Span Diagnostic Vs. Assistant Controller of Patents and Design and anr.

Span Diagnostic Vs. Assistant Controller of Patents and Design and anr.

SooperKanoon Citation : sooperkanoon.com/696676

Court : Delhi

Decided On : Apr-01-2008

Reported in : LC2009(1)22; 2008(37)PTC56(Del)

Judge : Pradeep Nandrajog, J.

Acts : Trade Marks Act, 1999 - Sections 83; Patents Act, 1970 - Sections 8, 15, 16, 17, 18, 19, 20, 25, 25(1), 25(2), 25(3), 25(4), 27, 28, 29(2), 29(3), 37, 41, 42, 47, 51, 54, 57, 59 to 63, 66, 69(3), 74, 78, 84(1) to 84(5), 85, 86, 88, 88(3), 89, 91, 92, 93, 94, 96, 97, 116, 116(1), 116(2), 117, 117A, 117A(2), 117G and 158; Patents Amendment Act, 2002 - Sections 1(2), 18 and 47; Patents Amendment Act, 2005 - Sections 1(1), 1(2), 23, 60 and 61; Patents Amendment Act, 1999

Appeal No. : FAO Nos. 292 and 293/2006

Appellant : Span Diagnostic

Respondent : Assistant Controller of Patents and Design and anr.

Advocate for Def. : Pratibha M. Singh and ; Pema Yeshey, Advs.

Advocate for Pet/Ap. : N.K. Kaul, Sr. Adv.,; Sagar Chandra and; Anu Bagai, Adv

Judgement :

Pradeep Nandrajog, J.

1. The question which I am called upon to answer, for the moment, in the instant appeals is:

Whether the appeals are maintainable and if yes, whether the same require to be transmitted to the Appellate Board established under Section 83 of the T.M. Act, 1999?

2. The question of law afore-noted has arisen due to the amendments incorporated in the Patents Act, 1970 by the Patents Amendment Act, 2002 notified on 25th June, 2002 but various provisions thereof brought into force firstly on 20.5.2003 and the remaining by and under a notification issued in the year 2007 as also the further amendment to the Patents Act, 1970 by the Patents Amendment Act, 2005, again bringing into effect the provisions of the said Amendment Act on 2 different dates.

3. As I would be referring to the date with effect wherefrom the provisions of the Amendment Act, 2002 and 2005 were brought into effect, I would be noting the amended provisions as in force with effect from the notified dates and their impact. Thereafter, I propose to consider the rival submissions.

4. At the outset it may be noted that the appeals were filed on 17.10.2006.

5. Proceedings commenced before the Controller of Patents in the year 2000 when the respondent sought a patent of a device which was opposed to by the appellant in the year 2000. By then, the Patents Amendment Act, 1999 had amended the Patents Act, 1970 with effect from 26.3.1999. Section 25 of the Patents Act, 1970 as existing in the statute book as of the year 2000 (i.e. after promulgation of the Patents Amendment Act, 1999) dealt with opposition to a patent. Appeals against decisions passed by the Controller of Patents pertaining to oppositions under Section 25 were maintainable before the High Court under Sub-section 2 of Section 116 of the Act.

6. The 2 provisions i.e. Section 25 and Section 116 as existing in the statute book and operative in the year 2000 read as under:

Section 25. Opposition to grant of patent:

(1) At any time within four months from the date of advertisement of the acceptance of a complete specification under this Act (or within such further period not exceeding one month in the aggregate as the Controller may allow on application made to him in the prescribed manner before the expiry of the four months aforesaid) any person interested may give notice to the Controller of opposition to the grant of the patent on any of the following grounds, namely:

a. that the applicant for the patent or the person under or through whom he claims, wrongfully obtained the invention or any part thereof from him or from a person under or through whom he claims;

b. that the invention so far as claimed in any claim of the complete specification has been published before the priority date of the claim -

i. in any specification filed in pursuance of an application for a patent made in India on or after the 1st day of January, 1912; or

ii. in India or elsewhere, in any other document:

