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Article

The right to cross-examine in a post grant opposition

By **Sutapa Jana**

In the case of *Onyx Therapeutics Inc v Union of India*¹, a Division Bench of the Delhi High Court *vide* its order dated September 26, 2019 held that once the Patentee has filed its reply-statement, the Patentee is not required to provide any separate reasons for cross-examination of the witnesses whose affidavits are filed by the Opponent in support of its Post-grant Opposition. The objections in the reply-statement are the reasons for seeking cross-examination.

Facts of the Case

The Appellant, Onyx Therapeutics Inc., filed an international application under the Patent Cooperation Treaty bearing No. PCT/US05/012740 dated April 14, 2005 and pursuant thereto, filed an application under Section 7(1A) of the Patents Act, 1970 (hereinafter referred to as the “Act”) on September 27, 2006 bearing No. 5644/DELNP/2006, seeking a patent in India based on aforesaid international application. Thereafter, the said patent application was duly examined under the Act and the Indian Patent Office proceeded to grant a patent bearing no. 255964 (hereinafter referred to as “IN ‘964”), on April 09, 2013.

Later, the Appellant received a post-grant opposition from the Third Respondent, Fresenius Kabi Oncology Ltd (hereinafter referred to as the “Opponent”). The opposition by the Third Respondent was supported by the affidavit of an expert, Dr. Surajit Sinha. In response to the

same, the Appellant filed a reply-statement under Rule 58 of the Rules without any affidavit in evidence and also sought permission from the second Respondent, the Deputy Controller of Patents and Designs (hereinafter referred to as the “Deputy Controller”), to cross-examine Dr. Surajit Sinha. Meanwhile, the Opponent prayed to place on record additional evidence affidavits of a new expert Dr. Prachi Tiwari and a second affidavit of Dr. Surajit Sinha. The Opponent also filed a second affidavit of Dr. Prachi Tiwari challenging the validity of IN ‘964.

Thereafter, the Deputy Controller forwarded a copy of the recommendation of the Opposition Board constituted under Section 25(3) of the Act. The list of documents considered by the Opposition Board included the evidence affidavits of both Dr. Surajit Sinha and Dr. Prachi Tiwari. In response to the aforesaid email of the Deputy Controller, the Appellant requested cross-examination of Dr. Surajit Sinha and Dr. Prachi Tiwari and that the hearing be deferred until then. The Deputy Controller accepted the said request and directed the Opponent to notify the date on which the witnesses will be made available for cross-examination, before the hearing date.

Subsequently, the Opponent raised objections that the Appellant was required to move a formal application to this effect. Thereafter, the Deputy Controller directed the Appellant to file a formal petition for cross-examination. However, immediately thereafter, the Deputy Controller on his own denied the

¹ LPA 229/2019 & LPA 249/2019

request for cross examination and intimated that a hearing on merits would take place as scheduled.

Aggrieved by the said order of the Deputy Controller, the Appellant filed a writ petition before the High Court of Delhi. The Ld Single Judge allowed the writ petition of the Appellant and permitted the Appellant to cross-examine the expert witnesses of the Opponent, but imposed a pre-condition that the Appellant would first file affidavit in evidence of its expert witnesses controverting the opinions of the expert witnesses of the Opponent. In view of the said pre-condition, the Appellant preferred a Letters Patent Appeal before the Division Bench with a limited relief that the pre-condition imposed by the Single Judge be set aside. The Opponent also preferred a Letters Patent Appeal before the Division Bench seeking quashing of the order of the Single Judge.²

Contentions of the Parties before the Division Bench

The Appellant's primary contention was that cross-examination of the witnesses led by the Opponent had to be allowed, independent and irrespective of whether any affidavit in evidence was tendered by the Appellant or not. Moreover, the Appellant contended that it was not required to cite any grounds or reasons to justify its request to cross examine the witnesses since the reply statement filed by the Appellant under Rule 58 itself constituted the reason for seeking the cross-examination of experts. It was also contended by the Appellant that while reasons for cross-examination were in-built in the reply statement, a separate application for cross-examination was also filed by the Appellant.

The Appellant further contended that the veracity of the claims made by the experts in the affidavit can be established only through cross-examination, and therefore, the same should be treated as a rule and not as an exception. The same also facilitates the Deputy Controller to adjudicate the Opposition. Therefore, the Appellant claimed that the cross examination ought to have been allowed by the Deputy Controller in the interest of justice.

