

THE INDIAN JUDICIARY AND PATENTS: A STUDY OF THE STANDARDS AND PRACTICES ADOPTED BY THE INDIAN JUDICIARY IN DETERMINING PATENT CRITERIA AND ENFORCEMENT (from 1980-till date)

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ABSTRACT

The **judiciary** is a system of courts that is interpreting, defending, and applying the law in the names of the state. The **judiciary** also works as a mechanism for the “resolution of disputes”. The courts are applying the law, and settling the disputes, and punishing the law-breakers by the law.

From the year 2000 to 2005, the cases of damages under the Patents Act, 1970 has been fewer. The two main types of damages which are awarded in patent infringement actions are reasonable royalties and lost profits. “The judges were used to grant reliefs in the corresponding year. A case came up in 2002, and it was held that respondents are restrained from using the word “Perry's(r) Fruit Beer” or “Fruit Beer” over his product in Hindi or English till the decision of the suit, Therefore, this appeal is allowed.”

The cases for defences under Patents Act, 1970 have been more as compared to damages. “The patentee is entitled to seek relief in case of an infringement which includes an injunction, damages or an account of profits. For example:- in a case, it was said that the respondent cannot take defence, that registration of the trademark of the plaintiff was invalid on the ground that the word picnic was not “distinctive” and that it was akin to a dictionary word or that the trademark did not satisfy various clauses of section 9(1).”

The cases of an invention under section 2(1)(j) of Patents act 1970, a case came up where the appellant has invented an antibiotic with minimal side effects and he approached for the patent whereas the respondent came up with the same combination of drug, by infringing the appellants' product. “Invention’ includes any new and useful improvement of the process of manufacture. It was held that the defendant has not infringed the product.”

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Two of the major subject matters in the IPR enforcement are “Infringement and Counterfeiting”. Although infringement was used as an IP without any of the authorization to use the same and counterfeiting is the use of an IP on fake products to pass them off as originals. Nations all over the globe are aggressively battling both these anti-IPs. Not only do they harm the economy, but also contribute to bringing down the IP morale and discourage innovation amongst the community.”

“The judicial system has been cradling the legislature's intellectual property policies and the directing the executive's role in its enforcement with active, expedite participation.”

LITERATURE REVIEW

The legal regime which is in India is like the most advanced jurisdiction in the world, which is providing adequate protections for Intellectual property rights. “An example of a legislation protecting the intellectual property rights in India in the early 1900s in the India patents and design act, 1911, which is been subsequently repealed by the patents act, 1970”.

In India protection for intellectual property for today is finding a place in both the constitution as well as various statutory instruments.

The Constitution of India under Article 300-A is guaranteeing, no people will be deprived of property- save by the authority of law.² The provision might be extending for covering intellectual property & is the basis to ensure that- inventor or the author will have a right over his invention or the work.

“The Indian legal system is protecting the various form of intellectual property rights including- patents, design, trademark, copyright, plant breeders and plant varieties, trade secrets and geographical indication- through many of the legislative enactments”. The above sentence in which we have mentioned all of the intellectual property rights in India is recognizing that the rights of the owner of IPR and violating these rights will be resulting in the 2 casual courses of action i.e., civil suits and criminal prosecution. In the event happening of infringement, the owner will be having an option of coming forward with an act of civil suit or initiating a criminal proceeding against the accused.

²A.K Ganguli, Right To property: Its Evolution and Constitutional Development in India.

This review that I have been given to research is examining the judiciary attitudes towards patent protection in India and the straight involvement of the judiciary in the protection of patents and to determine the “legal consequence of patent infringement.”

The Judiciary of India is been actively involved in or to understand the extending of protecting that a patent is offering. The concept of Patents is being defined under Patents Act 1970 as, “the grant of some privilege, property or authority made by the government of a country to 1 or more individuals or corporations.”

The fundamental principle of a Patents Law is that- a patent monopoly is to be granted only for the inventions which are new, non-obvious, and useful and that have industrial applications.

