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Abstract

Patent litigation in India is growing. Awareness about patents and the possibility of commercial exploitation of patents is increasing. This is due to better laws and improving registration facilities. Indian firms are taking the patent disputes to courts, as was and is very common in the United States. More than a century back, disputes about electric bulb, telephone and automobile have been resolved in the American courts. Indian courts never had as much patent litigation as the American and English courts had. In the last ten years or so, things have changed. Post-WTO, Indian law has been amended and patent protection has become stronger. Patent law and protection provided by it is being increasingly used as a potent tool in competitive strategy formulated by many companies. The courts are playing a very important role in ultimately resolving the disputes and interpreting the law. There is, however, a need to expedite the process of resolution of such disputes.

Keywords

Courts, Disputes, Inventive Step, Litigation, Obviousness, Patents

Whither Patent Litigation in India?

Introduction

Patents are rights created by statute. These are negative rights and stop everyone except the inventor to get the benefits of the invention. It has to be the inventive step of the inventor which must be rewarded by the society. As this protection is provided by the enacted law, it depends on the jurisdiction in which the invention has been made and needs to be protected.

Merges, Menell and Lemley introduce the concept of patent law in their authoritative text¹ as follows:

Patent law is the classic example of an intellectual property regime modelled on the utilitarian framework. Following the constitutional authorisation, patent law offers the possibility of a limited period of exclusive rights to encourage research and development aimed at discovering new processes, machines, and compositions of matter, and improvements thereof. The public benefits directly through the spur to innovation and disclosure of new technology. After the term of the patent expires, the innovation becomes part of the public domain, freely available to all.

As per Halsbury's Laws of England² the word Patent is used to denote a monopoly right in respect of an invention.

According to the Indian law on the subject – The Patents Act, 1970 – patent and related terms are defined as follows:

Patent – Section 2 (1) (m) – patent means a patent for any invention granted under this Act.

Invention – Section 2 (1) (j) – invention means a new product or process involving an inventive step and capable of industrial application.

Inventive Step – Section 2 (1) (ja) – inventive step means a feature of an invention that involves technical advance as compared to the existing knowledge or having economic significance or both and that makes the invention not obvious to a person skilled in the art.

¹ Merges, Menell and Lemley; *Intellectual Property in the New Technological Age*, Wolters Kluwer (Law & Business), Aspen Publishers, New York, 2010, Fifth Ed., p. 29

² Cited in *Bajaj Auto Limited v. TVS Motor Company Limited*, Madras High Court, Bench: P. Jyothimani, J., 16 Feb 2008, 2008 INDLAW MAD 546

New Invention – Section 2 (1) (l) – new invention means any invention or technology which has not been anticipated by publication in any document or used in the country or elsewhere in the world before the date of filing of patent application with complete specification, i.e. the subject matter has not fallen in public domain or that it does not form part of the state of the art.

Inventive Step

Inventive step is the cornerstone of a patent. This inventive step must make the existing thing better, either in terms of technology or in terms of economy or both. How small or big this inventive step should be is a matter to be decided according to the facts and circumstance of the case, i.e. the invention, prior art, problems faced in using the existing product or process or both, and how effectively the new invention takes care of the problems. The patent office has to exercise its discretion in this matter.

Another important ingredient of the inventive step is that it should not be obvious to a person skilled in the art. Thus, the inventive step needs to something more than ‘obvious’. What is obvious and what is not has not been defined in the Act. The idea is that the inventive step may not be obvious to a layman, however, a person who has ordinary skill in the art may be able to understand it and it may be quite obvious to him. The emphasis is on the person with ordinary skill in the art. He need not be a super specialist in the subject, for whom the thing may be very obvious. The test is of the person with ordinary skill in the art. This again has to be decided by exercising discretion. It cannot be defined and put in black and white for all the cases. The law makers have left this to the discretion of the patent office.