Provided that the ground specified in Sub-clause (ii) shall not be available where such publication does not constitute an anticipation of the invention by virtue of Sub-section (2) or Sub-section (3) of Section 29;

that the invention so far as claimed in any claim of the complete specification is claimed in a claim of a complete specification published on or after the priority date of the applicant's claim and filed in pursuance of an application for a patent in India, being a claim of which the priority date is earlier than that of the applicant's claim;

a. that the invention so far as claimed in any claim of the complete specification was publicly known or publicly used in India before the priority date of that claim.

Explanation - For the purposes of this clause, an invention relating to a process for which a patent is claimed shall be deemed to have been publicly known or publicly used in India before the priority date of the claim if a product made by that process had already been imported into India before that date except where such

importation has been for the purpose of reasonable trial or experiment only;

b. that the invention so far as claimed in any claim of the complete specification is obvious and clearly does not involve any inventive step, having regard to the matter published as mentioned in clause (b) or having regard to what was used in India before the priority date of the applicant's claim;

c. that the subject of any claim of the complete specification is not an invention within the meaning of this Act, or is not patentable under this Act;

d. that the complete specification does not sufficiently and clearly describe the invention or the method by which it is to be performed;

e. that the applicant has failed to disclose to the Controller the information required by Section 8 or has furnished the information which in any material particular was false to his knowledge;

f. that in the case of a convention application, the application was not made within twelve months from the date of the first application for protection for the invention made in a convention country by the applicant or a person from whom he derives title;

but on no other ground.

(2) Where any such notice of opposition is duly given, the Controller shall notify the applicant and shall give to the applicant and the opponent an opportunity to be heard before deciding the case.

(3) The grant of a patent shall not be refused on the ground stated in Clause (c) of Sub-section (1) if no patent has been granted in pursuance of the application mentioned in that clause; and for the purpose of any inquiry under clause (d) or clause (e) of that sub-section, no account shall be taken of any secret use.

Section 116. Appeals

(1) No appeal shall lie from any decision, order or correction made of 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.

7. Suffice would it be to note that as existing in the statute book as of the year 2000 and in force, vide Section 25 only one right was granted to a person interested to oppose the grant of a patent by filing objections at the pre-grant stage. Further, vide Sub-Section 2 of Section 116 a right of appeal was available to the aggrieved party against orders passed under Section 25. The said appellate remedy was by way of an appeal to a High Court.

8. The legislature desired an amendment to the law and intended to create an appellate forum to hear appeals against orders passed by the Controller of Patents. Certain other amendments were also desired in the law with which I am not concerned in the instant appeals. The Patents Amendment Act, 2002 was promulgated on 25.6.2002. But, it was not brought into force immediately. Sub-section 2 of Section 1 of the Patents Amendment Act, 2002 reads as under:

Section 1. (1)...

(2).It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint; and different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into

force of that provision.

9. It is thus apparent that for a legal affect of any provision of the Patent Amendment Act, 2002 the relevant date was the date on which a particular provision thereof came into force.

10. Relevant for my decision would be to note that vide Section 18 of the Patent Amendment Act 2002, Section 25 of the Principal Act was amended by introducing clauses 'j' and 'k' after existing clause 'i' as also substituting certain words in Sub-section 2 and Sub-section 3 of Section 25. However, pertaining to an opposition to an application for grant of a patent no amendment was incorporated in Section 25; existing provisions whereof were retained as they were in the statute book.

11. Vide Section 47 of the Amendment Act, 2002 entire Chapter XIX in the existing statute was substituted. Section 116 and Section 117A were reworded.

