

**BEFORE THE PLANT VARIETIES REGISTRY
AT NEW DELHI**

IN THE MATTER OF: - Form PV-5 to extend time for filing opposition filed by proposed opponent Nuziveedu Seeds against registration of cauliflower variety SCFH-130 filed by Sungro Seeds Research Limited.

IN THE MATTER OF: -

NUZIVEEDU SEEDS LIMITED,

.... PROPOSED OPPONENT

-Versus-

SUNGRO SEEDS RESEARCH LIMITED

..... APPLICANT

Counsel for Proposed Opponent: - *Mr. Abhishek Saket, Advocate M/s. Infini Juridique*

Counsel for Applicant: - *Mr. Anil Dutt and Mr. Sudarshan Singh, Advocates for M/s. Lakshmikumaran & Sridharan*

ORDER

By this order I shall dispose of the Form PV-5 (request for extension of time for 24 months for filing Form PV-3 - Notice of Opposition against registration of applicant variety SCFH-130).

FACTS OF THE CASE:

On 04.01.2011 the applicant filed application for registration of their cauliflower variety SCFH-130. The said variety was advertised in Plant Variety Journal of India issue dated 02.01.2012. The proposed opponent filed PV-5 on

23.01.2014 and PV-3 was filed on 07.02.2014. The applicant's variety SCFH-130 and proposed opponent's variety RIYA are under DUS testing.

PLEADINGS OF THE CASE:

The applicant has filed their reply to form PV-5. The proposed opponent has filed the rejoinder and the applicant have filed their written submission. Both the parties were heard in detail on 07.04.2015.

CASE OF THE PROPOSED OPPONENT:

The opponent has been vigilant enough to file the opposition much earlier however the delay was because of the misleading /incomplete information furnished by the applicant before this Registry and also non-disclosure of parental line being mandatory to fill the information. The Plant Variety Journal issue dated 02.01.2012 in which the applicant's variety was advertised for inviting opposition was received by the proposed opponent on 18.02.2012. The opponent received a copy of Civil Suit No. 1163 of 2013 and until the receipt of the copy of the said Civil Suit the proposed opponent never realized that the applicant's variety was similar to that of the proposed opponent's variety and hence the issue of filing opposition did not arise. The proposed opponent has always been vigilant enough to check and oppose the varieties which are similar to the varieties developed by them. The proposed opponent bought the seeds of the applicant by invoice dated 12.07.2013

for field testing seeds of the applicant procured from the market and the same was send to testing in the fields of the proposed opponent and on 15.07.2013 the same was sown in the fields of the proposed opponent under the supervision of one of its breeder. The proposed opponent filed an RTI application dated 08.08.2013 and received the information during the first week of September, 2013 and was surprised to know that the applicant had not applied for their parental lines and the applicant's variety was under the DUS testing and the said variety have been accepted without even conducting the DUS test and a test is still to be conducted as late as September 2013. The proposed opponent was constantly following with this office to reveal the DUS test result of applicant's variety. Further the proposed opponent tried to gather information during DUS monitoring of the cauliflower of its own variety on 29.12.2013 as well as that of applicant's varieties and the same has not been revealed till date. The field data of DUS testing of applicant's variety conducted by the proposed opponent revealed something which was beyond expectation that the proposed opponent's variety RIYA being distinct to applicants variety SCFH-130 but in fact it was identical to varieties developed by PUSA and ICAR namely PUSA KARTIK SHANKAR. This Registry held in Mahyco -vs- Nuziveedu if sufficient cause is shown the delay can be condoned. On 16.01.2013 the proposed opponent filed PV-33 to this Registry for disclosure of all documents and it is incumbent upon this Registry to disclose the same. The delay must be computed only from the date

when the proposed opponent obtains complete information and accordingly, PV-33 must be allowed the proposed opponent has also filed affidavit of persons who have conducted the DUS test.

