



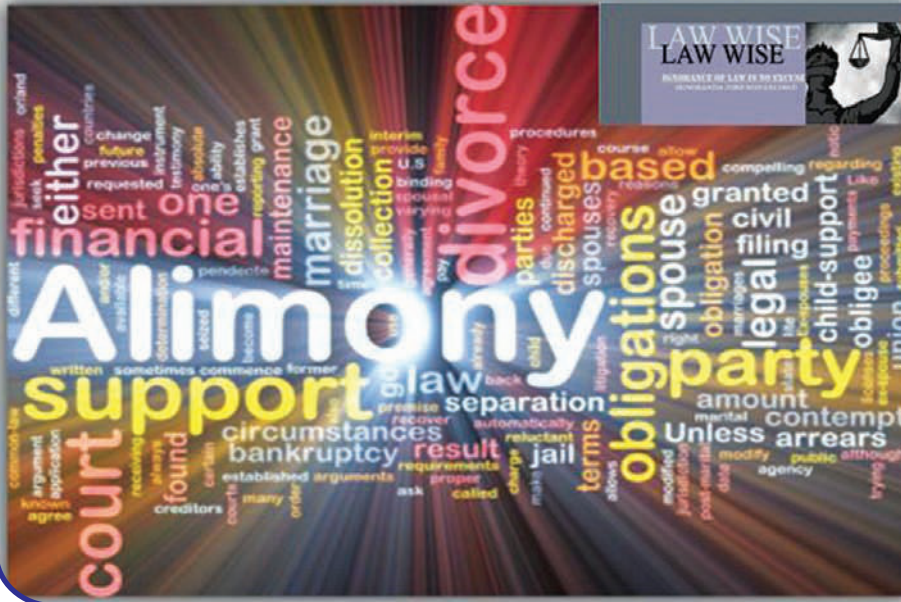
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November 2014. Vol. VII, Issue XI

# INDIAN LEGAL IMPETUS

**PPH** Patent  
Prosecution  
Highway

**SEC 125 CrPC - ORDER FOR MAINTENANCE OF WIVES,  
PARENTS AND CHILDREN**





## FOREWORD



**Manoj K. Singh**  
Founding Partner

It is our immense pleasure to bring the November, 2014 edition of our monthly newsletter "Indian Legal Impetus". The ascription of our readers has provided us the opportunity to enlighten the legal network around the world. This newsletter is a window through which we try to provide a glimpse in to the latest legal happening in India and around the world to keep our readers informed.

The cover article of the current edition deals with **Transformation of principle of Exhaustion of Rights**. The principle of exhaustion of rights is been dealt in light of the case of Samsung Electronics Company Limited & Anr. Vs Kapil Wadhwa & Ors, wherein the different benches Of High Court have taken different viewpoint of this concept and the matter is still pending for final verdict in the Hon'ble Supreme Court of India.

This issue continues to grab the reader's attention by the next thought provoking article on **The Relevance of Doctrine of Scène à Faire in Copyright Law**. The doctrine of Scene A Faire gives a rational view to create a balance between freedom of expression and Copyright Law.

As the world is seeing a high rise in the pending Patent applications and increasing cost of the same the next article **Patent Prosecution Highway (PPH)-Smooth or Bumpy!** gives an insight of what the Patent offices across the World are trying to do to reduce the amounting burden, delays and cost reduction mechanism. Furthermore this article also talks the role of PPH in context to India.

Moving ahead with this issue we will attempt to throw light on the **proposed amendments to the consumer protection act 1986** to harmonize ourselves with the latest affairs in the Consumer Protection Laws. The next article discourses the applicability of Transfer Pricing Laws on Shares issued to the foreign parent, in context to the recent Judgment by Hon'ble High Court of Bombay.

This issue will be covering several other topics through articles like **right to maintenance under section 125 of criminal procedure code, 1973** , **access to justice in india**, and the last but not the least **passport-power to impound and sieze**.

The concluding section of **Newsbytes** will provide the latest goings-on and recent developments in the legal world.

We hope this issue also helps us in further achieving our objective of making you understand the laws and recent legal developments in India. We welcome all suggestions and comments for our newsletter and hope that the valuable insights provided by our readers would make "Indian Legal Inputs" a valuable reference point and possession for all. You may send your suggestions, opinions, queries or comments to [newsletter@singhassociates.in](mailto:newsletter@singhassociates.in)

Thank You!



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# TRANSFORMATION OF PRINCIPLE OF EXHAUSTION OF RIGHTS

Himanshu Sharma & MS. Sonal Shrivastva<sup>1</sup>

## INTRODUCTION

A trademark right is typically exhausted by the first sale of good or placing the same in market. The basic principle is that once the right holder has been able to obtain economic return from the first sale or placing in the market, the purchaser or transferee of the goods or services is entitled to use or dispose it of without further restriction. Exhaustion of rights is linked to the distribution right. The right to distribute objects means that such objects is released by or with the consent of the owner as a result of the transfer of ownership.

## TYPES OF EXHAUSTION OF RIGHTS:

There are three kinds of exhaustion of rights:

a) **National Exhaustion of rights:** National exhaustion of rights refers to one of the limits of intellectual property rights. Once a product protected by an IP right has been marketed either by manufacturer or by others with his consent, the IP rights of commercial exploitation over this given product can no longer be exercised by manufacture as they are exhausted. Any proper use of the goods after the first sale of the product would not amount to infringement. The concept of national exhaustion does not allow the IP owner to control the commercial exploitation of goods put on the domestic market by the IP owner or with his consent. However, the IP owner (or his authorized licensee) could still oppose the importation of original goods marketed abroad based on the right of importation.

b) **Regional exhaustion of rights:** Regional exhaustion of rights refers to the first sale of the IP protected product by the IP owner or with his consent exhausts any IP rights over these given products not only domestically, but within the whole region, and parallel imports within the region can no longer be opposed based on the IP right.

c) **International exhaustion of rights:** Once a product is exported in a market out side India and the further sale of the same product there would come under the purview of International exhaustion of rights but at the same time if the goods are purchased from the international market and sent back to India for the purpose of selling them here would not be allowed as per principle of parallel imports.

Section 30(3) of the Trademarks Act, 1999 which provides that:

Where the goods bearing a registered trade mark are lawfully acquired by a person, the sale of the goods in the market or otherwise dealing in those goods by that person or by a person claiming under or through him is not infringement of a trade by reason only of-

- a) .....
- b) the goods having been put on the market under the registered trade mark by the proprietor or with his consent.

Section 30 wording is wide enough to subsume both national and international exhaustion principles. Section 30 (3) provides that the general legal proposition that once certain goods bearing a registered trademark are lawfully acquired by a person, the subsequent sale of the goods in the market or otherwise dealing in those goods is not an infringement.

The principle of exhaustion of rights is been dealt in the case of **Samsung Electronics Company Limited & Anr. Vs. Kapil Wadhwa & Ors**<sup>2</sup>. wherein the different benches of High Court have taken different stands of this concept and the matter is still pending in the Supreme court for the final verdict on the issue.

## BRIEF OVERVIEW OF THE MATTER:.

In this case plaintiff is a company which makes printer under its trademark and has licensed the use of the Samsung trademark to its Indian subsidiary, the plaintiffs have stated that the printers sold in India by them are sold through the authorized channel of resellers and partners of the plaintiffs. Any third party who is not authorized by the plaintiff cannot legitimately

1. Student of NLS Orrisa, final year

1. MANU/DE/0571/2012





sell or advertise the Samsung products in India. In the plaint it was also stated that the advertisement of the products is through website namely Samsung.com/in, through which they intend to educate the customers of their varied range of products etc.

Defendants on the other hand are the company engaged in distributing, retailing and selling various types of computer hardware as well as peripherals. The defendants also have a retail outlet. They are importing the printer and selling it in India at the price lesser than the MRP of the printer manufactured by the plaintiff company.

Plaintiff challenged the said act of the defendants on the basis that the act of defendants of importation without the consent of the registered proprietor would amount to infringement of its trademark.

When the matter came in the court of law the plaintiff argued that in the present case the defendants have infringed the rights of the plaintiff because the importation has been caused by without the permission of the registered proprietor, also the act of meta tagging and deep hyper linking, by the defendants have infringed the trade mark SAMSUNG as the defendants are using the mark in relation to the advertisement and the use of the same is treated to be used for the purposes of infringement and thus the defendants are violating Section 29(1) read with Section 29(6) of the Act. Plaintiff said that the defendants passing off the goods which are not meant for Indian market giving the impression that they are authorized to do so. The act of defendants would also hamper the business of plaintiff in case of any dissatisfaction.

All this is being done to the detriment of the plaintiffs is clear act of misrepresentation as well as deceit to the general public

Defendants on the other hand argued that the plaintiffs have suppressed a material fact that defendants are importing and selling the genuine, original unaltered SAMSUNG printers which have been purchased and imported through the legitimate channels. Defendant said that no change in condition of the printer is done also they counter the act of infringement saying that they are doing parallel import which is permissible under the law and would not amount to infringement.