Further, the Appellant argued that the above-mentioned aspects were not properly appreciated by the Single Judge while allowing conditional cross-examination. Therefore, it was prayed by the Appellant that the judgement and the order of the Single Judge is required to be modified and cross-examination of the experts must be allowed without any pre-conditions.

The Opponent, on the other hand, argued that the Single Judge erred in permitting the Appellant the right to cross-examination because the proceedings before the Deputy Controller were not judicial but inquisitorial in nature. More so, no reasons were pleaded by the Appellant while seeking the cross-examination of the Opponent's witnesses.

The Opponent further argued that by virtue of a grant of the suit patent, monopoly was created in favour of the Appellant, against which the Opponent filed its objections along with its expert affidavits and therefore, the Deputy Controller was entitled to evaluate the objections of Opponent without the Appellant being permitted to cross-examine its experts. Lastly, it was argued that permitting cross-examination is the discretionary power of the Deputy Controller and there exist no vested right in the Appellant to cross-examine the experts whose affidavits have been relied upon by the Opponent. Since the Deputy Controller had denied the request of the Appellant, the same ought not to be interfered.

² LPA 249/2019

Decision of the Division Bench

Firstly, the Court upheld the decision of the Single Judge to grant the request of the Patentee to cross examine the witnesses of the Opponent. However, it was observed that no pre-condition should have been attached to the said order. The Division Bench held that when a request for cross-examination of the Opponent's witnesses is made by the Patentee, the said request should be allowed when objections in the form of reply-statement are already filed by the Patentee under Rule 58 of the Rules.

Secondly, the Division Bench observed that there is no need for the Patentee to give separate reasons to avail the right of cross-examination of the Opponent's witnesses, as defence of the Patentee may not be disclosed. The objections, i.e. the reply-statement filed under Rule 58 of the Rules are the reasons for the cross-examination of the witnesses. The Court reasoned that cross-examination is necessary since it is the only way to demolish the claims made by the Opponent's witness. Therefore, it was held that filing objections in the form of reply-statement under Rule 58 of the Patent Rules will be sufficient to avail of the right of cross-examination. Thus, it is not necessary to make it conditional upon the filing of an evidence affidavit by the Patentee.

Thirdly, it was also observed that under Section 77 of the Act, the Deputy Controller exercises the power of a Civil Court and thus, on conjoint reading of Section 77 with Section 79 of the Act and Rules 55A, 56, 57, 58 and 59 of the Rules, there is no need for the Patentee to give

separate reasons for seeking cross-examination of the witnesses whose affidavits are being relied upon by the Opponent. It was also observed that though the word "may" has been used in Section 77 of the Act, it must be borne in mind that, when the Opponent places reliance upon the evidence given by the witnesses in a post-grant opposition proceeding, then, cross-examination should be allowed for the reasons as stated in the reply statement filed by the Patentee under Rule 58.

Finally, it was observed that cross-examination of the witnesses is a touchstone for the examination-in-chief which is in the form of affidavit. Therefore, cross-examination will only facilitate the Deputy Controller to arrive at the decision in an opposition proceeding. Further, such cross-examination will not be prejudicial to the Opponent.

Conclusion

This case, thus, recognized the right of one party to cross-examine the experts whose affidavits are filed by the Opponent/other party in a post-grant opposition. If a Patentee has filed the reply statement under Rule 58, the Patentee is not required to give separate or additional reasons to exercise this right. Further, under Section 77 of the Act discretionary power of allowing cross-examination is already vested with the Controller, and accordingly, the same should be allowed by the Controller when a reply-statement under Rule 59 of the Rules has been filed by the Patentee and the Opponent seeks to rely on the depositions of its witnesses.

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Statute Update

Fees under Patents Act sought to be reduced for small entities

The Department for Promotion of Industry and Internal Trade in the Ministry of Commerce and Industry has on 18th of October 2019 notified the draft Patents (2nd Amendment) Rules, 2019 proposing to reduce the fees payable by the small entities under the Patents Act in respect of grant of patents and applications therefor and in respect of other matters.

As per the proposals, the slabs of fees for small entities, as prescribed in the first Schedule to the Patents Rules, 2003 read with Rule 7 thereof, are sought to be merged with that of natural persons and/or startups, both in respect of e-filing and physical filing. Further, an explanation in sub-rule (3) of Rule 7 will also be substituted, if the proposals are accepted, to provide that where a startup/ small entity, having filed an application for a patent, ceases to be a startup/ small entity due to the lapse of the period during which it is recognised, or its turnover subsequently crosses the financial threshold limit, difference in the scale of fees shall not be payable.

