition as claimed in claim 1, wherein the inert filler is a mixture of Attapulgate 30-40% w/w and precipitated silica 60-70% w/w of the total inert filler.

8. A composition as claimed in any of the claims 1 to 7, wherein the stabilizer is ammonium sulphate.

9. A chemically stable synergistic herbicidal composition as claimed in any of the claims 1 to 8, wherein the stabilizer is hexamethylene tetramine.

10. A chemically stable synergistic herbicidal composition as claimed in any of the claims 1 to 9, wherein the defoamer is Silicon Oil Derivative.

11. A chemically stable synergistic herbicidal composition as claimed in any of the claims 1 to 10, wherein the defoamer is Rhodorsil 426-R.

12. A chemically stable synergistic herbicidal composition substantially as herein described and illustrated with reference to the text and the examples."

14. The main claims of plaintiff's Indian patent No. 244551 are as under:

"1. A stable synergistic herbicidal composition, the composition comprising 5 to 10% by weight of metsulfuron methyl, 70 to 80% by weight of sulfosulfuron, 1 to 25% w/w of inert fillers, 0.1 to 10% w/w of a stabilizer, 0.1 to 1% w/w of a defoamer, 0.1 to 5% w/w of wetting and 0.10% of dispersing and suspending agents.

2.

7. The herbicidal composition as claimed in claim 1, wherein the said stabilizer is hexamethylene tetramine.

8. The herbicidal composition as claimed in claim 1, wherein said defoamer is selected from tallow soap, silicon oil derivative or a mixture thereof.

9. The herbicidal composition as claimed in claim 1, wherein said defoamer is Rhodorsil 426-R.

10. A process for preparing the herbicidal composition as claimed in anyone of the above claims, said process comprising:

a) preparing a first mixture by pre-blending 5 -10% metsulfuron methyl active content, 20-40% of sulfosulfuron active content and 0.1-10% of inert filler; milling said pre-blend and post-blending the milled mixture to get said first mixture;

b) preparing a second mixture by pre-blending 30-60% of sulfosulfuron active content, 0.1-10% stabilizer, 0.01-15% of inert filler, with 0.1-5% wetting and 0.1% dispersing and suspending agent; milling said pre-blend and post-blending the milled mixture to get said second mixture;

c) preparing a spray solution being 10-40% w/w of the composition by mixing 1-10 parts defoamer(s) and 50-500 parts water;

d) charging completely said first mixture in a roto-granulator having a rotor and a pan, followed by mixing it with the help of the rotor for 4-6 minutes;

e) spraying 20-60% of said prepared spray solution, of step (c), to the mixture of step (d);

f) operating the roto-granulator such that the rotor's movement and the pan's movement are in a direction opposite to each other, to get agglomerates in size range of 75 μ -200 μ ;

g) charging completely said second mixture in the roto-granulator of

step (f) and mixing said first and second mixtures by operating the roto-granulator for 3-5 minutes such that the pan is rotated at a speed of 20-200 rpm and the rotor is at a speed of 500-3000 rpm, keeping movement of the rotor and that of the pan in the same direction, for layering the agglomerates;

h) spraying the remaining quantity (40-80%) of said prepared spray solution to the agglomerates of step (g), followed by mixing for another 10-15 minutes to get granules in size range of 100 μ -1000 μ ;

i) drying the granules to step (h) to get granules containing moisture content less than 0.5%;

j) sieving the dried granules of step (i) to get 95-99% w/w yield; and

k) conditioning the resulting granules obtained in step (j), by passing the granules through an air chamber to get chemically stable synergistic herbicidal composition.

11. The herbicidal composition as claimed in any of the claims 1 to 9, the composition comprising metsulfuron methyl active content about 5% by weight of composition, sulfosulfuron active content about 75% by weight of composition, 1 to 5% w/w of inert fillers or a blend thereof, about 6.6% w/w of a dispersant and about 0.2% w/w of a defoamer.

12. The herbicidal composition claimed in claim 11, wherein said dispersant is a blend of about 2.5% of sodium naphthalene sulphate, about 0.1% of lignosulfonate and about 4.0% of potassium polycarboxylate.

13. The herbicidal composition claimed in claim 11, wherein said filler is ammonium sulphate, precipitated silica or a mixture thereof.

14. The herbicidal composition claimed in claim 11, wherein said defoamer is a blend of about 0.1% of silicone defoamer and 0.1% of tallow soap defoamer.

15. The herbicidal composition claimed in claim 11, wherein said wetting agent is a blend of about 0.1% sodium dialkyl naphthalene sulfonate and about 4.2% of 3EO alkyl (C₁₂ -C₁₃) ether sulfate.

