Patent litigations in India - Emerging Trends
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India is not just a lucrative market but has become a dynamic hotbed of Intellectual Property Rights in recent years. Even though enforcement of Intellectual Property has picked up only in the last decade or so, the legal principles guiding the Intellectual Property matters have been forged long ago, evolving gradually with time. From the time injunction was granted in Patent no. 18164 in one of the earliest reported cases *Lallubhai Chakubhai Jarivala vs Shamaldas Sankalchand Shah* (1934) 36 BOMLR 881 by a division bench of the Bombay High Court to the recent judgments on SEP patents, Indian Courts have always reinforced the importance of protecting Intellectual Property Rights.

The trends witnessed in India concur with the world-wide trends although the volume of patent litigation in India has seen a spike only after 2007. The High Court of Delhi has been the busiest with patent litigation followed by the Bombay High Court and the Madras High Court. The High Court of Delhi has become a hub for patent cases, and it has helped shape patent law in India. Its judgments are getting noticed not only by other high courts but also at international forums. The recent judgments, especially those rendered after trial, have established India as a strong enforcer of intellectual property regime.

To cite a few, in *F.Hoffmann-la Roche Ltd. v Cipla Ltd.* (RFA (OS) Nos.92/2012 & 103/2012), a case involving two pharmaceutical giants, the Delhi High Court found Cipla, an Indian generic manufacturer, to be infringing the Swiss drug major Hoffmann-La Roche’s patented drug Erlotinib Hydrochloride. Similarly, in *Merck Sharp & Dome v Glenmark Pharmaceuticals Ltd.* (CS(OS) 586/2013), the Delhi High Court barred Glenmark Pharmaceuticals Ltd., a Mumbai based company, from selling its anti-diabetes drug based on Merck’s patented drug Sitagliptin. What is significant about this ruling is that it was passed in less than two years which included the time taken in trial.

The Delhi High Court has even aligned its rules with the necessities arising from the peculiar aspects of a patent litigation. A patent infringement case not only involves a question of law but also complex technical questions that are important to be determined for a proper and just adjudication. A technical expert is an indispensable part of any patent litigation. To reduce delay in examining and cross examining technical witnesses from each side, the Delhi High Court has allowed ‘hot-tubbing’ in which, technical experts of both sides are questioned by the court simultaneously on their points of difference. This reduces a significant time in recording technical evidence. Another recent trend has been to conduct recordal of evidence before a local commissioner appointed by the court for such purpose. Given the enormous volume of pending cases in each court, recording of evidence takes a lot of time. The local commissioners on the other hand, allow flexibility in hearings and can even accommodate continuous hearings for evidence as they are not pressed by enormous volumes of cases. Mostly, retired judges are appointed as local commissioners.

One of the challenging issues in India has been the inevitable delay in finally adjudicating a case. With the Commercial Courts Act, 2015, the government has taken a significant step towards reforming procedures that contributed to delay. One of the key changes brought with
The Commercial Courts Act, 2015 is ‘Case Management Hearing’ that set a mutually agreeable schedule for smoother, more organized and time bound trial process. Provisions were made for summary judgment in which either party can apply for a summary disposal of the suit or an issue if it does not require going through the elaborate evidence gathering trial process. Another significant reform has been introduction of a mandatory pre-institution mediation in case an urgent relief is not sought. The timelines to file pleadings have also been made stricter, which had historically been one of the main causes of delay. As on October, 2018, 63% cases were disposed by the High Court of Delhi in less than 1 year and only 17% continued for more than 2 years. Moreover, the data shows that 45% of the commercial cases were settled and 34% were adjudicated by the court[1].

One of the predictable trends in patent litigations is parties opting to settle the dispute instead of going for a trial. Even in cases where trial has either commenced or even completed, the parties are found to be preferring a settlement instead of awaiting adjudication by the court. An early settlement in patent cases is mostly pivoted on the outcome of the request for an interim injunction made by the patentee. This has given rise to high pitched battles between parties at the beginning of the case itself on the issue of temporary injunction. In most of the cases, the courts have been liberal in granting interim injunctions in the first hearing itself while even granting ex-parte injunctions before summoning the defendants. Indeed, it puts the patent holders at an advantage to bring an early end to the case by way of settlement. For example, Ericsson filed several cases against different mobile phone manufacturers in India and interim injunctions were granted in most of them. The litigations eventually ended with a settlement between the parties with defendants agreeing to pay royalties on mutually settled rates. Similarly, several cases were instituted by Vringo Infrastructure against different entities that were also settled.

