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

Reserved on: 26th February, 2021

Date of decision: 2nd August, 2021

\+ **CS(COMM) 1225/2018 & CC(COMM) 9/2019**

SULPHUR MILLS LIMITED ..... Plaintiff

Through: Mr. Hemant Singh, Mr. Hari Subramaniam, Ms. Mamta Jha, Mr. Ankit Arvind, Mr. Sanuj Das, Ms. Mamta Bhadu, Advocates (M: 9873603089)

versus

DHARAMAJ CROP GUARD LIMITED AND ANR ..... Defendants

Through: Mr. Akhil Sibal, Sr. Advocate with Mr. S.K. Bansal, Mr. Ajay Amitabh Suman, Mr. Nikhil Chawla & Ms. Shriya Misra, Advocates for D-1 (M:9990389539).

CORAM:
JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

I.A. No. 15243/2018 in CS (COMM) 1225/2018

1. The present suit has been filed alleging infringement of Indian Patent Number 282429 *(hereinafter, "IN'429")* granted in favour of the Plaintiff. The patent relates to a ***'Novel Agricultural Composition'***.

2. The elements of IN'429, as claimed, are:

   i. a novel agricultural composition for application to soil;

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ii. an agricultural composition that converts sulphur to its sulphate form instantly to be available for uptake by the plants;

iii. an agricultural composition comprising an effective amount of a sulphur active ingredient in a range of 82% to 98% (w/w) and at least one dispersing agent in the range of 2% to 18% (w/w);

iv. wherein the composition is in the form of water dispersible granules and the said water dispersible granules are in a size range of 0.1 to 2.5 mm and comprise particles in the size range of 2 microns to 12 microns.

3. The case of the Plaintiff is that in view of the instant conversion of sulphur into sulphate, the sulphate becomes available for immediate absorption by plants. The patented composition is used as a fertilizer composition or a nutrient composition. According to the Plaintiff, the previously available sulphur fertilizer formulations required administration in high doses, led to uneven coverage and were not compatible with modern irrigation methods. The patented composition, however, can be used at a reduced dosage to uniformly deliver sulphur to the soil through drip and sprinkler irrigation systems.

Prosecution History of IN'429

4. The application for grant of patent was filed on 8th January, 2007 and numbered as 40/MUM/2007. Publication under Section 11A of the Patents Act, 1970 took place on 2nd February, 2007. The application was examined and a response was sought, which response was filed on 6th May, 2008. Upon

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publication, pre-grant opposition was filed by one M/s. Jaishil Sulfur & Chemical Industries. Vide order dated 24th October, 2009, the Controller of Patents rejected the patent for lack of novelty and inventive step. The said order was challenged by the Plaintiff before the IPAB, which affirmed the rejection of the patent on 4th April, 2012.

5. The order of the IPAB came to be challenged before the Bombay High Court, which set aside the order and remanded the matter back to the IPAB on 13th April, 2016. After the remand order, the IPAB again considered the matter on 21st April, 2016 and remanded it back to the Controller of Patents for fresh consideration. Both orders i.e., the order of the Bombay High Court and the second order of the IPAB dated 21st April, 2016, were rendered on grounds of non-supply of documents to the patentee and not on merits.

6. The IPAB, in its order dated 21st April, 2016, directed the Controller of Patents to decide the matter within three months. The operative portion of the order reads as under:

> *"14. The reading of the above said provisions would make it crystal clear that the appellant/applicant shall be furnished with notice of opposition along with the enclosures and thereafter by affording prescribed time limit of 3 months for submitting their reply and thereafter affording opportunity of hearing. It is seen that even the application for amendment of claim under Form 13 was taken on record and the same was considered by the Assistant Controller of Patents & Designs, Mumbai on his own and inspite of rejecting the claim in part, the Assistant Controller of Patents & Designs, Mumbai has not thought it fit to afford opportunity to the appellant/applicant. In our considered view, there is clear violation of mandatory provisions under Rule 55 (3), (4), (5) &*

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> *(6) of the Patents Rules, 2003. We have no hesitation, to hold that the Assistant Controller of Patents & Designs, Mumbai has adopted a strange and unfair procedure contrary to the mandatory provisions of the Act and Rules in examining patent application of the applicant/appellant herein, which resulted in the grave miscarriage of justice to the appellant/applicant. At this juncture, it is needless to state that the Assistant Controller of Patents & Designs, Mumbai while considering the patent application acts as a quasi-judicial authority and such authority is expected to follow the statutory provisions of the Acts and Rules and by following the principles of natural justice. As far as the case on hand is concerned, in view of the above said factors, the applicant/appellant has been deprived of their opportunity to put forward their contentions and to substantiate their claims for seeking the relief of patentability of their inventions.*
>
> *15. In view of the aforesaid factors, we are constrained to set aside the order of the Assistant Controller of Patents & Designs, Mumbai dated 24.10.2009 made in Patent Application No. 40/MUM/2007. Consequently, the Controller of Patents & Designs, Mumbai shall reconsider the Patent Application No.40/MUM/2007 filed by the applicant/appellant herein by affording reasonable opportunity to both sides and put forward their respective contentions and thereafter pass orders on merits and in accordance with law within a period of three (3) months from the date of receipt of order copy of this Bench."*

7. Once the matter was remanded back to the Controller of Patents by the IPAB, further pre-grant oppositions were filed by various parties. There were thus a total of seven pre-grant oppositions filed by the following, viz.,

i. M/s Jaishil Sulphur & Chemical industries,

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ii. Mr. Vilash Shetty,

iii. M/s Safex Chemicals India Private Limited,

iv. M/s Haryana Pesticides Manufacturers Association,

v. M/s Jailaxmi Industries,

vi. M/s Swati Petro Products Pvt. Ltd. and

vii. M/s Excel Crop Care Ltd.

Two pre-grant oppositions were decided by the Controller of Patents vide order dated 9th September, 2016 and five were decided vide order dated 11th April, 2017. All pre-grant oppositions were dismissed and the patent was granted on 11th April, 2017.

8. Post-grant oppositions were also filed challenging the grant of the patent. The same are stated to be pending decision. Defendant No.1 herein i.e., Dharmaj Crop Guard Limited, also filed a post grant opposition on 7th October, 2017. During the pendency of the post grant opposition, the Plaintiff acquired knowledge of the Defendant No.1's agricultural composition, launched under the brand names "SUFFAR 90" and "COZY WET 90 WDG". According to the Plaintiff, the impugned products infringed the Plaintiff's patent. Legal notices were issued to the Defendant No.1 on 26th April, 2018. In its reply dated 23rd May, 2018, the Defendant No.1 denied infringement. The Plaintiff thereafter got tests conducted at the Shriram Institute for Industrial Research, which allegedly confirmed that the Defendant No.1's products were infringing the Plaintiff's patent. Another expert opinion confirming this finding was also obtained by the Plaintiff.

9. The present suit came to be instituted in November, 2018. On 20th December, 2018, arguments commenced on the injunction application. On the said date, Defendant No.1 was directed to submit a bank guarantee to the tune

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of Rs.50 lakhs in favour of the ld. Registrar General of this Court. Further, subject to the post grant opposition being withdrawn by the Defendant No.1, the Defendant's counter claim seeking revocation of the Plaintiff's patent was registered.

10. The Defendant No.1 has complied with order dated 20th December, 2018 and has submitted the bank guarantee for a sum of Rs.50 lakhs, which continues to be renewed in favour of the ld. Registrar General of this Court.

11. In the present order, the application for interim injunction is being considered. The suit was filed in 2018 and was partly heard at the initial stage. However, owing to the lockdown declared due to Covid-19, there was a delay in conclusion of arguments. The patent having been filed in 2007, the term of the patent ends on 7th January, 2027 i.e., in approximately 6 years.

Plaintiff's Submissions

12. At the outset, Mr. Hemant Singh, ld. Counsel, submits that Defendant No.1 does not dispute the aspect of infringement but primarily relies on the plea of invalidity of IN'429 and misrepresentation before the Commissioner of Customs and Central Excise, Bharuch *(hereinafter, "Commissioner of Customs")*.

13. Mr. Hemant Singh, ld. counsel submits that IN'429 relates to an agricultural composition which immediately converts sulphur into sulphate. Various difficulties which were faced by farmers were overcome by the patented invention. It is submitted that sulphur in its crude form cannot be absorbed in the soil, only sulphate can. Earlier, several months were consumed in conversion of sulphur into sulphate and hence, there was a need for an easy, quick and efficient conversion.

14. Mr. Singh, ld. counsel emphasizes the fact that there were seven

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opponents who had opposed the patent and it was granted after huge contest. He submits that the earlier patent application i.e., 655/MUM/2000, was only for a fungicidal composition and the content of sulphur was minimum 80%, as opposed to the range of 82% to 98% covered in IN'429. Further, it is submitted that the fungicidal composition is applied on the plant whereas the fertilizer is applied on the soil. Thus, he submits that IN'429 would neither be anticipated nor hit by the earlier patent application.

15. Reliance is placed upon the order of the Controller of Patents dated 11th April, 2017. According to Mr. Singh, unless this Court finds that the findings of the Controller are wrong, it cannot be held that there is a credible challenge to IN'429.

16. Reference is then made to the legal notices dated 26th April, 2018 and the reply thereto dated 23rd May, 2018. The case of Defendant No.1 in the reply is that it is using the invention as disclosed in US5443764. Mr. Singh, ld. counsel submits that Defendant No.1 is free to use the invention disclosed in the earlier patent application, however, imitation of the product as disclosed in IN'429 is a blatant infringement of the same.

17. The affidavit of Dr. P.K. Patanjali, comparing the products of the Plaintiff and Defendant No.1 is also relied upon to argue that that the product of Defendant No. 1 infringes IN'429.

18. The submission of Defendant No.1, which ld. counsel for the Plaintiff wishes to meet is that there is a contradiction between the stand of the patentee before the Controller of Patents and before the Commissioner of Customs. It is submitted that the patentee has not indulged in approbate or reprobate. Ld. Counsel submits that a perusal of the documents would show that the issue before the Commissioner of Customs is not the same as the issue before the

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Controller of Patents. The Commissioner of Customs was looking at the question as to whether there is 'manufacture' or not and not whether the product is 'novel'. The patentee does not claim any monopoly on the use of Sulphur as a fertilizer but what is patented by it is a new agricultural composition with a specific granule size and loading of Sulphur. The patentee, therefore, does not claim any new use for Sulphur. The stand of the Plaintiff before the Commissioner of Customs is that the physical and chemical properties of Sulphur remain the same. According to ld. Counsel, this position does not change despite the patent having been granted to the patentee.