The question of truth and the first invention has been raised in the early as 1930 in an old Privy Council case: “[Canadian General Electric v. Fada Radio](#)” -wherein the court had concluded that- “*true and first inventor is a person who first made the invention and had been applied for a patent*”³

The term, “invention” again is coming up for consideration in the case- “[Farbwerke Hoechst AG Meister Lucius and Burning corporation v. Unichem Laboratories](#)”⁴ wherein the Bombay High court had concluded that:-

In an invention there are 3 stages which are been involved:-

1. In solving the definition of the problem, or else to overcome the difficulty.
2. In solving a problem, a general principle is been applied.
3. The choice of the defined means to be used.

Under the current patent law in India (2000-2005), the suits of relief in a matter of infringing a patent will be instituted in the district court in having jurisdiction over those matters. “ The courts in the cases of threats of infringement of proceeding is been empowered to give a

³Canadian General Electric v. Fada Radio, A.I.I, 1930, this case was followed in Bombay Agarwal vs. Ramachand (Nagpur High Court)

⁴Farbwerke Hoechst AG Meister Lucius and Burning Corporation vs. Unichem Laboratories, AIR 1969 Bom 255; (1974) 76 BOM LR 130.

declaration that such threats are unjustifiable and can issue an injunction for their discontinuance or even award appropriate damages”.

In any suit concerning infringement of a patent can be able to grant an injunction. The relief of permanent injunction is to be granted through final decree alone based on the suit's merits.

The legislative change which in brought the realm of Patent Law is not aiming to harmonize our law with ‘international treaties’ such as TRIPS Agreement but is also giving effect to the varied authorizing pronouncement of the courts. The judiciary will be giving proper direction to the law so that they will be not in conflict with the underlying intentions of the legislatures. “In the wake of India’s obligation at the WTO- the Indian judiciary is facing with various new challenging while the cases are been deciding for protection of patent”.

RESEARCH METHODOLOGY

My research topic is based on, “*The Indian Judiciary and Patents: A Study of the Standards and Practices Adopted by the Indian Judiciary in Determining Patent Criteria And Enforcement from 1980 till date*”.

In this research I have collected lots of data in the year which was given to me was from 2000-2005. I have researched about the judgements in the above mentioned years, regarding:

- Novelty
- Inventive Step
- Patentable subject matter
- Person Having Skilled in the Art
- Damages payable in patent infringement
- Defenses to Patent Infringement

The data which I have received from this research is that from the year 2000-2005, what the patents related judgments are given by the judiciary.

I have referred to Manupatra for writing various cases on the topics given to me for the corresponding years. And I have only got Inventive step, damages payable in patent

infringement, and defences to patent infringement. In this paper, I have discussed a bit introduction about the topic. And the following cases according to the corresponding years given to me is been discussed below.

ANALYSIS AND DISCUSSION

DEFENSES TO PATENT INFRINGEMENT IN THE YEAR 2000-2005:-

1. S.M. DYECHEM LTD. VS. CADBURY (INDIA) LTD⁵

Facts of the Case:-

The plaintiff's company is claiming that "it had been starting its business in the year 1988" for 4 products such as- "potato, chips, potato wafers, corn-pops and preparations made of rice and rice flour". In the year 1989, it started to use the Trademark "PIKNIK". He applied for the registration of the said word in class 29 and class 30.

He renewed his trademark for the last 7 years. The defendant was seen using the mark "PICNIC" - for chocolates.

The appellant (he) files a suit based on allegedly using his trademark and passing off. He is also applying for a temporary injunction.

The defendant is saying that the application is been introduced in 1998 for- chocolates. The plaintiff will not claim a monopoly in the different of the ordinary dictionary word PICNIC or any misspelling. Plaintiff is never intending to do business for chocolates. Its main business is for dyes and chemicals.

The judgment of the Case:-

The trial court is saying that the defendants' marks are being deceptively similar to the plaintiff's "within Section 2(1)(d) of the Trade and Merchandise Marks Act, 1958" i.e. any type of confusions will be created in the mind of the buyers, because of the marks will be similar visually/jocularly or phonetically.

⁵ S.M. Dychem Ltd. vs. Cadbury (India) Ltd., MANU/SC/0407/2000.

The contentions which were registered were concerning label and is not with the respect of the word “PIKNIK”, will not be accepted. “Section 2(1)(f) referred to 'mark' as including a device brand, heading, label, ticket, name, signature, word, letter, numeral or any combination thereof.” even if we are considering the word ‘PIKNIK’, then the defendant’s word ‘PICNIC’ is deceptively similar.

