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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 31st May, 2022

+ **W.P.(C)-IPD 5/2022**

THE EUROPEAN UNION REPRESENTED BY THE EUROPEAN
COMMISSION Petitioner

Through: Mr. Peeyoosh Kalra, Mr. Vineet
Rohilla, Mr. Rohit Rangi, Mr.
Sudhindra Tripathi, Mr. Rohan
Kapoor, Mr. Garvil Singh, Mr.
Debashish Banerjee, Mr. Ankush
Verma, Advocates (M:8800558037)

versus

UNION OF INDIA & ORS. Respondents

Through: Mr. Harish V. Shankar, CGSC, Ms. S.
Bushra Kazim, Mr. Srish Kumar
Mishra, Mr. Sagar Mehlawat,
Advocates

AND

+ **W.P.(C)-IPD 6/2022**

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COMMISSION Petitioner

Through: Mr. Peeyoosh Kalra, Mr. Vineet
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**CORAM:
JUSTICE PRATHIBA M. SINGH**

Prathiba M. Singh, J. (Oral)

1. This hearing has been done through hybrid mode.
2. These two writ petitions, *W.P.(C)-IPD-5-2022* & *W.P.(C)-IPD-6-2022* have been filed by the Petitioner- the European Union, represented by the European Commission located at Brussels, Belgium. The Petitioner is seeking setting aside of orders dated 21st January, 2019 and 30th September, 2019, passed by the Controller General of Patents. Vide the said orders, two patent applications bearing nos. 11123/DELNP/2012 and 3466/DELNP/2013, filed by the Petitioner have been treated as '*deemed to have been abandoned*' under Section 21(1) of the Patents Act, 1970 (*hereinafter, 'the Act'*).

Brief Chronology of events in W.P.(C)-IPD-5-2022

3. The Petitioner filed Indian application no. 11123/DELNP/2012 on 21st December, 2012 through its Indian patent agent, Mr. Guruswamy Nataraj (*hereinafter, 'first patent agent'*). The said application was titled '*Method of Providing an Authenticable Time-and-Location Indication*', the bibliographic details of which are set out below:

Priority Application No.	EP 10166025.6
Earliest Priority Date	15/06/2010
PCT International Application No.	PCT/EP2011/058989
PCT International Filing Date	31/05/2011
Indian Patent Application No.	11123/DELNP/2012
Indian Filing Date	21/12/2012

Request for Examination Filed	7/10/2013
FER issued	10/4/2018
Dates of follow up emails written by the Applicant's international attorneys to the Indian patent agent	16/11/2018, 23/08/2018, 26/07/2018, 28/05/2018, 18/05/2018, 26/04/2018, 28/03/2018
Date of order holding the application 'deemed to be abandoned'	21/1/2019
Date of engaging fresh attorneys	February, 2019
Date of filing of Reply to the FER along with a representation seeking hearing in the application	29/4/2019
Term of the Patent if granted	30/5/2031

Brief Chronology of events in W.P.(C)-IPD-6-2022

4. The Petitioner filed application no. 3466/DELNP/2013 on 18th April, 2013 through the same patent agent mentioned above. The said application was titled '*Apparatus and Method*', the bibliographic details of which are set out below:

Priority Application No.	GB 1016079.4
Earliest Priority Date	24/09/2010
PCT International Application No.	PCT/EP2011/066478
PCT International Filing Date	22/09/2011
Indian Patent Application No.	3466/DELNP/2013
Indian Filing Date	18/04/2013
Request for Examination Filed	7/10/2013

FER Issued	29/6/2018
Dates of follow up emails written by the Applicant's international attorneys to the Indian patent agent	16/11/2018, 18/10/2018, 21/09/2018, 23/08/2018, 26/07/2018, 28/05/2018, 18/05/2018, 26/04/2018, 28/03/2018
Date of order holding the application as ' <i>deemed to be abandoned</i> '	30/9/2019
Date of engaging fresh attorneys	March, 2019
Date of filing of Reply to the FER	29/4/2019
Term of the Patent if granted	21/9/2031

5. The Petitioner, through the initially engaged European Law Firm, M/s FREYLINGE had engaged the first patent agent to file and prosecute the Indian national phase applications of their Patent Cooperation Treaty (*hereinafter, 'PCT'*) applications before the Indian patent office.

6. Thereafter, the responsibility of processing, prosecution, maintaining and coordination of these applications were moved by the Petitioner to another European firm namely, M/s GEVERS in June 2017. Emails were exchanged between the first patent agent and M/s GEAVERS informing the patent agent of the movement of the files from M/s. FREYLINGE to M/s.GEVERS. The first patent agent had duly confirmed the receipt of instructions to the effect that the file has been transferred.

7. The First Examination Reports (*hereinafter 'FER'*) were issued by the Patent Office on 10th April, 2018 for 11123/DELNP/2012 and on 29th June 2018 for 3466/DELNP/2013 respectively. However, due to non-filing of the Reply to the FER within the stipulated time, both the applications were

'deemed to have been abandoned'.

8. Even prior to the abandonment of the applications, M/s GEVERS wrote several emails to the first patent agent. From January, 2018 onwards M/s GEVERS was in communication with the first patent agent requesting the report and invoice for the examination request that was filed in respect of both the applications. Thereafter, several reminders were sent in respect of the status of the applications via emails. However, M/s GEVERS did not get any response from the first patent agent.

9. In view of the fact that the firm did not hear from the first patent agent, the files of these applications were moved by the Petitioner to another Indian firm – M/s REMFRY & SAGAR (*hereinafter, 'second patent agent'*), in February 2019, which then informed the Petitioner that the patent applications were *'deemed to be abandoned'* in view of non-filing of reply to the FER. The second patent agent after learning of the abandonment of both the applications filed its reply to the FER on 29th April, 2019. Various emails were also addressed to the patent office seeking a hearing, however, since no reply was received, the present Writ Petitions have been filed seeking setting aside of the order of abandonment. The reliefs sought in the Petitions are as under:

W.P.(C) IPD 05/2022:

“(a) That this Hon'ble Court be pleased to issue a writ of mandamus or any other writ or order or direction in the nature of mandamus setting aside/quashing the deeming abandonment Order dated January 21, 2019 issued in Indian Patent Application No.11123/DELNP/2012 and issue directions to the Respondents to revive the application and take on record the response filed by the Petitioner to the First Examination Report issued in Indian Patent Application No. 11123/DELNP/2012 and

further process and examine the Indian Patent Application No. 11123/DELNP/2012 for patent grant procedure; and

(b) That this Hon'ble Court be pleased to pass such other appropriate writ, further relief, declaration, order and/ or direction which this Hon'ble Court may deem fit and proper in the circumstances of case to meet the ends of justice.”

