

EXPEDITED TRIALS IN IP CASES

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I. INTRODUCTION

The famous quote “justice delayed is justice denied” by William E. Gladstone has stood the test of time. Judicial delay remains one of the biggest problems faced by litigants throughout the world. Delays in the Indian judicial system as well have long been highlighted not just by foreign courts but even by our own judges.

Recently, however, delays have severely undermined the credibility of the Indian legal system. Judgments of foreign courts and tribunals have been extremely critical of said delays. As seen in *White Industries Australia Ltd. v. Republic of India*,¹ inordinate delays in the legal process were viewed as a breach of investment treaty obligations by India. In *Pike v. Indian Hotels Co. Ltd.*² the Queen’s Bench Division of the High Court of Justice observed, “granting a stay in English proceedings and requiring proceedings to be commenced in India would amount to a denial of justice.”

With the increase in the number of Intellectual Property (hereinafter IP) rights granted and IP related transactions, the number of disputes related to this field has seen tremendous growth and is only set to grow exponentially in the years to come. The recently announced National IPR Policy recognizes the importance of IP rights for building an innovation driven eco-system in the country.³

Trends show a steady growth in the field of patent litigation in the country. Both users and holders of IP rights need well-functioning and efficient mechanisms to resolve these disputes, which are also growing in technical complexity.

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¹ Final Award of the UNCITRAL Arbitration in Singapore, November 30, 2011.

² *Pike v. Indian Hotels Co. Ltd.*, 2013 EWHC 4096 (QB).

³ National IPR Policy available at http://dipp.gov.in/English/Schemes/Intellectual_Property_Rights/National_IPR_Policy_12.05.2016.pdf.

To make litigation in the country more speedy and effective, a number of significant amendments were made to the Code of Civil Procedure in 2002. These brought in some sweeping changes to ensure a speedy trial.

For instance,

- the Defendant is required to file his Written Statement within 120 days of being served with the summons. If no written statement is filed within the said 120 days, the right to file a written statement stands forfeited;⁴ and
- adjournments of a Case Management Hearing can only be granted on the basis of a written application. Besides, the Court should not grant more than three adjournments to a party to the suit.⁵

These amendments however, did not specifically cover cases relating to IP where a person's right can be enforced only for a specific term, as in the case of patents, designs and copyright.

There has been a perceptible change in the approach of judges while deciding IP cases. Greater emphasis is being laid on expedited trials, though the focus on interim injunctions still exists. In several cases, expedited trials have been ordered. Moreover, wherever parties and their counsels have been keen on getting matters disposed of without seeking unnecessary adjournments, trials have concluded expeditiously. Some cases where such directions have been issued include the orders of the Hon'ble Supreme Court in *Shree Vardhman Rice and General Mills v. Amar Singh Chawalwala*,⁶ wherein it was held as under:

“...we are of the opinion that the matters relating to trademarks, copyrights and patents should be finally decided very expeditiously by the Trial Court instead of merely granting or refusing to grant injunction. Experience shows that in the matters of trademarks, copyrights and patents, litigation is mainly fought between the parties about the temporary injunction and that goes on for years and years and the result is that the suit is hardly decided finally. This is not proper.”

The Supreme Court of India in *Bajaj Auto Ltd. v. TVS Motor Co. Ltd.*⁷ again held as follows:

⁴ Rule 4 (D), Schedule I, Commercial Courts Act, 2015.

⁵ Rule 7(I), Schedule I, Commercial Courts Act, 2015.

⁶ *Shree Vardhman Rice and General Mills v. Amar Singh Chawalwala*, (2009) 10 SCC 257.

⁷ *Bajaj Auto Ltd. v. TVS Motor Co. Ltd.*, (2009) 9 SCC 797.

“...in matters relating to trademarks, copyright and patents the proviso to Order XVII Rule 1(2) C.P.C. should be strictly complied with by all the Courts, and the hearing of the suit in such matters should proceed on day to day basis and the final judgment should be given normally within four months from the date of the filing of the suit. Experience has shown that in our country, suits relating to the matters of patents, trademarks and copyrights are pending for years and years and litigation is mainly fought between the parties about the temporary injunction. This is a very unsatisfactory state of affairs, and hence we had passed the above quoted order in the above-mentioned case to serve the ends of justice. We direct that the directions in the aforesaid order be carried out by all courts and tribunals in this country punctually and faithfully.”

These orders did emphasise the importance of trials being conducted without undue delays but in practice, the impact was not too significant. This trend has however changed now, especially in patent cases.

