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RATIONALE AGAINST THE PARALLEL EXISTENCE OF NOVELTY AND INVENTIVE STEP

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ABSTRACT

We all know that patentability standards are having three main pillars novelty, industrial application as well inventive. Now the question is whether there is really need any separate existence of Novelty as well as Inventive step. They are significantly encompassing each other. Hence in the following paper such has been described thoroughly. Firstly each of the components of novelty as well as inventive step are analysed, where it is been that both through objective as well as philosophically the same. After that there is also highlight of various case laws in order to bring pit the practicality of the matter. Hence post to it the highlighting of the various adverse effects the sae with it different affixation having upon the applicants as well as common people, making it a lengthy process. Lastly the devising of various solutions against the problem i.e. merging the two principles and making it more effective, is mentioned. And at the end the summarization of the entire matter is shown.

INTRODUCTION

We all know, patents being one of the most prominent forms, of IP and also being applied on the products being the most commercially utilized as well as commercially exploited, hence in order to get protection upon certain goods, there is actually a very strong scrutiny made in order to have determined the patentability standard of a particular product. Hence their process of evaluating a particular product is rather compared to be much accurate to the objective as well as filtering in lieu of the reason as mentioned above. This the three main prototypes they always try to adhere with. One is the novelty, the other is the inventive step

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and lastly the most important one is the industrial application. If we analyse the part of the industrial application part of the three main factors, we get to find out that the last one is actually serving the objective of the standard put to the same. The reason for which the same is given with the patents is to gain from the market economy. As science & technology is there for he welfare of the people, similarly the work of the parents does also work accordingly with their standard. Hence such is the mandate for them. On other hand the other part deal with why the same would actually get the patent over the same. That is the uniqueness the same actually wants to bring from the particular invention, which is not there in any kind of invention made so far as well as granted so far. So under such uniqueness there is two major divisions regarding the same. They are namely the novelty as well as the inventive step. Both of these ideas are at the end of the day having shared a common objective, i.e. anything new to be created. The essence of Novelty is such that the same is having such newness, which would not be found to be present in the knowledge of the public. On other hand inventive step is such where the particular step / process through which the particular new product is made, such process should not be made known or applied i.e. being obvious for the persons, who are there in making such kind of inventions, But the fact s that the parallel existence of theses two kinds of products, some way or the other is creating diversification of approach for a same dimension. It is actually the steps which creates something novel. Through a particular step which is novel in nature i.e. id having no prior knowledge of any body but created something which has nothing new about it in the same. Hence for that then there would not be any kind of relation with the commercial exploitation. The particular product, which if cannot keep any kid of significance in the market economy, then accordingly there would not be any kind of utilization for such product. Hence no benefit from the particular product, which would make the same of no use to give protection under the regime of the patents, contra ringwith the basic essence of the ideology. On other hand for the creation of a new product, it is obvious of having an inventive step created which would facilitate the same. On other hand for novelty it says keeps restriction regarding the knowingness of the public, on the other hand the same is for the person skill in the art, is for the inventive step. But the question is whether not public is actually inclusive of both the abovementioned the persons. So whether there is actually the need to have separate criterion for both novelty as well as the inventive step is actually the pre requisite for having the patentability standard to be granted is actually the discussion here and has been eluded in the following paras.

KEYWORDS

Patents, novelty, inventive step, rationale, parallel existence, effect to patentees and common people.

RESEARCH GAPS

- Whether there is any rationale for having parallel existence of the novelty as well as inventive steps as criterion of patents?
- Is there really any need for having a separate existence of Novelty
- What effect the same is keeping upon the patentees as well as common people?