W.P.(C) IPD 06/2022:

“(a) That this Hon'ble Court be pleased to issue a writ of mandamus or any other writ or order or direction in the nature of mandamus setting aside/quashing the deeming abandonment Order dated September 30, 2019 issued in Indian Patent Application No. 3466/DELNP/2013 and issue directions to the Respondents to revive the application and take on record the response filed by the Petitioner to the First Examination Report issued in Indian Patent Application No.3466/DELNP/2013 and further process and examine the Indian Patent Application No. 3466/DELNP/2013 for patent grant procedure.

(b) That this Hon'ble Court be pleased to pass such other appropriate writ, further relief, declaration, order and/or direction which this Hon'ble Court may deem fit and proper in the circumstances of case to meet the ends of justice.”

10. The Petitions have thus been filed on the ground that the delay in filing the reply to the FER, was completely not attributable to the Applicant. Despite continuous follow-up, the first patent agent had not responded. Under these circumstances, the delay in filing the responses, deserves to be condoned as the Petitioner's valuable rights in the patents have been completely lost due to the negligence of the first patent agent which could not have been the fault of the Petitioner.

Submissions of Parties

11. It is submitted by Mr. Peeyoosh Kalra, Id. Counsel appearing for the Petitioner that the subject patents were international applications filed in over several jurisdictions and have been granted in many of these jurisdictions, as detailed below:

i. Application no. 11123/DELNP/2012

Country	Application No.	Application Date	Status	Patent No.	Patent Date
China	201180028306.2	31/05/2011	Granted	ZL2011800283062	10/12/2014
Russia	2012141285	31/05/2011	Granted	2531384	25/08/2014
Mexico	MX/A2012/013071	31/05/2011	Granted	319219	07/04/2014
Canada	2800193	31/05/2011	Granted	2800193	06/03/2018
Brazil	BR112012031598.6	31/05/2011	Under examination		
New Zealand	603704	31/05/2011	Granted	603704	29/10/2014
Australia	2011267274	31/05/2011	Granted	2011267274	21/05/2015
Japan	2013-514625	31/05/2011	Granted	5788976	07/08/2015
South Korea	10-2013-7001117	31/05/2011	Granted	10-1701912	25/01/2017
United States	13/697898	31/05/2011	Granted	8948392	03/02/2015
Italy	11722807.2	31/05/2011	Granted	2583117	16/04/2014
Spain	11722807.2	31/05/2011	Granted	2583117	16/04/2014
France	11722807.2	31/05/2011	Granted	2583117	16/04/2014
United Kingdom	11722807.2	31/05/2011	Granted	2583117	16/04/2014
Germany	11722807.2	31/05/2011	Granted	2583117	16/04/2014

ii. Application No. 3466/DELNP/2013

Country	Application No.	Application Date	Status	Patent No.	Patent Date
Canada	201180028306.2	22/09/2011	Granted	2811830	27/03/2018

New Zealand	609085	22/09/2011	Granted	609085	01/09/2015
China	201180055072	22/09/2011	Granted	ZL201180055072.0	19/08/2015
Japan	2013/529648	22/09/2011	Granted	5933559	13/05/2016
Australia	2011306909	22/09/2011	Granted	2011306909	26/11/2015
Russia	2013118630	22/09/2011	Granted	2570837	07/10/2015
United States	13/825724	22/09/2011	Granted	9453918	27/09/2016
Mexico	MX/A/2013/003234	22/09/2011	Granted	327688	09/02/2015
South Korea	10-2013-7001117	22/09/2011	Granted	10-1860328	16/05/2018
Brazil	BR112013006724.1	22/09/2011	Under Examination		
Taiwan	100134145	22/09/2011	Granted	1510801	01/12/2015
France	11758230.4	22/09/2011	Granted	2583117	16/04/2014
Italy	11758230.4	22/09/2011	Granted	2583117	16/04/2014
Spain	11758230.4	22/09/2011	Granted	2583117	16/04/2014
United Kingdom	11758230.4	22/09/2011	Granted	2583117	16/04/2014

12. Ld. Counsel for the Petitioner also places reliance on various judgments passed by this Court and other High Courts to argue that the Controller may not have the power under Rule 138 of the Act to condone delay in filing response to FER. However, while exercising writ jurisdiction under Article 226 and 227 the Court can, in exceptional circumstances, permit the Applicant to rectify the defect and restore the application. He relies on the following judgments:

- a) *Telefonaktiebolaget Ericsson v. Controller of Patents [W.P (C) 9126 of 2009, decided on 11th March, 2010]*
- b) *Ferid Allani v. Union of India [W.P (C) 6836 of 2006, decided on 25th February, 2018]*

- c) *Yoshida Kenji v. Asst. Controller of Patents [W.P (C) 5182 of 2015, decided on 2nd August, 2021]*
- d) *Rubicon Research Pty Ltd. v. Controller General of Patents [OA/18/2014/PT/KOL, decided on 21st August, 2020]*
- e) *PNB Vesper Life Sciences v. Controller General of Patents, [W.P 22253 of 2021, decided on 14th March, 2022]*
- f) *Nokia Corporation v. Deputy Controller of Patents [W.P. 2057 of 2010, decided on 24th January, 2011].*

13. It is thus prayed by the Petitioner that the reply to the FER be taken on record and both the patent applications of the Petitioner be restored.

14. Mr. Harish V. Shankar, Id. CGSC appearing for the Patent office, submits that the deadlines fixed under the Act are strict in nature. He relies upon the judgments of this Court in -

- *Nippon Steel Corporation v. Union of India [W.P. (C) 801 of 2011, decided on 8th February, 2011]* and
- *Carlos Alberto Perez Lafuente v. Union of India [W.P.(C) 4573/2012, decided on 10th January, 2019]*

to argue that when there is a delay in filing the request for examination, if the prescribed time period as per the Patent Rules, 2003 (*hereinafter 'Rules'*) has lapsed, the same cannot be extended thereafter. The timelines provided in the Rules are mandatory and not directive in nature. He submits that the legislative intent is evident from a plain reading of Rules 137 and 138 of the Rules. The said Rules clearly provides that though the Controller has general powers to extend, amend and remove any irregularities without detriment to the interest of the Applicant in respect of specific procedures to be undertaken by the Applicant. Rule 138 of the Rules does not give power

to the Controller for granting an extension in respect of filing reply to the FER.