12. The amended Section 25 and Section 116 and 117A (as per the Amendment Act of 2002) read as under:

Section 25. Opposition to grant of patent:

(1) At any time within four months from the date of advertisement of the acceptance of a complete specification under this Act (or within such further period not exceeding one month in the aggregate as the Controller may allow on application made to him in the prescribed manner before the expiry of the four months aforesaid) any person interested may give notice to the Controller of opposition to the grant of the patent on any of the following grounds, namely:

a. that the applicant for the patent or the person under or through whom he claims, wrongfully obtained the invention or any part thereof from him or from a person under or through whom he claims;

b. that the invention so far as claimed in any claim of the complete specification has been published before the priority date of the claim -

i. in any specification filed in pursuance of an application for a patent made in India on or after the 1st day of January, 1912; or

ii. in India or elsewhere, in any other document:

Provided that the ground specified in Sub-clause (ii) shall not be available where such publication does not constitute an anticipation of the invention by virtue of Sub-section (2) or Sub-section (3) of Section 29;

c. that the invention so far as claimed in any claim of the complete specification is claimed in a claim of a complete specification published on or after the priority date of the applicant's claim and filed in pursuance of an application for a patent in India, being a claim of which the priority date is earlier than that of the applicant's claim;

d. that the invention so far as claimed in any claim of the complete specification was publicly known or publicly used in India before the priority date of that claim.

Explanation - For the purposes of this clause, an invention relating to a process for which a patent is claimed shall be deemed to have been publicly known or publicly used in India before the priority date of the claim if a product made by that process had already been imported into India before that date except where such importation has been for the purpose of reasonable trial or experiment only;

e. that the invention so far as claimed in any claim of the complete specification is obvious and clearly does not involve any inventive step, having regard to the matter published as mentioned in clause (b) or having regard to what was used in India before the priority date of the applicant's claim;

f. that the subject of any claim of the complete specification is not an invention within the meaning of this Act, or is not patentable under this Act;

g. that the complete specification does not sufficiently and clearly describe the invention or the method by which it is to be performed;

h. that the applicant has failed to disclose to the Controller the information required by Section 8 or has furnished the information which in any material particular was false to his knowledge;

i. that in the case of a convention application, the application was not made within twelve months from the date of the first application for protection for the invention made in a convention country by the applicant or a person from whom he derives title;

j. that the complete specification does not disclose or wrongly mentions the source or geographical origin of biological material used for the invention;

k. that the invention so far as claimed in any claim of the complete specification is anticipated having regard to the knowledge, oral or otherwise, available within any local or indigenous community in India or elsewhere;

but on no other ground.

(2) Where any such notice of opposition is duly given, the Controller shall notify the applicant and may, if so desired, give to the applicant and the opponent an opportunity to be heard before deciding the case.

(3) The grant of a patent shall not be refused on the ground stated in clause (c) of Sub-section (1) if no patent has been granted in pursuance of the application mentioned in that clause; and for the purpose of any inquiry under clause (d) or clause (e) of that sub-section, no account personal document or secret trial or secret use.

Section 116. (1) Subject to the provisions of this Act, the Appellate Board established under Section 83 of the Trade Marks Act, 1999 shall be the Appellate Board for the purposes of this Act and the said Appellate Board shall exercise the jurisdiction, power and authority conferred on it by or under this Act:

Provided that the Technical Member of the Appellate Board for the purposes of this Act shall have the qualifications specified in Sub-section (2). (2) A person shall not be qualified for appointment as a Technical Member for the purposes of this Act unless he-

(a) has, at least five years, hold the post of Controller under this Act or has exercised the functions of the Controller under this Act for at least five years; or

(b) has, for at least ten years, functioned as a Registered Patent Agent and possesses a degree in engineering or technology or a masters degree in science from any University established under law for the time being in force or equivalent; or

(c) has, for at least ten years, been an advocate of a proven specialized experience in practicing law relating to patents and designs.

Section 117A.(1) Save as otherwise expressly provided in Sub-section (2), 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) An appeal shall lie to the Appellate Board from any decision, order or direction of the Controller or Central Government under 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, Section 66, Sub-section (3) of Section 69, Section 78, Sub-sections (1) to (5) of Section 84, Section 85, Section 88, Section 91, Section 92 and Section 94.

