

(2022) 11 DEL CK 0043

In the Delhi High Court

Case No : C.A. (COMM.IPD-PAT) No. 29 Of 2021????

Avery Dennison Corporation

APPELLANT

Vs

Controller Of Patents And Designs

RESPONDENT

Date of Decision : 04-11-2022

Acts Referred:

Patents Act, 1970 — Section 2(1)(j), 2(1)(ja), 15, 117A(2)

Citation : (2022) 11 DEL CK 0043

Hon'ble Judges : Prathiba M. Singh, J

Bench : Single Bench

Advocate : Rohit Rangi, Vineet Rohilla, Harish V. Shankar, Srish Kumar Mishra, Sagar Mehlaawat, Alexander Mathai Paikaday

Final Decision : Allowed

Judgement

Prathiba M. Singh, J

BRIEF FACTS

1. The present is an appeal filed by the Appellant-Avery Dennison Corporation - seeking inter alia, an order to set aside the decision dated 12th August, 2021 (hereinafter 'impugned order') of the Respondent-Controller General of Patents and Designs. The impugned order refused the application for grant of a patent titled 'Notched Fastener' bearing Application No. 5160/DELNP/2013, filed on 10th June, 2013 (hereinafter 'subject patent'), under Section 15 of the Patents Act, 1970 (hereinafter 'the Act') on the ground that the claimed subject matter of the subject patent does not constitute an invention under Section 2(1)(j) of the Act.

2. The Appellant company is engaged in the business of providing branding and information labelling solutions and manufactures a wide variety of labelling materials to enhance brand packaging, to carry or display information about products. It was founded in the year 1935 as Kum Kleen Products and thereafter in 1990 changed its name to Avery Dennison after merging with Dennison Manufacturing Company.

3. The subject patent application arose out of a PCT Application No. PCT/US2011/062189 filed on 28th November, 2011 which thereafter entered the national phase in India on 10th June, 2013. The Appellant filed a request for examination for the said application. A First Examination Report (hereinafter 'FER') with statement of objections was issued on 25th April, 2018. The primary ground raised in the FER was lack of inventive step under Section 2(1)(ja) of the Act. The Controller relied upon the following three documents in the FER:

(i) D1: GB2053296A Pub Date: 04/02/1981

(ii) D2: WO 94/10044A1 Pub Date: 11/05/1994

(iii) D3: US4456123A Pub Date: 26/06/1984

4. After the FER was issued, the Applicant responded to the FER and filed amended claims. However, after considering the response to the FER, the respondent maintained that the subject patent application does not merit the grant of a patent. A hearing was conducted on 1st March, 2021 and written submissions in support of oral arguments were submitted on 16th March, 2021 to the Respondent. Finally, the subject patent application was refused on the ground of lack of inventive step relying on prior art documents D2 and D3.

5. Thus, the present appeal has been preferred by the Appellant under Section 117A(2) of the Act seeking setting aside of the impugned order issued by the Respondent.

Submissions

6. Submissions have been made by Mr. Rohit Rangi, Id. Counsel, appearing on behalf of the Appellant and Mr. Harish Vaidyanathan, Id. CGSC on behalf of the Respondent.

7. Mr. Rangi, Id. Counsel relies upon the Appellant's Patent specification, written submissions and the amended Claims therein to establish the inventive step involved in the subject patent. His submissions are as under:

i. The inventive step in the subject patent would lie in the following features

a. Creation of the Notch

b. Position of the Notch

c. Shape of the Notch

d. Direction of the Notch in relation to cross-pieces

ii. The technical advancement in the subject patent lies in overcoming the variation in the length of the fastener being cut due to elasticity. This feature is achieved by using notches in the manner, shape and orientation as described in the patent application.

iii. The primary case of the Respondent is reasoned on the basis of prior art

document D2. A comparison between the figures of D2 and the subject patent would itself demonstrate that the subject patent is not obvious when considering the knowledge of D2.

iv. The shape and slant angle of the notches are essential for the functioning of the dispensing mechanism claimed in D2. The pawl/finger needs to be inserted for the fastener stock to move in the forward direction. On the other hand, in the subject patent notches are engaged directly with the feeding system of the fastener dispensing system. The subject patent has economic significance over D2, as manufacturing fastener stocks with the slanting profile of notches in D2, is complex, thereby, more expensive.

v. The prior art document D3 referred to in the impugned order teaches away from the invention as the notch provided in D3 at the top surface does not engage the feeder mechanism but is provided at the position where the cutting is done.

vi. Therefore, he submits that the cited prior arts are distinguishable, and the subject patent is worthy of patent protection as it involves an inventive step.