Scheme of the Patents Act, 1970 and the Patent Rules, 2003

15. Heard Id. Counsel for the parties and perused the record. Insofar as the present petitions are concerned, the applicable provisions are Section 21(1) of the Act read with Rule 24B of the Rules. The same are extracted hereinbelow:

*“121. Time for putting application in order for grant.—
(1) **An application for a patent shall be deemed to have been abandoned unless, within such period as may be prescribed, the applicant has complied with all the requirements imposed on him by or under this Act,** whether in connection with the complete specification or otherwise in relation to the application from the date on which the first statement of objections to the application or complete specification or other documents related thereto is forwarded to the applicant by the Controller.
Explanation.--Where the application for a patent or any specification or, in the case of a convention application or an application filed under the Patent Cooperation Treaty designating India any document filed as part of the application has been returned to the applicant by the Controller in the course of the proceedings, the applicant shall not be deemed to have complied with such requirements unless and until he has refiled it or the applicant proves to the satisfaction of the Controller that for the reasons beyond his control such document could not be refiled.*

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Rule 24B of the Patent Rules, 2013

*“24B. Examination of application. -- (1)
(i) **A request for examination under section 11B shall***

¹ As substituted by Act 15 of 2015, sec.19, for section 21 (w.r.e.f. 1-1-2005)

be made in Form 18 within forty-eight months from the date of priority of the application or from the date of filing of the application, whichever is earlier;

(ii) The period within which the request for examination under sub-section (3) of section 11B to be made shall be forty-eight months from the date of priority if applicable, or forty-eight months from the date of filing of the application;

(iii) The request for examination under sub-section (4) of section 11B shall be made within forty-eight months from the date of priority or from the date of filing of the application, or within six months from the date of revocation of the secrecy direction, whichever is later;

(iv) The request for examination of application as filed according to the 'Explanation' under sub-section (3) of section 16 shall be made within forty-eight months from the date of filing of the application or from the date of priority of the first mentioned application or within six months from the date of filing of the further application, whichever is later;

(v) The period for making request for examination under section 11B of the applications filed before the 1st day of January, 2005 shall be the period specified under the section 11B before the commencement of the Patents (Amendment) Act, 2005 or the period specified under these rules, whichever expires later.

(2) (i) Where the request for examination has been filed under sub-rule (1) and application has been published under section 11A, the Controller shall refer the application, specification and other documents related thereto to the examiner and such reference shall be made in the order in which the request is filed: Provided that in case of a further application filed under section 16, the order of reference of such further application shall be the same as that of the first mentioned application: Provided further that in case the first mentioned application has already been referred for examination, the further application shall have to be accompanied by a request for examination, and such further application shall be

published within one month and be referred to the examiner within one month from the date of such publication.

(ii) The period within which the examiner shall make the report under sub-section (2) of section 12, shall ordinarily be one month but not exceeding three months from the date of reference of the application to him by the Controller;

(iii) the period within which the Controller shall dispose off the report of the examiner shall ordinarily be one month from the date of the receipt of the such report by the Controller.

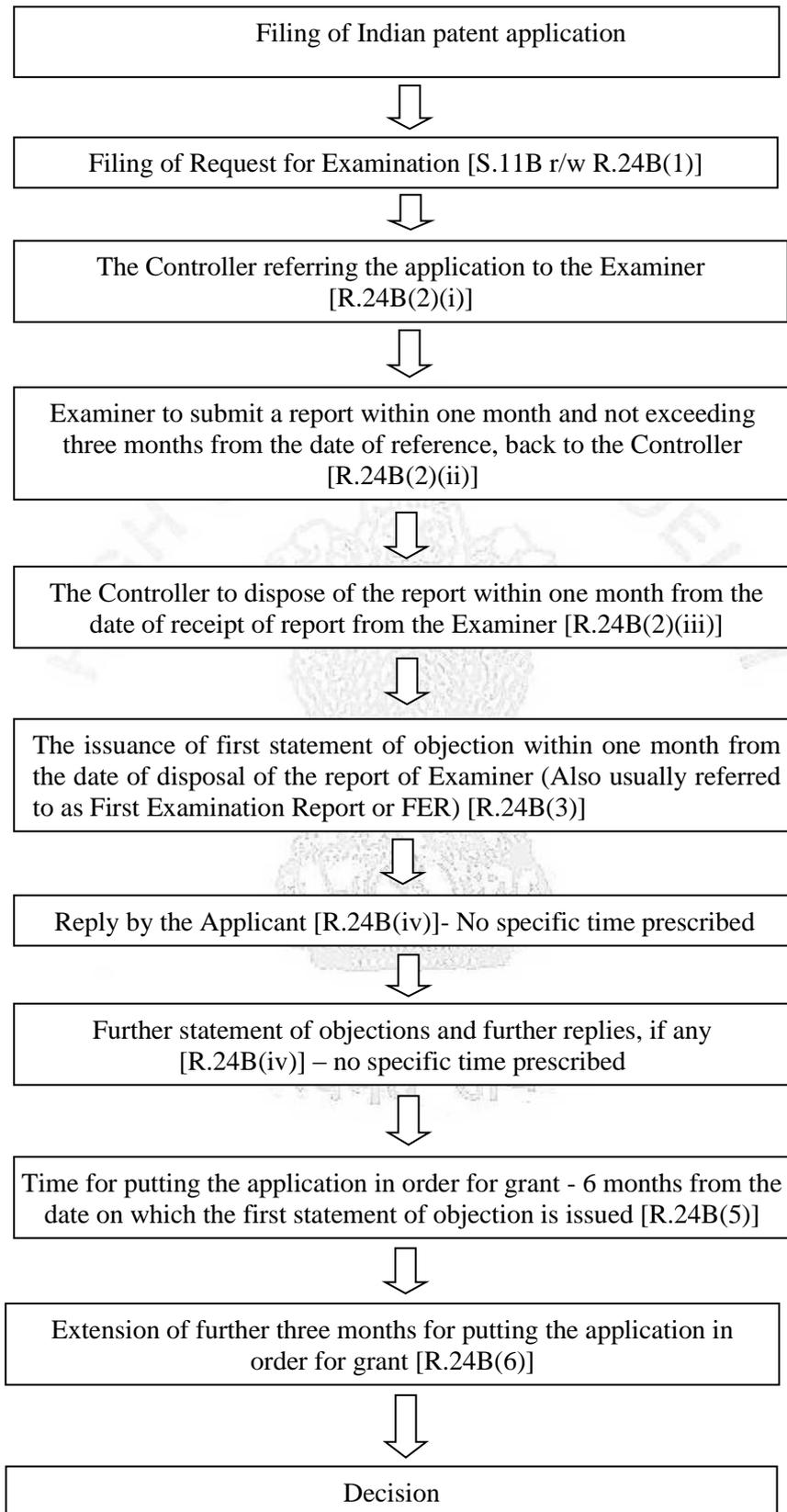
(3) A first statement of objections, along with any documents as may be required, shall be issued by the Controller to the applicant or his authorised agent within one month from the date of disposal of the report of examiner by the Controller: Provided that where the request for examination was filed by a person interested, only an intimation of such examination may be sent to such person interested.

(4) Reply to the first statement of objections and subsequent reply, if any, shall be processed in the order in which such reply is received.

(5) The time for putting an application in order for grant under section 21 shall be six months from the date on which the first statement of objections is issued to the applicant to comply with the requirements.