With discussion on Ericsson and Vringo cases, one cannot miss the advent of patent cases arising out of ‘Standard Essential Patents’. When a patent in a technical field becomes necessary to meet a standard of such technology, it is termed as a Standard Essential Patent (SEP). The benefits arising from SEPs are provided to manufacturers utilizing such standard by way of a license agreement between the SEP holder and the manufacturer. For the protection of the manufacturers from unfair and inconsistent license terms, standard setting bodies make it mandatory for a SEP holder to provide license at are fair, reasonable, and non-discriminatory (FRAND).

After 2010, there has been an increase in the number of litigations in Information and Communication Technology (ICT). To start with, Philips sued a local assembler of DVD players for infringement of its patents that qualified as SEPs. This was followed by Ericsson suing several mobile manufacturers in India viz., Kingtech in 2011, Micromax, Gionee and Intex in 2013, Xiaomi in 2014 and iBall and Lava in 2015 in relation to 8 SEPs on mobile standards. Similarly, Vringo filed two different suits against ZTE (2013 and 2014) and one suit against Asus and its distributor in New Delhi in relation to its SEPs. Later, Dolby joined the foray and sued Chinese mobile manufacturers Oppo and Vivo based on its SEPs. These disputes arose from SEPs and inevitably revolved around FRAND licensing terms and the amount of royalty to be paid. There was a growing expectation that eventually there would be some judicial principles laid down in respect of FRAND terms in India in at least some of the cases. Even
though the Philips case was decided after a lengthy trial and the court relied upon license agreements that Philips entered with other manufacturers to arrive at rate of compensation in the form of royalty that the defendants should pay as damages, the Court did not venture into laying strong legal principles on FRAND terms in India. Since other cases were also settled between the parties, the Court could not analyze the issue of FRAND terms and a judicial scrutiny in this respect is still awaited.

On the other side, the trend in defenses being taken by the mobile manufacturers in SEP related cases has been a consistent one. A defendant in a patent case can take any ground in defense by which a patent can be revoked and almost all the defendants in the aforesaid patent cases took the defense that the patent alleged to be infringed is invalid. Section 64 of the Act provides grounds for revoking a patent and the same grounds are available as defense in any patent infringement suit. These ground include, amongst others, the grounds of lack of novelty and inventive step, non-patentability etc. Another defense availed by the defendants was that there is no infringement, which is obvious. The defendants also took the ground that material facts were concealed and the technology used by the defendants is entirely covered by another earlier patent.

The above mentioned defenses are normally manifested in every patent litigation. However, in SEP cases, the defendants also struck at the ‘essentiality’ of the patents and in the Ericsson SEP cases, the defendants took a defense under the competition law. The defendants alleged that the patent holder is misusing its dominant position and is hindering commercialization of proprietary technologies in an unfair manner. The defendants in almost all the SEP infringement cases filed by Ericsson complained before the Competition Commission of India and sought an investigation into the misuse of dominant position by Ericsson. There is no conclusive decision in this regard by the Competition Commission of India as yet.

In recent years, India has also seen a gradual rise of patent cases in pharmaceutical sectors. Only in the year 2005, India amended its Patents Act to allow grant of patents to pharmaceutical products, which till then was limited only to processes. Due to highly skilled human resource and government’s focus on pharmaceuticals, domestic industry increased manifold in manufacturing of pharmaceutical drugs. However, when the patent product regime was introduced in 2005, this industry transformed into one of the largest producers of generic drugs that brought it in direct conflict with the innovator pharmaceutical companies. This has given rise to increased patent litigation in pharmaceutical sector and currently almost every second patent infringement case relates to pharmaceuticals.

To sum it up, the recent trends witnessed in patent cases are rise in pharmaceutical patent and SEP cases that are shaping up the IP regime in this country. The Court procedures and the patent law is also evolving hand in hand with the increasing volume of patent cases resulting in simpler and stricter procedural laws that go a long way in reducing the time taken in adjudicating a case. The parties are also encouraged to arrive at a settlement thereby reducing the burden of the courts. Although these trends paint an optimistic picture for patent right holders, there is still a need to disperse patent awareness and patent litigation in other parts of the country, which is currently focused to Delhi and Bombay High Court predominantly.