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Telefonaktiebolaget LM Ericsson (PUBL) V. Competition Commission of India: A Case Comment

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ABSTRACT

The dichotomy that exists between the Patent Rights and that of the Competition Act is always a debatable topic. The present decided by the Delhi High Court by Hon'ble Justices Najmi Waziri and Vikas Mahajan, stated that the specialized legislation prevails over general laws and in the process of deciding the case mentions section 21 of the Competition Act which acts a harmonizing tool between the existing tussle of Intellectual Property Rights and Competition Act.

INTRODUCTION

The tussle that exists between the Competition Act 2002 and the Intellectual Property Rights is a consistent source of discussion. On one side where we have competition law which advocates and aims for free market concept, absolutely detest the concept and practice of monopolies, and in perseverance to create an ecosystem which is consumer friendly assuring consumers rights and availability of resources. On the other side there is intellectual property rights, in which the essence of legislations provides monopoly rights to the creator or the innovators. The intellectual property rights are set of rights which are statutory in nature and is protected under the Indian Copyright Act 1957, Patents Act 1970, Trademarks Act 1999, etc. This dichotomy or the tussle between Competition law and Intellectual Property Rights is acknowledged by TRIPS under Article 40[1] of the TRIPS Agreement.

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[1] Article 40 of TRIPS Agreement says: "Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology." https://www.wto.org/english/docs_e/legal_e/27-trips_04d_e.htm

The Hon'ble Delhi Court on 13th July 2023, in Telefonaktiebolaget LM Ericsson (PUBL) V. Competition Commission of India[2] finally decided and settled the debate of jurisdiction between the Competition Act 2002 and the Patents Act 1970.

FACTS OF THE CASE

Ericsson, which is a telecommunication company having a global presence owns multiple patents which are generally essential for the functioning of the wireless standards of communication. There was multiple or a series of legal disputes where both Ericsson and Monsanto contested decisions which were made by the Competition Commission of India (CCI). This led to multiple writ petitions.

The core dispute arose when Ericsson had enforced the Standard Essential Patent (SEP) for mobile telecommunication standards. The SEPs, required all the patent holders to license them on fair, reasonable and non-discriminatory in short FRAND practices and the terms to enable consistency across devices from various manufacturers.

To this companies like Intex and Micromax contented that the licensing practice done by Ericsson was neither fair nor reasonable and practice by Ericsson created discrimination and barrier to free market entry and affected fair competition in the relevant market. To this complaint was filed with the CCI under the Competition Act 2002.

CONTENTIONS MADE BY PATENTEES

Senior Advocates contended on behalf of the patentees that:

1. Mere licensing of patents does not result in a sale or purchase of goods or services as no property right or title in a patent is transferable.

2. As there does not exist any sale or purchase of goods under patent licensing hence the CCI do not have any jurisdiction with regards to the enquiry of such business under section 2(f)(ii) of the Competition Act.[3]

3. Such power to enquire into the subject matter of patent licensing is withhold by the Controller or Civil Court under section 84(7) (c) of the Patents Act 1970.

4. It was contended that the CCI has neither the power not the expertise to decide the portfolio licensing and unfair rates. Any allegations with regards to patent holder are dealt under sections 84(6) and 90 (1) (ix) of the Patents Act 1970. The CCI do not hold any role into such matters.

[2] Telefonaktiebolaget LM Ericsson (PUBL) v. Competition Commission of India (2023),LPA 247/2016 https://www.livelaw.in/pdf_upload/judgementphp-2-481114.pdf

[3] Sharad Vadehra, Kanu Priya and Aakriti Vadehra ,*Competition Law v Patent Law: Telefonaktiebolaget LM Ericsson competition Commission of India,* July 25, 2023. https://kankrishme.com/competition-law-vs-patent-law-telefonaktiebolaget-lm-ericson-v-competition-commission-of-india/

5. If anti-competitive practice has been established then such shall be dealt under the ambit of Patents Act provisions and there exist no room for the CCI to intervene upon such matters.

6. On behalf of Monsanto, Dr Singhvi contended that there existed significant differences between cases related to Monsanto and to that of Ericsson as Monsanto did not deal with SEP nor was into the practice of FRAND and stated that Monsanto's allegation was under the umbrella of Patents Act and the CCI do not hold any role upon such matter.