(6) The time for putting an application in order for grant under section 21 as prescribed under sub-rule (5) may be further extended for a period of three months on a request in Form 4 for extension of time along with prescribed fee, made to the Controller before expiry of the period specified under sub-rule (5).”

16. A perusal of the provisions extracted above reveals that the following are the stages of a patent application:



17. A perusal of Section 21 of the Act along with Rule 24B of the Rules, as extracted above, shows that the application has to be mandatorily deemed to have been abandoned unless the Applicant has fulfilled all the requirements imposed on him under the Act.

18. One such requirement that has been set out in Section 21 are steps to be taken in connection with “..... *the application from the date on which the first statement of objections to the application is forwarded to the Applicant by the Controller.*” Under Rule 24B of the Rules, no specific timeline is fixed for filing the reply to the first statement of objections. There is also no deadline fixed, within which the subsequent objections are to be raised by the patent office and the subsequent reply is to be sent. However, there is an overall deadline under Rules 24B (5) & (6), as per which the application is to be put in order for grant within **six months** from the date on which the first statement of objections is issued. This period is **extendable by a period of three months**, a request for which has to be made within the initial six months period specified in Form-4. Thus, there is an outer deadline prescribed for putting the application in order for grant – which in effect means that the Applicant has to comply with the requirements as may have been raised in the first statement of objections, within the prescribed time limit in the FER or objections itself. The entire process of Objections & Replies thereto, Further objections & Replies thereto, has to be concluded within the maximum time limit of six months + three months maximum.

19. Thus, these are two deadline limits i.e. six months and three months which are provided under Rule 24B (5) & (6) of the Rules which are mandatory in nature. If the application is not put in order for grant within this maximum period from the issuance of the First statement of objections,

Section 21 of the Act mandates that the application shall be deemed to have been abandoned.

20. Under Rule 138 of the Rules as it stood in 2004 with effect from 1st January, 2005 only some of the deadlines were non-extendable and this is clear from Rule 138 which is extracted herein below:

“138. Power to extend time time prescribed. –
(1) Save as otherwise provided in the Chapter III of these rules, rule 24B, sub-rule (4) of rule 55 and sub-rule (1A) or rule 80, the time prescribed by these rules for doing of any act or the taking of any proceeding thereunder may be extended by the Controller for a period of one month, if he thinks it fit to do so and upon such terms as he may direct.
(2) Any request for extension of time made under these rules shall be made before the expiry of prescribed period.”

21. As on 16th May, 2016 an amendment of Rule 138 of the Rules has made further deadlines as being mandatory. The said Rule reads as under:

138. Power to extend time prescribed.-- *(1) Except for the time prescribed in clause (i) of sub-rule (4) of rule 20, sub-rule (6) of rule 20, rule 21, sub-rules (1), (5) and (6) of rule 24B, sub-rules (10) and (11) of rule 24C, sub-rule (4) of rule 55, sub-rule (1A) of rule 80 and sub-rules (1) and (2) of rule 130, the time prescribed by these rules for doing of any act or the taking of any proceeding thereunder may be extended by the Controller for a period of one month, if he thinks it fit to do so and upon such terms as he may direct. (2) Any request for extension of time prescribed by these rules for the doing of any act or the taking of any proceeding thereunder shall be made before the expiry of such time prescribed in these rules.”*

22. Thus, the legislative intention is of strict adherence to deadlines by the

Applicants, wherein the power of the Controller to grant extension is curtailed for a period of one month only. This power of extension of one month does not extend in respect of the provisions contained in Rule 138. Several deadlines under different provisions of the Act, have over the years been made mandatory in nature, as can be seen by the aforementioned amendment of Rule 138. The interpretation of these rules and provisions of the Act leads to the conclusion that the deadline for putting the application in order for grant is mandatory.

23. Thus, after the request for examination has been filed, once the patent office issues the FER or first statement of objections, the patent has to be put in order for grant within the six + three months maximum period, in accordance with the deadlines prescribed in Rule 24B of the Rules. Therefore, within the stipulated period, the following must be completed:

- I. The Applicant has to deal with the objections in the FER by filing a reply.
- II. The patent office may issue further objections and further replies may be filed by the Applicant;
- III. The Patent office is expected to hold and conclude the hearings in respect of the application.
- IV. The process of putting the application in order for grant has to be concluded as per Rule 24B (5) & (6) of the Rules.

24. The clock starts to tick immediately upon the issuance of the FER/ First statement of objections and these deadlines are not extendable including under Rule 24B, except as provided under Rule 138.

25. A conjoint reading of the above provisions– Section 21 of the Act

read along with Rules 24B, 137 and 138 of the Rules, leaves no doubt in the mind of the court that insofar as the powers of the Controller are concerned, they are circumscribed by the said provisions and the Controller does not have the discretion to extend the timelines prescribed in the provisions, especially those timelines, that are specifically excluded in Rule 138 of the Rules.

26. Several judicial decisions have been relied upon by the parties in these two petitions. It is seen that there are broadly four categories in which these decisions can be categorised:

- I. The first category concerns decisions relating to the entry of the international application into the national phase.
- II. The second category of decisions relates to delay in filing of Request for Examination.
- III. The third category refers to decisions concerning response to FERs.
- IV. The fourth category concerns regular payment of annuities once the patent has been granted.

27. The said decisions are discussed below in the chronological order:

28. *Ferid Allani v. Union of India [W.P (C) 6836 of 2006, decided on 25th February, 2008] [Third category]*

- The Applicant filed the Indian patent application on 17th July, 2002.
- The request for examination was filed by the applicant on 19th November, 2004.
- 21st February, 2005: The FER was issued on 21st February, 2005 raising certain objections.

- A reply to the FER was filed on 17th September, 2005.
- On 21st September, 2005, a further examination report (SER) was issued. In this report, the examiner indicated that the last date for submission of the reply would be the same date i.e. 21st September, 2005. The said examination report was received by the Applicant only on 24th September, 2005.
- The patent office treated the application as abandoned. The writ petition was filed challenging the said order. The Id. Single Judge held as under:

*“24. Having heard learned counsel for the parties at length, I find that the first issue which requires to be considered is the impact of the deemed abandonment of an application for grant of patent. **The impact is prescribed inasmuch as the applicant is deprived of the valuable rights which flow in favour of any invention as are guaranteed under Section 48 of the Patents Act.** Furthermore, under the statutory scheme, an appeal has been provided from any decision, order or direction made or issued under the Patents Act, 1970 by the Central Government or from any act or order of the Controller for the purposes of giving effect to any such decision, order or direction under Section 117(A). Similarly, an appeal lies to the Appellate Board from any decision, order or direction of the Controller or Central Government under Section 15 to 19, 20, 25(4), 28, 51, 54, 57, 60, 61, 63, 66, 69(3), 78, 84(1) to 84(5), 85, 88, 91, 92, and 94.*

25. It is noteworthy, that no appeal is provided against an order of deemed abandonment of the application for patent which is passed under Section 21 of the statute.

