

MANU/IC/0052/2013

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**BEFORE THE INTELLECTUAL PROPERTY APPELLATE BOARD
CHENNAI**

ORA/7/2012/TM/DEL

Decided On: 08.07.2013

Shreedhar Milk Foods Pvt. Ltd. **Vs.** Vikas Tyagi and Ors.

Hon'ble Judges/Coram:

Prabha Sridevan, Chairman, Usha, Vice Chairman and D.P.S. Parmar, Member (T)

Counsels:

For Appellant/Petitioner/Plaintiff: Shri. K.G. Bansal & Co.

For Respondents/Defendant: Shri. U.S. Sharma

Case Note:

Trade Mark - Power to grant interim orders - Section 95 of Trade Marks Act, 1999; Intellectual Property Appellate Board (Procedure) Rules, 2003- Whether Intellectual Property Appellate Board (IPAB) had power to grant interim orders -

Held, as per Section 95 of Act, IPAB could make interim orders in an appeal or in any proceedings relating to an appeal subject to conditions in Section 95 of Act. IPAB had power to grant interim orders. Interim orders meant "orders" in nature of stay or injunction. No interim orders should be granted without hearing other side as provided for in Section 95(2) of Act with regard to interim orders pending appeal; if Trade Mark or Patent had been in force for a considerable period that would be a condition against grant of interim order; factors like prima facie case, balance of convenience, irreparable injury and hardship should be kept in mind; and order was so worded as to bind only parties to proceedings and no one else. Ordered accordingly.

Ratio Decidendi:

"Once it is held that there is a power of review, Board cannot limit it to errors of procedure alone but to include substantive review"

ORDER

Prabha Sridevan, Chairman

1. Two Larger Benches of the IPAB were constituted recently to decide two issues one relating to the IPAB's power to review its own order and the other relating to IPAB's power to grant interim orders pending final application. In both, we had to consider the importance of this Tribunal and the nature of its jurisdiction, power and authority. This order relates to the power to grant interim orders. The applicant in ORA. No. 7 of 2012 moved an Application for interim stay of the registration of the respondent's Trade Mark on the ground that it was obtained by fraud.

2. The learned counsel appearing for the applicant relied upon various decisions of the

Court earlier, wherein interim stay was granted. He also referred to *Indian Bank Vs. Satyam Fibres (India) Pvt. Ltd.* (MANU/SC/0657/1996 : AIR 1996 SC 2592) and *Grindlays Bank Ltd. Vs. Central Government Industrial Tribunal and Others* (MANU/SC/0308/1980 : AIR 1981 SC 606) in support of his contention that every Tribunal should be considered to have such power ancillary or incidental as are necessary to do justice in a case where if prima facie case is established, stay must be granted.

3. The learned counsel for the respondent vehemently opposed for granting stay on the ground that IPAB has no power to grant stay.

4. We could have decided the matter as an issue that had arisen inter se parties in that particular case. But, whatever we decide, it would apply, not only to the proceedings under the Trade Marks Act, 1999 but also to proceedings under the Patent Act, 1970 and under Geographical Indications Act, or under any other Act, which is brought under the IPAB umbrella in the future. Therefore, we felt that it may not be fair to decide such an important question in the absence of Members of the Bar who practice in Patent Law or in Geographical Indications proceedings. Since there had been varying views of this Board, we thought that we should constitute a Larger Bench and we issued directions for constituting a larger Bench which was published in Website, where we invited Members of the Bar to appear as interveners. We had also observed that if no intervening application was filed, we would appoint an Amicus Curiae to assist us. But the response from the Bar has been enthusiastic. In fact, arguments were made over two days at New Delhi and again by a special request on one day at Chennai. We are extremely grateful to the Members of the Bar for this comprehensive and well researched assistance each one gave as amicus to help us to decide this purely legal issue. The following learned Advocates appeared before us:-

Mr. S.K. Bansal, Mr. Sushant Singh, Mr. Sanjeev Tiwari, Ms. Prathiba Singh, Mr. M.K. Miglani, Mr. Amarjit Singh, Ms. Rajeswari, Mr. S. Majumdar, Mr. Peeyush Kalra, Mr. Anil Dutt, Mr. Ajay Sahani, Mr. U.S. Sharma, Mr. Shalien Bhatia, Mr. Sidharth Bambha, Mr. N. Mahabir, Mr. Praveen Anand, Mr. M.S. Bharath and Mr. D. Solomon. Intervening Applications were filed by Subhatosh Majumdar @ Majumdar & Company for Shreedhar Milk Foods Ltd.,

5. Written arguments were also filed by the learned counsel to supplement their oral arguments. Written submissions were filed by M/s. Y.J. Trivedi on behalf of himself and the Intellectual Property Rights Bar Association at Ahmedabad, who could not be present in person.

6. At the outset, objections were raised to the Constitution of the Larger Bench on the ground that this Board has no jurisdiction for such a reference. In an order of the Central Excise, Customs and Service Tax Appellate Tribunal, a question arose whether the exemption provided in the Notification covered cannulae for the distance part of veins and blood vessels and it is limited to cannulae for iota and ventricle and similar veins and blood vessels whether the term "Blood Vessels" have to be read separately. The Bench decided that a reference to a Larger Bench cannot be made merely on the ground that the Division Bench desired the issue to be decided by a Larger Bench and therefore, there is no justifiable ground for reference. The reference was returned. This was relied on to show that the reference to the Larger Bench was without jurisdiction. In fact, M.P. No. 138 of 2013 was filed on the question whether the Appellate Board has power to refer the matter to Full Bench. Section 83 gives the Appellate Board jurisdiction power and authority, which shall be exercised by the IPAB in accordance

with the Act.

7. It was submitted that neither did we have the power to constitute a Larger Bench, nor did we have the power to invite intervention of lawyers as third party interveners and Section 84 was referred to, which relates to the constitution of Appellate Board and in the absence of statutory provisions, empowering the Chairman or the Bench of the Appellate Board, the present argument was illegal. It was also submitted that Rule 15 of IPAB procedures Rules relates to the intervention by third party, in appeals filed under Section 91 of the Trade Marks Act, 1999 and therefore, allowing intervention by third parties is contrary to the provisions of Rule 15, and it creates a bad precedent. It is further submitted that the Larger Bench which passes orders will not decide the present jurisdictional issue judicially and impartially. In view of the fact that the coordinate Benches of the IPAB had passed stay orders staying registration of Trade Marks without considering Section 95, and for a fair and impartial application of mind, the matter should have been referred to the Hon'ble High Court under Article 227 of the Constitution of India and not by invoking the quasi-judicial power of the Tribunal. These objections were raised in relation to our power to constitute a Larger Bench to decide the issue in question.

8. Consistency and certainty are recognized as being central requirements for the Rule of law, since it provides those subjects to it with the ability to organize their affairs in a manner as not to violate the law. Therefore, it is in the interest of justice and the parties before us and the counsel, who advise them, that everyone knows with a degree of certainty whether the application for grant of interim order/review will be entertained by this Board. That cannot be left to the vagaries of the individual cases.