The plaintiff’s TRADEMARK is been registered under class 30 which is including “chocolates”.

“Section 28 of the Act conferred a statutory right on plaintiff on account of registration. The said mark was registered without opposition under Section 21. On the above reasoning, the trial court granted a temporary injunction in favour of the appellant.”

On further appeal by the defendant, the High Court has reversed the Judgment & believes that the word ‘PIKNIK’ will not be called an “essential feature”. The plaintiff’s label is consisting of a divine script for the word ‘PIKNIK’ which is in a curved fashion with having a little boy including a hat in between the word ‘K’ & ‘N’. Plaintiff is only marketing “potato chips and potato wafers” in a polythene bag and not “chocolates”. The defendant is only marketing with the trade label “CADBURY’S PICNIC” in a polythene bag and therefore both of the marks will be different.

Defendant has not been using the label of the plaintiff i.e. “with a caricature of a little boy”.

“It was true there was phonetic similarity but the word 'PIKNIK' was a misspelling of the common dictionary word PICNIC and hence could not be the subject of any proprietary right”. Here in this case the products were way too different than each other, so there has to be no confusion in this. “The fact that the plaintiff was using the word 'PIKNIK' could not be compared to cases where well-known trade names were under use - like Cadbury - and if the defendant used the word PICNIC along with the word Cadbury, for a different product, there could be no infringement. Cadbury was a household name in India and the defendant had been marketing chocolates since 1948. The said word had almost become synonymous with chocolates in India as in the case of 'Cadbury Dairy Milk', 'Cadbury Five Star' etc. The same was true with 'Cadbury Picnic'. There was absolutely no scope for deception. There was neither infringement nor passing off. Based on this reasoning the High Court allowed the appeal of the respondent-defendant and set aside the order of temporary injunction.”

Analysis of the Case:-

It is true in every sense “*under section 107, of the Patents Act, 1970*” it will be permitting for any of the suits of infringements of the patent- for the defendant for raising all the pleas in defence which he can also use in raising “under section 64” of the act for “revocation” and there is no similar provision in the “Trade Marks Act, 1958.”

The Plaintiff to prove the “essential features” of the registered trademark is been copying. In order of proving “deception” lies on the plaintiff who is alleging infringement. “A mark is said to be infringed by another trader if, even without using the whole of it, the latter uses one or more of its "essential features".

Identifying an “essential feature” has to depend on the court’s judgement and lightly with the evidence which will be placed before the court. “Our discussion under this head is again in the context of the relevant strength of the case of the parties and for the temporary injunction as laid down in *Palmolive*.” section 29 is using the word “deceptively similar” & Section 2(1) (d) is defining “deceptively similar” as in the situations “where one is 'deceiving' others or 'confusing' others”.

We will have to keep in view the difference in the words - “deceive” and “confuse” which is being used in section 2(1) (d).

In the present case- the defendant’s goods are consisting of the word “Cadbury” in their wrappers.⁶ “Lord Romer, LJ has said in [Payton & Co. v. Snelling Lampard & Co.](#)⁷ that it is a misconception to refer to the confusion that can be created upon an ignorant customer.” The customers that the courts are thinking of in the present case are who, are aware of the differences in the plaintiff’s goods, which will be differentiating his good’s from that of the others.

In my view, the trial Court in the present facts of the case is going wrong in principle for holding the scope for a purchaser being misled. The conclusion has arrived at without noticing the above principles.

⁶ *Fisons Ltd. vs. E.J. Godwin* (1976) RPC 653.

⁷ *Payton & Co. vs. Snelling Lampard & Co.*, (1900) 17 RPC 48.

2. ROTELA AUTO COMPONENTS (P) LTD. AND ORS. VS. JASPAL SINGH AND ORS.⁸

Facts of the Case:-

In the present case the Plaintiff No. 1 is a “Company” which is being registered in India and Plaintiff No. 2 is a “corporation” which is being existed in the Laws of “The Republic of China” - which is a registered office in Taiwan. The applicant is the “sole distributor and attorney in India” - for “Top open locks and Pin locks” which Plaintiff No. 2 is manufacturing.