16. The herbicidal composition claimed in claim 11, wherein said suspending agent is a blend of about 1.7% of ethylene oxide-propylene oxide and about 0.1% of α -alkyl (C₁₀ -C₁₆) -co- hydroxypoly (oxyethylene) mixture. "

15. As per the application of defendant its product an insecticide sought to be registered under Section 9(3) of the Insecticides Act would have the composition as under:

"Sulfosulfuron a.i.	75.00 % w/w
Metsulfuron methyl a.i.	05% w/w
Dispersant:-	%
i) Sodium naphthalene sulfonated	02.50% w/w
ii) Lignosulfonate	00.10 % w/w
iii) Potassium carboxylate	04.00 % w/w
Defoamer – Tallow soap	00.20 % w/w
Wetting agent:	%
i) Sodium dialkyl naphthalene sulfonated	00.10 % w/w
ii) 3 EO alkyl (C12-C15) ether sulphate	04.20 % w/w
Suspending aid-	
Ethylene oxide-propylene oxide	01.70 % w/w
Alpha-alkyl (C10-C16) omega-Hydroxypoly (oxyethylene) mixture	00.10 % w/w
Silicone defoamer	00.10 % w/w
Filler (precipitated silica)	Q.S. %
Total: 100.00 % w/w"	

16. In the written statement the defendant admits that the plaintiff has also got a certificate of registration of insecticides under Section 9(3) of the Insecticides Act for a herbicidal composition containing the following ingredients:

- "a) 75% by weight of sulfosulfuron a.i.
- b) 5% by weight of metsulfuron methyl
- c) Dispersant comprising:
 - i) 2.5% by weight of sodium naphthalene sulfonate
 - ii) 0.1% by weight of lignosulfonate
 - iii) 4% by weight of potassium polycarboxylate
- d) 0.2% by weight of tallow soap defoamer
- e) Wetting agent comprising:
 - i) 0.1% by weight sodium dialkyl naphthalene sulfonate
 - ii) 4.2% by weight of 3EO alkyl (C12-C15) ether sulfate
- f) 1.7% by weight of a suspending aid: ethylene oxide-propylene oxide;
- g) 0.1% by weight of Alpha-alkyl (C10-C16) omega hydroxypoly (oxyethylene) mixture
- h) 0.1% by weight of silicone defoamer
- i) q.s. of filler (precipitated silica)"

17. Thus, the composition of products for registration of the herbicidal composition of the plaintiff and defendant are same.

18. As noted above, the claims of the plaintiff's suit patents comprise of 5 - 10% metsulfuron methyl and the defendants 5% weight of metsulfuron methyl. Plaintiff's suit patents claims 70-80% by weight of sulfosulfuron and the defendant's product registration consists of 75% weight of sulfosulfuron. The Q.S. filler (precipitated

silica) is also noted in the plaintiff's claim besides .1% weight of silicon defoamer. The claim of the defendant is that its product contains polyoxyethylene Sorbitan, which is also there in the plaintiff's suit patent IN 551, the fatty acid ester which is missing in the defendant's product is also missing in the plaintiff's suit patent IN 551.

19. Thus even as per the defendant the only difference between the plaintiff's and defendant's product is absence of a stabilizer which cannot be an essential ingredient. A comparison of the claim of the plaintiff's suit patent and the defendant's product reveal that prima facie the defendant's product registration relates to the suit patent of the plaintiff. It is not the case of the plaintiff and the defendant that the composition is not a stable compound and an addition of .1 to 10% weight of the stabilizer being added further would not make the compound as a different compound not infringing the patent of the plaintiff, as all the essential ingredients with their requisite composition and percentage are the same.

20. This Court is now required to deal with the other arguments advanced by learned counsel for the defendant that the suit patents are liable to be revoked in terms of the defence taken by the defendants as per Section 107 of the Patents Act. Section 107 of the Patents Act reads as under:

"107 Defences, etc., in suits for infringement. -

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

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

[107A. Certain acts not to be considered as infringement. -For the purposes of this Act,-

(a) any act of making, constructing, [using, selling or importing] a patented invention solely for uses reasonably related to the development and submission of information required under any law for the time being in force, in India, or in a country other than India, that regulates the manufacture, construction, [use, sale or import] of any product;

(b) importation of patented products by any person from a person[who is duly authorised under the law to produce and sell or distribute the product],

shall not be considered as a infringement of patent rights.]"