(3) Every appeal under this section shall be in prescribed form and shall be verified in such manner as may be prescribed and shall be accompanied by a copy of the decision, order or direction appealed against any by such fees as may be prescribed.

(4) Every appeal shall be made within three months from the date of the decision, order or direction, as the case may be, of the Controller or the Central Government or within such further time as the Appellate Board may, in accordance with the rules made by it, allow.

13. Even to a lay man it would be apparent that if brought into force immediately when the Amendment Act of 2002 was promulgated there existed only one right to challenge a patent i.e. at the pre-grant stage and against orders passed by the Controller of Patents a remedy of appeal was available before the Appellate Board by virtue of Sub-Section 2 of Section 117A. Relevant would it be to note that by

virtue of Section 116(1) the Appellate Board established under Section 83 of the T.M. Act, 1999 was the Appellate Board for the purposes of the Patents Act.

14. The provisions of the Patent Amendment Act, 2002 were not simultaneously brought into force. On 20.5.2003 a notification No.SO561E was notified notifying certain provisions of the Amendment Act to be brought into force. Suffice would it be to note that Section 18 of the Amendment Act of 2002 which was amending Section 25 of the principal Act was brought into force under the notification. Section 47 of the Amendment Act, 2002 which substituted the entire Chapter XIX (which included Section 116, 117 and 117A) was not brought into force.

15. If the Patent Act, 1970 as amended from time to time and as in force as of 20.5.2003 had to be considered pertaining to a challenge to a patent the legal position would that under Section 25 only one right to oppose a patent at the pre-grant stage was available and appeal against an order passed by the Controller of Patents was available before the High Court under Section 116 of the Patents Act for the reason by not bringing into force Section 47 of the Amendment Act, 2002, Chapter XIX as existing in the statute book minus the amendments to be incorporated as per Section 47 of the Amendment Act of 2002 continued to remain in the statute book.

16. Without promulgating the date to bring into effect the remaining provisions of the Patent Amendment Act, 2002 i.e. the provisions which were not brought into force by virtue of the notification dated 20.5.2003, on 4.5.2005 the legislature promulgated the Patents Amendment Act, 2005. Even pertaining to the Amendment Act of 2005, not all provisions thereof were simultaneously brought into force. Only certain Sections of the Amendment Act of 2005 were brought into force.

17. Sub-section 2 of Section 1 of the Patents Amendment Act, 2005 reads as under:

Section 1(1)...

(2) (ii) (a), and clause (b), of Section 37, Sections 41, 42, 47, 59 to 63 (both inclusive and Section 74 shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint; and the remaining provisions of this Act shall be deemed to have come into force on the first date of January, 2005.

18. Vide Section 23 of the Patents Amendment Act, 2005 existing Section 25 was substituted. The substituted Section 25 reads as under:

25. Opposition to the patent.- (1) Where an application for a patent has been published but a patent has not been granted, any person may, in writing, represent by way of opposition to the Controller against the grant of patent on the ground-

(a) that the applicant for the patent or the person under or through whom he claims, wrongfully obtained the invention or any part thereof from him or from a person under or through whom he claims;

(b) that the invention so far as claimed in any claim of the complete specification has been published before the priority date of the claim-

(i) in any specification filed in pursuance of an application for a patent made in India on or after the 1st day of January, 1912; or

(ii) in India or elsewhere, in any other document:

Provided that the ground specified in Sub-clause (ii) shall not be available where such publication does not constitute an anticipation of the invention by virtue of Sub-section (2) or Sub-section (3) of Section 29;

(c) that the invention so far as claimed in any claim of the complete specification is claimed in a claim of a complete specification published on or after the priority date of the applicant's claim and filed in pursuance of an application for a patent in India, being a claim of which the priority date is earlier than that of the applicant's claim;

(d) that the invention so far as claimed in any claim of the complete specification was publicly known or publicly used in India before the priority date of that claim.