ANALYSIS OF THE OBJECTIVE OF THE CRITERION OF THE NOVELTY

If we scrutinize the various parts of the novelty, we first find the prevalence of significance of ***prior art*** on the same. Prior art means any kind of invention or scientific creation subject to industrial utilization, which was there in the existence prior to the creation of a particular act. Here scientific invention is regarded as the prior art, which as such name only because of the reason being the same, is that it includes creativity within the same. So in order to grant a patent to a particular product, there iss the obvious necessity for a particular product to see that there is much resemblance with that product in comparison to that of the prior product. And within resemblance there must be a specification, and such is the significance. Here significance actually implies the application the same would keep in the regular usage of the people there. The significance of such product will be like that, where the same difference in characteristics with any other inventions, which has been actually created before inhand. Hence the same stands with that of uniqueness, the exceptionality in the application of the product. Hence the main intention of the product is to create something new. And in order to create something new, the same is needed to have processed likewise, which would lead to the creation of something which is found to. Entire genre of scientific creation is governed with logistics. It has a specific form of ingredients, which actually lead to the creation of a particular product[2]. And in such situation, if there is a creation of a particular thing which was non-existent to the particularity, then there must be accordingly creation ofa mode that would facilitate the creation of the particular act. And with that accordingly a new mode is also found to be developed here. And accordingly such is found, must to be unknown to the one

[2]https://dexpatent.com
https://www.wipo.int

who has created the prior art. So in this way the particular form of patent i.e. the prior art for novelty within it, having carried the essence of the novelty also has the nature similar to the essence of the inventive step.

The next criterion is the ***disclosure***. The same implies such where particular act must be of such kind which would actually leads to the creation of a certain product which through the capacity of the same must have ability to create any kind of replicate within the same, i.e. the base upon which utility is made must be the same, but the nature of it should be different which would enhance the industrial exploitation of it. But there should be the nexus with that of the prior with which the same is being examined. The significance which is patented, would lead to the creation or the enhancement of a particular significance. But the question is whether the same not encompassing the particulars of inventive step also. If we literally analyse the entire meaning of the "inventive step" we find out that the same talks about a particular advancement, which would actually be unique. Our society are actually entitled as well as fixed with the necessities. Science & technology is actually there to smoothen access of such necessity. So there lies the inventions. But, the ground of importance would remain the same. Hence there is a clear nexus existent regarding the invention which has been newly created as well as the ground which would facilitate the need of the same. Hence the invention in a new form, would be examined on the basis of its competency regarding the grant of the patent application of the same. Hence this way essence of inventive step is also found to have covered within the ambit of the novelty.

Then coming on to ***public accessibility***. This is also an important part of Novelty. Here it is seen that public has a clear access upon the same. It is found that the invention which is created must be having a public upon the same. It must be there to meet out the public needs. Through the application of it there must be a redress to certain issue which is acting as a problem, for these kinds of inventions. Hence in order to grant the same, firstly the need of the access of the product or to a certain specific people, who would examine on the basis of the patentability standard of the same. Without that there would not be any kind of determination regarding the clarity of the same. Sometimes confidentiality of particular documents to the public would not affect the acquiring of the novelty of it. Similarly, for an inventive step the same in order to determine regarding the same, there is always a person skilled at the prior art is to be there who would determine the patentability of a particular product. Without that the patentability standard would not be determined. Hence as it is

actually mentioned earlier there can be some confidentiality regarding the disclosure of the documents, the person skilled in the particular art can only be the mediator in the particular problem. Hence through him/ hers scrutinization the person's art in the form of invention, an be adjudicated through the essence of both the novelty as well as inventive step, as the person skilled in the particular act would be the best adjudicator of the fixation, that whether a certain product is eligible for patenting or the ingredients which make up the product are subject to confidentiality or not.[3]

ANALYSIS OF THE OBJECTIVE OF THE CRITERION OF THE INVENTIVE STEP

While analysing the inventive step, it particularly seen that the people that mainly there should be adherence to the three main factors which would contribute to qualification of the product for such kind of patent. And for that the first one would be the ***non-obviousness***. It is of such criterion, which would have the resemblance with Prior Art as an ingredient of Novelty. In the segment of prior art, it says that the same would then only be adjudicated as a product of novelty, if it is seen that the particular product has non-resemblance with the prior art. And that is not the products entirety but rather with the significance which the same is carrying with the same. The applicability to the industrial application must be different. On other hand we find out that the another part is telling that the person skilled at a particular art must not know about the significance of the same. The process through which the same is making the product must be non-obvious to the one who are there in making up of these kinds of instruments. But the fact is that the one who actually creates a particular invention, knows the first regarding the invention, in comparison to the normal public to whom such invention would be presented. Hence the particular person knowing its efficacies would create the invention and then only the same and then only the same would be presented before the public. Before that it is not possible for the person to know the same. And such person who is examining must be a person having knowledge to the prior art. So in that situation, when there is already the existence of a person, who has created any kind of invention, similar to the examinee invention, must be the compact one to know the actual efficacy of the particular object. The normal public without having knowledge of the art cannot know anything extra to the one who is the profounder of similar nature of inventions. So now the question actually arose whether it is really necessary for opening any ground for

[3]https://papers.ssrncom

the public to assess the particular invention, when there is already the examination done by the person skill in the prior art[4].