21. Thus even in the absence of a counter claim the defendant can seek revocation of the suit patents. The main ground on which the defendant seeks revocation of the suit patent of the plaintiff is the study by Dr. C.P. Singh. The search paper of Dr. C.P. Singh titled as 'Effect of Sulfosulfuron alone and its combination with Metsulfuron on wheat and Associated weeds, winter 2001-02' reads as under:

"* Metsulfuron methyl 20 WP @ 2 gm a.i. ha⁻¹ with surfactant and 4 gm a.i. ha⁻¹ without surfactant is found effective for the control of only broad leaved

weeds.

* Combination of sulfosulfuron + Metsulfuron @ 25gm + 2 gm, and 25 gm + 4 gm a.i. ha⁻¹ did not improve the weed control efficiency over solo sulfosulfuron @ 25 gm a.i. ha⁻¹.

* Sulfosulfuron @ 25gm a.i. ha⁻¹ at 35 days after sowing (DAS) followed by Metsulfuron @ 4 gm a.i. ha⁻¹ at 45 DAS gave the broad spectrum control of both Phalaris minor and complex of broad leaved weeds and resulted in the maximum yield of wheat 4938 kg ha⁻¹.

RESULTS & DISCUSSION

Table 1: Effect of Sulfosulfuron alone and its combination with Metsulfuron on wheat and Associated weeds, winter 2001-02.

Treatment	Number of weeds m ⁻² (mean of 5 on farm trials)							Yield (kg ha ⁻¹)
	Grasses		Broad leaved weeds					
	P minor	C album	M alba	M indica	M denticulate	R acetosella	Others	
Sulfosulfuron 75 WG @ 25 g a.i.ha ⁻¹ at 35 DAS	6	1	1	3	4	5	3	4805
Metsulfuron methyl 20 WP @ 2 gm a.i.ha ⁻¹ + 500 gm Surfactant at 45 DAS	240	0	1	1	0	0	2	3575
Metsulfuron methyl 20 WP @ 4 gm a.i.ha ⁻¹ (without Surfactant) at 45 DAS	221	1	1	0	1	1	2	3560
Sulfosulfuron 75 WG @ 25 gm at 35 DAS Followed by Metsulfuron Methyl 20 WP @ 4 gm a.i.ha ⁻¹ at 45 DAS	2	0	0	0	1	0	2	4938
Sulfosulfuron 75 WG @ 25 gm a.i.ha ⁻¹ + Metsulfuron methyl 20 WP @ 2 gm a.i.ha ⁻¹ at 45 DAS	10	0	1	1	0	1	3	4768
Sulfosulfuron 75 WG @ 25 gm a.i.ha ⁻¹ + Metsulfuron methyl 20 WP @ 4 gm a.i.ha ⁻¹ at 35 DAS	11	0	1	1	1	1	3	4782
Untreated control	298	21	11	14	17	7	11	1618

Sulfosulfuron when used sequentially with metsulfuron offers maximum grain yield followed by sulfosulfuron solo, sulfosulfuron mixed with metsulfuron and metsulfuron solo."

22. Thus the finding of Dr. C.P. Singh is that a combination of sulfosulfuron and metsulfuron is not effective and sulfosulfuron when used sequentially with metsulfuron offers maximum grain yield followed by sulfosulfuron solo, sulfosulfuron mixed with metsulfuron and metsulfuron solo.

23. In US 301 the claim was metsulfuron and sulfosulfuron mixed with other compounds with no fixed percentage and were not combinations of metsulfuron sulfosulfuron only. Thus US 301 cannot be said to be a prior teaching to the plaintiff's product. US 301 which the defendant claims is a prior art claimed:

"D3 discloses, in particular, combinations of the sulfonylurea of the formula 3 with fenoxaprop, fenoxaprop-P, isoproturon, diclofop, clodinafop, mixtures of clodinafop and cloquintocet, chlortoluron, methabenzthiazuron, imazamethabenz, tralkoxydim, difenzoquat, flamprop, flamprop-M,

pendimethalin, nicosulfuron, rimsulfuron, primisulfuron, mecoprop, mecoprop-P, MCPA, dichlorprop, dichlorprop-P, 2,4-D, dicamba, fluroxypyr, ioxynil, bromoxynil, bifenoxy, fluroglycofen, acifluorfen, lactofen, fomesafen, oxyfluorfen, ET-751, azoles according to WO/08999, diflufenican, bentazon, metolachlor, metribuzin, atrazin, terbuthylazin, alachlor, acetochlor, dimethenamid, amidosulfuron, metsulfuron, tribenuron, thifensulfuron, triasulfuron, chlorsulfuron, prosulfuron or CGA-152005, sulfonyleureas according to WO 94/10154, flupyrsulfuron (DPX-KE459), sulfosulfuron (MON37500), KIH-2023, glufosinate, glufosinate-P or glyphosate.