Explanation.-For the purposes of this clause, an invention relating to a process for which a patent is claimed shall be deemed to have been publicly known or publicly used in India before the priority date of the claim if a product made by that process had already been imported into India before that date except where such importation has been for the purpose of reasonable trial or experiment only;

(e) that the invention so far as claimed in any claim of the complete specification is obvious and clearly does not involve any inventive step, having regard to the matter published as mentioned in clause (b) or having regard to what was used in India before the priority date of the applicant's claim;

(f) that the subject of any claim of the complete specification is not an invention within the meaning of this Act, or is not patentable under this Act;

(g) that the complete specification does not sufficiently and clearly describe the invention or the method by which it is to be performed;

(h) that the applicant has failed to disclose to the Controller the information required by Section 8 or has furnished the information which in any material particular was false to his knowledge;

(i) that in the case of convention application, the application was not made within twelve months from the date of the first application for protection for the invention made in a convention country by the applicant or a person from whom he derives title;

(j) that the complete specification does not disclose or wrongly mentions the source or geographical origin of biological material used for the invention;

(k) that the invention so far as claimed in any claim of the complete specification is anticipated having regard to the knowledge, oral or otherwise, available within any local or indigenous community in India or elsewhere, but on no other ground and the Controller shall, if requested by such person for being heard, hear him and dispose of such representation in such manner and within such period as may be prescribed.

(2) At any time after the grant of patent but before the expiry of a period of one year from the date of publication of grant of a patent, any person interested may give notice of opposition to the Controller in the prescribed manner on any of the following grounds, namely:

(a) that the patentee or the person under or through whom he claims, wrongfully obtained the invention or any part thereof from him or from a person under or through whom he claims;

(b) that the invention so far as claimed in any claim of the complete specification has been published before the priority date of the claim-

(i) in any specification filed in pursuance of an application for a patent made in India on or after the 1st day of January, 1912; or

(ii) in India or elsewhere, in any other document:

Provided that the ground specified in Sub-clause (ii) shall not be available where such publication does not constitute an anticipation of the invention by virtue of Sub-section (2) or Sub-section (3) of Section 29;

(c) that the invention so far as claimed in any claim of the complete specification is claimed in a claim of a complete specification published on or after the priority date of the claim of the patentee and filed in pursuance of an application for a patent in India, being a claim of which the priority date is earlier than that of the claim of the patentee;

(d) that the invention so far as claimed in any claim of the complete specification was publicly known or publicly used in India before the priority date of that claim.

Explanation.-For the purposes of this clause, an invention relating to a process for which a patent is granted shall be deemed to have been publicly known or publicly used in India before the priority date of the claim if a product made by that process had already been imported into India before that date except where such importation has been for the purpose of reasonable trial or experiment only;

(e) that the invention so far as claimed in any claim of the complete specification is obvious and clearly does not involve any inventive step, having regard to the matter published as mentioned in clause (b) or having regard to what was used in India before the priority date of the claim;

(f) that the subject of any claim of the complete specification is not an invention within the meaning of this Act, or is not patentable under this Act;

(g) that the complete specification does not sufficiently and clearly describe the invention or the method by which it is to be performed;

(h) that the patentee has failed to disclose to the Controller the information required by Section 8 or has furnished the information which in any material particular was false to his knowledge;

(i) that in the case of a patent granted on convention application, the application for patent was not made within twelve months from the date of the first application for protection for the invention made in a convention country or in India by the patentee or a person from whom he derives title;

(j) that the complete specification does not disclose or wrongly mentions the source and geographical origin of biological material used for the invention;

(k) that the invention so far as claimed in any claim of the complete specification was anticipated having regard to the knowledge, oral or otherwise, available within any local or indigenous community in India or elsewhere,

but on no other ground.

