THE PATENT: AN UPSTAIRS FOR ONE'S EXCLUSIVE RIGHT

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Abstract:

A patent is a form of industrial 'or' intellectual property granted to a person who has invented a new and useful article or an improvement of an existing article or new process of making, selling and using the invention for which a patent has been granted for a limited period, after the expiry of the duration of patent, anybody can make use of the invention. Patent is not a new field but exists since ancient times and through many centuries its progress has been supported. In the year 1856, the Patent Act in India was established and it has been modified many times. In the year 1970, the major revision was done which satisfied the international norms of patentability such as novelty, inventive step and industrial application.

Keywords: Patent, invention and novelty.

1. INTRODUCTION :

MEANING OF PATENT:

The term patent has its origin in the term "letter's patient. It refer to grant of some privilege' property or authority made for the government or the sovereign of the country to one or more individuals. The instrument by which such grant is made is known as patent.

In the later part of the nineteenth century new inventions in the field of art, process, method or manner of manufacture, machinery, apparatuses and other substances, produced by manufacturers were on the increase and the inventors became very much interested that the inventions done by them should not be infringed by anyone else by copying them or by adopting the methods used by them. To save the interests of inventors, the then British rulers enacted the Indian Patents and Designs Act, 1911 (2 of 1911).

A patent is a form of industrial[1] 'or' intellectual property granted to a person who has invented a new and useful article or an improvement of an existing article or new process of making', selling and using the invention for which a patent has been granted for a limited period, after the expiry of the duration of patent, anybody can make use of the invention.

[1] P. Narayanan, "Patent Law" (1998) p. 2.

A patent being a creation of a statute is territorial in extent. A patent granted in one state can't be entered in another state unless the invention concerned is also patented in that state. An invention is the creation of intellect applied to capital and labour, to produce something new and useful. Such creation becomes the exclusive property of the inventor on grant of patent. The patentee's exclusive proprietary right over the invention is an intellectual property right. The owner of the "patient", i.e., patentee is entitled to deal with his such property in the same manner as owner of any other movable property deals with his property.

A patent when granted confers on the patentee the exclusive right to use the invention during the term of the patent, or as long as it is in force, on payment of the renewal fee from time to time. Patents have assumed an international character. The international convention for the protection of Industrial Property (i.e. Paris Convention) and the TRIPS Agreement of WTO provided patent rights for industrial property in all the countries of the union for the protection of industrial property. In India, the rights conferred on a patentee are purely statutory rights conferred by the Patents Act 1970 and as amended from time to time.

OBJECT AND SCOPE OF PATENT LAW

The patent law recognize the exclusive advantage out of his invention. This is to encourage the inventors to invest their creative faculties; knowing that inventions would be able to copy their inventions for certain period during which the respective inventors would have exclusive rights.

In the case of *Bishwaath Prasad Radhey Shyam v. Hindustan Metal Industries*; it has been held by the SC that 'the object of patent law is encourage scientific research' new technology and industrial progress.

Scope of patent law is also increasing with the passing of time. Inventions breeds inventions and thus the pace of inventive activity is accelerated. New products and process are creaked 'industry encouraged to manufacture new and better products and an expansion of the industry based upon the inventions takes place' thus employment; national wealth and higher living standard are created, the patent system are not created in the interests of the inventor but in the interest of the national economy. The rules and regulations of the patent system are not governed by civil or common law but by political economy.[2]

HISTORICAL PERSPCTIVE OF LAW OF PATENT IN INDIA

India was under the British rule for along period law in British India was modeled on the lines of British law in England ' A vent on law of 1474 provided a system for granting ten year privilege to inventors of new arts and machines statute of monopolies' 1624 allowed patent monopolities for 14 years. The industrial revolution in Britain brought many changes in the law relating to patents.