The learned counsel for Plaintiff “Mr. Arun Bhardwaj” is contending that the plaintiff has been manufacturing its locks which are very unique & distinctive from the period in which it has been registered under the “Designs Act, 2000”.

Further Mr. Bhardwaj is contending that the defendant is been adopting the same/identical or deceptively similar features. Within the meaning of section 22- the plaintiff’s counsel is been contending that adopting and applying the identical/ deceptively similar designs by the defendant’s will be amounting to an “act of piracy” and so as the defendants will not earn profits illegally from that.

Further contending that defendants will be guilty in order of “passing off” the plaintiff’s goodwill give an impression that they are being the seller “of the genuine goods manufactured by the plaintiff”. Mr. Bhardwaj is further contending that- the argumentation of defendants in pursuance to “Sub-section 3 of section 22”- grounds in which the design which was registered will be cancelled under section 19 will not be available as a ground for defence.⁹

“Mr. V.P. Singh” counsel for the defendant is contending that new Design is enacted -in the year 2000 & there will be no proprietary right in a good/ article is being functional. He is stating that the documents which are being filed by him show- the designing of the locks

⁸ Rotela Auto Components (p) Ltd. and Ors. vs. Jaspal Singh and Ors., MANU/DE/1429/2001.

⁹“Metro Plastic Industries (Regd.) v. Galaxy Footwear New Delhi 2000 PTC 1 (FB) in which it is held:-

“In our view, these are matters where no hard and fast rule can be laid down Section 53 creates a right in a registered owner. In the absence of an application for cancellation of the design such a right can be enforced and no defense can be taken based on a ground of cancellation. But once an Application for cancellation has been made then it would not be open for the Court, trying the Suit under Section 53, to turn a blind eye to the pendency of such Application.....”

which the applicant is “canvassing” the right, is published in the year 1995. He is contending that in the accounting of publication the case of infringement with locks will not be agitated by plaintiffs. “He has also contended that there could be no monopoly in respect of matters relating to design as the shape or a particular kind of belly of locks and curd top was pure and simple functional features and no novelty could be claimed in respect of the same.” Based on the argumentation of the defendant’s counsel- the injunction will have to be vacated.

The judgement of the Case:-

The design will be applying to any type of article but few “novelty or originality” will be existing to a degree, or else it will be paralyzing the industry & making the registered design a trap for the “honest traders”. In the event of a registered design in a recent date- whether an injunction will be continuing in the accounting of design registered, when there will be a serious disputing about the publication.

“The law is well settled that when seriously disputed questions on various grounds such as prior publication, lack of originality, trade variation are used in a particular case, an injunction will not follow as a matter of routine.”

Locks are being manufactured in order of fixing “Gear Sticks” in cars. The locks of the plaintiff are manufacturing by “Taiwanese companies and Korean companies”, who are advertising are publishing, the same is being filed by the defendant, the documentation belongs to “to the period 1995, 1997 and 1998”. The locks which are being advertising by the journals is been similar to the manufacturing by the plaintiff. So, that the plaintiffs will not be claiming any “novelty” for the locks.¹⁰

¹⁰Western Engineering Company v. America Lock Company (1973) II Delhi 178- "A large body of case law has been built up during the years, to explain what is meant by 'novelty and originality'. As the English law on the subject is almost the same as in India, the English cases are also a great help in determining the principles to be applied. In fact there are very few Indian decisions on the subject. Generally, the test for novelty and originality is dependent on determining the type of mental activity involved in conceiving the design in question. If the design is original, then the designer must have conceived something new; if the design is a mere trade variation of a previous design then the designer could be said to have merely kept an existing design in view and made some changes in its. Taking the instant case, it is clear that the previously existing design was almost exactly the same as the design of M/s. Western Engineering Company as well as that of M/s. America Lock Company in some respects. The lock itself being in the form of protruding cylinder. Therefore, some original mental application involved in conceiving the new design.”

Analysis of the Case:-

People who look at one lock and after that look to the other lock, will not be deceived. Both of the locks bearing the names on the locks and the case's of the following types will have to be decided by considering that "when is a person looking at plaintiffs' lock and if at that time he is offered defendants' lock, whether he would take the lock of the defendants as that of the plaintiffs?"

The decision of the court will have to be based on whether the alleging infringement is having the same type of shapes/ patterns and will eliminate the questioning of identifying functions, though any other design might be having a part that fulfills the same function without infringement.

