IN THE HIGH COURT AT CALCUTTA

DATED: 08.02.1974

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THE HONOURABLE MR. JUSTICE SABYASACHI MUKHARJI

Raytheon Company ... Appellant

Vs.

The Controller of Patents and Designs and others ... Respondents

JUDGMENT

Sabyasachi Mukharji, J.

1. This is an appeal to the High Court under the Patents Act, 1970. The order challenged in this appeal is regarding the application for Patent No. 133687 filed on November 19, 1971, by Raytheon company, of Lexington, County of Middlesex, Commonwealth of Massachusetts, United States of America. It appears that the said company is a company organised and existing under the laws of the State of Delaware, United States of America. The application related to Patent in respect of what is called "Imaging System". The system is described in the words of the application, inter alia, as follows:--

> "This invention concerns an imaging system suitable for use with and, more particularly, to radiation characterized by the high energy particles, particularly high energy photons such as in gamma radiation.
>
> "....
>
> According to the present invention, there is provided an imaging system for providing an image of an object from which quanta of radiation are emitted sequentially, comprising coding means for causing the emitted quanta to be spatially coded in a predetermined manner with the spatial code displaced in accordance with the location from which each quantum is emitted, and decoding means responsive to the spatially coded quanta to effect an inverse

> decoding operation and to provide an image whose points are accumulated in accordance with the locations from which the quanta are emitted.
>
> In one embodiment of the invention, the spatial modulation of the radiation is accomplished by means of a mask or plate having regions which are relatively transparent and regions which are opaque to the radiation. .....
>
> A detector assembly is positioned to intercept the radiant energy which in the case of gamma radiation comprises a sequence of photons, or quanta or radiant energy. An image of these rays is formed on the face of the detector assembly, the image being scrambled due to the spatial modulation. An image of the object itself is provided by scanning the scrambled image on the face of the detector assembly to provide a scan signal containing information relating to the locations of the various portions of the scrambled image. The scan signal is passed through a filter having a transfer function which is conjugate to the scan signal produced from a point source of radiation through the spatially coded mask, that is, the temporal impulse response function of the filter is the temporal inverse of the scan signal wave form, so that there is a correlation between the filter and the spatial modulation. Thus, for example, where the modulating elements have the form of a series of opaque and transparent regions of successively decreasing size, the scan signal has a form similar to that of a chirped radar signal where the frequency is linearly increasing; and accordingly, in this case the filter would have the form of a pulse compression filter providing differential delays between portions of the signal having differing frequencies. Thus, the image of radiant energy on the face of the detector assembly would be decoded and compressed into a series of points which are then displayed as the image of the object."

It appears that after this application the Deputy Controller of Patents and Designs had referred the matter to the Central Government as to its opinion whether the patent in any way touched, inventions relating to the production, control, use or disposal of atomic energy or the prospecting, mining, extraction, production, physical and chemical treatment, fabrication, enrichment, canning or use of any prescribed substance or radioactive substance or the ensuring of safety in atomic energy operations. The Central Government, it further appears, has expressed an opinion that the invention which was the subject-matter of the application related to an invention which was useful for or related to the production of, control, use or disposal, of atomic energy and therefore patent

could not be granted. The said opinion was expressed under the provisions of Section 20 of the Atomic Energy Act 1962. The relevant portions of the section, inter alia, provide as follows:--

> "Sec. 20. Special provisions as to inventions -- (1) As from the commencement of this Act, no patents shall be granted for inventions which in the opinion of the Central Government are useful for or relate to the production, control, use or disposal of atomic energy or the prospecting, mining, extraction, production, physical and chemical treatment, fabrication, enrichment, canning or use of any prescribed substance or radioactive substance or the ensuring of safety in atomic energy operation.
>
> (2).....
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> (3) The Central Government shall have the power to inspect at any time any pending patent application and specification before its acceptance and if it considers that the invention relates to atomic energy, to issue directions to the Controller of Patents and Designs to refuse the application on that ground.
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> (4) Any person, who has made an invention which he has reason to believe relates to atomic energy, shall communicate to the Central Government the nature and description of the invention.
>
> (5) .....
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> (6) The Controller of Patents and Degins shall have the power to refer any application to the Central Government for direction as to whether the invention is one relating to atomic energy and the direction given by the Central Government shall be final.
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> (7) .....
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> (8) Notwithstanding anything contained in the Indian Patents and Designs Act, 1911, the decision of the Central Government on points connected with or arising out of this section shall be final."

