
(2010) 11 IPAB CK 0008

In the Intellectual Property Appellate Board

Case No : M.P. Nos. 8, 36, 59 Of 2010 In ORA No. 20/2009/PT/CH

Enercon India Ltd.

APPELLANT

Vs

Aloys Wobben

RESPONDENT

Date of Decision : 18-11-2010

Acts Referred:

Patents Act 1970 — Section 2(1)(s), 2(1)(j), 2(1)(ja), 2(1)(t), 3, 3(k), 25, 25(3), 58, 59, 59(1), 64, 117D, 64(1)(e), 64(1)(d), 64(1)(i), 64(1)(f)

Citation : (2010) 11 IPAB CK 0008

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

Bench : Division Bench

Final Decision : Allowed

Judgement

S. Chandrasekaran, Technical Member

1. This is an original application for revocation filed under Section 64 read with Section 117 D of the Patents Act 1970 (herein after referred to as the

Act) for revoking the patent No. 201910 dated 5.12.2003 granted to the Respondent a German citizen.

2. The impugned Patent was filed on 5.12.2003 having the priority date 7.6.2001 and the Patent was granted on 23.02.2007 by the Patent Office after

due examination of the Patent application having the title ""Method for controlling a wind turbine and a wind turbine"". The applicant is a Company

registered under the Companies Act 1956, a subsidiary of ENERCON GmbH. Germany applied for the revocation of the Patent on the following

grounds.

a. The subject matter of the Patent stands anticipated (Section 64 (1) e);

b. The subject matter of the Patent is obvious and does not involve any inventive step [Section 64 (1)(f)];

c. The claimed subject is not an invention as per Section 3 (k) of the Act, [Section 64 (1) (d)]

d. The claims do not clearly define the scope of the invention. [Section 64 (1) (i)].

3. The applicant stated that they are the one of the foremost leaders in the wind energy sectors in India and they manufacture and install wind turbines

all over India and thus they are the interested person within the meaning of the Section 64 of the Act.

4. The Respondent challenged the competency of the signatory to the application for revocation and the same was heard by this Appellate Board and

passed an order disposing the matter to be decided along with the main matter. Aggrieved by this order, the Respondent appealed in the High Court,

which was heard and disposed off by the Hon'ble High Court directing this Appellate Board to consider and dispose of this preliminary issue along

with the main matter.

5. On completion of the pleadings, the matter was listed for final hearing on 14-09-2010 before this Appellate Board. Mr. R. Parthasarathy advocate

appeared for the Applicant and the Respondent was represented by Mr. Vijay Anand advocate.

6. The Respondent filed a M.P. No. 59/2010 on 08.04.2010 questioning the locus standi of the applicant to maintain the present revocation application.

Therefore this has to be considered first and disposed of. Before considering this question of locus of the signatory, let us look into the facts and

background of the case as to its origin briefly.

a. The applicant is a joint venture company. The applicant is involved in the manufacturing of wind turbine generators and setting up of wind farms on

a turnkey basis. There are two shareholder groups of the applicant company, viz., Enercon GmbH, a company incorporated under German law owns

56% of the shareholding of the applicant company as a first shareholder. The members of the Mehra family own the remaining 44% of the

shareholding of the applicant company as a remaining shareholder.

b. There are 4 members on the board of the Petitioner,

â?¢ 2 representatives of Enercon GmbH

â?¢ 2 representatives of the Mehra family

â?¢ The Chairman of the board is Dr. Aloys Wobben and the Managing Director of

the applicant company is Mr. Yogesh Mehra.

â?¢ The actual day to day management of the affairs of the applicant company is to be carried out by the Managing Director of the company in India.

c. In 2007, Enercon GmbH filed a petition under the Companies Act, 1956 in the Company Law Board, Principal Bench, New Delhi alleging

oppression and mismanagement of the affairs of the applicant company by the Mehra group members. On 29.10.2007 the Company Law Board

passed an interim order which directed""Status quo with regard to all the issues pending in the proceeding should be maintained and no action in

relation to the same shall be taken"" (emphasis supplied). CLB further directed that""No changes shall be brought about in the managerial set up

and their responsibilities."" On 19.5.2008 the CLB passed a further order stating that no further board meetings of the applicant company should be

convened without the leave of the Company Law Board thus freezing all the meetings except the day to day activities of the applicant company.

d The said revocation applications have been filed in January 2009. They were filed in the name of the applicant company and were signed by Mr.

Yogesh Mehra, the Managing Director of the applicant company. The counter statements were filed nearly after a year later by the Respondent.

Along with the counter statement, miscellaneous applications were also filed questioning the locus standi of Mr. Yogesh Mehra to sign the said

revocation applications for and on behalf of the applicant company. Mr. Yogesh Mehra has signed the revocation applications on the strength of a

Board resolution dated 26.4. 2007 which is quite evidently prior to the orders passed by the CLB dated 29-10-2007.

e. The main arguments of the Respondent are as follows:

â?¢ The Board resolution dated 26.4. 2007, by which Mr. Yogesh Mehra is authorized to file proceedings on behalf of the applicant company is bad in

law since it falls foul of the orders dated 29.10.2007 and 19.5.2008 passed by the CLB;

â?¢ The Board resolution only authorizes Mr. Yogesh Mehra to manage day to day activities of the applicant company and under the general powers,

to defend the Company and file suits on behalf of the company on matters that may arise out of contractual laws, corporate laws, taxation laws or

any other statutory acts"" but not to initiate these revocation proceedings;

â?¢ Mr. Yogesh Mehra having filed a suit in a derivative capacity in the Bombay High Court could not now file this proceeding on behalf of the

applicant company;

â?¢ That the validity of the Board resolution has been challenged before the Company Law Board.

â?¢ This Appellate Board having been formed substituting for the High Court as regards finalizing the applications for revocation of patents, this

Appellate Board like the High Court has the powers to decide on all the matters of law and those connected matters of legal disputes.

f The aforesaid contentions have been refuted by the applicant. The applicant's counsel referred to the Supreme Court of India case in ""Patel

Roadways Ltd. v. Birla Yamaha Ltd., (2000) 4 SCC 91"" to show how the Hon'ble Supreme Court of India has decided about ""a suit"".

g On perusing the entire details available in the records, it is seen that Mr. Mehra was authorized by the Board resolution dated 26.4.2007 to sign the

pleadings i.e the revocation applications. The present revocation applications have been signed by Mr. Mehra by virtue of the said Board resolution

dated 26.4.2007 which empowers Mr. Mehra to do so as is clear from the contents of the resolution produced before us. This Appellate Board cannot

decide upon the validity, legality and propriety of this Board resolution dated 26.4.2007 and this Appellate Board, in the absence of any judgment or

order of a competent Court of Law declaring the resolution to be null and void or staying the resolution, has to proceed on the footing and directions

given therein and assume that the said resolution dated 26.4.2007 is perfectly valid and legal. Counsel for the Respondent during the course of

arguments sought to urge grounds in support of the proposition that the resolution dated 26.4.2007 was not proper and legal. However as stated

hereinbefore the legality and/or validity of the Board resolution dated 26.4.2007 cannot be questioned in the present proceedings which are instituted

under the provisions of Section 64 of the Act. The jurisdiction to test the validity and legality of the Board resolution does not rest with this Appellate

Board. If that be so, then the obvious conclusion is that Mr. Mehra by virtue of the resolution dated 26.4.2007 is fully empowered to sign the suits /

pleadings including all these revocation applications. As such there is no substance in the contention of the Respondent that Mr. Mehra has no

authority to sign the pleadings. Further the contention of the Respondent is wrong that the applicant company cannot maintain the present revocation applications.

h It was further contended by the counsel for the Respondent that the present proceeding is not a suit and as such the resolution dated 26.4.2007

cannot be taken to have empowered Mr. Mehra to sign the same. This argument too is without any substance. It cannot be said that the present

proceeding is not a suit especially in the light of the arguments of the counsel of the Respondent made already, that this Appellate Board is a Court for

all practical purposes, having regard to the nature of the powers and jurisdiction vested in it by statute, which appears that the Respondent is

contradicting his own arguments made already before us. Reliance can be placed in this regard on the law laid down by the Supreme Court of India in

Patel Roadways Ltd. v. Birla Yamaha Ltd., (2000) 4 SCC 91. The Hon'ble Supreme Court at paragraph 48 and 49 observed as follows:

i ""Suit, Action - 'Suit' is a term of wider signification than action; it may include proceedings on a petition.

49. From the above it is clear that the terms ""suit"" is a generic term taking within its sweep all proceedings initiated by a part for realization of a right

vested in him under law. The meaning of the term ""suit"" also depends on the context of its user which in turn, amongst other things, depends on the

Act or the rule in which it is used. No doubt the proceeding before a National Commission is ordinarily a summary proceeding and in an appropriate

case where the Commission feels that the issues raised by the parties are too contentions to be decided in a summary proceeding it may refer the

parties to a civil court... A proceeding before the National Commission, in our considered view, comes within the term ""suit.

j. Therefore, as can be seen from the Supreme Court ruling, the term ""suit"" is not to be strictly construed but construed in the manner in which it is

used. The term ""suit"" has been used in the Board resolution in the context of 'initiation of proceedings' and has to be liberally construed. That apart, the

above mentioned Supreme Court decision, and particularly the admission of the counsel for the Respondent that this Appellate Board is a Court,

clearly establishes that the proceedings before this Appellate Board would also be in the nature of a suit and as such it is clear that Mr. Mehra is

competent to sign the present revocation applications.

k. As regards the derivative action, the circumstances in which the same were filed have no bearing on the present proceedings. The mere filing of a derivative action cannot and does not act as estoppel of Mr. Yogesh Mehra from filing these revocation applications. The argument of the counsel for the Respondent in this regard is therefore completely irrelevant and not germane to the issue as to whether Mr. Mehra has the authority to sign the present proceedings.

l. It was next contended that Enercon GmbH has filed an application before the Company Law Board, New Delhi praying for a stay of the operation of the Board resolution dated 26.4.2007. The said application was filed on 5.10.2010. The said application came up for admission on 19.10.2010 wherein a stay of the operation of the resolution was sought. The Company Law Board has however not granted any interim order. Therefore, as on date, the Board resolution is valid and subsisting. It has not been set aside or stayed by any court / judicial body. Under these circumstances, it cannot be said that Mr. Mehra has no locus or authority to sign the revocation applications on the strength of the resolution dated 26.4.2007. As such it cannot also be held that the applicant company is not a person within the meaning of Sections 2(1)(s) or 64 of the Act.

m. Lastly, reliance by the Respondent on the interim orders passed by the CLB dated 29.10.2007 and 19.5.2008 is completely misconceived and misconstrued for the sole reason that these orders have been passed after the resolution dated 26.4.2007 and cannot in any manner have any relevance on the issue as to whether Mr. Mehra has the authority to sign the revocation applications in the present case, particularly when this Board resolution has not been made null and void.