8. On the other hand, Mr. Vaidyanathan, Id. CGSC relies on the impugned order and written submissions filed by him to submit that the subject patent application does not involve an inventive step. His submissions are:

i. The creation, purpose, and effect of the notch in the subject patent can be construed by a reading of prior art document D2. A mere change in shape or position of the notch in the subject patent would be obvious to a person skilled in the art. The shape of the notch itself cannot constitute an inventive step and would merely constitute a workshop improvement for a person skilled in the art. To support this assertion, he relies on the decision in Bristol-Myers Squibb Holdings Ireland Unlimited Company v. BDR Pharmaceuticals International Pvt. Ltd., (2020) SCC. OnLine Del 1700.

ii. The means of engagement with the notch, whether by a pawl or directly with the notch is not relevant.

iii. Prior art document D2, also assigned with the appellant discloses the purpose for using notches.

iv. The subject patent is an attempt aimed at evergreening of the patent since the prior art is also of the appellant.

v. There has not been any no substantial data has been provided by the appellant to substantiate their claim of economic advantage over prior art.

vi. Therefore, he submits that the subject patent does not involve an inventive step and does not merit the grant of a patent.

Principles of Law under consideration

9. The question that arises in this case is whether the subject Patent Application

lacks inventive step as defined in Section 2(1)(ja) of the Act in view of the disclosures made in the prior art documents.

Test for Inventive Step/Lack of Obviousness

10. In order to decide this issue, some of the fundamental principles for determining the existence of an inventive step and the lack of obviousness need to be emphasised.

11. For determining inventive step or lack thereof, various approaches and tests have emerged over the years from decisions of courts/authorities as also from examination guidelines of patent offices from different jurisdictions. The same include:

i. Obvious to try approach:

- * This approach involves an analysis of whether in view of the teachings/solutions proposed in the prior art, it was obvious to try and arrive at the subject invention.

ii. Problem/solution approach:

- * This approach considers whether in the light of the closest prior art and the objective technical problem, the solution claimed in the invention would be obvious to the skilled person. If the skilled person can decipher the solution being claimed, then the subject matter is held to be obvious.

- * This test has been discussed by the Division Bench in *F. Hoffmann-La Roche Ltd. and Ors. v. Cipla Ltd.*, 2016(65) PTC 1 (Del).

iii. Could-Would Approach

- * In this approach the question that is raised is whether there is any teaching in the prior art as a whole that would and not simply could have prompted a skilled person, with the knowledge of the objective technical problem, to either modify or adapt the closest prior art to arrive at the subject matter of the claims.

iv. Teaching Suggestion Motivation (TSM test)

- * This test originated in the USA as per which, if by the Teaching, Suggestion or Motivation from the prior art, an ordinary skilled person can modify the prior art reference or combine prior art references to arrive at the claimed invention, then the subject matter being claimed is obvious.

- * However, the application of this test ought not to be done in a narrow manner as held by the US Supreme Court in the case of *KSR International v. Teleflex*, 550 U.S. 398 (2007).

12. The above mentioned approaches to determining inventive step have been discussed and debated in various jurisdictions, including the UK, EPO, USA etc. These approaches have also been applied, even with modifications, in order to

suit the facts and circumstances of each case by Courts. [Actavis Group PTC EHF v. ICOS Corporation, [2019] RPC 9, Human Genome Sciences v. Eli Lilly [2012] RPC 6 and Johns-Manville Corporation, [1967] R.P.C. 479] Some of these approaches to determine lack of obviousness also find a mention in the Guidelines for Examination published by the European Patent Office.

13. One of the seminal tests for determining inventive step and lack of obviousness was first laid down by the House of Lords in *Windsurfing International Inc. v. Tabur Marine Ltd.*, [1985] RPC 59.