The Delhi high court after hearing both the party held that the claim of plaintiff is justified because law does not give any unfettered right of importation of goods under the mark. On the other hand, court supported plaintiff and said that in the normal course, the act of importation without the consent of the registered proprietor amounts to an infringement. Section 29 clearly put barriers on importation and had there been such a legislative intent to remove barriers on imports or exports and to promote free commerce under the goods of identical trademarks, Section 29(6) ought not to have provided for the acts of importation or exportation as a use of the mark for the purposes of Section 29.

Section 29(1) read with Section 29(6)(c) of trademark act 1999 in explicitly terms restrict the free flow of goods. Court interpreted the Section 30(3) and Section 30(4) and said that these sections operate in the domestic market and the same cannot be said to be relating or introducing any such concept of international exhaustion of rights on the basis of the putting of the goods on the market. The balance of convenience lies in favour of the Plaintiffs as the Plaintiffs would be more inconvenienced if the Defendants were allowed to run such market of parallel importation to the detriment of the Plaintiffs.

### **LATER ON WHEN THE MATTER WENT FOR APPEAL, QUESTION AROSE:**

Whether the Indian trademark act 1999 adopts the Principle of International exhaustion of Rights?

The Division Bench disagreed with the standing of the Single Judge the division bench observed that the single bench court has committed an error by concluding that the phrase 'lawfully acquired' in Section 30(3) meant 'acquisition by consent for the purposes of import'. The Division Bench said that it is incorrect interpretation of the section. Single judge interpreted that acquisition has to originate from the domestic market itself, where the trademark is registered and not from anywhere else but the court of division bench is of opinion that there is no law which stipulates that goods sold under a trade mark can be lawfully acquired only in the country where the trade mark is registered. As per division bench Trade Mark



Law is not to regulate the sale and purchase of goods. It is to control the use of registered trademarks.

In the appeal case, the trademark legislations in EU, UK, Australia, Brazil, Turkey, Singapore and Hong Kong were also discussed. The Division Bench stated that the statutes of foreign countries clearly indicate whether international exhaustion applies or otherwise. Therefore the reliance on these provisions to clear the ambiguity in the existing Indian provision is of no use.

Division bench supported the order of single bench with respect to the expression "market" that it is not clear that the expression market refers to what meaning, does it imply domestic or international market? Thus the division bench goes with the opinion of the apex court saying that it is the logical conclusion.

The Bench said that section 30(4) recognizes the principle in limited sense by curtailing the right of the proprietor to prohibit further sale. Section 30(4) gave a right to the registered Proprietor of the trade mark to oppose further sale of the goods.

As per the case even in the absence of a statutory provision, the registered proprietor of a trade mark would have the right to oppose further dealing in those goods inasmuch as they would be the same goods improperly so called, or to put it differently, if a physical condition of goods is changed, it would no longer be the same goods. But, sub-Section 4 of Section 30 is not restricted to only when the conditions of the goods has been changed or impaired after they have been put on the market. The Section embraces all legitimate reasons to oppose further dealings in the goods.

Thus, changing condition or impairment is only specie of the genus legitimate reasons, which genus embraces other species as well literature provided with the product. This could only happen in case where goods have to be imported from a country of manufacture or a country where they are put on the market thereof, and then imported into India. Only then would there be a difference in the language of the literature provided with the product; difference in services and warranties in the country from where the goods are imported by the seller and the country of import i.e. the manufacturers warranties not being available in the country of import; difference in quality control, pricing and presentation as also differences in advertising and promotional efforts. This was also an

indication of India adopting the Principle of International Exhaustion of Rights in the field of the Trade Mark Law. Hence, the market contemplated by Section 30(3) of the Trade Marks Act 1999 is the international market i.e. that the legislation in India adopts the Principle of International Exhaustion of Rights.

Finally, The Division Bench has partially allowed the appeal. Court set aside the restrain order of the single bench; appellants were allowed to import the printers, ink cartridges/toners bearing the trade mark Samsung/SAMSUNG and selling the same in India.

the order directed the Appellant to prominently display in their showrooms that the products sold were imported and that the Respondents do not provide any warranty or after sale services over such products. The injunction order given by the single judge with respect to meta-tagging their website to that of the respondents was hold as correct order.

## CONCLUSION

Although the both single bench and division bench of the High Court has taken contrasting views but the matter far from over till the Supreme Court decides the same one way or the other. We need to wait and watch till we reach on a conclusion on the principle of exhaustion of rights

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# THE RELEVANCE OF DOCTRINE OF SCÈNE À FAIRE IN COPYRIGHT LAW

Vaibhavi Pandey & Vaisahli Singh<sup>1</sup>

## INTRODUCTION

Scène à faire is a French term which means “scene to be made” or “scene that must be done”. It is a concept in Copyright Law which holds that certain works of a creative work are held to be not protectable because they are mandated by or are customary to a particular genre<sup>2</sup>. There are sometimes specific conditions when there is no other way to present an idea but only by using certain fixed elements then those elements are identified by the term “scenes à faire”.

In the treatise "Nimmer on Copyright", while dealing with the topic - Action - Substantive aspects, the doctrine of "Scenes a Faire" has been elucidated in the following words:

“Bearing in mind the hoary wisdom of Ecclesiastes that there is nothing new under the sun, certain patterns and situations are bound to recur. The claim ( and variations thereon) is often advanced that "the entire dramatic literature of the world can be reduced to some three dozen situations" Schwartz v. Universal Pictures Co. 85 F. Supp. 270(S.D. Cal. 1949) So, for example, if two scenarios wish to treat the unprotected idea of police life in the South Bronx, for each it will be only natural to depict " drinks, prostitutes, vermin and derelict cars", juxtaposed against hard drinking Irish cops chasing fleeing criminals Judge Leon Yankwich has called such incidents" scenes a faire" i.e., "scenes which 'must' be done." That language is often invoked to immunize from liability similarity of incidents or plot which necessarily follow from a common theme or setting.”<sup>3</sup> The doctrine essentially tries to encourage continuous creative endeavors and discourage the monopoly contended by copyright owners over common subject matters.

## EVOLUTION OF THE DOCTRINE

This doctrine first evolved in the famous US case of Cain v. Universal Pictures Co.<sup>4</sup> , wherein Judge Leon

Yankwich while passing the order in the favour of the defendants admitted that the scene from the plaintiff’s book and the defendant’s movie were somewhat similar but it cannot be said to constitute a copyright infringement.

The judge likewise stated that the idea of a couple taking shelter from a storm in a church was regular and as old as going back to the time when the first churches came and thus couldn't be made a subject matter of copyright. He noted that there was some homogeneity between the book and film adaptations, for example, playing piano in the church, praying and suffering from hunger. He brought out the French term "scènes à faire" for these similarities, holding "it was inevitable that incidents like these and others which are, necessarily, associated with such a situation should force themselves upon the writer in developing the theme." The doctrine is an indispensable part of the American jurisprudence furthering and fostering the growth and development of individual creativity on the one hand and protecting the rights of a copyright owner on the other hand. The doctrine mandates a copyright owner to prove that the alleged work is largely similar to his work and is not merely based on the common theme employed by both the plaintiff and defendant.

Other important judgments of the US courts on the subject matter are Walker v. Time Life Films, Inc<sup>5</sup>. and Joshua Ets-Hokin v. Skyy Spirits Inc<sup>6</sup>. In Walker v Time Life Films, Inc., writer Thomas Walker documented a claim against one of the production companies, Time-Life Television Films (lawful holder of the script), after the release of the film Fort Apache, The Bronx, asserting that the makers infringed on his book Fort Apache. The United States Court of Appeals for the Second Circuit decided that the alleged infringement are only conventional thoughts, and that the United States copyright law does not protect ideas or thoughts.

1. 3rd Year Student, National Law School, Orissa  
2. Scène à faire under Copyright Law, Ivan Hoffman, BA JD.  
3. Nimmer on Copyright, Vol. III, 1993

4. Cain v. Universal Pictures Co., 47 F.Supp. 1013 (1942).  
5. Walker v. Time Life Films, Inc., 784 F.2d 44 (2d Cir. 1986)  
6. Joshua Ets-Hokin v. Skyy Spirits Inc., 225 F.3d 1068 (9th Cir. 2000)





Another noteworthy case in United States was *Ets-Hokin v. Skyy Spirits*, in which scenes à faire was maintained as a certifiable barrier by the United States Court of Appeals for the Ninth Circuit. The case included a business photographic artist, Joshua Ets-Hokin, who sued Skyy vodka when another photographer made commercials with a considerably comparable appearance to the work he had done for them previously. It was held that the closeness between his work and the later works of the photographer was mainly because of the constrained scope of articulation conceivable of the subject matter. Inside the limitations of a photograph shoot for a saleable business item there are only so many ways one may photograph a vodka bottle. In light of this, to constitute copyright infringement, the two photographs would have to be essentially compulsorily indistinguishable.

## POSITION IN INDIA

The doctrine of *Scène à faire* has not been expressly stated in the Copyright Act in India. The courts have discussed this issue following what has already been stated in their US and UK counterparts. The doctrine is basically American in origin and the Indian courts have not deviated much from what is the settled law in the US.