19. The following judgments are relied upon by the Plaintiff: -

(i) On the issue of order dated 29th July, 2016 passed by the Commissioner of Customs, vehement reliance is placed on ***Servo-Med Industries v. Commissioner of Central Excise 2015 (14) SCC 47.*** It is argued that if any particular product is merely transformed for any purpose but the fundamental character and end-use of the product is the same, there is no transformation for the purposes of determining manufacture.

(ii) Reliance is also placed on the judgment in ***Minerals and Metals Trading Corporation of India Ltd. v. Union of India, (1972) 2 SCC 620*** to argue that the separation of wolfram ore from rock to make it usable by a magnetic process would not amount to manufacture as the ore continues to be an ore. On the strength of this judgment, the tests for manufacture, as discussed in paragraph 27 of ***Servo Med (supra)***, are relied upon.

20. Further, it is submitted that the Plaintiff was paying excise duty on the

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80% Sulphur loading, as explained in patent application No. 655/MUM/2000, however, it moved on to manufacture fertilizers as it was informed thereafter that manufacture of fertilizers does not attract imposition of excise duty. The Plaintiff then stopped paying excise duty because of which the excise authorities had issued a show cause notice to the Plaintiff.

21. In the proceedings relating to the show cause issued by the Excise authorities, the Plaintiff relied upon the previous order of the CESTAT to argue that no excise duty was payable. According to the Plaintiff, the raw material of Sulphur, which was obtained by the Plaintiff, is already charged to excise and the question is whether the manufacturing process which Sulphur thereafter undergoes constitutes 'manufacture' under Section 2(f) of the Central Excise Act, 1944 or not.

22. The order of the Commissioner of Customs dated 29th July, 2016 is referred to, with a view to urge the Plaintiff's position that the basic material being only Sulphur and no new use being claimed, the same does not constitute manufacture. Emphasis is laid on the finding of the Commissioner of Customs that merely adding inert chemicals to Sulphur would not result in a process of manufacture. It is submitted that the notification exempting Sulphur from excise payment itself makes it clear that the loading of Sulphur, being in the range of the notification, the exemption is liable to be given to the Plaintiff. It is submitted that the question as to whether there is manufacture or not would not be relevant to the question of patentability.

23. It is thereafter submitted that in order dated 29th July, 2016, the Commissioner of Customs has erroneously mentioned that the earlier CESTAT order dealt with the same very product which was being used as a fungicide whereas, at that time, it was being used as a fertilizer itself. Ld.

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counsel submits that this is an error which has crept into the order, which would be easily clarified from a reading of the CESTAT order in its entirety. It is submitted that this error cannot be the basis to conclude that the Plaintiff's earlier product was a fungicide and is now being used as a fertilizer. It is the stand of the Plaintiff that IN'429 was always being used as a fertilizer and not as a fungicide as wrongly mentioned in paragraph 20.1.

24. Insofar as the issue of invalidity is concerned, it is not disputed that Sulphur has efficacy as a fertilizer. The question is of efficacy of Sulphur in high dosage and the manner in which it is described in the patent specification. The submission is that the main prior art which is relied upon is the Plaintiff's own patent application No. 655/MUM/2000. It is submitted that the said patent had a different particle size and granule size for Sulphur and the same is not covered in any manner by the patented composition.

25. Reference is made to page 3 of the specification to argue that the disadvantages that existed in the conventional art, including leaching, clogging etc., have all been explained. The known art used Sulphur in pellets and wettable form and hence, the need for innovation is clearly mentioned on page 4 of the specification. The three broad objectives that the patentee wished to achieve were not there in patent application No. 655/MUM/2000.

26. Insofar as the argument of lack of novelty is concerned, the submission is that the comparison of claim 1 of both patents would itself show that the 80% loading of Sulphur in patent application No. 655/MUM/2000 is not identical in any manner to the 82% to 98% Sulphur loading in IN'429. It is submitted that the allegation of lack of novelty has to be established by showing the entire patented product in a particular prior art. Even if there is one difference between the prior art and the patented product, it is not hit by

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novelty.

27. Insofar as the argument of lack of inventive step is concerned, the first submission is that IN'429 proceeds on a footing which is exactly the opposite of what is taught in patent application No. 655/MUM/2000. The said application in fact teaches that the particle size of Sulphur should not be reduced. IN'429 does the exact opposite, as the particle size is reduced to 2 to 12 microns, while at the same time increasing the loading of Sulphur. This is where the innovation of the Plaintiff lies, inasmuch as reduction in the particle size and the simultaneous increase in the loading of Sulphur makes IN'429 a very effective and efficient product.

28. It is submitted that the very nature of Sulphur being inflammable, reducing the particle size by increasing the loading of Sulphur also makes it more dangerous to use. Thus, the patented composition is going against the basic properties of Sulphur i.e., its inflammable nature. The high loading and low particle size of Sulphur is the innovation of the patentee which leads to higher absorption and higher yield. Thus, according to the patentee, IN'429 is completely non-obvious and satisfies the requirements of patentability. An analysis of the claims is thereafter done to show that the two compositions are completely different.

29. Ld. counsel argues that there is no teaching, suggestion or motivation in the prior art to manufacture an agricultural composition in the process as has been explained in IN'429.

30. It is submitted that the monopoly being sought is not on Sulphur *per se* but on the unique agricultural composition which converts Sulphur to its Sulphate form and makes it an effective fertilizer leading to a higher yield of the crop. It is submitted that it is a basic rule while testing inventive step that

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hindsight analysis is not permissible.

31. Further, it is submitted that a reading of patent application No. 655/MUM/2000 would show that the said application related to manufacture of a pesticide and fungicide and not a fertilizer. Though both are agricultural compositions, the use of a fertilizer is completely different.

32. The next submission is that the amendments to the claims were within the permissible limits, as per Section 59 of the Patent Act, 1970. It is submitted that an applicant is permitted to narrow its claims, though broadening is not permissible. In any event, it is submitted that under Section 64(1)(o) of the Patent Act, 1970, amendments that can be relied on to support a challenge to the validity of a patent are those amendments which are obtained by fraud. Not every amendment can be challenged in a proceeding under Section 64, unless and until the same is obtained by fraud. So long as the amended claim is supported by the complete specification, the same can be considered and allowed and cannot be raised as a ground under Section 64.

33. A distinction is sought to be made between the purpose, use, function and object of the earlier patent application No. 655/MUM/2000 and the present application. It is highlighted that IN'429 has gone through several pre-grant oppositions. Thus, unless and until there is something completely erroneous in the Controller's orders, it would be safe to *prima facie* hold that the patent is valid. Reliance is placed upon the following judgments:

(i) ***Bristol-Myers Squibb Company & Ors. v. J.D. Joshi & Ors., 2015 (64) PTC 135 (Del)*** (paragraphs 82-84)

(ii) ***Strix Limited v. Maharaja Appliances Limited, MANU/DE/2174/2009*** (paragraph 22)

(iii) ***Telemecanique & Controls (I) Limited v. Schneider Electric Industries SA, 2002 (24) PTC 632 (Del) (DB)*** (paragraphs 28-31)

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34. The balance of convenience is stressed upon to argue that once the Defendant No.1 had filed a post-grant opposition, the fair course of action for the Defendant was to wait till the said opposition was decided.

35. It is submitted that so long as the Defendant No.1 can use any other form of sulphur of a different range, the Defendants business is not affected. On the other hand, if the injunction is not granted, the Plaintiff's patent would be rendered completely ineffective as very few years of the term of the patent are left. Accordingly, it is prayed that the interim injunction prayed for ought to be granted in the present case.

Defendant No.1's Submissions

36. On the other hand, Mr. Akhil Sibal, ld. Senior counsel, places enormous reliance on order dated 29th July, 2016 passed by the Commissioner of Customs.

37. It is submitted that originally, the Commissioner of Customs had noticed that the Plaintiff was paying duty on raw Sulphur. The Department then sought to impose duty on the ground that the conversion of raw Sulphur into a final product constitutes a process of "manufacture" under Section 2(f) of the Central Excise Act, 1944. While attempting to avoid payment of excise duty, the Plaintiff clearly took the stand that there is no 'new use' which emerges by using the current process. Inert chemicals are added to the Sulphur, which does not change the property of Sulphur. Hence, it does not constitute a new manufacturing process. By taking this stand, the Plaintiff was able to escape payment of excise duty as fertilizers are exempt from excise duty. The Commissioner of Customs finally arrived at the conclusion that the product does not constitute "manufacture" as per Section 2(f) as no physical

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or chemical change of Sulphur takes place.

38. It is the submission of Mr. Sibal, ld. Senior Counsel, that the Plaintiff is bound by this finding. He submits that due to the Commissioner of Customs being a statutory authority, the stand taken by the Plaintiff before such authority would constitute an admission of fact. The only document available with the Defendants is the order passed by the Commissioner of Customs and though an application has been filed seeking disclosure of further documents relating to this proceeding, no disclosure has been made. Accordingly, it is his submission that this stand of the Plaintiff ought to be held as binding and the Plaintiff ought not to be allowed to rescind from the same.

39. It is submitted that the difference between a fungicidal and a fertilizer composition is an artificial distinction. A fungicide kills the bad fungi and a fertiliser enables better growth. Thus, both compositions enable better growth. In fact, it is submitted that the earlier patent was also promoted as a fertilizer and the difference between the two patents is illusory. The patented product is nothing but a tweaking of the earlier product and admittedly, its physical and chemical properties are no different from raw sulphur.

40. It is submitted that the fact that the earlier product is also used and perceived to be a fertilizer is evident from the report of the Indian Institute of Vegetable Research *(hereinafter, "IIVR Report")* which has been relied upon by the Plaintiff to show that the present product leads to an 81.8% increase in yield as compared with the fungicide product. Further, in IN'429, the current product, apart from being described as a fertilizer, is also described as a plant protectant, which is nothing but a fungicide. According to ld. Senior counsel, this itself shows that there is no difference between the previous product and the current product of the Plaintiff. Both are plant protectants, whether they

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are used as a fungicide or as a fertilizer.