14. In *Windsurfing* (supra) the Court laid down a four-step test to determine whether a patent satisfied the requirement of inventive step and lack of obviousness. The said steps are as under:

- "1. Identifying the inventive concept embodied in the patent;
2. Imputing to a normally skilled but unimaginative addressee what was common general knowledge in the art at the priority date;
3. Identifying the differences if any between the matter cited and the alleged invention; and
4. Deciding whether those differences, viewed without any knowledge of the alleged invention, constituted steps that would have been obvious to the skilled man or whether they required any degree of invention."

15. The tests laid down in *Windsurfing* (supra) were again considered by the England and Wales Court of Appeals in *Pozzoli Spa v BDMO SA*, [2006] EWHC 1398 (Ch) and modified by Jacob LJ as under:

- "1. (a) Identify the notional "person skilled in the art"
(b) Identify the relevant common general knowledge of that person;
2. Identify the inventive concept of the claim in question or if that cannot readily be done, construe it;
3. Identify what, if any, differences exist between the matter cited as forming part of the "state of the art" and the inventive concept of the claim or the claim as construed;
4. Viewed without any knowledge of the alleged invention as claimed, do those differences constitute steps which would have been obvious to the person skilled in the art or do they require any degree of invention?"

16. The Id. Division Bench of this Court in *F. Hoffmann-La Roche Ltd. (Supra)* added a further step as elaborated below:

- "Step No.1 To identify an ordinary person skilled in the art,
- Step No.2 To identify the inventive concept embodied in the patent,

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

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

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

17. Further, this Court in Bristol-Myers Squibb Holdings (supra) has summarised some of the principles which can be used determine whether an invention is obvious or not. The said principles are:

"(i) A hindsight reconstruction by using the patent in question as a guide through the maze of prior art references in the right way so as to achieve the result of the claim in the suit, is required to be avoided.

(ii) The patent challenger must demonstrate the selection of a lead compound based on its promising useful properties and not a hindsight driven search for structurally similar compounds.

(iii) There should be no teachings away from the patent in question in the prior art.

(iv) Mere structural similarity cannot form the basis of selection of lead compound in a prior art and the structural similarity in the prior art document must give reason or motivation to make the claim composition.

(v) Though mosaic of prior art documents may be done in order to claim obviousness, however, in doing so, the party claiming obviousness must be able to demonstrate not only the prior art exists but how the person of ordinary skill in the art would have been led to combine the relevant components from the mosaic of prior art.

(vi) It has to be borne in mind, small changes in structures can have unpredictable pharmacological effects and thus, structural similarity alone is not sufficient to motivate to selection of the lead compound.

(vii) Though it would be tempting to put together a combination of prior arts but this requires a significant degree of hindsight, both in selection of relevant disclosures from these documents and also in disregarding the irrelevant or unhelpful teachings in them."

18. The above approaches, tests and steps laid down by various courts and authorities – all seek to formulate the manner in which prior arts are to be analysed and a patent application is to be tested on the anvil of inventive step.

None of the above approaches and tests are to be adopted in a straightjacketed manner. Each patent application, depending on the field of technology and the nature of the prior arts may require different approaches or tests to be followed or applied. In some situations, the Court may even adopt an approach of combining more than one test as was done by the UK Supreme Court in *Actavis v. ICOS*, [2019] UKSC 15. In the ultimate analysis, the examiner in the patent office or the Court adjudicating the issue would need to identify the elements in the prior art and compare the same with the claims in question from the point of view of a person skilled in the art, as was done by the Id. Division Bench of this Court in *3M Innovative Properties Ltd [FAO (OS) 292/2014 & CM No. 10651/2014 titled 3M Innovative Properties Ltd. and Ors. vs. Venus Safety and Health Pvt. Ltd. and Ors.]*. If the same demonstrates a technical advancement over the prior art on the priority date of the application, then the patent would be liable to be granted. Unlike the test of novelty or anticipation which is easier to determine by a straight comparison with the prior art, in the case of obviousness, the attempt of the Court is conjectural – making it a rather difficult exercise.

19. The decision of the UK Supreme Court in *Actavis* (supra) identified the ten relevant considerations to be made while assessing obviousness. The Court mentioned that the factors identified in the list are not exhaustive. The relevant considerations are:

"(1) First, it is relevant to consider whether something was "obvious to try" at the priority date, in other words, whether it is obvious to undertake a specific piece of research which had a reasonable or fair prospect of success ...;

(2) Secondly, it follows the routine nature of the research and whether there is an established practice of following the research through to a particular point may be a relevant consideration which is weighed against the consideration that the claimed process or product was not obvious to try at the outset of a research programme. ...