[2] Michael on Principal National Patent System, Vol. 1, p. 15, quoted in Ayyangar's Report (1959), para 21

The patent law amendment act[3] '1852 was enacted according to the new wave in the industry. Afterwards the patent act 1883 brought major changes in the U.K. there are statutory changes and revision in 1907 '1919'1932 in patent act ' the patent act 1977 establishes a patent system in the U.K. a modern lines act xv of 1859 provided a patent reglame for granting exclusive privileges to inventers in British India. In 1872 'the patent and designs protection act 1872 was enacted and later the inventions and designs act 1888 was made. Later a comprehensive legation was enacted through the patent's and designs (Amendment) act' 1950 brought many changes in act. It was respected by the patent act of 1970. Patents rules '1972 were made by the Central Govt.'

The patent act 1970 has been amended by the repealing and amending act '1974' the legislation provisions (Amendment) act the patent (Amendment) act '1999'and the patents (Amendment)act 2002 and the patent (Amendment) act 2005. The patent rule 1972 are being amended by the patents (Amendment) rules '1999 and the patent (Amendment)rules 2005 'all these amendments are made as the Govt of India accepted the TRIPS agreement of WTO.

The patents act '1970 extents to the whole of India and it shall come into force on such date as the Central Govt. may by the notification in the official gazette' appoint.[4]

In 1957 the government of India requested SHRI..JUSTICE N.RAJAGOPLA Ayanagar Dr. S. Venkateswaran to advise the government on the question of revision of the patent law Shri Ayyangar for effecting radical changes in the law. On the basis of this report a patent bill was introduced in the Lok Sabha in 1965 which ' however ; lapsed. Amended bill was introduced in 1967 which culminated in the patents act 1970 embodying the present law of patents in India. The draft patent rules was published in November 1971. The act and the final rules (with the exception of a few) provisions came into force on 20th April 1972. The expected provisions came into force on 1st April 1978.

PRINCIPLES UNDERLYING THE PATENT LAW :

Invention must be new, useful and non-obvious:

It is a fundamental principal of new and useful and which have industrial application.[5] The validity of a patent is not guaranteed by the act. Various checks have been provided to prevent an invalid patent being granted. Thus the patent office examines an application for the potentiality of the invention[6] and controller of patent has vast power to refuse a patent at various grounds. If the application is passed; patent will be granted 'but its validity can be challenged before the various grounds in refection or infringement proceeding.

[3] P. Naryanan, "Patent Law" (1998) p. 4
[4] P. Naryanan, "Patent Law" (1998) p. 4
[5] P. Naryanan, "Patent Law" (1998) p. 6
[6] P. Naryanan, "Patent Law" (1998) p. 7

The invention must be non-obvious to a person possessed of average skilled in the art cannot be patented. For instance, an invention in carpentry may be non-obvious to a layman but it may be obvious to a carpenter of average skill. Such obvious invention would not be patentable.

Invention must be Disclosed Fully

Patent Act, 1970 grants the exclusive right to the inventor to exploit his invention for commercial gain for a specific period of time 'it also impose on him the duty of fully disclosing the invention in the complete section so as to facilitate anyone from the public can work on the invention; once the period of protection expires.

The full disclosure of the patented invention is mandatory. If an inventor fails to disclose the invention fully, the patent will not be granted. The validity of such patent, even if granted can be contested by an opposing party. The patent can be revoked on such contest succeeding

Free Use of Patented Invention for Creation Purpose

PATENT MONOPLY BEING PURELY a creation of the statute the stake can impose any condition provisions permitting the central government to use a patented invention in specified circumstances to use a patent for experiment or research or for imparting instructions to pupils.

Commercial Working of Invention

Patent systems are not created in the interest of the inventor but in the interest of the national economy. The object of a patent grant is not only to encourage inventions but to see that the inventions are worked in India on a commercial scale. Patents are not granted merely to enables patents to enjoy a monopoly[7] for the importation of the patented to articles. These principles have received statutory recognition in the act.