7. Background & nomenclature in respect of Power Control of Wind Turbines

Here in this case there are few words, such as pitch angle and yaw angle or yaw error, the meaning of which should be clearly understood first and with this view, certain technical information about these phrases have been slightly elucidated here for reference. Wind turbines are designed to produce electrical energy. They are designed so that they yield maximum power output at wind speeds around 15 mps. (30 knots). In case of stronger winds it is necessary to waste part of the excess wind energy in order to avoid

damage to the wind turbine. All wind turbines therefore come with some sort of power control. There are two different ways of doing this safely on modern wind turbines.

Pitch Control for Wind Turbines

8. In a pitch controlled wind turbine the turbine's electronic controller checks the power output of the turbine several times per second. When the power output becomes too high, it sends a signal to the blade pitch mechanism which immediately pitches (turns) the rotor blades slightly out of the wind. Conversely, the blades are turned back into the normal position to wind whenever the wind drops again. The rotor blades should be able to turn around their longitudinal axis (to pitch) as shown in the picture. During normal operation the blades will pitch (turn) a fraction of a degree at a time and the rotor will be turning at the same time. Designing of a pitch controlled wind turbine requires some degree of engineering management to make sure that the rotor blades pitch exactly the amount required. In a pitch controlled wind turbine, the computer will generally pitch (turn) the blades a few degrees every time the wind changes in order to keep the rotor blades at the optimum angle in order to maximize the power output for all wind speeds.

9. The Wind Turbine Yaw Mechanism: Wind turbine yaw mechanism is used to turn the wind turbine rotor against the wind.

Yaw Error.

10. The wind turbine is said to have a yaw error, if the rotor is not perpendicular to the wind. A yaw error implies that a lower share of the energy in the wind will be running through the rotor area. If this is the only thing to happen, then yaw control would be an excellent way of controlling the power input to the wind turbine rotor. That part of the rotor which is closer to the wind direction will be subject to a larger wind force than the rest of the rotor. On the one hand, this means that the rotor will have a tendency to yaw against the wind automatically, regardless of the fact whether an upwind or a downwind turbine is being dealing with. On the other hand, it means that the blades will be bending back and forth in a flap wise direction for each turn of the rotor.

11. The counsel for the Applicant started his argument inviting our attention to the definition of the "invention" as under Section 2(1)(j), "inventive step as under Section 2(1)(ja) respectively of the Act. The counsel submitted that

how the applicant is a person interested and what is the definition of person interested"" as given in Section 2(1)(t) of the Act. Then the counsel submitted his arguments as follows:

A. Claims of the patent are anticipated:

a. A Patent is granted for a single invention only. Accordingly the claims and the complete specification shall relate to a single inventive concept.

b. The claim 1 relates to a process for controlling the wind turbine with a change in at least one operational setting such as pitch angle, and such

change being performed at predetermined time intervals which are changed in response to the operating conditions.

c. Predetermined ambient condition does not mean that every smaller change would define a predetermined time interval and thus insignificant

changes in the operating conditions may not result in change in the operational settings.

d. Submitted that the operational setting claimed in the claim may relate to pitch angle of the blade, or azimuth angle of the nacelle or generator torque

which is evident from the description in page 3 or change in wind direction as is evident from the description in page 10 or said turbine having a

controller which is microprocessor and a memory device to execute the said controlling method for effecting such variations as explained in 4 of the

patent specification annexed to the application for revocation.

e. Those changes in the operational settings have been effected or varied or made in the form of trial and error method.

f. That changes are carried out at very small time intervals of 50 milliseconds by way of a microprocessor or microcontroller and such performance

consequent to the measurement in variations is nothing but an algorithm incorporated in the microcontroller, which first makes changes in

predetermined intervals, measures the changes and then controls the whole process of carrying it out in a repetitive sequential manner.

12. The applicant's counsel continued his arguments next based on the grounds relied in the revocation application and submitted as follows:

a. As per Section 64(1)(i), claims do not clearly and sufficiently define the scope of the invention. - to this objection the Respondent while filing the

counterstatement agree to the deletion of the claim 18. So the applicant decided not to press further.

b. Claims are anticipated due to prior publication affecting the novelty.

i. Referred to the US 5,289,041 Patent document (hereinafter referred to as US '041 patent) comparing it with the impugned patent, where the object

is to control the rotor speed of wind turbine, in a corresponding best operational point, changing the operational settings, at predetermined time

intervals, in accordance with the external parameters and maximize the power output. The external parameter could be wind speed, and operational

settings being azimuth position, pitch angle and the generator torque. To show the same,

1 reference was made to lines 10 to 68 of Col.1; lines 1 to 8 of Col.2 to control the rotor speed based on the observed settings and commanded

parameters;

2 lines 9 to 23 of Col.2 and lines 55 to 68 of Col.2 to provide a solution by way of a controller maintaining optimum relationship between rotor speed

and wind speed taking into account of the operational settings;

3 lines 1 to 5 of Col. 3 show to predict the wind speed at a subsequent point of time and then corresponding to the predicted wind, the controller

changes the operational settings.

4 Lines 1 to 10 of Col. 7 of the US '041 patent mentions about the pre-definable time period Δt , which is of 50 milliseconds and being programmed for

the prediction of the wind speed. Thus according to every wind speed there is corresponding change in the operational settings made by the controller

to achieve the maximum power output from the wind power machine.

5 Figs. 5A to 5C of the US '041 patent discloses about the illustrations graphically about the changes in the rotor speed corresponding to the wind

speed and more particularly between the operational settings such as pitch angle and load torque vis-a-vis the changes in the wind speed.

ii. The impugned patent defines a claim 1 for a method of controlling a wind turbine characterized in that,

1 At least one operational setting is varied within predefined limits;

2 Such variations being performed at pre-definable time intervals;

3 Said time intervals being varied in response to ambient conditions.

a. In view of the aforesaid features of the US'041 patent, this US patent anticipates the impugned patent.

iii. Respondent in para 5.3 of the counter statement agrees that US'041 patent in figs. 5a to 5c discloses only changes of operational settings and not variations in the operational settings. Further there is no variation of the desired pitch angle disclosed. Additionally the regions disclosed in the figs. 5a to 5c showing different regions in dependence of wind speed do not refer to any time intervals. - the (applicant's) counsel submitted that the wind speed is predicted from time to time and depending on the predicted wind speed the operational settings are varied in order to get the maximum power output; the pre-definable time period Δt can be any time length and the Respondent has not disclosed any particular time gap or range and consequently the graphic illustration in fig.5c is a time to wind speed to rotor blade pitch angle diagram, thus the argument that fig.5c does not refer to any time intervals is not correct. The counsel referred to the para 5.3 of the counter statement, which states that "as the wind speed cannot be predetermined, regions disclosed in fig.5a to 5c showing different regions in dependence of wind speed cannot correspond to predictable time intervals" and in this respect, referred to the para 14 of the reply to the counter statement, which states that, changes in operational settings is the same as variations in operational settings. Further submitted that as the wind speed for each of the regions is predicted or predetermined by the wind observer 40, each of the regions in fig. 5a to 5c corresponds to a predicted time interval of the wind speed and reiterated that fig. 7 of the US '041 patent discloses that the wind speed is predicted at time $t_i + \Delta t$ and i varies or increases in steps where t_i refers to the current time and Δt refers to the time interval of prediction. Thus the submission by the Respondent that the regions in fig.5a to 5c do not correspond to the predictable time intervals is not valid.

iv. Further emphasized that claim1 of the impugned patent claims that the variation in operational settings are changed from time to time and this time is changed in response to the ambient condition i.e. wind speed, which means, that change in operational settings is based on the change in the wind speed. The counsel said that the US '041 patent clearly discloses that the change in operational setting is dependent on the change in wind speed which has also been accepted by the Respondent in para 5.3 of the counter statement, which states as, "getting from one region to another depends

only on the wind speed."" Thus claim 1 is fully anticipated.

v. Then referred to the applicant's expert affidavits and submitted that the disclosures of US '041 patent clearly anticipates the claim 1 of the impugned patent.

vi. Submitted that claim 2 of the impugned patent discloses about the variations are by a predetermined amount in one direction, starting from the initial

setting or successively in two opposing directions.-US '041 patent discloses the yaw error in fig.9 which is an operational setting of the turbine, that

can be varied in clockwise direction as well as anti-clockwise direction as shown in Col.8 lines 29 to 40, which is similar and same as the yaw error

angle, i.e. the operational setting feature claimed in claim 2, showing that the claim 2 is also anticipated and there is no novelty in the claim 2.

vii. Submitted that claim 3 states that variation is performed after a change in the operation setting has been caused by external factors.- shown that

the US '041 patent describes a parameter schedule (item 42 in fig.2) which gives values of various desired operational settings like blade pitch

angle(Col.6 lines 42 to 47). Based on these values the wind turbine is adjusted to the desired value by using the blade pitch actuator and hence the

claim 3 is fully anticipated the US '041 patent.

viii. Claim 5 discloses about the tip speed ratio of the rotor blade which is detected contemporaneously with the variation of the operational setting --

US '041 patent discloses that 'aerodynamic driving torque' is determined, which is dependent on the aerodynamically varying quantities such as 'tip

speed ratio' and blade pitch angle (Col.7 lines 52 to 56), which shows clearly that claim 5 of the impugned patent is anticipated.

ix. Claim 8 discloses about the rotor blade pitch angle or the azimuth setting or the generator torque is varied.-the feature claimed in claim 8 is already

disclosed in the main principal claim 1 and there is variation between the claim 1 and claim 8. However US '041 patent discloses about variation in

blade pitch angle (Col.6 lines 47 to 56) and regarding variation in yaw angle setting (Col.8 lines 29 to 40) and the net torque is dependent on the

variations in the other operational settings (Col.7 lines 45 to 68 and Col.8 lines 1to 15), which all goes to prove that the claim 8 of the impugned patent

is not novel and stands fully anticipated.

x. Claim 9 discloses about the storage and analysis of the data regarding

variations in the setting, and the direction and the amount of variations made.