In *NRI Film Production Associates v. Twentieth Century Fox Films*<sup>7</sup>, this doctrine was discussed in reference to the famous Supreme Court case of *R G Anand v. M/s Delux Films And ors.* wherein it was held that “there can be no copyright in an idea, subject-matter, themes, plots or historical or legendary facts and violation of the copyright in such cases is confined to the form, manner and arrangement and expression of the idea by the author of the copyrighted work.”<sup>8</sup>

“Also it was stated that where the same idea is being developed in a different manner, it is manifest that the source being common, similarities are bound to occur. In such a case the courts should determine whether or not the similarities are on fundamental or substantial aspects of the mode of expression adopted in the copyrighted work. If the defendant's work is nothing but a literal limitation of the copyrighted work with

some variations here and there then it would amount to violation of the copyright. In other words, in order to be actionable the copy must be a substantial and material one.”<sup>9</sup>

“Further it was held by the Court that where the theme is the same but is presented and treated differently so that the subsequent work becomes a completely new work, no question of violation of copyright arises.”<sup>10</sup>

The doctrine of *Scenes a Faire* has come into light recently in India when Rajinikanth-starrer ‘*Lingaa*’ ran into trouble ahead of its release. K.R. Ravi Rathinam, an aspiring film maker, filed a case in the Madras High Court alleging that the director of ‘*Lingaa*’ has lifted his script.

The petitioner has alleged that the script of *Lingaa* is copied from his yet-to-be-released Tamil film titled ‘*Mulai Vanam 999*’ which is based on the life of a British engineer who conceived the idea behind the Mullaperiyar dam and that the petitioner had uploaded the entire story on YouTube on Feb 24, 2013. The respondents have denied his claims stating that a work which has not been published cannot claim copyright infringement.

In a counter-affidavit, Rajinikanth said that there were numerous stories focused around the nationalization of rivers and it would not be right for the applicant to claim copyright over such an issue. For now, Justice M. Venugopal has reserved his order on the petitioner's plea to stay the release of the film.

The case raises important questions relating to the doctrine of *scene a fair*. It must be thought upon whether a copyright protection can be granted to the aspiring director on the premise that he had made a Youtube video on the story. Also, it has to be noted that a copyright cannot be granted on a theme. To establish that there was copyright infringement it must be shown that it is not merely a theme which has been copied but the whole storyline has been copied. Venugopal has reserved his order on the petitioner's plea to stay the release of the film.

7. *NRI Film Production Associates v. Twentieth Century Fox Films*, ILR 2004 KAR 4530

8. *R G Anand v. M/s Delux Films And ors.*, 1978 AIR 1613

9. *Ibid*

10. *Ibid*



The case raises important questions relating to the doctrine of scene a fair. It must be thought upon whether a copyright protection can be granted to the aspiring director on the premise that he had made a Youtube video on the story. Also, it has to be noted that a copyright cannot be granted on a theme. To establish that there was copyright infringement it must be shown that it is not merely a theme which has been copied but the whole storyline has been copied.

## CONCLUSION

The doctrine of Scène à faire creates a balance between freedom of expression and copyright law. On the one hand it protects the rights of the artist whereas on the other hand it gives another individual a freedom to create on a particular theme which has been used earlier by another artist. This doctrine has been created considering both law and equity in mind.

As popularly described by Prof. Nimmer in his book, "this doctrine does not limit the subject matter of copyright; instead, it defines the contours of infringing conduct."<sup>11</sup> In order to best serve the interests of copyright law, in light of the ever increasing statutory protection afforded to copyright owners and the plain language of the copyright statute itself, courts should require plaintiffs to show that their work is protectable despite the doctrine of scenes a faire.

The doctrine of scenes a faire is used by the courts to distinguish copyrightable material from those which cannot be copyrighted. Its purpose is to ensure that what belongs in the public domain stays there, and what deserves protection gets it<sup>12</sup>.

Thus, scenes a faire is a concept invoked to promote the very same public policy that copyright law itself promotes, namely, the progress and public dissemination of knowledge<sup>13</sup>.

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11. *Nimmer on Copyright*, Vol. III, 1993.

12. *Feist Publications v. Rural Tel. Service*, 499 U.S. 340, 348 (1991)

13. *Fin. Control Assocs. v. Equity Builders, Inc.*, 799 F. Supp. 1103, 1118 (D. Kan. 1992)



# PATENT PROSECUTION HIGHWAY (PPH) –SMOOTH OR BUMPY!

Monika Shailesh

Today patent offices across the world are seeing increasing number of patent applications.

Globalization in almost all the sectors like commerce, technology, education etc. has led to the increase in patent applications. It has been observed that same patents are filed in multiple countries, increasing the redundancy of applications. This has led all the patent offices and officers to work together in cooperation. It is believed by many patent examiners and commissioners that this type of co-operation is very crucial to increase productivity. In addition to this large number of pending applications and backlogs has made this cooperation a must and giving rise to what is known as Patent Prosecution Highway.

Under PPH, participating patent offices have agreed that when an applicant receives a final ruling from a first patent office that at least one claim is allowed, the applicant may request fast track examination of corresponding claim(s) in a corresponding patent application that is pending in a second patent office. PPH leverages fast-track examination procedures already in place among participating patent offices to allow applicants to reach final disposition of a patent application more quickly and efficiently than standard examination processing<sup>1</sup>.

## Enthusiasts of this program often cite below advantages:

PPH, through the exploitation of all the search/examination-related information of the OEE,

- (1) Delivers lower prosecution costs.
- (2) Supports applicants in their efforts to obtain stable patent rights efficiently around the world.
- (3) Reduces the search/examination burden and improves the quality of the examination of the major patent offices in the world.

The USPTO has reported a PPH application allowance rate of about 94%, or more than double the usual allowance rate, and the average number of office actions is approximately half that of other U.S. patent applications. The CIPO has reported that approximately 35% of the PPH applications were deemed allowable without an examiner's report.

The Patent Prosecution Highway was first developed between the USPTO and the Japan Patent Office ("JPO") as a pilot program that began on July 3, 2006<sup>2</sup>. This Pilot program was started to explore the way to reduce burden on both the US and Japan patent office for the same patent filed in both the countries. The sole purpose of this pilot project was to expedite the patent examination in the second office by considering the examinations results of the first office of applications if the patent application was found to be patentable in the office of first examination.

Although PPH is believed to be a good initiative for providing high quality patent examination with less cost and lead time it has few reproach also.

1. The most relevant denigration of all current Patent Prosecution Highway programs is that all claims in the office of second filing must be limited to the claim scope allowed in the office of first filing, which could result in narrower claims than if prosecuted separately in each country. This major limitation may not be optimal for many applicants who prefer to have broadest scope of claims, which may differ from country to country due to the differences in patent laws and local practice. Another criticism is that filing applications under all Patent Prosecution Highway programs could increase initial costs due to the filing requirements, which involve compiling specific documents, writing letters, and filling out petitions<sup>3</sup>.

1. Source [http://www.uspto.gov/patents/init\\_events/pph](http://www.uspto.gov/patents/init_events/pph) Last visited 26-Oct-2014

2. [http://www.uspto.gov/web/offices/pac/dapp/opla/preognotice/pph\\_pp.pdf](http://www.uspto.gov/web/offices/pac/dapp/opla/preognotice/pph_pp.pdf) Last visited 26-Oct-2014

3. *The Patent Prosecution Highway: Is Life in the 'Fast Lane' Worth the Cost?* By ALICIA PITTS AND JOSHUA KIM.



2. Country-Specific Practices that Reduce the Allure of the Patent Prosecution Highway in view of the different patent laws and practices of each participating country; there are distinct disadvantages in choosing to use the Patent Prosecution Highway in each participating office<sup>4</sup>.
3. Applicants cannot take advantage of the PPH if the first favourable examination results are from an office of second filing. To address this shortcoming, eight patent offices agreed to launch an enhanced PPH program called PPH MOTTAINAI.
4. There is also a concern that negative comments by the examiner in an Office of Second Filing (OSF) might be used during litigation against the patent granted in the Office of First Filing (OFF).

To make the PPH process more accessible and simplified, CIPO and 16 other intellectual property offices have partnered in a Global PPH pilot beginning January 6, 2014. Under the Global PPH, one have the option of making a request to any or all of the participating offices based on the work products, including Patent Cooperation Treaty (PCT) work products, from another participating office. Applicants may make requests to CIPO under the Paris Route PPH ("PPH") or the PCT-PPH, depending on the work product from our partner office<sup>5</sup>.

## CONCLUSION-

PPH and GPPH programs seems to bid benefits like reduction in application redundancy in Partner patent offices, speeds up the entire process to give expedited patent prosecution, better allowance rate and a significant cost reduction mechanism. However due to above mentioned pot holes in this highway, it is advisable to be careful while opting to have a ride on this highway as it may become a bumpy ride.