"The legislature in its wisdom by enacting Designs Act, 2000 does not want to stop the progress in industrial products as that would amount to pin down the competitors and in the process, the technology would be blocked, same would result in clogging the economic growth. I feel substance in the arguments of the defendants that locks manufactured by the applicants are functional and these are items of common use and the same lack novelty is originality apart from being prior published."

Cancellation of design:-

Any of the people who are being interested might present a "petition" in order of cancelling the registered design in any of the time after the design registered, "to the controller" or any of the following grounds-

1. Registration of design is being done previously,
2. it is being published in India or any of the country before the registered date,
3. "design will not be a new original design"
4. The design will be not registered in this Act,
5. "That it is not a design as defined under Clause (d) of Section 2."

3. CADILA PHARMACEUTICALS LTD. VS. INSTACARE LABORATORIES PVT. LTD.¹¹

Facts of the Case:-

The plaintiff is a “pharmaceutical company” that deals in the manufacturing of different varieties of “pharmaceutical products”. The appellant is also manufacturing “antibiotics”. Consuming much of the antibiotics keeps affecting the normal function of the body, the side effects which causes are - “diarrhea, vomiting, dizziness, etc”.

The appellant developed and invented a unique process. “The said antibiotic is a penicillin product combination of a dose of lactobacilli marketing under the name of 'LMX'.”

The combining of “lactobacilli” with the antibiotic is affecting the “lactobacilli” & after quite periods the “lactobacilli” is withering away, which loses the virility. The appellant is evolving a process which coats “lactobacilli”- isolates the doses of “lactobacilli” from an antibiotic substance by a thin protective film. The “protective film” is preventing antibiotic which reacts with “lactobacilli”. The combined medicine which is being consumed orally even after a long time the “lactobacilli” is still being effective and successfully is counteracting the side effects which are being caused by the antibiotic.

“The appellant thus being the proprietor of a registered patent, has an exclusive right to manufacture and market its innovative medicine for five years i.e., the appellant has a right to a monopoly over the market for the process invented by it for five years.”

The respondent who is also a “pharmaceutical company” had been starting to manufacture the same combining of drugs, in the name “Hipen LB & Hipenox LB”

The appellant is filing for an interim injunction which restrains the defendant from manufacturing “Hipen LB & Hipenox LB”

Mr. Dave the counsel for the appellant is saying that the definition of invention is, “includes any new and useful improvement of the process of manufacture.”

¹¹Cadila Pharmaceuticals Ltd. vs. Instacare Laboratories Pvt. Ltd., Appeal From Order No. 145 of 2001.

The inventing of a process by the appellant for manufacturing of combining “anti-infecting agent with lactobacilli” & is being entitled to Patent in the Act.

Whereas the defendants' counsel Mr. Thakore is saying that, “defendants have a right to defend the action for infringement on all grounds available under Section 64 of the Act.”

Judgements of the Case:-

The contentions which are being arisen by Mr. Dave, the defendants choosing not for lodging opposition/ for applying for “revocation” of patent, having no right to defending the action of infringement which is being brought by the appellant. It being true in every sense that the defendant will be having an opportunity for giving notice for its opposition to the controller in pursuant of advertising of the acceptance published “under section 23 of the Act”.

It is further being true that the defendant will be having a right for applying to revocation of the subject patent “under Section 64 of the Act”.

“Section 107 of the Act, the defendant has a right to defend the action of infringement on all grounds that are available for revocation under Section 64 of the Act. Section 107 expressly empowers a defendant to defend any suit for infringement of a patent. Every ground on which a patent may be revoked under Section 64 shall be available as a ground of defence.”

In the view of the judges though the defendants are choosing not for giving notice to opposing under, “Section 25 of the Act or to apply for revocation under Section 64 of the Act”, yet having right in defending the action of infringement subject to a patent on any of the grounds which the patent will be revoked under section 64 of the Act.

In the current scenario of the case, it will be an admitting fact, the subjected patent will be in the respect of a process which is being evolved by the appellant for formulating the combining of “anti-infecting agent with that of micro-organism namely lactobacilli”.

