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National News

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In the last few years, the Indian courts have attempted to lay down principles for enforcement of Intellectual Property Rights. One subject matter which is hotly contested as an issue of public interest is pertaining to compulsory licensing of patents on life saving drugs. The decision of *NATCO v Bayer Corp,* was a first when the Supreme Court of India allowed Compulsory Licensing of life saving drugs manufactured by Bayer Corp. While compulsory licensing may increase the accessibility of medicines by reducing costs, at the same time it has an impact on the incentive to innovate. In the recent case of *Cipla Ltd v Novartis AG* the division bench of the Delhi High Court gave a nuanced judgment carefully assessing the need to consider public interest while upholding patent rights in India.

Novartis is the owner of the patent for 'Indacaterol', sold as 'Onbrez', which is a medicine providing relief to persons suffering from Chronic Obstructive Pulmonary Disease (COPD). Cipla launched its drug 'Unibrez' for the same ailment. Novartis filed a suit against the Respondent, which was disposed of when the Respondent submitted a written undertaking of changing its trademark 'Unibrez' to 'Indaflo'. Novartis then filed a case for patent infringement against Cipla and the learned single judge restrained Cipla from using, manufacturing, and selling any pharmaceuticals products containing 'INDACATEROL' alone or in combination with any other compound. Cipla filed an appeal against this order of the single judge. Cipla's counsels argued before the Division Bench, that the patentee's rights are subject to Section 83 of the Act i.e. the general principles applicable to working of patented inventions. It was further argued that Novartis was not manufacturing the drugs in India and even the importation was in small quantities. Furthermore, it was argued that the tablets of the Ciplas's drugs were available at a lesser price in comparison to the drugs manufactured & sold by Novartis. Finally, it was argued that along with establishing *prima facie* case, balance of convenience and irreparable harm, it was necessary to show public interest was involved in granting a temporary injunction. Novartis' counsel countered these arguments, by stating that a patentee's rights were not subject to provisions of Section 83. It was also submitted that working of a patent in India under Section 83, did not imply that the drugs ought to be manufactured in India.

The Hon'ble Division Bench held that Cipla had not put forth any credible challenge to Novartis' patent No. 222346. It was further held that the Novartis' rights under Section 48 may be subject to the terms of Section 47 or other provisions in the Act, but Section 83 would not be such provision. It was held that Section 83 dealt with general principles and enjoins authorities to encourage inventions and secure that the inventions are worked in India on a commercial scale. However, to show the workability of the patent it is not necessary that the product embodying the invention must be manufactured in India, it could even be worked through imports. The Court held that public interest may be a factor to be borne in mind while granting injunction however, it was one of the factors, not the most dominant factor. In fact, if injunction would not be granted, Novartis' rights under Section 48 would be impaired and irreparable harm would be caused to it.

This decision puts things in to perspective and prevents any potential misuse of the provisions of the Indian Patents Act, 1970. It is a win for the patentees who have rightfully obtained the patent registrations for their invention and also for the society by protecting the inventors' interests.

Reverse Passing off and the junior user

An action of passing off can be brought before the Court upon proving that the mark in question enjoys goodwill in the market; 2) the subsequent user of such trade mark is misrepresenting its goods/services as that of the prior user; and 3) this has resulted in causing damage to the prior user of the trade mark. However, in the case of *Intex Technologies (India) Ltd & Anr. v M/s Az Tech (India) & Anr* the Delhi High Court discussed the concept of 'reverse passing off'. A case of reverse passing off is established when the subsequent user of a trade mark has gained immense popularity in the market such that the consumers confuse the goods of the prior user as that originating from the subsequent user of the trade mark. A case of reverse passing off is usually established if the subsequent user of a mark is a well-known company such as Intex in the present case.