CASE OF THE APPLICANT:

The applicant's variety was published on 02.01.2012 in the Plant Variety Journal. The opponent belatedly filed the instant application seeking extension of time for filing notice of opposition on 23.01.2014 invoking Rule 33 that is more than 24 months after publication only with mala-fide intention so as to cause maximum prejudice to the applicant. The present opposition is nearly a counter blast to CS (OS) 1163 of 2013 filed by the applicant before Hon'ble Delhi High Court against the proposed opponent for inter alia misappropriation of confidential information pertaining to applicant. The suit involves clinching evidence against proposed opponent. The opponent is attempting to resurrect a lost right of opposition to harass and gain undue advantage. Section 21(2) of PPV&FR Act, 2001 and Rule 31 (1) of PPV&FR Rules, 2003 provides 3 months time period for filing notice of opposition. Rule 32 provide that if this time line is not complied the opportunity granted to file a notice of opposition shall be forfeited. Reliance of proposed opponent on PV-5 seeking extension of time to file opposition is totally misplaced even assuming PV-5 could be used for notice of opposition include only to extend the time and not to condone the delay. It is settled position in law

that extension of time can be considered only if it is filed within the time and in the present case admittedly this was not the position and the Act and Rules do not provide for such leverage. This fortifies the stand of the applicant that Registrar does not have power to extend the time or condone the delay in filing notice of opposition. Further section 24 (1)(a) provides that "if the application has not been opposed and the time of notice of opposition has expired the Registrar shall register the variety " failure to comply with the time schedule leads to consequences of forfeiting the opportunity and the Registrar shall register the variety. Further after registration also an effective alternate remedy is available to proposed opponent by way of revocation under 34 and cancellation/variation of registration under section 36 of the Act. Rule 33 (1) and 33 (6) does not refer to notice of opposition but only to evidence. This sub rule namely Rule 33 (6) empowers the Registrar to extend the time limit for filing evidence by passing a special order and on an application for extension being submitted in PV-5 with payment of specified fees. Even though heading of Rule 33 deals with time limit for filing notice of opposition the entire rule deals with production of evidence. Rule 32 specifically provides that time schedule provided for opposition shall not be extended and failure to comply with the time schedule shall forfeit the opportunity granted. PV-5 form cannot be used as an aid to interpret Rule 33. Head note of Rule 33 and Form PV-5 cannot override the provisions of section 21 of the Act and

Rules 32 of the Rules. A perusal of section 96 (xviii) and 96 (xx) provides that legislature has provided for filing notice of opposition and has not delegated power with respect to framing rules regarding the time limit for filing notice of opposition to the Government. The scope of Rule 33 dealing with time limit for submitting evidence cannot be interpreted to extend the time limit for filing notice of opposition. This Registry order dated 09.03.2010 condoning the delay in filing notice of opposition and upheld by Hon'ble Delhi High Court vide order dated 22.03.2015 in W.P.(C). 4527/2010 has been stayed by the Hon'ble Supreme Court in SLP (C) No. 22138-39 of 2013 by order dated 26.07.2013 and it continues till now. The merits of the opposition cannot be looked into until the delay is condoned. The order dated 09.03.2010 of this Registry in C 5196 has held that limitation will start from date of dispatch of journal and even a delay of 44 days was not condoned. Further RIYA and SCFH-130 are not the same and it was for this reason the applicant has not opposed it. A parental line is distinct from hybrid and accordingly non protection of parental line is not relevant in explaining the delay in filing notice of opposition against the hybrid. The proposed opponent has not taken steps to determine the date of dispatch. Further the opponent has failed to explain the delay from April 2012 (expiry of time limit for filing of notice of opposition) upto the date of receipt of copy of the suit (05.06.2013) and again from the purchase of seeds of applicant variety by proposed opponent (13.07.2013) there is