Provision of Litigation in the Patents Act, 1970

The Patents Act, 1970 provides under Chapter XVIII ‘Suits Concerning Infringement of Patents’ and under Chapter XIX ‘Appeals’. Under the former, sections 104 to 115 deal with different issues related to jurisdiction, declaration as to non-infringement, cases of groundless threats of infringement proceedings, defences in suits for infringement, reliefs in suits for infringement, rights of exclusive licensees, damages, injunctions, certificate of validity, partially valid specification, and scientific advisers. The latter chapter deals with appeals, which are filed in a High Court.

The provisions which are most often used are related to the declaration as to non-infringement in section 105 and the power of the court to grant relief in cases of groundless threats of infringement proceedings in section 106. These sections are reproduced for ready reference:

Section 105 – Power of Court to make declaration as to non-infringement

(1) Notwithstanding anything contained in section 34 of the Specific Relief Act, 1963, any person may institute a suit for a declaration that the use by him of any process, or the making, use or sale of any article by him does not, or would not, constitute an infringement of a claim of a patent against the patentee or the holder of an exclusive licence under the patent, notwithstanding that no assertion to the contrary has been made by the patentee or the licensee, if it is shown -

- a. that the plaintiff has applied in writing to the patentee or exclusive licensee for a written acknowledgement to the effect of the declaration claimed and has furnished him with full particulars in writing of the process or article in question; and
- b. that the patentee or licensee has refused or neglected to give such an acknowledgement.

(2) The costs of all parties in a suit for a declaration brought by virtue of this section shall, unless for special reasons the court thinks fit to order otherwise, be paid by the plaintiff.

(3) The validity of a claim of the specification of a patent shall not be called in question in a suit for a declaration brought by virtue of this section, and accordingly the making or refusal of such a declaration in the case of a patent shall not be deemed to imply that the patent is valid or invalid.

(4) A suit for a declaration may be brought by virtue of this section at any time after the date of advertisement of acceptance of the complete specification of a patent, and references in this section to the patentee shall be construed accordingly.

Section 106 – Power of Court to grant relief in cases of groundless threat of infringement proceedings

(1) Where any person (whether entitled to or interested in a patent or an application for a patent or not) threatens any other person by circulars or advertisements or by communications, oral or in writing addressed to that or any other person, with proceedings for infringement of a patent, any person aggrieved thereby may bring a suit against him praying for the following reliefs, that is to say -

- a. a declaration to the effect that the threats are unjustifiable;
- b. an injunction against the continuance of the threats; and
- c. such damages, if any, as he has sustained thereby.

(2) Unless in such suit the defendant proves that the acts in respect of which the proceedings were threatened constitute or, if done, would constitute, an infringement of a patent or of rights arising from the publication of a complete specification in respect of a claim of the specification not shown by the plaintiff to be invalid, the court may grant to the plaintiff all or any of the reliefs prayed for.

Explanation – A mere notification of the existence of a patent does not constitute a threat of proceeding within the meaning of this section.

Other matters taken to Courts

Besides these issues as mentioned in Chapter XVIII, matters are taken to court for other reasons also. One of the most important reason being the denial of a patent. The Novartis case of the Madras High Court in 2007 is directly on this issue. Let us have a look at the case.

Novartis Case, Madras High Court, 2007³

Novartis, a Swiss pharmaceutical company, was granted EMR (exclusive marketing rights) in 2003 for cancer drug Glivec. Novartis had applied for EMR in anticipation of the product patent regime that was due to come into effect in India on January 1, 2005. As Novartis got the EMR, it filed petitions in different courts and sought injunction against certain Indian pharmaceutical companies which were manufacturing generic version of Glivec. Novartis achieved partial success in getting injunction orders.

