

(2010) 07 IPAB CK 0008

In the Intellectual Property Appellate Board

Case No : M.P. NOs. 48, 49, 50, 51, 59, 60, 61, 62, 63, 64, 74, 75, 76, 77, 78, 79, 80, 81/10 IN ORA/3,4, 5, 6, 7, 8, 9, 10, 11, 19, 20, 25, 26, 27, 38, 39, 40, 41/2009/PT/CH

Enercon (India) Limited

APPELLANT

Vs

Alloys Wobben

RESPONDENT

Date of Decision : 27-07-2010

Acts Referred:

Patents Act, 1970 — Section 2(1)(t), 25, 25(3)(b), 64

Citation : (2010) 07 IPAB CK 0008

Hon'ble Judges : S. Usha, J;S. Chandrasekaran, Technical Member

Bench : Division Bench

Judgement

S. Chandrasekaran, Technical Member

1. This is a Miscellaneous Petition No. 48/10 in ORA/3/2009/PT/CH, filed by the Petitioner/Respondent herein, for dismissal of revocation application

filed by the Respondent/applicant for evoking the patent No. 196341, under Section 64 of the Patents Act, 1970 (hereinafter referred to as the Act).

2. The Respondent and the Petitioner here in this Miscellaneous Petition is Mr. Alloys Wobben who filed a patent application on 16 April, 2001 having

a priority date of 29 July, 1999 based on the International Patent Application No. PCT/EP99/05434 which claims priority from a German Patent

Application No. 19845903.3 dated 5 October, 1998.

3. Mr. Alloys wobben was granted a patent bearing the patent No. 196341 on 3 January, 2006, hereinafter referred to as the subject patent.

4. The applicant viz. Enercon (India) Limited (hereinafter referred to as EIL) in the main revocation application and the Respondent herein in this

miscellaneous petition filed a revocation application praying for the revocation of

the subject patent. The affidavit in support of the revocation application was signed by the Managing Director of the applicant company which filed the application for revocation of the subject patent.

5. The Respondent/patentee filed the counter statement on 5th February, 2010 after taking necessary extension of time denying all the averments

contained in the revocation application. In fact, the Respondent in the main revocation application has already questioned the locus standi of the

applicant who filed the revocation application stating the fact that the Enercon (India) Limited is a joint venture company between Enercon GmbH

Germany and the Managing Director of the applicant company wherein the Germany Company namely Enercon GmbH is the major share holder of

this joint venture company Enercon (India) Limited. Further, the Respondent Mr. Alloys Wobben is the Chairman and sole owner of Enercon GmbH

German Company.

6. In the meanwhile, the applicant in the main revocation application, namely EIL filed a miscellaneous petition for stay of the operation of the

impugned patent and another miscellaneous petition for early hearing of the stay petition. But the Respondent/patentee in the main revocation

application filed this M.P. challenging the locus standi of the applicant. Reply was filed by the Respondent to this miscellaneous petition No. 48/10

denying and disputing of the material allegation and the averments contained in the miscellaneous petition and the rejoinder to the miscellaneous

petition was filed Respondent/Petitioner once again reiterating and challenging the very locus standi of the Managing Director to file the revocation

application. The Petitioner here in this miscellaneous petition made the following prayer:

i) Dismiss the revocation application

ii) fix the early date of hearing for this miscellaneous petition even prior to the hearing of the miscellaneous petitions filed by the Respondent in this

miscellaneous petition, who had filed the main revocation application and also an miscellaneous petition for the stay of the impugned patent and early

hearing therein.

7. Mr. Alloys Wobben, the patentee had filed several applications for patent on various topics and had been granted patents by the patent office, on

each of the application. The applicant in the main revocation application namely

EIL filed different revocation applications against each one of these patents granted to Mr. Alloys Wobben. Accordingly, the Petitioner/patentee and Respondent in the main revocation application filed different and independent miscellaneous petitions as a counter attack questioning the locus standi, against each one of these revocation applications filed by the applicant company M/s. EIL being the applicants for revocation of subject patent.

8. The matter was listed before us on 19th July, 2010. Shri P.S. Raman, Senior Advocate appeared for the Petitioner/Respondent and Shri V. Lakshmi

Kumaran appeared for the Respondent/applicant for the revocation of patent.