(3) Thirdly, the burden and cost of the research programme is relevant. But the weight to be attached to this factor will vary depending on the particular circumstances....

(4) Fourthly, the necessity for and the nature of the value judgments which the skilled team would have in the course of a testing programme are relevant considerations

(5) Fifthly, the existence of alternative or multiple paths of research will often be an indicator that the invention contained in the claim or claims was not obvious. If the notional skilled person is faced with only one avenue of research, a "one way street", it is more likely that the result of his or her research is obvious than if he or she were faced with a multiplicity of different avenues. But it is necessary to bear in mind the possibility that more than one avenue of research may be obvious ...

(6) Sixthly, the motive of the skilled person is a relevant consideration. The notional skilled person is not assumed to undertake technical trials for the sake of doing so but rather because he or she has some end in mind. It is not sufficient that a skilled person could undertake a particular trial; one may wish to ask whether in the circumstances he or she would be motivated to do so. The absence of a motive to take the allegedly inventive step makes an argument of obviousness more difficult ...

(7) Seventhly, the fact that the results of research which the inventor actually carried out are unexpected or surprising is a relevant consideration as it may point to an inventive step ...

(8) Eighthly, the courts have repeatedly emphasised that one must not use hindsight, which includes knowledge of the invention, in addressing the statutory question of obviousness. That is expressly stated in the fourth of the Windsurfing/Pozzoli questions ...

(9) Ninthly, it is necessary to consider whether a feature of a claimed invention is an added benefit in a context in which the claimed innovation is obvious for another purpose ..."

20. This Court in the case of *Agriboard International LLC. v. Deputy Controller of Patents & Designs* [C.A.(COMM.IPD-PAT) 4/2022 dated 31st March, 2022] held that while rejecting an application for lack of inventive step, discussion on the prior art, the subject invention and manner in which the subject invention would be obvious to a person skilled in the art would be mandatory. Merely arriving at a bare conclusion that the subject invention lacks inventive step would be contrary to Section 2(1)(ja) of the Act itself, is insufficient. The relevant portion of the judgment reads as under:

"24. In the opinion of this Court, while rejecting an invention for lack of inventive step, the Controller has to consider three elements-

- the invention disclosed in the prior art,
- the invention disclosed in the application under consideration, and
- the manner in which subject invention would be obvious to a person skilled in the art.

25. Without a discussion on these three elements, arriving at a bare conclusion that the subject invention is lacking inventive step would not be permissible, unless it is a case where the same is absolutely clear. Section 2(1)(ja) of the Act defines 'inventive step' as under:

(ja) "inventive step" means a feature of 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.

26. Thus, the Controller has to analyse as to what is the existing knowledge and

how the person skilled in the art would move from the existing knowledge to the subject invention, captured in the application under consideration. Without such an analysis, the rejection of the patent application under Section 2(1)(ja) of the Act would be contrary to the provision itself. The remaining prior arts which are cited by Id. Counsel having not been considered in the impugned order, the Court does not wish to render any opinion in this regard."

Claimed invention:

21. Coming to the facts of the present case, the overall system being claimed in the subject patent identifies the purpose of the invention as under:

- * To provide a substantial fastener stock leading to less wastage and less inconsistencies and variations.
- * To ensure that the cross pieces connected to the longitudinal and continuous side members are equidistantly spaced.
- * The placement of the notches is done in such a manner so as to ensure that the fasteners stock once fed into a needle assembly is dispensed in a uniform manner and the same regular shaped fasteners is affixed on the article.

22. As per the Appellant's submissions, the inventive concept within the subject patent resides in the following three features:

i. Position of the Notch

- * Notches are positioned at locations in close proximity to the desired cut locations and be aligned with either an actual or desired cut location. The position of the notches is also ensuring consistent cutting/severing of the fasteners from the fastener stock.

ii. Shape of the Notch

- * The rectangular or square shape of the notches enable the forward linear movement of the fastener stock.

iii. Direction of the Notch in relation to cross-pieces

- * The notches on opposite direction to the cross-pieces is also aimed at enabling the usage of the feeding mechanism.

Comparison with the Prior Art documents

23. Upon identification of the inventive concept within the subject patent, as required for determining inventive step and lack of obviousness, a comparison with the identified prior arts is warranted.