a delay of more than one month. Between sowing of applicant's variety by the proposed opponent (15.07.2013) up to the date of filing of RTI application (8.8.2013) there is delay of more than 20 days and again from receipt of RTI information (07.09.2013) to final reading of DUS test conducted by the proposed opponent (19.12.2013) there is delay of more than 3 months. Again from final reading of DUS test conducted by the proposed opponent (19.12.2013) to visiting of the site for DUS monitoring (30.12.2013) of applicant's and proposed opponent's varieties there is a delay of more than 10 days. Further when final reading of DUS testing was done on 19.12.2013 then why another visit for DUS monitoring was required on 30.12.2013. Finally PV-33 application was filed after one month from the final reading of DUS testing conducted by the applicant there is delay of more than one month. The proposed opponent has taken his own sweet time and not diligent and proposed opponent cannot be permitted to approach the Authority on account of its laxity and cause hindrance to applicant's registration of their variety and accordingly the PV-5 filed by the proposed opponent must be dismissed.

ISSUE INVOLVED:

The first issue I have to decide is the deemed date of publication of Plant Variety Journal of India. The applicant's variety SCFH-130 was advertised in PVJ on 02.01.2012 the same has been stated to be received by the proposed opponent on 18.02.2012. However the proposed opponent

has not furnished any document or proof to substantiate his claim on the date of receipt. Accordingly, as per the settled in this regard the date of publication occurring within section 21 of PPV&FR Act, 2001 means the date of dispatch of the Journal to the subscriber and that would be the deemed date of publication. This legal point has already been settled by this Registry between the same parties in order dated 09.03.2010 in Form PV-5 in filing PV-3 in C 5193. The relevant portion are extracted hereunder:-

“A perusal of these two provisions in two analogous enactments make it clear that section 21 of the PPV&FR Act, 2001 and section 21(1) of the Trade Marks Act, 1999 are substantially same. Consequently, the judgments interpreting the word “date of advertisement” in section 21(1) of Trade Marks Act, 1999 would squarely apply to the instant case. The issue has already been settled in Pavunny Ouseph -Vs- Registrar of Trade Marks AIR 1952 Travancore-Cochin 77 wherein it was held that the period of three months referred to in section 21(1) of the Trade Marks Act should be counted from the date of dispatch of the Journal containing the advertisement to the subscribers and not the date printed on the journal. The relevant portion of the said High Court Judgment is extracted hereunder: -

“4. The object of advertising that an application for the registration of a trade mark has been received by the Registrar is obviously to let the public know about it and to invite opposition to it, if any. That object will be served only when the journal is distributed among the subscribers

or otherwise made available to the public and not when it is got printed or few copies or cuttings distributed among sub-ordinate offices of the Trade Marks Registry or among the applicants for registration."

In Siyaram Kumar Engineering Works Private Limited -Vs- The Assistant Registrar of Trade marks and another [1996 (2) DLT 179] the Hon'ble Delhi High Court followed Pavunny Ouseph case (AIR 1952 Travancore-Cochin 77) and held in para 3 as follows:-

"So far as the first contention of the appellant company is concerned, I am in agreement with their contention that the words "from the date of advertisement" in Rule 51(3) of the said Act must mean the date when the journal is issued and not the date borne on the journal"

The decision in Pavunny Ouseph case (AIR 1952 Travancore-Cochin 77) was agreed with respect by the Hon'ble August Bench of Madras High Court in Nalli Sambasivam case [2007 (34) PTC 553 (Mad) (DB)] cited by the learned counsel for proposed opponent. The relevant portion of the decision is extracted hereunder:-

"But as contended by the learned senior counsel, the issue is already covered by the judgement of the Division Bench of Travancore-Cochin in Pavunny Ouseph -Vs- Registrar of Trade Marks (supra) and we respectfully agree with the ratio laid down therein. If the words "date of the advertisement" are given any other meaning, it would virtually amount to curtailing the period of limitation. Even for determining the period of limitation either under the Limitation Act, 1963 or under the Code of Civil Procedure, 1908, it is always the date on which the certified copies of the Judgements and decrees are made available, that is taken into account for the purposes of calculating limitation."