- fig.4 of the US '041 patent discloses about the parameter schedule which collects data relating to the variations in the operational settings and the

graphical analysis is done and the feature claimed in the claim 9 of the impugned patent is fully anticipated.

xi. The counsel citing the US patent 5,798,631 (hereafter referred to as US '631 Patent) Col. 1 lines 10 to 15; lines 65 to 67; Col. 3 lines 22 to 32;

Col.12 lines 24 to 54 and fig.11 and 13 and said that this prior art show to prove that all the features of the claim 1 of the impugned patent , have been

disclosed in this cited specification.

B. Claims of the patent are obvious

1. As regards inventive step, US '041 patent discloses that the wind speed is predicted at a time interval of Δt and a wind observer predicts the wind

speed at $t + \Delta t$ and based on the predicted wind speed which is an external factor, the operational setting such as blade pitch angle is changed. (Col.3

lines 43 to Col.4 line8). Here the blade pitch angle is a variable parameter. All these values collected and measured values are computed and

analysed. The sequence of steps as claimed in claim 1 of the impugned patent are;

a. At least one operational setting is varied within predefined limits.

b. Variations are performed at pre-definable intervals of time.

c. Time intervals are varied in response to predetermined ambient or operating conditions.

i. In Col. 3 line 43 to 65 wind speed is predicted by the wind observer, where wind speed is an external factor.

ii. The wind speed is predicted at pre-defined time intervals in different steps such as $t + \Delta t$. - Col. 3. Lines 43 to 50.

iii. Operational setting is varied - Col. 3. Lines 43 to 52 and Col. 4 lines 24 to 51.

The steps claimed in claim 1 of the impugned patent is same as the steps disclosed in the US '041 patent which shows there is no inventive step.

2. The US '631 patent discloses that rotor speed of a doubly fed machine is varied till the maximum power output is achieved (Col,2.- lines 3 to 8).

Here the rotor speed is an operational setting of the wind turbine. Now the US '041 patent discloses that variations are made in the time intervals and

such change in time intervals effected in response to some operational settings. It is stated that wind speed is estimated at a time $t + \Delta t$ where the Δt is

a time step to current time 't' (Col.3, lines 43 to 45). Based on the wind speed the value of the desired operational settings like pitch angle, are

calculated and fed to devices, pitch angle actuator, which control the said settings (Col.6, like 44 to 55). Therefore, combining the above references, a

person skilled in the art can easily reach the invention claimed in claim 1. Hence the invention cannot be said to have any inventive step and would be

obvious in view of the said prior art without prejudice to the fact that the claim 1 is anticipated by the US '041 patent.

3. The counsel submitted that assuming, for the time being, without admitting, that the US '041 Patent shows only one optimal setting for one ambient

condition and it does not teach or show any variation of the optimal setting within the pre-defined limits, it is very clear that the said variation does not

involve any technical advance and in any case the invention would be obvious to the person skilled in the art having normal skills.

4. The variation done in the operational setting in response to the changes in the external factors, being only a trial and error process which is very

normal and natural to a skilled person in the Art Hence the claim 1 does not involve any inventive step.

5. In this case it has been demonstrated that, if at all, the inventive step is varying the operational setting after it has been changed due to change in the

ambient conditions, within pre-defined limits of tolerance range. Since that step has been shown to be obvious, all the dependent claims which only add

minor methods of variations will not impart any inventive step to the dependent claims.

6. Further, without prejudice to the fact that US '041 patent discloses that the operational setting is changed at pre-definable time interval, it is

submitted that it would be obvious to person skilled in the art that operational setting has to be changed at pre-definable time interval since in order to

maximise the power output operational settings have to be changed from time to time because the wind speed keeps on changing from time to time.

C. The claimed invention is not patentable under Section 3(k):

1. Section 3(k) of the Patents Act, 1970 was referred to and it was submitted that all types of algorithms are not patentable under Section 3(k).

Further the attention was drawn to Section 3(k) to show that while "computer programs per se" was not a patentable invention, the words "per se" are

not attached to algorithms. The counsel also pointed out that in EU both algorithms as such and computer programs as such are not patentable.

2. Submitted that the subject matter of claims 1 to 18 is an algorithm. Algorithm was defined by Black's Law Dictionary, (7th edition, 1999) as, "a

statement or conclusion based on a sequence of steps involving mathematical, logical or natural rules or principles". The Webster's Dictionary defines

an algorithm as "a number of rules, which are to be followed in a prescribed order, for solving a specific type of problem" which is clearly noticeable

from the claim 9 which states that varied setting, the direction and the amount of variation are stored and / or analysed. In the claims 1 to 15, a method

has been claimed comprising various steps which are actually nothing, but, a set of rules for the control mechanism of the wind turbine. For example,

claims 1 to 11 claims in a prescribed order how and when the variation of several operational settings like, the pitch angle and azimuth angle, rotor

speed etc, would be carried out. On the other hand, claim 11 sets out a condition that if the power yield decreases the variation is discontinued. Similar

conditions and rules have been claimed in the subsequent claims also. Lastly all the above has been provided for obtaining optimum power output from

the wind turbine, in response to the ambient or operating conditions. Thus all the claims involve a sequence of steps for optimum power output. The

use of microprocessors and microcomputers (claim 17 read with second para of page 4 of the specification of the impugned patent) is prominently

indicative of the fact that the method is an algorithm and will be accordingly implemented by means of computerized means using said processors and

controllers.

3. Expert affidavit of Mr. Mayank Sharma was referred to and it was submitted that the expert in his opinion considers the claims of the impugned

patent to be algorithms.

13. Further, it was pointed out that despite being given time extensively, the Respondent has not produced any affidavit of an expert to counter the

expert affidavits submitted in favour of the applicant for revocation. In this respect counsel for the Respondent confirmed that they will not be

submitting or relying on any expert affidavit / evidence.

14. The counsel for the Respondent started his arguments first referring to the M.P No. 59/2010, where the Respondent had challenged Mr. Yogesh

Mehra's competency to depose an affidavit and has no locus standi to initiate revocation application on behalf of Enercon (India) Limited. The counsel

said that the matter was heard and decided that this matter would be disposed off along with the other matters of the main application. When they

appealed against this order, the Hon'ble Madras High Court, had also directed the Appellate Board to consider this issues in the miscellaneous petition

along with the other matters in the main application. Hence the request was made to decide the locus standi issue along with other grounds of the

revocation application.

15. Without prejudice to the above issue, the counsel submitted as follows:

Novelty by way of anticipation:

a. The features of the invention claimed in the claim¹ was first stated as below:

i. Feature 1: A method for controlling a wind turbine.

ii. Feature 2: Varying at least one operational setting of the wind turbine.

iii. Feature 3: The operational setting is varied within a pre-defined limit.

iv. Feature 4: Variation is carried out at predetermined time intervals

v. Feature 5: The time intervals are varied in response to the pre-determined ambient and / or operating condition.

b. Operation of the wind power installation in response to the direction of the wind and wind speed was explained. Then it was said, that, when the

direction of the wind changes, the same will be detected and the wind power installation will be turned with respect to its azimuth position accordingly.

If the wind speed changes, this will also be detected and the operating point of the wind power installation will be changed accordingly. If none of

these external parameters change, the operating point of the wind power installation will also be left unchanged.

c. However claim 1 of the impugned patent proposes to vary the operational settings at predetermined time intervals. Accordingly the subject matter

of the claim is to perform arbitrary variations of operational settings at predetermined time intervals and thus independently of any changes of the

prevailing wind conditions.

d. As the present invention is directed to arbitrary variations of operational

settings, a skilled person understands that these are variations in addition to the changes of the operational point due to the changes in detected wind conditions.

e. The applicant for revocation petition has submitted that claims 1 to 3, 5, 8,9 and 16 are anticipated in view of US '041 patent, but this US patent

does not attack the claims 4, 6, 7, 10, 11 and 15 whereas the claims 12 to 14 and 17 are anticipated by the US '631 patent. Here the claims 12 and 14

are dependent on the preceding claims. It is an established fact in law that in order to succeed in anticipation for novelty, all the features of the claim

have to be shown in a one single document with explicit disclosure.

f. The US '041 patent cited is for a speed control system for a variable speed wind turbine. Figs. 5a, 5b, and 5c each show a characteristic curve

providing a desired relationship between the wind speed and other parameter. This other parameter is the desired rotor speed according to fig. 5a, the

desired load torque according to fig.5b and the desired pitch angle according to fig.5c. There is a clear relationship between the desired rotor speed

and wind speed (fig.5a); the desired load torque and the wind speed (fig.5b); and the desired pitch angle and the wind speed (fig.5c). Accordingly, the

underlying control strategy is to control the wind power installation as precisely as possible along these characterizing curves. Whenever there is a

change in the wind speed, there would be a desired change in the rotor speed, a desired change in the load torque and the desired change in the pitch

angle accordingly as predetermined by the characterizing curves.

g. Varying the pitch angle in accordance with the teaching of the Impugned patent would in fact mean, to deviate from the given characteristic curve.