24. A reading of D1 and D3 shows that they are broad patents relating to fastener guns which do disclose the fastener related elements. But, the most relevant prior art document which has been held against the Applicant, is D2 titled 'Apparatus for dispensing individual plastic fasteners from continuously

connected ladder stock'. Additionally, even oral submissions have been confined to D2 as the most relevant prior art cited against the subject patent.

25. Document D2 is an application filed by the same very Applicant on 2nd November, 1993 as a PCT application deriving priority from a US Patent Application bearing Application Number US 07/970060 with priority date of 2nd November, 1992. It deals with an apparatus for dispensing individual fasteners. The fastener stock and notch as disclosed in D2 is set out below:

26. The remaining part of the apparatus as disclosed in D2 would not be relevant for the present purpose, as it relates to a hollow casing and slotted needle mounted within the casing. The fastener stock as disclosed in D2 has a particular mechanism of operation, in which, the forward movement of the fastener stock is dependent on the engagement of the notch with a pawl. The individual plastic fasteners in the connected ladder stock are connected to each other through a notch at 21 (22, 24). The shape of the notch is enlarged in figure 2 which is triangular. Additionally, the position of the notch and the manner in which the fastener would tear apart when used would be crucial in understanding how the fastener stock in D2 functions.

27. A comparison between the fastener stock in D2 and the subject patent would show that in the subject patent, the tearing off of the fastener from the continuous roll and the manner in which the notch is positioned is different. Figure 1 and 2 of the suit patent are set out below:

28. A comparative table of the relevant figures in D2 and the subject patent is set out below:

Subject patent application

Prior Art – D2 [WO1994010044]

Fig. 1 is a perspective illustration of a length of continuously connected fastener stock

Fig. 1 is a fragmentary front elevation view of one type of continuously connected ladder stock.

Fig. 2 is a perspective view schematically illustrating the fastener stock engaged by linearly moving fingers of a feed mechanism

Fig. 2 is an enlarged fragmentary bottom elevational view of a portion of the continuously connected ladder stock shown in Fig. 1

29. In the case of the subject patent, there is proper alignment between the notch and the manner in which it is torn from the roll. However, in prior art, there is a possibility of the tearing resulting in irregular cutting. This disadvantage is sought to be overcome in the suit patent. A perusal of the subject patent would show that in the background of the specification, the variation in the manner in which the stock could get stretched or expanded and

the irregularity therein in the existing state of art is clearly captured:

"[0005] In conventional systems, the feed mechanism for feeding the fastener stock to the needle assembly of the fastener dispensing system generally comprises a feed wheel or similar rotary mechanism that engages the filaments extending between the side members and pulls or urges the fastener stock forwardly to feed a next fastener into the needle assembly for cutting and insertion. Such rotary feed systems, however, typically can be somewhat bulky and can create variation in a cut location. The filaments of the fastener stock typically have a desired amount of elasticity or flexibility and thus can stretch or expand by varying amounts as the filaments are engaged by the feed wheel, causing a variation or difference in the distance that the fastener stock is pulled forward. Thus, a variation or inconsistency is created in the cut location for successive fasteners cut from the fastener stock. These inconsistencies or variation in the location at which the fasteners are cut or severed from their fastener stock leads to inconsistent and reduced sizes of the side members for the plastic fasteners that in turn can lead to improper retention of the fastener in use. Such rotating feed wheel systems also can be somewhat complex and expensive in operation."

30. The subject patent, thus, tries to address inconsistencies while cutting or severing of the fastener from the fastener stock, reduction in the size of the side members, variation in the cuts and the locations thereof.

31. From a comparison between D2 and the subject patent it is clear that the location, shape and the manner in which the notches are created as also the position at which the longitudinal detachment takes place when the fastening is done in the two fastener stocks is different. The question now is whether while comparing D2 and the subject patent, the invention would have been obvious.

Assessment of lack of obviousness

32. Some of the fundamental principles while analysing inventive step and whether an invention is obvious or not are:

- i. That simplicity does not defeat an invention - even simple inventions are patentable.
- ii. The inventive step has to be assessed on the basis of the date of priority of the subject patent and not after the publication of the same i.e., it is not permissible to do a hindsight analysis or an ex-post facto analysis.

