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FATE OF PATENT RIGHTS WITHIN THE JURISDICTIONAL DOMAIN OF COMPETITION COMMISSION OF INDIA

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I.INTRODUCTION

The right to exclude others from using, selling, making, or putting an invention to practise is one of the main tenets on which Patent Act 1970 is based. This exclusionary right renders a monopolistic position to the Patent holder which could be abused while commercially exploiting the invention. The primary aim of the CCI is to prevent anti-competitive practices and ensure healthy market conditions for the market players. This gives birth to a very interesting discourse in a legal regime whereby on one hand monopoly is prescribed and on the other side it is curtailed. The primary aim is to understand what has been the implications of this interplay, whether the conflict is just the apparent suspicion or there are some latent issues which needs scrutiny.

II.BRIEF ROAD MAP OF COMPETITION LAWS IN INDIA

Economic reforms of the 1990s ushered a new era of "decentralised economy" in India, which was in contrast to "command economy" which dominated India since independence. Under the "command economy" public sector had a sway over the private sector since it subjected the latter to excessive governmental control. Legislations dominated the period of "command economy" such as the Industrial department Act 1951 (IRDA) and Monopolies and Restrictive Trade Practice Act 1964 (MRTPA). Licensing system created by the IDRA 1951 due to excessive governmental control stagnated the economic growth. Licensing authorities ended up granting licenses to owners of established business undertakings because of the availability of capital and manpower and their ability to secure financial help from within and outside India[1].

Apart from constricting the economic growth, the licensing system further led to the concentration of economic power which resulted in practices which were monopolistic and restrictive. Such circumstance persuaded the government to start studies to counter the abuses created by the licensing system and reach a conclusive solution.

[1] Dr S. Chakravarthy " Why India Adopted a new Competition Law" (2006).

These studies included the appointment of Hazari committee in 1951, Mahalanobis committee in October 1960, and Monopolies Inquiry Commission in April 1964. On the recommendation of the industrial licensing policy inquiry committee which was appointed by the government in 1967, Monopolies and Restrictive Trade Practice Bill was proposed which appeared to be the perfect solution for the then prevailing economic crisis.

The MRTP Act was enacted to regulate and prevent the market from any distortion caused because of abuses borne out of the licensing system which included concentration of economic power, monopolistic trade practices, unfair trade practices Restrictive trade practices

The MRTP Act dealt with each component in a comprehensible way as far as possible. Even then the MRTP Act failed to stand the pressure of changing economic waves which started way back in the 1980s in the shape of economic reforms giving way to reform of 1990s known as liberalisation, privatisation and globalisation (LPG). The economic reforms brought with them a paradigm shift from "command economy" to "decentralise economy". One of the characteristic features of the decentralised economy was it demanded relaxation or rather abolition of the licensing system and boast in international trade in the form of increased FDI and foreign collaboration, mergers and acquisitions.[2]

MRTP Act has not been found in consonance with changed circumstance because of which concerned government-appointed Ragahvanan committee which recommended a new market regulation law in the form of competition act 2002.

The basic philosophy on which competition Act 2002 is based states that market conditions should be competitive for the businesses to compete without resorting to any anti-competitive practices to ensure consumer welfare and economic development[3]. Thus with introducing competition Act 2002, there is a shift from "command economy" to "decentralised economy" which ensures consumer benefit but allowing freedom of trade to encourage growth and development[4].

It has been observed by the supreme court of India " *the primary purpose of competition law is to remedy some of those situations where the activities of one firm or two lead to the*

[2] Competition laws in India -Analysis and Comparison, India, available at : www.indiajuris.com (last visited on Feb 1 2020).
[3] Shashank Jain and Sunita Tripathy, "Intellectual Property and Competition Laws: Jural Correlatives"12 *JIPR* 224-225 (2007.)
[4] Ibid.

breakdown of the free market system, or to prevent such a breakdown by laying down rules by which rival businesses can compete with each other"[5].

Therefore, the inherent goal of competition law is to achieve easy market entry, economic and social advancement by ensuring proper utilisation of resources, optimal production and increase in innovation[6].

III. **NATURE OF PATENT RIGHTS**

A Patent is a bundle of rights which empowers the patent holder to restraint any person who is not allowed to use "invention" for a certain period prescribed by law[7]. The government issues patents once applied by the inventor or any person allowed under the law[8].

TRIPS Agreement which is the international charter regarding intellectual property rights under Article 27 defines the parameters within which patents can be obtained[9].

Indian Patent Act 1970 getting inspired by the TRIPS agreement defines an invention as " new product or process involving an inventive step and capable of industrial application"[10].