Fees under Designs Act sought to be reduced for small entities and startups

The fee to be paid for registration of designs and applications therefor, and in respect of other

matters relating to the Designs Act and the Rules framed thereunder, is sought to be substantially reduced for small entities and for startups.

The draft Designs (Amendment) Rules, 2019 notified by the Department for Promotion of Industry and Internal Trade in the Ministry of Commerce and Industry on 18th of October, 2019 proposes to amend the first Schedule to the Designs Rules, 2001 to provide only two slabs prescribing the quantum of fees. While the first and lower slab of fees will be applicable for natural persons, startups and small entities, the higher slab will apply for others alone or with persons specified in the first slab. It may be noted that as per the draft proposals the startups would also be eligible for the lower fees along with the small entities. The fee at present has three slabs with fees for small entities being higher than for natural persons.

Further, while defining 'startup' for this purpose, an explanation will also be inserted in Rule 5 to provide that where a startup/ small entity, having filed an application for a design, ceases to be a startup/ small entity due to the lapse of the period during which it is recognised by the competent authority, or its turnover subsequently crosses the financial threshold limit, the difference in the scale of fees shall not be payable.



Ratio decidendi

Injunction against MAKEMYTRAVEL - Correspondence with lowest rung executive is not acquiescence

In a dispute involving MAKEMYTRIP and MAKEMYTRAVEL, the Delhi High Court has made absolute the interim injunction granted earlier by it against use of the trade mark/trade name 'Make My Travel' (word per se), MMT (letter mark) and the tag line 'Dreams Unlimited', the MakeMyTravel Logo and their website. The Court observed that the defendant's marks were *prima facie* phonetically, visually, structurally and conceptually identical/deceptively similar to the plaintiffs MakeMyTrip Marks, and that the defendants had not offered any plausible explanation for adoption of the infringing marks.

It noted that while the first two words of the marks MakeMyTrip and MakeMyTravel are identical, the last words, TRIP and TRAVEL are similar and convey the same idea. Similarly, the Defendant's tag line DREAMS UNLIMITED is deceptively similar to the plaintiff's taglines HOTELS UNLIMITED and MEMORIES UNLIMITED. While the second word in the tag lines is identical, the first words DREAMS, MEMORIES and HOTELS, when considered in the context of travel and holiday related services, may be used in the same context or idea.

The High Court also observed that merely on the basis of the correspondence that defendant had with the booking customer care executive of the plaintiff and the franchisee of the plaintiff, and not with the management or the key managerial personnel, it cannot be *prima facie* accepted that plaintiff has acquiesced to the use of the infringing mark by the defendant. It was held that correspondences with personnel who did not

have knowledge of the intellectual property rights of the Plaintiff, cannot be considered as positive acts of encouragement towards the Defendant to do business under infringing/impugned marks. Defense of suppression of facts by the plaintiff was also rejected. [*Make My Trip (P) Ltd. v. Make My Travel (P) Ltd.* – Judgement dated 18-10-2019 in CS(COMM) 889/2018, Delhi High Court]

Trademarks – Not possible to conclude on disparagement when evidence yet to be led

The Division Bench of the Delhi High Court has set aside the Single Bench Order of the Court in a case involving alleged disparagement of trademark. It vacated the injunction on the three Television Commercials [TVCs] of the appellant and permitted it to even release the pamphlet flyer after appellant stated that it would delete the blurred image of salt packets from it. It noted that at the stage when the evidence is yet to be led, it was not possible to conclude that TVCs made direct reference to TATA salt and were either disparaging or denigrating it.

The High Court noted that in the present case, with the appellant pleading truth in defense, the threshold for proving defamation is higher. The Court was of the *prima facie* view that the respondent was reading too much into the waving gesture in the impugned video relating it as direct reference to TCL because it is a *Ta Ta* (Bye-Bye) gesture.

Further, observing that the only suggestion which appears to be there in the TVCs was that the consumer should make an informed choice, it held that there was *prima-facie* no suggestion that TATA salt is either poisonous or harmful to health. The Court also held that *prima facie* it

does not appear that the TVCs specifically targeted TATA salt. It was also of the view that the class of the product itself is not comparable and that the class of consumers targeted was also different. [*Puro Wellness (P) Ltd. v. Tata Chemicals Ltd.* – Judgement dated 31-10-2019 in FAO (OS) 64/2019, Delhi High Court]

Trademark licence agreement for unregistered mark is for the goodwill in specific business only

Observing that where a mark is unregistered, ownership of proprietor is not in the trademark, but in the goodwill associated with the business where the trademark is used, Delhi High Court has held that any licence under the Trade Mark Licence Agreement is to be in respect of the goodwill associated with the cable TV business only and not in respect of inventor business, since the former was admittedly the business conducted.