2. After the communication to the Deputy Controller of Patents and Designs by the Central Government intimating that in opinion of the Central Government the patent applied for should not be granted as mentioned hereinbefore, the Deputy Controller intimated to the appellant that the application was refused. The aforesaid order and/or communication of the Deputy Controller of Patents

and Designs dated July 19, 1972 is the subject-matter of challenge in this appeal. Appeal to the High Court is provided under Section 116 of the Patents Act, 1970, which is in the following terms:--

> "116. Appeals--(1) No appeal shall lie from any decision, order or direction made or issued under this Act by the Central Government, or from any act or order of the Controller for the purpose of giving effect to any such decision, order or direction.
>
> (2) Save as otherwise expressly provided in Sub-section (1), an appeal shall lie to a High Court from any decision, order or direction of the Controller under any of the following provisions, that is to say, Section 15, Section 16, Section 17, Section 18, Section 19, Section 20, Section 25, Section 27, Section 28, Section 51, Section 54, Section 57, Section 60, Section 61, Section 63, Sub-section (3) of Section 69, Section 78, Section 84, Section 86, Section 88(3), Section 89, Section 93, Section 96 and Section 97.
>
> (3) Every appeal under this section shall be in writing and shall be made within three months from the date of the decision, order or direction, as the case may be, of the Controller, or within such further time as the High Court may in accordance with the rules made by it under Section 158 allow."

The procedure for hearing of appeal is regulated by the provisions of Section 117. Counsel for the respondents took a preliminary objection before me that the appeal was not in proper form. It was submitted that if the appeal had been in proper form by petition then by affidavit it would have been possible for the respondents to state the facts which were necessary for the determination of the appeal. In the premises it was urged that the appeal was incompetent. Though there is good deal of substance in this submission made on behalf of the respondents, in the view I have taken of this appeal, I do not think it is necessary for me to express any opinion on this preliminary objection. In view of the fact, however, that the appeal was not in the form of the petition as required under the provisions of Section 117 I directed that the parties would be at liberty to file such documents before me as they may be advised appertaining to the record of this case which might be relevant for the determination of the appeal. Pursuant thereto the respondents have filed certain documents. I direct that these

documents which are with the enclosures to the letter dated February 2, 1974, written by the Joint Controller of Patents and Designs to the Solicitor for the Government of India, should be kept on record as part of records of this case. From the said documents it appears that on April 28, 1972 the Joint Controller of Patents and Designs had referred to the Under-Secretary to the Government of India, Department of Atomic Energy, and in which it was stated that the "Imaging system" for which an application had been made appeared to the Joint Controller to come within Sub-section (1) of Section 20 of the Atomic Energy Act, 1962, and accordingly he sought direction under Sub-section (6) of Section 20 of the said Act of the Central Government whether he should proceed with the said application or not. To this on July 12, 1972 the Under-Secretary to the Government of India communicated the following:--

> "I am directed to refer to your letter No. 14A/54/72-Pol. dated 28-4-1972 on the subject mentioned above and to say that the specification received with the application under reference has been examined. As the invention falls under Section 20(1) of the Atomic Energy Act, 1962 (Act 33 of 1962), it is NOT repeat NOT patentable."

Thereafter the impugned order of July 19, 1972 was passed by the Deputy Controller of Patents and Designs.

