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Trademark suits won at interlocutory stage? Complexities of trial in India

Vikram Grover and V Mohini of law firm Remfry & Sagar discuss strategies in tackling trademark cases in India

The Indian judiciary's outlook is, on the whole, very progressive and recent trends have gone a long way in boosting the confidence of businesses in the country. However, one aspect which sullies the good work is the huge backlog (the largest in the world) of pending cases and the resultant delays in concluding trials. Over thirty million cases are pending and more often than not, it takes years for a matter to reach trial from the date of its institution. Intellectual property suits are no different; these being instituted and tried in courts engaged in, *inter alia*, real estate, matrimonial, succession and recovery issues. Very often, it is said that Intellectual property matters are decided at the interlocutory stage – the losing party choosing to settle rather than battling it out to the end. But what if settlement cannot be achieved? What if a litigant is dissatisfied with the outcome at the interlocutory stage? What if damages and a permanent injunction are the object of the litigation? In such cases, trial ensues with a long wait for final resolution.

The High Court of Delhi, perhaps having achieved the distinction of receiving the maximum number of trademark suits in India, may take at least three-five years to conclude trial and pronounce the judgment and decree. However, there are Courts which may take more than 10 years. This reality underlines the importance of interim relief as an immediate and effective remedy for trademark owners – a fact which the judiciary itself acknowledges.

The Supreme Court has held that the grant of an interim injunction is a matter requiring exercise of the discretion of the court and the following tests are applied to test the plea of interim injunction: (i) whether the plaintiff has a *prima facie* case; (ii) whether balance of convenience is in favour of the plaintiff; and (iii) whether the plaintiff would suffer an irreparable injury if the defendant is not restrained – the underlying objective being protection of the plaintiff against injury for which it could not be adequately compensated in damages if the suit were resolved in its favour at the trial. In fact, courts in India are known to adopt a proactive stance insofar as repeated trademarks are concerned and grant interim injunctions, *ex parte* and/or *inter partes*.

Usually, trademark suits in India draw to a close upon completion of the interlocutory proceedings. If an interim injunction is granted restraining the defendant from using a trademark pending final decision in a suit, the defendant is quite reluctant to contest the suit up to its conclusion. Also having successfully halted the misuse, the plaintiff may not pursue trial diligently. However, for a rightfull owner of a trademark who is refused interim relief, continuing the proceedings to their logical end is the subject matter of
"The High Court of Delhi, perhaps having achieved the distinction of receiving the maximum number of trademark suits in India, may take at least three-five years to conclude trial and pronounce the judgment and decree."
"Beyond the interlocutory stage lies the somewhat arduous world of trial, where the rights of both parties must be conclusively determined on the basis of the evidence."

To embroil the issue even more, the Indian Code of Civil Procedure mandates that in suits filed by or against corporations, pleadings may be signed and verified on behalf of the corporations by the secretary or by any director or other principal officer of the corporation who is able to depose the facts of the case. It has been observed that in trademark suits filed by a plaintiff through a constituted attorney, great emphasis is laid by the opponent on the constituted attorney being merely authorised to sign and verify the pleadings on behalf of the plaintiff and not institute the suit. However, another provision of the Code of Civil Procedure contemplates appointment of a recognised agent to act on behalf of the appointing party. This may come to the rescue of the plaintiff which has chosen to appoint a constituted attorney provided the power of attorney (empowering the constituted attorney) is duly executed before a notary. The Supreme Court has also endorsed the view that once an original power of attorney which has been duly notarised is produced, the court should presume that all necessary requirements for the proper execution of the power of attorney have been fulfilled and the suit treated to have been validly instituted.

It is best to avoid controversy. Plaintiffs should either sign and verify the Statement of Claim themselves or consider appointing individuals from their subsidiary/affiliate or lawyers not working on the matter in question. The appointment of attorneys for instituting, signing and verifying the lawsuit should be vested in a power of attorney which is executed by authorised personnel before a notary. The plaintiff, if a corporation, could append the resolution to the power of attorney, where the initiation of the suit and execution of the power of attorney therefore are recorded and approved.

It is not to say that the judiciary and/or the legislature are unconcerned by the lacunae in the Indian judicial system. The Indian Code of Civil Procedure has been amended to ensure speedy disposal. It curtails unnecessary adjournments and envisages payment of costs to compensate for delays caused by adjournment to the other party. Courts are also now doing away with oral testimony. Not only this, post granting an interim injunction, the Delhi High Court has, in a few instances dispensed with the cross-examination of witnesses and directed the parties to prove their case on the basis of examination-in-chief and documentary evidence. There are other instances where the High Court of Delhi has refused to pass any interim orders and directed trial to be completed within a few months so as to decide issues once and for all. In one such matter, cross-examination of witnesses was waived on account of the parties consenting that there was no dispute on the facts included in the suit and documents read in evidence without formal proof.

In a very encouraging move, the Supreme Court recently directed subordinate courts to decide IP cases within four months from filing. Recognising that parties primarily litigate on the issue of interim injunction and the main suit languishes for years, it has been observed that the emphasis must shift from temporary relief (by virtue of an interim injunction) to final settlement in suits pertaining to trademarks, copyrights and patents. It has also opined that the hearing in a suit should continue day-to-day until all witnesses in attendance are examined.

The observations of the Supreme Court may have a far-reaching impact on IP litigation in the country. If the pronouncement is followed religiously by the courts, trial would assume tremendous significance in that grant of interim reliefs may be debated intensely and not awarded easily. The fate of litigation will boil down to the evidence led before the court and its appreciation. Whether or not such change is in the offing – retarded by insufficient infrastructure and paucity of judges – trial should be an integral constituent of any litigious strategy.

AUTHORS

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