*26. **It is apparent that by an order of deemed abandonment, substantive rights of the applicant***

claiming entitlement to exlcuse rights for its invention are denied.

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29. Section 12 of the Act requires examination of the application and issuance of the examination report within three months of the date of reference of the application for examination.

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40. It is an admitted position that no opportunity of such hearing was afforded to the petitioner either after the petitioner filed its response to the first examination report or after the second examination report. The action of the respondents therefore is rendered illegal for failure to comply with the specific statutory mandate of Section 14 of the Patents Act, 1970 and failure to abide by the pricnciples of natural justice as statutorily envisaged.

41. It has been urged by the petitioner that the abandonment requires a conscious act on the part of applicant which would manifest his expressed intention to abandon the application and that there can be no presumption as has been drawn by the respondents in the facts of the instant case.

42. My attention has been drawn to the observations in *Browning Manufacturing Co. v. Brothers Inc.*, 134 USPO 231, wherein it was observed that the question of abandonment is fundamentally a question of intent, though express or implied by action or conduct. Abandonment is never presumed.”

29. The Court then applied the judgment in *Kailash v. Nanhku*, (2005) 4 SCC 480 as also the Full Court decision in *Hasti Mal Jain Trading as Oswal Industries v. Registrar of Trade Marks*, 2000 PTC (FB) and held that the SER raised new and technical objections in the Application.

30. It was held that the requirement under Rule 24B(4)(1) of the Rules as it then stood was directory and not mandatory in nature. The Controller was held to be empowered to extend the time for a period of one month, so long it was within the overall period of three months.

31. Since the Petitioner has been deprived of an opportunity to pursue its application, the order treating the application as having been abandoned, was held to be unwarranted and improper and was set aside.

32. *Telefonaktiebolaget Ericsson v. Controller of Patents [W.P (C) 9126 of 2009, decided on 11th March, 2010] - [Third Category]*

- The patent application was filed on 29th July, 2005 and the applicant filed a request for examination within the prescribed time.
- The FER was issued on 8th October, 2007.
- On 10th December, 2007, objections in the FER were replied to.
- On 25th June, 2008 further objections were communicated which were raised by the patent office in terms of a Second Examination Report (*hereinafter, 'SER'*)
- Last day for complying with objections was 8th October, 2008.
- Further reply was filed on 22nd September, 2008 in respect of the objections raised in the SER.
- Curiously, the patent office passed the order on 10th October, 2008 and held that the time for putting the application in order to grant had expired on 8th October, 2008 and accordingly, the application was deemed to have been abandoned under Section 21(1) of the Act.

33. In this context, the Id. Single Judge observed that it is only if no reply is filed at all that the application could be deemed to have been

abandoned. In any event, the abandonment requires a conscious act, which is to be manifested. The relevant observations as under:

“14. Where in response to an examination report, an applicant does nothing by way of meeting the objections raised therein within the time stipulated, and does not seek extension of time for that purpose only then it can be said that such application should be "deemed to have been abandoned". If he has replied but such reply is not found satisfactory, even after a further opportunity if any is given, then the Controller should proceed to take a decision in terms of Section 15, after complying with Section 14 of the Act.

15. As pointed out in Ferid Allani "abandonment" requires a conscious act on the part of the Petitioner which would manifest the intention to abandon the application. That judgment also refers to Section 80 of the Act and Rule 138 of the Patents Rules which gives discretionary powers to the Controller to extend the time for complying with a requirement. In the instant case the Petitioner responded to each of the objections set out in the examination report in writing within the time prescribed. It cannot, therefore, be said that it failed to respond to the objections and, therefore, did not comply with the requirements imposed on it under the Act. In other words, the basic factual condition for attracting the deemed fiction of "abandonment" in terms of Section 21(1) of the Act, was non-existent in the instant case.

16. Importantly, the intention of the Petitioner not to abandon its application was evident in its response dated 22nd September 2008 where it requested that in the event the Controller was not inclined to grant its patent, it may be afforded an opportunity of being heard. Such an opportunity is clearly envisaged in

Section 14 itself. This is further provided for in Section 80 of the Act and Rule 129 of the Patent Rules. While discussing the above provisions, this Court in Ferid Allani held that there was a duty of the Controller to give a hearing to an applicant before exercising any discretionary power which was likely to adversely affect an applicant's claim for registration of patent.

17. Lastly, this Court finds merit in the contention of the Petitioner that by holding that the Petitioner should be deemed to have abandoned its application in terms of Section 21(1) of the Act for the three reasons mentioned therein, the Controller of Patents has in effect rejected the application for patent. Such an order is an order relatable to Section 15 of the Act. However this has been done without indicating the reasons why the reply filed by the Petitioner to the objections was not found satisfactory. Also, there is no explanation for denying the Petitioner an opportunity of hearing in terms of Section 14. Since no order was passed under Section 15 of the Act, the Petitioner is also deprived of filing an appeal under Section 117A of the Act.

18. For the aforementioned reasons, this Court sets aside the impugned order dated 10th August 2008 passed by Respondent No. 2. The Petitioner's application will be restored to the file and be dealt by the Respondent No. 2 in accordance with law. If Respondent No. 2 finds that the Petitioner has not made out a case for grant of patent, it will pass a reasoned order under Section 15 of the Act. Of course, prior to doing so, the Petitioner will be offered an opportunity of being heard, in terms of the request already made by it under Section 14 of the Act.”

34. *Nokia Corporation v. Deputy Controller of Patents [W.P. 2057 of*

2010, decided on 24th January, 2011] – [First Category]

- On 18th August, 2009, the national phase application was filed in India. The PCT National Phase application sought priority from the US application dated 11th January, 2007.
- The delay in this case was in respect of the 31 months period for filing of the application in India under Rule 20(3) of the Rules. The Deputy Controller of Patents held that in respect of an international application, designating India, was required to be filed with the prescribed fee within the time limit i.e., 31 months from the date of priority as envisaged under Rule 20(4) of the Rules.
- According to the Dy. Controller of Patents, 31 months' period had lapsed and applying Rule 22 of the Rules, the application was held to be '*deemed to be withdrawn*'. Condonation of delay had been sought by the Applicant and a hearing was also given.
- The challenge raised was that the time period for filing a national phase application was provided in the Rules and not in the Act. It was contended that in any event, however, a one month extension was permissible.
- The Court held that if good cause is shown for delay in submitting the application, one month extension can be granted even if the said application was not moved within the period of 31 months. The observations of the Court are as under:

“34. The application for extension is required to be made within the period prescribed. Therefore, proviso would come into operation for the purpose of calculating period of one month. On true interpretation of rule 138, it is held that application for

extension is to be filed within one month after expiry of prescribed time under rule 20. In case, an application is moved for extension of time by one month or shorter period, it is required to be decided on merit by taking into consideration facts and circumstances of each case.