Abuse of Patent Monoply

Every monopoly is libly to be abused and patent monopoly is no exception. To prevent the abuse of monopoly. Right created by the patent grant by the act provides for compulsory licensing of the patented invention on creation grounds inspite of the patented invention on creation grounds inside of the grant of compulsory licenses, if the patent is not worked in India, it can be revoked for non working.

PATENTABLE AND NON PATENTABLE INVENTION

Patentable Invention

A patent can be obtained only for an invention. Section sec 2(1)(j) of the patent act 1970 defines on invention as follow :

[7] P. Naryanan, "Patent Law" (1998) p. 7

"Invention means any new and useful;

(i) art process method or manner of manufacture

(ii) Machine 'apparatus or other article;

(iii) Substance produced by manufacture and includes any new and useful important of any of them and an alleged invention.''[8]

An invention in order to be patenable must be relate to a new and useful manner of manufacture. 'manner of manufacture has been interpreted to include not only a process of manufactured product. The word "manufacture'' applies not only to things made but to the practice of making to principles carried into practice. If the starting material remains unaltered by the process and the end product also remains the same as the starting material 'then the process can't be called a manufacture for the purpose of patentability.[9]

In *R. v. Wheeler Abbott* C.J. Observed as follows:"[10] the word 'manufacture 'has been generally understood to denote either a thing made 'which is useful for to own sake 'and vendible as such a medicine a stove a telescope and many others or to mean an engine or instrument to be employed either in the making of some previously known article or in some other useful purpose 'as a stocking-frame or a steam engine for raising water from mines. Or it may perhaps extend also to new process to be carry on by known implements elements, acting upon known substance and ultimately producing some other known 'substance' but producing it in a cheaper or more expeditious manner or of a better or more useful kind but no nearly philosophical or abstract principal can answer to the word manufacture.[11]

Invention Associate with Commerce and Trade

In C. & W.S. application it was held that an invention within the meaning of the patents act 1907 (U.K. Act) is an invention for a manner of new manufacture that is in some way associated with commerce and trade. A manner of new manufacture may be a newly made or a substance which if made before is improved in its manufacture or quite apart from that it may be a machine or a process that can be used in making something that is or may be of commercial value.'

INVENTIONS NOT PATENTABLE

(a) An invention which is frivolous or which claims anything obviously contrary to well established natural laws is not patentable similarly an invention 'the primary or intended use of which would be contrary to law or

[8] According to S.I. of U.K. patents act 1977, a patent can be granted only to an invention which is new, (2) involve an inventive step, (3) capable of industrial application and (4) is not excluded by S.I (2) and (3)
[9] Arun Kumar Chatterjee's Appln. 2 BPD 30 at 41.
[10] (1819)2 B. Ald 345 at 349, quoted and followed in Bombay Aggarxal Co. V Ram Chand AIR 1953
[11] (1914) 31 RPC 235.
[12] Section 3 CC

morality or injurious to public health is not patentable. A machine purporting to produce perpetual motion will not be patentable because such a machine is impossible to produce.

(b) An invention the primary or intended use of which would be contrary to law or morality or injurious to public health

(c) The mere discovery of a scientific principle or the formulation of an abstract theory is not an invention within the meaning of the act the theory of relativity is an example of abstract theory

Under the U.K patent law also a principle per se is not patentable, but a principle coupled with a method of carrying the principle into effect can be patented.

(d) Mere discovery of any new property or new use for a known substance or a mere use of a known process, machine or apparatus unless such known process result in a new product or employs at least one new reactant is not an invention within the meaning of act.

In *Lane Fox v. Kensington Lord*[12] justice kindly stated : "a man who discovers that a known machine can produce effect which no one knew could be produced by it before may make a great and useful discovers but if he does no more his discovery is not a patentable invention. He has added nothing but knowledge to what previously existed. A patentee must do something more he must make some addition not only to knowledge but to previously known invention and must use his knowledge and ingenuity so as to produce either a new and useful thing or result or a new method of producing an old thing or result.[13]

(e) A substance obtained by a mere admixtures result only in the aggregation of the properties of the component is not an invention. This is merely an extension of the principle of British cleaness case "to admixture of substance.