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4. *The Patent Prosecution Highway: Is Life in the 'Fast Lane' Worth the Cost?* By ALICIA PITTS AND JOSHUA KIM
5. [http://www.cipo.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/h\\_wr02160.html](http://www.cipo.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/h_wr02160.html) Last visited on 26-oct-2014 [http://www.cipo.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/h\\_wr02160.html](http://www.cipo.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/h_wr02160.html) Last visited on 26-oct-2014 [http://www.cipo.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/h\\_wr02160.html](http://www.cipo.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/h_wr02160.html) Last visited on 26-oct-2014



# PATENT ON TRADITIONAL KNOWLEDGE- PATENT OFFICE DECISION ON DEVELOPMENT CENTER FOR BIOTECHNOLOGY (TAIWAN) VS CSIR

*Saipriya Balasubramanian*

In a recent decision taken against the pre-grant opposition filed by the Council of Scientific & Industrial Research, the Patent Office granted patent rights for the invention titled "A Pharmaceutical Composition And Process Thereof For The Preparation Of Plant Extracts For Treating Skin Disorders And Enhancing Healing Of Wounds" (provisionally numbered as 1556/KOL/2007)" filed by Development Center For Biotechnology (The Applicant), a Taiwanese company. The grounds of Opposition are lack of novelty and inventive step. A detailed analysis of the case is as follows,

The Applicant has amended the claims twice one before filing the Pre-grant opposition followed by the final amended set of claims after filing the Pre-grant opposition. The claims are processing, extraction, composition and use claims. The first 10 claims in 'as filed' format comprise of a process for the preparation of Plectanthus amboinicus extracts, a plant extract. The said process is being prepared by a stirring separation method. Further Claims 4 to 10 comprise of the step involved in stirring separation method of the extract. Claim 11 to 16 comprises of the pharmaceutical composition and amount of Centella asiatica Urban extract. Claims 17 to 20 comprise of the use of the Pharmaceutical composition extracted from Plectanthus amboinicus.

In the amended claims, claims 14, 15 and 16 were deleted by the applicant during prosecution as they were 'use' claims. Claims 11 to 16 were objected to by the opponent (CSIR).

The Opponent has quoted " the following claims are included in the third party observation." However, no arguments have been made against the remaining claims.

## CLAIMS 11 TO 16 THAT ARE DISPUTED READ AS FOLLOWS:

1. <http://164.100.176.38/decision/1556-KOL-2007-8021/PRE%20GRANT%201556%20KOL%202007.pdf>

"11. The pharmaceutical composition as claimed in claim 10 further comprising a therapeutically effective amount of Centella asiatica Urban extract.

12. The pharmaceutical composition as claimed in claim 11, wherein the Plectranthus amboinicus extract and the Centenella asiatica Urban extract have a weight ratio of about 1:60 to about 1:4.

13. A wound dressing comprising a pharmaceutical composition as claimed in any one of claims 10 to 12.

14. A use of the pharmaceutical composition of any one of claims 10 to 12 in the manufacture of a medicament for treating skin disorder.

15. The use as claimed in claim 14 wherein the disorder is general trauma or bedsores.

16. The use as claimed in claim 14 wherein the skin disorder is wounds in a diabetic patient."

The Opponent has filed a Pre-grant Opposition by way of representation on 19/06/2012. The Patent Office acknowledged the role of CSIR as the general opponent in the field of Traditional Knowledge based patent applications. Further, CSIR is found to file documents prepared by them under the programme of the preparation of Traditional Knowledge Digital Library (TKDL) to prevent the persons to claim patent right over the traditional knowledge.

## CSIR-TKDL PRACTICE

It was further stated that as per practice CSIR-TKDL always submitted prior-art evidences available in TKDL with respect to patent applications filed on India's Traditional knowledge at International Patent Office's but has never been a part of hearing process in patent offices. Hence there was no personal representative in any of the Pre-grant Opposition hearings. Therefore in the present case, the hearing proceeded in the presence of the applicant representative only.

The opponent had annexed 11 documents at the time of filing Pre-grant opposition in languages other than





English for which the translations in English have been filed. The cited documents mainly referred to *Centella asiatica* and no reference was made to *Plectranthus amboinicus* in terms of its method of preparation, extraction, and composition as well its use in wound healing.

### **THE APPLICANT'S ARGUMENTS:**

The Applicant had primarily argued that the opponent has merely provided documents from TKDL without providing verified translation. The agent of the applicant challenged the validity of the translations by making reference to Patent Rule 61(2) that requires production of verified translations. However, the applicant did not attempt to prove that the translations are wrong. On the question of authorised translator, the Controller held that CSIR is funded by the Government and as stated by them in their annex has an agreement with Patent office to share the TKDL for the purpose of search during prosecution of the filed patent applications and disposing them on merits. Therefore translations filed by CSIR are deemed authenticated by the Government itself. Therefore the translations were considered for the disposal of the present case.

The Controller further stated that the present opposition filed by the opponent is loosely drafted and do not even set out the grounds of opposition. Further, the Controller pointed that in a contested opposition preceding the grounds ought to be pleaded and proved. In absence of pleadings such proceeding ought to be outright rejected.

As seen from above claims 11-16 are disputed. Claims 14,15 and 16 were deleted during prosecution as the said claims are 'use' claims and do not fall within the scope of Section 2(1)(j) of the Patents Act.

### **CLAIMS 11 TO 13:**

Defending Claims 11 to 13, the Applicant stated that Claim 11 is dependant claim on the previous claim. It is noteworthy to state that claims 1 to 10 of the present invention are not opposed. Further, the annexed documents refer to *Centella asiatica* Urban throughout which is an optional feature of the present invention. It is admitted that though the extract of *Plectranthus amboinicus* is known, the existing techniques of extractions (e.g. column chromatography) are cumbersome, time consuming and do not produce

large quantities. The present invention, through the stirring separation technique, provides better and faster extraction. Also better wound healing efficacy is observed in *Pamboinicus* and *Centella asiatica* combination.

Therefore, it was prayed by the Applicant that the Claims 11 to 13 are novel and inventive and hence be allowed.

### **ANALYSIS AND DECISION OF THE CONTROLLER**

The Controller assessed the novelty of the present invention based on the latest filed claims as well as the documents provided by the Opponent and observed that while filing opposition it is not correct to conclude that the opponent is not aware about the first 10 claims of the present specification. In the absence of any documental evidence about the extract of *Plectranthus amboinicus* prepared by stirring method and its use for wound healing novelty of the first 10 claims has been upheld by the Controller.

The combination of *Plectranthus amboinicus* and *Centella asiatica* as claimed in claim 11 is not mentioned by the opponent as either published prior to the priority date or prior claimed or been in the public domain before the priority date of the present application. Therefore, Claim 11 is considered Novel. Claim 12 is dependent on Claim 11 which defines the specific ration of the two constituents also considered as novel.

Claim 13 defines an independent claim, claiming a product that is a "wound dressing" which in turn comprises either the extract of *Plectranthus amboinicus* or the combined extracts of *Plectranthus amboinicus* and *Centella asiatica*. Hence Claim 13 is also novel.

The Applicant has acknowledged about the existence of the extract of *Plectranthus amboinicus* from US patent applications 2006/0099283 A1 and USSN 11/605,178. The extraction in the said patent documents was carried out by column chromatography. However the drawbacks of traditional column chromatography methods are cumbersome, time-consuming, large quantity of the active ingredient is unavailable. Hence the present process that is stirring separation is superior to column chromatography or centrifugal separation because Example 1 of the



specification explains that yield of the active is shown as 0.94% whereas Example 2 of the specification explains the preparation of Plectranthus amboinicus extracts by column chromatography separation method that is the process of the prior art wherein the yield of the active is shown as 0.67%. Therefore, there exists the technical advancement as compared to the existing knowledge hence satisfying the requirement of the Section 2(1)(ja) of the Patents Act, thus the “inventive step” is established.

### CONCLUSION:

Though the opponent had pointed the lack of novelty and inventive step, but could not prove it. The opponent’s main objection is for Centella asiatica which is only an option in the present invention. The Opponent had made no references to the extract of Plectranthus amboinicus nor to its method neither of preparation nor to a combination nor to its use for skin disorders. Based on the aforesaid, it has been decided to grant the patent right to the applicant.

Plant Extract	Prior Art		Present Invention
	Wound healing Property	Method of Extraction	
P.amboinicus	Not Known	Known (traditional column chromatography-cumbersome, time-consuming, large quantity unavailable)	Improved Process provides stirring method to replace the traditional column chromatography for mass production.
Centella asiatica Urban	Known		
P.amboinicus + Centella asiatica Urban	Not Known		Better wound healing effectiveness of P.amboinicus + Centella asiatica Urban

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# PROPOSED AMENDMENTS TO THE CONSUMER PROTECTION ACT, 1986

*Mrinali Mudoi*

India has been a consumption-driven economy for the last many decades and as per the Ministry of External affairs, Government of India, the Consumer spending in the country is expected to increase about 2.5 times by 2025. The Ministry quotes that it is expected that the consumer durables market will expand at a compound annual growth rate (CAGR) of 14.8 per cent to US\$ 12.5 billion in FY 2015 from US\$ 7.3 billion in FY 2012. Urban markets account for the major share (65 per cent) of total revenues in the Indian consumer durables sector. In rural markets, durables, such as refrigerators, and consumer electronic goods are likely to witness growing demand in the coming years. From US\$ 2.1 billion in FY 2010, the rural market is expected to grow at a CAGR of 25 per cent to touch US\$ 6.4 billion in FY 2015<sup>1</sup>.