However, there is no indication in this US '041 patent document that the pitch angle (or any other parameter in fact) shall deviate from the given

characteristic curve. Accordingly a variation at predetermined time intervals according to the claim1 of the impugned patent is an arbitrary variation of

operational settings which is not disclosed in the said US '041 patent.

h. Even when considered the changes disclosed in the US '041 patent as variations according to claim 1 of the impugned patent, these changes are not

performed at pre-definable time intervals, but directly whenever there is a change in the wind speed.

i. The counsel said that it was contended by the applicant's counsel that Col.7

lines 1 to 11 of the US '041 patent disclose the pre-definable time intervals in order to perform the changes and variable time interval of prediction is Δt which is kept as 50 m.secs. The counsel argued that Δt refers to the time interval of prediction and not to the time interval of performing changes of parameters. Further this time interval of 50 m.secs is extremely short and it is absolutely difficult, even impossible to perform any change in the rotor blade pitch angle of a rotor blade of a wind power installation. In this respect it is pointed out that consequent to the heavy weight of the rotor blade, time interval of 50 m.secs for changing the rotor blade angle is very negligible. Even there is no disclosure in the US '041 patent that this variable Δt will be varied in dependence of the ambient conditions. Accordingly the claims 1 and 16 of the impugned patent are not anticipated by the US '041 patent and the claims 2 to 15 respectively, they are also novel and definitive.

j. The counsel referred to the other cited US '631 patent and said that it is directed to a performance optimization controller and a control method for double fed machine. The control of doubly fed machine is quite complex. The variation of time period in dependence on the ambient conditions has not been disclosed in the US '631 patent or in other words, the US'631 patent does not stand as anticipation to this Indian granted patent. Therefore the claims 1 and 16 as granted are not anticipated by the US '631 patent. Further the granted claims 2 to 15 and 17 are dependent on the claims 1 and 16, respectively, and hence they are also novel.

Inventive step

1. US '041 patent is clearly directed to control strategy of providing clear and fixed characteristic curves in order to control the wind power installation as explained with respect to figs.5a, 5b, and 5c. On the other hand, US '631 patent is directed to a very specific type of wind power installations, i.e. one that uses a doubly fed machine. Both documents are directed to different control techniques, which cannot be combined. In particular, the document US '041 discloses to choose a specific desired load torque in dependence on the wind speed (fig.5b) and a specific desired pitch angle in dependence on the wind speed (fig.5c). As a result, these two parameters will directly lead to a resulting rotor speed. In contrast to this, the US '631 patent discloses in Col. 6 lines 45 to 48 that the turbine shaft speed is controlled

by means of the control frequency. These control techniques belong to the specific wind power installation and are in fact incompatible. Even if a skilled person would want to combine these documents, this would not be possible.

2 US '041 patent does not give any hint to perform the arbitrary variations (triggered by the predetermined time intervals) but teaches to precisely track wind speed. The control and optimization method according to US '631 is a control optimization at start-up, not or at least not sufficiently considering the prevailing wind speed. As these variables are non-permanent values, these have to be constantly supervised. Whereas the claimed invention according to the impugned patent is directed to operational settings, in particular the pitch angle, which are basically fixed values and also permanent values, which are set to a fixed value according to the prevailing wind conditions. In this respect these operational settings do not need to be changed or supervised. Precisely the claimed invention proposes to perform variation of these operational settings in an arbitrary manner by setting corresponding time intervals. Reiterating the subject matter of invention, the operational setting of the pitch angle has to be changed actively, i.e. a corresponding pitch motor has to be activated in order to turn the rotor blade with respect to its pitch angle. The US '631 patent does not give any hint to question any optimal settings and perform further variation in the operational settings seeking for further optimization, as the said US patent cannot even rely on an optimal setting.

3 The counsel submitted that the granted claims of the impugned patent are non-obvious and involves inventive step over the subject matter of US '041 and US '631 patents when taken alone or together.

Non-patentable under Section 3(k)

The argument that the subject matter of granted claims 1 to 15 is an algorithm is totally incorrect and does not have any merit. An algorithm is clearly

a "set of rules". The claims of the impugned patent relate to a method for controlling a wind turbine by performing specific process steps. Neither the

granted claims contain a "set of rules" nor do they seek any protection for a "set of rules". The patent for the said invention has been granted by the

patent office after having duly conducted a strict technical examination and considering the invention to be meeting the patentability criteria,

simultaneously not attracting the provisions of Section 3 of the Act. In this respect the first examination report submitted during the hearing may kindly be referred to and decide the matter that it is not an algorithm.

Amendment of claims

A miscellaneous petition has been filed on 14th September 2010 with revised set of claims amending the claims as granted. It was also pointed out that

the amendments are merely directed to a combination of granted claims thereby limiting the scope of the claims. Even though the amendments as such

have been recently filed, the amendments made in the claims were part of the claims as originally filed and granted. Prayer is made to the Appellate

Board to consider these revised and amended claims as filed under Section 58 of the Act, in case the Appellate Board decides to conclude that the

granted claims cannot be held valid and revoking the entire patent.

16. The counsel for the applicant submitted his rejoinder to the arguments made by the Respondent counsel. Further submitted that the impugned

patent goes one step ahead of the US '041 patent that it again performs a trial and error variation after the operational setting has been changed in

response to the ambient conditions. It was submitted that the interpretation, which the Respondent is imparting to the claim 1, i.e. it also claims a

second set of trial and error variation, is present in claim 3 / 4 and not in claim 1. Further, as said earlier in the revocation petition only claim 1 is

anticipated by US '041 patent and not claim 4. Thus, in view of the same claim 1 is anticipated by US '041 patent. Also it is submitted that the scope of

claim 1 is not restricted to any preferred embodiment of the invention, whereas the claim 4 is for one particular preferred embodiment of the invention.

Thus claim 4 cannot be included in claim 1. Reference was made to ""Super Guide Corporation v. Direct TV enterprises Inc. 358 F.3d 870 of the US

Court of Appeals, Federal Circuit, case and submitted that it is important not to import into the claim limitations that are not a part of the claim. Thus

limitation in claim 4 cannot be imported into claim 1, under the guise of restricting the scope of the claim 1. It was submitted from the cited case law

that a description in the specification as an embodiment, may not be read into the claim, when the claim language is broader than the embodiment.

Thus as said earlier claim 4 covers one preferred embodiment and claim 1 is broader than claim 4, then the interpretation as provided by the

Respondent to claim 1 is not correct. Even according to the disclosure in the patent specification and the submissions of the Respondent, the variation of the operational setting within the tolerance range based on the realization that tolerances move within ranges is the improvement. However varying the changed operational setting within ranges to optimize the yield, i.e. the power output is a standard step, which is within the knowledge and skill of the person skilled in the art as already demonstrated supra. It was argued that the Respondent's submission that the claims 12, 13 and 14 cannot be anticipated by US '631 patent and in this respect reply to the counter statement in para 15 at page 5 was referred to and submitted that claim 1 was by US '041 patent since it discloses the same steps in the same sequence and so there cannot be any inventive step in claim 1 as no feature represents a technical advance. It is to be noted that dependent claims only add non-essential elements and routine variations to the main claim they also do not involve any inventive step. Respondent contended that in EU law only algorithm 'per se' is not patentable but if they are used for operating a machine etc, then there is patentability; further it was submitted that the law with regard to patentability of algorithm in Europe and India are different. In this context Article 52 of the EPC was referred to and it was submitted that under Article 52(3) a mathematical method as such"" i.e. per se is not patentable. Under Section 3(k) of the Act, 'per se' is not attached to algorithm, but attached to business methods and computer programs, thus showing the difference in law with regard to patentability of algorithms in Europe and India.

17. Finally the applicant's counsel submitted that as the Respondent has not produced any expert affidavit till the date of hearing, the Respondent should not be allowed to produce any affidavit later, as the arguments have been concluded. Finally the counsel made the prayer that the impugned patent 201910 be revoked in its entirety.

18. We have heard the arguments of both the counsel and have gone through the pleadings and the documents filed in support thereof.

19. Person interested

In this case, the Respondent has raised a question of locus standi for the person who has filed the application for revocation for and on behalf of the

Petitioners that he is not authorized and is not ""the person interested"" to file a

revocation petition. The Respondent has taken the ground that in terms of the articles of association of the company, Mr. Yogesh Mehra, the Managing Director lacks the competence to file a revocation application for and on behalf of the applicants for revoking the patent granted to the Respondent, as the reliance placed on the articles of association is wrong and the power is not conferred on him to execute any such legal action, and more so when the matter is still pending before the company law board. The applicant had stated that Mr. Yogesh Mehra, being the Managing Director has been authorized by the Board resolution dated 26th April 2007 to defend and initiate suits and proceedings on behalf the applicant and that in terms of the articles of association of the company, Mr. Yogesh Mehra, being the Managing Director has the requisite locus standi to file and institute the revocation proceedings. Appellate Board has the power only to check as to whether the applicant filing the revocation, namely the applicant company, herein M/s. Enercon (India) limited is a "person interested" or not according to the Act under which this proceeding has been initiated.

20. Now we wish to point out that this issue of locus standi of Mr. Mehra has already been discussed and decided earlier in Para 6(g) ante. The Company Law Board having not granted any interim order after 29.10.2007 and 19.5.2008, as on date, the Board resolution is valid and subsisting. It has not been set aside or stayed by any court / judicial body. Under these circumstances, it cannot be said that Mr. Mehra has no locus or authority to sign the revocation applications on the strength of the resolution dated 26.4.2007. Miscellaneous Petition No. 59/2010 is therefore dismissed. As such it cannot also be held that the applicant company is not a person within the meaning of Sections 2(1)(s) or 64 of the Act.