9. Counsel for the Petitioner in this miscellaneous petition submitted that the Managing Director has not been duly authorized by the Board of the

Indian Company viz. EIL to sign the revocation application and also to file the affidavit in respect of the revocation application for the revocation of

the subject patent. Hence he has no locus to sign this revocation application and also questioned that how EIL can sue the Chairman of the company

itself. The counsel for the Petitioner submitted that Enercon GmbH is a 56% share holder of the Enercon (India) Limited viz.

EIL. The counsel further submitted that the applicant EIL was a licensee trader and partner in India for the technology since 2006. But due to the

termination of the IPLA the relationship between the licensor and the licensee got soured. The counsel further argued that subsequent to this

development the Indian company namely EIL filed the revocation application for revocation of the subject patent held by Mr. Alloys Wobben and

continued further that the inventor-cum-patentee, Mr. Alloys Wobben is the owner of the Enercon GmbH German Company and also Chairman of the

Indian Company namely EIL who filed an application for revocation. Consequently, the counsel for the Petitioner herein argued and submitted that the

Managing Director of the Indian company has no authority to sign the verification clause, as well as the affidavit in respect of the main revocation

application. The counsel also drew our attention to the proceedings which have been initiated by Enercon GmbH before the Company Law Board

(CLB) and is still pending. The counsel also referred to the article of association namely Article 128(1), 157, 158(1), 170(14) and 171(4). The counsel

for the Petitioner herein submitted that subsequent to the proceedings taken place in CLB and also pursuant to the directions of the Company Law

Board, the future meetings of the Board have been frozen until further directions from the Company Law Board. Subsequently, the counsel submitted

that the Managing Director could not have signed the revocation application challenging the Chairman of the Indian Company, without written consent

and approval of the Board of Directors as per the directions of the Company Law Board as any such Board meeting could not have taken place

without the knowledge of the CLB. The counsel for the Petitioner herein also referred to the derivative suit filed in Bombay High Court by the

Managing Director of the Indian Company namely EIL.

10. The counsel for the Respondent/applicant in the revocation application viz., EIL, submitted that neither the findings of the Company Law Board

nor directions of the Company Law Board will apply to these proceedings or affect the proceeding herein in this Hon'ble Appellate Board. The

counsel also submitted that if the owner of the German Company Enercon GmbH can file an infringement suit against the Indian Company, EIL, the

filing of the revocation applications against the patents held by Mr. Alloys Wobben is no way wrong and fully stand justified. The counsel had

submitted a list of infringement suits filed by Mr. Wobben before the Delhi High Court against EIL, the Indian Company and so the legal action taken

against the Indian Company had to be defended by the Managing Director who is incharge of the day to day activities of the said Indian Company and

also duty bound to defend the interest of the said Indian Company. The counsel for the Respondent herein in this miscellaneous petition also

questioned as to why the Petitioner herein namely the inventor/patentee, Mr. Alloys Wobben has not filed this miscellaneous petition earlier before this

Hon'ble Appellate Board or why neither the patentee/Petitioner, Mr. Alloys Wobben has not moved any application for the board meeting nor the

parent company namely Enercon GmbH has not moved the board meeting challenging the permission granted to the Managing Director of the Indian

Company to defend the interest of the said company against all the infringement suits filed by the patentee/Petitioner herein. The counsel also

submitted that the articles of association provision shown and cited therein do not apply to the proceedings taking place before the Hon'ble Appellate

Board. The counsel submitted that in their counter affidavit to this M.P., a copy of the Board Resolution dated 27th April, 2007 authorizing the

Managing Director to do all acts including the defending of the company in addition to the day to day management activity.

11. The counsel for the Petitioner/ Respondent/patentee submitted that only the Chairman or the Director can call for the board meeting and the notice

can be initiated whereas the action taken by the Managing Director of the Indian Company is not justified and not in accordance with the law. The

counsel also emphasized and submitted that the so called meeting initiated by the Directors of the Indian Company for a meeting on 27th April 2007

did not take place at all and subsequently no authorization could have been given to the Managing Director to sign the application for revocation.