The Plaintiff, (Az Tech) had filed a suit for passing off against 'Intex' (Defendant) in the year 2013 for the use of the mark 'AQUA' for the sale of its mobile phones. It was claimed by the Plaintiff that it was the prior user of the mark 'AQUA' in India and that the Defendant was attempting to pass off its goods as that of the Plaintiff. The Plaintiff further claimed to have used the mark 'AQUA' in Hong Kong, where its phones were claimed to be well received in the market. The Defendant's counsel argued that the mark 'AQUA' as used by it, was used along with the Defendant's house mark 'INTEX' so as to removes any possibility of confusion among the consumers. Furthermore, there was a 14 months delay by the Plaintiff in filing the suit against the Defendant. It was also claimed that the Defendant had sold 'AQUA' phones to the extent of INR 200 crore at the time of deciding the suit whereas, the Plaintiff had sold lesser number of phones; in fact it was claimed by the Defendant that the sale of Plaintiff's phones had increased since the Defendant's launch of its 'AQUA' phones. Furthermore, the Defendant informed the court that the Plaintiff had changed its mark to resemble that of the Defendant, after filing the suit against the Defendant. The following table shows the same:

AZ Tech's logo when present suit was instituted	Logo adopted by AZ Tech in the year 2015	Intex's logo since the year 2013
AQUA	aqua	aqua

The table above shows that the Plaintiff was using identical font and style as the Defendant's mark. The Court came to the conclusion that the Plaintiff had been unable to show any goodwill/reputation in its mark 'AQUA', in India; also the addition of the word 'INTEX' to 'AQUA' will be sufficient to distinguish the goods of the Defendant from that of the Plaintiff. There was also no explanation for the Plaintiff's adoption of a similar trade mark as that of Respondent therefore, the conduct of the Plaintiff was held to be not honest. The Court also noted that the Plaintiff was using the mark '' in Hong Kong which was different from the mark that it was using in India. This clearly showed that the Plaintiff was benefitting from the Defendant's use of the mark 'AQUA'. The Court rejected the Plaintiff's prayer for an injunction against the Defendant. This case is an interesting precedent in establishing reverse passing off and protects the bona-fide owner of a trade mark in India.

Revisiting rules of infringement

Recently the full bench of the Bombay High Court in the case of *Cipla Ltd. v Cipla Industries Pvt. Ltd.* interpreted the scope of Section 29(5) under the Indian Trade Marks Act, 1999.

In this case the Plaintiff (Cipla Ltd.) the registered owner of the trade mark 'CIPLA' in class 05 i.e. for pharmaceuticals filed a suit for infringement of trade mark by the Defendant (Cipla industries) for using the mark 'CIPLA' as its trading style. The Defendant was engaged in the sale of goods covered under class 21 of the NICE classification i.e. household or kitchen utensils. The Defendant's use of the mark 'CIPLA' for dissimilar goods attracts the provisions of Section 29(4) and the use of the mark as a corporate name attracts Section 29(5) of the Trade Marks Act, 1999.

Earlier, in the decision of *Raymond Ltd v Raymond Pharmaceuticals Pvt. Ltd,* it was ruled that if a mark is registered with respect to certain goods and another proprietor adopts the same trade mark as its corporate name and provides dissimilar goods/services it would not be considered as trade mark infringement. Justice GS Patel was the single judge presiding over the Cipla case, where he recommended that the Raymond decision must be reviewed by the High Court. The High Court reviewed the previous decision and differentiated between the language of Section 29(4) and Section 29(5). It was held that under Section 29(5), a case of trade mark infringement will only be established, if the company adopting such trade mark as its corporate name is also engaged in providing similar goods/services. Whereas, the Court observed that, Section 29(4) of the Act specified that it could be a case of infringement even if the mark is being used by another proprietor for dissimilar goods or services. The Court further held that since the language of the sections was clear then the literal rule for interpretation should be applied. The Court concluded that if the goods or services provided by the Defendant, adopting the Plaintiff's registered trade mark as its trading style, are different, it will not be a case of infringement. The Court upheld the division bench's ruling in Raymond case.

This decision of the Bombay High Court is a set back because it allows entities to adopt well-known trade marks as their Corporate name. There was a clear miscalculation of the consequences of such decision, a Corporate name is an indicia of origin of goods; if entities are allowed to adopt any registered trade mark as their Corporate name it will result in diluting the reputation of the registered trade mark. The case of *Bloomberg Finance v. Prafull Saklecha* was on similar issues but the Delhi High Court came to a conclusion different; it was ruled that even if the Defendant was carrying out activities different from that of the proprietor of a registered trade mark (Plaintiff) it would not render the Plaintiff without any remedy. An injunction was granted in favor of the Plaintiff.

At present the two High Courts deciding majority of the IP cases in India have adopted contrary positions regarding interpretation of Section 29(5) and unless there is a Supreme Court ruling this issue, there will be confusion on this issue.