9. Of course, whether the petitioners succeed in their prayer will depend upon the facts of each case. What we are concerned with the existence of the power with the IPAB to entertain the review petition/petition for stay or injunction. It is also desirable again in the interest of this jurisprudence that since this Board has a country wide jurisdiction, the same position is adopted in all matters regardless where IPAB is sitting in that particular case. This decision may not be final; it may be taken for being tested before the Superior Courts. The final decision will bestow a certainty to these two issues and will be applied uniformly in all IPAB proceedings throughout the country. It is with a view to give a degree of certainty and consistency to these two questions that we referred the matters to Larger Bench. We saw that, earlier there had been difference in the views of Benches of equal strength. At least now the regular benches of the Board will be bound by this decision as long as it holds the field.

10. First we will refer to the submissions made by the Members of the Bar, which were in favour of the proposition that the IPAB has the power to grant interim orders. It was submitted that as per Section 95 of the Trade Marks Act, 1999 there was nothing contained in the language of Section 95 of the Trade Marks Act, to exclude the IPAB's power to grant interim orders in the original application. Section 95 modulates the manner in which interim orders in appeals may be heard and therefore it must be understood that these restrictions cannot be applied to the original application. It cannot be understood that there is no power to pass interim orders. It was submitted that the registration of the Trade Mark itself is not a complete right. Under Section 31, it is only Registration to be prima facie evidence of validity and therefore, IPAB hearing the rectification application has inherent jurisdiction to decide the validity and invalidity. Section 28 of the Trade Marks Act shows that the IPAB has plenary power to look into to the registration even at the interim stage.

11. The learned counsel referred to the decision reported in *Grindlays Bank Vs. Central Government Industrial Tribunal and Others* (MANU/SC/0308/1980 : AIR 1981 SC 606) and submitted that this decision applies to all the Tribunals. It was submitted that merely because, the Act render interim orders in appeals, it cannot be read as excluding interim orders in application. There is no such explicit exclusion, indications in fact are to the contrary. In *State of Orissa Vs. Madan Gopal Rungta* (MANU/SC/0012/1951 : AIR 1952 SC 12) relied on by the counsel Hon'ble Supreme Court held that in cases of fraud and such extreme circumstances, the Tribunals are inherently clothed with jurisdiction to recall the orders obtained by means of fraud and to grant stay. In *Indian Bank Vs. Satyam Fibres (India) Pvt. Ltd.* (MANU/SC/0657/1996 : AIR 1996 SC 2592) the Hon'ble Supreme Court held the principle that the power of review where fraud is alleged springs not from the legislation but from the nature and constitution of Tribunals. Section 59(3) of the Trade Marks Act, 1999 gives the Board's power to decide any question that may be necessary or expedient to decide the issue in connection with the rectification of the registration. It was submitted that the word 'Expedient' can only mean to meet the ends of justice and therefore, the power to grant interim orders is inherent.

12. Similar power of stay is granted to the Board under Section 71(2) of the Patents Act, 1970. *MSM Discovery Pvt. Ltd. Vs. Viacom 18 Media Pvt. Ltd. & Others* (MANU/DE/1935/2010 : 2011 (2) CLJ 658), was relied on, wherein the Delhi High Court dealt with the question whether the Civil Court in TDSAT case had the power to grant interim order of injunction to restrain the erstwhile agent from performing acts, as if, the Agency constituted has to be answered in the affirmative. It was submitted that IPAB has wide powers and only the principles of natural justice must be adhered to.

13. According to the counsel, as per Section 92(1) and 92(2) of Trade Marks Act, 1999 the Board's powers are wide. It cannot be restricted to what is mentioned therein. The grant of interim order, if incidental or ancillary to the main relief, this question must be answered in the affirmative. There are several situations, where without further investigation, it may be seen that the registration is wrong or that it has remained wrongly in the register in spite of non-payment renewal fee and so on. In these situations, all the conditions for grant of interim orders would arise.

14. It was submitted that when the IPAB was constituted, it stepped into the shoes of the High Court by virtue of Section 100 of the Trade Marks Act and Section 117-G of the Patents Act. Whatever power, the High Court was vested with, got transferred to the IPAB, and there are no words in the Act which limit that power. If the Tribunal has exclusive jurisdiction with regard to the Intellectual Property Rights as provided under the Act, then necessarily, the Board has the power and duty to balance the equity. IPAB has to bear in mind the object avowed which is to prevent fraudulent Trade Marks, to avoid confusion and thereby protect the public interest and otherwise to remove unworthy patents and reject merit less challenger. In this regard if it is absolutely necessary to grant interim orders, IPAB must be held to have the power. It was submitted that the word 'notwithstanding' contained in Section 95 would only indicate that the ambit of the provision of the Act and any other Law were modified by the condition. The learned counsel also referred to the principle of *casus omissus* and submitted that if actually, the Act is seen in its entirety the court should avoid creating a *casus omissus* where there is none. Section 95 of the Act deals with interim orders; it means that the Tribunal shall have the power to pass interim orders. While doing so, in appeals, it shall bear in mind, the restriction. It was also submitted that the power granted to IPAB, while hearing the appeals and applications is whittled down with regard to the appeals in Section 95. Under the Code of Civil Procedure, a Court may

pass ex parte, interim orders, notwithstanding the IPAB shall follow the conditions of Section 95. The Act cannot be read to mean that there is no power. Therefore, it takes the colour of the power conferred under Article 226 of the Constitution of India. Section 92(1) must be given reasonable meaning and Section 95 is actually limitation of larger power which is understood to be implicit and not as though the power granted under that Section. It was submitted that the distinction between appeals and applications is artificial. Merely because Section 95 mentions only appeal it is not a reason to construe the act, as if, there is no power to grant interim orders. It was submitted that the IPAB has Original jurisdiction and Appellate jurisdiction and when the power of the High Court was vested in the IPAB, the power did not change. It was submitted that under the 1958 Act, the Registrar or the High Court had the concurrent power to rectify a Trade Mark or revoke a patent and we cannot be heard to say that merely because the Registrar did not have the power to grant the interim order the High Court also did not have the power to grant interim orders. The history of the Constitution of the IPAB shows that Appellate Board came into existence in the place of the High Court and all the powers of the High Court were transferred to the IPAB. Then unless it is specifically taken away, the IPAB must be held to have the power. The dividing line between the appeals and applications is very thin but the power is the same. It was submitted that if in opposition proceedings Patent is granted or Trade Mark is registered then in an appeal by the opponent an application for stay or injunction against the grant of patent or registration of the Mark can be filed. If so, there is no reason why in rectification/revocation application the same order cannot be passed. *Super Cassettes Vs. Music Broadcast Private Ltd.*, (MANU/SC/0408/2010) was relied on where the question was whether the interim compulsory license can be granted and it was submitted that this would not apply to IPAB. The point was that status-quo should be preserved and not altered.

Ashok Kumar Lingala Vs. State of Karnataka (MANU/SC/1260/2011 : 2012 (1) SCC 321) where the Hon'ble Supreme Court held that the power to grant interim orders is implicit, in the power to make a final order, except, when it is taken away.