21. Now we have to see whether the applicant is a person interested or not to file a revocation application. 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;

22. 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,

(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..

23. In AIR 1983 DELHI 496 Ajay Industrial Corporation v. Shiro Kanao of Ibaraki city, para B in page 496, it was held that, ""person interested"" must

be a person who has a direct, present and tangible commercial interest which was injured or affected by the continuance of the patent on the register.

The applicant's counsel stated at the very beginning, that they are the one of the foremost leaders in the wind energy sectors in India and they

manufacture and install wind turbines all over India and thus they are an interested person within the meaning of the Section 2(1)(t) as well as the

Section 64 of the Act. In view of this judgment, we have to check and find out whether this applicant is a person interested as per the requirement of

the Act under which these proceedings are taking place.

24. In AIR1983 Delhi 496, Ajay Industrial Corporation v. Shiro kanao of Ibaraki City (supra), it was held 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.

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

that, ""where the statute uses the words 'any person interested', the interest has to be genuine; the possibility of prejudice has to be genuine and in

addition, and quite independently, the Court must be satisfied that the opposition or the application for revocation, as the case may be, is not a frivolous,

vexatious or blackmailing operation.

26. And in the same case law, 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.

27. In *Medline 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.

28. Therefore applying the same analogy here, we find that, as regards the first ground, there is no evidence before us to show that the applicants are in possession of any patents in the same field. As regards the second ground i.e., the manufacturing interest, the applicants are one of the foremost leaders in the wind energy sectors in India and they manufacture and install wind turbines all over India and this establishes the manufacturing interest.

As regards the trading interest, looking at the ruling of the Solicitor General, Sir Thomas Inskip in *Clavel's application* 45 R.P.C 222 and a previous ruling by Sir Stanley Buckmaster in *New Thing's application* 31 R.P.C 40 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".

29. It is very clear that the applicants have been manufacturing and installing the wind turbines shows the trading interest of the product, too, as "a person interested" in opposing the grant or revocation of the patent. Therefore what an applicant for revocation of patent, (the applicants herein) has to establish is that there is a real and genuine interest together with a commercial interest, which may be prejudiced when such a patent is granted.

The applicants have shown that they have been manufacturing and installing wind turbines all over India and this shows that they have a real and genuine interest together with a commercial interest in the product. In view of the above said findings, we feel and think that undoubtedly locus Standi is established by the applicants and they are "the person interested" in this case sufficiently meeting the requirement of the Section 2(1)(t) of the Act.

30. Common general knowledge

Now we shall see as to whether a common knowledge on the date of the

patentee's claim would amount to anticipation by way of public knowledge

destroying the novelty or affecting the inventive step. First we should see what is a common general knowledge?

31. "Criteria for "Common General Knowledge

It is important to have a clear understanding of the meaning of the common general knowledge. It is the background technical knowledge available to

all in a particular trade while doing or carrying out a product development activity.

32. The common general knowledge as described by Laddie J in Raychem Corp's Patents 1998 RPC 31 "The common general knowledge is the

technical background of the notional man in the art against which the prior art must be considered ... It includes all that material in the field he is

working in which he knows exists, which he would refer to as a matter of course if he cannot remember it and which he understands is generally

regarded as sufficiently reliable to use as a foundation for further work or to help understand the pleaded prior Art. This does not mean that

everything on the shelf which is capable of being referred to without difficulty is common general knowledge nor does it mean that every word in a

common text book is either. In the case of standard textbooks, it is likely that all or most of the main text will be common general knowledge.

33. The law as to what constitutes common general knowledge is also set out in the decisions of the Court of Appeal in General Tire & Rubber Co v.

Firestone Tyre & Rubber Co Ltd 1972 RPC 457 at 482-483 and Beloit Technologies Inc v. Valmet Paper Machinery Inc 1997 RPC 489 ;

34. In General Tire v. Firestone 1972 RPC 457 at 482: it is held, 'on the other hand, common general knowledge is a different concept [sc. from public

knowledge] derived from a commonsense 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.'

35. In Beloit v. Valmet 1997 RPC 489 (CA)). Aldous J held; "At the same time, the skilled man should not be taken to represent some sort of lowest

common denominator of persons actually engaged in the field, possessed only of the knowledge and prejudices that all of them can be said to possess.

The common knowledge of different groups employed on the same tasks in different organizations is likely to be different, and It is unlikely that the

expert witnesses will be truly representative of the skilled person, as not only may they be too well qualified but they will come to the case with

personal prejudices or preferences that must be discounted:

36. Luxmoore J. in *British Acoustic Films* (53 R.P.C.221 at 250) stated: "It is not sufficient to prove common general knowledge that a particular

disclosure is made in an article, or series of articles, in a scientific journal, no matter how wide the circulation of that journal may be, in the absence of

any evidence that the disclosure relates. A piece of particular knowledge as disclosed in a scientific paper does not become common general

knowledge merely because it is widely read, and still less because it is widely circulated. Such a piece of knowledge only becomes general knowledge

when it is generally known and accepted without question by the bulk of those who are engaged in the particular art; in other words, when it becomes

part of their common stock of knowledge relating to the Article

37. The correct explanation was given by the Court of Appeal in *Beloit Technologies Inc v. Valmet Paper Machinery Inc* (1997) RPC 489 at pages

494-495:-"The information in a patent specification is addressed to such a man and must contain sufficient details for him to understand and apply the

invention. It only lacks an inventive step if it is obvious to such a man. It follows that evidence that a fact is known or even well-known to a witness

does not establish that fact forms part of the common general knowledge. Neither does it follow that it will form part of the common general

knowledge if it is recorded in a document.

38. In *ICI Chemicals & Polymers Ltd., v. Lubrizol Corps* 45 IPR 577 Emmett J stated, "the common general knowledge is the technical background to

the hypothetical skilled worker in the relevant art....but also includes the material in the field in which he is working which he knows exists and to

which he would refer as a matter of course.

39. Thus from the above cases, common general knowledge is the common knowledge in the field to which the invention relates. It is generally known

as common knowledge and regarded as a good basis for further research activity by those engaged in that art before it becomes part of their common

stock of knowledge relating to the art, and then becoming part of the common general knowledge. Therefore it means the information which at the

date of the patent in question is known and accepted without question by those

who are engaged in the art or science to which the alleged invention relates. It would also appear therefore that when it is a question of common general knowledge i.e, knowledge available in a country for a long time, which every skilled worker in that field is, expected to know. Then such knowledge would be sufficient to invalidate a patent. Again such knowledge need not even be found in a particular document. In other words a patent application has to be assessed on the basis of not only what will be available from prior documents but also from the common general knowledge on the subject, which may or may not be available in any such document. It can be taken as a well settled principle, that the common general knowledge is a knowledge that must be attributed to a skilled person, without which he may not be taken to be a skilled person in the Article Therefore it is a knowledge that every skilled person should acquire before he embarks on the problem for which the patent provides the solution. A patent can therefore be taken to be addressed to the skilled addressee, someone skilled in the subject matter of the invention. It is also important to differentiate between matter which was in the public domain at the priority date of the patent and matter which can properly be regarded as common general knowledge. Evidence that a particular fact is known or even well-known to a witness does not mean that it is common general knowledge. Likewise, a piece of information disclosed in a scientific paper does not become common general knowledge merely because it is widely read. On the other hand, it is not necessary to show that the information is known in the sense that the skilled person has memorized it. Material which is known to exist and to which the skilled person would refer as a matter of course if he cannot remember it is clearly part of the common general knowledge.

40. Skilled person in the art

A patent specification is addressed to those likely to have a practical interest in the subject matter of the invention, and such persons are those with practical knowledge and experience of the kind of work in which the invention is intended to be used. The addressee reads the specification with the common general knowledge of persons skilled in the relevant Article He is unimaginative and has no inventive capacity. So a patent must be considered through the eyes of the notional person skilled in the Article The 'notional skilled person' who is the addressee of the specification is

normally described in various ways for various purposes. The skilled person is essentially a legal construct, and not a mere lowest common order of all

the persons engaged in the art at a particular time.

41. The Patentee shall disclose all the features of the invention in the specification, without any ambiguity, in return to the exclusive monopoly right

which is granted to him. A patent can be granted only when all the three following criteria are satisfied or complied with. They are,

1 New and useful

2 Inventive step or non-obviousness

3 Capable of industrial application

42. The first criterion is the novelty of the product, which is to be patented. Novelty is not defined in the Indian law, but the 'invention' and ""inventive

step"" are defined as below under Section 2(1)(j) and 2(1) (ja) of the Act respectively;

(j) ""invention means a new product or process involving an inventive step and capable of industrial application;

(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;

43. The applicants have argued by referring to US patents 5,289,041 & 5,798,631 in respect of lack of novelty, obviousness and we also consider only

those arguments made before us.

44. Therefore the novelty as per the reported case laws could be defined as below; Novelty: An invention shall be taken to be

1. New if it does not form part of the state of the art or the available prior Article

2 The state of the art in the case of an invention shall be taken to comprise all matter (whether a product, or a process, information about either, or

anything else) which has at any time before the priority date of that invention been made available to the public (anywhere in the world) by written or

oral description, by use or in any other way.

45. The law of novelty is concisely stated by Lord Hoffmann in Smithkline Beecham plc's (Paroxetine Methanesulfonate) Patent 2005 UKHL 59:

2006 RPC 10. In summary, and for present purposes:

(1) There are two requirements for anticipation which is very important to consider separate, (a) disclosure and (b) enablement;

(2) So far as the disclosure is concerned, the prior art must disclose subject matter which, if performed, would necessarily result in an infringement of the patent.

46. The law of novelty was again explained by the House of Lords in *Synthon v. Smithkline Beecham* 2005 UKHL 59; 2006 RPC 323 the

specification should meet two requirements. First, the matter relied upon as prior art must disclose subject matter which, if performed, would

necessarily result in an infringement of the patent. Second, that disclosure must have been enabling, that is to say the ordinary skilled person would

have been able to perform the invention if he attempted to do so by using the disclosed matter and the common general knowledge.