35. It is a well settled law that the Courts and statutory authorities are to do substantial justice. The object of Rule 138 is that prescribed time under rule 20 can be extended by period of one month on showing of sufficient cause. As already observed above, it is the discretion of the Controller to extend the period on facts and circumstances of the case, but it was not correct on the part of the Deputy Controller to have rejected the application, by treating it to be not maintainable, as having been filed after expiry of prescribed time under rule 20 of the Patents Rules 2003. The merits of the facts disclosed were to be considered. Rule 6(5) or Article 48 and rule 82 of PCT rule do not govern powers under rule 138, as the Controller under this rule is to exercise quasi judicial power.”

35. *Nippon Steel Corporation v. Union of India, [W.P.(C) 801/2011, decided on 8th February, 2011] [Second category]*

36. The Id. Single Judge was concerned in this case, with the delay in filing the Request for Examination. In *Nippon Steel Corporation (supra)*, the Id. Single Judge held as under:

“25. There is a logic to the time limits set out under the Act. The scheme of the Act and the Rules require time-bound steps to be taken by applicants for grant of patent at various stages. The provisions of the Act and the Rules have to expressly reflect the legislative intent to permit relaxation of time limits, absent which such relaxation cannot be 'read into' the

provisions by a High Court exercising powers under Article 226 of the Constitution. **In other words, it is not possible for this Court to accept the submission of the learned Senior counsel for the Petitioner that the time-limits under Section 11-B(1) of the Act read with Rule 24-B of the Rules, notwithstanding Section 11-B(4) of the Act, are merely 'directory' and not mandatory. In fact, the wording of Section 11-B(4) of the Act underscores the mandatory nature of the time limit for filing an RFE in terms of Section 11-B(1) of the Act read with Rule 24-B of the Rules.**

37. The Court distinguished the said case in *Nippon Steel Corporation (supra)* from the earlier decision of *Telefonaktiebolaget Ericsson (supra)* as under:

“28. This Court is of the view that the decisions in *Ferid Allani v. Union of India (UOI)* and *Telefonaktiebolaget LM Ericsson (Publ) v. Union of India (UOI)* were rendered in a different factual context and do not aid the Petitioner's submissions. **The Petitioners there were in correspondence with the Office of the CoP in relation to the defects pointed out in their respective patent applications and had in fact made requests for oral hearing. In those circumstances, this Court held that those Petitioners could not be held to have abandoned their claims for the purposes of Section 21 of the Act.** As far as the present case is concerned, the Petitioner missed the deadline of 9th February 2010 for filing an RFE. It realised the error much later and on 28th October 2010, filed an application for amending the priority date by which time the patent application itself ceased to exist. The decisions of the Commissioner of Patents and Trademarks, USA in *Re Katrapat, AG 6 U.S.P.Q. 2 D (BNA) 1863* and *Re Application of Ong, et al (Application No. 11/754,*

832) are also of no assistance since the patent law regime in our country is governed by the Act and Rules which in themselves constitute a complete code.”

38. M/s. Iritech Inc. v. The Controller of Patents, [W.P. (C) 7850/2014, decided on 20th April, 2017] – [Second category]

- The Applicant’s international application was filed on 8th January, 2007.
- On 18th June, 2008 the Indian national phase application was filed.
- On 30th June 2008, the Request for examination was filed under Section 11B(1) of the Act, in Form 18. However, the applicant later realised that there was an error in the application number as mentioned in the form. Instead of 5272/DELNP/2008, the application number was incorrectly typed as 6272/DELNP/2008.
- Thus on 2nd January 2009 a letter was addressed to the Controller of Patents bringing to its notice the aforesaid error in Form 18 and requested the Controller to allow the request for substantive examination in relation to 5272/DELNP/2008 instead of 6272/DELNP/2008.
- Thereafter, on 2nd February, 2010 the application was shown as ‘deemed to be withdrawn’.
- The Id. Single Judge of this Court distinguished *Nippon Steel Corporation (supra)* and held that the error in the number of the application was merely a clerical error. Since the request itself was made within the 48 months period and the request for correction of error was also made within the 48 months period, the order deeming the application to be withdrawn was quashed. The same was restored

and treated to be pending. The relevant portion of the judgment reads as under:

“43. Further, the reliance placed by counsel for the Respondent on the decision of a coordinate bench of this court in NIPPON STEEL CORPORATION (supra), to contend that the Controller of patents is not competent to allow the application for amendment after the patent application is deemed to have been withdrawn, is misplaced. In NIPPON STEEL CORPORATION, the petitioner failed to file a request for examination under section 11 B within forty-eight months from the date of priority of the application. Thereafter the Petitioner, therein, filed an application seeking to amend the date of priority. It was held that the amendment could not be granted as the application for amendment was filed after the original priority date had already expired and the application for grant of patent had already been deemed to have been withdrawn.

44. The said judgment is not applicable in the facts of the present case. In this case, the request for examination was filed within the 48- month period and even the request for correction of the clerical error was made prior to the expiry of the period of 48 months and prior to the application for grant of patent being deemed to have been withdrawn.”

39. Carlos Alberto Perez Lafuente v. Union of India [W.P.(C) 4573/2012, decided on 10th January, 2019] [Second category]

40. In this case, the Id. Division Bench was also concerned with condonation of delay in filing the Request for Examination. Similar to the view of Id. Single judge, the Id. Division Bench held as under:

“50. It is not in dispute that the petitioner, who is a Spanish national, made his prior application for a patent in a convention country and, therefore, Section

135 of the Act is attracted. As noticed above, the petitioner made his first application to seek patent as the European Patent Application on 28.03.2006 bearing No.06111804.8. Since, in respect of a Convention Application, the date of making the “basic application ” is treated as the “priority date”, on a plain reading of Rule 24-B(1)(i), the request for examination under Section 11-B of the Act in Form-18 was required to be made within 48 months from the date of priority, i.e. 28.03.2006 since that is the earlier of the two dates i.e. the “date of priority”, and the date of filing of the application under the Act, which was 28.08.2008. The period of 48 months, computed from 28.03.2006, expired on 27.03.2010. However, the request for examination was made on 19.11.2010.

51. No doubt, it appears that the petitioner, who is a foreign national, may have, bona fide, believe that the time for making request for examination of the patent application had not expired and was available when he did make the said request under Section 11B read with Rule 24B. It does appear that he was misled into believing that time was available for him to make such a request till the date when he actually made the request, in view of the communications received by him from his Indian agent, as well as on account of the interpretation of Rule 24B published in the publication of WIPO. His common sense would have led him to think that the examination of his application could be sought within forty eight months of the date of his application – which was later in point of time than his date of priority. **However, when the language used in the Rule is as clear as it could be, the petitioner could not have ignored the same and gone by his own logic. Howsoever bona fide he may have been in his conduct, he cannot seek to evade the rigor of the**

law, which is so clear and explicit in its enunciation.”