As India was under an international treaty obligation (TRIPS), it amended the Patents Act, 1970 to allow product patents in pharmaceuticals. Prior to this only process patents were allowed, which made it possible for India pharmaceutical companies to reverse-engineer the final product, work around the patented process and manufacture with a new process. This mechanism, legally, allowed them to manufacture the generic version of patented drugs. Glivec was one of them. The generic versions were sold at a fraction of the price of the patented drug, thus providing access to inexpensive

³ Novartis Case, Madras High Court, W.P. Nos.24759 and 24760 of 2006, decided on 06 Aug 2007; Bench: R. Balasubramanian and P. Sridevan, JJ.; Unreported

medicines to Indian patients. At times, these were also exported to certain countries, mostly poor and undeveloped. In a sense, it was a great service to humanity – providing medicines at affordable prices. However, plainly speaking, it was stealing the intellectual property of the pharmaceutical companies which had put in a lot of time, research and money in coming up with such an innovative medicine.

After amendment, section 3(d) of the Patents Act, 1970 reads as follows:

Section 3: What are not inventions –

3(d) the mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant.

Explanation.-For the purposes of this clause, salts, esters, ethers, polymorphs, metabolites, pure form, particle size, isomers, mixtures of isomers, complexes, combinations and other derivatives of known substance shall be considered to be the *same substance*, unless they differ *significantly* in properties with regard to efficacy.

Novartis applied for product patent for Glivec. The application was rejected by the Patent Office and Novartis appealed the decision in the Madras High Court. It asked for reversal of the patent office's order and also asked for declaring the amended section 3(d) as unconstitutional and violating India's obligation to TRIPS. By that time the IPAB (Intellectual Property Appellate Board) had been constituted and the Madras High Court transferred the first request regarding reversal of patent office's order to the IPAB. Regarding the second, the High Court held that the amended section 3(d) was not *ultra vires* the Constitution. However, regarding violation of TRIPS violation, it held that the Court had no jurisdiction.

Incremental v. Substantial Change

The case is a landmark judgment as it did not allow a patent for any *incremental* change. A patent can only be granted for *substantial* improvement. Whether the improvement is substantial or not is a matter of discretion of the Patent Office, which shall always be guided by national and public interest. Thus, providing access to inexpensive medicines remains the *mantra* for patent protection. It has been a big jolt to Novartis and other pharmaceutical MNCs, however, there had been global condemnation of Novartis for such a legal action. Human Rights groups and even some pharmaceutical companies joined in criticizing Novartis for taking the matter to the Madras High Court. Most of the companies

were not in favour of antagonizing India – a huge market for their products – and being branded as against access of inexpensive medicines to the poor and needy.

However, in the eyes of law, Novartis has every right to fight for the protection of its rights. The legal environment in India facilitates protection of rights and thus, Novartis moved the Madras High Court, which transferred the matters to IPAB. Novartis moved the Supreme Court, which issued notices in 2009 and the matter is yet to be decided.⁴

Bajaj - TVS⁵ Dispute

In Brief

Bajaj Auto Limited filed a patent application in 2002 for grant of a patent for “An Improved Internal Combustion Engine Working on Four Stroke Principle”, which was granted in 2005 as Indian Patent no. 195904. The invention used two spark plugs for efficient burning of lean air fuel mixture in a small bore engine in the size between 45 mm and 70 mm, which resulted in better combustion in a comparatively shorter duration of time leading to reduction in emission and improved fuel consumption while maintaining the predetermined level of performance. The use of two spark plugs in large bore engines or in high performance/racing bikes was known in the Automobile industry. In cases of racing applications, twin plugs have been applied in small bore air cooled engines which are not lean burn.

These engines used twin plugs as a means of mitigating knock which also gave added reliability by preventing loss of ignition/misfire. This invention, which is called "DTS-i Technology", of providing a second spark plug in a small bore engine running lean, was never thought of or implemented in the automobile industry. Bajaj started using DTS-I technology in its motor cycles in 2003.