With such positive probabilities, the Government is emphasizing on reforming Indian market into a strong potential market in the global strata. The consumer affairs ministry realizes that there has been a growing feeling that consumers do not get quick redressal and framework available is lagging behind. There is also a need align the framework in line with global best practices and new business practices that have cropped up<sup>2</sup>. Hence, it is proposed to create an agency similar to the US Federal Trade Commission, known as the Consumer Protection Authority. So as to strive at the objective, recently on 5 November, 2014, the Ministry of the Consumer Affairs issued a draft which discusses the proposed amendments to the Consumer Protections Act, 1986<sup>3</sup> ("Act").

## CONSUMER PROTECTION AUTHORITY

A new Chapter III after the existing Chapter- II is proposed to be added to the Act which establishes an executive agency, namely "Central Consumer Protection Authority" that enables prevention of exploitation of

consumers and violation of their rights and to promote, protect and enforce the rights of consumers. The basic objectives of the formulation of such a body are i) to protect and enforce the rights of consumers such as the right to be protected against the marketing of goods / products and services which are unsafe or hazardous to life and property, ii) the rights to be informed about the quality, quantity, potency, purity, standard and price of goods or services, iii) to prevent unfair trade practices as defined under Section 2(1)( r) of the Act, iv) to ensure that no advertisement is made of any goods or services which is misleading or deceiving or contravenes the provisions of this Act and rules and regulations made under it and v) to ensure that no person engages himself in unfair trade practices or takes part in the publication of any advertisement which is false or misleading.

## INCLUSION OF E-COMMERCE TRANSACTIONS

In India, presently the e-commerce and online shopping market is gaining tremendous popularity. Online shopping sites offer their online shopping services to various cities and towns. The proposed amendment attempts to include e-commerce transactions under the ambit of the Act. Under the current consumer protection regime, a consumer can initiate legal action against a seller only in the place where transaction takes place. However seeing the increasing trend of online shopping in India, the Government planned to propose amendment to the Act in order to allow 'territory free' legal action against any goods or service provider.

## MEDIATION PROCESS

It is noteworthy that the proposed amendments also include the process of mediation by inserting a new Section 2(1)(ja) which means the process by which a mediator( appointed by the National Forum or a State Forum or a District Forum, as the case may be), mediates the dispute between the parties to the complaint/ appeal made by the application of the provisions as specified under Chapter IV of the Act and in particular:

1. [http://indiainbusiness.nic.in/newdesign/index.php?param=economy\\_landing/415/1](http://indiainbusiness.nic.in/newdesign/index.php?param=economy_landing/415/1)
2. [http://articles.economictimes.indiatimes.com/2014-09-11/news/53811492\\_1\\_consumer-protection-act-consumer-disputes-district-consumer-forums](http://articles.economictimes.indiatimes.com/2014-09-11/news/53811492_1_consumer-protection-act-consumer-disputes-district-consumer-forums)
3. <http://consumeraffairs.nic.in/consumer/writereaddata/Comp%20Statement%20CP.pdf>



- by facilitating discussion between parties directly or by communicating with each other through the mediator,
- by assisting parties in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise, generating options in an attempt to solve the dispute; and emphasizing that it is the parties' own responsibility for making decisions which affect them.

## PRODUCT LIABILITY

The proposed amendments to the Act include a new chapter on the product liability which embraces provisions related to actions brought for or on account of personal injury, death, or property damage caused by or resulting from the manufacture, construction, design, formula, preparation, assembly, testing, service, warning, instruction, marketing, packaging, or labeling of any product. Further, the proposed amendment is set to introduce product liability charges even in cases like train or flight delays. Instead of just refunding the amount paid, the service providers will be liable for punitive action, fine and compensation.

Apart from above proposed amendments, there are further noteworthy proposed amendments which suit the requirement of today's advanced and cyber-oriented market. For instance, the scope of the definition of the term "complaint" is widened to include an additional condition stating a complaint means any allegation in writing made by a complainant that he has suffered a loss due to an unfair contract entered into by him. The proposed provisions are intended to protect the consumers who are placed in an unequal bargaining capacity.

## ADVERTISEMENT

The Act specifies that a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provisions of any service, adopts any unfair method or unfair or deceptive practice which includes permitting the publication of any advertisement whether in any newspaper or otherwise, for the sale or supply at a bargain price, of goods or services that are intended to be offered for sale or supply at the bargain price, or for a period that is, for sale or supply at the bargain price, or for a period that is, and in quantities that are, reasonable, having regard to the nature of the market in which the business is carried on, the nature and size of business, and the nature of the advertisement.

In order to make the existing provisions related to advertisement more effective, the proposed amendments have defined the term "Advertisement" which means any audio or visual publicity, representation or pronouncement made by means of any light, sound, smoke, gas, print, electronic media, internet or website and includes through any notice, circular, label, wrapper, invoice or other documents.

## CONCLUSION

India is likely to emerge as the world's largest middle class consumer market with an aggregated consumer spend of nearly US\$ 13 trillion by 2030, as per a report by Deloitte titled 'India matters: Winning in growth markets'<sup>4</sup>. The proposed amendments address various issues which remained unaddressed under the current consumer protection regime. Upon implementation of these amendments to the existing laws, the consumer laws of the country will not only get stronger but also will help India to outshine in the global strata with a stronger consumer driver- economy.

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4. <http://www2.deloitte.com/uk/en/pages/international-markets/articles/india-matters-winning-in-growth-markets.html>



# RIGHT TO MAINTENANCE UNDER SECTION 125 OF CRIMINAL PROCEDURE CODE, 1973

*Sumeet Anand & Rahul Bansal*

The Hon'ble Supreme Court in a path breaking judgment *Chanmuniya Vs. Chanmuniya Virendra Kumar Singh Kushwaha and Anr*<sup>1</sup> held that "Where partners lived together for a long spell as husband and wife, a presumption would arise in favour of a valid wedlock"

## FACTS OF THE CASE:

1. One Sarju Singh Kushwaha had two sons, Ram Saran (elder son) and Virendra Kumar Singh Kushwaha (younger son and the first respondent). The appellant, Chanmuniya, was married to Ram Saran and had 2 daughters-Asha, the first one, was born in 1988 and Usha, the second daughter, was born in 1990. Ram Saran died on 7.03.1992.
2. Thereafter, the appellant contended that she was married off to the first respondent as per the customs and usages prevalent in the Kushwaha community in 1996. The custom allegedly was that after the death of the husband, the widow was married off to the younger brother of the husband. The appellant was married off in accordance with the local custom of Katha and Sindur. The appellant contended that she and the first respondent were living together as husband and wife and had discharged all marital obligations towards each other. The appellant further contended that after some time the first respondent started harassing and torturing the appellant, stopped her maintenance and also refused to discharge his marital obligations towards her.

## ISSUES:

1. Whether the living together of a man and woman as husband and wife for a considerable period of time would raise the presumption of a valid marriage between them and whether such a presumption would entitle the woman to maintenance under Section 125 Cr.P.C?

2. Whether strict proof of marriage is essential for a claim of maintenance under Section 125 Cr.P.C. having regard to the provisions of Domestic Violence Act, 2005?
3. Whether a marriage performed according to customary rites and ceremonies, without strictly fulfilling the requisites of Section 7(1) of the Hindu Marriage Act, 1955, or any other personal law would entitle the woman to maintenance under Section 125 Cr.P.C.?

## OBSERVATIONS:

In the present era, a trend has evolved among unmarried couples to live together as husband and wife as long as they have attained the age of majority. Some of these couples never contract a legally binding marriage. Difficult consequences flow from such relationships where due to one reason or another, the relationship may come to an end. In such cases we find that couples had invested heavily in the relationship both financially and emotionally. The disgruntled persons in the relationship think that since there was no legally recognized marriage, they cannot resort to the law in acquiring their property back or in some instances getting compensation.

In the case of *Chanmuniya Vs. Chanmuniya Virendra Kumar Singh Kushwaha and Anr*. The appellant have been married off to one Virendra Kumar Singh in accordance with the local custom of Katha and Sindur. The High Court in its findings have opined that the essentials of a valid Hindu marriage, as required under Section 7 of the Hindu Marriage Act, had not been performed, thus the respondent was not the husband of the appellant.

The first question as to whether or not a presumption of marriage arises when parties live together for a long time is answered here as follows.

The parties may not have performed the statutory essentials of a valid marriage, but they had entered into this relationship with the intention to marry and to be called as husband and wife before the eyes of the

1. *Chanmuniya Vs. Chanmuniya Virendra Kumar Singh Kushwaha and Anr (2011)1SCC141*





society. It was clearly stated down in the facts of the case that the appellant and respondent had been living together as husband and wife and had discharged all marital obligations towards each other.

The law provides for presumption of marriage. Where parties have cohabited together for a certain period of time, then the courts can construe a presumption of marriage and hence apply the rules of marriage to deal with issues of those parties. All parties that seek to rely on the presumption of marriage must prove that indeed a union existed, and such a union can be challenged only by strong and satisfactory evidence<sup>2</sup>.