47. We feel it is very pertinent to rely upon the equally well-known statement of Lord Westbury in *Hills v. Evans* (1862) 4 De G.F. & J. 288 :

The information given by the prior publication must, for the purposes of practical utility, be equal to that given by the subsequent patent.

48. We quote here the judgment of the Sachs LJ with the classic statement in *General Tire* 1972 RPC 457 at p.485:

To determine whether a patentee's claim has been anticipated by an earlier publication it is necessary to compare the earlier publication with the

patentee's claim. The earlier publication must, for this purpose, be interpreted as at the date of its publication, having regard to the surrounding

circumstances which then existed, and without regard to subsequent events. ... If the earlier publication, so construed, discloses the same device as

the device which the patentee by his claim, so construed, asserts that he has invented, the patentee's claim has been anticipated, but not otherwise.

49. In *Flour Oxidising v. Carr* (1908) 25 RPC 428 at 457, line 34, approved in *BTH v. Metropolitan Vickers* (1928) 45 RPC 1 at 24, line 1); (*General*

Tire & Rubber Co v. Firestone Tyre & Rubber Co Ltd (1972) RPC 457 at 486)"" It was held that to prove anticipation:

A signpost, however clear, upon the road to the patentee's invention will not suffice. The prior inventor must be clearly to have shown to have planted

his flag at the precise destination before the patentee.

50. L J Sachs in *General Tyre & Rubber Co. v. Firestone Tyre Co.* (1972) RPC

4567 at page 485, held:

for anticipation to occur the antecedent document must contain clear and unmistakable directions to do what the patentee has claimed in the claim under consideration.

51. The best-known statement of the status and function of the claims is given by Lord Russell of Killowen in *Electric and Musical Industries Ltd v.*

Lissen Ltd (1938) 56 RPC 23: ""The function of the claims is to define clearly and with precision the monopoly claimed, so that others may know the

exact boundary of the area within which they will be trespassers. Their primary object is to limit and not to extend the monopoly. What is not claimed

is disclaimed. The claims must undoubtedly be read as part of the entire document and not as a separate document; but the forbidden field must be

found in the language of the claims and not elsewhere.

52. We shall analyse all the relevant claims as regards novelty first.

Claim 1

The claim 1 relates to a process for controlling the wind turbine with a change in at least one operational setting such as pitch angle, and such change

being performed at predetermined time intervals which are changed in response to the operating conditions.

53. Here the operational setting claimed in the claim 1 relates to pitch angle of the blade, or azimuth angle of the nacelle or generator torque which is

evident from the description in page 3 of the specification or change in wind direction as is evident from the description in page 10 of the specification

or said turbine having a controller which is microprocessor and a memory device to execute the said controlling method for effecting such variations

as explained in page 4 of the patent specification. It was contended by the Respondents that these changes in the operational settings have been

effected or varied or made in the form of trial and error method. From the US '041 patent in Col.7 lines 1 to 10 mentions about the pre-definable time

period Δt , which is of 50 milliseconds and being programmed for the prediction of the wind speed. Thus according to every pre-definable time period of

Δt , wind speed will be predicted and for every wind speed predicted there is a corresponding change in the operational settings which is evident from

the Col.3 lines 1 to 10, made by the controller to control the rotor speed and to achieve the maximum power output from the wind power machine.

Here in the instant case too, change in the external operating conditions mean only the change in the wind speed and that is being detected at a pre-

finable time period, which performs the change in the operational settings to control the rotor speed and finally to maximise the power output.

Therefore from these lines pointed out in the US '041 patent, the invention claimed in claim 1 is very clearly anticipated and claim 1 fails and is found to be anticipated.

54. Claim 2

The method step claimed here performing the variations in one direction is in respect of yaw error or angle first from the initial angle when the wind is

directly aligned with the rotor spin axis and subsequently in opposite direction, which is a change in the operational setting. This is very clearly pointed

in Col.8 lines 29 to 40 of the US '041 patent wherein yaw sensor defining four regions by an angle, each region being shown to have one direction

change and thereafter in the opposite direction. The claim 2 also has the same feature variation done first in one direction, starting from the initial

setting and then in the other direction and therefore the claim 2 stands anticipated and therefore claim 2 fails as invalid.

55. Claim 3

The external factor is change in wind speed due to which the change in the operational setting is done which is similar and exactly the same disclosure

as in Col.6 lines 42 to 47 of the US '041 patent and now based on these values the wind turbine is adjusted to the desired value of the operational

setting. These features of the claim 3 are clearly seen in lines 47-57 of the Col.6 of the US '041 patent and therefore the claim 3 is anticipated by the

said US '041 patent.

56. Claim 5

The tip speed ratio of a rotor blade is detected contemporaneously with the variation in the operational setting is the feature claimed in the claim 5.

The features in Col. 7 lines 52 to 56 of the US '041 patent disclose the measure of aerodynamic driving torque which is dependent on the

aerodynamically varying quantities such as tip speed ratio $[R/R_{Uo}]$ or the blade pitch angle $[\theta(t)]$, as a function, wherein any one of these quantities

are one of the operational settings as below:

$$T_{wind}(t_i) = 1/2 \rho U_o^2(t_i) f_1[R(t_i) / U_o(t_i)](t_i)$$

The very same feature of tip speed ratio detection and change corresponding to a change in the operational setting viz. Blade pitch angle is claimed in

claim 5. Therefore the claim 5 stands clearly anticipated.

57. Claim 8

In claim 8 there are no extra feature claimed except the feature what is claimed in claim 1 is explicitly mentioned here in this claim showing no

variation in features, except bringing in only redundancy aspect but being dependent on the claim 1. So this claim 8 is found to be invalid when the

claim 1 has been found to be anticipated and invalid.

58. Claim 9

Claim 9 claims all those parameters such as operational setting, direction and amount of variation to be stored and analysed and the monitoring of the

wind turbine's operation is done by a computer, which includes the unit 42, parameter schedule as shown in the fig. 2 and as well as in fig. 4 of the US

'041 patent and consequently the claim 9 is found to be invalid.

59. When the main principal claim1 is found to be anticipated by the US '041 patent and hence the claim1 fails, then the subsidiary claims which are

dependent on the principal claim1 would also be invalid and does not stand as a separate independent or individual claim as no exclusive technical

improvement in the feature is shown therein. It is a well settled law that a prior art reference cited anticipates the claim when its limitations are not

expressly found in that reference but are nonetheless inherent in it. Under the principle of inherency, if the prior art necessarily functions in

accordance with, or include the claimed limitations, it anticipates.

60. We find the features of the US '631 patent to be completely different from that of the features claimed in the claim 1 of the impugned patent and

so do not stand to anticipate at all.

61. In *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, it was held:

A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art

reference.

62. In *Pope alliance Corpn. v. Spanish Siver Pulp & Paper Mills Ltd.* A.I.R. 1929 -

P.C. 38 it was held that

The specification which is relied upon as an anticipation of the invention must give the same knowledge as the specification of the invention itself.

63. In the above case His Lordships have further held:

In patent law, in order to render a document a prior publication, it must be shown that it contains all that is material to instruct the public how to put the invention in practice

64. We do not dispute that applicant's claim may, upon its proper construction, cover products or processes which involve the use of technology

unknown at the time the claim was drafted. The question is whether the person skilled in the art would understand the description in a way which was

sufficiently clear from the US '041 patent about the control of the rotor speed based on the wind speed and also to maximize the power output to

arrive at the new technology. There is no difficulty in principle about construing general terms to include embodiments which were unknown at the

time the document was written. We do find that the generalizations from the US cited document being earlier would cover the specific disclosure in

the latter's document. Let us take a simple example. Suppose the prior art says two items are to be "screwed together." There will not be anticipation

of a claim in which the items are "nailed or riveted" together in the later claim, but if the later claim were to a generalized conception viz., "fixed

together", then there would be anticipation. More easier would be the case where it is the earlier document which has the detailed conception and the

later being much broader. Hypothetically considering the above example, suppose the earlier document said "fixed together" and in that event, would it

anticipate a later claim to have the feature "screwed together" or indeed any other later claim which condescended to the obvious detail of how the

fixing was done?

Certainly 'yes' to this question and there would be something odd if there were no anticipation here. This suggests that one has got to examine the

concept of novelty with care. Therefore it is not a mere mechanical application of mind or an "inevitable result" rule.

65. Obviousness

A patent will be invalid for lack of inventive step if the invention claimed in it was obvious to a person skilled in the art having regard to the state of the

art at the priority date. In fact at the date of the patent, the US '041 patent and the US'631 patent are already known to the public knowledge and the person skilled in the art is aware of the same.

66. According to US '041 patent, the external ambient conditions or parameters such as wind speed is predicted by the wind observer at time intervals

of Δt and based on the predicted wind speed, changes are effected in the operational setting like blade pitch angle or azimuth angle or generator

torque. Thus the sequence of steps claimed in claim 1 of the impugned patent, is same as the sequence of steps disclosed in US '041 patent. As

argued by the applicant, if the US '041 patent teaches or shows a change in one operational setting within pre-defined limits, at definite intervals of

time, in respect of one external ambient condition to control the rotor speed to achieve the maximum wind power output and if the IN '910 patent also

claims the same sequence of steps, where is the technical advance in this patent and in the absence of any such technical advance, the later invention

will be considered to be only obvious and any skilled person in the art with average knowledge of skills will be able to visualize the details of the

invention or in other words, with his average and normal skill will be able to arrive at this invention. It is a fact that for every change in external

condition, there would be a change or variation in the operational settings, which would affect the rotor speed and it needs to be set right to achieve

the maximum power output. if the actual measured power output after the change in setting is found to be less than the predicted power, then it is

quite natural and normal also to any skilled person in the art to do the necessary changes within the normal ranges (pre-defined limits) an optimum

setting to achieve or identify that condition due to which there would be an optimum power output. The Respondent submitted that there can be trial

and error setting process which would be the natural and normal course of action to any person skilled in the art, when these US '041 patent and US

'631 patent are available to their knowledge. In view of this there is no inventive step in the method claimed in the impugned patent and the invention

claimed is obvious to any skilled person in the Article

67. The Respondents contention that there is no motivation or any scope for optimization in the US '041 patent is not correct and further their

contention to show that all the elements claimed in the dependent claims are

present in one prior art, this condition will not apply to inventive step. As per the Act, all the claims in a complete specification will have one inventive step or making to be group of inventive features to have a single inventive concept. Since that step has been shown to be obvious, all the subsidiary claims dependent on the principal claim 1, which tend to add only minor variations of features will not impart any inventive step to the dependent claims.