12. Shri Samaresh Chakraborty argued for M.P. Nos. 74 to 81/10 submitted that the Respondent/applicant in the main revocation application as well

as in his M.P's. for the stay of the operation of the subject patent mentioned that if the patent is allowed then all their employees in the Indian

company will be jobless and this is an incorrect statement. Because of the invented technology having been used, manufactured and sold by Indian

company till this date under the IPLA. Shri Samaresh Chakraborty also submitted that as regards other points he would adopt the same arguments put

forth by Shri P.S. Raman, Sr. Advocate in respect of M.P. Nos. 48 to 51/10. Shri Sowmyaji, Sr. Advocate also submitted that instead of repeating the

same arguments, he would adopt the same arguments put forth Shri P.S. Raman, Sr. Advocate in respect of M.P. Nos. 48 to 51.

13. We have heard the arguments of both the counsels and have gone through the petitions and the replies and the rejoinder filed thereon.

14. The counsel for the Petitioner / Respondent (Patentee) has been arguing and questioning the very locus of the applicant to sign the revocation

application. This is a case of invention dealing with the wind power mills technology. The invention in this field are very much needed for the society,

when there is already a drive for searching an alternate source of technology of power generation of electricity, compared to the usual source of

generation of electrical energy. Today's science, technology and creativity shape our day to day lives and the every technological breakthrough

catapulted the human race out of the feudal systems of society and the technological leadership has become a determining factor in nation's wealth

creation and has also fueled the growth of a nation. There has been a surge of technological invention in all the sectors of an industry of a nation, but

in the recent years, the most important inventions has been in the new fields such as computer electronics, digital technology, biotechnology and wind power technology.

In the field of electrical energy generation, the newer forms of generation by using the wind power is one such technical advancement. Every such technology needs to be protected and such protection kindles the fuel of interest in the inventor so as to come out with more such technologies, which

are useful to the society. But the patent system is designed to strike a proper balance between the inventor's interest and the public interest. The

Controller of patents is the guardian of the public interest and has a duty to protect the interests of the public also, simultaneously whenever he grants

a patent protection to the inventor as referred to in the ""General Motors Corporation (Turney & Barr's) Appln. 1976 RPC 659"".

15. Now that the patent has been granted to this inventor, the same has been opposed by way of revocation by another party, which here is an Indian

company. In this proceeding the counsel for the Petitioner / Respondent (Patentee) has raised a preliminary question that the Respondent /applicant is

not having the locus to file a revocation application. The Respondent/patentee, Mr. Wobben had raised this preliminary point of objection already in the

counter statement and once again raised this point by way of a miscellaneous petition. The Respondent / applicant in return questioned that if Mr.

Wobben can sue the Indian company for infringements of the patents held by him in individual capacity, then the action taken by the Indian company

to revoke the said patents is also equally justified and valid.

16. At this juncture we have to see who is a person interested to file a revocation application and what is the provision in the law. According to

Section 2(1) (t) of the Act, ""person interested"" is defined as below:

Person interested"" includes a person engaged in, or in promoting, research in the same field as that to which the invention relates;

17. The word or expression ""person interested"" appears under Sections 25 as well as 64 of the Act, dealing with opposition proceedings to the grant of

patent and revocation proceedings before this Appellate Board. In fact the actions taking place in opposition proceeding is almost analogous and

similar to the revocation proceedings before this Appellate Board, excepting for the creation or constitution of an opposition Board under Section 25(3)

(b) of the Act, to examine and submit the recommendation to the Controller who is to hear the opposition parties. As per Patent Law by P.

Narayanan, it could be clearly seen or stated that there are three grounds upon which the opponent can establish his locus standi to oppose the grant

of patent or to seek the revocation of the patent, which are mainly, "Person interested" includes a person engaged in, or in promoting, research in the same field as that to which the invention relates;

1) Possession of patents in the same field as the invention relates

2) Manufacturing interest relating to a similar product being manufactured by the patentee and

3) Trading interest.

18. In AIR1983 Delhi 496 Ajay Industrial Corporation v. Shiro kanao of Ibaraki City, it was held by S. Ranganathan, J that "the person interested

within the meaning of Section 64 must be a person who has a direct, present and tangible commercial interest or public interest which is injured or

affected by the continuance of the patent on the register.

19. In Globe Industries Corporation's Patent (1977) R.P.C 563 in the Supreme Court of Judicature - Court of Appeal, Lord Justice Goff observed that,

what an opponent on an application for revocation has got to establish is that there is genuine interest which may be prejudiced; Of course, the

prospect of prejudice must be real, not speculative or fanciful and it must be a prejudice to present a commercial interest.