In the instant case the appellant and the respondent have been staying together as man and wife for a period of time. The people around them must have believed, from their conduct that the parties are husband and wife. The parties must be living or lived in one household and behaved in a way that led others to believe that they were husband and wife. A relationship, which may be adulterous at the beginning, may become matrimonial consent. This may be evidenced by habit and repute<sup>3</sup>. Courts also insist that such unions should be qualitative and quantitative. The cohabitation should be long, continuous having substance and not periodical. Parties should be living under one roof, do things together like acquiring property, and maybe even have children together, which would then move the relationship from the realm of concubinage to marriage. The Privy Council laid down the general proposition that where a man and woman are proved to have lived together as man and wife, the law will presume, unless, the contrary is clearly proved, that they were living together in consequence of a valid marriage, and not in a state of concubinage<sup>4</sup>.

The next question as to whether claim of maintenance can be sought under Section. 125 of Cr.P.C. if valid marriage is presumed and what 'wife' under Section 125 of Cr.P.C. means especially having regard to explanation under Clause (b) of the Section, is answered here as follows. The objectives of Section-125 of Cr.P.C are to achieve a social purpose and to prevent vagrancy and destitution.

## COURT HELD:

The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. When an attempt is made by the husband to negative the claim of the neglected wife depicting her as a kept-mistress on the specious plea that he was already married, the court would insist on strict proof of the earlier marriage. The term 'wife' in Section 125 of the Code of Criminal Procedure includes a woman who has been divorced by a husband or who has obtained a divorce from her husband and has not remarried. The woman not having the legal status of a wife is thus brought within the inclusive definition of the term 'wife' consistent with the objective<sup>5</sup>. Thus, in those cases where a man, who lived with a woman for a long time and even though they may not have undergone legal necessities of a valid marriage, should be made liable to pay the woman maintenance if he deserts her. The man should not be allowed to benefit from the legal loopholes by enjoying the advantages of a de facto marriage without undertaking the duties and obligations. Any other interpretation would lead the woman to vagrancy and destitution, which the provision of maintenance in Section 125 is meant to prevent. The Committee on Reforms of Criminal Justice System, headed by Dr. Justice V.S. Malimath, in its report of 2003 opined that evidence regarding a man and woman living together for a reasonably long period should be sufficient to draw the presumption that the marriage was performed according to the customary rites of the parties. Thus, it recommended that the word 'wife' in Section 125 Cr.P.C. should be amended to include a woman who was living with the man like his wife for a reasonably long period. The Constitution Bench of this Court in Mohammad Ahmed Khan v. Shah Bano Begum and Ors<sup>6</sup>, considering the provision of Section 125 of the 1973 Code, opined that the said provision is truly secular in character and is different from the personal law of the parties. The Court further held that such provisions are essentially of a prophylactic character and cut across the barriers of religion. The Court further held that the liability imposed by Section 125 to maintain close relatives, who are indigent, is founded upon the individual's obligation to the society to prevent vagrancy and destitution.

2. *Lousia Adelaide Piers and Florence A.M. De Kerriguen v. Sir Henry Samuel Piers* (1849) 11 HLC 331  
3. *In Lieutenant C.W. Campbell v. John A.G. Campbell* (1867) Law Rep. 2 HL 269  
4. *A. DINOHAMY V. W.L. BALAHAMY AIR 1927 P.C. 185*

5. *VIMALA (K) V. VEERASWAMY (K) MANU/SC/0719/1991: (1991) 2 SCC 375*  
6. *MANU/SC/0194/1985: (1985) 2 SCC 556*



## **ACTS/RULES/ORDERS:**

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1. Hindu Marriage Act, 1955 - Section 2, Section 7, Section 7(1), Section 9, Section 20, Section 20(1), Section 22, Section 26, Section 28;
2. Family Law Act; Protection of Women from Domestic Violence Act, 2005 - Section 3, Protection of Women from Domestic Violence Act, 2005 – Section 26;
3. Code of Criminal Procedure, 1973 (CrPC) - Section 125; Section 536; Section 488, Section 488(1);
4. Indian Penal Code (IPC) - Section 494;
5. Constitution of India - Article 15(3), Constitution of India - Article 39

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# ACCESS TO JUSTICE IN INDIA

Amit Pratap Shaunak

## INTRODUCTION

The phrase “access to justice” cannot be easily defined. It is a political, legal, and rhetorical symbol of undeniable power and attractiveness for the subjects of statecraft. Access to justice has an intrinsic nexus with the term “justice”, in the sense that it is its minimum prerequisite. The notion of justice evokes the cognition of the rule of law, of the resolution of conflicts, of institutions that make law and of those who enforce it; it expresses fairness and the implicit recognition of the principle of equality<sup>1</sup>.

Access to justice relates to the ease of entry to a legal institution as also to the nature of the de jure fact that carries its promise<sup>2</sup>. The concept of access to justice has undergone an important transformation; earlier a right of access to judicial protection meant essentially the aggrieved individuals formal right to merely litigate or defend a claim. The reason behind this was that access to justice was a natural right and natural rights did not require affirmative state action. However with the emergence of the concept of welfare state the right of access to justice has gained special attention and it has become right of effective access to justice. In the modern, egalitarian legal system the effective access to justice is regarded as the most basic human right which not only proclaims but guarantees the legal rights of all<sup>3</sup>.

In today's world, “Access to justice” means having recourse to an affordable, quick, satisfactory settlement of disputes from a credible forum<sup>4</sup>. The words “access to justice” serve to focus on two basic purposes of legal system- the system by which people may vindicate their rights and/or resolve their disputes under the general auspices of the state. Thus it requires that the

system, firstly, must be equally accessible to all, and second, it must lead to results that are individually and socially just.

Access to justice can be broadly categorized into formal and informal access to justice. The formal access to justice is basically adjudication of disputes by the courts which follow the rules of civil and criminal procedure. This mode of justice delivery system though the primary model, has numerous shortcomings such as cost hurdles, inordinate delays and other technical hurdles like laches and execution of courts order. On the other hand informal access to justice includes alternative modes of dispute resolution such as arbitration, conciliation, mediation, lok adalats and nyaya panchayats. Contrary to what the nomenclature suggests, alternative modes are more of a supplementary phenomenon and were devised with that very intent. However, one has to remember that these methods of dispute resolution are required to always adhere to certain basic postulates of dispute resolution - parity of power between the contesting parties being one such postulate. If they in their very conceptions offer scope for coercion or influence, they cannot be considered to be imparting justice. It has to be remembered that justice is the beacon of any dispute resolution method and not just mere settlement of dispute. If mere settlement becomes the beacon, then there comes the element of power imbalance and as a result, the society becomes lopsided leading to tussle and eventual conflict between power holders and power addressees.

## ACCESS TO JUSTICE IN INDIA

The present mode of access to justice through courts, followed in India is based on adversarial legalism. The adversarial system of law is generally followed in common law countries, and is characterized by the state's neutrality and in which the parties are responsible for initiating and conducting litigation except in criminal matters wherein the state initiates the proceedings<sup>5</sup>. This mode of access to justice is an inheritance from the British and was implemented by the British government to exploit the Indian masses.

1. Rawl John, “A Theory of Justice” (Harvard University press, Edition 1997) p11
2. This view is contrary to the general notion wherein the nature of justice as contained in the law (procedural or otherwise) is considered beyond the scope of this head.
3. Cappilietti, M., Garth, Bryant, Access to Justice, Vol I, The Florence Access to Justice Project, Sijthoff and Noordoff, Milan, 1978, p. 9.
4. P P Rao, Access to Justice and delay in disposal of cases, Indian Bar Review, vol-30, 2003, pp 208

5. 'cited in' [http://en.wikipedia.org/wiki/Adversarial\\_system](http://en.wikipedia.org/wiki/Adversarial_system)



The whole set up was for the benefit of the power holders and not for the power addressees. In this method there was no parity of power between the parties to the dispute and it was plagued by high cost, delay, uncertainty and exploitation of parties by advocates. This mode of access to justice displaced the community justice system as well as the last vestiges of the inquisitorial model, which was prevalent in ancient India. This inherited mode of access to justice is unable to deliver as it is a relic of colonial rule, was born out of the need of the colonial masters to perpetuate their dominance and was thus primarily designed for the same, with 'justice' being more or less an afterthought. It was fashioned to provide a semblance of justice so as to avoid dissent, which is but the natural fallout of denial of the same. Real and effective justice, for obvious reasons, was not a priority of the colonial masters. The system prevalent then, and unfortunately for us, still in continuation is inherently partial to the well heeled. It discriminates on economic grounds, creating disparities right at the outset, de facto denying to some even access to the institutions of justice delivery. And the de facto denial is a consequence of us trying to work de jure equality<sup>6</sup> through a mechanism at odds with it, on account it being inherently iniquitous.

After the independence when the Constitution of India came into being the approach towards access to justice was redesigned and modified, and an attempt was made to bring parity of power in modes of dispute resolution. The preamble of the Indian Constitution resolves to secure for all its citizens, justice-social, economic and political. Further, Article 14 of the Indian Constitution reads as follows: "Equality before Law – The State shall not deny to any person equality before the law and the equal protection of the laws within the territory of India." The words "equal protection of laws" indicates two things: Firstly that every person is entitled to protection of all the laws of the land, and secondly, every person within Indian territory is equally entitled to that protection.