Dr. Shahid Rizwan Khan Vs. Dr. Smt. Masoor and Others (Manu/MH/0859/2011) wherein the Hon'ble Bombay High Court held that unless there is any express prohibition, the power to grant interim orders must be held to exist.

In *Industrial Credit and Investment Corporation of India Ltd. Vs. Grapco Industries Ltd. & Others* (MANU/SC/0372/1999 : 1994 (4) SCC 710) the High Court's view was not accepted by the Hon'ble Supreme Court. The Hon'ble Supreme Court held in the case of *Debts Recovery Tribunal Act*, which is similar to Section 92(1)(a) of the Trade Marks Act that the Tribunal can travel beyond the Code of Civil Procedure and the only fetter that is put on its powers is to observe the principles of natural justice. It was submitted that if Tribunals are to replace High Court, then we would be rendering them toothless and if we cry that the Board has no power to pass interim order it tacitly meant that the litigant must go to the Tribunal for final orders and approach the High Court for interim orders under Article 226 of the Constitution of India. It was submitted that the purpose of bringing in Section 92 was to make the procedures in appeals uniform since until then each High Court which had jurisdiction had its own Rules. Section 92 was created only to bring uniformity and not restriction and the only restrictions imposed were under Section 95 of the Trade Marks Act, 1999. It was submitted that if one must question that the power to grant interim order sprang only from Section 95, and that it was enabling provision, it cannot be accepted since enabling provisions are never couched in negative terms. *Cotton Corporation of India Ltd. Vs. United Industrial Bank Ltd. and Others* (MANU/SC/0375/1983 : AIR 1983 SC 1272) was relied on and it was

submitted it would be ironical to say that IPAB has no power to grant stay even if the registration is illegal because IPAB must do justice. In *Deoraj Vs. State of Maharashtra & Others* (MANU/SC/0314/2004 : AIR 2004 SC 1975) the Hon'ble Supreme Court prescribed certain guidelines as to what should work at the back of the mind of a person, who passed interim order. The court also took note of the overburden, which results in long drawn out proceedings necessitating the request for urgent interim orders.

15. Several practical instances were given by the counsel. For example, one who continuously used any Trade Mark can fraudulently get it registered in his name. It was submitted that if there is significant violation in the registration of grant and the IPAB declared it has no power to grant interim orders impartiality shall remain. In *Public Services Tribunal Bar Association Vs. State of Uttar Pradesh* (MANU/SC/0062/2003 : AIR 2003 SC 1115) the Supreme Court held as follows:

For effective adjudication to a cause of action complete jurisdiction to grant relief including the interim relief should vest in one and the same forum. Single cause of action cannot be split and divided for getting the interim and final relief in two different forums.

In *Subash Chandra Vs. Rahamathullah* (I.L.R. 73 (Del) 181), the Hon'ble Delhi High Court held that the court is created for a purpose and its power is inherent by virtue of its duty to do justice.

In *Gurditta Mal VS. Bal Swarup* (MANU/DE/0284/1979 : AIR 1980 Delhi 216), the Hon'ble Delhi High Court held that if the inherent power is denied to any Tribunal, it would be paralyzed. Section 95 which imposes conditions for interim orders must be understood by the very effect it imposes conditions that the power is implicit must be recognized.

16. It was submitted that Super Cassette's case will not apply to Intellectual Property Appellate Board as adjudicatory power between adversaries whereas the Copyright Board is only to enquire into the royalty. It was submitted that in fact several Tribunals have been held to have the power to grant interim orders. The Registrar's power and the power of the IPAB are not the same. Section 127 and Section 91 of the Trade Marks Act, 1999 are different Section 127 may be equated to section 92(2), but no power has been given to the Registrar similar to the power given to the IPAB under Section 92(1). It was submitted that it would not be proper to decide the issue on the basis of the headings to the Section. The purpose of the Act as seen from the objects and reasons has provided the Appellate Board the power for speedy disposal of the matters, which itself laid before the High Court. It was submitted that interim orders were heard to expedite the matters. It was submitted that the Supreme Court had dealt with implied powers of the court in *Sakri Vasu VS. State of Uttar Pradesh and Others* (MANU/SC/8179/2007 : 2008 (2) SCC 409) Section 92(3) declares IPAB to be a Civil Court for all purposes of rectification/revocation which is not such between the powers. There is public interest. If the Board feels that the unwary consumer will be deceived and the object of the Act is sought to be defeated, then the power to set it right must be deemed to exist. The judgment rendered in *L. Chandra Kumar Vs. Union of India* (MANU/SC/0261/1997 : AIR 1997 SC 1125), was relied on and it was submitted that the Tribunals will continue to act like Courts of first instance in respect of areas of law, for which they have been constituted. In *Thomson Press (India) Limited Vs. Nanak Builders Investors Pvt. Ltd.* (MANU/SC/0554/1999 : AIR 1999 SC 3426), the Supreme Court while dealing with the recovery of debts due to Banks and Financial Institutions

had held that when the Act says that the Tribunals shall not be bound by C.P.C. but shall be guided by the principles of natural justice it means that the Tribunal can go beyond the Code as long as it is in conformity with the principles of natural justice. In *Income-Tax Officer VS. M.K. Mohammed Kunhi* (MANU/SC/0087/1968 : AIR 1969 SC 430), the Supreme Court held that Section 255(5) of Income-tax Act, 1961 empowers the Appellate Tribunals to regulate its own procedure but the power of stay cannot be split out from that. However in our opinion, the Appellate Tribunals must be held to have the power to grant stay as incidental or ancillary in its Appellate jurisdiction.

17. It was submitted that while deciding this question, it is irrelevant whether the facts justified the interim orders are not. The issue here is whether the IPAB has the power. The decision rendered in *Liberty Footwear Company Vs. Force Footwear and Others* {MANU/DE/2574/2009 : 2009 (41) PTC 474 (Del)} was relied on to show that the Section 92 gives wide discretion to IPAB in following and adopting its own procedure, so long as it acts fair. It was submitted that the effect would be far reaching, if the IPAB is held not to have the power to pass interim orders. It was submitted that the IPAB must be held to have the powers. However, there should be self imposed restraint and the guidelines which prevail upon the Civil Courts in an application under Order 39 C.P.C.

18. It was submitted that the IPAB is a unique Tribunal and it will be borne out by the history of legislation by which it was created. Was it the intention of the Parliament to deprive the litigant's power that existed in the High Courts, whose power was vested with the IPAB? Especially, in *Pharmaceutical Patent*, the legitimate concern of the IPAB should be to protect the public interest. It was submitted that it was not necessary to establish IPAB if it is denuded all the powers that was originally vested with the High Court. The order passed by this Board in O.R.A. No. 192 of 2011 dated 2nd January, 2012 (*M/s. Sunstar Overseas Ltd., VS. M/s. KRBL Ltd., & Another*) where prima facie case, balance of convenience, irreparable hardship, and irretrievable injury was relied on. It was submitted that any orders that are passed in kind would sub-serve justice.

19. *Gujrat Bottling Company Vs. Coca Cola Company and Others* (MANU/SC/0472/1995 : 1996 (16) PTC 89 SC), was referred to, to indicate how interim orders should be granted and also warning in discriminatory grant of interim orders.