Then coming on to the next form of criterion i.e. the ***combination of a particular act***. It must be seen that the certain invention is whether having any resemblance i.e. in the form of the significance it is carrying with the art of the previous invention which is created. The same must be examined the problem which was solved by the prior invention, the same solution is carried by the invention or not, or there was any advancement to it. But the fact remain undeniable is that the same has a clear connection with any invention which has actually happened in the past. And that's why the existence of such examination comes into the prevalence. And also all the criterion involving the novelty i.e. the disclosure as well as public accessibility, it is seen that the same is involving the examination of the necessary information regarding the invention, with which the same would see that whether there is any kind of publication or not. And all such publications are there for the public to see. So from the perspective of a complete specification, it is already disclosing all about the nature of the invention as well as the applicability of the particular invention. On other hand person knowledgeable / skilled at a prior art would examine the same. So both of the same consequently is having the same objective set with full clarity. So accordingly, what would be the need of parallel existence of both forms of examination, where the essence carried by both of it is same. So from that perspective again there is quite resemblance reflected in the particular feature of the inventive step with that of novelty.

Another very important form of requirement as the criterion for the inventive step is having a ***proper technical base***. It is found that the same must be having a certain technical base which would be examined to see whether a particular good would be patented or not. Here technical field implies such area where the same is can be assessed regarding its expertise regarding a particular field. Hence that field would be a particular mode which would assess the skill of the person. Hence the skill must be of a genre of public domain, through which the same would testify its prevalence. So if we analyse the features of public accessibility we find out that the public is there to access the clarify the truthfulness of a particular form of art. So for a particular art form to be publicly assessed it is best to asses the same through a particular mode, which would facilitate the transaction of the same. Merely presenting the art before the

[4]https://research.jgu.edu.in
https://www.jpo.org

public and the same to have assessed it, would be a time taking process. So merely presenting the same before public and they were to assess in which filed the same is based is really a very time taking process, and also be out of clarity, as well as can create confusion. But if there is a technical mode to be specified, such would lead to the clarified examination of a creator of a particular patent, that whether the same would have knowledge on particular skills or not. Hence here even the existence of the particular asset would resemble with the essence of novelty.[5]

So from analysing the various features of novelty as well as inventive step, it is seen that there is no uniqueness regarding the existence of them. Some where it is seen that they are overlapping with each other, while in some instances it is seen that objective which they want to fulfil is almost similar to each other.

All such criterion some way or the other is facilitating or having impact upon the entire process of registration of the patents. The are the hallmarks of determining whether on a particular product, a patent would be granted, so naturally those things must be a part or is inclusive of a part of examination post registration of having a particular product to attain its patented status. Hence this way the entire process of registration is also very long in that regard.

ANALYSIS OF THE LONG REGISTRATAION PROCESS OF THE PATENTS AND THE PROBLEMS FACED BY THE PEOPLE DUE TO THE PARALLEL EXISTENCE OF NOVELTY &INVENTIVE STEPS

First in a process for registration of patents, the essentials regarding the same is the process of evaluation. First an idea formulated must be seen that the same is examined to be novel, non obvious as well as useful. And for that all the above processes which are previously, mentioned must be discussed at the first instance. Followed by that there would be a thorough check up regarding the fact whether any kind of similar product is patented or not. There can be various products, which are there as similar form with its nature but the same has not been patented. So in that situation from a perspective of the patentee, there is no reason if frustration on discovering his / her invention to be not nonobvious, novel. If such similar product is not patented previously then there is no bar from patenting certain invention and

[5]https://pure-ideas.co.uk

also there would not be any probability to oppose in the future times. Such products which are patented must be shown within the chart of the Google Patents, United States Patents, Trademark office i.e. the UPSTO database.