(f) The mere arrangement or rearrangement or duplication of known devices each functioning independently of one another in a known way.

(g) A method or process of testing applicable during the process of manufacture for rendering the machine, apparatus or other equipment or for the improvement or control of manufacture.

(h) A method of agriculture or horticulture is not an invention within the meaning of the act and hence not patentable. Any process for the treatment of plants to render them free of disease or to increase their economic values or that of their product is also not an invention.[14]

[13] (1892) 9 RPC 413 at 414.
[14] Section 101(7)

(i) Method of treatment of human beings animals or plants is not an invention within the meaning of the act and accordingly not patentable.

ILLUSTRATIONS

(1) A hearing system comprising certain instrument involving dental operation for employment of the system was allowed ‘ it being held that a claim to a system for acting hearing could not be equated with a method of treatment. Purchasing Lawrence's Apply (1965) RPC 395, see also biodigital science Incs APPLN(1973)RPC 668; and clamic eng. Co. Ltd. APPLN (1973) RPC684.

(2) A method of reducing gastric secretion in mammals by the systemic administration of certain compounds was held to be a method of treatment of human ailment with a substance and not a patentable invention. The Upjohn company (Roberts) Apply (1977) RPC 94(A)

(3) A method of removing dental plague and carries from teeth and a method of preventing the formation of calculus were refused on the ground that they were claims for the medical treatment of human beings to cure or prevent disease oral Health products Inc.(Hallstead's) Appln (1977) RPC 612.

LEGISLATIVE PROVISIONS REGULATING PATENTS

To the inventor a patent system[15] confers certain advantages. If the inventors do not disclose his invention and other people start manufacturing the article by independent discovery or by privilege of the secret the original inventor has no effective legal remedy. On the other hand, if a patent is obtained for the invention the patentee gets the exclusive right to use the invention for a definite period, which right can be lawfully enforced against infringers. If he has not the financial resources to work the patent, he can get monetary reward by granting lines to other or by assigning the patent.

ADVANTAGES OF PATENT TO INVENTOR

The Patent Act 1970 is modelled substantially on the U.K. Patents Act of 1949. The Indian Patent Act, 1970 and the Patent Rules, 2003 regulate the Grant, the operative period, the revocation and infringement, etc. of the patents. The Patent Act was amended in 2005 and the Patent Rules were amended in 2005 and 2006 for the purpose of contemporary adjustment in Patent Laws.

PATENT A SOURCE OF TECHNOLOGICAL INFORMATION

Patent Literature is a mine of technological information which is not available in text books periodicals or other sources. Patent specification, particularly the claims parts are notoriously abstruse and complicated. In

[15] P-Narayanan, "Intellectual Property Law" (2008)

respect of technological fields patents are the only source of information of practical value relating to details of manufacture of Technology, particularly up to date information.

SPECIAL STATUS OF PATENTS RELATING TO MEDICINES, FOOD ITEMS AND CHEMICALS

The Act accords special status to patents relating to medicines, food items and chemicals.

No product patent can be granted relating to any process of medicinal, surgical, curative prophylactic, diagnostic, therapeutic or other treatment of human being, food items and chemicals. Only the process of manufacturing such products can be patented. In case of grant of patents for certain substances which are not food items or drugs as such, but are capable of being used as food and drugs, the same are deemed to be endorsed with 'licences of rights'. The significance is that a patent endorsed with the words 'licences of rights' does not retain the exclusive right of the patentee. Any other person can apply for a right to use the invention after the expiry of three years from the date of sealing of the patent. The Controller would grant patent to that person to manufacture such substance. In such cases, the inventor's (patentee's) right of exclusive use is limited only to three years. This again is for use of the invention in certain circumstances for general public good.