3. Counsel for the appellant contended before me, firstly, that the order in question of the Central Government was not an order in terms of Section 20(1) of the Atomic Energy Act, 1962, nor did the communication contain any direction as contemplated under Sub-section (6) of the said Act. It was submitted that there was no application of mind by the Central Government on the matters mentioned in Sub-section (1) of Sec-of Section 20, nor was any direction given as to whether the patent application was to be proceeded or not. It was urged that only the terms of the section had been quoted by the Central Government and opinion was expressed by the Central Government that the invention was not paten-table. In this connection reliance was placed on Kishori Mohan v. State of West Bengal, , in support of the proposition that where there was no application

of mind there was no decision given by the Central Government and as such the Controller of Patents and Designs should have ignored the purported expression of opinion by the Central Government.

4. So far as the contention that there was no direction under Sub-section (6) of Section 20 of the Atomic Energy Act, 1962 concerned, I am unable to accept the same. The Central Government in unequivocal terms has expressed the opinion that he invention was not patentable. It is true that the Central Government did not specifically add that the Controller or the Deputy Controller was not to grant the patent but, in my opinion, in substance and for all practical purposes that was the direction. Therefore, I must accept the position that there was a direction as contemplated in Sub-section (6) of Section 20 of the Atomic Energy Act, 1962. So far as the contention that there was non-application of mind by the Central Government is concerned I am of the view that that contention is not open in this appeal. That contention is not open for two reasons firstly, in view of Sub-section (1) of Section 116 of the Patents Act, 1970, and secondly, whether the opinion of the Central Government under Section 20(1) of the Atomic Energy Act was properly formed or not cannot, in my opinion, be the subject-matter of a collateral challenge in an appeal under the Patents Act, 1970. So long as the direction under Sub-section (6) stands, so far as the Controller of Patents and Designs is concerned he is bound to follow it and so far as the validity of that direction is concerned that is beyond challenge in an appeal under the Patents Act and more so specially in view of the specific provision of Sub-section (1) of Section 116 of the Patents Act, 1970. If the appellant is aggrieved by such direction or opinion or communication of the Central Government it is for the appellant to take such steps as he is entitled in law to challenge the propriety or the validity of the opinion or direction of the Central Government but this does not come within the purview of an appeal under the Patents Act, 1970. In the aforesaid view of the matter this contention of the appellant also must be rejected.

5. It was lastly contended that the Deputy Controller of Patents and Designs was in error in referring the matter to the Central Government for its opinion or direction without giving the appellant an opportunity of being heard or of making submission in respect thereto. My attention was drawn to provisions of Sections 65 and 80 of the Patents Act, 1970 and to Rule 21 of the Patents Rule as also to Section 4 of the Act. It was submitted that in referring the matter to Central Government the Deputy Controller of Patents and Designs was exercising a discretion and that discretion should have been exercised quasi-judicially and as such the order of the Deputy Controller of Patents and Designs was bad. I am unable to accept this contention. Section 65 of the Act cannot, in my opinion, have any application to the facts of this case. Section 65 is in Chapter XII of the Act dealing with surrender and revocation of Patents. Section 65 deals with the cases subsequent to the acceptance of the complete specification in accordance with Section 22 of the Act. That is not the case here. This position is undisputed. Section 80 when it speaks of the exercise of discretion it means the cases where the Controller or the Deputy Controller in exercise of his powers acts--but in cases where these authorities act or are obliged at the direction of the Central Government no question of exercise of discretion by the Controller arises. A reference to the terms of Rule 21 will make it clear that it can have no application to the facts of the case. Furthermore, in any event if there has been an opinion expressed by the Central Government this point is no loneer open be-cause whether the reference was bad or properly or improperly made if there has been any direction given by the Central Government so far as the Deputy Controller of Patents and Designs is concerned he is concluded by the said opinion or direction.

6. In the aforesaid view of the matter this appeal fails and is accordingly dismissed.

7. There will, however, be no order as to costs.