TVS Motor Company Limited launched motor bikes of 125-CC in December 2007 under the trade mark 'FLAME' powered with a lean burn internal combustion engine of bore size 54.5 mm with a twin spark plug configuration. Bajaj sued TVS on the ground that its patent was infringed and sought a permanent injunction. TVS argued that Bajaj's so-called invention was already known as the U.S. Honda patent no. 4534322 dated August 13, 1985 and also suffered from the 'vice of obviousness'. Bajaj reiterated that its invention was not obvious and the Honda patent was neither in respect of small bore engine nor aimed at efficient combustion of lean mixture.

⁴ The Times of India, SC notices to Centre, Pharma Companies on Novartis Petition, 11 September 2009, http://articles.timesofindia.indiatimes.com/2009-09-11/india-business/28112508_1_glivec-indian-patent-law-patent-application, last accessed 30 March 2011

⁵ Bajaj v. TVS, Supreme Court, Sep. 16, 2009; TVS v. Bajaj, Madras High Court, May 18, 2009; Bajaj v. TVS, Madras High Court, Feb. 16, 2008

TVS suffered a big blow when, the Madras High Court (Single-Judge Bench) granted a temporary injunction in February 2008. The Madras High Court, however, did not decide the dispute regarding the validity of patent. Later, the Division Bench of the Madras High Court granted relief in favour of TVS in May 2009. The Supreme Court in Bajaj's appeal directed the dispute regarding patent to be decided expeditiously by the Madras High Court and allowed TVS, in the meantime, to sell its motor bike Flame while maintaining accurate accounts of sales.

The Bajaj Patent 195904

The application was filed on July 16, 2002 for an invention related to improvement in combustion in a two valve per cylinder internal combustion engine working on four stroke principle. It related specifically to cylinder volume ranging from 75 cc to 225 cc and cylinder bore diameter from 45 mm to 70 mm.

Prior Art

Spark plug develops a spark and ignites the air-fuel mixture. This mixture takes a swirling and tumbling motion inside the combustion chamber and the flame propagates in the desired manner so as to give optimum performance. The performance is also improved by better ignition timing, design of combustion chamber, valve timing, valve angles, etc. All this is well-known and comprises the prior art on the subject.

Disadvantages

There are however disadvantages due to the presence of only one spark plug, which often results in incomplete combustion, fuel wastage, loss of power and increased emissions. Rich mixture is needed for more power. One spark plug is insufficient for lean mixture.

Invention by Bajaj

To provide better combustion, the invention used two spark plugs located at different places in the combustion chamber. It resulted in decreased emissions, better fuel consumption and better power, even with lean mixture.

US Patent No. 4534322 – Honda

Two spark plugs have earlier been used with three valves – Bajaj did with two valves – and large bore diameter, more than 70 mm. It has been described in US Patent No. 4534322 for Honda. Three valves do not provide sufficient space to mount a spark plug centrally and hence it is necessary to provide two spark plugs. For two valves, use of two spark plugs is not done due to space constraints. Also, in a small bore cylinder the distance for flame propagation is not much and, hence, use of two spark plugs is counterintuitive. Thus the idea itself is non-obvious. Honda patent uses a sleeve threaded into cylinder head. Its disadvantages have been taken care of in Bajaj patent by providing a sleeve push fitted in the cavity.

Bajaj developed a two valve, per cylinder 150 cc capacity engine and used the invented features. It was found that there was significant reduction in CO and HC emissions. It also resulted in increase in fuel efficiency. There was also improvement in peak power of the engine.

Claims

Bajaj made seven claims in the application and the first claim is as follows:

An improved Internal Combustion Engine working on four stroke principle, having two valves per cylinder, for efficient burning of lean air fuel mixture used in engines wherein the diameter of cylinder bore ranges between 45 mm and 70 mm characterized in that said Internal Combustion Engine comprises a pair of spark plugs...

The Reported Judgments

The dispute has so far seen four reported judgments from different courts, including the Supreme Court of India. These are:

- 1) Madras High Court, Single-Judge Bench, 16 February 2008
- 2) Madras High Court, Division Bench, 18 May 2009
- 3) Supreme Court, 16 September 2009
- 4) Madras High Court, Division Bench, 04 October 2010

The first matter⁶ is still pending in the Madras High Court. It is the main suit which needs to be decided about the validity of Bajaj patent. It has been discussed in the court for the purpose of temporary injunction and thereafter the suits are lingering on the issues of procedure.