(3) (a) Where any such notice of opposition is duly given under Sub-section (2), the Controller shall notify the patentee.

(b) On receipt of such notice of opposition, the Controller shall, by order in writing, constitute a Board to be known as the Opposition Board consisting of such officers as he may determine and refer such notice of opposition along with the documents to that Board for examination and submission of its recommendations to the Controller.

(c) Every Opposition Board constituted under clause (b) shall conduct the examination in accordance with such procedure as may be prescribed.

(4) On receipt of the recommendation of the Opposition Board and after giving the patentee and the opponent an opportunity of being heard, the Controller shall order either to maintain or to amend or to revoke the patent.

(5) While passing an order under Sub-section (4) in respect of the ground mentioned in clause (d) or clause (e) of Sub-section (2), the Controller shall not take into account any personal document or secret trial or secret use.

(6) In case the Controller issues an order under Sub-section (4) that the patent shall be maintained subject to amendment of the specification or any other document, the patent shall stand amended accordingly.

19. Further, vide Section 60 of the Amendment Act of 2005, Clause 'c' of Sub-section 2 of Section 116 of the Principal Act as substituted by Section 47 of the Patents Amendment Act, 2002 was omitted. Further, vide Section 61 of the Amendment Act of 2005, Section 117A of the principal Act as inserted by Section 47 of the Patents Amendment Act, 2002 was also amended, in that, in Sub-section 2 of Section 117A the words and figures 'Section 20, Section 25, Section 27, Section 28' were to be substituted by the figures and words 'Section 20, Sub-section 4 of Section 25, Section 28'.

20. Section 61 of the Patents Amendment Act, 2005 reads as under:

Section 61. In Section 117A of the principal Act [as inserted by Section 47 of the Patents (Amendment) Act, 2002, in Sub-section (2), for the words and figures 'section 20, Section 25, Section 27, Section 28,', the words, figures and brickets 'section 20, Sub-section (4) of Section 25, Section 28' shall be substituted.

21. It would be interesting to note that the Amendment Act of 2005 amended certain provisions of the Amendment Act, 2002 which were not even brought into force by the time the Amendment Act of 2005 was enacted. It is also interesting to note that save and except some provisions of the Amendment Act of 2005 which were simultaneously brought into force when the Amendment Act of 2005 was

promulgated other provisions were to be brought into force as and when a notification was published in the Official Gazette.

22. On the date when the instant appeals were filed, Chapter XIX of the principal Act, i.e. the Patents Act, 1970 as amended vide Amendment Act of 1999 continued to be operative notwithstanding the enactment of the Patent Amendment Act, 2002 and the Patent Amendment Act, 2005 since Section 47 of the Amendment Act of 2002 which replaced Chapter XIX was being brought into force.

23. 2 notifications were published in the Official Gazette on 2.4.2007. Vide notification No.SO.510(E), exercising power under Sub-section 2 of Section 1 of the Patents Amendment Act, 2002 the Central Government notified the remaining provisions of the Amendment Act of 2002 to come into force with effect from the date of the notification. Vide another notification of even date, exercising power under Sub-section 2 of Section 1 of the Patents Amendment Act, 2005 i.e. notification SO.509(E) the remaining provisions of the Patent Amendment Act, 2005 were also brought into force by the Central Government.

24. Needless to state, Section 47 of the Amendment Act of 2002 as amended by the Amendment Act of 2005 was brought into force w.e.f. 2.4.2007. Meaning thereby existing Chapter XIX was brought into force. In other words, the forum of appeal was the Appellate Board and the right of appeal was restricted to an order passed by the Controller under Sub-section 4 of Section 25 of the Patent Act, 1970 as amended from time to time. No appeal lay against an order passed by the Controller under Section 25(1) i.e. no appeal was maintainable against an order passed relatable to an opposition to a grant of a patent at the pre-grant stage.

