

Intellectual Property Law as evolved by Indian Courts

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Patent Law – evolution in 20 years

- Rapid Changes since 2005 – Last limb of Trips & Pharma Product Patents
- Franz Xaver 1996 – Loom in Textile Industry – patent not worked – no interim injunction possible
- From 2009 onwards BMS vs Hetero – Status quo orders in Quia Timet actions – steadily grant of interim injunctions
- 2010 to 2020 – tremendous changes in Patent Litigation (Speed)
 - SC in 2009 in Bajaj vs TVS said: Dispose IP cases in 4 months
 - 4-month orders of Delhi HC–Commercial Court Act in 2016
- Growth of a Damages culture

Pharma, Agro and Life Science cases

- **Novartis case (SC)** - whether Imatinib Mesylate beta crystalline form could be patented? Held hit by Section 3(d) – Polymorph of known compound must show enhanced therapeutic efficacy (thermodynamic stability or bioavailability not good enough) – patent not granted except on process
- **Roche vs Cipla (DB)** – Erlotinib Hydrochloride – Lung Cancer
 - Admissions in subsequent patent that first patent was mixture of Polymorphs A plus B not relevant (defendant claimed making Poly B) – infringement held
 - Validity not just based on structural similarity, onus on defendant, test of POSA
 - Principles of Claim construction , Claim vs Product not product vs product

Pharma....

- **Merck vs Glenmark** – interim order (DB) – defendant should have cleared the way (6 ways) ; interim injunction if not granted the price would spiral downwards & never recover – it would be a pyrrhic victory
- **Merck vs Glenmark** Final after trial – Sitagliptin phosphate monohydrate – Obviousness failed – Hindsight not permissible
- **Bayer vs Alembic** ; vs UOI – exports of patented drug allowed if not commercialized but for regulatory purposes subject to safeguards indicated in para 10 and 11
- **Monsanto vs Nuziveedu Seeds** – Complex questions of Section 3(j), manmade DNA sequence inserted in a plant cell to generate a fusion protein that would kill boll worms in cotton...patent could not be held invalid without trial (Settled as of 9th April 2021)

AstraZeneca line of cases

- Anti Diabetes Type 2 drug Dapagliflozin, 9 appeals pending on issues:
 - Genus- Species
 - Disclosure vs Coverage
 - Markush Claims
 - Prior claiming
 - Terminal Disclaimers
 - Section 8 requirements

Telecom & Software

- **Philips vs Bhagirathi** – First SEP order to be finally decided after trial – decreed with damages - DVD players
 - FRAND and unwilling licensee
 - Royalty on price of player not chipset
 - Competition issues not relevant
 - No exhaustion as chip sets not from Philips licensee
- **Ericsson & Dolby cases** – Interim arrangements for deposit or Bank guarantee or interim payments
- **Interdigital vs Xiaomi** – Confidentiality Club; Anti Anti suit injunction
- **Sukesh Bahl vs Philips** – Section 8 requires Materiality & intent

Other fields...

- **Enercon** (Wind Energy) – defendant must choose between post grant opposition (25(2)) and revocation (S 64)
 - If infringement suit filed first only counterclaim lies

Damages – trademark cases

- Compensatory, Punitive and Aggravated
- Hindustan Unilever vs Reckitt Benckiser – punitive only when actual damages proved & insufficient to cover mala fide conduct
- Philips vs AmazeStore – Rookes v Barnard – Egregious conduct – to teach defendant that tort does not pay (also Cassel vs Broome)
 - 3 crores total ...aggravated one crore
- Whatman International vs Mehta – 25 years violation, multiple brands, false pleadings and statements ... 1.85 crores

Internet issues – intermediary Section 79 IT Act

- Many cases – Amazon vs Amway, Christian Louboutin, Amul, ITC, Godrej, loreal, Shreya Singhal, Myspace.....
- Section 79 only by true intermediary
- A rogue website cannot avail this defence
- A website that does exercise due diligence may be attributed with knowledge of wrong doing
- Due diligence at the least requires name and address of seller
- Act, Rules of 2021, Consumer Protection Rules 2020 and Press note 2

Conclusion

- Abolition of IPAB –effect to be seen
- Uncertainty in many areas....clarity needed with many more judgements
- With our rich jurisprudence in diverse fields, leading the way our judiciary can make India an IP SuperPower