The first case which saw this perceptible change was *F. Hoffmann-La Roche Ltd. v. Cipla Ltd.*⁸ (hereinafter *Roche v. Cipla*) wherein the Hon’ble Supreme Court vide order dated 28th August 2009, directed that the trial should be completed as expeditiously as possible. This being the first full-fledged pharmaceutical patent trial in which expert witnesses were deposed from both sides, the trial commenced in April 2009 and concluded in November 2010. Thus, the first attempt to conclude a patent trial was met with success. The case is currently pending after the Single Bench and Division Bench judgments, before the Hon’ble Supreme Court.

Following the case of *Roche v. Cipla*, there have been a number of cases where expedited trials have been directed.

II. RECENT CASES

In *Glenmark Pharmaceuticals Ltd. v. Merck Sharp & Dohme Corpn.*,⁹ the Supreme Court vide Order dated 15th May 2015, directed the Local Commissioner to record evidence on a day-to-day basis. Pursuant to this order, the evidence of the witnesses was recorded in as few as 22 days. The court further asked both parties to cooperate and directed that any percep-

⁸ *F. Hoffmann-La Roche Ltd. v. Cipla Ltd.*, SLP (Civil) No. 20111 of 2009, decided on 28-8-2009 (SC).

⁹ *Glenmark Pharmaceuticals Ltd. v. Merck Sharp & Dohme Corpn.*, (2015) 6 SCC 807.

tible lack of cooperation by either side be noticed and recorded by the Local Commissioner.

The Supreme Court further observed the following:

“...we have taken a little unusual and extraordinary course of action in ordering the above time schedule. This has been prompted by our desire to ensure that highly contested commercial cases, in which category this instant case can be put, requires immediate attention and disposal to ensure a suitable commercial environment which is vital to national interest.” (emphasis added)

It is important to note that in this case, the trial was conducted during the summer vacations of the Delhi High Court, in a mutually agreed calendar by the parties who agreed to produce their witnesses. Without imposing undue scheduling burdens, the cross examination of a total of six witnesses (four produced by the plaintiff and two by the defendant) was recorded. The final arguments commenced, as directed by the Supreme Court, on 6th July 2015 and concluded on 27th August, 2015. The judgment was pronounced on 7th October, 2015.

This case has shown that trials in patent cases, when duly supervised and managed by the Court with the cooperation of counsels, can be concluded in less than six months.

In *Lava International Ltd. v. Telefonaktiebolaget L.M. Ericsson*,¹⁰ the Supreme Court, by its order dated 16th December 2015, directed the High Court to decide the suit as expeditiously as possible in view of the time consumed in the settlement talks. The trial in this case is currently underway and final arguments are yet to commence.

The Delhi High Court in *Bayer Corpn. v. Cipla Ltd.*¹¹ ordered that instead of deciding upon the interim injunction application, the suit should be expedited directly to trial, and to that effect, also appointed two scientific advisers for expert opinion under section 115 of the Patents Act. In addition, both parties were allowed to cross-examine such appointed scientific advisers.

¹⁰ *Lava International Ltd. v. Telefonaktiebolaget L.M. Ericsson*, SLP (Civil) Nos. 34886-34887 of 2015, decided on 16-12-2015 (SC).

¹¹ *Bayer Corpn. v. Cipla Ltd.*, CS(OS) No. 523 of 2010, order dated 23-7-2010 (Del).

In *Xu Dejun v. Vringo Infrastructure Inc.* (hereinafter Vringo case),¹² a Division Bench of the Delhi High Court vide order dated 12th December 2013, directed that the trial should be expedited. It was further directed that the trial shall be completed within six months from the first day when the matter is listed before the Local Commissioner. The Vringo case was however settled before the commencement of the trial.

In an attempt to promote ease of doing business and remove inefficiencies in legal procedures, the government recently gave the nod to create special courts for adjudicating commercial disputes of a specified value.

III. THE COMMERCIAL COURTS ACT, 2015

Until now, law suits involving commercial disputes were being tried by the regular Civil Courts and judges were taking up all civil cases. Commercial Courts have been created to address the concerns related to pendency of law suits and slow disposal of commercial matters, which include disputes related to Intellectual Property Rights (IPRs). As per Section 2(c)(xvii) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (hereinafter the Commercial Courts Act), such cases would include unregistered and registered trademarks, patents, copyright, designs, geographical indications, domain names and semiconductor integrated circuits.

As per the Statement of Objects and Reasons, the Commercial Courts Act has been enacted to accelerate growth, improve the international image of the Indian justice delivery system and boost investor confidence in the legal culture of the nation.