Two suits were filed – the first was filed by TVS and was numbered C.S. No. 979 of 2007 and the second was filed a bit later by Bajaj and was numbered as C.S. No. 1111 of 2007. Thus, TVS was the plaintiff in the former and Bajaj was the plaintiff in the latter.

TVS filed the suit 979 of 2007 on the basis of groundless threat of infringement under section 106 of the Patents Act, 1970, for declaring that threats held out by Bajaj were unjustified and also restraining Bajaj from issuance of any such threats. TVS also prayed for damages of Rs. 1 crore on account of unjustified threats. While the suit was pending, TVS filed an application for interim relief.

Bajaj filed the suit 1111 of 2007 under section 108 of the Patents Act, 1970 for the relief of permanent injunction in respect of its patent no. 195904, the DTS-i technology for small engines. While the suit was pending, Bajaj filed an application for interim relief praying *inter alia* to restrain TVS from selling its proposed 125 cc FLAME motorcycle.

The Unending Legal Battle

It has been a very long, arduous and unfinished legal battle so far between the two warring parties – Bajaj and TVS. As a competitor, both aspire to get as much market share as possible. This, however, has to be done in a legal manner. Courts and law in India provide ample opportunity to litigation-friendly parties to stretch the matter to almost eternity. Astute parties, however, close the chapter by out of court settlement. It seems that in this dispute both the parties are not willing to budge. Both have deep pockets. Presently, both are able to sell their products in the market. Thus, the entire litigation appears to be a meaningless exercise. But, one never knows. By aligning the business and legal strategy, one party may be trying to tire out the other party. Procedural issues are being resolved for the last couple of years and the substantive issues remain untouched.

The use of patent law to achieve business ends reminds us of the electric bulb patent and Ford's car. These are very interesting cases decided long ago in the U.S.

⁶ Bajaj Auto Limited v. TVS Motor Company Limited, Madras High Court, Bench: P. Jyothimani, J., 16 Feb 2008, 2009 (3) CTC 129, 2008 (1) LLJ(Mad) 726, 2008 (1) MIPR 217, 2008 INDLAW MAD 546, Case No. O.A. No. 1357 of 2007 In C.S. No. 1111 of 2007 and O.A. No. 1272 of 2007 In C.S. No. 979 of 2007

Two American Cases Decided a Century Ago

Patents and litigation almost go together. As patents are the rights granted by the enacted law, its protection is also guaranteed by the same law. In the absence of any such protection, patents have no meaning. The legal environment should be conducive for the legal battles to be fought for protection of patent rights and also for getting revoked a patent, which was wrongly granted. The case of electric bulb tells us that it is a long legal battle and requires a lot of money to be fought. Similarly, the case of Ford's car tells us that besides litigation, the business strategy must incorporate other aspects also, for instance public support and media, as was done in this case

*Edison's Bulb*⁷

Thomas Edison once commented, "My electric light inventions have brought me no profits, only forty years of litigation." Edison spent more than \$2 million in late 1800s in patent litigation for the bulb.

There was a significant legal battle between Sawyer and Man and the Edison systems of electric lighting. Sawyer and Man's lamp consisted of an incandescing conductor of carbon made from a vegetable fibrous material, in contradistinction to a similar conductor made from mineral or gas carbon, and also in the form of such conductor so made from such vegetable carbon. The experiments with carbonized paper and wood carbon were imperfectly successful and the lamp was never a commercial success. A patent was, however, granted for this lamp.