20. The *Major Law Lexicon* was relied on to show that there is no distinction between "appeal" and "application" by a party to an Appellate Court and therefore it would be hair splitting distinction between the "appeal" and "application", but nature of powers of the IPAB in both rectification petition and appeal filed by the opponent are the same.

21. It is submitted that the Tribunal is Special and the decision in *Super Cassette* (cited supra) will not militate against the recognition of the power to issue interim order. The history of the statute was explained to prove this. It could not have been the intention of the Parliament to deprive the litigants of the power existing in the forum which hitherto decide the cases i.e., in the High Court. It is submitted that the public interest is very much in favour of the recognition of such power. But it was submitted that it would be a legitimate exercise of power by the IPAB especially when fraud is alleged and it appears prima facie that the registration/grant has been wrongly given. The IPAB cannot fold its hands and refrain from intervention even when fraud is apparent. The IPAB was meant to advance speedy justice. The word "only" in Section 95 of the Trade Marks Act, 1999 gives away the intention of the Parliament that the power is implied.

22. It was submitted that the factual basis for grant of stay is not the relevant issue

before this Bench. The issue is whether there is power. It is needless to say that the interim orders will not be automatically granted. Whether the power is exercised by the IPAB in appellate jurisdiction or original jurisdiction, the Board's power is inherent.

In a Decision rendered by Justice Vikramajit Sen in *Rhizome Distilleries P. Ltd., & Others* (MANU/DE/2742/2009 : 2010 (42) PTC 806 DEL) relied on to injunction regarding the use of Trade Marks that will not affect this issue. The judgment of the Hon'ble High Court indicate how the judges had perceived this power. If the IPAB is held not to have the power to pass orders, it will have too far reaching effect. The counsel also submitted that there must be self imposed restraint.

23. It was submitted that the grant of interim relief would depend upon the facts and circumstances of each case and no strait-jacket formula can be applied. The IPAB is the only Tribunal in the whole India and it is required to consider various cases for constitution of sittings and therefore if there is any fraud in obtaining trade mark it is necessary and in the interest of justice for interim orders to be issued in a short period. The history of the constitution of the IPAB and the various provisions of the 3 statutes trade marks governing Trade Marks, Patent Act and Geographical Indications make it amply clear that the IPAB has wide powers including the power to grant interim orders. The exercise of the power is not the subject matter of the reference, but whether the IPAB is vested with this power. The grant of interim order will depend upon the facts of each case to hold that the IPAB does not have the power is to completely render nugatory. The very purpose for which the IPAB has been constituted in 2003, there were two kinds of matter with respect to Trade Marks. The first set of matters were appeals from the order of the Registrar and interim orders were passed in the appeals, if the Court deems fit. Even in the rectification petitions, which were maintainable either before the High Court or before the Registrar, the High Court always had the power to pass interim orders, when the IPAB was constituted those matters which were pending before the High Court were transferred to IPAB and unless the legislator consciously wished to take away the power one must read the Act, as if the power was with the IPAB. As regards the appeal and application "the difference is only the nomenclature" power and effect of granting interim orders in appeals and applications are the same. Under the Trade Marks Act, 1999 or the Patents Act, 1970, if opposition is dismissed and Registration or Patent is granted, the opposing party may file an appeal against the order of stay granted in such cases, which power is found in Section 95 will have the same effect as interim order granted in rectification application. *Super Cassettes* case is distinguished, where the Court concerned with compulsory license and therefore that decision is distinguishable. Moreover, the scheme of the Copyright Act is completely different. Reliance was placed in *M/s. Total Telefilms Pvt. Ltd. Vs. M/s. Prasar Bharati & Another* in Petition No. 183 (C) of 2008 dated 15th December, 2008 before the Telecom Disputes Settlement & Appellate Tribunal, New Delhi.

24. Now, we will take up the submission made by those who argued against such power. It is submitted that Section 92(2) is only a procedural provision and it cannot be stretched to include substantive powers. In rectification or revocation petition, granting of the interim orders would tantamount to granting final relief. In *Super Cassettes* case (cited supra), the Hon'ble Supreme Court had held that the power to grant interim orders is not there and it squarely applies to the case on hand. The non obstante clause is introduced in Section 95, because Section 92(1) gives IPAB wide power. So a fetter is placed under Section 95. In National Green Tribunal Act it is specifically mentioned in Section 19(4)(i) that interim orders may be granted on any application made or appeal filed. Such a provision is not found here.

In *Secretary Minor Irrigation & Engineering Vs. Sahl Ram Arya & Another* MANU/SC/0441/2002 : (2005 (5) SCC 521) the Hon'ble Supreme court held that if a Tribunal has no power to grant interim order on that ground it cannot be by passed. But after the petition is filed, if the Tribunal declines to grant interim order on the ground that it has no power then the aggrieved party can seek remedy under Article 226 of the Constitution of India. It was submitted that in the Definition Section Rule 2 (d) and 2 (f) of IPAB Rules, appeals and applications are dealt with separately. Therefore the meaning of appeal cannot be construed, to include application etc, Section 47 of the Trade Marks Act, 1999 gives both the Registrar and the IPAB the power of removal. If IPAB is given the power to grant interim order, then the Registrar must also be given the power to grant interim order. And if the Registrar has not been given the power to grant any order, the IPAB cannot grant interim order. Section 124(4) of the Trade Marks Act, 1999 refers only to final orders and not to any other order. Therefore, the law does not provide for granting interim orders. If interim orders are granted in trade mark matters, then the presumption of validity under Section 31 of the Act becomes otiose. Section 23 of the Trade Marks Act indicates that the registration is automatic after the procedure is followed and so too in Section 44 of the Trade Marks Act. Therefore looking at the scheme of the Acts in question there appears to be no legislative intention to grant power to pass interim orders.

In *Bipin Chandra Das Patel & Parshottam Patel Vs. State of Gujrat* (MANU/SC/0308/2003 : AIR 2003 SC 2256), the Supreme Court had held that when two different expressions are used by the Legislator, they must be held to convey different sense of meaning.

Kesavananda Bharathi Vs. State of Kerala (MANU/SC/0445/1973 : AIR 973 SC 1461) was also referred where the following extract:

Where, the language of an Act is clear and explicit, effect is to be given to it whatever may be the consequences. The words of the statute speak the intention of the legislature. Where the reading of a statute produces an intelligible result there is no ground for reading any words or changing any words according to what may be supposed intention of the legislature.

Sunrider Corporation Vs. Hindustan Lever Ltd. & Another (MANU/DE/2111/2007 : 2007 (35) PTC 388 DEL) was relied on for the proposition the Rules should be treated as part of the Act. Section 83 was referred to, to show whatever the jurisdiction or authority has been conferred under the Act, alone can be aid to possess. The words "any other manner" in Section 95 must be read ejusdem generis. Chapter XI of the Trade Marks was read out section by section and it was submitted that Section 91 provides for appeals and Section 95 to grant interim orders in appeals. Logically, after Section 97 which deals with procedure for rectification an analogous section should have been introduced. The fact that it is not there means that no interim order can be granted, pending applications. The basic ground on which interim orders can be granted is prima facie case and in any trade mark matters, a trade mark is prima facie valid, on that ground alone, it is apparent that no interim order could be granted. If an interim order is granted, then what would happen to the entry itself? If it is suspended, it will be a final relief. It was submitted that Section 31 must be read to negate to the Board the power to grant interim order and will operate, only if a prima facie case exist, but if the prima facie validity is statutorily recognized, then there is no justification for granting interim order.