The Commercial Courts Act stipulates various functions to be performed by three key players; namely, state governments, Chief Justices of High Courts and lawyers/litigants to ensure that the provisions under the Commercial Courts Act are followed in letter and spirit for quicker dispute resolution. All state governments have the duty to ensure that adequate infrastructure is provided for Commercial Courts and commercial divisions so that modern methods like electronic filing and video conferencing can be implemented without delay.

¹² *Xu Dejun v. Vringo Infrastructure Inc.*, FAO(OS) No. 573 of 2013, order dated 12-12-2013 (Del).

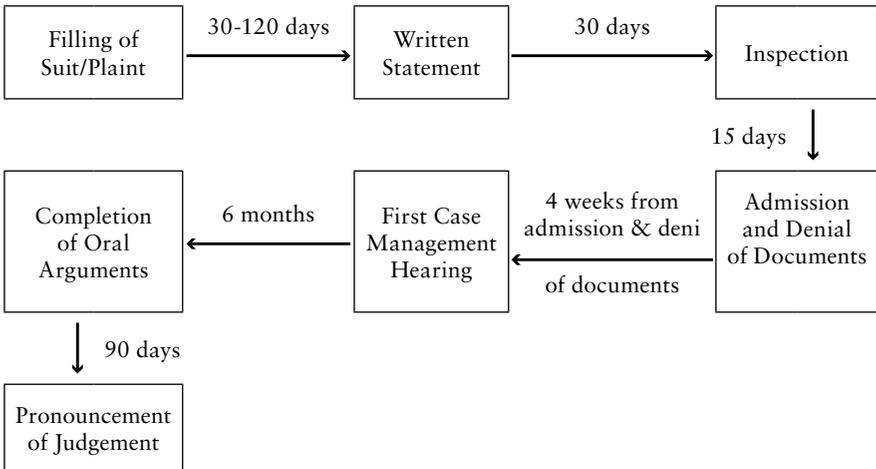
Chief Justices have a huge responsibility to implement this Act by setting up Commercial Courts in various districts and by designating or setting up commercial divisions in the High Courts, which also need to issue practice directions to implement the provisions of this Act. There can be consultation between different High Courts and common practice directions can be evolved so that implementation is uniform across the country.

The Act makes a complete departure in the general practice followed by lawyers and litigants. Unnecessary adjournments are frowned upon and strict timelines have been prescribed, reinforced by not vesting any discretion in Courts to condone delays. The Act features a number of amendments to the C.P.C. which should result in expedited proceedings. Litigants often fail or deliberately refuse to file pleadings in matters during the time period prescribed and thereafter approach the Court to condone their delay, which is more often than not granted by the Courts to avoid miscarriage of justice. In order to discourage such practices, it is now prescribed that if the defendant fails to file the written statement within one hundred and twenty days (120) from the date of having been served with the summons, then he would abdicate his right to file a written statement and the Court would be bound to not take such a delayed submission on record.

If the Act is fully implemented, then the trial of a commercial suit from the date of filing till that of judgment can be concluded within 365 days. Earlier, a number of interlocutory/interim orders of a court were subject to an appeal or revision petition leading to delay in the adjudication of the principal dispute. The Act has reduced the ability of defaulting parties to use such appeal/revision provisions as delaying tactics.¹³ Appeals against orders of Commercial Courts have to be disposed of within six months.

¹³ Section 13 and Section 8 of the Commercial Courts Act, 2015.

The following chart describes the strict timelines prescribed by the Commercial Courts Act:



One of the biggest reforms is that the court is vested with the discretion to impose heavy costs on parties who indulge in frivolous litigation and delay cases. Earlier, Section 35A of the Code of Civil Procedure, 1908 provided for compensatory costs in respect of false or vexatious claims or defenses. The maximum amount that could be levied as compensatory costs for false and vexatious claims used to be a meager Rs. 3,000/-. After the enactment of the Commercial Courts Act, both Sections 35 and 35A have been amended. A cost-based system would result in the culture of ‘losing party pays’ in commercial cases and hence litigants would be well advised not to bring frivolous cases to courts.

The Act also amends several provisions of the C.P.C. in order to curtail delays. The said provisions include,

- payment of costs (Section 35);
- strict timeline and forfeiture of right to file Written Statement after completion of 120 days of the service of summons (Order V, Rule 1);
- disclosure & discovery of documents (Order XI, Rule 1);
- discovery by interrogatories (Order XI, Rule 2);
- inspection of documents (Order XI, Rule 3);
- admission and denial of documents (Order XI, Rule 4);

- production of documents (Order XI, Rule 5);
- electronic Records (Order XI, Rule 6);
- no adjournments for the purpose of filing written arguments (Order XVIII, Rule 3E) and
- pronouncement of judgment within 90 days of conclusion of arguments (Order XX, Rule 1).