41. It is argued that at this stage what is relevant is vulnerability. It is submitted that the patent was only recently granted in 2017, is anticipated by its own earlier application, lacks inventive step and is obvious to a person skilled in the art. Ld. Senior counsel argues that the Controller of Patents and the IPAB, have arrived at opposing conclusions, when dealing with the matter on merits and hence, the present matter would require a trial.

42. Reliance is placed on the first order of the Patent Office dated 24th October, 2009 refusing the grant of the patent. The rationale of the said order dated 24th October, 2009 is pressed into service, though the said order has been set aside. The argument on behalf of the Defendant No.1 is that the range in IN'429 was initially *"about 40% to about 98%"* however after the pre-grant opposition was filed it was sought to be amended to *"about 82% to about 98%"*. This amendment was refused by the Controller and the Controller has discussed in detail how D-1 i.e., the Plaintiff's own earlier patent application, anticipated IN'429. Reliance is placed on the table in the said order to show that each of the elements which are part of IN'429 are clearly anticipated by the earlier patent. This, according to ld. Senior counsel, itself shows that the reasoning in the first order ought to be accepted rather than the reasoning in the later order granting the patent.

43. The rejection of the patent by the Controller was challenged before the IPAB and curiously, at that stage, the opponent withdrew the opposition. The IPAB affirmed the rejection of the patent vide order dated 4th April, 2012 which was, however, set aside by the High Court of Bombay on 13th April, 2016 on a procedural ground and the matter was remanded back to the IPAB. The IPAB set aside the order of rejection vide order dated 21st April, 2016 and

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directed the Controller to examine the matter afresh.

44. It was after the remand by the IPAB that the third set of amended claims were filed by the Patentee wherein the Sulphur range was changed to a precise percentage i.e., *"82% to 98%"* and the word *'about'* was removed. There were a total of seven pre-grant oppositions filed, which were decided vide orders dated 9th September, 2016 and 11th April, 2017 and the patent was finally granted in favour of the Plaintiff.

45. On a query from the Court as to whether the product manufactured by the Defendant No.1 is currently covered by the claims of IN'429, Mr. Sibal, ld. Senior counsel fairly submits that the Defendant No.1 does not dispute infringement in this case, however, since the test at the interim stage is vulnerability of a patent, the validity of the patent is being seriously disputed, as there are a large number of Sulphur based fertilizers which are used by several companies in the market.

46. The logic of the earlier order of the Controller, which notes that there is no fundamental difference between a plant protectant composition and a fertilizer or an agricultural composition or a fungicide, is emphasized. Thereafter, the IPAB order dated 4th April, 2012 is relied upon to submit that the expert testimony which was given was considered in detail by the IPAB while upholding the refusal to grant the patent.

47. As against these two orders on merits, it is argued that the Bombay High Court's order dated 13th April, 2016 set aside the IPAB's order and remanded the matter back to the IPAB on a procedural issue that some US judgments which were cited in the IPAB's order were not put to the patentee. In the second order of the IPAB dated 21st April, 2016, again, it was on a procedural issue of non-compliance of natural justice due to non-furnishing

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of certain documents and no hearing having been afforded for refusal of the amendment, that the IPAB has remanded the matter back to the Commissioner of Customs.

48. Interestingly, it is pointed out that when the second remand order was passed by the IPAB, the patentee again sought to amend the claims by removing the word *'about'* as contained in the claims in respect of the range of Sulphur content of 82% to 98%. According to Mr. Sibal, ld. Senior counsel, even the removal of the word *'about'* would not make any difference to the final conclusion that in the first patent application i.e., D-1, the language used is *"80% minimum"* which in itself signifies that 82% or even 98% would be covered.

49. Ld. Senior counsel thereafter takes the Court through the second set of orders of the Controller dated 9th September, 2016 and 11th April, 2017, wherein the Controller arrived at a completely opposite finding in respect of D-1. The Controller holds that narrowing of the particle size can also be an innovation and D-1 itself does not anticipate IN'429 as the word *'about'* now stands deleted.

50. It is also highlighted that the claims have been repeatedly amended by the Plaintiff. The third amendment, by which the range of sulphur active ingredient was changed to *"82% to 98%"* is a clear give-away that the unamended claim would have been fully anticipated by the earlier application. The Plaintiff's attempt to delete the word *"about"* shows that the attempt was merely to try and somehow bring it outside the scope of the earlier patent application. The earlier patent application having been abandoned and the present specification being on almost identical lines, it is submitted that IN'429 is liable to be revoked.

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51. It is argued that sulphur, being both a fungicide and a fertilizer, was well within the knowledge of the Plaintiff. Only when the Government issued a notification dated 28th December, 2006, by which 90% sulphur compositions have been recognized as fertilizers and exempted from excise duty, the Plaintiff completely changed its strategy and took a new stand before the excise authorities and filed a fresh patent.

52. Insofar as the particle size is concerned, the earlier patent application i.e., D-1, is again shown to emphasise the fact that in all the examples, the range of particle size is between 0.1-20 microns. Thus, the range is quite varying and the innovation of 2 to 12 microns was clearly contained even in the earlier patent application. Finally, the table of prior arts and the references thereto are relied upon by the Defendants.

53. Insofar as the judgments are concerned, the proposition canvassed before the Court is that the test at this stage is of vulnerability and not to emphatically establish that the patent is invalid. Moreover, no importance can be granted to the fact that the patent has gone through an examination and the opposition process as held in ***Tenxc Wireless and Anr. v. Mobi Antenna Technologies, 2011 (48) PTC 426 (Del).*** The judgment in ***Glaverbel SA v. Dave Rose, 2010 SCC Online Del 308*** is relied upon to argue that in the case of objections of obviousness and lack of inventive step, mosaicing is permissible, however, the fact that mosaicing is done does not mean that the documents which show the range of the particle size cannot be considered by the Court. Finally, it is argued that the judgment of the Supreme Court in ***Mumbai International Airport v. Golden Chariot Airport, (2010) 10 SCC 422*** clearly holds that a party cannot approbate or reprobate, in the context of the fact that once the Plaintiff seeks an advantage in the payment of excise

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and has taken a particular stand that there is no difference between the old and new composition, a contrary stand cannot be taken for the purposes of a patent.

54. Mr. Sibal, ld. Senior Counsel, thereafter relies upon the affidavit of the expert – Dr. Pietro Zanuccoli to argue that the novelty, according to the Plaintiff, resides in two elements i.e., high loading of Sulphur and small size of particles (2 to 12 microns) leading to a higher yield with lesser quantity of fertilizer i.e., 3kg/acre. It is his submission that all these elements were present in the first patent application itself and hence, the present patent is invalid and, in any case, vulnerable, which is all that the Defendants need to prove at this stage.

55. Ld. Senior Counsel, thereafter conducts a detailed analysis of the first specification, to argue that the examples in the said specification clearly cover the range of particle sizes as contained in the present specification. Reliance is also placed on the claims of the first patent to argue that the powder form and the wettable form which was mentioned to be minimum 80% clearly shows that the present specification lacks novelty and there are no specific inventive steps that it is capable of establishing.

56. The Court is thereafter taken to IN'429 to argue that despite the amendments to the claims, both in the summary of the invention and the detailed description, the Sulphur range was 40% to 98%. Further, examples 4 and 5, which are retained in IN'429, show the sulphur active ingredient at 65% and 70%. According to Mr. Sibal, ld. Senior Counsel, therefore, the specification does not support the final amended claim. Even the inventive component of the yield which, as per the expert, is 3kg/acre is defeated as for different types of crops, the quantity used and the yield varies from 3kg/acre

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to 4kg/acre, 6kg/acre and even 16kg/acre. Thus, there is no consistency and the expert's affidavit is not supported by the patent specification.

57. The guidelines of the Patent Office, as also the manual of the Patent Office, are relied upon to argue that whenever there is an improvement of a product or process, the prior art and the invention in the new patent, is distinguished very clearly and separated by use of the word 'characterized by' or 'wherein'. After relying on these two documents, claim no. 1 is shown, in order to emphasize the fact that the claim is in two parts. The first part is the prior art and the second part, divided by the word *'wherein'*, shows that the invention relies only on the size of the water dispersible granules and the particles as per claim no.1. In conclusion, it is submitted that for the above reasons, the interim injunction ought not to be issued.

Analysis & Findings

58. At the outset, it needs to be recorded that Defendant No.1does not challenge infringement at this stage. The primary challenge of Defendant No.1 is to the validity of the Plaintiff's patent. If the patent is found to be valid, then Defendant No.1's products would be held to be infringing the Plaintiff's product. Thus, at this stage, the only issue to be decided is whether Defendant No.1 raises any credible challenge to IN'429 or not.

59. The broad grounds raised on behalf of Defendant No.1 in support of its plea are:

(i) The patented invention is anticipated and is not novel. The prior art document relied upon and repeatedly referred to before the Court during submissions is 655/MUM/2000.

(ii) IN'429 lacks inventive step and is obvious.

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(iii) The amendments sought in IN'429 during the examination process establish the vulnerability of IN'429.

(iv) The Plaintiff has made admissions before the excise authorities which prove that the patent is invalid.

(v) The specification does not fairly describe the invention and also does not match with the finally granted claims.

(vi) The patented invention is hit by Section 3(d) of the Patents Act, 1970.

60. The issues that arise for consideration in the present interim injunction application are:

i) Whether the suit patent, bearing Indian Patent Number 282429, is *prima facie* valid or whether the Defendant No.1 has raised a credible challenge to the same?

ii) What is the effect of the statements made by the Plaintiff before the Commissioner of Customs and Central Excise, Bharuch, as captured in order dated 29th July, 2016?

iii) Whether the Plaintiff is entitled to an interim injunction?

Issue No. (i) - Whether the suit patent, bearing Indian Patent Number 282429, is *prima facie* valid or whether the Defendant No.1 has raised a credible challenge to the same?

61. The challenge raised by the Defendant No.1 before this Court is that IN'429 lacks novelty and inventive step.

135. Though a large number of prior art documents have been cited by the Defendant No.1 in pleadings, during oral submissions and in the written submissions, reliance has primarily been placed on the Plaintiff's earlier

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patent bearing No.655/MUM/2000, i.e., the document referred to as D-1 which is considered to be the closest prior art document.