VI. LIAISON BETWEEN COMPETITION COMMISSION OF INDIA AND PATENT RIGHTS

Patents rights result in creating a temporary monopoly in the patentee's favour to exclude others from making use of the patented invention.[11] The grant of the exclusive period is usually seen as a recognition of the efforts laboured by the inventor in creating something novel which will ultimately be utilised for the benefit of the society, because of the monopolistic and exclusive nature of the patent rights, the patent holder is usually considered to exercise market power. Such market power could lead to detrimental implication if left unchecked or in case of abuse.

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[5] *CCI* v *SAIL*, (2010) 10 SCC 744

[6] Aditya Bhattacharjea " Of Omissions and Commissions: India's Competition Laws" 45 *Economic and Political weekly* 31-37 (2010).

[7] Committee on the Judiciary United States Senate, *An Economic Review Of The Patent System*, S Res. 236, Study No 15.

[8] An assignee of the true and first inventor in respect of the right to make an application and the legal Representative of a deceased person who immediately before his death was entitled to apply.The Application may be made by any of these persons either alone or jointly with others.

[9] The Trade Related Intellectual Property Rights Agreement, 1995, Section 27 patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application.

[10] The Indian Patent Act, 1970 (Act 39 of 1970) S. 2 (1)(j).

[11] Organisation for Economic Co-operation and Development, Licensing of IP rights and competition law, DAF/COMP/WD(2019)4.

The Competition Act 2002, generates and maintains competition in the market by preventing any practices which are unfair, anti-competitive or result from abuse of monopoly. The chief area of concern between Competition Act 2002 and Patent rights is the market power enjoyed by the patent holder which could cause distortion in the market if patent rights are exercised in any anti-competitive manner.[12]

Unregulated exercise of market power could lead to practices which will have an adverse effect on the consumers and limit the productive capacity of the market.[13]Furthermore, the harm could also result in the concentration of power in few hands which will impede the rate of innovation.

Undoubtedly patent rights play an important role in giving impetus to the creative ability of the human mind, but it becomes imperative to make sure such rights are enjoyed and exercised within the boundaries prescribed by the law because every right could be susceptible to abuse if not regulated and have a negative implication on the competition.

Patent monopoly gives substantial power to the patent holder which may be used to further strengthened its position in the market by using unfair and exploitative practices[14]. In case the patent holder is given unrestricted power, it could lead to practices that can result in disturbing the market equilibrium by restricting production, manufacturing, distribution and having an adverse impact on the demand and supply.

The Competition Act 2002 provides for the establishment of the Competition Commission of India to curb the anti-competitive practices which have an adverse effect on the competition in the market.

The Competition Commission of India which is the successor of Monopolies Trade Practices Commission has played a significant role in preventing those activities which have any negative impact on the competition within the market. For the regulation, the whole array of anti-competitive practices has been divided into three main categories i.e anti-competitive agreement under section 3, abuse of dominance under section 4 and regulation of combination under section 5 and 6.

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[12] Atul Patel, Aurobinda Panda, Akshay Deo,Siddhartha Khettry and Sujith Philip Mathew, "Intellectual Property Law & Competition Law",6 *JICLT* (2011).

[13] Ibid.

[14] Yogesh Pai and Nitesh Daryanani, "Patents and competition law in India: CCI's reductionist approach in evaluating competitive harm"5 *Journal of Anti trust Enforcement* 299-325 (2017).

Section 3 of the Competition Act 2002 prohibits agreements which "cause or is likely to cause an appreciable adverse effect on competition within India" shall be void. Agreements for the purpose of this section is divided into "horizontal" and "vertical" agreements. Horizontal agreements are those agreements which have been concluded between market players enjoying a similar position of power in the relevant market, like for example Cartel. Whereas vertical agreements are carried between market players which have been placed at different levels of market operation like for example production, supply, distribution etc. The Competition Act further provides for certain exceptions in terms of "reasonable restriction" which could be imposed by the patent holder in order to protect its Intellectual Property Rights from getting infringed or as a defence in suits of infringement.

Section 4 prohibits the abuse of a dominant position it is very interesting to note here that it is abuse, not dominance the Competition Act prohibits. For this section, the term dominance is defined as "position of strength enjoyed by an enterprise which enables it to operate independently and cause the desired impact in the market for its own benefit".

Under section 6 of the competition act 2002, it is directed to any person or an enterprise before entering any combination whether in form of acquisition or amalgamation prior approval of the competition commission is to be obtained. In case such combination results in having "adverse effect on the competition in the market shall be rendered void".