Edison's Lamp consisted of a burner made of carbonized bamboo of a peculiar quality. It was about 6-inch long, 5/1000 of an inch thick and had electrical resistance of more than 100 ohms. It was bent into the form of a loop and the ends were secured to two fine platinum wires, which passed through a glass stem. A glass globe was fused to the glass stem. Edison worked very hard to identify the right carbonized bamboo. Edison tried as many as 30 or 40 different woods of exogenous growth and ultimately found a bamboo grown in Japan to have the peculiar characteristics making it suitable for a filament as fibres ran more nearly parallel than in other species of wood.

Sawyer and Man filed a case in the court against Edison for infringing the patent – using a conductor made from a vegetable fibrous material. The U.S. Supreme Court decided in 1895 that Sawyer and Man did not have a monopoly over all fibrous and textile materials for incandescent conductors. An

⁷ Consolidated Electric Light Co. v. McKeesport Light Co., U.S. Supreme Court, 159 U.S. 465 (1895)

examination of over 6,000 vegetable growths showed that none of them possessed the peculiar qualities that fitted them for that purpose. The Court held that Sawyer and Man had made a very broad claim covering all fibrous and textile materials which was not justified.

Edison-Ford friendship

Henry Ford was introduced to Edison in 1896 as ‘a young fellow who has made a gas car’. Edison, by that time a legend with more than a thousand patented inventions, asked Henry some questions and banged his fist down on the table to emphasize his satisfaction. “Young man,” he said, “that’s the thing! You have it! Your car is self contained and carries its own power plant.” And thus began a long friendship. To celebrate the 50th anniversary of the light bulb, Ford established the Edison Institute in 1929. Invention of the first successful incandescent bulb in the original Menlo Park laboratory was enacted. Ford paid attention to the minutest details for accuracy. Edison remarked that Ford got everything 99-9/10ths perfect. The inaccuracy, he told Ford, was that “our floor was never this clean.” Later, at the banquet, Edison said, “I can only say that in the fullest meaning of the term, he is my friend.”

Surely, the legendary patentee’s confidence must have rubbed off on Ford to give him tremendous courage to fight it out with Selden.

Ford-Selden Patent Litigation

George Selden, a patent attorney from Rochester, New York, was granted a patent in 1895 for a “road engine” which was a three-cylinder motor vehicle. Selden collected royalties from all American car manufacturers, who got patent licensing rights to build cars. Ironically, Selden had never built a car and was unabashedly enjoying patent benefits in the name of ‘Association of Licensed Automotive Manufacturers’ (ALAM), his holding company.

When Henry Ford, encouraged by Edison’s words, made up his mind to make the inexpensive car for masses, refused to pay royalty to Selden and thus infringe the patent, Selden took Ford to court for a long legal battle and also took out magazine advertisements. Ford countered with his own advertisements.

Selden’s patent was upheld at the trial court. Ford took the risk and appealed. Selden patent was overturned in 1911. Ford had the last laugh. This is a fantastic illustration about

enablement. Any inventor who cannot make his own invention work can never be granted a patent. In case, he is granted a patent, it is sure to be revoked, if challenged.

Critique

Even a century ago, it took a very long time for the patent disputes to be finally decided. It cost both the parties a lot of money. It is not surprising that in today's world, a patent litigation will take a long time and cost a lot of money. Thus, litigation in India in Novartis and Bajaj – TVS cases will expectedly take time. As 'law takes its own course', procedural issues are as important as substantive issues in any case to be decided by the court.

Problems and Suggestions

There are problems with patent litigation in India. Some are general problems related to any litigation in India, however, these become much more complex in case of intellectual property disputes, particularly patent disputes which require technical expertise along with legal expertise. Some of these problems with suggestions to surmount them are as follows:

Litigation is time consuming

The procedure in courts is time consuming. There is uncertainty along with the time take to get a matter resolved. The patent litigation has also been fallen in this trap of consumption of too much time. As technology develops, at times, very fast, the slow pace of law may not be conducive for the growth and development of that technology. It is important to get the matter decided by the right forum in a speedy manner. For this very purpose, the IPAB – Intellectual Property Appellate Board – has been formed. However, the matters are still taking a very long time to be decides as has been seen in the case of Novartis and Bajaj-TVS disputes, besides several others. There is a need to have matters decided in a speedier manner. The suggestion is to provide a better and practical framework of procedural law which is not too technical and provides the requisite flexibility to the presiding officer in the forum. Exercise of discretion has to be done in more judicious manner so that too many matters do not reach the High Courts and the Supreme Court.

