

MANU/TN/2452/2017

Equivalent Citation: 2018(1)CTC715, (2017)7MLJ793, 2017(72)PTC152(Mad), 20172WritLR437

IN THE HIGH COURT OF MADRAS

W.P. No. 11951 of 2011

Decided On: 18.08.2017

Appellants: **K. Manivannan**
Vs.

Respondent: **The Chairman Intellectual Property Appellate Board and Ors.**

Hon'ble Judges/Coram:

M. Venugopal and P.D. Audikesavalu, JJ.

Counsel:

For Appellant/Petitioner/Plaintiff: A. Yogaraj for R. Marudhachalamurthy

For Respondents/Defendant: S. Namo Narayanan, CGSPC

ORDER

M. Venugopal, J.

1. The Petitioner has focused the instant Writ Petition before this Court praying for calling of the records pertaining to the impugned order passed by the 1st Respondent in ORA/3/2007/PT/CH dated 17.04.2009 by confirming the Patent granted to the 3rd Respondent in Patent No. 204322 by the 2nd Respondent.

2. According to the Learned Counsel for the Petitioner, the order of the 1st Respondent/Appellate Board dated 17.04.2009 is against Law, Facts, weight of evidence and all probabilities of the case. Further, it is the stand of the Petitioner that the 3rd Respondent had obtained the 'Patent' in his favour by suppressing the material fact, which was brought to the knowledge of the 1st Respondent/Board by the Petitioner through documentary evidence, which was not appreciated in proper and real perspective.

3. The Learned Counsel for the Petitioner proceeds to take a stand that the 3rd Respondent had fraudulently filed an Application for Patent on 14.09.2004 keeping the entire technology of the Applicant, but making little variation in respect of studs and the filter and ultimately managed to obtain a Patent.

4. Moreover, it is represented on behalf of the Petitioner that the subject matter of the Patent was available to the public openly by way of the machine manufactured by him, for revocation, inasmuch as he is manufacturing some threshing machine and marking such identical machine even prior to the filing of the Application for the grant of Patent and in short, the subject matter of the Patent was identical or similar to the invention claimed in his Application No. 455/MAS/2000.

5. Advancing his arguments, the Learned Counsel for the Petitioner contends that the 'Inventive Step' in the present Patent issue is that providing helical path for the crop during threshing operations, ensured by the helical thresher cover which is the subject matter in both the Patent Applications (filed by the Petitioner and the 3rd Respondent).

6. Expatiating his submission, the Learned Counsel for the Petitioner takes a plea that

the 3rd Respondent's Patent was completely anticipated by means of prior claim anticipation, by prior publication and prior public knowledge in view of the fact that the Petitioner was manufacturing the aforesaid machine from the year 2000.

7. In this connection, the Learned Counsel for the Petitioner projects a legal argument that when the Patent is anticipated by prior public knowledge and prior publication as aforesaid, then, the Patent granted to the 3rd Respondent is liable to be revoked under Section 64(e) of the Indian Patents Act, 1970.

8. The Learned Counsel for the Petitioner strenuously contends that the Patent granted in respect of the 3rd Respondent is completely similar or identical to the subject matter claimed in earlier Application filed by the Petitioner bearing Patent No. 455/MIAS/2000.

9. That apart, the invention claimed by the 3rd Respondent Patent was fully anticipated by prior public knowledge and also referred to many advertisements published in various Tamil Dailies from the year 2000 till the date of filing of the Application for Patent by the 3rd Respondent.

10. Besides the above, it is the contention of the Learned Counsel for the Petitioner that the 1st Respondent/Board, without properly appreciating the factual aspects and legal position of the subject matter in issue, had simpliciter dismissed the Petitioner's Revocation Application based on the reason that there is a Novelty in the invention of the 3rd Respondent.

11. The Learned Counsel for the Petitioner submits that the ingredients of Section 3(f) of the Patents Act, 1970 clearly enjoins that 'the mere arrangement or rearrangement or duplication of known devices each functioning independently of one another in a known way' and therefore, the 3rd Respondent's claimed Patent is only a mere arrangement or re-arrangement of Petitioner's invention, which is available to the public for number of long years.