62. In view of the same, though there are several documents that have been cited by the Defendant No.1 in support of its plea of invalidity, at this stage, pending trial, this Court is of the opinion that only the closest prior art i.e., D-1, needs to be considered.

63. D-1 is a patent application filed by the Plaintiff bearing no.655/MUM/2000 titled ***'An improved fungicide/Bactericide, namely copper oxychloride formulation in the dry flowable form (WG) and a method of manufacturing/making & using the same.'*** A perusal of the said patent application shows that the main focus of the application is on a fungicidal composition which is more environmentally friendly, less toxic, creates lesser dust and is not hazardous. The specification itself clearly states that sulphur fungicides are well-known. The process for manufacture of sulphur is also well-known. The conventional sulphur product has a narrow particle size. Sulphur is a contact fungicide i.e., the greater the surface area of the product which is used on the plant, the higher the efficacy. D-1 therefore discloses an improved process for manufacture of sulphur with a wider range of particle size, bigger granule size and better bio-efficacy. D-1 then sets out the method for manufacturing the said product and also gives examples to show the bio-efficacy of the product.

64. D-1 discloses an aqueous suspension wherein the sulphur active ingredient is 80% by weight. It consists of a wetting agent, dispersing agent, filler and a binding agents. It is a fungicidal/miticidal formulation, meaning thereby it helps in cleaning fungi and also controls mites and tics. The background to D-1 and the claims in D-1 are as under:

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"Background of the Invention

Fungicides are a known art for years, specially Sulphur fungicides. Typically the known product i.e. Sulphur (WP) or Sulphur (WG) contains Sulphur technical of about 60% to 90%) along with blends of wetting/suspending agents and fillers. More typically in India the product contains 80% Sulphur. It is light yellow in colour in case of a Sulphur WP and Brown in colour in case of a Sulphur WG. It exists in a fine powder form for the Sulphur WP. In case of Sulphur WG it exist in the micro granule form along with some dust. Its chemical formula is: S.

The conventional product contains 80% Sulphur and the particle size is typically approximately in the range of 4 to 15 microns for -WP & 4-10 microns for WG. It is yellowish or Brownish in colour and not free flowing in case of Sulphur WP and Free flowing in case of Sulphur WG. The product has bulk density range from 0.39 to 0.45 in case of Sulphur WP and has bulk density from 0.87 to 0.90 in case of Sulphur WG (typically towards higher side after compaction). The known art product (Sulphur WP) is not free flowing and has flow number in the range of 8 to 10. Whereas the improved version Sulphur WG is free flowing and has a flow number in the range of 0 to 2. Sulphur WP when put in water does not disperse well. Sulphur WP has tendency to cake over a period of time. When the product is used on pouring it creates dust cloud & irritations to the user which may be inhaled by the user causing inhalation toxicity resulting in eye irritation during production of the dry milled product as well as during use by the user. The particles are fine thus causing some dust to fly away when being brought to use. Where as an improved version (Sulphur W.G.) in the known art is made by some companies is better than the

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conventional product (i.e. Sulphur WP) but has a narrow particle size. Sulphur is a contact fungicide, where the efficacy of the product is improved when the surface area of the product is improved. Due to the narrow particle size range of the particles of product the efficacy of the product is restricted.

Over the year as man learnt of the hazards of using pesticides and the risks associated with this to mankind there is a growing need to make the same products which have been used for years in such an improved form so that it is more efficient letticacious and reducing the risk to the user, thus a further improved composition having better physical properties and more efficient bioefficacy properties which is understood to be due an efficient particle size as a result of increasing the range of the particles and having more particles in the range of 0.5 to 4 microns which in turn increases the surface area of the sulphur particles. Due to the product being a contact fungicide this increase in contact area increases the bioeffectivness of the product.

The prior art fungicidal composition have detrimental effects (due to excess Consumption on Fruits) to animals as well as human being. The process of manufacturing of prior art (Sulphur – WP conventional Sulphur WG) fungicidal composition is hazardous due to the inhalation toxicity.

The inventor has carried out continuous research to overcome the drawbacks of the above product and processes in the literature. The inventor has come out with an further improved process having initial process upto manufacture fine particles of sulphur as per art known to the industry. However for an improved Sulphur WG formulation, a finished product, the process is diverted from known art to an improved version to provide a product having an

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Sulphur composition with smaller particle size with wider range of particle size, but bigger Granule size, better bioefficacy, every particle being coated with dispersing agent, wetting agent, free flowing (pourable) properties, reducing dust by agglomeration, reducing inhalation toxicity. This is also achieved by improving chemical formulation.

The principle object of this invention is to provide an improved process of manufacturing fungicide composition that is more biological efficacious than the conventional formulation known in the art. Also the invention has a larger particle size range with more percentage particles in the range of 0.5 to 4 microns & in turn."

WE CLAIM:

1) An improved fungicidal/miticide formulation consisting of the following ingredients which are mixed thoroughly to obtain an improved formulation for making granules from micro particles obtained by wet grinding the aqueous suspension coating and subsequently drying in spray/fluidized bed spray and fluid bed spray granulator or a combination thereof to get water Dispersible Granules. Which will have better bioefficary, more available surface area in turn reducing amount of product used. The product will have better flowability, be practically dust free & hence reduced inhalation toxicity to human being during mannfacture & use by farmer. The product has smaller average particle size but larger range of particles, better sticking properties, better dispersion & leaves lesser residue in the soil & is hence user/friendly & Environmentally friendly. Unlike the conventional product which has a smaller particle size range this product has a larger range where the most particles are from 0.1 microns to 20 microns

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The aqueous suspension consists of 80% by weight (dry basis) of the (Sulphur active ingredient) between 0.5 to 5% of a wetting agent of the group of lignin derivatives; between 0.5 to 5% of the dispersing agent of the group of phenol/naphthalene; and/or polyyoxyethelene derivatives and balance 6% to 35% of the filler along with required binding agents. Also anti foaming agent, if required between 0.02 to 1.4%. This slurry when dried as described above forms a free flowing formulation with less than 3% moisture giving a granule size above 200 microns (0.2 mm) and reducing dust.

2) An improved fungicidal formulation as claimed in 1 wherein the binding agent is from lignin derivatives or group of derivatives of polycarboxylate.

3) An improved fungicidal formulation as claimed in claim 1 wherein the wetting agent is alkyl naphthalene aromatic sulphonic acid condensate or derivatives of polycarboxylate &/OR Ammonium Salt of Polyoxyethelene.

4) An improved fungicidal formulation as claimed in claim 1 wherein the wetting agent is alkyl naphthalene aromatic sulphonic acid. & Anti foaming agent 0.02% to 1.4% is used.

5) An improved fungicidal formulation as claimed in claim 1 wherein the filler may be talc, china clay, bentonite, dolomite ppt Silica and the like.

6) An improved fungicidal formulations claimed in claim 1 wherein the composition before drying is maintained at pH 6-8.

7) An improved fungicidal formulation as claimed in claim 1 wherein the wet grinding is carried out at 5^{o}-50^{o} C temperature.

8) An improved fungicidal formulation as claimed in claim 1 wherein sulphur is the toxicant

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the particle size is in the range of 0.1 to 20 microns for larger surface area of the individual particles available for fungicidal action.

9) An improved fungicidal formulation as claimed in claim 1 wherein the antifoam agent is more efficaceous due to the improved capability of the formulation to have a larger surface area of sulphur particles which are the toxicant.

10) An improved fungicidal formulation as claimed in claim 1 which has continuous flowability for better user control when making a sprayable tank mix.

11) An improved fungicidal formulation as claimed in claim 1 which is practically dust free thus reducing the inhalation toxicity to the user and, reducing wastage of the product lost to the atmosphere when making the tank mix.

12) An improved fungicidal formulation as claimed in claim 1 wherein superior coverage properties thus reducing the amount of product required.

13) An improved fungicidal formulation as claimed in claim 1 wherein the formulation leaves less harmful residue in the soil due to lower use rates thus making it a more desirable formulation.

14) An improved fungicidal formulation as claimed in claim 1 where the granulation of the Formulation gives the finished product directly from the slurry to granules thus eliminating dusting in manufacture & drastically reducing toxicity to workers during manufacture & farmers during use of the product."

This application was, however, abandoned by the Plaintiff.

65. The application for IN'429 was filed by the Plaintiff on 8th January, 2007 i.e., almost seven years later. The focus of IN'429 is oxidization of sulphur into sulphate, to serve as an essential nutrient for a plant's growth.

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Sulphur can only be absorbed in sulphate form by plants. IN'429 recognizes that the deficiency in the existing art, *inter alia,* is that it is required to be applied in high doses. Moreover, the manner of dispersing the product is also not cost efficient as it cannot be applied through drip and sprinkler irrigation systems. The purpose of IN'429 is captured in the background to the application as under:

> ***"BACKGROUND OF THE INVENTION***
> ***1. FIELD OF THE INVENTION***
> *The present invention relates to an agricultural composition comprising an effective amount of sulphur active ingredient and at least one dispersing agent.*
> ***2. DESCRIPTION OF THE RELATED ART***
> *All the crops need balanced fertilization and presently high emphasis is laid on N-P-K as major nutrients for fertilizer applications. However, in the past couple of years sulphur has gained importance as a fourth major nutrient and its requirement in various crops and soils is increasing world wide due to the decrease in sulphur emissions and hence lower depositions into the soil.*
> *Sulphur is known as an elemental fertilizer for feeding plants and is an essential component of certain vitamins and enzymes of plants. Sulphur, together with phosphorus and nitrogen takes part in the synthesis of certain plant, proteins. Sulphur is insoluble in water, is easily inflammable and also displays irritable action on the human body. These properties of sulphur influence both its production as well as its use in the agricultural field.*
> *Sulphur is also used as a rectifier of certain structural characteristics of the soil, including in particular its pH, which it shifts towards acidic values for alkaline soils. Sulphur is naturally present in the soil as a component of certain salts.*

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When sulphur is oxidized to its sulphate form it serves as an essential nutrient for plant growth as sulphate is the only form in which plants can take up sulphur.