33. Way back in 1890, the House of Lords, in *Vickers v. Siddell* (1890) 7 R.P.C. 292 while considering simplicity in an invention observed:

"If the apparatus be valuable by reason of its simplicity, there is a danger of being misled by that very simplicity into the belief that no invention was needed to produce it. But experience has shown that not a few inventions, some of which have revolutionised the industries of this country, have been of so simple a

character that when once they were made known it was difficult to understand how the idea had been so long in presenting itself, or not to believe that they must have been obvious to everyone."

34. A similar sentiment was echoed almost 100 years ago in *Pope Appliance Corp. v. Spanish River Pulp & Paper Mills Ltd*, (1929) 46 R.P.C. 23 when the Privy Council while deciding an appeal arising from the Supreme Court of Canada observed as under:

"The principal objection seems to be that the invention is too simple, but that is not an objection that a practical paper-maker would take. It ought to be looked upon as a bold conception. Although air has been used, it has not been applied in the particular way in which it was applied by Pope. The man who correlated the elements of a forty-year old problem is entitled to a patent."

35. It is thus clear that simplicity in the invention should not deter the Court from granting a patent.

36. One of the sure tests in analysing the existence of inventive step would also be the time gap between the prior art document and the invention under consideration. If a long time has passed since the prior art was published and a simple change resulted in unpredictable advantages which no one had thought of for a long time, the Court would tilt in favour of holding that the invention is not obvious.

37. *Terrel on Law of Patents* (16th Edition) opines that the age of the prior art and why it was not done before is one of the factors to be considered while deciding on obviousness. The observations made in the judgement *Brugger v. Medic-Aid Ltd*, [1996] R.P.C. 635 delivered by the UK Patents Court has been cited to substantiate the consideration of this factor. The relevant portion reads:

"The fact that a piece of prior art has been available for a long time may indicate, contrary to first impressions, that it was not obvious to make the patented development from it. It is useful to bear in mind in this regard the concept of long felt want. This is a particularly efficient expression. An apparently minor development which meets a long felt want may be shown to be non-obvious because, although the prior art has long been available, the development was not hit upon by others notwithstanding that there was a need for improvement (the 'want') and an appreciation of that need (the 'felt'). In other words the age of prior art may be an indication that a development from it is not obvious if it can be shown that the circumstances in the relevant trade were such that a failure of the development to appear earlier is surprising."

38. In the present case, the distinction between the prior art and the subject patent primarily resides in the shape, position, and engagement with the notch as also with the manner in which the detachment takes place when the fastening happens. The prior art document D2 belongs to this very Applicant, and the subject patent application was filed almost 18 years after the filing of D2. The

Complete Specification explains clearly the disadvantages of the prior art and sets out in clear terms the various advantages of the subject invention. The said advantages are logically decipherable while one understands the invention. No other prior art has been cited between the period 1992 till 2010 which has dealt with fasteners in this manner and has even come close to suggesting changes in the prior art fastener stock. If the invention was so obvious, fasteners and fastener stock being products used in bulk in industries, any third party could have made the changes in the prior art to arrive at the subject invention – which obviously has not happened.

39. The improvement in the present case between the prior art and the subject invention is clearly decipherable. The same does not lack inventive step. The fact that it was not obvious to a person skilled in the art is clear from the lack of any other prior art document addressing the problems in the prior art and suggesting any solutions close to the invention despite the gap of more than 18 years. D1 and D3 are of a period prior to D2, though, dealing with fastening guns and fasteners. The closest prior art identified is D2 and the subject application discloses a technical advancement in comparison with the closest prior art and the features comprising inventive step are not obvious to a person skilled in the art and therefore, the subject patent application satisfies the test of inventive step.

40. Applying any of the judicially recognised tests or the settled approach towards such cases, as discussed above, the Controller's finding that any person skilled in the art could make the variation and modifications in D2 to arrive at the subject invention, is not tenable. The differences which the Controller describes as 'superficial' may appear simple but clearly have an impact on the product concerned. The description of the said differences as superficial would, therefore, be misplaced. This Court also notes the fact that the corresponding patent applications in various jurisdictions have already been granted in the USA, Japan, South Korea and China. The issue of evergreening raised in the submissions would not arise in these facts.

41. The patent shall, accordingly, proceed for grant. The appeal is allowed with no order as to costs.

42. List before the Patent office for completion of requisite formalities, if any, on 14th November 2022.