41. *Rubicon Research Pty Ltd. v. Controller General of Patents [OA/18/2014/PT/KOL, decided on 21st August, 2020] [Fourth Category]*

- Indian Patent Application was filed on 17th February, 2003.
- On 2nd March, 2007 the Application matured into a granted patent.
- The patent agent sent a letter to the Australian agents of the Applicants on 24th May, 2007 informing them that the Indian patent had been granted and 3rd – 7th annuities were to be paid immediately. A debit note was raised.
- 2nd June 2007: Subject patent would have lapsed due to non-payment of accumulated renewal fees. The Applicant was not informed of the said payments by the patent agent.

42. The allegation raised was that the patent agent of the Applicant, which was an Australian company, wrote repeated emails to the patent agent in India as to the status of the renewal of the granted patent. The Australian agent sent multiple follow up emails to to the Indian agent, however, they werer not responded to.

43. Finally, after a gap of two and a half years, the patent agent informed the Petitioner that the patent had lapsed due to non-payment of annuity. Despite the application for restoration, the same was declined by the Contoller General of Patents.

44. The Intellectual Property Appellate Board, after considering Rule 137 of the Rules, in these facts, held that the Applicant would suffer immensely as it has lost patent rights due to no fault by it. Great prejudice would be

caused to the Applicant. It was also held that orders of restoration could have been passed by the Controller under Section 60 of the Act. The impugned order was found to be unreasonable and the same was set aside.

45. *Yoshida Kenji v. Asst. Controller of Patents [W.P (C) 5182 of 2015, decided on 2nd August, 2021] [Third Category]*

- Application for the registration of the patent filed on 1st February, 2008.
- The First Examination Report was generated on 11th December, 2012 and the same was received on 14th December, 2012.
- On 10th December, 2013, extension was sought by the Petitioner. However, the same was not considered.
- On 13th December, 2013, the Response to the FER was filed.

46. The application of the Petitioner was deemed to be abandoned by counting the time for filing of response from 11th December, 2012, which is the date of issuance of the FER. The Id. Single Judge of the High Court allowed the petition for two reasons. First, that the extension was filed on 10th December, 2013, which was not considered by the patent office as it allegedly not in proper form. Secondly, that the FER was received by the applicant only on 14th December, 2013, hence the reply filed on 13th December, 2013 was within the stipulated time.

47. *PNB Vesper Life Sciences v. Controller General of Patents, [W.P 22253 of 2021, decided on 14th March, 2022] [third category]*

- The Petitioner filed an application for a novel class of products on 13th June, 2011.
- On 10th April, 2018 the said application was abandoned on the ground that reply to the FER was not filed as there was some dispute

between the Applicant and the patent agent as to who had to prosecute the patent application.

- The reply to the FER was filed then filed on 4th October, 2018.

48. The High Court held on facts as under:

“11. Be that as it may, bearing in mind the purpose for which the application is being pursued as well as the fact that the petitioner had applied for and had been granted the patent for the identical product in other jurisdiction, it does not stand to reason that a company engaged in Pharma research and for whom commercially expediency is paramount, will not pursue the applications in right earnest.

12. Nothing would indicate why the petitioner would wilfully neglect to respond to an objection received from the patent office. Thus, the benefit of doubt in such circumstances must be given to the petitioner and I proceed on this basis. Enough said on this.

XXX

20. **I clarify at this juncture, that no fault is being attributed to either the patent agent/the petitioner or the respondent and my decision turns upon the nature of the patent being sought as well as the factual circumstances that commend themselves to me.**

21. **In the light of the discussion as aforesaid, the application stands restored to the file of the respondent. Learned Senior counsel confirms, based upon instructions from the learned Counsel on record, that the petitioner has received the First Examination Report and is fully prepared to respond to the same, within any time frame fixed by this Court and this Court fixes a time frame of two weeks from today for the purpose.**

22. *Let the petitioner be heard by the respondent who shall consider the application, follow due procedurers as laid down under the applicable Rules, Act and pass orders thereupon, within a period of four weeks from the date of personal hearing afforded to the petitioner. This writ petition stands disposed with the above obserations. Connected writ miscellaneous petition is closed, with no order as to costs.”*

Findings

49. It is clear that in the prosecution of patent applications, deadlines fixed in the Act read with the Rules fall into two categories:

- i. Deadlines which can be extended.
- ii. Deadlines which cannot be extended.

50. In the opinion of this Court, patent agents are expected to know of which deadlines are extendable and which are not extendable. Non-extendable deadlines include *inter alia* -

- deadlines relating to entry of the application into the national phase,
- timelines for filing of request for examination,
- timelines for putting an application in order for grant etc.,

51. The provisions of the Act and the Rules are abundantly clear as to which deadlines can be extended and which cannot be extended.

52. From a reading of the aforementioned decisions, insofar as the time period for filing of request for examination is concerned, the decision in ***Carlos Alberto Perez Lafuente (supra)*** of the Division Bench of this Court has categorically held that the time period is mandatory and cannot be extended even in the facts of a case where the patent agent is found to be negligent. However, this Court notes that in the case of response to the FER is concerned, in ***Ferid Allani (supra)***, ***Telefonaktiebolaget Erricson***

(supra), and *PNB Vesper Life Sciences (supra)* High Courts while exercising writ jurisdiction have granted extension in filing of the response to the FER including on the ground that the applicant did not have the intention to abandon. In such extraordinary situations, the Court has exercised its writ jurisdiction to ensure that valuable statutory rights of the Applicant are not completely deprived of. Thus, before arriving at a conclusion that an Applicant has abandoned its application, due to non-filing of Reply to the FER/first statement of objections, while the Controller may have no power to extend the deadline within which the application has to be put in order for grant, courts exercising writ jurisdiction, may in rare cases permit the same, after examining the factual matrix to see as to whether the Applicant in fact intended to abandon the patent or not. Any extraordinary circumstances could also be considered by the Court, such as negligence by the patent agent, docketing error and whether the Applicant has been diligent. However, lack of follow-up by the Applicant would be a circumstance which may lead to an inference that the applicant intended to abandon the patent. Thus, the court would have to examine the circumstances in the peculiar facts of each case.

53. The present writ petitions clearly highlight the important role of patent agents in prosecuting patent applications. In these cases, it is seen that the Applicant had no intention to abandon the application at all. Firstly, after the filing of the patent application in 2012, the request for examination was filed within the time prescribed. Secondly, even when there was a change in the law firm in Europe in 2017 which was coordinating the prosecution of the patent, the Indian patent agent was duly notified of the said fact. The first patent agent had even confirmed the receipt of the said instructions.