Directing permanent injunction against the defendant, the High Court also noted that the defendant was in exclusive control and management of plaintiff-company when the renewal of the mark was done and he did not challenge the same, and hence his rights for the same if not extinguished were at least barred by limitation.

The Court was also of the view that when a summary judgment application allows the Court to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. It held that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the Court the confidence that it can find the necessary facts and apply the relevant legal principles so as to resolve the dispute. [*Su-Kam Power Systems Ltd. v. Kunwer Sachdev* – Judgement dated 30-10-2019 in CS(COMM) 1155/2018, Delhi High Court]

Otrivin and Biotravin – Passing off and not infringement of trademark

Observing that there was similarity/deceptive similarity in the mark *Otrivin* of the plaintiff and the mark *Biotravin* of the defendant, Delhi High Court has restrained the defendant from manufacturing, offering for sale and advertising any product under the name *Biotravin* or any mark deceptively similar to *Otrivin*. The Court noted that both the products were nasal decongestants but with different chemical composition. The High Court was of the view that possibility of confusion entitles the plaintiff to relief on ground of passing off.

Plea of infringement was however rejected taking note of the fact that the defendant was the registered proprietor of *Biotravin*. The Court, for this purpose, noted that the registration of the mark, till removal thereof, cannot be deemed to have lapsed. It was also noted that defendant did not obtain registration for split terms *Bio Trivin* but for *Biotravin* with obvious similarity to *Otrivin*, and that using the prefix *Bio* on all their products would not entitle the defendant to argue that it is using “family of marks” to defend an action of infringement and passing off.

Defendant’s plea of acquiescence and laches was also rejected by the High Court as it held that since the plaintiff was the registered proprietor of the mark, Section 33 of the Trademarks Act was not attracted. [*GSK Consumer Healthcare S.A. v. EG Pharmaceuticals* – Order dated 31-10-2019 in CS(COMM) 238/2019, Delhi High Court]

Trademark protection when registration of mark under Design Act cancelled

Calcutta High Court has held that cancellation of previous registration of the mark as design under the Design Act does not disentitle the petitioner to use the said mark as a Trademark and sue for passing-off of the same. The petitioner was

accordingly held entitled to an *ad-interim* injunction as defendant's TMT bar used the pattern identical and deceptively similar to plaintiff's trade dress and pattern.

The High Court observed that petitioner *prima facie* established itself to be a prior user of the mark X in relation to TMT bars since 2001. It was noted that even before the registration under the Design Act, the petitioner was using the said unregistered mark and even after the cancellation, the petitioner continued to use X mark on the TMT bars as its trademark.

It also observed that as per Section 2(1)(m) of the Trade Marks Act, a mark on a product or shape of a mark can be used as a trademark. [SRMB Srijan (P) Ltd. v. Super Smelters Ltd. – Order dated 30-10-2019 in C.S. No. 192 of 2019, Calcutta High Court]

Blocking of access to specific information – Indian Court when can grant global injunctions

In a case involving publication of defamatory videos and other contents in social media, a Single Judge of the Delhi High Court has held that disabling and blocking of access, in respect

of such information uploaded from India, must be from the computer resource, and such resource includes a computer network, i.e., the whole network and not a mere (geographically) limited network.

Interpreting provisions of Information Technology Act, 2000 and the Information Technology (Intermediaries Guidelines) Rules, 2011, the Court was of the view that since the unlawful act in case of content uploaded from India is committed from within India, a global injunction shall operate in respect of such content.

It also held that so long as either the uploading takes place from India or the information/data is located in India on a computer resource, Indian courts would have the jurisdiction to pass global injunctions.

The High Court, however, held that in case of uploads which take place from outside India, the unlawful act would be the dissemination of such content in India, and thus in those cases the social media platforms may resort to geo-blocking. [Swami Ramdev v. Facebook – Judgement dated 23-10-2019 in CS (OS) 27/2019, Delhi High Court]



News Nuggets

Hearing of *ex-parte* ad interim IPR matters in separate chamber in Bombay High Court

All urgent mentioning for *ex-parte* ad interim application in Intellectual Property matters will now be allowed only at 10:30 a.m. in Chamber No. 45 in Bombay High Court. Further, as per Notice dated 6-11-2019 issued on oral directions

of Hon'ble Shri Justice S.J. Kathawalla, the matters allowed to be circulated shall be placed on production board, which will be called out at 11.00 a.m. in Court on the assigned date. However, the production board will not be uploaded / displayed. As per reports, such discretion has been directed so that surprise raids could be conducted on the defendants.