Alma Mater vs the Alumni

The necessity of protecting a trade mark is not confined to preserve the economic interest of a proprietor but goes further to protect the standard, quality and the goodwill associated with such trade mark. Recently, the Delhi Public School Society (Plaintiff), owner of the popular Delhi Public School franchise in India and a few other countries, instituted a trade mark infringement and passing off suit against a trust operating under the name of ‘DPS World Foundation’ (Defendant).

The Plaintiff stated that they had 11 core schools in India and a total of 170 affiliated schools. The Plaintiffs pleaded that it has used its logo ‘ ’ and the words ‘Delhi Public School’ inside the shield since the year 1948. The Plaintiff stated that it had obtained registration for the logo and the mark ‘DPS’ in class 16, 35, 36 and 42 (application under class 41 was pending) ;the Plaintiff’s applications for the mark ‘Delhi Public School’ were pending under classes 16, 35, 36, 41 and 42. The Plaintiff alleged that the Defendant was using ‘DPS World Foundation’ as the name of its trust and such use was resulting in infringement of the Plaintiff’s rights in the trade mark ‘DPS’. The Plaintiff claimed that the Defendant’s logo ‘ ’ was similar to its logo and also contained the mark ‘DPS’ furthermore, the objective of forming Defendant was to establish schools in India i.e. similar to the activities of the Plaintiff. The Plaintiff claimed that the Defendant’s such use of the mark ‘DPS’ and the use of the logo was solely for the purpose of making illegal gains and riding on the reputation of the Plaintiff. The Single judge ruled that while the Defendant was guilty of using the mark ‘DPS’ as a part of its trust name therefore, until the disposal of the suit Defendant was restrained from using the mark ‘DPS’ or any other similar mark. The Defendant preferred an appeal before the division bench against the single judge’s order. The Defendant contended that their society ‘DIPSITES’ (alumni of Delhi Public Schools) formed the DPS World Foundation Trust with the altruistic motive of upholding high quality education and human values. The Defendant also pleaded that in all their published material it was specified that the same belonged to the Defendant and it was not a part of the Delhi Public School Society, New Delhi. The Defendant's counsel argued that the single judge's dismissal of this fact as a document to be assessed at the time of evidence was incorrect. It was also argued that none of Plaintiff's schools were named as 'DPS' and the same was used solely for convenience and could not be extended to obtain statutory protection.

The division bench concluded that the single judge was correct in granting an injunction in favor of the Plaintiff, it was clear that the Defendant had adopted the mark 'DPS' to unjustly benefit from the Plaintiff's reputation and wrongly impress upon people at large that there was a nexus between the Plaintiff and the Defendant. However, the bench noted that the no registration had been obtained by the Plaintiff for the mark 'Delhi Public School' and the said mark *"contains separate words 'Delhi' 'Public' 'School' in respect of which the Plaintiff cannot seek exclusive rights for the purpose of passing off. Therefore, it was open to the Defendant to adopt the trade mark/trade name including the words 'Delhi' 'Public' 'School' but the registered trade mark 'DPS' could not be allowed to be used"*.

The decision of the division bench is quite comprehensive however, the ruling that the Plaintiff could not claim exclusivity over the use of the mark 'Delhi Public School' makes the decision slightly ambiguous; more so, when the Plaintiff is actually using the 'Delhi Public School' mark continuously and exclusively. If the Defendant is allowed to use the said mark it will increase the likelihood of confusion in the minds of the public at large. The absence of registration will not take away the Plaintiff's right to claim goodwill and prior use of the mark 'Delhi Public School'.

Genericide of Trade Marks and Public Awareness

Extensive marketing of a trade mark coupled with its immense popularity among the members of public is beneficial for a company looking to succeed however; this comes with an added baggage of potential genericide of a trade mark. Rubiks Brand Ltd. (Plaintiff) too found itself in a similar position when Mr. Mahesh Vaman Manjrekar's (Defendant) forthcoming film was titled 'Rubik's Cube'. A suit was initiated by the Plaintiff against the Defendant to prevent infringement of its trade mark 'Rubik's Cube'.

