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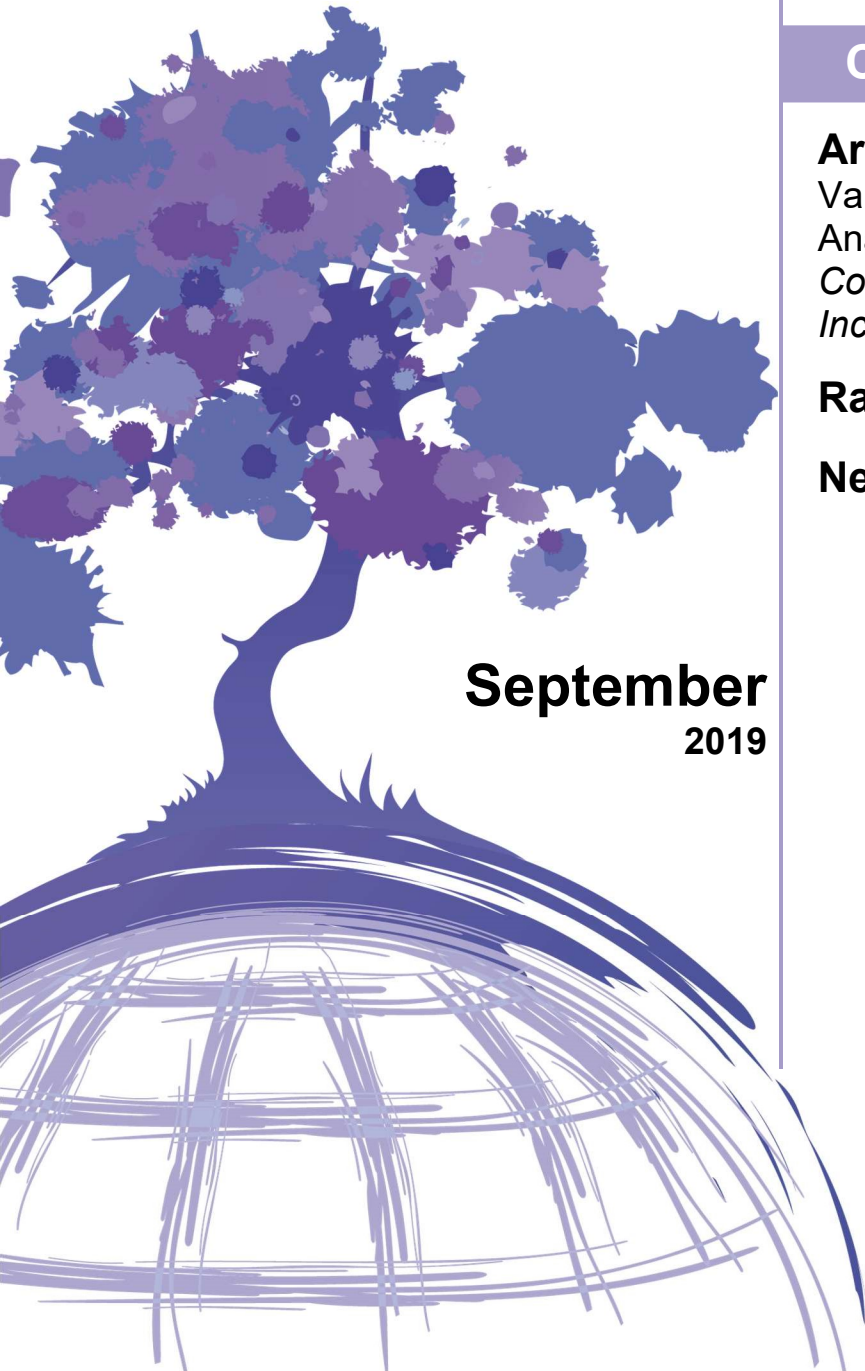
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Article

Validity and infringement of a Patent: An Analysis of the Judgment in *Communication Components Antenna Inc v. Ace Technologies Corp.*

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Introduction

In *Communication Components Antenna Inc v. Ace Technologies Corp. and Ors* [CS (Comm) No. 1222/2018], the Plaintiff had sought a permanent injunction restraining infringement of one of its patents. A single Judge of the Delhi High Court, vide a recent interim order, directed the Defendants to deposit an amount proportional to the total value of sales of some of its products, as they appear to be infringing the Plaintiff's patent.