In particular, combination with fenoxaprop, fenoxaprop-P, isoproturon, diclofop, clodinafop, mixtures of clodinafop and cloquintocet, chlortoluron, methabenzthiazuron, imazemethabenz, tralkoxydim, difenzoquat, flamprop, flamprop-M, pendimethalin, mecoprop, mecoprop-P, MCPA, dichlorprop, dichlorprop-P, 2,4-D, dicamba, fluroxypyr, ioxynil, bromoxynil, bifenoxy, fluroglycofen, lactofen, fomesafen, oxyfluorfen, ET-751, azoles according to WO 94/08999, F 8426, diflufenican, bentazon, metribuzin, metosulam, flupoxam, prosulfocarb, flurtamone, amidosulfuron, metsulfuron tribenuron, thifensulfuron, triasulfuron, chlorsulfuron, sulfonyleureas according to WO 94/10154, sulfonyleureas according to WO 92/13845, flupyrsulfuron (DPX-KE459), MON 48500, sulfosulfuron (MON37500), glufosinate, glufosinate-P or glyphosate are known."

24. This Court in F. Hoffmann-La Roche Ltd. (supra) held that whether an invention involves 'novelty' and an 'inventive step' or is 'obvious' is a mixed question of law and fact, depending on the facts and circumstances of each case and laid down the broad criteria to ascertain the same as under:

"151. From the decisions noted above to determine obviousness/lack of inventive steps the following inquiries are required to be conducted:

Step No. 1 To identify an ordinary person skilled in the art,

Step No. 2 To identify the inventive concept embodied in the patent,

Step No. 3 To impute to a normal skilled but unimaginative ordinary person skilled in the art what was common general knowledge in the art at the priority date.

Step No. 4 To identify the differences, if any, between the matter cited and the alleged invention and ascertain whether the differences are ordinary application of law or involve various different steps requiring multiple, theoretical and practical applications,

Step No. 5 To decide whether those differences, viewed in the knowledge of alleged invention, constituted steps which would have been obvious to the ordinary person skilled in the art and rule out a hindsight approach. "

25. No doubt Dr. C.P. Singh's research paper was a prior art, however the findings of the same were contrary to the product of the plaintiff and the study of Dr. C.P. Singh being contra indicative to the product of the plaintiff cannot be used to come to the conclusion that the invention of the plaintiff was obvious and not a novelty. The differences between the claim in the US 301 and the suit patents are too many and US 301 nowhere suggests a combination as prepared by the plaintiff's product and cannot be thus treated as a prior art to reject the claim of the plaintiff as not novel or

obvious.

26. Defendants claim that the plaintiff is not entitled to an interim injunction for concealment of facts and material variations deserves to be rejected for the reason even if there has been amendment in the plaint, this Court has to construct the claim on the basis of what is claimed in the patent documents, as has been noted above. Further the Insecticides Registration Committee has no jurisdiction to decide on patent registration as held in the decision reported as Shogun Organics Ltd. v. Union of India MANU/KE/1313/2013. Finding by the Insecticides Registration Committee being finding of a body which has no effect on the validity of the patent, mere non-disclosure of the finding of the Insecticides Board prima facie cannot be held to be material suppression of facts and injunction refused on the said count. The defendant having not been able to demonstrate invalidity of the suit patents and a pre-grant opposition to the patent of the plaintiff already having been dismissed by the Appellate Board and in writ petition settlement arrived at with Gharda Chemicals, the plaintiff has made out a strong prima facie case in its favour. [See National Development Corporation v. Delhi Cloth and General Mills Co. Ltd., (1979) SCC Online Del 206.] The defendant was not to launch its product till 19th November, 2017 and thus even if it has launched now during the interregnum, no loss or irreparable harm would be caused in directing the defendant to not launch the product pending decision in the suit, as held in the decision reported as Bristol-Myers Squib Co. and Ors. v. J.D. Joshi and Anr. MANU/DE/1889/2015 : 2015 (64) PTC 135. The balance of convenience also lies in favour of the plaintiff.

27. Consequently, the defendant, its directors, employees, officers, servants, agents are restrained from making, selling, distributing, advertising, importing, offering for sale, and in any other manner, directly or indirectly, commercializing or dealing in any product that infringes the plaintiff's registered patents, as prayed for in the application.

28. IA 9585/2017 is disposed of.

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