Presently, sulphur is typically blended with other granular fertilizers such as phosphates, nitrates, urea and potash among others to provide it in a form suitable for application to the soil. Sulphur is available commercially as prills, soluble sulphur liquids, wettable powders and micronized powders. These compositions are then applied to the soil by various means such as broadcasting or banding to supply the soil with sulfur, as well as additional nutrients found in granular fertilizers.

One problem associated with the use of these conventional compositions is that they need to be applied in very high dosages. The applicable dosage of these conventional compositions per acre is very high and can extend from about 10 kg / acre for Sulphur bentonite compositions to about 25 kg per acre for Sulphate based fertilizers and goes all the way to more than 100 kg/acre in case of gypsum. Also since these conventional compositions are used in high dosages there is an increased possibility of leaching in the soil making it unavailable to the plant for uptake. Large amount of money is being spend for drip and sprinkler irrigation for several horticulture crops and the use and practice of drip irrigation is increasing considerably. However, the conventional fertilizers comprising sulphur or sulpbur plus bentonite mixture cannot be applied through drip irrigation as the particle size of these compositions are large and particles do not disperse in water, causing nozzle clogging in the irrigation equipment and resulting in a non-homogenous tank mixture at the time of application. These conventional compositions such as pellets and wettable powders

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do not exhibit uniform suspension resulting in uneven coverage on the plant and thereby affecting and minimizing the bio-efficacy of the product. They also need to be applied two to three months in advance so as to ensure timely conversion to sulphate and its uptake by the plant for which there is additional application and cost. Conventionally, acids such as sulfuric acid, nitric acid and/or phosphoric acid and ammonia (anhydrous) are used to produce these conventional fertilizers. The use of these chemicals creates a potentially hazardous environment for production of the fertilizer. In developing countries, these chemicals may be less available with the consequence that fertilizer must be imported at a considerable expense and crop yields are reduced in areas where food is most needed.

Sulphur has also been incorporated in fertilizer compositions for a different purpose. Specifically, sulphur has been sued in the manufacture of compositions such as Sulphur bentonite pellets, Calcium Sulphate, Ammonium Sulphate and other sulphate based compositions of fertilizers, the process of conversion of Sulphur to sulphate form is slow and sulphate is the only form in which plants can take up sulphur. In the conventional sulphur based fertilizers it is observed that sulphur is not timely converted into sulphate and hence is not readily available to the plant.

There is a need, therefore, to develop a composition which converts sulphur to its sulphate form almost instantly to be available for uptake by the plants and which delivers sulphur and other nutrients uniformly and effectively to the soil and the plant does not need to be applied in advance or as an additional application and can be applied with ongoing applications. Also, there is a need to reduce the dosage substantially so as to develop a

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> *composition which is economical to the farmers. The composition exhibits a good suspension and dispersion properties in water and soil moisture so as to be miscible with other soluble fertilizers and hence applicable through drip and sprinkler irrigation to ensure a. uniform spray and availability."*

66. The invention is thereafter described in the specification. Six examples are set out in the specification for the manufacture of the composition as per IN'429. Three of the examples relate to the use of 91% sulphur active ingredient and the remaining examples relate to 84%, 65% and 70% sulphur active ingredient. After setting out the examples, the specification also gives the actual impact of the use of the composition on various crops, such as, crucifers, groundnut, soybean, mustard, rice and wheat, bulbs and tubers, potatoes, etc. The conclusion in the specification is that higher yield was obtained.

67. After the detailed description in the specification, the main claim in IN'429 is for an agricultural composition which converts sulphur to sulphate. Initially, the claims were for a broader range of sulphur active ingredient. However, over the course of the examination and oppositions, the range has been reduced and restricted as 82% to 98% (w/w). It is to be borne in mind that during the prosecution of a patent application, amendments to the claims are a common phenomenon, especially in response to the objections raised by the Patent Examiner. So long as the amendments are within the broad scope of the claims originally filed, they can be considered by the Examiner. No inference can be drawn based on the amendment of claims by a process of *`reverse analysis'*. In an infringement action, it is the granted claims that are

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to be considered. Accordingly, it is the main claim consisting of 82% to 98% (w/w) range of Sulphur, along with the dependent claims, which has to be examined by this Court to be tested on the plank of novelty and inventive step.

68. The claims in IN'429 as granted read as under:

> *"1. An agricultural composition for application to the soil that converts Sulphur to its sulphate form instantly to be available for uptake by the plants, the agricultural composition comprising: an effective amount of a Sulphur active ingredient in a range of 82% to 98% (w/w) and at least one dispersing agent in a range of 2% to 18% (w/w): wherein the said composition is in a form of water dispersible granules and wherein the water dispersible granules are in a size range of 0.1 to 2.5 mm and comprise particles in a size range of 2 microns to 12 microns.*
>
> *2. The agricultural composition as claimed in claim 1 wherein, at least one dispersing agent is selected from a group comprising polyvinylpyrrolidone, polyvinylalcohol, lignosulphonates, phenyl naphthalene sulphonates, ethoxylated alkyl phenols, ethoxylated fatty acids, alkoxylated linear alcohols, polyaromatic, sulfonates, sodium alkyl aryl sulfonates, glyceryl esters, maleic anhydride copolymers, phosphate esters, condensation products of aryl sulphonic acids and formaldehyde, condensation products of alkylaryl sulphonic acids and formaldehyde, addition products of ethylene oxide and fatty acid esters, salt of addition products of ethylene oxide and fatty acid esters, sulfonates of condensed naphthalene, lignin derivatives, naphthalene formaldehyde condensates, sodium salt of isodecylsulfosuccinic acid half ester, polycarboxylates, sodium alkylbenzenesulfonates, sodium salts of sulfonated naphthalene, ammonium*

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salts of sulfonated naphthalene, salts of polyacrylic acids, salts of phenolsulfonic acids and salts of naphthalene sulfonic acids.

3. The agricultural composition as claimed in claim 1, wherein the composition further optionally comprises a wetting agent in the range of 0.1% to 5% (w/w); a binding agent in the range of 0.1% to 7% (w/w); and a filler in the range of 0.1% to 5% (w/w).

4. The agricultural composition as claimed in claim 3, wherein the wetting agent is selected from a group comprising phenyl naphthalene sulphonates, alkyl naphthalene sulfonates, sodium alkyl naphthalene sulfonate, sodium salt of sulfonated alkylcarboxylate, polyoxyalkylated ethyl phenols, polyoxyethoxylated fatty alcohols, polyoxyethoxylated fatty amines, lignin derivatives, alkane sulfonates, alkylbenzene sulfonates, salts of polycarboxylic acid, salts of esters of sulfosuccinic acid, alkylnapthalenesulphonates, alkylbenzenesulfonates, alkylpolyglycol ether sulfonates, alkyl ether phosphates, alkyl ether sulphages and alkyl sulfosuccinic monesters.

5. The agricultural composition as claimed in claim 3, wherein the binding agent is selected from one or more of polyvinyl alcohols, phenyl naphthalene sulphonate, lignin derivatives, polyvinylpyrrolidone, polyalkylpyrrolidone, carboxymethylcellulose, xanthan gum, polyethoxylated fatty acids, polyethoxylated fatty alcohols, ethylene oxide copolymer, propylene oxide copolymer, polyethylene glycols and polyethylene oxides.

6. The agricultural composition as claimed in claim 3, wherein the filler is selected from one or more of bentonites, sub-bentonites, attapulgites, kaolinites, montmorillonites, bauxite, hydrated aluminas, calcined aluminas, diatomaccous earth,

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chalk, fuller's earth, dolomite, kiesulguhr, loess, prophyllites, talc, vermiculites, limestone, natural and synthetic silicates, silicas and china clay.

7. The agricultural composition as claimed in claim 1 or 3, wherein the composition further optionally comprises and additive in the range of about 0.01% to about 50% (w/w).

8. The agricultural composition as claimed in claim 7, wherein the additive is selected from one or more of macronutrients, micronutrients, minerals and urea groups, wherein the macronutrients are selected from the group consisting of nitrogen, phosphorous, potassium, calcium and magnesium and the micronutrients are selected from the group consisting of zinc, iron, manganese, copper, boron, cobalt, vanadium, selenium, silicon and nickel.

9. The agricultural composition as claimed in any of the claims 1 to 8, wherein the agricultural composition is used as at least one of a fertilizer composition, a nutrient composition, a plant strengthener composition, a soil conditioner composition and a yield enhancer composition."

69. The Plaintiff has raised various arguments to combat the allegation of lack of novelty and inventive step. The Plaintiff has also relied upon the affidavits of two experts, namely, Dr. Pietro Zanuccoli and Mr. John Peace in support of the validity of the patent.

70. The testimony of Dr. Pietro Zannucoli, who has over 30 years of experience in use of sulphur for plant nutrition and is the inventor of one of the prior arts relied upon by the Defendant No.1, is that sulphur has an explosive and hazardous nature. As per Dr. Zannucoli, the surprising result in the Plaintiff's invention is that it has been able to achieve a high loading of sulphur in a small particle size. This, according to Dr. Zannucoli, is where the

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novelty resides. Mr. John Peace who is stated to be an expert in the sulphur industry also finds it surprising that IN'429 has obtained over 80% dispersibility with an extremely high loading of sulphur i.e., 80 to 91%, which is totally unexpected and completely unpredictable from the prior art. Both the experts are of the opinion that the prior art D-1, in fact, teaches use of bigger particle size for greater efficacy.

71. On the other hand, the Defendant No.1 has relied upon the affidavit of Dr. Puneeta Arora to argue that conversion of sulphur to sulphate is a natural process that depends on many factors. Dr. Puneeta Arora has, in her affidavit, stated that almost the same combination of factors, including particle size range, granule size range, dispersibility, suspensibility etc. has been disclosed in D-1 i.e., 655/MUM/2000. Dr. Arora has also referred to the IIVR Report as an admission on the part of the Plaintiff that D-1 can also act as a fertilizer.