The Ld. Judge has given a reasoned and detailed analysis as to why the Plaintiff's patent appears to be valid and as to why the Defendants appear to infringe the Plaintiff's patent.

Brief Facts

The Plaintiff is involved in the business of manufacturing and selling products relating to the telecommunication industry, such as antennae, amplifiers, and low loss combiners. The first Defendant – M/s Ace Technology Corporation – is also in the business of manufacturing and selling antennae for the telecommunication industry.

The Plaintiff has a patent in India numbered 240893 (*hereinafter, the '893 patent*) and titled "*Asymmetrical Beams for Spectrum Efficiency*". The '893 patent discloses a split-sector antenna for use in a sectorized cellular communications network having a base station supporting at least one sector. Each sector has an associated sector antenna that has a critical coverage area

extending therefrom. The split-sector antenna is constructed and arranged for replacing the sector antenna and has a plurality of sub-sector coverage areas extending therefrom. At least one sub-sector coverage area is asymmetrical. A total critical coverage area provided by the plurality of sub-sector coverage areas is substantially equivalent to the critical coverage area of the replaced sector antenna. The asymmetrical sub-sector coverage area reduces overlap with neighboring sub-sector coverage area as compared to overlap of the replaced antenna.

The application for the '893 patent was originally filed in India on August 5, 2008 as a national phase application of a PCT application. Subsequently, the '893 patent was granted on June 9, 2010. The corresponding US patent numbered US 8311582 (*hereinafter, the '582 patent*) was granted on November 13, 2012 and the corresponding European Patent Application, numbered 07710762.1, is pending, and yet to be granted.

The Plaintiff contended that some models of antennae of the Defendants infringe the '893 patent. The Plaintiff issued letters to the Defendants calling upon them to obtain a license for the '893 patent. However, the Defendants did not respond. Therefore, the Plaintiff filed the suit seeking permanent injunction against the Defendants.

The Defendants argued that the validity of the '893 patent was challenged in *Ten XC Wireless Inc v. Mobi Antenna* [CS (Comm) No. 977/2016] and *Ten XC v. Andrew Comm Scope*

[CS (Comm) No. 1072/2016]. Further, vide its order dated November 4, 2011 in the first suit, a single Judge of the Court opined that there appears to be a credible challenge to the validity of the '893 patent and declined interim injunction to the Plaintiff.

The Defendants also relied on various prior art documents to contend that the '893 patent is invalid and that the '893 patent is not a patentable invention under Sections 3(a), 3(c), 3(d), and 3(f) of the Patents Act, 1970. The Defendants challenged the validity of the '893 patent based on various statements made by the Plaintiff in the prosecution of the corresponding patent in USA and on the fact that the corresponding European patent application is not yet granted.

Contentions of the parties

The Plaintiff submitted that the novelty of the '893 patent lies in the fact that by changing the beam pattern of antennae, greater efficiency is achieved in the usage of spectrum. The '893 patent provides asymmetrical beam patterns in split-sector fixed beam antennae. According to the Plaintiff, any split-sector antenna that emits asymmetrical beams that result in asymmetrical sub-sector coverage area(s) such that the total critical coverage area of the sub-sector coverage areas of the split-sector antenna is substantially equivalent to the critical coverage area of a sector antenna that it replaces, is covered within the scope of the '893 patent.

As for the suit *Ten XC v. Andrew Comm Scope*, the Plaintiff submitted that Andrew LLC, against whom this suit was filed, was a subsidiary of CommScope Technologies LLC, which opposed the '582 patent before the US Patent Trial and Appeal Board (*hereinafter, the 'PTAB'*). The validity of the '582 patent was upheld by the PTAB, and CommScope Technologies LLC took a global license for the Plaintiff's patent. Therefore, the said suit was disposed of. As for

the suit *Ten XC Wireless Inc v. Mobi Antenna*, the Plaintiff submitted that various developments have taken place since the order declining interim injunction was passed. The developments include upholding validity of the US '582 patent by the PTAB and the opponent to the '582 patent obtaining a global license for the Plaintiff's patent.

The Plaintiff further submitted that the slight difference in the language of the claims in the '582 patent from that of the '893 patent is merely clarificatory in nature and does not make any difference in terms of the scope of exclusivity. The Plaintiff added that the Defendants did not raise any new grounds for validity more than what was considered by the PTAB.