All the decisions cited above supports my view that the time limit for filing notice of opposition should be

computed from the date of dispatch of journal to the subscribers. “

I called for the record and found that the PVJ issue January 2012 was dispatched to the subscriber by this Registry on 16.02.2012 and accordingly the time limit for three months would end on 16.05.2012.

The other arguments of the counsel for applicant relating to head note of Rule 33 providing for time limit for notice of opposition and body of Rule 33 providing for extension of time limit only for filing evidence and Rule 32 forfeits the opportunity once an action is not done within the time have been settled by the Hon'ble Delhi High Court in Mahyco -Vs- UOI & Ors (W.P.(C) No. 4527/2010 and 640 of 2012). In the said matter the Hon'ble Delhi High Court has directed that the word 'shall' occurring in Rule 32 must be read as 'may'. This judgment has been pointed by the Counsel for applicant to have been stayed by the Hon'ble Supreme court.

Having decided the date of deemed publication now I have to examine whether sufficient cause have been shown to extent the time for filing notice of opposition from 17.05.2012 to 07.02.2014. The Hon'ble High Court of Delhi in W.P.(C) No. 4527/2010 and 640 of 2012 by order dated 22.03.2013 has held in Mahyco -Vs- UOI & Ors and Nuziveedu -Vs UOI & Ors

"However, even if Rule 32 is examined as it is, keeping in mind the intent and purpose of the Act and the

principles of law enunciated, the word "shall" in Rule 32 may be read as "may" and, thus, the conclusion in the impugned order where sufficient cause had been found to condone the delay and the power, thus, exercised cannot be faulted though we cannot agree with the reasoning adopted in the impugned order – an aspect with which even the respondents agree."

The counsel for applicant has pointed out that this judgment is stayed by Hon'ble Supreme Court of India SLP (C) No. 22138-39/2013. Earlier also this Registry several matters has held that if there is a delay in filing notice of opposition and sufficient cause is shown the same could be condoned.

I do not find any merit any argument of the counsel for applicant there is distinction between extending the time limit for filing notice of opposition and condoning the delay in filing the notice of opposition as what is provided in the PPV&FR Act and PPV&FR Rules is extension of time limit and not delay condonation and accordingly a petition for extending the time limit should be filed within the prescribed period and not after that. Earlier also this Registry by order dated 3rd December, 2010 in Form PV-5 dated 25.10.2010 filed in C 5193 between the same parties held that the PV-5 could be filed even after the expiry of the time limit between the same parties.

"The next issue that I have to decide is whether form PV 5 filed under Rule 33 (6) should be filed within the expiry of time limit or it can be filed after the expiry of time limit.

The counsel for the opponent cited 2007 (35) PTC 388 Delhi and argued that the Registrar has no discretionary power to extend the time for filing evidence once the period has expired. The counsel for applicant cited Oswal Industries Vs. Registrar of Trade Marks 2000 PTC 24 (FB) wherein it was held that period of limitation for submitting evidence in support of opposition is directory and not mandatory. I agree with the counsel for applicant in this regard. The above-said decision cited by the counsel for applicant was also followed in Aktieboaget AKF -Vs- - SKR Engineering Corporation 2001 PTC 389 (Del) wherein it was held that the Registrar of Trade Marks has power to extend the time for filing evidence in opposition even though the period mentioned in Rule 53 of Trade and Merchandise Marks Rules 1959 or the extended period thereof has expired or the application for extension of time was made beyond that period. Again in Cadila Healthcare -Vs- Union of India 2000 PTC 33 (Guj) it was held that Registrar has power to extend the time to file evidence even after the expiry of prescribed period or the period already extended. The ratio involved in these decisions applies to the instant case also. Accordingly I have to hold this issue in favour of the applicant and my reason is fortified for the reason that no right has been accrued to either of the parties and no prejudice would be caused by extending the time limit. On the other hand the applicant would be a severely prejudiced had not the evidence been laid. It has been held In re: graco children's products Inc. 2009 (40) PTC 739 (Reg) it was held by the