Followed by that a documentation would be created. And within the documentation certain paraphernalia to be fulfilled. First is the patent claims. There the description of the particular product and the state of the reason for the claiming patent upon the same. Followed by that the Description. It is actually the detailed representation of the applicability of a certain product. It shows the unique contribution the same is keeping over the industry which would lead to the commercial gain of the industry. And post to that whenever there is any kind of ambiguity regarding the clarity of the depicture made, then surely an abstract or a drawing made attached to it for serving the purpose. After that the application must be submitted to either of the three patent offices. There are various patent offices throughout a particular country. But the three main offices having separate guidelines are the ones, whose either of any principles the country follows. Post to that a thorough examination is conducted, where there is the chance for amendments. Such examination is conducted by an expert in the field. And post to that a publication of the same to a journal is required where the sae is represented before a public, presenting them to opportunity to oppose if they feel even after thorough scrutinization by a standard expert to the field. If there is no opposition, then accordingly the patent would be granted, but even after that such invention would be open to the public for a compact one year such grant, to oppose, and such opposition would be taken into due diligence for examination[6]. But once such year accomplishes there would be no ground for any party to oppose. It would become un revocable till the period of 20 years for the time of renewal of it. So in this circumstance, we get to find that entire process of registration is having a very lengthy as well as time taking process. But the question lies that what is the rationale for having such kind of long process of registration. If we analyse critically the entire process of registration, we get to find out that the prevalence of all the assets of novelty as well as inventive step is making it fussy as well as confused with its objective. As mentioned earlier, it was seen that the people after the innovation of a particular idea, are trying to have searched the fact that whether there is a semblance with the prior art. Or not that the same is having any kind of resemblance or not. And after that within 3 months of

[6]https://cleartax.in Patent registration process in India
https://www.setindiabiz.com Step by step procedure for patent registration in India

such publication, the examiner handles the work. But it is found that handler would check both the novelty as well as inventive step, at the end, the derivation of the utility from it. But the question is what is the need for the matching the piece with that of the prior art. Those scientific inventions are having all kinds of technicalities within the same. For a lay person to such technicality, it is not actually possible for him/ her to come out with any kind of detection of the art. They may can have pointed out with the nature of the invention, but burying that there are various other technicalities, which are associated with the same, which may not be suitable for such persons to point out. A clear cut example regarding the same would be the example the Apple. Here we find out that the same does not have any apparent providing of benefits or advantages to the people, but the fact is that the same has a much more capacity of storage in comparison to that of the Apple. Those storage is done through the vigilance of RAM. That is found to be a more technical form of storage in comparison to the other forms of storage. And also such storages are actually having various quantum associated with the same. So from the perspective of a lay man it is not possible for that person to investigate regarding the matter and also to filter out the clarity of the same A particular mode of measurement may be known but the units within it may not be well versed by a common man. And in cases where we find out the particular product has been newly introduced newly in the market and for the same, where another inventive advancement to many other invention, having the same technical base, it would be more obscure for such persons to know the fact. But in such situations, only the persons who are skilled in that particular art, can only come out with any kind of solution to that effect. And such persons having knowledge in the prior art can actually be the person, who is skilled in the particular art. Hence there would not be any rationality of the presence of such kind of provision. On other hand it would be found that the such lengthy process involves a lot of draining of money from the applicant, who is actually publishing the same. Not only that the same is also needed to have financed the process of examination of the controller of the patents. Hence this way that would become cost worthy as well as time consuming. It is very obvious regarding the fact that the there's quite a huge amount of money needed for the publication of a particular article. And in addition to the same, there is no right given to the concerned persons regarding the any kind of action against any infringement. So this way, the same would incur a huge amount of loss from the persons concerned there. So in continuance to the economic problem, it must be taken into consideration that the same must be represented with the various drawings, abstracts, and also other formalities, which are to be attached with

the same. All such, involves a detailing. While for a person who is technically able to the particular job, the same is doing, the capability to grab a certain technicality would be easy to grab. All such detailing is only for all the layman to have a better understanding regarding the particular matter, so they cannot bring out with any kind of opposition against the same. And there is absence of clarity regarding the presence of rationale for separate criterion of publication as well as examination, to that respect. Then even on the aftermath of the positive report given by the controller of patents, the rights are not vested upon the applicant fully. Even after that there would be the re publication of the particular patent, where if there is opposition, then, for defending the claim, a large amount of money would be wasted. And not only that if even a justified error raised by a person of skill in the prior art, the other amount of money, which can be calculated as the pre requisite for examination previously, is found to be worthless then. And such problem only crops up because of the les person there in the board, who are found to have taken the examination. Hence all such factors are highly affecting the applicant involving the pre requisites of both the novelty as well as the inventive step within the same, and where there is no rationale to grant parallel existence to them.