12. The Learned Counsel for the Petitioner contends that the Petitioner as true inventor of the machine had already commercially sold the vehicles which is the subject matter of the Patent granted (vide No. 204322) and in short, the invention was already known to the public and that the public are using the same in India before the priority date of the claim.

13. The stand of the 3rd Respondent is that a Patent Application No. 921/CHE/2004 was filed on 14.09.2004 in the name of Valasumani Lathe Works of which, he was the sole proprietor and that the said Application was examined, published in the Patent Gazette for Opposition purposes and the Learned Controller, after satisfying himself, had granted the Patent in his favour and further that, the Petition for Revocation filed by the Petitioner in regard to the Patent granted relates to 3rd Respondent's Patent No. 204322.

14. The Learned Counsel for the 3rd Respondent submits that the Patent granted for an IMPROVED THRESHING CUM SEPARATING MACHINE under No. 204322 is entirely different from any other machine anywhere for similar purposes and the said invention was made out of years of hard work and innovation based on research and observation. In fact, the 3rd Respondent's invention is not even remotely similar, much less identical to any then existing machine for similar use. In short, the Petitioner has no exclusive or valid right or claim or any 'Technology' relevant to the present case and in fact, enough opportunity was given to any interested person to oppose the Patent granted in favour of the 3rd Respondent and only after following the due process of Law, the Patent was granted in favour of the 3rd Respondent.

15. Proceeding further, the Learned Counsel for the 3rd Respondent contends that the Petitioner has projected his 'Revocation Petition' mainly on the ground of 'Anticipation'. Also, it is the argument of the Learned Counsel for the 3rd Respondent had obtained the Patent as early as in the year 2004 and indeed, the advertisements given by the 3rd Respondent and the numerous articles and it appeared in the daily newspapers and related agricultural magazines prior to the initiation of the suit in O.S. No. 243 of 2007 on the file of the trial Court had not elucidated a murmur or objection from the Petitioner side.

16. The Learned Counsel for the 3rd Respondent had submits that the 3rd Respondent had categorically denied that the invention in the Patent which was the subject matter in the Rectification Petition was known to the public prior to the date of Application. In any event, the Application for Revocation of the Patent filed by the Petitioner is barred on the ground of 'Delay and Latches'.

17. At this stage, this Court pertinently points out that the Petitioner, through his Learned Counsel, had addressed a Communication dated 14.06.2000 to the Controller of Patents, Patent Branch Office, Chennai stating that he had submitted FORM - 1 [Application for Grant of a Patent] (in triplicate) and FORM - 2 [Complete Specification] (in triplicate) together with drawings (in triplicate) in respect of Invention titled as 'MACHINE FOR THRESHING EAR OF CORN'. Also that, the Patent Application No. 455/MAS/2000 of the Petitioner was formally examined and that preliminary scrutiny Report was sent by the Assistant/Deputy Controller of Patents & Designs on 18.06.2002 to the Petitioner's Learned Counsel for attention and immediate compliance thereof. By means of the said Communication dated 18.06.2002, the Assistant/Deputy Controller of Patents & Designs had requested the Petitioner's Learned Counsel to see the paragraphs noted on the reverse of the said communication and the said formal requirements were to be complied with and corrected/additional documents along with the original documents duly cancelled and the same were directed to be resubmitted to the office within a period of 15 days from the date of this communication for technical examination.

18. It is to be noted that from a perusal of the Communication of the Assistant/Deputy Controller of Patents & Designs addressed to the Petitioner's Learned Counsel shows that the Petitioner is to satisfy with the following requirements: (a) All documents shall be filed in A4 size paper only; (b) Patent Application No. and Applicant's name shall be stated at the left hand side top corner of each of the drawing sheet; (c) Nationality of the applicant(s) and inventor(s) should be stated at the left hand side top corner of each of the drawing sheet; (d) Nationality of the applicant(s) and inventor(s) should be stated in all documents (Form 26); (e) Name of the signatory should be mentioned in block letters below the signature in all documents; (f) Date given in the application and complete specification should be consistent with each other.

19. It comes to be known that the Petitioner had not complied with the requirements of the Assistant/Deputy Controller of Patent & Designs as per communication dated 18.06.2002.