Newness

The element of novelty (newness) in an invention is dependent upon the state of prior art, i.e., the existing knowledge and similar inventions already known in the particular field. There would be no novelty if there has been prior publication and prior use of same or an identical invention. For instance, the recent grant of patent in the U.S.A. to turmeric products was attacked on this ground. The Indian Council of Scientific and Industrial Research (CSIR) challenged the grant of patent on turmeric by the U.S. Patent Office on the plea that the patent could not be granted since there was no novelty in the invention. Also that what was patented was already published in Indian texts and use of turmeric preparations has been made in our country since times immemorial. The CSIR was successful in getting the grant of patent to an American company revoked. This instance highlights the importance of the element of novelty for an invention to qualify for grant of patent.

For the purpose of patent, the invention must be a new one. It means that the invention must involve any innovation or technology which has not been anticipated by publication in any document or used in the country or elsewhere in the world before the date of filing of patent application with complete specification. That is to say, the subject-matter must not have fallen in public domain or that it does not form part of the state of the art.

Usefulness

The invention besides being new and non-obvious, must also be useful. An invention which is new and also non-obvious but which cannot be put to any beneficial use of the mankind, cannot be patented.

However, not so useful inventions are protected in some countries as 'utility models'. But that concept is not statutorily recognized in India.

Non-obviousness

The invention must be non-obvious to a person skilled in the art to which the invention relates.

GUIDELINES FOR RESTRICTIVE PATENTABLE SECTORS ETC.

The Government of India has formulated the draft guidelines for the newly amended Patent Act, 2005. As per the guidelines, non-inventions, inventions relating to atomic energy, or those contrary to public order or causing serious prejudice to human beings, animals, health or environment will not be patentable.

These draft guidelines have been put for public comments. They envisage that any process for medical, surgical, curative, diagnostic and therapeutic treatment of human beings or animals is not patentable under the Patents Act. The patents however can be obtained for surgical, therapeutic or diagnostic instruments.

The draft guidelines relate to the practice and procedure to be followed in examination of patents application in India. They also aim at making industries, research and development organizations, individual researchers and inventors familiar with the patents system in India. They provide for a user-friendly system for obtaining as well as maintaining patents under the existing legal system. While clones and new variety of plants are not patentable, the process or method of preparing genetically modified organisms are patentable subject-matter.

The Draft guidelines also include procedure for examining inventions in the software sector. As per the guidelines, claims relating to software programme products, which are nothing but computer programmes per se simply expressed on a computer readable storage medium, are not patentable. However, an invention involving hardware along with software or a computer programme in order to perform the function of a hardware may be considered patentable, for instance, embedded systems.

Further, mere discovery of a scientific principle or formation of an abstract theory or discovery of any living thing or non-living substance will also not be eligible for a patent. Similarly, literary, dramatic, musical or artistic works or any other aesthetic creation, including cinematographic works and television products, are not patentable, according to the guidelines.

When a patent is granted to two or more persons, each will be entitled to an equal undivided share in the patent unless an agreement to contrary is in force. All can enjoy their rights for their own benefits without accounting for the others but the license cannot be given to any other person, or its assignment cannot be done without the consent of others.

Similarly, when a patented article is sold by one of two or more persons registered as grantee or proprietor of a patent, the purchaser and any person claiming the article through him shall be entitled to deal with the article in the same manner as if the article had been sold by a sole patentee.

Further, the Controller of Patents can, at any point of time, revoke a patent if the criteria like novelty are not fulfilled. The violation of conditions or false information given in the disclosure forms can also lead revoking of patents.

Certain Restrictive Conditions to be Avoided

Patentees are allowed the liberty to impose certain restraints on the licensees. For instance, a patentee may restrain the licensee from selling the patented article in a particular territory or not to seek items manufactured by patentee's competitors. However, the patentee cannot impose such restrictions on the licensees which are against public interest.