The Defendants contended that the addition of an additional limitation in the claims of the '582 patent shows that the '582 patent would have been obvious without the limitation. Therefore, the Defendants argued that the '893 patent, without the additional limitation in the claim, is obvious.

The Defendants also argued that the presence of the words 'replacing'/'replacement' in the claims of the '893 patent means that the claims would be infringed only when an existing antenna is replaced with the split-sector antenna and not if a new antenna is used or installed. Since the Defendants are involved in the manufacture and sale of antennae, and not in replacement of existing antennae, the Defendants argued that they do not infringe the '893 patent.

The Defendants relied on certain graphics to argue that the total coverage area of the '893 patent is not comparable with that of their antennae. The Defendants also relied on a technical opinion of an expert to submit that the beam patterns shown in the plaint do not reflect the beam patterns of the '893 patent. The Defendants further submitted that they need not

disclose their beam patterns because the Plaintiff had failed to discharge its own onus.

Analysis and findings of the Court

The Court observed that the wordings of the claims in different jurisdictions may be different due to the subjectivity in the prosecution of the patent application. The Court also held that the language of claims in the foreign jurisdictions can be looked at to ensure that the invention is broadly the same and that, for determining infringement in India, the variation in the language of the claims in different jurisdictions need not be examined in a minute fashion.

Addressing the issue of the difference in the language of the '582 patent and the '893 patent, the Court observed that the independent claims of the '582 patent has the below language in addition to the features in the independent claims of the '893 patent:

wherein said at least one asymmetrical sub-sector coverage area reduces overlap with said neighbouring sub-sector coverage area comparing to overlap of the replaced antennae while maintaining the critical coverage area of the replaced antenna.

The Court held that the above language is not a further limitation when viewed in the context of the invention. Specifically, the Court held that the feature of 'reduction of overlap' in the above language is part of the '893 patent as well. Therefore, Court rejected the Defendants' contention that the '893 patent was obvious without the above additional language.

The Court also rejected the Defendants' argument that the word 'replacing'/'replacement' in the claims refers to an actual replacement of an existing antenna with a new antenna. The Court rejected such a literal reading of the claim. The Court, relying on *Catnic Components Ltd. V. Hill and Smith* [1982 RPC 183] and *F. Hoffman-La Roche Ltd. v. Cipla Ltd.* [225 DLT 391], held

that the claims have to be interpreted not literally, but purposively. By analyzing the purpose of the sub-sector antenna in the invention, the Court observed that replacement does not mean only replacement of existing antennae – even the use of a new sector antenna with an asymmetrical sub-sector coverage would also be covered under the invention. This is because the new sector antenna would still be an antenna where a sub-sector coverage area is replaced from a symmetrical one to an asymmetrical one. To sum up, the Court held that, in the context of the invention, replacement is used to denote the purpose for which the sector antenna having a symmetrical sub-sector coverage area is being replaced with a sector antenna having an asymmetrical sub-sector coverage area. Therefore, according to the Court, any telecommunication network where a sector antenna having an asymmetrical sub-sector coverage area is used, would be covered by the '893 patent.

The Court also took note of the fact that the Defendants had not produced beam patterns of their antenna to argue that they do not infringe the '893 patent, even though it was convenient for them to do so. The Court observed that, once the Plaintiff has established a *prima facie* case of infringement, it was up to the Defendants to disprove the same. Considering the fact that the Defendants did not produce their beam patterns to disprove infringement and that it would have been convenient and easy for the Defendants to do so, the Court concluded that the Defendants had deliberately chosen not to produce their beam patterns, which were crucial aspects in this case.

The Court rejected the contentions that the '893 patent is not patentable under sections 3(a) and 3(c) of the Patents Act, 1970, as the claims are not vague and are not discoveries. The Court also held that the '893 patent relates to newer

technology developed based on existing technology and achieves better efficiency and is therefore allowable under section 3(d). The Court further held that the invention is not a mere arrangement/re-arrangement of known components and rejected the challenge based on section 3(f).

Similarly, the Court rejected the Defendants' contention that the '893 patent was invalid in view of some prior art documents, as the prior art documents seemed insufficient to anticipate the disclosure of the invention.