20. In Mediline A.G's Patent (1973) R.P.C 91 before the patents Appeal Tribunal, Mr. Justice Graham has held that, "there must be a real, definite

and substantial interest to prove the commercial interest and that it must be a genuine interest. There must be the existence, or the likelihood of real

prejudice.

21. In Clavel's application 45 R.P.C 222 and also in another ruling by Sir Stanley Buckmaster in New Thing's application 31 R.P.C 40 it was held that

a trading interest to be effective, must be a real, definite and substantial interest and must not arise from something that the opponent proposes to do".

22. The inventor cum Patentee, who is the Petitioner herein, had also filed some infringement suits against EIL who manufactures the same wind

energy generators and also marketing the same in India and argued affirmatively that proves his locus standi. But what is said and argued by the

Petitioner / Respondent (Patentee) counsel, as to whether the Managing Director of Enercon (India) Limited has the power or the authorization to sign

the revocation application is a matter of procedure in filing the revocation application by an opponent in a revocation proceeding. The statute is

general; there is neither express limitation upon the nature of the interest that has to be shown nor there is any clear cut procedure laid down in the

statute about this qualification of the Respondent / applicant in filing the revocation application. The wording of the statute leaves it to the Court, the

responsibility of determining as a question of fact whether the applicant has shown himself to be a "person interested". In Mediline A.G's Patent

(1973) R.P.C 97 before the patents Appeal Tribunal, Mr. Justice Graham has held that, "if the opponent or the applicant for revocation can show that

he has some genuine interest which will be prejudiced and if the opposition or the application to revoke is not frivolous, vexatious or blackmailing, then

the locus standi should be granted even if the patentee can throw some doubt on the exact extent of the opponent's interest.

23. As seen in the Clavel's Patent (1928) 45 RPC 222 where it was observed and well appreciated that although the question of locus standi has often

been decided as a preliminary point, which course has obvious advantages in the possible saving of expenses, it has been observed that, apart from

special circumstances, it is better to allow the question to be decided when all the facts are before the Tribunal. A similar view has also been taken by

the Supreme Court of India in the "Fomento Resorts and Hotels Ltd. v. Gustav Ranato Da Cruz Pint and Ors. [MANU /SC/0289/1985] Civil Appeal

No. 504 of 1985, where J. Sabyasachi Mukarji has held, "in a matter of this nature where several contentions factual and legal are urged and when

there is scope of an appeal from the decision of the Court, it is desirable as was observed by the Privy Council long time ago to avoid delay and

protraction of litigation that the Court should, when dealing with any matter dispose of all the points and not merely rest its decision on one single

point.

24. In fact during the hearing, it was also observed by the Learned Counsel for the Petitioner / Respondent (Patentee) and also agreed to by the other

side Counsel, that there are 3 different following ways to be chosen for this Hon'ble Appellate Board.

1. Consider this M.P and decide the locus immediately.

2. Till the CLB decides, adjourn the matter sine die.

3. Take up and consider everything while hearing the ORA.

25. We feel that the step 2 is not correct as the proceeding before CLB will not affect or cannot affect or influence the proceedings before this

Appellate Board and step 1 will only lead to unnecessary delay and protraction of litigation as held by the Supreme Court of India, in the

aforementioned Supreme Court case, instead of speedier justice in the matter and for a possible utilization of the technology for the benefit of the

public. Hence at this juncture, the third option or the step 3 would only be an apt one, to consider these M.P.s alongwith the respective OR As when

listed, in a judicious manner for the benefit of the industry and the public at large.

26. In view of the above findings we also feel and are of the opinion, that to avoid delay and also unnecessary protraction of litigation by way of

appeals in the interim, as held in the aforementioned Supreme Court case, this matter shall be disposed of along with all the other points in the main

matter when all the ORA's are being heard immediately, possibly after a period of two weeks, say by 9th of August 2010, so as to have speedier

justice in the matter, such that these alternate sources of production of electrical energy can be tapped and utilized for the betterment of society and

the public at large, either by way of upholding the patent grant or in the alternative, throwing open the same technology to the concerned industries to

utilize the same in an expeditious and benevolent manner for the benefit of the industry and the public as well as the nation.

27. Hence the M. Ps listed here have been disposed off accordingly with a direction to the registry to list the respective ORA's where all the pleadings

have been duly completed, on 9th August, 2010 at 11.00 AM, to be heard continuously, on a day to day basis. The parties shall bear their own costs.