20. It is brought to the notice of this Court on behalf of the 3rd Respondent that the 3rd Respondent was granted to the patentee on 13.02.2007 in the name of Valasumani Lathe Works for an invention entitled AN IMPROVED THRESHING CU SEPARATING MACHINE as disclosed in the above mentioned Application for the term of 20 years from 14.09.2004, in accordance with the provisions of the Patents Act, 1970.

21. The Petitioner before the 1st Respondent/Appellate Board had filed an Application under Section 64 of the Patents Act, 1970 in O.R.A. No. ... of 2007 for revocation of Patent Registered under bearing No. 204322 in the name of M. MANI, VALASUMANI LATHE WORKS, TAMIL NADU ENTITLING IMPROVED THRESHING SEPARATING MACHINE GRANTED ON 13.02.2007.

22. The Learned Counsel for the Petitioner contends that the Petitioner, being a leading manufacturers and marketeers of agricultural implements like Paddy threshers, groundnut decorticator, paddy cleaner, de-stoner, neem seed decorticator, neem cake powder crushing machine, rice grader, pulverising machine, elevator, seed separating machine, cultivator, gauge wheel, drumstick seed separating machine, kilinjal powder creator, maize polishing machine, corn power creator, sop cutter etc. In the course of aforesaid business, during 2000, the Petitioner had invented 'a Novel Machine for threshing paddy and other related crops or in other words known as multi crop threshing machine which is advanced and improved one over the 'Existing Threshing Machines' which used 'Threshing Technology' and was capable of threshing only paddy. The Petitioner also claimed in the Revocation Application before the 1st Respondent that the new invented machine was developed by the Petitioner uses cycling technology with the helical/helix plates which cycles paddy or other crops in conjunction with rotors creating continuous cycles pushing the material fed while threshing from one end to other end and in the process threshing the given materials separating the grains with the unique filter trays and sent out through grain outlet at the bottom. Moreover, the straw or hay or waste materials are pushed out through upper rear outlet. In short, the only inventive step in the machine is the helical/helix grooves provided in the upper hemisphere cover which receives & recycles raw materials and threshes paddy or other crop. Apart from that, the machine as invented by the Petitioner is fitted with the rotor as used in the Applicant's machine has steel studs etc.

23. The primordial plea taken on behalf of the Petitioner is that the 3rd Respondent/Patentee had made some minor changes to the invented machine of the Petitioner in particular using the plates instead of studs and further that, the Patentee had fraudulently filed the Application for grant of Patent on 14.09.2004 keeping entire technology of the Petitioner, but making variation in respect of studs and filter.

24. At the outset, it is relevantly pointed out by this Court that Patent Law is indicated by the Legislature for the encouragement of research, industry and progress as per decision Lakshpat Rai and others V. Sri Kishan Das and others, MANU/UP/0103/1918 : AIR 1918 All 24 (DB) [Under Act 2 of 1911].

25. It is to be noted that the basic Patent Law is that a Patent is granted only in respect of an 'Invention' which must be new and useful one. To put it differently, it ought to have a 'Novelty' and 'Utility' as per decision of the Hon'ble Supreme Court in M/s. Bishwanath Prasad Radhey Shyam V. M/s. Hindustan Metal Industries reported in MANU/SC/0255/1978 : AIR 1982 SC 1444.

26. Further, Section 2(1)(j) of the Patents Act, 1970 defines 'Invention' meaning 'a new product or process involving an inventive step and capable of industrial Application'. By the said definition, the term 'Invention' encompasses not only things that are new, but also things which are an improvement on what was known earlier, so long as such improvement is new and useful, as per decision Gandhimathi Appliances Limited V. L.G. Varadaraju, (2000) 3 M.L.J. 85. After all, 'Invention' is the process of manufacturing an article requiring some ingenuity or inventive skill.

27. Suffice it for this Court to make a significant mention that Novelty is necessary in

process of manufacturing and not in the article produced. A novel combination of two known ideas can prove novelty of subject matter. But, the 'mere useful things' is not sufficient to support a patent. Moreover, whether there is an 'Invention' is a question of fact to be determined upon in a given case based on facts and circumstances of each and every case.