In *Kuthan Educational Charitable Trust Vs. State of Haryana* (AIR 2009 SCC 1648), this was cited to show if the different nomenclatures are used they must be held to have

separate and distinct meaning.

In *P.M. Diesels Pvt. Ltd. Vs. Thukral Mechanical Works*, (MANU/DE/0238/1988 : AIF 1988 Delhi 282) the Hon'ble Delhi High Court referred to Section 31 of the Act, which speaks of the prima facie evidence of validity.

In *A.K. Kraipak & Others Vs. Union of India, & Others* 2009 (39) PTC 627; MANU/SC/0427/1969 : AIR 1970 SC 150) the Hon'ble Supreme Court held that the aim of the rules of natural justice is to secure justice and they can appeal only in areas not covered by any law validly made. In other words, they do not supplant the law of the land but supplement it.

In *Rhizome Distilleries Pvt. Ltd. Vs. Pernod Ricard S.A. France & Others* (MANU/DE/2742/2009 : 2010 (42) PTC 806) the Hon'ble Delhi High Court held that the power to grant an injunction is conspicuous by its absence.

The provisions of the Specific Relief Act, 1963 viz., Section 41(b) was referred to and it was submitted that if stay is granted a suit for infringement cannot be filed.

In *Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal* (MANU/SC/0056/1961 : AIR 1962 SC 527) Hon'ble Supreme Court held that an order restraining the party from proceeding with any other suit in a court of law should not be made unless absolutely essential for the ends of justice.

Mrs. Maneka Gandhi Vs. Union of India & Another (MANU/SC/0133/1978 : 1978 SC 597) was referred to that the right of the registered proprietor can be curtailed only if there is a statutory provision.

25. It was submitted that if the Intellectual Property Appellate Board think it is necessary, the final hearing can be expedited or damages can also be awarded.

It was submitted that Section 92(2) is a complete code and the power cannot be extended. The Act does not provide for power to grant interim order. The Tribunal is creature of statute and hence it cannot assume a power that it does not have.

In *The Management of Hotel Imperial & Others Vs. Hotel Workers Union* (MANU/SC/0116/1959 : AIR 1959 SC 1342), the Supreme Court observed in paragraph No. 22, which is as follows:

The next question is as to how the tribunal should proceed in the matter if it decides to grant interim relief. The definition of the word "award" shows that it can be either an interim or final determination either of the whole of the dispute referred to the tribunal or of any question relating thereto. Thus it is open to the tribunal to give an award about the entire dispute at the end of all proceedings. This will be final determination of the industrial dispute referred to it. It is also open to the tribunal to make an award about some of the matters referred to it whilst some others still remain to be decided. This will be an interim determination of any question relating thereto. In either case it will have to be published as required by Section 17. Such awards are however not in the nature of interim relief for they decide the industrial dispute or some question relating thereto. Interim relief, on the other hand, is granted under the power conferred on the tribunal under Section 10(4) with respect to matters incidental to the points of dispute for adjudication.

In *Goa MRF Employees Union Vs. MRF Limited* 2010 (15) SCC 432 the Hon'ble Supreme Court doubted whether the incidental issues will include power to grant interim orders. Section 92 only mentions the principles of natural justice, which does not include the power to grant interim relief. Granting of interim order in such matters will not preserve the status-quo, but actually it will curtail the right that already exists. It was submitted that the challenger whether in trade mark or any patent matter had the right of opposition but not having done it having behaved like in a Rip Van Winkle he cannot wake up and file a rectification or revocation and ask for stay. The Registrar, while granting a registration is not pulling a Rabbit of a Hat. It is only after statutory requirements are met, that the Registration is granted. As regards the rectification if the IPAB alone was held to grant interim order then, the Registrar's power would become meaningless. The principles of natural justice are inherent in every Tribunal, but a new coat cannot be made out of the cloth of natural justice. The Parliament, deliberately omitted the word "application" from Section 95. If the power to grant stay is held to exist, then Section 124 would have provided for that. The owner of a mark has several rights for renewal, assignment and transmission. If registration is stayed, who will pay the renewal fee and can it be assigned or transmitted. All these three rights will be curtailed, if interim order is granted. If interim stay is granted, then the registered proprietor may not be able to file a suit for infringement before the High Court. IPAB is inferior to the High Court and cannot pass order, which will restrain the person from filing or prosecuting a suit. It was submitted that the mark is registered by operation of law and not by a decision. The operation of law cannot be enjoined. If stay is granted then the mark will be on the register, but the proprietor cannot exercise the proprietary right. The right will be of no consequence, if interim orders are granted. It was submitted that Trade Mark rights are compared to the Copyright, the period is longer in Copyright of the property right. There is global protection for copyright whereas Patent Right is contrary. Therefore, interim orders cannot be issued easily. Public interest demands that the right of the creators and users are also considered there are enough checks in the Act itself. There is no Patent extension for regulatory delays. If stay is granted then the Patent owner will not be compensated for the period during which his rights were curtailed. If there is a lacuna, then it should be set right by legislator not by reading what is not there. The grant of interim order will cause hardship. It is improper to mention pharmaceutical patents as if they are special. The Act does not distinguish between one kind of Patent and another kind of Patent. The Patent is either granted or rejected. There is nothing in between. If stay of patent is granted, then the party will be prevented from filing a suit for infringement. The rights and obligations during the period of stay will remain nebulous. These questions which will arise, if stay is granted and therefore the IPAB cannot be held to have the power to grant interim order.

26. The Registrar and the IPAB have concurrent powers of rectification. In those circumstances, if IPAB alone is given the power to grant interim order, then the Registrar's power would become meaningless. The Parliament has deliberately omitted application "from the purview of Section 95."

27. If IPAB grants interim order, then the proprietors concerned cannot file a suit. This cannot be the intention of the Government. The Board has not been given inherent power, the mark has been registered. The inconvenience alleged to be caused to litigant if there is no power to grant interim order is not a ground for reading into the statute what is not there. The appeals are clearly different from application.