72. The order of the Controller dated 24th October, 2009 and the orders of the Controller dated 9th September, 2016 and 11th April, 2017 arrive at completely opposite conclusions. The former, coupled with the IPAB order dated 4th April, 2012, conclude that IN'429 lacks novelty whereas the latter bring out the differences between D-1 and IN'429. When the two specifications are read *in toto*, this Court is persuaded by the Controller's conclusion in order dated 9th September, 2016 that the mere covering of the range in D-1 would not hit the novelty/inventive step of IN'429. The Controller concludes therein as under:

> ***"j)*** *It is established view that if general components and their amounts have been broadly disclosed in a prior art document, a specific selection from such documents will not by itself render the invention obvious unless having unexpected results.*

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I have considered that the specific ranges of values if carved out from a disclosure teaching a fungicidal composition and those selected values produced not a fungicidal composition but an unexpected plant growth nutrient composition it would be an invention having regard to non-obviousness synergistic selection of actives selected in narrowed range resulted in unexpected yield/production. In this aspect relied upon decision of T 0198/84, by the European Board of Appeals which rules as follows:

> *"A fairly broad range of number delimited by minimum and maximum values this, >0 and <1100 moI% does not necessarily represent a disclosure, ruling out the selection of a subrange, of all the numerical values between these minimum and maximum values if the sub-range selected is narrow." "The sub range is novel not by virtue of an effect which occurs only within in; this effect permits the inference that what is involved is not an arbitrarily chosen specimen from the prior art but another invention (purposive selection)."*

73. The above finding appears to be the core of IN'429, as per the Controller. The Controller concludes clearly that in the first patent, the disclosed values related to a fungicidal composition and the selected values in IN'429 leading to a fertiliser was not obvious to a person skilled in the art. According to the Controller, the crux of IN'429 was both novel and inventive as per the findings set out above.

74. Insofar as this Court is concerned, both parties have produced their own experts and their reports. However, the experts are yet to be cross-examined. That would happen in the course of trial. Therefore, at this stage, in order to

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prima facie arrive at a conclusion as to the validity of the patent, this Court deems it appropriate to compare IN'429 and the closest prior art i.e., D-1. A comparative chart comparing the various elements in the claims of the two documents is as under:

Particulars of ingredients/process	**D1**	**IN'429**
Sulphur	80% by weight (dry basis) **(claim 1)**	82-98% **(claim 1)**
Wetting Agent	0.5-5% (lignen derivatives, alkyl napthelne aromatic sulphonic acid condensate or derivatives of polycarboxylate and/or ammonium salt of polyoxyethelene) **(claim 1 and 3)**	0.1-5% (same – includes lignen derivatives and alkyl napthelne sulphonates) **(claim 1)**
Dispersing Agent	0.5-5% (phenol/naphthalene and/or polyoxyethelene derivatives) **(claim 1)**	2-18% (includes phenyl naphthalene sulphonates) **(claim 1 and 2)**
Filler	6-35% (talc, china clay, bentonite, dolomite ppt. Silica and the like) **(claim 1 and 5)**	0.1-5% (includes bentonites, china clay, silicas, dolomite and talc) **(claim 1 and 6)**

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Binding Agent	- Lignen derivatives or polycarboxylate derivatives **(claim 2)**	0.1-7% (includes lignin derivatives) **(claim 1 and 5)**
Anti-foaming agent	0.02-1.4% **(claim 1)**	
Moisture content	Less than 3% **(claim 1)**	
Granule size	Above 200 microns (0.2 mm) **(claim 1)**	0.1-2.5mm (100-250 microns) **(claim 1)**
Wet grinding	At 5-50 degrees celsius temperature **(claim 7)**	
Particle size	0.1-20 microns **(claim 1 and 8)**	2-12 microns **(claim 1)**
Additive	-	0.01% - 50% **(claim 7)**

75. A perusal of the claims of D-1 and IN'429 shows that D-1, which was an application titled as *'An improved fungicide/Bactericide, namely copper oxychloride formulation in the dry flowable form (WG) and a method of manufacturing/making & using the same'*, is a **fungicide/bactericide**. However, elsewhere in the patent, it is described as a sulphur formulation.

76. A perusal of the background of D-1 shows that it had various objects including eco-friendliness, cost effectiveness, etc. However, the important

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feature of D-1 is a sulphur loading of 80% and increased particle size in order to have greater surface area of the sulphur particles. This is reiterated in the background in several places. The claims in D-1 go on to describe the process of obtaining the formulation which consist of 80% sulphur by weight as the active ingredient. The claims in D-1 are slightly unusually worded inasmuch as the main claim does not merely describe the formulation but also its uses and effects.

77. On the other hand, IN'429 relates to a product commercially used as a **Fertilizer**. The core of the invention as per claim no.1 is the sulphur active ingredient in the range of 82% to 98% and a dispersing agent in the range of 2% to 18%. In D-1, the dispersing agent is in the range of 0.5% to 5%. Thus, on both counts i.e., the loading of sulphur and the dispersing agent, IN'429 seeks to achieve a higher sulphur loading with the range of dispersing agent of a higher range. The particles are also intended to be smaller in the case of IN'429.

78. Apart from the above elements which have been compared, certain important features that need to be noted are:

i. D-1 specifically relates to a fungicidal/miticidal composition. Such compositions are meant to kill or control external attacks on the crop, such as fungi, mites, tics etc. A fertilizer, on the other hand, is meant to increase the productivity and yield of the crop. While the former performs a negative function, the latter performs a positive function. It is possible that even fungicides and miticides may, in the process of preventing attacks on the crop, also lead to better yield. However, their primary function is to prevent or destroy external attacks on the crops.;

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ii. A perusal of D-1 shows that in all the examples which have been given, the sulphur active ingredient is 80%. In IN'429, there are three examples which have sulphur as the active ingredient to the extent of 91%. Thus, the increase in the active ingredient of sulphur with the range, 82% to 98% is a substantive improvement over D-1.;

iii. The other difference between D-1 and IN'429 is in the range of the dispersing agent, the filler and the binding agent.;

iv. Insofar as particle size is concerned, Claim No.8 of D-1 refers to particle size in the range of 0.1 to 20 microns and the detailed description in the specification clearly teaches that having a larger particle size range is more efficacious. This is clear from a reading of paragraph 2 at page 3 of D-1 and paragraph 6 at page 5 of D-1. In IN'429, however, the granule size and the particle size is much smaller. D-1 discloses a granular size of above 200 microns. However, in IN'429, the range is 100 to 250 microns. Insofar as particle size is concerned, in D-1 the range is 0.1-20 microns, whereas in IN'429, the range is 2 to 12 microns.

79. In the order of the Controller dated 24th October, 2009, as also the order of the IPAB dated 4th April, 2012, a mere comparison is made between the particle size and granule size of IN'429 and D-1 and it is concluded that the range in D-1 would include the range given in IN'429. In the opinion of this Court, this is an incorrect approach inasmuch as the main sulphur range is itself different. Moreover, D-1 is actually teaching away from what is contained in IN'429. D-1 encourages use of larger particle size whereas

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IN'429 shows a shift in the opposite direction i.e., use of smaller particle size to enable better absorption. The mere presence of standardised agents such as wetting agent, dispersing agent, filler and binding agent would not make the two compositions identical in as much as the nature of the composition and the loading of sulphur, the utilisation of the same etc., are different.

80. D-1 does not defeat the novelty of IN'429 due to the range of active ingredient itself being different. Thus, the main claim 1 is not anticipated by D1. On an analysis of the two patent specifications, this Court is of the opinion that the process disclosed in D-1 relates to sulphur of a lower concentration but with a bigger granule and particle size. In IN'429, however, the patented product is a composition which has a much higher sulphur loading/concentration and, surprisingly, a lower granule and particle size than what is taught and suggested in D-1. Thus, when a person skilled in the art analyses D-1, there is no motivation for the said person to explore the opposite of what it teaches i.e., to use a higher loading of sulphur with lower granule and particle size.

81. The Defendants ought to have satisfied the Court as to how D-1 would make IN'429 obvious to a person skilled in the art. The Defendants have not been able to demonstrate by comparing the method/process in D-1 with IN'429 as to how there was any motivation, suggestion or teaching in D-1 to arrive at IN'429. There was no argument forthcoming as to how a person skilled in the art would be inspired to try and arrive at the invention disclosed in IN'429. The submission as to the lack of inventive step has to be supported by some material to show that the journey from D-1 to IN'429 was an obvious one. However, this has not been demonstrated or established by the Defendants from the record. The mere fact that IN'429 uses the term *'plant*

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protectant' would not lead to the conclusion that the composition can also be used as a fungicide, when admittedly it is being used as a fertiliser. Due to the above comparative features of D-1 and IN'429, this Court is of the opinion that IN'429 patent discloses a novel and inventive composition.

82. Recently, the ld. Division Bench of this Court in ***Astrazeneca AB & Anr. v. Intas Pharmaceuticals Ltd. [FAO (OS) (Comm) 139/2020, decided on 20th July, 2021]***, while dealing with two patents of the same proprietor has observed as under:

> *"30. The tests of "obvious to a person skilled in the art" and "anticipation by publication" and "use before the date of filing of patent application with complete specification", in the context of an earlier patent and its specifications, in our view, have to be different, when the inventor of both is the same. The counsel for the appellants/plaintiffs has argued, that owing to delays in obtaining approvals of Drug Regulators in different jurisdictions, for marketing of a new drug/medicine, after obtaining patent with respect thereto, results in the inventor/patentee being not able to enjoy the exclusivity granted under the Patent Laws to the inventor/patentee, for the full term of the patent. However merely because there are such delays, would not be a reason for the Court to give to the patent a longer life than provided in the statute. The cure therefor is with the Legislature and not with the Courts, by allowing more than one patent with respect to the same invention. The said argument of the counsel for the appellants/plaintiffs has however made us suspicious, that the appellants/plaintiffs, though invented DAPA at the time of seeking IN 147 and/or US equivalent thereof, though „covered" it therein (to prevent others from inventing it) but intentionally did not disclose it, to subsequently claim patent with*

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> *respect thereto, and in the interregnum obtain approvals of the Drug Regulators. When the inventor is the same, the tests aforesaid, in our opinion, cannot be in the context of "person ordinarily skilled in the art" but have to be of the "person in the know". The enquiry, in such a situation, has to be guided by, whether the inventor, while writing first patent, knew of the invention claimed in the subsequent patent."*

83. Thus, unless and until the Defendant No.1 is able to show that the fertiliser product which is contained in IN'429, was in the knowledge of the Plaintiff at the time when the first patent was filed, the invention cannot be held to be obvious. Moreover, it is a fundamental principle of patent law that if a prior art reference teaches away from the invention, the objection as to obviousness would not apply:

> ***"Chisum, D., 1978. Chisum on patents: a Treatise on the Law of Patentability, Validity, and Infringement. New York, pp.5-124, Vol. I:***
>
> *"Numerous decisions recognize that an invention that otherwise might be viewed as an obvious modification of the prior art will not be deemed obvious in a patent law sense when one or more prior art references "teach away" from the invention."*
>
> ***Chisum, D., 1978. Chisum on patents: a Treatise on the Law of Patentability, Validity, and Infringement. New York, pp.5-130, Vol. II:***
>
> *"A reference may be said to teach away when a person of ordinary skill, upon reading the reference, would be discouraged from following the path set out in the reference, or would be led in a direction divergent from the path that was taken by*

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> *the applicant. The degree of teaching away will of course depend on the particular facts; in general, a reference will teach away if it suggests that the line of development flowing from the reference's disclosure is unlikely to be productive of the result sought."*

84. The Defendants have also argued that the Controller ought not to have permitted the amendments to the claims of IN'429. It is seen that the Plaintiff has amended IN'429 on four occasions during the examination and oppositions process. The consistent view of the Controller, except in order dated 24th October, 2009 which is no longer in operation, has been that the said amendments were well within the scope of the originally filed claims and the Plaintiff only sought to restrict the claims and not broaden them. The view having been that the amendments are in accordance with Section 59 of the Patents Act, 1970, the mere fact that the Plaintiff has amended the claims would not weigh against the Plaintiff. It is usual for patent applicants to edit, amend, modify and vary the claims during the examination and opposition process. So long as the amendments sought are within the scope of the claims originally filed, no adverse conclusion can be drawn on the basis of the said amendments.

85. Insofar as the submission that the suit patent is hit by Section 3(d) is concerned, this Court is of the opinion that the patent specification of IN'429 has given comparative efficacy figures of the patented composition, in considerable detail. A perusal of the specification shows that when the patented composition was used on different crops, in differing quantities and in a specific manner, it showed greater yield. The said figures are tabulated below:

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Sl. No.	Nature of crop	Enhancement in yield
1.	Crucifers	15-20%
2.	Groundnut, soybean and mustard	12%
3.	Cereal crops such as rice and wheat	5%
4.	Under soil crops such as bulbs and tubers like onion and garlic	10%
5.	Potatoes	25%
6.	Cumins, maize, sorghum, sunflower, tomatoes, chili cucurbits, rape seed oil, sugarcane	10-30%
7.	Fruits such as banana, grapes and mangoes	10-30%

The data given in the specification also sets out the quantity to be used for each of these crops, when the fertilizer is to be applied i.e., after how many days of sowing of seeds etc., in great detail. The product of the Plaintiff is also stated to have been a commercial success. At the interim stage, when this Court is to take a *prima facie* view, there is sufficient material on record to hold that enhanced efficacy is established by giving data in the specification itself which is sufficient to meet the objection of Section 3(d). The factum of enhanced efficacy over D-1 is also supported by the IIVR report dated 16th June 2009. The said report is relied upon by the Defendants to argue that the product generated from D-1 is also a fertilizer considering the manner in which the comparison is made by IIVR. A perusal of the IIVR report does not

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in any manner show that D-1 was termed to be a fertilizer as is being argued by the Defendants. The said report merely shows the comparative data between COSAVET DF 80WDG, COSAVET Fortis 90 WG, Elemental Sulphur and Gypsum and their respective yields.

86. As held in ***Novartis A.G. v. UOI & Ors., 2013 (6) SCC 1***, Section 3(d) does not prohibit grant of patents for incremental inventions so long as enhanced efficacy is established. The relevant extract reads:

> *"191. We have held that the subject product, the beta crystalline form of Imatinib Mesylate, does not qualify the test of Section 3(d) of the Act but that is not to say that Section 3(d) bars patent protection for all incremental inventions of chemical and pharmaceutical substances. It will be a grave mistake to read this judgment to mean that section 3(d) was amended with the intent to undo the fundamental change brought in the patent regime by deletion of section 5 from the Patent Act. That is not said in this judgment."*

87. Thus, at this *prima facie* stage, this Court is of the opinion that the suit patent IN'429 is valid as it is novel and inventive over the prior art. It is also not hit by the provisions of Section 3(d).

Issue No. (ii) – What is the effect of the statements made by the Plaintiff before the Commissioner of Customs, as captured in order dated 29th July, 2016?

88. One of the main planks of the Defendant No.1's argument is the alleged admission made by the Plaintiff before the Commissioner of Customs. The case of the Defendant No.1 is that the Plaintiff has admitted before the Commissioner of Customs that the physical and chemical properties of raw sulphur and IN'429 are the same which, in effect, is an admission that there

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is no innovation in IN'429.

89. The context in which the order was passed by the Commissioner of Customs was to consider as to whether the process followed to arrive at the fertilizer product of the Plaintiff constitutes *'manufacture'* as defined under Section 2(f) of the Central Excise Act, 1944. The test for determining whether a particular process constitutes *'manufacture'* under the Central Excise Act, 1944 is different from the tests to determine novelty and inventive step, under the provisions of the Patents Act, 1970.

90. Sulphur has certain inherent chemical and physical properties which can help plants in several ways. The use of sulphur as a preventive mechanism, protective mechanism or as a growth mechanism, would depend on the manner in which the composition is prepared. Sulphur could be converted into a pesticide, fungicide, miticide or a fertilizer, but that does not mean that it ceases to be sulphur. The inherent properties of sulphur would remain the same. However, the quantity of sulphur that is dispersed, the quantity that is absorbed, the effect it has on the plants, the effect it has on the humans who are administering the composition on the plants, the wastage involved, the bio-efficacy, the effect on the yield of different crops, etc. could vary from composition to composition. The mere fact that the core ingredient is sulphur, whose physical and chemical properties are known and do not change, does not mean that no patent can ever be granted on sulphur related compositions. It would also be incorrect to hold that if patents are granted for the manufacture of specific compositions, each and every such process would constitute *'manufacture'* for the purposes of the Central Excise Act, 1944.

91. The question as to what constitutes *'manufacture'* under the Central Excise Act, 1944 is not the same as examining the novelty or inventive step

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in a particular composition. To argue on the basis of submissions made before the Commissioner of Customs that there is no novelty or inventive step in IN'429 would lead to an anomalous situation and incongruous results.

92. The allegation of the Defendant No.1 is that COSAVET FERTIS WG (Sulphur 90%) was earlier classified under the head of fungicide but was later declared as a fertilizer from June, 2007. Hence, the product is nothing but a fungicidal product. While dealing with this submission, one needs to bear in mind that in a patent infringement action, the defendant's product is to be compared with the claims of the granted patent. The brand names used may be extraneous to the issue.

93. Before the Commissioner of Customs, the Plaintiff was seeking exemption from payment of excise duty as fertilizers were exempted from the payment of excise duty. In ***Servo-Med Industries v. Commissioner of Central Excise, (2015) 14 SCC 47***, the Supreme Court clearly lays down the difference between manufacture and marketability. As per the said judgment, change for the purpose of marketability may not always constitute manufacture. The observations of the Supreme Court are relevant and are set out below:

> ***"9.*** *A duty of excise is levied on the manufacture of excisable goods. "Excisable goods" are those goods which are included in the schedules of the Central Excise Tariff Act, 1985. "Excisable goods" brings in the concept of goods that are marketable, that is goods capable of being sold in the market. On the other hand, manufacture is distinct from saleability. Manufacture takes place on the application of one or more processes. Each process may lead to a change in the goods, but every change does not amount to manufacture. There must be*

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> *something more—there must be a transformation by which something new and different comes into being, that is, there must now emerge an article which has a distinctive name, character or use.*
> ***10.*** *When a finished product cannot conveniently be used in the form in which it happens to be, and it is required to be changed into various shapes and sizes so that it can conveniently be used, no transformation takes place if the character and the end use of the first product continue to be the same. An illustration of this principle is brought out by the judgment in CCE v. S.R. Tissues (P) Ltd.[(2005) 6 SCC 310 : (2005) 186 ELT 385] On facts, in the said case, jumbo rolls of tissue paper were cut into various shapes and sizes so that they could be used as table napkins, facial tissues and toilet rolls. This Court held that there was no manufacture as the character and the end use of the tissue paper in the jumbo roll and the tissue paper in the table napkin, facial tissue and toilet roll remains the same.*
> …
> ***12.*** *In Minerals and Metals Trading Corpn. of India Ltd. v. Union of India [(1972) 2 SCC 620 : (1983) 13 ELT 1542] , this Court dealt with the separating of wolfram ore from rock to make it usable. It was held that the process of separation and sorting out pieces of wolfram or by washing or magnetic separation would not amount to a manufacturing process. Wolfram ore does not cease to be an ore even though by the aforesaid processes it may become concentrated wolfram ore."*

94. From the above extract, it is clear that even if there are changes, additions or alterations made to increase the efficacy of the product, the character of the product can still be the same. For example, in ***Dunlop India Ltd. v. Union of India, (1994) 4 SCC 686*** it has been held that if the identity

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of the core product is not changed, then there is no manufacture. In order to constitute manufacture, the tests evolved by the Supreme Court are as follows:

> ***"27.*** *The case law discussed above falls into four neat categories:*
> *(1) Where the goods remain exactly the same even after a particular process, there is obviously no manufacture involved. Processes which remove foreign matter from goods complete in themselves and/or processes which clean goods that are complete in themselves fall within this category.*
> *(2) Where the goods remain essentially the same after the particular process, again there can be no manufacture. This is for the reason that the original article continues as such despite the said process and the changes brought about by the said process.*
> *(3) Where the goods are transformed into something different and/or new after a particular process, but the said goods are not marketable. Examples within this group are the Brakes India case [Brakes India Ltd. v. Supt. of Central Excise, (1997) 10 SCC 717] and cases where the transformation of goods having a shelf life which is of extremely small duration. In these cases also no manufacture of goods takes place.*
> *(4) Where the goods are transformed into goods which are different and/or new after a particular process, such goods being marketable as such. It is in this category that manufacture of goods can be said to take place."*

95. As per the above laid down tests, it is only when the product is transformed into a new product that manufacture takes place. In the present case, the core of the product continues to be sulphur, albeit in a different form. The water dispersible granules, according to the Plaintiff, have higher efficacy due to the innovative process of the Plaintiff. The patented composition

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leading to a higher loading of sulphur does not cease to be sulphur. The stand of the Plaintiff before the Commissioner of Customs cannot, therefore, be held to be in negation of the patent. The existence of the patent also cannot, by itself, lead to the conclusion that there is *'manufacture'* under the Central Excise Act, 1944. The tests, the standards and the purpose of both these laws being completely different, one cannot be conflated with the other. The over-emphasis of the Defendant No.1 on the order passed by the excise authorities is clearly a red-herring, in as much as the argument of the Plaintiff that in the product before the excise authorities there is no change, i.e., the previous and the current product is the same i.e., Sulphur - cannot mean that there is no new process or composition. The previously manufactured product was a Sulphur based fungicide and the present product is a Sulphur based fertilizer with greater efficacy on various counts.