The Competition Commission of India has shown tremendous zeal in providing its insight in the matters concerning competition matters. The various provisions of the Competition Act have guided the Competition Commission to identity various anti-competitive practices and provide reasonable observations. Some landmark cases the Competition Commission of India dealt in the recent times wherein patent holders have been accused of violating provisions pertaining to Competition Act 2002 provides an understanding of nexus shared by the two legislation.

In *Department of Agriculture, Cooperation and farmers welfare v. M/s Mahyco Monsanto Biotech India Limited*[15] Competition Commission of India was approached by the Government of India to address the issue related to the licensing of the Bt gene technology. The government submitted that most Indian farmers depend on the BT gene technology for the cultivation of the Bt cotton. Mahyco Monsanto Biotech India Limited (MMBL) results

[15] (Reference Case No. 02/ 2015).

from a joint collaboration between the American-based company Monsanto (which only deals with the genetically modified crops) and Maharashtra based hybrid seeds company (MAHYCO). MMBL brings Bt cotton technology in India to facilitate the manufacture of Bt cotton seeds by sub-licensing it to Indian seeds manufacturers. The price paid by the Indian seeds companies to the MMBL for the Bt cotton technology included royalty fee which was a lump-sum amount and periodically fixed "trait value" fee (price charged on the gene responsible for bringing requisite variation). The dispute in the present case was related to the determination and fixation of the "trait value fee" between licensor and licensee. The government alleged that MMBL is engaging in anti-competitive conduct by charging exorbitant trait value fee, which is consequently increasing the price of Bt cotton seeds ultimately borne by the poor farmers. MMBL on the other side contended that they are justified in charging the said trait value fee as it makes up the reward for its innovation in the Bt gene technology. Competition Commission of India after hearing both the parties prima facie made the following observations: -

- Firstly it has been determined whether Bt cotton is a distinct product in the relevant market[16]. Such a market is considered to be the relevant market, which includes products and services which could be a replacement for each other, because of the unique characteristic of Bt cotton as compared to other traditionally used pesticides, it was held to be a distinct product in the relevant market.

- Second, the Indian market was considered to be the "relevant geographic market" in this case[17].

- Third, MMBL is the dominant provider of Bt cotton technology clear from the fact most of the Indian farmers buy Bt cotton seeds manufactured by the utilisation Bt gene technology which is sub-licensed by the MMBL to domestic seed manufacturers

- Last, the conduct of MMBL while licensing out its Bt cotton technology apparently raised many doubts where MMBL could probably be found abusing its dominant position vis-à-vis India market. Therefore, based on the observations drawn by the CCI, an investigation have been ordered in the concerned matter which has to be undertaken by the Director-General[18].

[16] The Competition Act, 2002 (Act 12 of 2002), s 19 (5).
[17] The Competition Act, 2002 (Act 12 of 2002), s 19 (6).
[18] The Competition Act, 2002 (Act 12 of 2002), s 19(1).

The observations made in the above case not only called attention to market abuse caused by the licensor but also to the negative social implication it had for the poor Indian farmer who was paying excessive prices while buying Bt cotton seeds from the domestic seed manufacturers. In the standard-essential patent case, *Micromax Informatics Limited v.Telefonaktiebolaget LM Ericsson (Publ)*[19] the informant Micromax one of the leading Indian electronic company alleged that Ericsson a multinational company which is holding several standard-essential patents in the telecommunication sector is abusing its dominant position by charging excessive royalties from the Micromax. It requires every industry whether dealing in the manufacture of products or provision of services to follow certain basic standards before such products or services are made available to the customers or launched in the market. Standard-setting organisation (SSO) act as the nodal agency which is entrusted with the job of setting technical and other standards in the particular field. Standard essential patents are such technical requisites which are being adopted by the SSO as a common design for manufacture of product, process or provision of services. The advantage of holding standard-essential patents can place a company or an individual patent holder in a place of monopoly, and there is every likelihood that such patent holders can resort to anti-competitive conduct while licensing out such patents. To remedy such a situation, the standard-setting organisation required holder of every standard-essential patent to license such patent on the conditions which are fair, reasonable and non-discriminatory (FRAND). Once a patent is being adopted as a standard, it becomes imperative for the manufacturer to use such patent in its product or process to make it commercially viable. In a certain situation, the holder of the standard-essential patent can impose unreasonable or excessive royalties resulting in the manufacture's exploitation. However, SSO can oblige the SEP holder to adhere to the terms and conditions of the FRAND. Thus creating a perfect balance for both licensor and licensee. However, the yardstick of FRAND provided by the SSO is open-ended and varies from one transaction to another. It mainly depends on the contract between licensor and licensee.