Several important parameters have been incorporated for the Court to take into consideration while awarding costs. One of the key parameters is an *unreasonable refusal of a reasonable offer for settlement made by a party*. This is clearly aimed at promoting settlement of disputes and encouraging a reasonable approach by parties towards such discussions.

Currently, one of the biggest delaying factors in commercial cases is trial procedures. The Act contemplates “case management hearings” similar to the procedure adopted in the U.K. Civil Procedure Rules. Such a system was hitherto unknown in India. This would reduce most of the procedural hearings which clog the pipelines in courts deciding commercial cases. The Court is further empowered to dismiss a petition, foreclose the right to make certain pleadings or submissions or order payment of costs in the event of non-compliance of the orders passed in a Case Management Hearing.

To curb frivolous claims or defences being raised and to cut short litigation, provisions have been made for a party to apply for a summary judgment without trial, either for dismissal or decreeing of a suit or for acceptance or rejection of any particular claim or defence.

The Act has laid down new and detailed procedures regarding the disclosure, discovery, inspection, admission and denial of documents and nature of verification of pleadings, with a view to bring about greater clarity, objectivity and efficiency in the proceedings. Such procedures should end the delays occasioned due to prevalent practices such as bald denials without proper reasoning, introduction of fresh documents and amendment of pleadings which were not disclosed at the outset during the course of the proceedings. Care must be taken to meet the prescribed timelines for disclosure, failing which a party may not be permitted to rely upon the same.

The Act recognizes that competent judges having experience in dealing with commercial disputes are important for expeditious disposal and therefore, requires the appointment of persons having such experience to be judges of the Courts. It also acknowledges that piecemeal production of documents by parties at different stages tends to delay proceedings and

therefore, requires the filing of all documents relevant to the dispute at the time of filing of the suit itself or at the time of filing of the defence, as the case may be.

Recent judgments passed under the Commercial Courts Act have shown that timelines are being held to be mandatory. In *Telefonaktiebolaget L.M. Ericsson v. Lava International Ltd.*,¹⁴ the Learned Single Judge of the Delhi High Court vide order dated 9th December 2015, held that the time period prescribed for filing the written statement is mandatory under the Act.

In another recent order,¹⁵ trade secrets have been held to be “commercial disputes” by a Ld. Single Judge of the Delhi High Court.

IV. CONCLUSION

India’s approach towards protection of intellectual property has undergone a paradigm shift in the last few years. There has been a boost in IP litigation recently and the number of disputes related to intellectual property is growing each passing year. This shows that IP owners realize the importance of their intellectual property and are actively taking measures to protect the same.

The Commercial Courts Act has been enacted with the vision to put an end to the cumbersome process of litigation that has thwarted the speedy disposal of cases in India. Its enactment is a major policy shift in commercial dispute resolution in the country. It is a laudable piece of legislation and a step in the right direction. It shall not only change the speed at which commercial disputes will attain finality, but also improve the perception of India as an investment destination. While the need for Commercial Courts is obvious in India, the institution of such courts should be seen as a stepping-stone to reforming the larger civil justice system.

The role of lawyers is extremely important in commercial disputes. Since well-established international procedures have been incorporated in this Act, lawyers should avail this opportunity to cooperate and kick-start the system together with the Courts. Procedural issues like admissions and denials, inspection of documents, interrogatories etc., ought to be held in lawyers’

¹⁴ *Telefonaktiebolaget L.M. Ericsson v. Lava International Ltd.*, 2015 SCC OnLine Del 13903.

¹⁵ *Sanofi Winthrop Industrie v. Kirti B. Maheshwari*, CS(OS) No. 2265 of 2014, order dated 14-12-2015 (Del).

offices. Litigants ought to be advised not to seek undue adjournments and adhere to the schedule fixed by the Courts.

It is important that even though Commercial Courts are in the process of being designated, courts which are dealing with commercial disputes must adhere to the timelines provided in the Act. The Act has been enacted with the vision to reduce delays and unless the same is strictly enforced by courts, the purpose of the legislation will be defeated. The legislature has done its job by enacting the statute; it is now up to the judiciary and lawyers to implement and create an environment favourable for businesses. Thus, the implementation and strict enforcement by Courts of the relevant provisions of the Commercial Courts Act is key to ensure that the idea of speedy disposal of cases is manifested in reality and does not remain a dead letter. If the Act is properly implemented, it would go a long way in reposing public confidence in the judicial system.