The restrictive conditions which cannot be imposed on a licensee in any contract for sale or lease of patented articles or license to manufacture or use such articles or license to work any patented process are provided in section 140 of the Act as below:

(i) To require the licensee to acquire from the licensor or the patentee or to prohibit him from acquiring any article other than the patented article or the article made by the patented process.

(ii) To prohibit the licensee or to restrict him to use an article other than the patented article or the article made by the patented process which is not supplied by the licensor.

(iii) To prohibit the licensee or to restrict him to use any process other than the patented process.

(iv) To provide exclusive grant back, preventing the challenges to validity of patent and coercive package licensing.

Any such condition laid down by the patentee on a licensee shall be void.

When a restrictive condition can be imposed

A patentee who has licensed a wholesaler or retailer to sell the patented article may prohibit them from selling his competitor's goods. He can also insist that the spare parts required for repairing the patented article leased or licensed should be purchased from him only. This is a reasonable requirement to preserve the reputation and quality of the patented article and is, as such, permissible.

CONCLUSION:

The Indian patents Act, 1970 is not only a complete Act but also in conformity with the TRIPS Agreement. It, however, needs enunciations in the form of judicial precedents as the same are lacking in case of patent law. It further must be analyzed in the light of International developments in this field. The Indian Patent law must also be analyzed in the light of both Public International law and the Private International Law as the same may create some problems in future. Further, the use of Information and Communication Technology

(ICT) is going to be one of the inevitable requirements of a sound Indian Patent System. In India we are managing the solely available ICT HELPDESK that is analyzing the needs of the contemporary International Patent regime within an ICT environment. Among other areas it is also dealing with the ICT-IPRs collaboration and requirements.

Patenting starts when the inventor finds value in his/her invention and starts thinking to protect invention. Formal process of obtaining patent begins when the inventor discloses the full details of invention in written format to the patent office. While disclosing, the inventor should clearly state details such as the nature of the invention, details process steps involved in the development of the invention, the various merits and demerits of the invention over other existing methodologies, usefulness of the invention etc. The possibility of obtaining patent is more if the inventor discloses the invention by means of illustrations, drawings and it is important that whatever has been described in written format should be similar to when has been explained through drawings. At last, the inventor should sign at the end of disclosure and clearly specify the date on which the disclosure was made which ensures there was somebody who had witnessed the invention disclosure.

Every application shall be accompanied by a provisional or complete specification. Filing of a provisional specification allows the applicant to get an early application date. Provisional Specification contains Title, Written Description, Drawings, if necessary and Sample or model if required. The complete specification shall contain Title, Abstract, Written Description, Drawings (where necessary), Sample or Model (if required by the examiner), Enablement and Best Mode, Claims and Deposit (Microorganisms). The following documents have to be submitted at the time of filing patent applications are : Form 1--Application for the grant of patent, Form 2--Provisional or Complete Specification, Form 3--Statement and undertaking by the applicant, Form 5--Declaration as to inventor ship, Form 26--Authorization of patent agent or any other person.

The first step in securing a patent is the filing of a patent application. Patent search should be conducted before filling the application.[16] If the application is submitted with the Patent Office, the officer then starts publication and examining the authenticity of invention. If everything is in order, the patent would be granted to the inventor. If the application gets rejected, the inventor has to make the necessary amendments and resubmit the application. It is advisable to use help from the Patent professionals or IPR firms so that the entire process is smooth and painless. Once the application is submitted to the Patent Office, the office then starts examining the authenticity of invention. If everything is in order, the patent is granted to the inventor. If the application gets rejected, the inventor has to make the necessary amendments and resubmit the application. Usually there are specialized firms that take care of patent applications and it is advisable to use help from these professionals so that the entire process is painless and smooth. By getting a patent, the amount invested for the development of products for development of products and also could generate sufficient income for further research and development.

[16] Section 9 (1)