The Plaintiff claimed that its trade mark 'Rubik's Cube' was a coined word and enjoyed immense popularity among the masses to the effect that a reference to 'Rubik's Cube' would only remind individuals of the Plaintiff's puzzle/toy. Justice GS Patel while passing the interim order in this suit correctly stated that the Defendant's use of the trade mark 'Rubik's Cube' as a title of its film may create a confusion in the minds of the audience regarding the origin of the movie. Furthermore, in the promotional poster of the movie the trade mark 'Rubik's Cube' was written in four of the six colors of the puzzle, this clearly shows that the Defendant was well aware of the Plaintiff's reputation and ownership of the said trade mark. Hon'ble Justice Patel correctly noted that such use by the Defendant will cause considerable damage to the Plaintiff in terms of dilution of its brand. An interim injunction order was passed in favor of the Plaintiff.

This order though an interim one, addresses the important issue of genericide of trade marks. It is possible that incorrect use of a popular trade mark will result in dilution of the mark's value and reputation. It is necessary for proprietors of such trade marks to be vigilant in protecting their IP rights. It is worth appreciating that the Bombay High Court upheld the rights of the Plaintiff and correctly addressed the issue of dilution of trade marks.

Frivolous suits and punitive damages

It has become a common practice that immediately before the release of a movie, the producers are sued for copyright infringement claims which may or may not be valid. The purpose of such last minute suits is often to stall the release of the movie and pressurize the producers of the movie to settle the matter outside the court. Recently, the Bombay High Court did not let a similar matter slide easily and set forth a precedent to deter miscreants from filing frivolous suits in future.

In *Dashrath B Rathod & Ors. v Fox Star Studios India Pvt. Ltd.& Anr.*the Plaintiff filed a suit on 21st March, 2017 against Fox Star alleging copyright infringement regarding the plot of its upcoming movie 'Phillauri'. The movie was due for release on 24th March, 2017. The Plaintiff admitted that the trailer of the movie was released on 6th February, 2017, but the Plaintiff noticed it on 24th February, 2017 and a notice was sent to the Defendants on 28th February, 2017. The Defendants replied to the notice on 2nd March, 2017 and sent a more detailed response on 10th March, 2017. The Plaintiff did not explain as to why there was a delay in filing the suit, such that it was filed at the eleventh hour before the release. The Plaintiff claimed that the plot of his story and that of the Defendant's suit was similar; The Plaintiff's story concerned a Manglik girl who was forced to marry a tree and spirit who resided in the tree claimed her as his wife, the Plaintiff's movie was a horror movie which had been made into Gujarati, Nepali and Bhojpuri films. It was admitted that the Defendants' movie was not of a horror genre and was in fact more towards providing comic relief and a dramatic narration. Furthermore, it was noted that the concept of Manglik girls marrying a tree was not a unique concept, it is unfortunately prevalent in India and apart from this one detail even the Plaintiff agreed that the Defendants' story took a different turn.

Justice G.S. Patel, who was presiding over the matter, ruled that there was no merit in the Plaintiff's claim and did not restrain the Defendants from releasing its movie. At the heart of the judgment are issues of assessing copyright infringement as well as the nuisance posed by frivolous suits. The Hon'ble judge correctly pointed that the Indian courts were burdened with several suits and vexatious suits result in delay in deciding other meritorious matters. Furthermore, when suits are filed at the last minute the counsels for the parties insist on expeditious hearing of their matter it also results in burdening the officers of the court. The amendments made by the Commercial Courts Act to the Code of Civil Procedure Code specify that in a commercial dispute, damages have to be paid by one party to the other, if it does not then reasons have to be submitted for the same. *"The statutory intent is equally plain: no litigant in* *the commercial division can ordinarily escape a litigation loss without an accompanying order of costs."* The Court concluded that since the Plaintiff deliberately delayed coming to the court, wasted judicial time, suppressed materials in their plaint (receiving a response from the Defendants), not lodging their motion and still insisting on immediate hearing, it was necessary to impose costs on the Plaintiff. In line with the recent Supreme Court decision in *Dnyandeo Sabaji Naik v Mrs Pradnya Prakash Khadekar & Ors* (imposing exemplary costs on frivolous litigants) damages worth INR 5,00,000 (five lakh) were imposed. However, as a deviation it was ordered that half of the costs will be paid to the Legal Aid Cell and the remaining 50% to the Tata Memorial Hospital.

This judgment is a good change and it is in the interest of the public to put an end to nuisance of unfounded lawsuits.