25. To put it pithily, the legislative intent evidenced by the Patent Amendment Act, 2002 and the Patent Amendment Act, 2005 is to give a right to every person to oppose the grant of a patent i.e. file a pre-grant opposition. A second stage right is also granted, but limited to a person interested to file a post grant opposition. Orders pertaining to a pre-grant opposition are not appealable orders. Orders pertaining to the post-grant opposition are appealable orders. The appellate forum is the Appellate Board and not the High Court.

26. But the manner in which the legislative provisions were brought into force have resulted in a problem. The original Act contemplated only one stage of opposition to an application seeking grant of a patent i.e. opposition at the pre-grant stage. Section 25 as enacted so stipulates. Further, a remedy by way of an appeal was available under Section 116 i.e. before the High Court. Vide Section 23 of the Patent Amendment Act, 2005 existing Section 25 was amended. Whereas only one right of opposition at the pre-grant stage was given to any person; to a person interested a second right of opposition was given at the post grant stage. Further, no appeal was contemplated against an order passed by the Controller of Patents pertaining to a pre-grant opposition but against an order passed at the post grant opposition which right of opposition was restricted to a person interested a right of appeal was given before the Appellate Tribunal.

27. It is settled law that a right of appeal is a vested right. Further, the availability of a remedy to an aggrieved person has to be determined with reference to the legislative provisions in force on the date when the aggrieved person alleges that a wrong has been committed.

28. There can be no doubt that the legislative intent under the Patent Amendment Act, 2002 as well as the Patent Amendment Act, 2005 was to do away with the right to appeal against an order passed by the Controller of Patents at the pre-grant opposition stage and that the only right of appeal was intended to be against orders passed by the Controller at the post opposition stage. Further, the legislative intent was to substitute the forum of appeal being the High Court with the Appellate Tribunal. But due to not bringing into force the relevant sections of the Amendment Act, 2002 and the Amendment Act, 2005 the inevitable legal consequence has to be that the existing rights and remedies remained available as per the statutory provisions in force till the notifications above noted were issued on 2.4.2007.

29. Ms. Pratibha Singh, learned Counsel for the respondent urged that the statutory provisions have to be construed with reference to the legislative intention. Learned Counsel urged that the legislative intention was to take away the right of appeal against orders passed by the Controller under Sub-section 1 of Section 25.

Thus, counsel urged that the appeals should be held to be not maintainable. Learned Counsel, Ms. Pratibha Singh, highlighted analomous situations arising if right of appeal curtailed under Section 117A(2) was not given full effect to. With reference to Sections 27, 86, 88(3), 89, 93, 96 and 97, learned Counsel pointed out that a laughable situation would arise if right of appeal had to be construed with reference to Section 116 forming part of Chapter XIX ignoring the replacement of said Chapter vide Section 47 of the Patent Amendment Act, 2002.

30. I may highlight the argument with reference to Section 96 of the Patents Act which was deleted when some provisions of the Patent Amendment Act, 2002 were brought into force w.e.f 20.5.2003. Counsel pointed out that under existing Section 116 an appeal was maintainable against an order passed under Section 96 of the Patent Act, 1970. Counsel wondered as to how could an appeal lie against an order relatable to a Section which was not even in the statute book?

31. No doubt, the submission made by learned Counsel for the respondent does bring out a fairly laughable situation, in that, as of 20.5.2003 due to promulgation of a notification on said date bringing into force certain provisions of the Patents Amendment Act, 2002 but not bringing into effect the proposed amendment vide Section 47 of the Amendment Act of 2002 provision relating to appeal i.e. Section 116 as existing pre-amendment continued to remain as the legislative provision in force but certain Sections, orders whereto were made appealable were deleted from the statute book. The laughable situation is that a right of appeal existed against orders passed under a Section which did not exist. In other words, against non-existing substantive orders the ghost remedy of appeal continued to be available.