Trademarks – Registrar duty bound to communicate grounds for refusal

The Delhi High Court has held that the Registrar of Trade Marks is duty bound to send the copy of the order passed under Section 18(5) of the Trade Marks Act, containing the grounds for refusal/conditional acceptance and material used by him in arriving at his decision, to the applicant. Allowing the writ petition filed against non-speaking orders passed by the Registrar of Trade Marks, the Court in the case *Intellectual Property Attorneys Association v. Controller General of Patents, Designs & Trade Marks* was of the view that Rule 36 of the Trade Marks Rules is arbitrary, unreasonable and inconsistent with the mandatory provision of the statute insofar as it empowers the Registry to communicate the decision without the grounds for refusal/conditional acceptance. It held that Section 18(5) shall prevail over Rule 36.

No honest concurrent use on steady encroachment upon goodwill

UK High Court has refused to grant defense of honest and concurrent use to Bentley Motors. It observed that automobile giant's decision to develop use of the trademark 'Bentley' in relation to range of clothing and headgear, that too in incremental stages, amounted to steady encroachment on Bentley Clothing's goodwill. Further, observing that there was likelihood of confusion, the Court held there was infringement of the mark 'Bentley' by use of the combination mark (B with wings and the word Bentley) by Bentley Motors.

The High Court in *Bentley 1962 Ltd. v. Bentley Motors Ltd.* observed that the defendants took steps which exacerbated the level of confusion

and encroached upon claimant's goodwill. The Court observed that until 2000 the branding used by Bentley Motors clothing was limited to the B-in-wings device sold as part of Bentley Selection, and from 2000 Bentley Motors took a conscious decision to develop the use of Bentley in relation to their range of clothing and headgear such as to increase the prominence of their sign only in incremental stages so as not to provoke any reaction from Bentley Clothing. It also observed that the conduct of Bentley Motor's litigation in the UKIPO and EUIPO, in an attempt to revoke Bentley Clothing's Trademark and extinguish their rights altogether, does not sit well with their defense of honest concurrent use.

No visual and phonetic similarity between marks DOKKIO and <IO

In a case involving alleged similarity in word mark 'DOKKIO' and the figurative mark <IO, the General Court of the European Union has upheld the Board of Appeal finding that the signs at issue were visually and phonetically dissimilar overall and that no conceptual comparison was possible. It also rejected the argument that the comparison of the marks had to be carried out based on the premises that the figurative mark is to be perceived as consisting of the sequence of letters 'KIO'. The Court in *Sixsigma Networks Mexico v. EUIPO* also rejected the argument that the first element in the earlier figurative mark will be perceived as a stylised representation of the letter 'k', while it upheld the finding of the Board of Appeal that similarities in the last two elements of the two signs, cannot offset the overall visual differences between the signs at

issue. Finally, it was held that the mark applied for will be perceived as a whole which the relevant public will not try to break it down.

Designs - Registration is no proof, even prima facie, of validity of a design

In a case involving design of the container where both plaintiff and the defendant had acquired registration, Delhi High Court has reiterated that merely because registration has been obtained, it is no proof, even *prima facie*, of the validity of the design. Court observed that the process of registration of a design is materially different from that of a trademark where an opportunity is given to others to object. The High Court in the case of *Mehra Cosmetics v. Ram Kumar Gulati* also held that plaintiff was entitled to permanent injunction even if plaintiff is found to have forged the documents of use, as long as it is not the plea of the defendants that they are prior user of the impugned trademark.

Streamlining processing of trademark applications - HC seeks information from Registrar

In order to streamline the procedure for processing of Trademark application and registrations, the Delhi High Court has directed the Registrar of Trademarks to place an affidavit on record detailing current procedure for processing trademark applications, the manner of uploading of documents for trademark registry and details regarding post-registration formalities. The Court in the case of *Asianet Star Communications (P) Ltd. v. Registrar of Trademarks* observed lapses on the part of registry in dispatch of O-3 notice to incorrect address due to in-action for 10 years in processing application TM-34 for changes in address and not uploading of O-3 notice on website for 3 years. The Court was of the view that if separate departments deal with separate forms, then obviously such lapses are bound to occur and such procedure would result in enormous inefficiency in the processing of trade mark applications.

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