Communication Components Antenna Inc. vs Mobi Antenna Technologies(Shenzhen) ... on 4 February, 2022

Author: Sanjeev Narula

Bench: Sanjeev Narula

NEUTRAL CITATION NO: 2022/DHC/000855

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* IN THE HIGH COURT OF DELHI AT NEW DELHI
Date of Decision: 4th February, 20
+ CS(COMM) 977/2016, CC(COMM) 38/2017 & I.As. 10524/2018,
16746/2021

COMMUNICATION COMPONENTS ANTENNA INC..... Plaintiff
Through: Mr. J. Sai Deepak, Mr. Sidhant Goe
Mr. Mohit Goel, Mr. Aditya Goel, M
Avinash Kumar Sharma and Mr.
Deepankar Mishra, Advocates.

versus

MOBI ANTENNA TECHNOLOGIES (SHENZHEN)
CO. LTD ..... Defendant
Through: None.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA
JUDGMENT

[VIA VIDEO CONFERENCING] SANJEEV NARULA, J. (Oral):

1. In terms of the Order dated 12th January, 2022, the Plaintiff has filed an Affidavit of Service dated 28th January, 2022, enclosing therewith proof of service through e-mail, speed post as well courier tracking reports. The courier consignment has not been accepted by the addressee. In view of the above, Defendants stand served. Since there is no appearance on their behalf, they are proceeded against ex-parte.

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NEUTRAL CITATION NO: 2022/DHC/000855

2. Vide order dated 4th February, 2016, the following issues were framed:

"(i) Whether the impugned Patent No.IN240893 is invalid in view of any of the grounds raised in counterclaim No.38/2012? OPCC

(ii) Whether the defendants have infringed any of the claim of the impugned Patent No.IN240893? OPP

(iii) If the answer to issue no.(ii) is in affirmative, what is the relief that the plaintiff is entitled to, and for what period? OPP

(iv) Relief."

The afore-noted Issue No. (i) was taken up first and hearing on Issue No. (ii) and (iii) was deferred. In the judgment dated 10th August, 2021, the Court while rendering findings on Issue No. (i), rejected all grounds urged by the Defendants and upheld the patent. However, at the same time, the Court on its own, proceeded to analyse whether the subject patent was liable to be revoked under Sections 64(1)(h) and (k) of the Patents Act, 1970 [hereinafter, "the Act"] in the context of Section 10 of the Act. On this aspect, findings were rendered against Plaintiff and it was concluded that the subject patent i.e., 'IN240893' - was invalid and liable to be revoked under Section 64(1)(h) and (k) of the said Act.

3. When the matter was carried out in appeal, the Division Bench vide order dated 1st December, 2021,1 set-aside the Single Judge's judgement and made several observations as to how the Court should consider the grounds of revocation. The Division Bench directed the Single Judge to frame a specific issue, and accordingly, an additional issue was framed, which reads as follows:

"(i) Whether the Plaintiff's Patent Number IN 240893 is liable to be revoked on the grounds under Sections 64(1)(h) or 64(1)(k) of the In RFA(OS)(COMM.) 06/2021 dated 1st December, 2021.

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NEUTRAL CITATION NO: 2022/DHC/000855 Patents Act, 1970 in the context of Section 10 of the Patents Act, 1970? OPCC."

The afore-noted issue was framed in the presence of the Defendant's counsel. However, the said counsel subsequently took discharge, and summons were re-issued to the Defendant, and now, as noted above, despite service, there is no appearance on their behalf.

ARGUMENTS ADVANCED

4. Mr. J. Sai Deepak, counsel for the Plaintiff, has been heard at length on the afore-noted additional issue. Mr. Sai Deepak argues that the onus of proof on the issue lies on the Defendants/ counter-claimants. The ground for revocation of patent under Sections 64(1)(h) and (k) of the Act has to be premised on facts. However, in absence of any foundation in pleadings or evidence, the

issue stands disproved against the Defendants. Mr. Sai Deepak highlights that during the course of arguments before the Division Bench, the Defendants had admitted that there were no pleadings on this issue in the written statement or the counter-claim. Rather, in the appeal proceedings, counsel for the Defendant, admitted the above fact. The counsel for Defendant took a categorical stand that the issue of revocation under Sections 64(1)(h) and (k) of the Act was purely legal, and further, made an unqualified statement that no further pleadings would be made or evidence be led on the afore-noted issue and the Single Judge would decide this issue as a pure question of law.

5. In this background, Mr. Sai Deepak states that since the Defendant voluntarily elected to argue on the issue relating to revocation as a purely legal issue, it is beyond doubt that there is no foundational material on record in the form of pleadings or evidence to support to their case. In the above This is a digitally signed Judgement.

NEUTRAL CITATION NO: 2022/DHC/000855 circumstances, the issue must be decided in favour of the Plaintiff.