28. Apart from that, Section 2(1)(ja) of the Patents Act, 1970 speaks of 'Inventive Step' meaning 'a feature an invention that involves technical advance as compared to the existing knowledge or having economic significance or both and that makes the invention not obvious to a person skilled in the art'. As a matter of fact, 2(1)(m) of the Act defines 'Patent' meaning 'a patent for any invention granted under this Act' and the remarkable features of a Patent are as follows:

- "(a) The patent must be in respect of an invention and not a discovery.
- (b) In respect of one single invention there must be one single patent.
- (c) A patent may be in respect of a substance or in respect of a process.
- (d) But it is not possible to bifurcate a patent and state that one relates to the substance and the other to the process.
- (e) In order to have a complete patent, the specifications and the claims must be clearly and distinctly mentioned.
- (f) It is the claims, and claims alone which constitute the patent. [As per decision AIR 1978 Calcutta 77 at page 82]"

29. Section 2(1)(p) of the Patents Act, 1970 speaks of "Patentee" meaning 'the person for the time being entered on the register as the grantee or proprietor of the patent'.

30. It cannot be forgotten that a mere collection of more than one integers or things, not involving the exercise of any inventive faculty does not qualify for grant of Patent.

31. It is to be remembered that the Patent Rights are the monopoly rights granted to those who invent or discover new and useful processes, products, articles or machine of manufacture, or composition of matter, or any new and useful improvement of any of them. To put it precisely, it is a right to exclude others from making, using, importing, or selling patented invention, during its term. Also that, they are property rights granted by states, to inventors in exchange with their covenant to share its details with the public.

32. In fact, Section 3(f) of the Patents Act, 1970 defines 'What are not inventions' which reads as under:

"3(f) the mere arrangement or rearrangement or duplication of known devices each functioning independently of one another in a known way."

33. Indeed, a mere juxtaposition of known devices in which each device functions independently is not a patentable invention. In this connection, it is useful for this Court to refer to a decision in *British Celanese Ltd., V. Courtaulds Ltd.*, (1935) 52 RPC 171 (HL) at 193 wherein Lord Tomlin laid down the law as follows:

"It is accepted as sound law that a mere placing side by side of old integers so that each performs its own proper function independently of any of the

others is not a patentable combination, but that where the old integers when placed together have some working interrelation producing a new or improved result then there is patentable subject matter in the idea of the working interrelation brought about by the collocation of the integers."

34. One has to bear in mind that an invention is not a property right at all it is patented and the assignment of invention can be made. A patentee must particularly describe and ascertain the nature of his invention in the specification, since the ambit of his invention is circumscribed by the claims. A specification ought to be construed impartially and however, a Court of Law is ordinarily slow to construe it against the patentee. Of course, the construction ought to be a reasonable one.

35. Moreover, in order to find out whether the patent has been infringed the patented article or process has to be compared with the infringing article or process and unessential feature in the infringing article or process are of no account and if the infringing goods are made with the same object in view which is attained by the patented article, then a minor variation is not to be construed to mean that there is no piracy and a revocation of a Patent by means of a Petition as per Section 64 of the Patents Act, 1970 is to be filed by "any person interested". The object of Law in the domain of Patent is to ensure that the inventions must be benefit the public at large. It is true that the mere registration of the patent does not guarantee its resistance to subsequent challenges. The challenge to be made later on, which may be in the form of a counter-claim in a suit before the concerned Court based on the grounds mentioned in Section 64 of the Act.

36. In a Petition for Revocation under Section 64 of the Patents Act, 1970, the burden is on the shoulders of the Petitioner to establish that the Respondent is not true and first inventor of the invention. To put it precisely, an individual who claims an exclusive privilege in respect of an invention and is in possession of the facts which cannot entitle to him to that exclusive privilege to show that those facts exist. A failure to produce convincing evidence of secret or non-secret use at any stage at which the evidential onus rests on a litigation who fails to do so, there may prove fatal to his case and further, when all the evidence was let in, then, the issue will be revolving around whether it was proved that the prior use was a non-secret one. An objection to an Application for a patent based on prior claiming, if established, cannot be overcome by introducing into the claim as limitations additional features which are matters of common general knowledge and which do not affect the substantial identity of such claim with the claim made in the prior specification as per Babcock & Wilcox Ltd.'s Appln. (1952) 69 RPC 224.