Thirdly, there were repeated attempts through email to contact the first patent agent and follow up was done on the status of the Petitioner's applications.

54. It has been brought to the notice of the court that the FER came to be issued only on 10th April, 2018 for application no. 11123/DELNP/2012 and on 29th June, 2019 for application no. 3466/DELNP/2013. It appears that this was not intimated to the Applicant or its European law firm M/s GEVERS, who was handed over the responsibility of prosecution from M/s FREYLINGE. The FER is usually communicated by the patent office only to the patent agent on record, and not to the Applicant. A perusal of the FER in the present case shows that the same was again communicated only to the patent agent at the email address - mail@gnataraj.com.

55. Upon a perusal of the abovementioned facts, it is clear that the dates of the follow up emails were within the stipulated six months & three months period. The emails were written during the six months period in 2018 to the patent agent, following up as to the status of the applications. If in response to any of the said emails on behalf of the Applicant, the issuance of FER was notified and a reply had been filed, the same would not have been time barred.

56. It is unclear as to whether the said patent agent in fact informed the Applicant about the issuance of FER on record. The Applicant appears to have been in the dark about the issuance of the FER and subsequently events unfolded which revealed that the first agent may not have acted diligently and a new Patent agent had to be engaged. Until the second patent agent was engaged in February, 2019, the Applicant had no communication of the FER itself or the non-filing of the reply and finally the consequential

abandonment. When the second patent agent became aware of the abandonment of the application, steps were taken to file reply to the FER. Clearly, the chronology of the facts and events set out herein above leave no doubt in the mind of the Court that the Applicant was not negligent and was in fact taking all steps within its command to follow up on the prosecution of the patent application. However, for reasons beyond its own control, the consequence of abandonment has now been saddled upon the Applicant.

57. In the facts of the present case, the Applicant had undertaken the following actions –

- Initially, filed the application in several foreign countries,
- Entered India within the prescribed period,
- Obtained the grant of patent for corresponding applications in several foreign countries,
- Filed the request for examination within the prescribed period,
- Followed up continuously with the patent agent even during the prescribed period as to the status of the applications.

58. The decisions discussed above would show that inadvertent errors or errors of patent agents have been liberally considered by the Court. The consequences of patent being abandoned is quite extreme i.e., the Applicant is deprived of exclusivity for the invention completely. In the opinion of the Court, such a consequence ought not to visit the the applicant for no fault of the Applicant. In the facts of these cases, the Applicant had no intention to abandon the application. It has taken all measures possible to prosecute these applications. The Applicant was conscious of the fact that the patent may be maturing for examination and took the initiative to keep in touch with the patent agent from the very inception.

59. Therefore, the question that arises is whether this Court while exercising writ jurisdiction under Article 226 and 227 ought to condone the delay and restore the patent applications of the Petitioner.

60. The Court is convinced that there was no intention to abandon on behalf of the Petitioner, instead, the Petitioner's actions indicate that they were actively pursuing the application. Moreover, the judicial opinion in respect of responses to FER or other deadlines seems to suggest that if the Applicant did not have an intention to abandon and if the Court is convinced that there was a mistake of the patent agent and the Applicant is able to establish full diligence, the court ought to be liberal in its approach.

61. In the opinion of this Court, the mistake of the patent agent would be similar to the mistake of an advocate who may be representing parties in any civil or criminal litigation. Insofar as any mistake committed by counsels/advocates are concerned, the settled legal position is that the litigants ought not to suffer, as has been laid down by the Supreme Court in a number of decisions including *Smt. Lachi Tewari & Ors. v. Director of Land Records 1984 Supp. SCC 431*; *Rafiq & Anr v. Munshilal (1981) 2 SCC 788*; *Mangi Lal v. State of M.P. (1994) 4 SCC 564* and *The Secretary, Department of Horticulture, Chandigarh v. Raghu Raj AIR 2009 SC 514*.

62. In view of the fact that no fault can be attributed to the Applicant, this Court is of the opinion that the Applicant ought not to be made to suffer. However, there is a word of caution that this Court would like to add in this regard. The intention of the Legislature in Rule 138 of the Rules cannot be ignored by the Controller, nor can one ignore the express language of Section 21(1) of the Act, which mandates a deemed abandonment in case of non-compliance with the requirements imposed under the Act. It is only in

extraordinary cases, while exercising writ jurisdiction, that the Court may consider being flexible, and this would depend on the facts of each case as to whether a condonation ought to be given at all.

63. There is yet another recent development which the Court notices. The 161st report submitted by the Department Related Parliamentary Standing Committee on Commerce on 23rd July, 2021, titled '**Review of the Intellectual Property Rights Regime in India**' has taken note of the enormous prejudice being caused to patent applicants due to 'deemed abandonment' provisions. The Committee has opined that the abandoning of patents would de-moralize or discourage patentees in India. The observations of the Committee is set out below:

*“vi. It was highlighted that the inflexibilities in Patent Act does not leave any room for errors thereby affecting the filing of patents. It was informed that in countries like US any delay in filing of patents could be condoned with an appropriate petition, fees, timely hearing and disposal. However, in India, once a due date has elapsed for filing request for examination report or a complete specification after a provisional one, there exist no remedy. Hence, as per Section 21(1) of the Patent Act, 1970, an application for a patent shall be deemed to have been abandoned unless the applicant has complied with all the requirements imposed on him by or under this Act within such period as may be prescribed. This inflexibility affects number of patents filed. **The Committee opines that the abandoning of patents, without allowing hearing or petition, may demoralize and discourage patentees in the country to file patents. It recommends the Department that certain flexibility should be incorporated in the Act to make for allowance of minor errors and lapses to prevent outright rejection of patents being filed. Hence, a revised petition with***

penalty or fee may be permitted under the Act for minor or bona fide mistakes that had been committed in the filed patents.”

64. In view of the judicial decisions cited above as also in the spirit of the Parliamentary Standing Committee’s report dated 23rd July, 2021, this Court is of the opinion that the present two applications would fall in the category of exceptional circumstances, owing to the peculiar facts where the response to the FERs deserve to be taken on record. Accordingly, it is directed that the response to the FER shall be taken on record by the patent office. The application nos. 11123/DELNP/2013 and no. 3466/DELNP/2013 shall be restored to their original position. The examination of the said patent shall now be proceeded with by the patent office in accordance with the Act and the Rules. The same shall be concluded within a period of six months.

65. Both the writ petitions are disposed of in these terms.

66. Let a copy of the present order be communicated to the CGPDTM for compliance through Mr. Harish Vaidyanathan, Id. CGSC.

भारतमेव जयते

**PRATHIBA M. SINGH
JUDGE**

MAY 31, 2022/aman/SS

Corrected and uploaded on 9th June 2022.