6. It is also argued that the ground of revocation under Section 64(1)(h) and (k) cannot be argued as a pure question of law, and thus, on this short- ground alone, findings have to be returned against the counter-claimant. The mandate of law and jurisprudence on the subject is well-settled. The revocation of patent can only be for grounds enumerated under Section 64 of the Act - which have to be founded on facts and proved by placing supporting material before the Court. On this aspect, Mr. Sai Deepak has taken the Court through the relevant provisions of the Act, certain judgements of the Courts and commentaries of distinguished authors on the subject.

7. Mr. Sai Deepak stresses that the issue qua revocation as framed, firstly, requires pleadings - affording an opportunity to the patentee to submit its stand thereon; following which, parties would then be relegated to a trial - giving them an opportunity to furnish evidence. In absence thereof, Mr. Sai Deepak submits that as a pure question of law, the subject patent cannot be revoked.

ANALYSIS

8. The Court has considered the contentions urged by Mr. Sai Deepak. Concededly, there are no pleadings or evidence led on grounds of insufficiency of disclosure by the Defendants. In fact, this Court vide judgment dated 10th August, 2021, in paragraph no. 32 specifically takes note that Defendant No. 1 had not pleaded the ground of insufficiency of disclosure under Section 64(1)(h) of the Act.

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NEUTRAL CITATION NO: 2022/DHC/000855

9. The question that arises for consideration is whether the additional issue can be argued as question of law and whether the patent can be revoked on basis of terms of the patent itself. The relevant provisions reads as follows:

"64. Revocation of patents.

(1) Subject to the provisions contained in this Act, a patent, whether granted before or after the commencement of this Act, may, [be revoked on a petition of any person interested or of the Central Government by the Appellate Board or on a counter-claim in a suit for infringement of the patent by the High Court] on any of the following grounds that is to say- [...]

(h) that the complete specification does not sufficiently and fairly describe the invention and the method by which it is to be performed, that is to say, that the description of the method or the instructions for the working of the invention as contained in the complete specification are not by themselves sufficient to enable a person in India possessing average skill in, and average knowledge of, the art to which the invention relates, to work the invention, or that it does not disclose the best method of performing it which was known to the applicant for the patent and for which he was entitled to claim protection; [...]

(k) that the subject of any claim of the complete specification is not patentable under this Act;

10. A claim in a patent is required to be construed in light of accompanying complete specifications. The role of such complete specifications, is to "teach" (i) what the invention was; (ii) how the invention was to be made; and

(iii) how the invention was to be used. 2 The sufficient disclosure of the invention in the patent specification is the consideration for which a patent is granted. The criteria determinative of the sufficiency of disclosure, has been demonstrated during the processing of the patent application, resulting in the grant of the patent. The same has to be construed impartially, when any of the grounds enumerated under Section 64 of the Act are invoked. The Court would be generally slow to construe patent specifications against the patentee, F. Hoffman La Roche v. Cipla 2009 (110) DRJ 452 (DB).

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NEUTRAL CITATION NO: 2022/DHC/000855 unless it is shown that, that claims do not meet the requirement of law.

11. The suit patent was not challenged by the Defendant in the pre-grant or post-grant stage. Now, faced with the infringement suit, the Defendant has set-up a plea of invalidity - which must be established by clear and conclusive evidence. Thus, the onus is on the Defendant to establish that the suit patent is liable for revocation on the ground of invalidity. In the instant case, as already noted above, there is no counter-claim for revocation on the afore- noted grounds. Nonetheless, the Defendant seeks revocation by relying upon the patent specifications itself - in other words, Defendant would contend that

(i) the specifications of the patent does not sufficiently and fairly describe the invention and method by which it is to be performed; or (ii) the description of the method or the instructions for the working of the invention, as contained in the complete specification, are not by themselves sufficient to enable a person in India possessing average skill in, and average knowledge of, the art to which the invention relates, to work the invention; or (iii) it does not disclose the best method of performing it, which was known to the applicant of the patent and for which he was entitled to claim protection; which renders it liable to revocation.

12. The afore-noted grounds deal with the construction of specifications of patent. In the instant case, the claim construction which had been undertaken during the examination of the patent application, is again being questioned. Although, the mere grant of a patent is not necessarily a prima facie indicator of its validity, it does not mean the patent has to be read as 'inherently suspicious'. To dislodge a patent before a court of law, the scrutiny of claim This is a digitally signed Judgement.