68. The test to ascertain whether an invention involves an inventive step is expressed in Halsbury Laws of England as: 'was it for practical purposes obvious to the skilled worker, in the field concerned, in the state of knowledge existing at the date of the patent to be found in the literature then available to him, that he should or would make the invention the subject of the claim concerned.' In other words, the question to be answered in determining inventive step is 'Would a non-inventive mind have thought of the alleged invention?' If the answer is 'no', then the invention is non-obvious. If the patent claimed merely includes the development of some existing trade, in the sense that it is a development as would suggest itself to an ordinary person skilled in the art, it would fail the test of non-obviousness.

69. We shall consider a few case laws as regards obviousness or inventive step and particular reference is made to M/s. Bishwanath Prasad Radhey Shyam v. Hindustan Metal Industries, (1979) 2 SCC 511, where it was held that, "'was it for practical purposes obvious to a skilled worker, in the field concerned, in the state of the knowledge existing at the date of the patent to be found in the literature then available to him, that he would or should make the invention the subject of the claim concerned?'

70. Buckley LJ in Valensi v. British Radio Corporation 1973 RPC 337, held that, "'The hypothetical addressee is not a person of exceptional skill and knowledge, and he is not to be expected to exercise any invention nor any prolonged research, enquiry or experiment. He must, however, be prepared to display a reasonable degree of skill and common knowledge of the art in making trials and to correct obvious errors in the specification if a means of correcting them can readily be found and arrive at the result...

71. A patent will be invalid for lack of inventive step if the invention claimed in it was obvious to a person skilled in the art having regard to the state of the art at the priority date. The familiar structured approach to the assessment

of allegations of obviousness first articulated by the Court of Appeal in

Windsurfing International Inc v. Tabur Marine (Great Britain) Ltd 1985 RPC 59; It is convenient to address the question of obviousness by using the

structured approach as explained by the Court of Appeal in *Pozzoli v. BDMO* 2007 EWCA 588 : 2007 FSR 37. This involves the following steps:

1 Identify the notional 'person skilled in the art' and the relevant common general knowledge of that person

2 Identify the inventive concept of the claim in question or, if it cannot be done, construe it.

3 Identify if any the differences existing between the matters cited as forming state of the art and the inventive concept of the claim or the claim as construed.

4 Ask whether, when 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?

72. The first step is; ""who is the notional person skilled in the art in this field of wind power installation technology?

a. This is a person who is likely to have a practical interest in the subject matter of the invention. The relevant common general knowledge of that

person must be such as the knowledge of electrical engineering with a broad specialisation or requisite experience in the wind power technology. In

this case, both the applicant and the Respondent are the person skilled in the art or otherwise a person having the knowledge of motors and generators

with a little knowledge of wind power installations.

73. The second step is; ""Identify the inventive concept of the claim in question

a. The inventive concept or portion is normally present in the succeeding portion after the words 'characterised in that' in the principal claim. Here

what is present as the inventive portion is:

i. Detect the change in the ambient or operating conditions ii. Time intervals are chosen or variations are performed in response to the above ambient

or operating conditions iii. At least one operational setting is varied within predefined limits.

b. The above steps are the main ones in the invented process or the method of control of the wind turbine.

74. The third step is; ""Identify if any the differences existing between the matters cited as forming state of the art and the inventive concept of the claim or the claim as construed"".

a. The inventive concept construed is: ""the variation in operational setting relates to pitch angle of the blade, or azimuth angle of the nacelle or generator torque which is evident from the description in page 3 of the specification; change in the ambient condition is the change in wind direction as is evident from the description in page 10 of the specification; Time intervals are varied or performed in response to the above ambient or operating conditions as evident from page 3 of the specification; all these steps are done in the said turbine having a controller which is microprocessor and a memory device to execute the said controlling method for effecting such variations as explained in page 4 of the patent specification.

b. From the cited document, viz, US '041 patent in Col.7 lines 1 to 10 mentions about the pre definable time period Δt , which is of minimum 50 milliseconds and being programmed for the prediction of the wind speed. Thus according to every pre-definable time period of Δt , wind speed will be predicted and for every wind speed predicted there is a corresponding change in the operational settings which is evident from the Col.3 lines 1 to 10, there is the controller provided to perform or monitor all these and to control the rotor speed and to achieve the maximum power output from the wind power machine.

c. ""Now to identify if any the differences existing between the matters cited as forming state of the art and the inventive concept of the claim or the claim as construed"". Here it is observed that, change in the external operating conditions mean only the change in the wind speed and that is being detected at a pre-finable time period, which performs the change in the operational settings to control the rotor speed and finally to maximise the power output. Therefore from these lines pointed out in the US '041 patent and the inventive features as construed here according to the principal claim 1, no difference in the steps of the method of control of the wind turbine could be perceived or noticed.

75. The last step is: ""ask whether, when 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?

a. For the lack of inventive step in the invention claimed when it is obvious to a person skilled in the art having regard to the state of the art at the

priority date of the patent application, that patent will become invalid.

b. In the instant case, at the date of the patent, the US '041 patent and the US'631 patent are already known to the public knowledge and the person

skilled in the art is aware of the same and any skilled person in the art, though he is unaware of this patent, but with his average knowledge of skills in

the field of electrical technology and their application in the field of wind power installation technology, will certainly be able to visualize the details of

the invention or in other words, with his average and normal skill will be able to arrive at this invention, because of the fact that it is normal technical

knowledge, that in the field of wind power machines, for every change in external condition, such as wind speed, there would be a change or variation

in the operational settings, which would affect the rotor speed and it needs to be set right to achieve the maximum power output and now if the actual

measured power output after the change in setting is found to be less than the predicted power, then it is quite natural and normal also to any skilled

person in the art to do the necessary changes within the normal ranges (pre-defined limits) an optimum setting to achieve or identify that condition due

to which there would be an optimum power output.

c. The Respondent submitted that there can be trial and error setting process during operation, but that would be a natural and normal course of action

within the knowledge of any such person skilled in the art, as mentioned above, so much so, when these US '041 patent and US '631 patent are

available to his knowledge.

d. While considering the Respondent's contention that ""there is no motivation or any scope for optimization in the US '041 patent"", it is perceivably

clear that the drawbacks or the problems, if any, faced during the wind mill operation, shall only have to become the motivation for finding out a

remedy to solve the said problem. When the basic technology has already reached a particular, probably, a saturated level or point, for any

optimization, then in any research made in that field should have or show any technical advance to the present level. In the absence of any such

technical advance in the work done, compared to the knowledge present and

available in the state of art, then that piece of work does not deserve the right of any monopoly.

e. In view of this analysis and the finding herein, it is very clear there is no inventive step in the method claimed in the impugned patent and the invention claimed is obvious to any skilled person in the Article

76. It was argued that the US '631 patent discloses the speed control of the rotor of the doubly fed machine used in wind turbine by varying its speed

accordingly till the maximum power output is reached. Here the rotor speed variation is an operational setting of the wind turbine. Similarly the US

'041 patent mentions about the pre-definable time period Δt , which is of minimum 50 milliseconds and being programmed for the prediction of the wind

speed. Thus wind speed will be predicted according to every pre-definable time period of Δt , and for every wind speed predicted there is a

corresponding change in the operational settings. A controller is provided to perform or monitor all these operational settings and to control the rotor

speed and to achieve the maximum power output from the wind power machine. Moreover the figs. 5a, 5b and 5c of the US '041 patent clearly

indicate as to how the variation of the operational settings is done. The variation in speed corresponding to that of such variations in the operational

settings, as indicated by the graphs in the said figures show the variations in time intervals as well. As all the above settings are dependent on the wind

speed, it can be said that these variations can be said to be in response to the wind speed. Therefore combining the said two cited US patents, a

person skilled in the art can arrive at the invention claimed in the claim 1 of the impugned patent. Hence the invention cannot be said to have any

inventive step and the invention is obvious.

77. It is very clearly ruled in General Mills inc. (Millers) application (1972) RPC 709 at 721 that if the attack on the ground of anticipation by

publication in a prior specification fails, it may also fail on the ground of obviousness based on the same document. Ground of obviousness or lack of

inventive step ground for revocation, taken by the applicant also goes in his favour because the applicant had succeeded in establishing the ground of

Novelty and anticipation by prior publication, having taken a US patent document for anticipation as well as the ground of obviousness. Hence, the

applicant is seen to have succeeded in proving the ground of lack of inventive

step or obviousness.

78. Not patentable under Section 3(k) of the Act

Applicants contend that the steps given in the method of controlling the wind turbine is a set or series of rules for the control mechanism and they

prescribe an order as to how and when the variation of operational settings would be carried out based on the external ambient conditions. All the

above steps have been provided for obtaining the optimum power output from the wind turbine. The Respondent submits that neither the granted

claims contain a set of rules nor the granted claims seek a protection for a set of rules. What is claimed is a method steps for controlling a wind

turbine, based on the external wind speed, at pre-defined variations in intervals of time, variations are effected in the operational settings to control the

rotor speed, to finally achieve the maximum power output. In this connection they referred to the famous Vicom case/ computer related invention

decided in EPO (1987) 1 OJEP 14 (T208/84).