Addressing the order in *Ten XC Wireless Inc v. Mobi Antenna*, in which the Court had held that there was a credible challenge to the validity of the '893 patent, the Court observed that an important factor considered by the Court to determine that there was a credible challenge to the validity was the rejection of the '582 patent by the US Patent and Trademark Office (USPTO). However, this factor is no longer valid, as the '582 patent has been granted and upheld. Another factor considered by the Court to determine that there was a credible challenge was that the '893 patent was a recent one (the '893 patent was granted in June 2010 and the suit was instituted in September 2010). This factor was also no longer valid, as the '893 patent is more than 9 years old. In this period, the Plaintiff's patent has not been revoked or held invalid in any jurisdiction. The Court also considered the judgment in *Sandeep Jaidka v. Mukesh Mittal & Anr* [CS (OS) No. 1900/2010], in

which it was concluded that if a patent is of long standing, then a case is made out for grant of an injunction. In view of the above factors, the Court rejected the Defendants' contention that there is a credible challenge to the validity of the '893 patent by merely due to the order in *Ten XC Wireless Inc v. Mobi Antenna*.

In view of the above findings, the '893 patent was found to be *prima facie* valid and being infringed by the Defendants. Since the first Defendant claimed that it did not have any assets in India, to continue sales of antennae in India, the Court ordered the Defendants to deposit an amount approximately equal to ten percent of the sales made.

Conclusion

The instant judgment has emphasized on the importance of purposive construction of claims to ensure that the claims are not construed too narrowly. The judgment has also made it clear that, for determining infringement in India, the Courts will primarily consider the claims granted in India, while the corresponding claims in foreign patents will be looked at only to ensure that the invention is broadly the same. The judgment also makes it clear that an older patent will be considered more favorably for injunction.

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Ratio decidendi

Patents - Registration under Insecticides Act is not 'prior publication' of process

The Delhi High Court has held that just because an earlier registration under the Insecticides Act, was in favour of the plaintiff and later the defendant, it does not mean that the patented process was disclosed. It noted that the defendant was not able to show that the steps in the process patent were disclosed previously. The Court observed that in the absence of any details as to the process which was disclosed by both parties to the Insecticides Authority, it cannot be held that the mere fact that the Defendants' registration was a follow-on registration under Section 9(4) of the Insecticides Act, would lead to the inference that there is an infringement of patent.

The Court observed that the language of Section 30 of the Patents Act makes it clear that disclosure to the Government department, not just of patentee but any other person, would not constitute a prior publication. It noted that in order to constitute disclosure, there has to be public manufacture, use or sale. The plaintiff was held entitled to permanent injunction restraining the defendants from manufacturing and selling D-trans Allethrin. The Court observed that there was absence of evidence by the defendant to rebut plaintiff's case of infringement. Judgement in *Lallubhai Chakubhai Jarivala v. Shamalda Shankalchand Shah* was relied on.

It was held that any patent that discloses a novel process would not contain analysis of process but would merely discuss the prior art, mention the advantages of the inventive steps and disclose the exact process sought to be patented. The Court also observed that

disclosure of the process is different from an external analysis of the process as to how it is novel and inventive. It noted that the latter was contained in expert testimony of the plaintiff's witness. [*Shogun Organics Ltd. v. Gaur Hari Guchhait and Ors.* – Judgement dated 14-8-2019 in CS (COMM) 201/2017, Delhi High Court]

Trademark passing off – No monopoly in word 'iTerm' used for online insurance policies

In a suit for passing-off, Bombay High Court has refused to grant injunction for the mark 'iTerm', observing that the same when used along with the company's name is not likely to cause confusion. The Court observed that as per IRDAI every company must mention its name along with the policy name and that itself clearly distinguishes the two policies. The Court further held that the class of customers who purchase insurance policies are educated and do not decide on the spur of moment and they generally go through policy terms and company's profile, and hence there is no possibility of confusion.

Rejecting the plea that 'iTerm' was an invented mark and therefore inherently distinctive, the Court held that the word was not coined by the plaintiff as it existed in the market as per the Google analytics report presented by the plaintiff itself, and therefore the plaintiff cannot claim any statutory rights. Further, observing that the plaintiff had filed for registration only 10 days before the application for injunction, the Court was of the view that even the plaintiff knew that their mark is descriptive and generic. It was also held that the mark was descriptive of the services (online term insurance) for which it was being used by the Plaintiff and the Defendant.