“The process of making combination drugs of a chemical material and a micro-organism is a well accepted process and isolation of one of the ingredients by giving it a coating is also a well accepted process”

Hence the process which is being developed after years of researching and developing is really in the use for decades. The appellant will not have to say that he has evolved a new

process unknown to the “pharmaceutical world”. “But as referred to hereinabove, what is patented is the process and not the combination drug itself. If prima facie, the process evolved by the appellant is not found to be patentable, the defendants cannot be restrained from using the said process for its products and for marketing them. In the present case, as referred to hereinabove, the defendants have already entered [the market with their products 'Hipen LB' & 'Hipenox LB' sometime in December 2000. It should, therefore also, not be proper to restrain them from continuing to market its products which have already entered the market for quite a few months. I am, therefore, of the opinion that the learned trial Judge was justified in vacating the ex parte ad interim injunction and in rejecting the application for an interim injunction.”

Analysis:-

"I, therefore, consider the process to be not only novel but also inventive and further industrially applicable to constitute a valid patentable subject."

Also to be mentioned that the “novelty and inventive” merits of the current inventions are being confirmed by the fact that the invention is also covering under the corresponding PCT.

In the case of Bishwanath Prasad Radhey Shyam, it was opined that the objective of the patent is to encourage “scientific research, new technology, and industrial progress”. Granting of exclusive privileges for owning, using/ selling the methods / the products which are being patented for the limiting of the period, for stimulating the new inventions of commercial utility. The pricing for the granting of the monopoly is the disclosing of the invention at the Patent’s office, which after the expiring of the fixed period which is being passed into the public domain.

“the interlocutory remedy is intended to preserve in status quo, the rights of parties which may appear on a prima facie case. The Court also, in restraining a defendant from exercising what he considers his legal right but what the plaintiff would like to be prevented, puts into the scales, as a relevant consideration whether the defendant has yet to commence his enterprise or whether he has already been doing so in which letter case considerations somewhat different from those that apply to a case where the defendant is yet to commence his enterprise, are attracted”

DAMAGES IN THE YEAR 2000-2005

RAJEEV INDRAVADAN MODI AND ORS. VS. INSTANCE LABORATORIES PVT. LTD. AND ORS.¹²

Facts of the Case:-

The suit is by the plaintiff for alleged infringement of “registered patents” in the possession of the plaintiff by the defendant. In this suit, applying for an interim injunction is being tendered and the Assistant judge, “Vadodara”, is granting ad interim injunction in the favouring of the plaintiff. The defendants also replied to the said application is filing an affidavit in reply for resisting that application and for vacating the ad interim injunction. In this reply pertains contentions were being arisen, for the plaintiff, amounting to pray for the “revocation of the patent”.

For the plaintiff, it is been a counterclaim for revocation, “by the proviso to Section 104 of the Patents Act read with Section 64 of the said Act, the suit was required to be transferred to the High Court by the Court below”.

Mr. Shelat is saying that there have been no disputes for the plaintiff which holds a “registered patent” for a process. “In the affidavit-in-reply, the defendants have come with a specific case of improper grant of patent and their intention of going for revocation of the patent granted to the plaintiff”.

“Mr. Shelat submitted that Sees. 104, 107, 108, and 116 are to be read with Section 64, which would indicate that, if in substance, the dispute between the parties is regarding improper grant of patent or revocation of such patent, the jurisdiction lies only with the High Court and when the defendants have expressly indicated their intention in the affidavit-in-reply of moving an appropriate application for revocation of the patent, the Court ought not to have taken a technical view of the matter, stating that no such application has been made”.

Mr. Thakkar is further contending that the provisions which are containing in sections 64, 107 and 116 of the Patents Act”, there has been a complete bar which has to be considered- the “questions of a patent by a district court”. Mr. Thakkar is submitting further that, if the order is been passing by the “trial court” is allowing to stand; a situation might be arising

¹² Rajeev Indravadan Modi and Ors. vs. Instance Laboratories Pvt. Ltd. and Ors., (2001) 3 GLR 2010.

when 2 of the different courts will decide 2 “litigations” between the “same parties for the same cause of action” which will be leading to a legal complications & multiplicity of the proceeding. “Mr. Thakkar submitted further that constructive res-judicata would apply to the defendants, and ultimately, the suit will have to be transferred to the High Court, and therefore, instead of having multiple proceedings consuming time of different Courts, the interest of justice requires that the matter is directed to be transferred to this Court.”