37. It is to be borne in mind that the process of comparison can be broken down as under:

"Firstly, one is to construe the prior document as at the date of its publication, in accordance with the normal principles of construction, taking account of surrounding circumstances, but excluding subsequent documents, information and events.

Secondly, one is to compare the disclosure in each prior document separately with the disclosure in the patentee's claim, construed in accordance with the principles set out for that purpose.

Thirdly, one is to ask as to whether making the comparison, the earlier document discloses the same invention as that disclosed in the patentee's claim. Besides this, the patentee's claim has been anticipated if the "clear and unmistakable directions" in the prior publication, when carried out by the

skilled workmen would "inevitably" result to something being made or done which, if the patentee's claims were valid, would constitute an infringement."

38. At this juncture, this Court aptly points out that it is well settled law that any one is entitled to do that which is old, namely that which has been described in a prior published document and be confident that he will not infringe the patent of another, as per decision *Merrell Dow V. Norton* reported in [1994] RPC 1 at 13, appeal dismissed [1995] RPC 233 (CA) and [1996] RPC 76 (HL).

39. As per Section 13 of the Patents Act, 1970, the examiner makes an investigation to find out whether any claim made in the complete specification in a patent Application is anticipated by prior publication of the matter either in a patent specification or in any other document published in India or elsewhere. Sections 14 and 15 of the Act confers the power on the Controller to refuse an Application on the ground that an invention is not new. Therefore, novelty in the purported invention is an essential factor for obtaining a patent grant under the Act. More specifically, Section 64(1)(e) provides a ground for revocation cemented on lack of novelty.

40. In reality, Sections 29 to 34 contemplates under what circumstances prior publication or prior user does not constitute anticipation. Lack of novelty is referred to in the anticipation. To fulfill the requirement of being publicly known as employed in Clauses (e) and (f) of Section 64(1), it is not essential that it should be widely used to the knowledge of the consumer public. It is enough if it is known to the persons who are engaged in the pursuit of the knowledge of the patented product or process either as men of science or men of commerce or consumers, as per decision *Monsanto V. Coramandal*, MANU/SC/0317/1986 : AIR 1986 SC 712 at page 717.

41. No wonder, for a claim to be anticipated, the earlier disclosure must contain a clear description of something or unambiguous and clear directions to do or make something that would infringe the claim if carried out after the grant of the patent. A claim in a patent will be invalidated if it has been publicly used before the priority date of the claim. A Secret use of the invention will not be taken into consideration. The concept of 'Public User' is that the patentee could not give any consideration to the public for the grant nor does he add to the knowledge of the public, if the invention which he claims to be new was either known to the public or used in public before the Application for the patent, that is, if the public already possessed everything that he could give. The term 'Public Use' does not mean use by the public, but use in a public manner and not secretly, as per decision *Lallubhai V. Sankalchand*, MANU/MH/0203/1934 : AIR 1934 Bom 407 at 417. The public use and exercise of an invention, means a use and exercise in public, not by the public, as per decision *Carpenter V. Smith*, (1841) 1 WPC 530.

42. In so far as the patent specification is concerned, it is the somewhat artificial concept of patent law that each and every specification, of a certain period, however unlikely to be worked at and in whatever language written, is part of the relevant public knowledge if it is resting anywhere in the shelves of the Patent Office. Per contra, common general knowledge is a different concept derived from a common sense approach to the practical question of what would in fact be known to an appropriately skilled addressee - the sort of man, good at his job, that could be found in real life, as per decision *General Tire & Rubber counting officials v. Firestone Tyre*, [1972] RPC 457 at 481-482 (CA).

43. It is to be noted that an ordinary member of the public is entitled to feel secure if he knows that which he is doing differs from that what has been done of old only in non-patentable variation, such as the substitution of mechanical equivalence or

changes of material shape or size, as per decision *Gillette V. Anglo-American Trading* (1913) 30 RPC 465 at 480 (Lord Moulton).

44. There is no two opinion of an essential fact that a patent Application is to be accessed based on the concept of not only what would be available from earlier documents but also from the common knowledge on the subject, which may or may not be available in any such document.