32. In my opinion I need not look to anamolies which may be highlighted with reference to other provisions of the Act which are not relatable to Section 25 and the remedy of appeal provided under the Act for the reason there is no conflict with the said other provisions vis-a-vis Section 25 and the remedy of appeal under Section 116 pertaining to orders passed under Section 25. An anomaly vis-a-vis the right of appeal and substantive orders passed under other provisions of the Act would have to be looked into and resolved in an appropriate case, should one

come up before this Court.

33. It is settled law that when enacting a Statute the legislature can delegate the power to the executive to bring into effect and notify the date on which the legislative provision would come into force. It is also settled law that the right of appeal is a substantive and a vested right and cannot be taken away by implication. It is also settled law that it is not permissible to supply a casus omissus. Only if the words are general, in a case within the mischief of the Act, a court may adopt a construction, if reasonably possible, to cover the case.

34. The instant case highlights a rather grim picture of those in the executive to whom the legislature has entrusted the pious duty of giving effect to the legislative intent. Conventionally understood, rights and remedies go hand in hand and thus it is imperative that where substantive rights are proposed to be amended with simultaneous amendments relating to the remedy, both should be notified together lest there is a hiatus in the changed substantive right vis-a-vis the changed appellate remedy. Had the executive been conscious of this simple rule and had paid heed to it the problem at hand would never had arisen.

35. But noting no conflict in the right and the remedy, in the facts and the circumstances of the instant case, it has to be held that the date on which the impugned order was passed, Section 25 which existed in the statute book and in force did not provide for a post grant opposition to a patent. Only one right at the pre-grant stage was in force. The remedy of appeal was before the High Court. The amended Section 25 was brought into force on 2.4.2007. Simultaneously, the change in the appellate forum with right restricted to challenge an order only at the post grant stage came into force on 2.4.2007. As noted above, the orders impugned have been passed on 28.8.2006. The appeals have been lodged on 17.10.2006. The legislative provisions in force render the appeals clearly maintainable. The forum of appeal has to be the High Court.

36. Before concluding I may note that Sh. N.K. Kaul, learned senior counsel for the appellant urged that in view of the notification dated 3.4.2007 the appeals have to be transferred to the appellate board. The notification in question reads as under:

S.O. 514(E)-In exercise of the powers conferred by Section 117G of the Patents Act, 1970 (39 of 1970), the Central Government hereby appoints the 2nd day of April, 2007 as the date on which all cases of appeals against any order or decision of the Controller and all cases pertaining to revocation of patent other than on a counter-claim in a suit for infringement and rectification of register pending before any High Court, shall transferred to the appellate board.

37. Section 117G reads as under:

117G. Transfer of pending proceedings to Appellate Board.- All cases of appeals against any order or decision of the Controller and all cases pertaining to revocation of patent other than on a counter-claim in a suit for infringement and rectification of register pending before any High Court, shall be transferred to the Appellate Board from such date as may be notified by the Central Government in the Official Gazette and the Appellate Board may proceed with the matter either de novo or from the stage it was so transferred.

38. Ms. Pratibha Singh, learned Counsel for the respondent urged that the tribunals can hear an appeal only against orders passed under Sub-section 4 of Section 25 of the Patent Amendment Act, 1970 as amended by the Patent Amendment Act of 2002 read with the Patent Amendment Act, 2005. Counsel urged that the amended provisions came into force on 2.4.2007. Counsel wondered as to how can a board hear an appeal against an order passed at the pre-grant opposition stage.

39. The language of Section 117G makes it clear that all appeals against decision of a Controller other than on a counter claim on a suit for infringement or a rectification of a register pending before any High Court shall be transferred to the Appellate Board. In other words, the plain and simple language of the statute requires the instant appeals to be transferred to the Appellate Board.

40. Holding that the appeals are maintainable and also holding that under Section 117G read with the notification dated 3.4.2007 the appeals require to be transferred to the Appellate Board, I direct the registry to forthwith remit/transfer the appeals to the Appellate Board constituted under Section 83 of the T.M. Act,

1999.

41. No costs.