Article 14 casts a duty on the State to deliver the substantial promise of the laws, in other words the state has been imposed with a duty of delivering justice to all the people within the territory of India. In addition to this, Article 256 of the Indian Constitution provides for two important things firstly, it obliges the State

governments to implement the laws, which are the laws passed by the State and Union Legislatures. Secondly, on failure to do so, the Union government is under an obligation to direct the State government to implement the laws<sup>7</sup>. Thus under the Constitution, a strict duty is cast on the State to ensure that there is compliance with every law. Therefore from the abovementioned, it is logical to conclude that even the violation of a private right casts a duty upon the state to initiate proceeding against the offender.

Thus, from a reading of the abovementioned provisions one can infer that the Constitution discarded the adversarial mode of adjudication and impliedly adopted the inquisitorial mode. But that idea, unfortunately has not reified as yet, and the old model though in dissonance with fundamental provisions of our Constitution is still operative.

In an inquisitorial system, the court or a part of the court is actively involved in determining the facts of the case, as opposed to an adversarial system where the role of the court is solely that of an impartial referee between parties. However, the constitutional mandate in this regard has been consistently overlooked and we end up, still upholding the adversarial mode of adjudication, inspite of the fact that it is inherently prejudicial to the parity principle and thus contrary to Article 14, and thereby unconstitutional.

## INFORMAL ACCESS TO JUSTICE

What does informal access to justice mean? There is as such no definition of informal access to justice, but as the name itself suggest, it means the "access to justice" which does not follow any prescribed procedure for adjudication of disputes. Unlike a court which is a formal mode of access to justice, in informal modes of access there is not strict adherence to procedural laws and the laws of evidence. Further, parties are free to represent themselves, without taking the help of an advocate and there are no formalities in respect of filing the suit etc. and other such technicalities as followed in the regular courts.

But the fundamental question that arises is that when we have the formal system of adjudication in the form of courts, why then are the informal modes required? There are many reasons for adopting the informal

6. See Article 14 of the Constitution of India.

7. See Article 256 of Constitution of India



modes of access to justice: First and foremost, it helps to dispose of a large number of trivial cases summarily and thus relieves the burden of regular courts. This is facilitated by the relaxation in rules of procedure and evidence, and as a corollary results in a relatively inexpensive settlement of disputes. Thirdly, cases are decided in a manner more befitting a compromise than adjudication and therefore the antagonism that follows in the wake of litigation is greatly reduced. Fourthly, it is more practical that matters relating to personal laws like divorce, maintenance etc. and other non compoundable criminal matters are settled through these means, for it works out in the best interests of both citizens and the state. It must, however, always be remembered that informal modes are to be supplemental to the conventional modes of access and not to ever substitute it. They, as the nomenclature suggests, make access more accessible by ridding it of excessive red tape, but this is not to be construed as affording to the administering instrumentality the space to subvert or overlook certain essential underlying principles, chief among them being the maintainance of the principle of parity. For that would defeat the very purpose of their being, on account of it seriously vitiating the quality of justice to be delivered. To impress upon this, it would be appropriate to mention that any justice delivery mechanisms, formal or informal ought to be able to withstand the test of the power spectrum as enunciated by Prof. Julius Stone<sup>8</sup>. The informal modes of access to justice include Nyaya Panchayats, lok adalats, Negotiation, Arbitration, Conciliation, Mediation and the Ombudsman.

## CONCLUSION

The Informal modes of access to justice are not to supplant the formal modes of access to justice rather to supplement them. But as we have already discussed that the Informal modes of access to justice which includes Nyaya Panchayats, lok adalats, Negotiation, Mediation, Conciliation, Arbitration and Institution of Ombudsman working in India, are not adhering to the principle of parity of power and are also not in consonance with the constitutional mandate. The institution of Nyaya Panchayat is providing easy access to justice to the people living in villages but it's not only about an access to justice rather one should be able to get justice. The problem is that the powerful factions of the villages are substantially using the nyaya panchayats

8. *Supra* 10 p 598

for their favour at the expense of justice. The lok adalats are also working well and helping courts in relieving their burden but the approach of lok adalats towards the dispute resolution is conciliatory which involves waiver of right and it is against the article 14 of the constitution. The other mode of informal dispute resolution like negotiation, mediation and conciliation are not effective because a mediator or a conciliator has no power to order a party to appear and defend a claim. Nor can a mediator or conciliator compel the losing side to comply with a decision. Moreover these mechanism of dispute resolution they involves waiver of right which is against the article 14 of the Constitution. As far as Arbitration is concerned the award of arbitrator is binding, thus satisfying the coercion count but as the Arbitration and conciliation act provides for the waiver of the right it is against the principle enshrined in article 14 of the constitution. Another lacuna is that it is based on the adversarial model of litigation which results in delay and high costs. The institution of ombudsman popularly known as office of "lokayukta" is not provided with the requisite machinery and powers by the respective state legislation and is thus not working effectively.

Although these modes of informal access to justice were premised on good intentions, their manifest effects are to the contrary. This is confirmed by the facts as have been aforementioned in the course of this paper. The primary and fundamental flaw being that despite making access to the instrumentalities involved easier, the very quality of justice that they are employed to deliver is warped by their processes. As has been reiterated time and again through this paper, these modes are inclined more to afford convenience to the state than to deliver wholesome justice, and that holds true for the formal modes as well. The quality of justice (the use of the word justice being malapropos here) in the true sense is made ineffectual to a great extent by it being moored in inequitable postulates.

The apocryphal notion that the adversarial system sub serves the object of justice better is exposed by its inherent inconsistency with Article 14, which is as compendious an articulation of the principle of equity as possible. Article 14 impliedly advocates the implementation of an inquisitorial system premised on the parity of power. We can also draw inspirations from the principles of Rajadharma which is based on the inquisitorial pattern. What we need is model which can suit our society and principle of Rajadharma answers





the present problems of the Indian society. The principles of Rajadharma are embedded in the Constitution also. Under the Constitution it is the duty of the state to provide equal protection of laws and to enforce compliance with every law. Thus a state has to play a pro-active role in providing justice; what is required is a reading and enforcement of the Constitution in the true spirit.

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## PASSPORT- POWER TO IMPOUND AND SEIZE

*Bijoylshmi*

Freedom of movement is a Constitutional right. A citizen is given the liberty to travel, work and reside at any place where he or she wants. The same can be curtailed only as per the procedure established by law. As there was no law in terms of Article 21 of the Constitution and as there was no law establishing such procedure, the government had no right to refuse a passport to any person who might have applied for the same. In such a scenario it was observed that government's claim of absolute discretion in the matter of issuance of passport was considered to be violative of Article 14 of the Constitution of India. For these reasons it became urgently important to regulate the issuance of passport and travel documents by law. As parliament was not in session, an ordinance namely the Passports Ordinance was promulgated by the President of India. To replace the ordinance of 1967 the Passports Bill was introduced in the Parliament. The Passports Bill having passed by both the Houses of Parliament received the assent of the President on 24th June, 1967. It came on the statute books as the PASSPORTS ACT, 1967<sup>2</sup>.

The question that arises now is can a passport be impounded by exercising power under section 102 read with section 165 and 104 of the Code of Criminal Procedure, 1973? The Hon'ble Supreme Court of India in *Suresh Nanda vs. CBI* has answered this question in negative and observed that while the police may have the power to seize a passport under Section 102(1) Criminal Procedure Code, 1973, it does not have the power to impound the same. Impounding of a passport can only be done by the passport authority under Section 10(3) of the Passports Act, 1967<sup>3</sup>.

The Hon'ble Supreme Court observed that Sub-section (3) (e) of Section 10 of the Passport Act, 1967 provides for impounding of a passport if proceedings in respect of an offence alleged to have been committed by the holder of the passport or travel document are pending before a criminal court in India. Thus, the Passport Authority has the power to impound the passport under the Passport Act, 1967. Section 102 of Criminal

Procedure Code, 1973 gives powers to the police officer to seize any property which may be alleged or suspected to have been stolen or which may be found under circumstances which create suspicion of the commission of any offence. Sub-section (5) of Section 165 of Criminal Procedure Code, 1973 provides that the copies of record made under Sub-section (1) or sub-section (3) shall forthwith be sent to the nearest Magistrate empowered to take cognizance to the offence Whereas Section 104 of Criminal Procedure Code, 1973 authorizes the court to impound any document or thing produced before it under the Code. Section 165 of Criminal Procedure Code, 1973 does not speak about the passport which has been searched and seized as in the present case. It does not speak about the documents found in search, but copies of the records prepared under Sub-section (1) and Sub-section (3). "Impound" means to keep in custody of the law. There must be some distinct action which will show that documents or things have been impounded. According to the Oxford Dictionary "impound" means to take legal or formal possession.

The Court stated that when we read Section 104 of Criminal Procedure Code, 1973 and Section 10 of the Passport Act, 1967 together, we will find that under the Criminal Procedure Code, 1973, the Court is empowered to impound any document or thing produced before it whereas, the Passports Act, 1967 speaks specifically of impounding of the passport. It is stated that the Passport Act, 1967 being a specific Act and Section 104 of Criminal Procedure Code, 1973 being a general provision for impounding any document or thing, it is the Passports Act, 1967 which shall prevail over the provision under the Criminal Procedure Code, 1973 as regards the passport. Thus, by necessary implication, the power of Court to impound any document or thing produced before it would exclude passport.