45. It is to be remembered that a patent comes into existence by differentiating the inventive contribution from the public domain. It enters the private domain during 'Exclusivity' term. Finally, it will be a part of public domain when the period of 'Exclusivity' comes to an end. For an invention to be granted a patent, an applicant is to exhibit that there has been significant addition to what already exists in public domain. In fact, the validity of a patent can be put to acid test even without a variation/an infringement as is done in the case of a time bound post grant review before the Patent office. The Patent Office is the competent forum for testing the initial/preliminary validity of a patent and that the third party competitors are the right persons to question unjustified rights.

46. In Patent Law, the knowledge in public purview is used to define the inventive contribution. If it is inventive, then, the patent process will work out well, in the considered opinion of this Court. A participation enhances or improves the process of fact and an enforcement of a right. A Patent by itself very nature is affected with a public interest. It is to be noted that Indian Patent System is rested on 'Social Democracy' which centres around the prime part played by the public.

47. As far as the present case is concerned, the Petitioner had abandoned his Application/petition as per Section 21(1) of the Act and was not open to the public. With reference to the claim of the Petitioner and that of the Respondent, it is necessary for this Court to refer to the Petitioner's claim and the Respondent's claim, which are as follows:

"Applicant's claim broadly defines "the rotor studs beating the raw material and the paddy being pulled & beaten by struds and thereafter advanced by helix plates provided in the cover, which finally fall on the vibrating tray to get screened to remove the dust by the blowers provided therein."

"Respondent's claim defines the constructional aspects of "thresher roller assembly having the threshing vanes provided 3/4 of the length on the longitudinal members in an angular manner to exert axial force to move the crop in horizontal direction and threshing operation being ensured by the helical guides provided in the thresher cover cum guide unit".

48. From the above, one can safely decipher the difference in the constructional factors of the threshing machine. That apart, the claims as worded appear to be distinct. For fuller and better appreciation, the Appellate Board had pointed the difference in the constructional features and the distinct factors to the words employed by the respective parties in their claims so made, which run as under:

| Constructional features/Process/function done | Applicant/petitioner for revocation | Respondent/Patentee |
|--|---|--|
| Raw Material beating by | Rotor Struds | Thresher roller assembly |
| Raw Material advancement | Helix Plates in the cover | Helically configured guide rods |
| Threshing operation done by | Helix Plates provided in the cover | Thresher vanes provided on the longitudinal members |
| Threshing chamber has vacuum creation during threshing operation | NO SUCH VACUUM CREATION IN THE THRESHING CHAMBER | Portal vacuum creation in the threshing chamber |
| Threshing vane mounting | Claim 1 defines only placement of Helix plates in the cover | Claim 1 defining thresher roller Assembly having threshing vanes in an angular placement of 20 degrees |

49. In the present case, the 1st Respondent/Appellate Board at paragraph 12 of its impugned order, had categorically observed that the copies of the Tamil dailies relating to the advertisements which are photocopies of apparatus claimed, they do not show any constructional aspects or the important features of the threshing cum separating machine. Further, the 1st Respondent/Appellate Board had opined that the 3rd Respondent had specifically characterised the inventive features in his principal claim defining the scope of the invention. Added further, the 1st Respondent/Board had proceeded to observe in the impugned order dated 17.04.2009, the Petitioner/Applicant's document does not anticipate the Respondent's claim.

50. Looking at from any angle and also this Court, on an overall assessment of the facts and circumstances of the present case in an objective manner, comes to an inescapable conclusion that the Writ Petitioner has not made out any prima facie case for Revocation of Patent No. 204322. Viewed in that perspective, the Application for Revocation of Patent was rightly dismissed by the 1st Respondent/Board, in the considered opinion of this Court. In short, the impugned order of the 1st Respondent/Board dated 17.04.2009 in dismissing the Application of the Petitioner for Revocation of Patent granted in favour of the 3rd Respondent is free from any flaw or legal infirmities. Consequently, the Writ Petition fails.

51. In fine, the Writ Petition is dismissed, leaving the parties to bear their own costs. Resultantly, the impugned order of the 1st Respondent/Appellate Board in ORA/3/2007/PT/CH dated 17.04.2009 is affirmed by this Court for the reasons assigned in this Writ Petition.

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