The Tier System

The litigant has the right to file the matter in the 'lowest court of competent jurisdiction' and hence the matter cannot be filed in any other court or forum. There are several tiers which have been created by the law makers in the judicial process. The idea is to arrest the defect at the next tier, if any error is committed at the lower forum. This is a right of the litigant and the courts in India protect it with zeal.

Due to this system, which is also followed in most of the evolved jurisdictions like the U.S. and the U.K., a lot of matters are filed at several forums and at different hierarchy. As a matter of routine, appeals are filed at the higher level. India is a developing country and has few judges vis-à-vis its huge population. The developed countries can afford that much litigation as they have ample resources. India need to restrict the tier system – often three – to two tiers. A lot of time can be saved.

The Gambler's Instinct

There is often a gambler's instinct in filing a appeal. With parties having deep pockets, it is a matter of prestige and honour to fight the matter to the highest court. There is a tendency, often seen in regular civil matters, that the losing party files an appeal as if it is a gamble. This is also being seen in patent matters as is evident from the Bajaj-TVS dispute. In case stakes are high, legal costs do no matter. If the party wins, it hits the jackpot and in case it loses, not much is lost. There is a need to make it a bit difficult and costly. The judicial officers have to exercise discretion to throw out the matters if appealed on frivolous grounds. It is now being practised in some courts, particularly the Supreme Court, however, it has to be followed strictly at other courts also.

Technical Expertise

Patent disputes often require technical expertise. It is desirable that judicial officers and presiding officers in different forums are equipped with technical expertise to handle these matters in a satisfactory manner. Though, it is not possible to equip them with expertise in all the subjects, however, the questions of law interfacing with that of technology have to be given deft handling. The subject of intellectual property is now being taught in most of the law colleges, however, there is a strong need to train presiding officers in this subject.

Use of Experts

The courts use the services of experts in these fields to come to a conclusion. The problem arises when the experts themselves are divided and they have different views on the subject. The courts in such a case have to apply the basic principles of law and try to decide on the well established principles of equity, justice and good conscience. Expert opinion should not be restricted to experts from India. Global experts may be called for contentious issues, for instance the dispute between Bajaj and TVS where an American patent and an Austrian patent are involved. It will be very difficult simply to decide the matter on the basis of expert opinion of one person only.

Amicable Solution

The parties to a dispute have to realize that by litigating the matter, they are wasting their time, effort and money. There are often reasons for each party to settle and move ahead. It is being observed in certain cases in the U.S., where companies settle the matter out of court rather than litigating for a long time. In India, the trend is yet to emerge, however, it will not be long before businesses will realize that it is better to negotiate. I have a strong feeling that it is just a matter of time.

Let the market decide

Another method of resolving the patent disputes is to let the market decide. What is the use of a patent if there are no users for it? Hence, simply winning the legal war is not going to serve the purpose. That win must translate into something good for the business. Otherwise, it is almost a futile fight to establish one's right. That may not be a good idea for businesses. In such a scenario, it is better to let the market decide as to whose product is better.

Conclusion

Patent litigation in India is in its infancy. In the last four decades, since 1970s, very few matters have been decided by the Supreme Court and the High Courts. However, in the last five years, many matters have been filed in the higher courts and some of them have been decided, but not even a single one by the Supreme Court on direct patent issues. This is certainly going to change. As the protection of intellectual property is becoming stronger, patentees will surely like to challenge infringement. The troubling part is that procedural issues are getting more importance than the substantive issues. It is high time that procedure is simplified for patent litigation. It has to be on the fast track.