Apart from that there are also other factors like that of technological obsolescence. We all know, that the entire process takes more than three years. And in many situations, it has been more than that. So by that there is strong probability that within the particular time the invention may become obsolete. So as result there lies no value of having such kind of invention previously.

And the last but not the least is that the objective which is actually getting fulfilled by such kind of invention is also a matter of paramount consideration. The same is actually existent because of the purpose of having facilitated the public in various ways, bringing out welfare to them. But question actually lies that whether such delay of time not some way or the other facilitating the delay of having the welfare to the public. So in all such situations it shows the parallel existence of the novelty as well as inventive step is detrimental for the carry out the entire process of registration,

Coming on to various case laws where through the outcome of the case, it has been clearly visible regarding the declaration of the case, where through the detection of the novelty the nature and circumstances of a particular case where it within itself deters the actual necessity of the novelty present.

CASE LAWS

Taking the reference of the Diamond Vs. Chakraborty case, here it is seen that the specific bacteriuminspite of being a living creature, the same should be regarded as novel as the existence of the same is only for fulfilling the industrial need. Burying that it does not have any kind of other significance. So for this case, the one i.e. the bacterium, which has been detected to be a novel can only be understood by a person, who has technical knowledge about the existence of the same. Otherwise from a person of ordinary prudence the same would not stand as a proper living organism, having the necessary characteristics, which are there for such creatures. Submission of such characteristics to the industrialization is only to be detected from the perspective of the person who is having a technical knowledge on the same.

Then coming on to the case of Novartis Vs Anderson, where it is found that the it must be taken into consideration that no matter how much nexus the particular invention is having with the base invention, which is almost similar to the other contrivance, in there is any advancement to such invention that no one has brought into existence and usage i.e. being a novel invention, then for such invention, patent must be granted. Here also the similar issue finds the light like that of previous matter. The same is so technically set up that it is only a competent person would understand its presence. From the perspective of the novelty, it may become in lieu of having almost similar kind of nature. But if the same is analysed through the facet of inventive step, then for a particular invention to become non-obvious, the solution to be put against the problem where the person skilled at the art doing it, which would actually lead to having of new invention made.

PROPOSED SOLUTIONS

Hence there addressing such problems, various solutions can be devised.

Firstly the main reason for the publication post to have known to have been there for quite a long period of time, where we find out that the main reason is to have cleared or to point out any kind of mistake if committed by the concerned person. But if its solution can be the presence of plurality of tech expert persons in the board then some way or the other problem may get solved. The presence more than one or two persons in the board, would have much less probability to get rid of these confusions. That would lead to much clearance of all kinds of doubts on repeated revision of the problem. So in such situations there is no need to

include the criterion of assessing novelty as well as the inventive step within the entire process of registration of the patents.

And sometimes for a particular board it may be problematic to have much members within the same . As there can be obviously situations of denial of a certain matter to produce clarity upon certain inventions. For that hierarchy of boards is needed in the very examination level. If any ambiguity arises regarding any particular invention, then in such situation, it can be very well presented to the superior board.

CONCLUSION

So it is very well concluded that entirety of the provisions in the form of criterion for both novelty as well as inventive step is detrimental for applicants using the same. From the perspective of the applicant it is exploiting both time as well its money. Not only that, but also the same is found to diminish the value of the patent. And above all the welfare of the people due to the invention of the same is getting diluted only because of the cause that the entire process is so time consuming because of the presence of both novelty as well as inventive step within the same. But if we also see philosophically the existence of both of it does not demarcate any kind of difference. The objective for both of these assets are almost the same. It's must be overlapping with each other. Hence there is no rationale in the parallel existence of novelty and inventive step So there must be the initiative taken to come out from the process and merge these two standards of patentability standards. There must be making out of new policies which would be even more scientific to theses. Because at the ned we have to understand these scientific inventions as well as their patents serves the common people as well as the creator of such invention the most, respectively.