Judgements of the Case:-

The court will be required, in addressing the question, *“whether in a suit for infringement of patent, when only an affidavit-in-reply to interim injunction application is filed indicating an intention on part of the defendants to take steps for revocation of a patent granted to the plaintiffs, can it be said that it is a counter-claim as contemplated under Section 104 of the Patents Act?”*

For this purpose, the provisions which are containing in the “patents act” will be perused. In a case where a “counter-claim” for the revocation of patents is being made by the defendant, the suit along with the “counter-claim” should be transferred to the High court for decision. “It is contended that, if Section 107 of the said Act is seen, it provides for the defences in the suit for infringement. It provides that every ground provided in Section 64 would be available as a ground for defence in any suit for infringement of a patent.”

If it is mostly argued with the contending of the affidavit, it is indicating that the defendants were having an intention for filing a ‘counter-claim’ for the revocation of the plaintiff. A contention which regards for lacking “novelty” in the plaintiff alleging a claim of patents is also taken and averting is been made for indicating the patents granting is invalid.

“It requires further to be noted that in both the cases, the written statement was filed, whereas in the instant case, a written statement is not filed and no pleadings are there from the defendants' side. In absence of pleadings in the written statement and absence of a separate counter-claim, it cannot be said that the defendants are coming with the counter-claim as contemplated under Section 104 of the Patents Act or that the suit requires to be transferred, therefore.”

This Court is not finding any of the jurisdictional error which is being committed by the Court nor it is been brought to the notice of the Court. “With the limited scope of jurisdiction

under Section 115 of C.P.C., this Court is not inclined to exercise revision jurisdiction and disturb the order of the Court below for the reasons stated above.”

Analysis:-

“Section 104 of the patents act”, is providing that no suits for declaring “under section 105” or any relief “under section 106” for the infringing of patents should have to be instituted in any court infuriating to a district court that has jurisdiction for trying the suit.

“Section 108 provides for relief in the suit for infringement wherein it is provided that in a suit for infringement, an injunction or damages or account for profits may be granted by the Court. It is contended that, therefore, ultimately, if the suit is allowed, the relief that would be granted would be in these terms”.

Order VIII, Rule 6-A(1) is providing that a defendant in any suit might, adding to his rights,” pleading a set-off under Rule 6”, which is being set up by the way of “counter-claim” against the claim of the plaintiff, a right or claim which in the respect of causing of action to the defendant against the plaintiff, either is before / after, the suit is being filed but before the defendant is delivering his defence/ before the time which is limiting for delivery of his defending has been expired, “whether such counter-claim is like a claim for damages or not”.

Rule 6-B is providing that when a defendant is seeking to rely on any of the grounds as supporting a right of “counter-claim” he should in his writing statements is stating specifically that he is doing so by way of “counter-claim”.

It will be undisputing that the defendant will not be filing a written statement in the matter in replying to the suit. What is being filed before the court is the replying of an affidavit to the “interim injunction” applications. It will also be undisputed that the defendants will not prefer to a format separating “counter claim” as contemplating under “Order VIII, Rule 6-A of C.P.C”

“If Rule 6-A of Order VIII, C.P.C. is seen, it provides for filing of counter claim prior to the filing of the written statement. Differently put, it contemplates a formal and separate counter-claim other than written statement.”

It is to be noted that the court will be considering this situations and it will be held that after the amending of “ C.P.C in 1976” , the proviso with regarding to the “counter claim” will have to be inserting in Order VIII.

PERRY BOTTLING COMPANY VS. S.S. SODA SOFT DRINKS COMPANY AND ORS.¹³

Facts of the Case:-

Mr. Perry Bottling Company is filing a suit of injunction against the defendant. The plaintiff is praying that the he is the trade mark's holder and the defendant is trying to confuse the customers', by that he(defendant) uses a mark which is similar to that of the plaintiff's. The defendant now sells the product's which is of fine quality. “According to the plaint allegations, the action of the defendants is offence under Sections 77, 78 and 79 of the Trade and Merchandise Marks Act, 1958 (hereinafter referred to as the "Act of 1958") and Sections 63, 64, 65 and 67 of the Copy Rights Act and Sections 420, 120-B, I.P.C., for which a complaint has been lodged by the plaintiff against the defendants”.