NEUTRAL CITATION NO: 2022/DHC/000855 construction for revocation of patent would have to be tested on a different footing. The assertion made by the Defendant has to be proved in accordance with the law. The applicant - seeking revocation of a patent - has the onus to explain in its pleadings as to how the claim construction renders it liable for revocation. One of the ingredients for revocation viz. insufficiency of patent specifications, as found in Section 64(1)(h), is to be interpreted from the standpoint of "a person possessing average skill in, and average knowledge of, the art to which the invention relates." This would necessarily mean that a party seeking revocation of a patent - must allege and show insufficiency of disclosure and specifically point out such deficiency and/or inadequacies in the patent specifications. Pertinently, while assessing the sufficiency of disclosure, the patentee should be afforded an opportunity to demonstrate that the ground of revocation is not sustainable on facts by leading evidence, and thus arises the requirement of specific pleadings. With no evidence led on the grounds of insufficiency of disclosure, determination of the grounds of revocation would not be feasible for the Court, as pure a question of law. Such grounds for revocation cannot be determined plainly by reading the patent specifications. Rather, as noted above, it would inherently require determination whether such "complete specification are not by themselves sufficient to enable a person in India possessing average skill in, and average knowledge of, the art to which the invention relates, to work the invention." For claim construction, parties may also rely upon the opinion of an "expert" or "person skilled in the art", to assist the Court for determination of patentability. The alleged insufficiency of disclosure has to therefore be tested, or seen through, the eyes of a person having the traits described in Section 64(1)(h) of the Act. This means that the opinion of an expert/ a person This is a digitally signed Judgement.

NEUTRAL CITATION NO: 2022/DHC/000855 skilled in the art, may become relevant to conclude whether a patent is insufficient or not.

13. Thus, it cannot be said that insufficiency of a patent is purely a question of law that could be decided by the patent specifications, rather, at best, by reading the patent claim specifications; a doubt may be raised qua the validity of the patent. The same would still require determination and

enquiry into further facts, on which no final opinion can be formed only on the basis of a prima facie view. With the categorical stand of the Defendant, the ground(s) of insufficiency of disclosure have to be decided on the basis of existing pleadings and evidence led by the Defendant/ Counter-claimant, the inevitable conclusion has to be against the Defendant. On this aspect, it would be appropriate to refer to the extracts in the 'Law of Patents' by Terrell, 3 wherein the author while relying upon judgments from Courts in the United Kingdom, has expressly the following view:

> "Whether or not the teaching of a specification is sufficient to enable the invention to be performed across the full width of the claim is a question of fact, the answer to which is highly sensitive to the nature of the invention and also depends upon the attributes of the skilled person and the effort which he can reasonably be required to apply".

Further, it is also apposite to rely upon the extracts from the 'Report on the Revisions of Patent Law' by Justice Shri. N. Rajagopala Iyengar,4 the relevant extract of which is as follows:

> "575. I have revised the language of each one of the grounds, besides including new ones needed to implement my other recommendations requiring applicants to furnish information regarding the fate of corresponding applications filed in other countries (Section 7A), a point of Terrell, Law of Patents, (Seventeenth Edition), [Pg. 416 - 417].
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> 'Report on the Revision of the Patent Law', Rajagopal Ayyangar Committee, September 1959, [pg. 188- 189].
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> NEUTRAL CITATION NO: 2022/DHC/000855 added importance in view of the expanded scope of anticipating publications recommended by me. In general the language of the several grounds has been adopted from that used in the U.K. Patents Act, mainly for the reason that their interpretation had been the subject of judicial decision. I however desire to draw attention to a slight change which I have introduced in ground (h) relating to insufficiency of description of a complete specification, viz., the additional of the following :-
>
> "that the description of the method or the instructions for the working of the invention as contained in the complete specification are not by themselves sufficient to enable a person in India possessing average skill in, and average knowledge of, the art to which the invention relates, to work the invention."

576. These words no doubt merely summarise the effect of the decisions in the U.K. as regards the sufficiency of the instruction which a complete specification ought to contain, but I believe that their inclusion in the grounds would serve to emphasise the purpose in law of a specification. Besides, there is a tendency for patent specifications and instructions for working, which have been drawn up

for being filed in connection with applications for patents in the more advanced industrial countries being filed in the same form in India. This proves a handicap by reason of the instructions which might suffice to work the invention in a country where the art has been highly developed, not conveying information which is requisite for enabling the average Indian technician to effect the working. Though the decisions on sufficiency of description relate the required quantum of instruction to the state of the art in the country to whose technicians the specification is addressed, I consider that the iteration of this requirement would induce foreign applications for patents to pay heed to this feature and also focus the attention of the courts to have regard to the state of the art in this country in judging of the sufficiency of description."

[Emphasis Supplied]

14. In view of the foregoing, the Court is of the view that since the additional issue was premised on a question of fact, it was necessary for the Defendant to make a specific pleading to that effect and lead evidence in support thereof. In the absence of such pleadings and no evidence having been led in this case, this Court cannot conclusively hold that IN240893 is insufficiently disclosed. Therefore, the issue has to be answered in favour of the Plaintiff, and against the Defendant.

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NEUTRAL CITATION NO: 2022/DHC/000855

15. This brings us the issue of infringement of patent. List for further consideration on 16th March, 2022.

16. On the said date, the Court would also consider Mr. J. Sai Deepak's submission regarding the issues of a certificate of validity of specifications under Section 113 of the Act.

SANJEEV NARULA, J FEBRUARY 4, 2022 d.negi (corrected and released on 08th March, 2022) This is a digitally signed Judgement.