It is observed that the Passport Act, 1967 is a special Act relating to the matters of passport, and whereas Section 104 of the Criminal Procedure Code, 1973 authorizes the Court to impound document or thing produced before it. Law is clear on the issue that where there is a special Act dealing with a specific subject, resort should be made to that Act instead of the general Act providing for the matter connected with the specific Act. As the

1. *Introduction, Passports Act, 1967*
2. *Statement of objects and reasons, Passport Act, 1967*
3. *Suresh Nanda Vs.C.B.I. (2008)3SCC674*



Passports Act is a special Act, the rule that "general provision should yield to the specific provision" is to be applied.

Thus the Hon'ble Supreme Court of India in Suresh Nanda vs C.B.I had finally held that, while the police may have the power to seize a passport under Section 102(1) Criminal Procedure Code, 1973, it does not have the power to impound the same. Impounding of a passport can only be done by the passport authority under Section 10(3) of the Passports Act, 1967.

The Court while holding this view relied on the judgment of Maneka Gandhi v. Union of India and Anr<sup>4</sup> wherein it was observed that now, it has been held by this Court in Satwant Singh's case (supra) that 'personal liberty' within the meaning of Article 21 includes within its ambit the right to go abroad and consequently no person can be deprived of this right except according to procedure prescribed by law. Prior to the enactment of the Passports Act, 1967, there was no law regulating the right of a person to go abroad and that was the reason why the order of the Passport Officer refusing to issue passport to the petitioner in Satwant Singh's case (supra) was struck down as invalid. It will be seen at once from the language of Article 21 that the protection it secures is a limited one. It safeguards the right to go abroad against executive interference which is not supported by law; and law here means 'enacted law' or 'State law' (Vide A.K. Gopalan's case). Thus, no person can be deprived of his right to go abroad unless there is a law made by the State prescribing the procedure for so depriving him and the deprivation is effected strictly in accordance with such procedure.

It may be mentioned that there is a difference between seizing of a document and impounding a document. A seizure is made at a particular moment when a person or authority takes into his possession some property which was earlier not in his possession. Thus, seizure is done at a particular moment of time. However, if after seizing of a property or document the said property or document is retained for some period of time, then such retention amounts to impounding of the property/ or document. In the Law Lexicon by P. Ramanatha Aiyar (2nd Edition), the word "impound" has been defined to mean "to take possession of a document or thing for being held in custody in accordance with law". Thus, the

word 'impounding' really means retention of possession of a good or a document which has been seized.

Hence, while the police may have power to seize a passport under Section 102 Cr.P.C. if it is permissible within the authority given under Section 102 of Cr.P.C. it does not have power to retain or impound the same, because that can only be done by the passport authority under Section 10(3) of the Passports Act. Hence, if the police seizes a passport (which it has power to do under Section 102 Cr.P.C.), thereafter the police must send it along with a letter to the passport authority clearly stating that the seized passport deserves to be impounded for one of the reasons mentioned in Section 10(3) of the Act. It is thereafter the passport authority to decide whether to impound the passport or not. Since impounding of a passport has civil consequences, the passport authority must give an opportunity of hearing to the person concerned before impounding his passport. It is well settled that any order which has civil consequences must be passed after giving opportunity of hearing to a party vide *State of Orissa v. Binapani Dei*<sup>5</sup>.

### CONCLUSION:-

Thus it is concluded that the police may have the power to seize a passport under Section 102(1) Criminal Procedure Code, 1973, but it does not have the power to impound the same. Impounding of a passport can only be done by the passport authority under Section 10(3) of the Passports Act, 1967. The Passport Act, 1967 is a special Act relating to the matters of passport, and whereas Section 104 of the Criminal Procedure Code, 1973 authorizes the Court to impound document or thing produced before it. Law is clear on the issue that where there is a special Act dealing with a specific subject, resort should be made to that Act instead of the general Act providing for the matter connected with the specific Act. As the Passports Act is a special Act, the rule that "general provision should yield to the specific provision" is to be applied. Thus, by necessary implication, the power of Court to impound any document or thing produced before it would exclude passport and passport can be impounded only by the authority provided under the Passports Act, 1967.

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4. *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Anr. (1978)1SCC248*

5. *'State of Orissa v. Binapani Dei. (1967)1ILLJ266SC*



# TRANSFER PRICING LAWS CANNOT BE IMPOSED ON SHARES ISSUED TO THE FOREIGN PARENT

*Shipra Makkar Devgun & Sonal Shrivastava'*

## INTRODUCTION

The Hon'ble High Court of Bombay has recently in the case of an Indian unit of Royal Dutch Shell Plc, categorically held that issuance of shares by an Indian Company to its foreign parent is not exigible to transfer pricing provisions as there is no income arising there from.

Transfer pricing practice has always been a topic of discussion all over the world. Transfer pricing rules basically determines the value at which companies trade products, services or assets between two units across borders. The main objective of transfer pricing is to ensure fair prices in cases of transaction between two groups of companies situated in different countries

## BRIEF OVERVIEW OF THE JUDGMENT:

Shell India had issued 870 million shares to Shell Gas BV in March, 2009, at Rs.10 a share. However, the Income Tax department was of view that the shares were grossly undervalued, and it valued them at Rs.180 a share. Thus the department added the difference to the taxable income of Shell India.

Furthermore, the Income Tax department had issued a show-cause notice adding another Rs.3,100 crore to Shell India's income for 2008-09 in another transfer pricing case. Being aggrieved, the company moved the Bombay High Court, challenging the tax notice.

The tax authorities argued that the deal is a transfer pricing arrangement by which the share issued are undervalued and hence the company is liable to pay tax on the income generated out of it. The tax authorities also asked for tax on the interest the Anglo-Dutch Oil Company would have earned in cases of under priced transfer of shares.

On the contrary the Shell Plc argued that the foreign parent's equity infusion into its subsidiary is not liable

1. *Intern- 5th Year National Law University Odissa*

to be taxed, the same being Foreign Direct Investment which cannot be taxed. Shell plc also denied the argument of the tax authority saying that the price of the share was perfectly valued and not undervalued.

The bench of Justices *M. S. Sanklecha and S. C. Gupte* of the Hon'ble Bombay High Court decided on a petition filed by Shell India Markets. The Court ruled in the favor of the Shell Plc on the ground that, under the provisions of transfer pricing the issuance of shares by an Indian Company to its foreign partner is **not taxable**. The judgment has specified that transfer-pricing laws cannot be imposed on shares issued to a foreign parent. It has been the practice of multinationals to fund its subsidiary by issuing shares, court viewed it as capital transaction thus not covered under the rule of transfer pricing. The court said by doing do the *tax department has exceeded its jurisdiction*.

## CONCLUDING REMARK:

This judgment definitely gives a positive ray of hope in favor of foreign investors seeking to invest in Indian firms from the taxation point of view and also against the Department who are vigorously pursuing claims against the foreign firms in India.

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## NEWSBYTES

### **FINANCER NOT LIABLE IN CASE OF FAILURE ON PART OF OWNER OF THE VEHICLE TO INSURE THE VEHICLE.**

A three judge Bench of the Supreme Court clarified the legal position that where a vehicle was subject of an agreement of hypothecation and the person who was in possession and control of the vehicle without the requisite insurance, he alone was liable and not the financier to pay the claim in the event of an accident. The Court said that the intention of the legislature is clear that a registered owner of a vehicle should not be held liable if the vehicle is not in his possession and control. In the present case, the appellant bank had financed the owner for purchase of the vehicle and the owner had entered into a hypothecation agreement with the bank. The borrower had the initial obligation to insure the vehicle, but without insurance he plied the vehicle on the road and an accident took place. Without the insurance he plied the vehicle in violation of the statutory provision contained in Section 146 of the 1988 Motor Vehicles Act and hence he alone is liable and not the financier.

### **INDIAN PATENT OFFICE (IPO) NOTIFIES THE ENABLING OF E-PCT SYSTEM**

IPO on 19th November, 2014 announced in its website (<http://www.ipindia.nic.in/>) that the International

applications filed to the Indian Patent Office as Receiving Office under the Patent Cooperation Treaty may be filed electronically using e-PCT effective from 15th November 2014.

The Official notice details the Filing and Processing in Electronic Form of International Applications and Documents Relating to International Applications.

According to the notice, Since 7 January 2002, any receiving Office having the adequate technical systems in place is able to accept the filing of international applications in electronic form in accordance with Part 7 and Annex F of the Administrative Instructions under the PCT containing, respectively, the legal framework and technical standard necessary to enable the implementation of filing and processing in electronic form of international applications, as provided for under PCT Rule 89bis.1.

Further it was mentioned in the Notice that on 3 November 2014, the Indian Patent Office, in its capacity as receiving Office, notified the International Bureau, under PCT Rules 89bis.1(d) and 89bis.2 and pursuant to Sections 710(a) and 713 of the Administrative Instructions under the PCT, that it is prepared to receive and process international applications in electronic form with effect from 15 November 2014.





*“Wishing you a joyous season filled with happiness  
and the best of everything for the New Year”*



**SA**

*Season's Greetings*



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