79. Windmills are normally erected in the manner of wind farm so as to have larger generation of power output in the order of Mega Watts Range.

That being the position in a wind farm which is normally away from the normal reaches of the public, any controlling of the wind machine in a gusty

wind times, it is always preferable to use the automatic control units like the computers or any other micro processors arranged, or housed in the

control panels of the wind mill installation or otherwise in the control instrumentation panel intended for their control. Here again the controlling of the

wind turbine cannot be done manually, neither the settings can be set or varied by manual process. All these have to be done at very short intervals of

time, preferably in milliseconds range, the variation change in the operational setting of blade pitch angle or azimuth angle etc, which is possible only by

using the advanced computer technology, which would read the signal from the external conditions and carry out the corrections in its internal

operating units. This is normally a computer operated or computer controlled technical instrumentation processing of the utilities to achieve the target

in an automatic fashion and this technical process control associated with or directed to a computer set up to operate in accordance with a specified

program (whether by means of hardware or software) for controlling or carrying out a technical process control such as the above, cannot be

regarded as relating to a computer program per se or a set of rules of procedure like algorithms and thus are not objectionable from the point of view of

patentability, more so when the claims do not claim, or contain any algorithm or its set of rules as such, but only comprise of some process steps to

carry out a technical process or achieve a technical effect finally the maximum power output by controlling the wind turbine. Hence the objection that

invention is not patentable under Section 3(k) fails or not valid.

80. Amendment of claims

Respondent in the revocation application came up with an unnumbered miscellaneous petition on 15-9-2010 with a revised set of claims, stating that

the amendments are merely directed to a combination of granted claims thereby limiting the scope of the claims and requested that the revised claims

filed under Section 58 of the Act may be considered rather than revoking the entire patent.

81. First the Respondent has filed these amendments, revising the claims, after the applicant's counsel has completed arguments on 14-9-2010. The

amendments which have been proposed must be complying with the requirements of Section 59 of the Act. Section 59 (1) of the Act reads as follows:

82. Hence from the above Section 59 of the Act, permissible amendments could be as follows:

- 1 Amendment must be by way disclaimer, correction, clarification or explanation;
- 2 The amendment must be for incorporation of actual fact; and
- 3 The effect of amendment should not enable the specification as amended to describe any matter not in substance disclosed or shown in the specification before amendment; or
- 4 That any claim of the specification as amended would fall wholly within the scope of the claim of the specification before the amendment,

83. Section 58 of the Act, gives the court the power, in revocation proceedings in which the validity of a patent is put in issue, to allow the proprietor of

the patent to amend the specification of the patent "in such manner, and subject to such terms ... as the court ... thinks fit". Plainly seen, this is a wide

statutory discretion. The general principles on which such discretion should be exercised were summarised by Aldous J in *Smith, Kline & French*

Laboratories Ltd v. Evans Medical Ltd 1989 FSR 561 as follows:

First, the onus to establish that amendment should be allowed is upon the patentee and full disclosure must be made of all relevant matters. If there is a failure to disclose all the relevant matters, amendment will be refused.

Secondly, amendment will be allowed provided the amendments are permitted under the Act and no circumstances arise which would lead the court to refuse the amendment.

Thirdly, it is in the public interest that amendment is sought promptly. Thus, in cases where a patentee delays for an unreasonable period before seeking amendment, it will not be allowed unless the patentee shows reasonable grounds for his delay. Such includes cases where a patentee believed that amendment was not necessary and had reasonable grounds for that belief.

Fourthly, a patentee who seeks to obtain an unfair advantage from a patent, which he knows or should have known should be amended, will not be allowed to amend. Such a case is where a patentee threatens an infringer with his unamended patent after he knows or should have known of the need to amend.

Fifthly, the court is concerned with the conduct of the patentee and not with the merit of the invention.

84. Accordingly checking the principles before exercising such discretion, we find that the onus has not been established by the Respondent who is the

patentee, making full disclosure of the invention, as to why it is done, thus meeting the requirements of the provisions of law in force. The patent was

filed on 5-12- 2003 claiming the priority date of 7-6-2001 and was granted on 23-2-2007. The application for revocation was filed only on 22-4-2009

raising the question of patentability under the law and the patentee who is the Respondent in the revocation application has not sought necessary

amendments immediately within a reasonable period, to avert such patentability issue, but the necessity of which never arose until the same was

challenged now by the applicant herein. In fact during the hearing, the applicant's counsel confirmed that the Respondent has already filed an

infringement suit against them in the Delhi high Court based on the granted patent which is pending. The amendments have been filed after the

applicant's counsel has completed arguments on 14-9-2010. The amendment sought has not been made in a prompt manner. The patentee, who is the

Respondent herein, has delayed for an unreasonable period before seeking this

amendment of the claims. The Respondent has not shown any reasonable grounds for his delay. This shows the conduct of the party, viz, the Respondent and when it is causing concern to the Court while considering the matter, the merits of the amendment do not find a place for allowing the same. Moreover the revised claim 1 of the specification as amended should fall wholly within the scope of the claim of the specification before the amendment. When these requirements have not been complied with, in a sincere and genuine manner by the Respondent, we do not find any reason for allowing the amendment sought and accordingly, the amendments sought have not been allowed.

85. Further it is necessary to record here that despite being given time and again since March 2010 and again in July and also on 9th August 2010, the Respondent has not produced any affidavit of the expert to counter the expert affidavits of the applicant and on clarification by us during the hearing, the Respondent's counsel submitted they will not be submitting or relying on any expert affidavit or evidence. In view of this and to have equality of opportunity and also in view of natural justice to both the applicants and Respondents in this revocation application, we do not intend to consider even the expert evidence produced by the applicant and only the revocation application, counter statement and rejoinder to the same and the oral submissions of both the sides have been considered.

86. Conclusions

1 US '041 patent, anticipates the invention claimed in claim 1 very clearly and claim 1 fails because of anticipation by way prior publication against novelty.

2 The claim 2 stands anticipated by the US '041 patent and therefore claim 2 fails or is invalid.

3 The claim 3 is anticipated by the said US '041 patent and so the claim 3 fails and is invalid.

4. The claim 5 stands clearly anticipated by the US '041 patent and hence the claim 5 fails and is invalid.

5 Claim 8 is dependent on claim 1 and as worded it is redundant. So this claim 8 is found to be invalid when the claim 1 has been found to be anticipated and is invalid.

6 Claim 9 claims all those parameters such as operational setting, direction and amount of variation. Computer stores and analyses these parameters

and the monitoring of the wind turbine's operation is done by the unit 42, parameter schedule as shown in the fig. 2 and as well as in fig. 4 of the US

'041 patent and consequently the claim 9 is found to be invalid.

7 When the main principal claim1 is found to be anticipated by the US '041 patent the claim1 fails. Then the subordinate claims which are dependent

on the principal claim1 would also become invalid and does not stand as a separate independent or individual claim as no exclusive technical

improvement in the feature could be shown therein.

8 Obviousness a. Comparing the inventive features in the US '041 patent and the inventive features as construed from the principal claim 1, no

difference in the steps of the method of control of the wind turbine could be perceived or noticed.

9. Obviousness

a. Comparing the inventive features in the US '041 patent and the inventive features as

b. Invention claimed would be obvious to a person skilled in the art having regard to the state of the art, when no technical advance over the prior art,

is established, that patent lack inventive step and will become invalid.

c. In the instant case, at the date of the patent, the US '041 patent and the US'631 patent are already known to the public knowledge and the person

skilled in the art is aware of the same and any skilled person in the art, though he is unaware of this patent, but with his average knowledge and skill in

the field of relevant technology will certainly be able to visualize the details of the invention and will be able to arrive at this invention, as this is a

known technical knowledge, that in the field of wind power machines, for every change in external condition, such as wind speed, there would be a

change or variation in the operational settings, which would affect the rotor speed and it needs to be set right to achieve the maximum power output

and now if the actual measured power output after the change in setting is found to be less than the predicted power, then it is quite natural and

normal also to any skilled person in the art to do the necessary changes within the normal ranges (pre-defined limits) an optimum setting to achieve or

identify that condition due to which there would be an optimum power output.

d. In view of this analysis and the finding herein, it is very clear there is no inventive step in the method claimed in the impugned patent and the

invention claimed is obvious to any skilled person in the Article

9 Therefore combining the said two cited US patents, a person skilled in the art can arrive at the invention claimed in the claim 1 of the impugned

patent. Hence the invention cannot be said to have any inventive step and the invention is obvious.

10 Objection that the invention is not patentable under Section 3(k) fails or not valid.

11 The Respondent has not established the onus to amend the claims in meeting the requirements of law in force. The application for revocation was

filed only recently raising the question of patentability and the Respondent has not sought the amendments immediately to avert revocation issue.

Amendments have been filed after the applicant completed oral submissions and amendment has not been prompt made. The delay for an

unreasonable period before seeking this amendment of the claims has not been shown which tells about the conduct of the party, causing concern to

the Court while considering the amendments, they do not find to be allowable. Moreover the revised amended claim 1 does not fall wholly within the

scope of the claim of the specification before the amendment. These requirements have not been met, in a sincere and genuine manner by

Respondent. We do not find any reason for refusing the amendment sought and accordingly, the amendments sought have not been allowed.

87. Hence after taking into consideration of the above said case laws and findings and analysis made herein above, together with foregoing statements

in the conclusions, we hereby allow the application for the revocation of the patent.M.P. No. 8/2010 for stay has been dismissed as nothing remains in

the miscellaneous petition and also that the main application has been disposed of. M.P. No. 36/2010 for early hearing is dismissed as infructuous. As

per the directions of the Hon'ble High Court of Madras, all the miscellaneous petitions have been heard and decided along with the main application.

Consequently the patent granted to the Respondent is revoked and we direct the Controller of Patents to remove the patent No. 197949 from the

register of patents. The parties shall bear their own costs.