28. The Tribunal has no jurisdiction to grant interim order of stay, since Section 83 of the Trade Marks Act, 1999 declares that the Appellate Board shall exercise the jurisdiction, power and the authority conferred on it by or under the Act. The

jurisdiction of the Board while sitting an Appellate Authority and while exercising the power of original authority is totally distinct. The IPAB rules distinguished the words "Appeal" and "Application" as seen from Section 2(d) and 2(f) of the Act. The powers of the Appellate Board are split out under Section 92(1) and 92(2) and it was implicit that this had been provided for inherent power or powers of injunction under Section 151 and Order 39 of C.P.C. respectively. The words and phrases "in any proceedings relating to an appeal" indicates specifically that the Appellate Board was authorized only to grant injunction or stay in appeals and not in applications, otherwise the words relating to an appeal are unnecessary. The reason why the Appellate Board has no power to grant injunction or stay are because Section 31(1) of the Trade Marks Act, 1999 makes registration prima facie evidence of validity, since this a statutory recognition of validity. Prima facie case for granting interim order will not arise. Section 23 of the Trade Marks provides for Trade Marks being registered if there is no opposition or if the opposition has been dismissed. Similarly, Section 25 of the Patents Act, 1970 provides for opposition to grant of Patent once these stages are crossed and the Trade Mark is registered or the patent is granted, then the person aggrieved is entitled to file a rectification application under Section 57 of the Trade Marks Act or Revocation application under Section 64 of the Act Patents Act, 1970. The law relating to 'Stay' and 'Injunction' will not allow such a person to claim the balance of convenience in his favour by taking the benefit of his wrong not filing an opposition. Therefore, if the provision for stay is recognized it would lead to injustice.

29. At the outset, we must understand the nature of IPAB in spectrum of justice delivery system. In Union of India Vs. R. Gandhi, President, Madras Bar Association (MANU/SC/0378/2010 : (2010) 11 SCC 1) Civil Appeal No. 3067 of 2004, the Hon'ble Supreme Court dealt with in detail the history of the tribunals, the independence of tribunal. The Judgment explained that judicial independence and separation of judicial power from the executive are implicit in our Constitution and crucial. They held that all Courts are tribunals and any tribunal to which the existing jurisdiction of courts is transferred should also be "a judicial tribunal."

30. We respectfully repeat and stress what the Hon'ble Supreme Court has stated that the IPAB is a Judicial Tribunal. What applies to quasi judicial tribunals or Executive Tribunals may not apply to the IPAB. This has to be borne in mind with regard to all the questions that arise under Chapter XI of the Trade Marks Act or for that matter Chapter XIX of the Patents Act. IPAB is introduced to be a substitute for the High Court not only de jure and in form but de facto and in content (vide S.P. Sampathkumar Vs. Union of India & others (MANU/SC/0851/1987 : 1987 SCC 124). The IPAB deals with a jurisdiction which has global implications. The subject matter of the disputes must be decided with at least two International Agreements in mind, the TRIPS and the Doha Declaration. It was born only to speed up the hearing of the disputes which was earlier done by the High Court. As far as these disputes, IPAB must be held to have all the powers of the High Court subject to the limitation that IPAB does not have the constitutional powers of the High Court and its orders are amenable to judicial review by the High Courts. But in so far as the dispute resolving power and procedure it is a substitute for the High court.

31. Before the present Trade Marks Act, 1999 and Patents Act, 1970 as amended came into force, the Acts that were in existence was the Trade & Merchandise Marks Act, 1958 and Patent Act, 1970 (prior to amendment) Section 108 of the Trade & Merchandise Marks Act, 1958 dealt with the procedure for application for rectification before a High Court under Section 47 or Section 56 of the said Act. Section 109(1) dealt with appeal to the High Court from any order or decision of the Registrar under this Act, where the

rectification application was heard by a single Judge of the High Court and an appeal could be preferred to a Bench of the High Court. The appeal under Section 109 of Trade Marks Act was heard by a single Judge, there was a further appeal to the Bench of the High Court. When the Trade Marks Act, 1999 came into force all cases of appeals under Section 109 and all cases of rectification of Register under Section 108 pending before any High Court stood transferred to the Appellate Board and the Appellate Board "in its discretion could proceed with the matter either De nova or from the stage it was so transferred". Similarly, under Section 117(g) of the Patents Act all cases of appeal against any order or decision of the Controller and all cases pertaining revocation of Patent other than of a counter claim in a suit for infringement and rectification of a register pending before the High Court stood transferred to the IPAB and the IPAB "had the discretion to hear the matter de novo or from the stage it was so transferred". Section 83 of the Trade Marks Act and Section 116 of the Patents Act states that the Appellate Board shall exercise the jurisdictional powers and authority conferred on it by or under this Act. This was how the IPAB was born.

32. Section 95 of the Trade Marks Act, 1999 deals with conditions as to making of interim orders, and it reads as follows:

Notwithstanding anything contained in any other provisions of this Act or in any other law for the time being in force, no interim order (whether by way of injunction or stay or any other manner) shall be made on, or in any proceedings relating to, an appeal unless:

- (a) copies of such appeal and all documents in support of the plea for such interim order are furnished to the party against whom such appeal is made or proposed to be made; and
- (b) opportunity is given to such party to be heard in the matter.

Though the section speaks of interim orders whether by way of injunction or stay any other manner, the Members of the Bar spoke only of orders of stay and injunction. It was clear that they were not referring to any other kind of interim orders. It is relevant to note that pending proceedings there are many interim applications seeking orders, e.g. Under Rule 24 of the IPAB Rules application may be filed for continuation of proceedings after the death of a party merger, assignment, acquisition or transmission request with evidence shall be filed and it goes without saying that orders will be passed for continuation of the proceedings.

33. Section 58 of the Indian Patents Act, 1970 provides for amending specification before the IPAB and the Board shall pass orders in any pending proceedings, if it thinks fit allowing the specification to be amended instead of revoking the Patent. This is an interim order also. Interim applications have been filed for cross examining the witness, who has filed proof of affidavit.

34. In C.P.C. we find Part III deals with Incidental Proceedings and specifically Section 75 deals with power to issue commission and Section 75(e) for the purpose of scientific, technical or expert investigation. Part VI deals with Supplemental Proceedings which deals with provision for arrest furnishing of security grant of temporary appointment of receiver and Section 94(e) empowers the Court to make such other interlocutory orders as may appear to the Court to be just and convenient. Section 115 of the Patents Act refers to appointment of Scientific advisers to assist the court but it does not speak of proceedings before the Board with reference to any recent matters interim orders passed for the performance of the experiment. According to the complete

specification, such orders may be necessary in a given situation considering the scientific complexity of many Patents. Therefore it is evident that when the learned counsel who argued against the power to grant interim order, they should be understood as a challenge to the IPAB's power to grant stay or injunction.

35. Section 95 contains a non-obstante clause. It bars the IPAB from granting any interim order unless the conditions in Section 95(a) or (b) are fulfilled. Therefore it should be understood to mean that even if there are provisions in the Act itself or in any other law empowering the Appellate Authority, to grant ex parte, order, the IPAB shall comply with the conditions mentioned in Section 95. One of the provisions which comes to the mind immediately is found in the proviso to Order 39 C.P.C. Rule 3 which requires the court to record reasons why the court proposes to grant injunction without giving notice to the opposite party.

So not withstanding such provision IPAB shall not grant ex parte, order. In this Section the non-obstante clause must be and can only be understood curtailing the scope of a wider power that might be presumed to exist. It is clear that it is not Section 95 which gives the power to make interim order. It is implicit in Section 95 that the IPAB can make interim orders in an appeal or in any proceedings relating to an appeal subject to the conditions in Section 95. The Act does not provide that these conditions should be observed while making interim order in application. The counsel appearing for the Proprietor, would contend that the power to grant interim order is there and submitted that it is possible to understand the absence of such conditions to mean that there are no restrictions while making orders in application.