The Court also observed that a mere use of mark, albeit continuous, does not necessarily translate into the mark obtaining secondary distinctive meaning. It observed that high sales and expenses cannot be the sole criteria and that the Plaintiff must show market trends, market surveys, etc., to show that this was indeed how the public now perceived the mark, and not as a mere description. [*Aegon Life Insurance Co. Ltd. v. Aviva Life Insurance Co. Ltd.* – Judgement dated 19-8-2019 in Commercial Suit (IP) No. 298 of 2019, Bombay High Court]

Copyright in film script – Court cannot opine without seeing both scripts

The Bombay High Court has held that without looking at both the scripts, the Court cannot make a *prima facie* opinion and conclude infringement, in a case involving copyright in a film script, as the same would be prejudice to the defendants. The Court further observed that in a case if the plaintiff's case is only on the basis of the teaser/trailer and the comparative analysis on the basis of this material is being made out without the Court looking at the actual works (scripts) to reach even to a *prima facie* conclusion to a copyright infringement, it would be treading on a dangerous path. The High Court also observed that plaintiff despite having all the knowledge about defendants producing a film with plaintiff's script, delayed in bringing the matter to court even when respective scripts could have been investigated for infringement. [*Radha Bharadwaj v. Ellipsis Entertainment Media LLP and Ors.* – Order dated 9-8-2019 in Commercial IP Suit No. 243 of 2019, Bombay High Court]

Trademark passing-off in packaged drinking water to be treated same as in pharmaceuticals

The Bombay High Court has held that, in public interest, passing off in packaged drinking water

should be dealt in a similar way as cases involving medicinal products, and hence a lesser burden of proof showing confusing similarity is required as against non-medicinal products. It noted that the confusion is more likely in such cases to result in loss of life or other serious health problems. The Court held that courts need to be vigilant since if water is contaminated or spurious product is introduced, it will cause harm and injury to the general public. It also noted that the confusion amongst customers can have unpleasant if not disastrous results.

The defendants were appointed as franchisee by the plaintiff from 13-03-2013 to 18-10-2017 to manufacture, fill, pack, sell and distribute packaged drinking water under the brand name 'Bailey' in the specified territories. However, the defendants were called upon by the plaintiffs to cease the manufacture of products under its brand name owing to the expiration of the defendant's BIS license. Plaintiff later saw newspaper articles that defendants' premises were raided by BIS and they were found to be in possession of packaged drinking water bearing plaintiff's trademark 'Bailey'. [*Parle Agro (P) Ltd. v. Shree Balaji Food & Beverages* – Order dated 6-8-2019 in Commercial IP Suit (L) No. 818 of 2019, Bombay High Court]

Trademarks - Delay in rectification application is not abandonment

The Delhi High Court has held that delay in filing the rectification application does not mean abandonment of the claim/objection to invalidity of registered trademark. The Court observed that it is only after additional issues are framed by the court, there is a time limit to file such application within 3 months as per Section 124(1)(b)(ii) of the Trademarks Act for stay of proceedings, and that this was not the situation in the present case, as that stage had not occurred yet.

The plaintiff was the registered proprietor of the trademark NATUREFRESH and the defendant was using a trademark 'GATI Nature Fresh Apples'. Originally, in its unamended written statement, the defendant claimed that they were using 'NATURE FRESH' in a descriptive sense and not as a trademark. However, in the amended written statement, it was claimed that the impugned mark has been registered. Plaintiff hence prayed that it was necessary to frame additional issue regarding the invalidity of the defendant's trademark registration in order to

avail the remedy of rectification. The application was contested as delayed by the defendant, alleging that plaintiff was aware of the registration since 2016.

The Court also held that defendant's registration for composite mark without a disclaimer on 'Nature Fresh' was a ground for rectification and thus plea on invalidity of registration was *prima facie* tenable. [*Cargill India Pvt. Ltd. v. GATI Ltd.* – Judgement dated 29-8-2019 in CS (COMM) 740/2017, Delhi High Court]



News Nuggets

License not required for playing sound recordings in marriage functions

The Copyright Office, DPIIT, Ministry of Commerce and Industry of India has clarified that utilization of sound recordings in the course of religious ceremony including a marriage procession and other social festivities associated with a marriage, does not amount to infringement of copyrights. Public Notice No. 10-26/2019-CO, dated 27-8-2019 issued to clarify this also states that hence no license is required to be obtained for the said purpose. Reliance in this regard was placed on Section 52(1)(za) of the Copyright Act 1957.