In the present case, the Micromax submitted before the commission that excessive royalties demanded by the Ericsson are in violation of FRAND terms and conditions. The royalties demanded by the Ericson from the Micromax was based on the net selling price (NSP) of the final product which was the Micromax Mobile device. This approach adopted by the Ericsson was considered being unfair and exploitative. Competition Commission of India after

[19] Case No. 50 of 2013. Available at https://www.cci.gov.in/sites/default/files/ 502013_0.pdf?download=1

thoroughly discussing the present case reach to the finding that SEP held by the Ericsson is definitely a distinct product in the relevant market and because there is a lack of similar technology in the relevant market which makes Ericsson enjoy a position of dominance. According to the CCI, the royalties charged by the Ericson was violating the FRAND terms and conditions. CCI insisted on calculating royalties on the chipset, which was the patented component installed in the Micromax handset.

Based on these observations, CCI ordered the investigation in the aforesaid matter and directed the director general to report back the findings within a reasonable time. In response to the observations and order passed by the CCI, Ericsson contended that CCI lack jurisdiction to decide the matter as it has to be decided according to the provision of the patent act and matter is already pending before the Delhi High Court. CCI while rejecting the contention made by the Ericsson stated that section 62 of the competition act clarifies that provision of competition act supplement and not conflict with the other existing legislation. Thus in case of the matter is pending before Delhi High Court does not take away right from the Micromax to approach CCI under competition act. Ericsson challenged the said order in the Delhi High Court and stated that any abuse associated with the patent rights should be dealt by the patent act rather than competition act which is a general law and deals with market regulation. The Delhi High Court[20] discussed both the Acts at length and stated that both laws are different from one another and there is no apparent conflict between the two. Both the legislations can operate simultaneously and peacefully. Thus upholding the jurisdiction of CCI in the present case. It is worthy to note that CCI dealt with SEPs in Micromax case though Indian Patent Act 1970 stands silent on this innovation on the field of technology thus throwing light on new challenges which India will be facing in the coming years and which require amendment and reformation in the current laws.

Based on the information placed before the CCI, in *Shamsher Kataria v. Honda/Volkswagen/Fait India and others*[21] it was alleged by the informant that three renowned automobile companies i.e. Honda, Volkswagen, and fiat are resorting to anti-competitive activities. It has been submitted by the informant apart from being in the business of car manufacturing these three automobile brands are also manufacturing the original spare parts used in such vehicles. By restricting the sale of spare parts and technical specifications

[20] ***Telefonaktiebolaget LM Ericsson v. Competition Commission of India*** (W.P.(C) 464/2014 & CM Nos.911/2014 & 915/2014)

[21] Case No. 03 of 2011, available at https://www.cci.gov.in/sites/default/files/032011_0.pdf.

to the authorised or independent car repairers and workshop owners, these car manufacturers are violating section 3 and 4 of competition act 2002. It was further stated that because of the unavailability of genuine spare parts with the independent car repairers buyer of such cars are being forced to avail maintenance services from the authorised service station of these car companies, which is causing hindrance in making healthy competition in the market. In the present case, CCI directed the director-general to investigate and furnish a detailed report before it. After the investigation was conducted it has been concluded by the director-general that apart from these cars manufacturer 14 other car makers were found violating section 3(4) and 4 of the competition act 2002. CCI after analysing all the information including the report of director-general and other shreds of evidence which have being put on record CCI held while enjoying the position of dominance in the relevant market the above automobile companies have restricted sale of spare parts and flow of other technical information which have resulted in foreclosing of competition in the market. In the Shamsher Kataria while addressing plight caused to the independent car repairers shops by big car brands CCI has established that even though licensor enjoys monopoly but it cannot be used or practised to the detriment of a licensee, even if he holds weaker bargaining power.

V. CONCLUSION

The conclusion that can be drawn from the above discussion is CCI has never hesitated to intervene in matters which demanded taking up new challenges and to explore new domains every time approached by the aggrieved party. CCI has always been very receptive and dynamic in its approach while dealing with competition matters placed before it. While dealing with different cases it has helped in understanding the negative impact patent rights could have on the market if left unchecked. Apparently there is no conflict between rights granted under the Indian Patent Act 1970 and provision of Competition Act 2002, both seem to have a different domain of operation where patent rights guarantee certain privileges to the patentee essential for protecting invention so that commercial benefits are accrued from an invention. The CCI is vigilant and ensures fair regulation of the market. The conflict erupts only in case exercise of patent rights endangers healthy competitive conditions prevalent in the market. Such a situation demands creation of mechanism which ensures patent rights exists without causing encroachment in the domain of competition act 2002 and both are sucessfully able to achieve their respective goals.