Issue No.(iii) – Whether the Plaintiff is entitled to an interim injunction?

96. This Court has concluded that the Plaintiff's IN'429 is novel and inventive. The question that now arises is whether the Plaintiff is entitled to an interim injunction.

97. The Plaintiff came across the Defendant No.1's product 'SUFFAR 90' and 'COZY WET 90 WDG', which, according to the Plaintiff, was an infringing product. The Plaintiff served two legal notices dated 26th April, 2018 on the Defendant No.1, informing the Defendant that the product of the Plaintiff which is protected under IN'429 is sold under the brand name 'FERTIS'. Upon being served with the notices, the Defendant No.1, vide reply dated 23rd May, 2018, took the following stand:

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i) That it is manufacturing and selling the pesticide by the name 'NILDHARA 90' since 2014;

ii) That the said 'NILDHARA 90' consists of the following ingredients:

- Sulphur: 90%
- Polysan DCP: 3.80%
- Polysan NRS: 2.20%
- China Clay: 3.50 kgs (QS-100%)

iii) That the said composition is already in the public domain in US Patent No. US5443764.

iv) The Defendant No.1 is completely silent insofar as the Plaintiff's product - 'FERTIS WG' is concerned.

98. On receiving the replies, the Plaintiff filed the present suit claiming that IN'429 is a revolutionary product which has provided better yield to farmers. The Plaintiff has made an enormous investment in the marketing and promotion of the product since 2007 and the Defendants, despite having knowledge of the Plaintiff's patent, continue to infringe the Plaintiff's patent. The Plaintiff also got the products tested by an expert in an agro-chemical formulation, who confirmed that the Defendant No.1's product is the same as the Plaintiff's product. The prayer is for an injunction, restraining the Defendants from infringing IN'429.

99. When the present suit was filed, this Court, vide order dated 2nd November, 2018, had appointed two Local Commissioners to visit the premises of the Defendants and to inventorize the products. The Local Commissioner who had visited the premises of Safal Agro Seeds found that

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the Defendant's dealer mentions 'SUFFAR 90' and 'COZY WET' in the stock register, however, the products could not be found. The Local Commissioner who visited Defendant No.1's premises found that 'COZY WET 90' was being manufactured by Sterling Agrichem Pvt. Ltd.

100. In the written statement/counter claim, the Defendant No.1 takes the position that the sulphur-based composition used in 'SUFFAR 90' is different from the Plaintiff's patent. However, during oral arguments, ld. Counsel for the Defendant No.1 made it clear that they do not dispute infringement at this stage. Thus, if IN'429 is held to be a valid patent, the injunction would follow.

101. From the above narration it is clear that the Defendants stand has been changing from time to time. Initially, in reply to the legal notices, the Defendant No.1 claimed that it is using the same process as a US patent. In the written statement/counter claim, it is claimed that the process used in 'SUFFAR 90' is different from IN'429 and no reference to any US patent is given. However, during oral arguments, the stand is that for the purposes of interim injunction, infringement is not challenged and only the issue of invalidity is raised. Thus, the Defendants have adopted a changing stance insofar as the nature of their product and the process involved is concerned. The only challenge being to the validity of the patent, the question that arises is that once the patent is held to be valid, can the Court refuse an injunction?

102. The product in question is a patent for an agricultural composition. Defendant No.1 had already filed a post-grant opposition. Prior to its grant, the patent was opposed by seven different parties. Two detailed orders have been passed by the Controller on 9th September, 2016 and 11th April, 2017, discussing the entire prior art which is identical to the prior art cited in the present suit. It is also noted that the same counsels who are currently

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representing the Defendants, were also representing the said opponents before the Controller.

103. In the first round, when the patent was rejected by the Controller and by the IPAB, the order of the IPAB was set aside by the Bombay High Court and the matter was remanded back to the IPAB. The IPAB, not following its own earlier order dated 4th April, 2012, set aside the rejection of the patent and remanded the matter back to the Controller. Thereafter, the patent has been granted by the Controller after hearing seven oppositions.

104. The patent is valid only for six more years i.e., out of a period of 20 years, 14 long years have already gone by. From the filing of the application in 2007 till the grant in 2017, ten years had passed. Owing to the pandemic, the hearings in this interim injunction application were considerably delayed. During this period, Defendant No.1 has continued to manufacture and sell its product and the Plaintiff has not been able to enjoy its exclusive monopoly granted under the patent. The conduct of the Defendants has also not been *bona fide.*

105. The grant of the patent does not put an embargo on the manufacture or sale of sulphur-based agricultural compositions. It merely prevents third parties from manufacturing or selling products that are infringing IN'429. Third parties are free to follow the process as contained in Ex. D-1 i.e., 655/MUM/2000 or even US5443764, as relied upon by the Defendant No.1 in reply to the legal notices.

106. All these factors need to be borne in mind while deciding the nature of relief that is to be granted. The Defendants stand is that only a credible challenge needs to be shown and invalidity need not be proved by the Defendants. This is the settled law as per the judgments of this Court in

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Glaverbel SA v. Dave Rose, 2010 SCC Online Del 308 and ***Tenxc Wireless and Anr. v. Mobi Antenna Technologies, 2011 (48) PTC 426 (Del)***. In the present case, however, IN'429 has gone through multiple levels of scrutiny and examination and the orders rejecting the patent have already been set aside. The pre-grant opposition proceedings were quite robust, as can be seen from the various contentions raised before the Controller. Seven opponents have opposed the grant of the patent and the Controller has considered almost all the prior documents which have currently been cited. Thus, this Court is of the opinion that merely on the strength of the Plaintiff's stand before the Commissioner of Customs, it cannot be argued that there is a credible challenge or that IN'429 is vulnerable.

107. The Plaintiff, having been granted the patent after long drawn opposition proceedings by multiple parties and the products of the Plaintiff having also been a commercial success, infringement having also not been challenged by the Defendants, the Plaintiff has clearly made out a *prima facie* case for grant of an injunction. The balance of convenience is also in favour of the Plaintiff. As held in ***Merk Sharp & Dohme Corporation & Anr. v. Glenmark Pharmaceuticals, (2015) 63 PTC 257***, irreparable injury would be caused to a Plaintiff who is not extended protection and recognition of the rights granted by the statute.

108. Accordingly, in the above facts and circumstances, the following directions are issued:

i) The Defendants, their distributors, agents, manufacturers, sellers and retailers are restrained from manufacturing and/or selling any products which consist of an agricultural composition that infringes IN'429. Defendant No.1 is, however, free to manufacture other

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sulphur-based products as fertilizers or agricultural compositions, so long as the same are not infringing IN'429;

ii) Since Defendant No.1 claims to have been manufacturing the infringing products, 'SUFFAR 90' and 'COZY WET' for the last more than three years and the products are fertilizers used by farmers, the Defendants are given an opportunity to exhaust the stock which has already been manufactured.;

iii) For the said purpose, in order to ensure that there is no violation of the injunction order and to determine the amount of stock that exists with the Defendants, ***Mr. Ajay Pal Singh Khullar, Advocate (M: 8860843870),*** who was earlier appointed as the Local Commissioner and visited Defendant No.1's premises is again appointed as a Local Commissioner to make an inventory of all the products in the premises of the Defendants, consisting of sulphur active ingredient in the range of 82% to 98% or any other products which are infringing of IN'429. The premises of the Defendants are as under:

1. Dharmaj Crop Guard Limited B-403-404, Signature-II, NR. Sanand Cross Road, S.G. Highway, Ahmedabad, Gujarat - 382210, India
2. Safal Agro Seeds, 3862, Main Bazar, Opp. Kamla Nehru Park, Old Sabzi Mandi, Delhi-110007

In order to identify the said products, a technical expert from the Plaintiff's side is permitted to remain present at the time of execution of the local commission. One technical expert from the Defendants' side is also permitted to be present at the time of

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execution of the commission. If the products are not physically available at the above premises, the Local Commissioner shall obtain a stock statement including the details of the batches already manufactured by the Defendant No.1. The Defendants shall cooperate with the Local Commissioner and produce all the records which may be demanded by the Local Commissioner. The fee of the Local Commissioner is fixed at Rs.1,00,000/- to be paid by the Plaintiff. The local commission shall be executed on or before 31st August, 2021. The report of the Local Commissioner be filed within two weeks thereafter.

iv) Complete accounts of the sale of the infringing products already manufactured shall be maintained and filed on a quarterly basis by the Defendants;

v) There shall be no fresh manufacturing of any of the products infringing the Plaintiff's patent.

109. I.A. No. 15243/2018 is disposed of in the above terms.

I.A. No. 3077/2019 in CS (COMM) 1225/2018

110. This application has been filed by Defendant No.1 praying for the Plaintiff to be directed to produce and file the complete paper book, including the reply and other documents forming part of case bearing F. No. V(a) Ch.25/88/Commr/Audit-II/15-16 before the Commissioner of Customs & CE, Bharuch.

111. The Plaintiff is directed to place on record the complete file relating to the said proceedings within eight weeks. If the same is not filed by the Plaintiff, Defendant No.1 is permitted to summon the said file from the excise

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authorities, at the stage of trial.

112. Application is disposed of.

PRATHIBA M. SINGH, J.

AUGUST 02, 2021
MW/Rahul/T

HIGH COURT OF DELHI
सत्यमेव जयते