Draft model guidelines on IPR policy for academic institutions released

Cell for IPR Promotion and Management (CIPAM), Department for Promotion of Industry and Internal Trade (DPIIT) under the Ministry of Commerce and Industry of India, has recently released draft model guidelines

on implementation of IPR policy for academic institutions. The draft describes as to how academic institutions can formulate legal relationships with scholars, researchers and young innovators regarding patents, copyrights, trademarks and industrial designs, to promote student-led startups and ventures to protect and respect intellectual property.

As per the draft, wherever inventions are developed using resources of the academic institutions, the ownership of patents shall rest with the institutions. The same will also hold true for industrial designs, semiconductor integrated circuits and plant variety. The draft also notes that ownership rights in all trademarks involving the academic institution shall ordinarily be vested with the academic institution. However, according to the draft, copyrights in scholarly and academic works generated utilising resources of the academic institution, shall ordinarily be vested with the author.

The draft proposes that to promote student led startups and ventures, the academic institution may grant certain rights by way of licensing agreement for commercialization to young scholars and innovators. It recommends that the academic institution should try to use the mechanism of licensing, so that ownership rights on the IP may be retained without hindering the prospects of commercialisation.

Trademark infringement – Presence of media intermediaries before Court when not required

In a case involving direction by the Trial Court to intermediaries to appear before it, the Delhi High Court has held that platforms (Facebook and Instagram), who had no active role in the alleged infringement, are not required to be present before the Court. The Court in the case of *Facebook Inc v. Surinder Malik* noted that as far as Section 79 of the Information Technology Act is concerned, any website which acts as an intermediary to a third-party post by the infringers, just have to remove the post when brought to notice. Supreme Court's judgement in the case *Shreya Singhal v. Uol* was relied on.

Trademarks - Ex-parte ad interim injunction on imitation of splat device

The Calcutta High Court has passed an *ex-parte* ad interim order against the defendant observing that defendant's detergent packets were *prima facie* deceptive imitation of plaintiff's packet clearly substantiating infringement. The Court in the case *Hindustan Unilever Ltd. v. Hindustan Lohani* noted that plaintiff was the registered user of the trademarks *Surf* and *Surf excel* and that their unique device splat with five appendages stemming out too was registered under the Trademarks Act 1999. Plaintiff had also contended

that the distinctive logo had acquired secondary meaning.

Trademarks – No confusion in same name of perfume with different house name

The Bombay High Court has held that even if the marks *LEGEND* and *FLIRT* are used by the two perfume manufacturers, there cannot be confusion since these were used along with their house names. The Court noted that the consumer for said goods are deliberate in selection and perfumes are not chosen with indifference. Plea that the marks were arbitrary, was also rejected. The Court in the case *Meso (P) Ltd. v. Liberty Shoes Ltd.* observed that the defendant was selling its goods through digital platforms whereas petitioner was exporting. It noted other brands were also selling perfumes with the same name though along with their house names.

Trademarks – Monopolization of word 'Pancharishta' when correct

Observing that though the word *ARISHTA* was generic to nature of drug, but word *PANCHARISHTA*, a combination of *PANCH* and *ARISHTA* was not in any ayurvedic text and was a word coined by the plaintiff, the Delhi High Court has restrained the defendant from using word *PANCHARISHTA* for medicinal preparations. The Court in the case *Emami Ltd. v. Shree Baidyaraj Ayurved Bhawan Pvt. Ltd.* also observed that the plaintiff was using the said name for 50 years and that the word was advertised extensively by them. The Court noted that since the plaintiff's product varied in contents from that of the defendant, leading to different effect on the patients, the resulting confusion by use of same mark should be avoided. It also observed that use of the mark by the plaintiff

had a scientific basis, however, its use by the defendant was in a general manner with no reasonable basis for use of the number '5' with Arishta.

Continuation of injunction even for a day impermissible once patent revoked

The Delhi High Court has held that even if the patent revocation order passed in a post grant opposition proceeding has been appealed against by the plaintiffs, once a patent is

revoked, suit for infringement of patent itself is not maintainable. The Court in the case *Novartis AG v. Natco Pharma Ltd.* suspended the interim order restraining defendant from manufacturing pharma preparation comprising of the API Ceritinib. The Court observed that no infringement action is maintainable in respect of unregistered or revoked patent as clear from Section 62(2) and 11A(7) of the Patents Act 1970.

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