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IN THE HIGH COURT AT CALCUTTA
ORIGINAL SIDE
[COMMERCIAL DIVISION]

IPDPTA/3/2022

HUAWEI TECHNOLOGIES CO LTD. (OA/21/2020/PT/KOL)
VS
THE CONTROLLER GENERAL OF PATENTS AND DESIGNS, MUMBAI

BEFORE:
The Hon'ble JUSTICE RAVI KRISHAN KAPUR
Date : 2nd March, 2023.

Appearance:

Mr. S. Majumdar, Adv.
Mr. P. Sinha, Adv.
Mr. K. K. Pandey, Adv.
Mrs. Mitul Dasgupta, Adv.
Mr. Dipro Dawi, Adv.
Ms. E. Saha, Adv.

Mr. Indrajeet Dasgupta, Adv.
Ms. Priti Jain, Adv.

The Court:- This appeal has been filed under Section 117A of The Patents Act, 1970, against an order dated 27th September, 2019, rejecting Patent Application No. 4551/KOLNP/2010 filed by the appellant.

Briefly, the subject invention relates to configuring upgraded bandwidth map (BWmap) for ten gigabit passive optical network (GPON) to improve Forward Error Correction calculation, reduce computation time and reduce communication errors in Passive Optical Networks.

It is submitted that the technical problem addressed by the inventors by way of the present invention is an improvement of the calculation of Forward

Error Correction (FEC) to receive data at a higher bandwidth. A user would experience faster download and surfing speed as a result of the advancement in which the Optical Line Terminal (OLT) devices are reconfigured so as to transmit the data frames at higher bandwidth e.g., about 10Gbps. The BWmap comprises of a plurality of allocations, which may comprise a start time and a length but no stop time. The Optical network units (ONU) uses the length in the allocation to calculate the stop time which is obtained directly from the allocation instead of calculating an inverse of a non-linear function for the FC transmission length which in turn improves FEC calculation, reduce computation time and reduce communication errors in the PON system.

The key features of the appellant's invention are as follows:

a) The BWmap comprise a plurality of allocations, which may comprise a start time and a length but no stop time.

b) The BWmap 200 comprise allocations 210 which comprises fields, and the fields comprises an allocation ID 212, a flags field 214, a start time 216, a grant size 218 (indicates the length of the transmitted data from this allocation 210), a reserved field 220, a burst profile (BProfile) 222, and a HEC 224.

c) The ONU uses the length in the allocation to calculate the stop time which is obtained directly from the allocation instead of calculating an inverse of a non-linear function for the FC transmission length.

d) It improves FEC calculation, reduce computation time, and/or reduce communication errors in the PON system.

e) The OLT 110 is configured to transmit the allocation payload length, instead of the stop time, to the ONUs 120 so that the ONUs 120 can calculate the stop time using the payload length.

The application being No. 4551/KOLNP/2010 was filed at the Kolkata Patent Office as National Phase Entry in India on 30 November 2010.

The First Examination Report (FER) dated 23 March 2016 was issued by the respondent citing 2 (two) prior arts, referred to as D1 and D2 respectively. However, the hearing notice dated 22 August 2019 cited an additional prior art referred to as D3 and raised objections and questions on the subject invention.

It is also contended that the subject patent has been granted in several other jurisdictions. A list of corresponding registrations granted in other countries has also been relied on by the appellant.

By the impugned order, the application for grant of patent has been rejected on the ground that there has been no compliance with the requirement of Section 2(1)(j) of the Indian Patents Act, 1970 (the Act). It has also been held that the subject matter of claims do not constitute an invention and the claimed invention is obvious in view of combined reading of the documents D1 and D3. It has also been held that the claims are not in compliance with section 10(4) and Section 59(1) of the Act. It is also held that the actual scope of invention and claimed feature has not been included in the specification.

On behalf of the appellant it is contended that the impugned order is unreasoned. Moreover, the impugned order does not discuss nor indicate as to how the prior arts D1, D2 and D3 either singly or in combination teach,

motivate or suggest the technical advancement of the invention. There are also no findings comparing the prior arts with the subject invention. It is also contended that the impugned order is contrary to the statutory provisions. The impugned order records that the application has been rejected on the ground of the document D3, though no opportunity was given to the appellant to deal with same. It is also contended that the amendment is to cure the deficits in the prior art D3. Thus, the fact that the subject invention improves the FEC calculation reduces computation time and reduces communication errors in the PDC system has been ignored in the impugned order.

I find that the impugned order has been passed without discussing or considering as to how the prior arts D1, D2 and D3 either singly or in combination teach, motivate or suggest the technical advancement of the subject invention. There are also no reasons in the impugned order. Moreover, though the Controller had ordered re-examination under Section 13(3), there was no Second Examination Report issued before passing of the impugned order. A new prior art being D3 was cited for the first time at the hearing notice. The impugned order records that the application is rejected on the ground of sections 10(4) and 59(1) of the Act although there was no whisper of such provisions in the First Examination Report or the hearing notice. No opportunity was also given to the appellant to deal with the applicability of sections 10(4) or section 59(1) of the Act before passing of the impugned order.

I also find that the cited documents which support the case of the appellant have not been dealt with in the impugned order. In passing the

impugned order, there has been complete disregard to the mandate of Section 13(3) of the Act. Filing of additional documents, data and evidence in support of the evidence to overcome the objection raised and to deal with a specific objection is something which is permissible under Patent Law not only in India but also in other jurisdictions *[University of Miami versus Controller of Patent, (Asst. Controller of Patents) 2020 SCC OnLine IPAB 8* at para 35].

The impugned order also does not deal with the registrations granted to the appellant in different countries. It is true that this may not be of binding effect but this fact must at least be taken into account while examining the application for registration of the subject invention. There is no whisper of this aspect of the matter in the impugned order. In my view, non-consideration of this aspect is fatal to the impugned order. *(Stempeutics Research Pvt. Ltd. versus Assistant Controller of Patent & Designs 2020 SCC OnLine IPAB 16* at para 34).

In view of the aforesaid, the impugned order is unsustainable and is set aside. The appeal stands allowed.

The matter is remanded back to the Controller with the following directions:-

a) To issue a Second Examination Report (SER) within three weeks from the date of communication of this order and indicate therein as to how D1, D2 and D3 on a combined reading leads to the technical advancement of the invention of the appellant.

b) Permit the appellant to submit its reply to the SER within three weeks from the date of receipt of the SER.

c) Hearing be offered preferably within two weeks from the date of filing of the Reply to the SER by the appellant and to dispose of the application within eight weeks from the date of hearing.

With the aforesaid directions, IPDPTA/3/2022 stands allowed.

(RAVI KRISHAN KAPUR, J.)

D.Ghosh