trade marks registry in a case where opponent was required to file evidence in support of opposition on or before 9th September 2008. The opponents did not file their evidence by aforesaid date by the 9th September 2008 but they meanwhile filed a request on TM 56 on 29th September 2008 for extension of time up to 9th October 2008. In this case it was held by Joint Registrar of Trademarks that any delay in filing evidence in support of opposition or in support of application could be condoned by the registrar of trademarks for good and sufficient cause. It was further held in that case that the registrar can extend the time whether the time so specified and has expired or not."

Again this Registry in order dated 10.05.2011 in PV-5 proceeding to extend the time limit for filing evidence in notice of opposition between the same parties held as follows:-

"Having received the evidence on 8.3.2011 the applicant should have filed the evidence on 7.4.2011 but on 8.4.2011 the applicant has filed the application to extend the time for filing evidence by 2 months. In this regard the counsel for opponent argued that the application for extension cannot be filed after the expiry of the prescribed period for filing evidence. This argument cannot be accepted as by order dated 3rd December, 2010 in Form PV-5 dated 25.10.2010 filed in C 5193 between the same parties this Registry has held that Form PV-5 can be filed even after the expiry of time limit and Registrar can extend the time whether the time so specified has expired or not."

Though these are relating to Form PV-5 filed extending the time limit for evidence the same is also applicable to instant proceeding wherein the issue is that of PV-5 in notice of opposition. It is settled point a petition to extend the time limit can be filed before or after the expiry of time limit and the same could be extended even after the expiry of time limit.

Now the only issue that has to considered is whether the applicant has shown sufficient cause to file the notice of opposition belatedly. It is an admitted fact that the proposed opponent was seized up the matter only when the copy of the civil suit file by the applicant was received by them on 05.06.2013. The time to file the opposition ended on 16.5.2012 as held earlier (that is three months from 16.2.2012 the date of dispatch of Plant Variety Journal of India to subscribers). From 16.5.2012 (late date for filing notice of opposition that is three months from the date of dispatch of PVJ to subscribers) to 5.6.2013 (Receipt by the opponent of the copy of civil suit filed by the applicant) admittedly for a period of more than a year nothing was done by the opponent. Thereafter the proposed opponent have conducted DUS test on their own with that of their variety RIYA and applicant variety SCFH-130. Further they have filed RTI application and they have filed PV-33 application on 07.03.2014 which was disposed only on 24.3.15. One thing cannot be denied that it is true for an effective opposition all documents are required but nothing could have prevented the proposed opponent from filing at least a

notice of opposition. Further the request for documents (that is PV-33) was also filed on 7.3.14 that is almost nearly two years after the last date for filing of notice of opposition that is 16.5.2012. This is fatal and is unexplained by the proposed opponent as to why the request for documents for filing effective notice of opposition was not filed within a reasonable time.

All these cannot constitute sufficient cause and it is a settled principle that the delay without sufficient cause is fatal. Further as on this date both the varieties namely RIYA (proposed opponent) and SCFH-130 (applicant) are under DUS testing and no prejudice would be caused by disallowing the instant PV-5. I find that there is no sufficient cause to condone the delay even with costs.

Accordingly, I hereby reject the PV-5 filed by the proposed opponent and the time limit for filing notice of opposition cannot be extended from 17.05.2012 to 07.02.2014 and consequently the PV-3 namely notice of opposition filed by the proposed opponent cannot be taken on record.

There shall be no order as to costs.

Given under my hand and seal on this the 22nd day
of November, 2016.

Sd/-
(R.C.AGRAWAL)
REGISTRAR-GENERAL