36. On the other hand, those who argued against the grant of interim orders submitted that the very fact no mention is made to the grant of interim orders in application would mean that this power is not there.

37. One of the strong objections made against the IPAB exercising the power to grant interim orders is that the rights of the IPAB owner would be nebulous if interim orders are granted. The right to file a suit for infringement would be taken away. It is unclear whether the right owner against whom the interim order is given would still be bound to pay renewal fee. It is also submitted that if stay is granted in the absence of any provisions for extension of the date of expiry of the Patent, the Patentee would be grievously prejudiced. The law as it stands presently does not provide that the period during which there is an interim order shall be excluded from the period of validity of Patent. Nor does it provide for extension of the expiry date, if the Patentee had been prevented by an order of stay from exercising the rights of the owner. The possible difficulties that may ensue cannot be the reason for holding that there is no power to grant interim order.

38. Let us assume the appeal is filed by the opponent in an opposition proceeding who is disappointed either by the grant of registration or grant of patent. If he asks for stay of the impugned order and it is granted, then it will result precisely in the same dire consequences. All the disadvantages that are mentioned above will follow, if stay is granted in favour of the opponent/appellant. Therefore that cannot be a reason for holding that the IPAB does not have the power to grant interim order.

39. At this juncture, we must say that when a Patent is granted or a Trade Mark is registered and revocation or rectification is filed, there are no proceedings to be stayed nor any impugned order to be stayed because it is the grant of Trade Mark registration and grant of patent that are challenged. Therefore, the interim order may take the shape

of a relief that could be granted in an Order 39 application. One argument in favour of the interim orders is that if there is fraud the IPAB cannot be silent holding that it has no power to pass any interim order. Many judgments were relied on, which indicated that if an order is obtained by fraud then the courts have the power to recall the order. In GRINDLAYS BANK case (cited supra), the interim order was for setting aside the ex parte, award and there was no express provision. The Hon'ble Supreme Court held that the Tribunal must be considered to be endowed with such ancillary or incidental powers as are necessary to discharge their functions.

40. SUPER CASSETTES case (cited supra) was relied on by both sides, one relying on it, and the other side distinguished it. The Copyright Board is empowered to grant compulsory license in works withheld from public under Section 31 of the Copyright Act. The question was whether the Board had the power to grant interim compulsory license. In SUPER CASSETTES it was held that pending final decision for grant of compulsory license it was held that there is no right or any power to make interim arrangement like grant of compulsory license.

41. The Hon'ble Supreme Court also considered whether the court has incidental powers to preserve the status-quo. The Hon'ble Supreme Court held in the instant case that the power being sought to be attributed to the Copyright Board involves the grant of the final relief, which is the only relief contemplated under Section 31. The Supreme Court held that even in matters under Order 39 and Section 151 C.P.C. an interim relief granting the final relief should be granted in rare and exceptional cases. The grant of interim compulsory license during the stay of the proceedings would amount to granting final relief.

42. In SUPER CASSETTE's case The Supreme Court also stated that the incidental powers would at best be "In order to preserve status-quo, but not to alter the same, which will happen if interim compulsory license is granted".

Dr. Singhvi referred to Section 25 of the Trade Marks Act as also Section 25(i) and (ii) of the Patents Act, which vested the authorities under the said Acts to pass appropriate orders in aid of the final relief. Dr. Singhvi urged that it is in situations such as these, that the doctrine of "implied power" comes into play. Learned counsel submitted that without holding that the Copyright Board had the Authority that the Copyright Board had the authority to direct the grant of interim compulsory licences in keeping with the doctrine of implied power, the provisions of the Copyright Act would be rendered somewhat unworkable.

Mr. Gupta also raised the question as to whether during the pendency of an existing licence granted under Section 30, a dispute could be raised with regard to the fees charged under Section 31(1)(b) of which may be subsequently convert the voluntary licence given under Section 30 of the Copyright Act into a compulsory licence under Section 31 thereof. Mr. Gupta contended that since Section 31(1)(b) of the Act contemplates adjudication, the copyright Board had the trappings of a quasi-judicial authority which inheres in itself the right to pass interim orders in the interest of parties and to apply the principles of natural justice, keeping in mind the public interest. In this regard, Mr. Gupta also submitted that Section 75 of the Copyright Act provides that the orders for payment of money passed by the Registrar of A Copyrights, the Copyright Board or by the High Court would be deemed to be decrees of a Civil Court and would be executable in the same manner as a decree of such court. Mr. Gupta contended that the intention of the legislature would be clear from the scheme of the Act that matters relating to copyright should be dealt with by the authorities under the Act and not the

Civil Court.

This judgment will apply if the Controller under Section 84 had proceeded to grant interim compulsory license against the Patentee that would be the relief itself a positive act done granting the license which is the relief sought for in the main petition. Interim orders that could be given pending revocation or a rectification application are not equivalent to granting of main relief.

In Ashok Kumar Lingala Vs. State of Karnataka & Others (MANU/SC/1260/2011 : 2012 (1) SCC 321), the Hon'ble Supreme Court held that the power to make an interim order is, except where it is specifically taken away by the statute, implicit in the power to make a final order and the Supreme Court has stated this power is exercised by the Authority who has to make final order or an authority who has the Appellate or Revisional jurisdiction and that the interim order serving only as a step in aid of such final order. In that case, the Director of Mines had suspended the mining operation since the Drawing Section and the Mining Department had concluded that the area, forms the subject matter of two leases was overlapping. Government case was that this was empowering in nature until the question of overlapping was decided. The Hon'ble Supreme Court accepted this contention that the order of restraining mining operation was only a temporary interim arrangement.

In Shah Rizas Khan (cited supra) it was held interim ex parte, order can be granted in aid of the final relief In Allahabad Bank case (cited supra) the Hon'ble Supreme Court has held that the Tribunal has wider power than the powers under C.P.C. but it has to observe the principles of natural justice.

In Liberty Footwear Company & Others Vs. Force Footwear Company & Others (MANU/DE/2574/2009 : 2009 (41) P.T.C. 474 DEL), The Delhi High Court held that it was incongruous to hold that IPAB has power to extend the time fixed under the statutory Rules but it is functus officio and is barred from extending time fixed in an earlier order. The Delhi High Court stated that Rule 14 certainly does not bar or expressly or impliedly prevent the IPAB for such extension of time.

In TDSAT Act, M/s. Total Telefilms Private Ltd., case the Tribunal had referred to Union of India Vs. Tata Teleservices (Maharashtra) Ltd., (MANU/SC/3396/2007 : 2007 (7) SCC 517) and held that the question that required determination was whether the Tribunal had authority to issue interim order of injunction and ex parte, orders. It was contended before the Tribunal that Section 16(2) TRAI Act refers to original jurisdiction and the power to grant injunction is not incorporated and that the Legislature having mentioned clearly the procedural issues, it would not have omitted the power to grant interim relief, which is an important measure. It was submitted before us that against this judgment, the parties had gone before the Supreme Court, but no stay was granted.