Judgements of the Case:-

The trial court opines that , the plaintiff's is having a trade mark which is registered 1, but by observing the certificates which was in favour of the plaintiff's , the “Perry's Fruit Beer” - which got its registration by the plaintiff and it is been renewing. Thereafter it will not be said that only “Fruit Beer” is the plaintiff's registration mark.

It is also been said that plaintiff is producing cash memos, “though in the list of products "Fruit Beer" has been shown as product of plaintiff firm but under this there is a monogram of "Perry's(r) Fruit Beer", therefore, it is not proved that "Fruit Beer" is a registered trade mark of the plaintiff.”

The court also founds that there is been a dissimilarity in the mark of the plaintiff & the mark which is been used by the defendant. “Fruit Beer” is a kind of beer which has no alcohol and it could be producing by the company “Perry”.

¹³ Perry Bottling Company vs. SS Soda Soft Drinks Company and Ors, 2003 (26) PTC 555 Raj, RLW 2003 (1) Raj 77, 2002 (3) WLC 333, 2002 (2) WLN 593.

Mo one will be able to claim exclusive rights of the name “Fruit Beer”, trial court founds that there is no “prima facie” case in plaintiffs favour, “also found that no irreparable injury will be caused to the plaintiff if the injunction is not granted and balance of convenience does not lie in favour of the plaintiff”.

“Hence injunction was refused by the trial court against which the plaintiff-appellant preferred this appeal”.

“Whether the defendants by using "Hello Fruit Beer" for their product, prima facie infringes right of the plaintiff”. “Fruit Beer” is a registration trade mark of the plaintiff & it has been also clear that “Perry’s” is plaintiff’s firms Name which is been mentioned, “In a manner in the label so as to show that the "Fruit Beer" belongs to the "Perry's".”¹⁴

The violation of the plaintiff’s right of Tm which is been concerned, there will not be any kinds of disputes with the “phonetic similarity” in the TM which is been using by the plaintiff and the defendants because both of them are been using the same word “Fruit Beer”

“Therefore, this appeal is allowed and the order of the learned trial court dated 18.6.2001 is set aside. The respondents-defendants are restrained from using the words "Perry's(r) Fruit Beer" or "Fruit Beer" over his product in Hindi or English till the decision of the suit”.

Analysis of the Case:-

The plaintiff has its trade in the name of the “ M/S Perry Bottling Co”. The name “Fruit Beer” is been invented by Plaintiff’s. “The "Fruit Beer" is not a word identifying a particular commodity but it identifies the only product of the plaintiff which was also invented by the plaintiff only.”

¹⁴“if the facts of this case are seen then it is clear that the product of the plaintiff is non-alcoholic soft drink which is being used by the general public in the cities as well as in the villages, therefore, it can be presumed that the product will be purchased by both villagers and resident of cities, illiterate as well as literate and, therefore, the question has to be approached from the point of view of a man of average intelligence and imperfect recollection and the Hon'ble Apex Court held that the purchaser in India cannot be equated with a purchaser of goods in England”

CONCLUSION

The judiciary has been playing a important role in order to protect the patents infringement rights in India. The district as well as the Higher courts is been conferred of jurisdiction against the patents matters as it is involving lot of techniques.

The patent litigation, in India has been comprised of infringement of Patents, revocation and counter claim. As in the “TRADE RELATED ASPECTS OF IPR” has become effective in 2005 and then after that 10 years of waiting periods, the judiciary’s role has been now become more and very utmost important.

In the years to come, we will be seeing very new kind of crucial cases and matters which might be coming out for interpretation before the judiciary in India. “in the view of this, the judges will be well trained in the matters as on today they are not fully geared up to face situation.” The judiciary is playing an important role in preventing infringement of patent rights as and when time arises in our country,

There has been pressure in judiciary not because of the lack of judicial precedents, but also due to demonstrable urgent with which the party is seeking relief. The courts intervention has been sought corporations & individuals desired remedies immediately. Even if the “intellectual property rights infringement” is a “high profile matter” due to high stakes and commercial sensitivity which is associated with it, they basic need for careful adjudication & expeditious decision-making rank highest in the order of priority of courts.