43. It is brought to our notice that in M.P. No. 262 of 2009 in O.R.A. No. 251 of 2009/TM/DEL dated 24th December, 2010 (M/s. AL Buheira Lacnor Dairies Co., Ltd. Located at United Arab Emirates Vs. Ramesh Verma Trading as R.V. Sales Corporation, New Delhi.), interim order has been granted by this Board.

MSM Discovery Pvt. Ltd. Vs. Viacom 18 Media Pvt. Ltd., & Others (MANU/DE/1935/2011 : 2011 (2) CLJ 658) was relied on.

In Kabushiki Kaisha Toshiba Vs. TOSIBA Appliances Company & Others (MANU/SC/2223/2008 : 2008 (10) SCC 766), the Supreme Court held 1958 Trade Marks Act, had plenary jurisdiction, this was relied on to show that IPAB having been vested

with the powers that were earlier exercised by the Supreme Court must be held to have the same jurisdiction.

In *Rhizome Distilleries Pvt. Ltd. & Others Vs. Pernod Ricard* (MANU/DE/2742/2009 : 2010 (42) PTC 806 (Del) (cited supra) the question was whether the interlocutory orders postulate in Section 124(5) of the Trade Marks Act, 1999 would include those flowing from the concept of infringement and the Court held "unless that there are strong reasons in favour of the plaintiff, the Court would decline injunction predicated on the prayer of infringement and in that context the Delhi High Court states that the power to grant injunction is conspicuous by its absence in Section 92(2).

44. The judgment rendered in *Maneka Gandhi's* case was relied on for the proposition that fundamental rights cannot be deprived without any statutory provision. We do not think that the said proposition applies to the rights created by the Trade Marks Act or the Patents Act. The other objections raised by the learned counsel against the grant of interim orders was that when the Registrar had concurrent power with IPAB to rectify the mark or revoke the patent giving the IPAB alone the power to grant interim order but not the Registrar would create an anomaly. This objection also deserves to be rejected. The High Court had earlier exercised the jurisdiction which is now vested with the IPAB. We assume that this argument would not have been raised then that the Registrar must be deemed to have the power which the High Court had. Of course, we were informed that the High Court seldom granted interim orders in rectification and revocation application. That obviously was really a matter of self restraint than a lack of power.

45. There is one difference, which definitely exists between an application and an appeal. In an appeal, the reasons and the decisions of the Judicial Authority are before us and we examine; whether the Judicial Authority has applied its mind correctly both as regards the facts and law; and whether a fair opportunity had been given to both the parties; whether the documents filed have been appreciated correctly; whether any evidence has been ignored or misconstrued and whether any law has been ignored or wrongly applied etc., But even in an appeal, the Appellate Authority would not interfere merely because, the Appellate Authority has a different view from the original authority on the same set of facts. Unless the original authority's view is arbitrary or per verse, the Appellate Authority will be hesitant to interfere much less to grant interim orders. In rectification application, be it Trade Marks or Geographical Indications or in a revocation application, we only have the registered Trade Mark/Geographical Indications or the granted Patent. The challenger would raise the various grounds alleging that the grant has been wrongly given. Therefore there is no order, which is before the IPAB which makes available the reasons on which the grant has been made. The challenger i.e., the person seeking an interim order may say that there has been fraud and the fraud may be prima facie apparent or there may be situations in Trade Marks Act where for example two brothers who have been crossing a Trade Mark jointly fell but in disagreement and one brother secretly obtained registration. or in a patent matter there may be an obvious failure to comply with Section 8 provision which may not require very elaborate examination of facts. In those cases, the IPAB may have to assess the prima facie case, balance of convenience, irreparable hardship and irretrievable injury

46. In M.P. No. 243/2001 in O.R. No. 192/2011/TM/DEL dated 2nd January, 2012 (*Sunstar Overseas Vs. M/s. KRBL Ltd. Delhi & Another*) the application was for removal of the Mark in "Babal Hind". "Babal Hind" is the Arabic mark for "Gateway of India", which was adopted by the applicant. The applicant raised several grounds for removal of the mark. According to the applicant, the respondent had not complied with the

mandatory provision of law by informing the Registrar and translation of the word "Babal Hind." The IPAB in another rectification application in M.P. No. 170/2011 in O.R.A. No. 160 of 2011/TM/DEL dated 23rd September, 2011 (Modern Flour Mills Ltd., V. KRBL Ltd., & Another) granted an order of stay staying the effect of registration of the mark as regards the applicant. In this case O.R.A. No. 192 of 2011 (supra) also the applicant prayed for an identical relief. The IPAB held that an interim order of stay is a matter of discretion and will depend on the facts of the case and in that case stay was not granted, because, the applicant had moved for the interim order belatedly. We have already given several instances where the IPAB had granted other interim orders, which was not for injunction or for stay. These Interim orders, which are necessary in the interest of justice.

47. It would be difficult for us to hold that interim orders for stay and injunction alone cannot be given but others can be given. This would amount to enacting the law by ourselves. Section 95 also speaks of stay or injunction or any other matter. The two courses open to us are; 1) to hold that the IPAB has no power to entertain any interim application or to pass orders thereon; 2) to hold that IPAB has the power to pass interim orders, and lay down guidelines for the manner in which this power shall be exercised. We think that adoption of the former course would result in collapse of the purpose for which the IPAB was created, whereas if we hold that the IPAB has the power but shall not exercise it arbitrarily it would sub serve the interest of justice.

In *Shree Vardhman Rice & Gen Mills Vs. Amar Singh Chawalwala* {MANU/SC/1680/2009 : 2009 (41) PTC 397 (SC)} Hon'ble Supreme court held as follows:

Without going into the merits of the controversy, 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.

48. For all these reasons, we answer the question in the affirmative as above.

But the following guidelines should be kept in mind while granting interim orders in order to avoid injustice. Wherever we mention the words "interim orders" herein below it must be understood to mean "orders" in the nature of stay or injunction:

- i) We bear in mind the *Shree Vardhaman* case, where an interim order is pressed for. We will first explore the possibility of the main matter can be decided expeditiously. Hearing the main matter shall always be the best option;
- ii) No interim orders shall be granted without hearing the other side as provided for in Section 95(2) with regard to interim orders pending appeal;
- iii) If the Trade Mark or Patent has been in force for a considerable period that will be a condition against grant of interim order;
- iv) Factors like prima facie case, balance of convenience, irreparable injury and hardship shall be kept in mind; and
- v) It is preferable that the order is so worded as to bind only the parties to the proceedings and no one else.

49. We express our appreciation of all the counsel, who made their submission for and against the proposition. We have already mentioned the names of the counsel, who had sent their written submissions as they had difficulties appearing before us. All the members of the Bar, who made their oral and written submissions, were really friends of the court. Without the enthusiastic response from the Bar, we would not have been able to decide this question. We had constituted the Larger Bench only because; there were different views in the various decisions of the Board itself and in law there should be certainty. With that view alone and in the interest of justice this Larger Bench heard this question.

50. The Registry shall issue certified copies of this order free of cost to all those who had made their oral and written submissions. All the other Members of the Bar, who desire to have certified copies, may obtain them on payment of the required fees. This reference is answered as above.

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