CONTENTIONS MADE BY CCI

1. It was contented by CCI that a mere overlap of the two legislations does not hinder the CCI from exercising the power given under the Competition Act 2002.

2. If any person approaches to CCI with respect to anti-competitive trade practice or abuse of dominant position in the market, then the CCI in such scenario shall apply such powers. For the interest of public and nation, the CCI should be given permission to enquiry upon such anti-competitive trade practice.

3. It was contented by the CCI that the mechanism under the Patents Act is not capable for the Controller to enquire upon the allegations of anti-competitive and abuse of powers by the patentees.

4. When it comes to being the regulator of the market, it is the CCI who is the regulator of the market. The Controller of Patents merely acts as an authority to implement the Patents Act and do not act as a regulator of the market.

5. Under section 84(6) of the Patents Act 1970, it highlights that the Controller only checks upon allegations of anti-competitive behavior once the CCI has looked and determined upon such question.

ISSUES OF THE CASE.

There were two crucial issues which were raised in this case:

1. Which among the two statutes i.e., the Competition Act 2002, and the Patents Act 1970 is having a specialized legislation?

2. Whether the CCI has the power and the authority to exercise upon the patentee's rights under the Patents Act 1970?

3. Whether a patent granted licensed shall cause appreciable adverse effect or shall amount to abuse of dominant position on competition within India?

CONFLICT BETWEEN TWO LEGISLATIONS AND ITS RESOLUTION

When it comes to the question as which among the two laws are to be considered as the special law, it is both the Patents Act as well as the Competition Act which are considered as special laws with regards to their own fields of expertise. Both laws were enacted by the Parliament in the form of Entry 49 of the First List under Seventh Schedule of the Constitution of India for Patents Act 1970 and Entry 21 of the Third List in the Seventh Schedule of the

Constitution of India for Competition Act 2002. The contention raised by the patentees with the support of the maxim *lex posterior derogate priori*[4] it is the Patent Act which overrides the Competition Act.

To decide upon this issue the Court considered the factors such as:

1. The subject matter prevailing in the question.

2. The intention that exist in the statutes.

3. Whether the relevant provision of the two statues gives an indication of any concern where the legislature might have felt that one must override the other.

These were the three-step process which was followed by the Court.

POWERS OF THE CCI V. POWERS OF THE CONTROLLER

When it came to the powers of the CCI, the CCI withholder a statutory authority under the Competition Act 2002. Section 19(1) of the Competition Act empowers the CCI to inquire upon allegations with violates sections 3 and 4 of the Competition Act dealing with anti-competitive agreements and abuse of dominant position. The CCI under sections 27 and 28 of the Competition Act 2002, has powers which can be prevailed by the CCI after the inquiry. Some of the powers are to discontinue any agreement which are in consonance with sections 3 and 4 of the Competition Act, to modify and make amendments to any such agreements, etc.

When it comes to powers of the Controller, sections 84(1) and 84(4) of the Patents Act 1970 empowers to grant compulsory patent license if reasonable requirements are not satisfied by the public. Section 84(5) provides Controller the power under section 88 of the Patents Act. Section 90 of the Patents Act 1970 empowers Controller to settle certain conditions of a compulsory license.

THE DECISION

Both the parties emphasized upon the sections 3(5)(i)(b) of the Competition Act 2002, where CCI defended the 2016 judgement stated that it is *only* the CCI with respect to sections 3(5)(i)(b) and 4 which can determine whether a condition imposed upon a patent license is unreasonable which can amount to abuse of dominant position. To this the Court disagreed.

The court stated that the powers exercised by CCI under sections 19(3) and 19(4) while assessing violations under sections 3 and 4 of the Competition Act is no different to the sections 84(6) and 84(7) when read with sections 83 and 89 of the Patents Act that a Controller has. In the court's view the inquiry conducted by CCI is very identical and like that of a Controller conducted under Chapter XVI of the Patents Act.

[4] "A latter law repeals an earlier law."
https://www.oxfordreference.com/display/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-1282

The Competition Act is a general legislation which pertains anti-competitive agreements and abuse of dominant position. After the inclusion of section 84(6)(iv)[5] by way of amendment to the Patents Act after the Competition passed section 3(5)(i)(b)[6] which provided instructions with respect to anti-competitive agreements.

Looking through the maxim of *generalia specialibus non derogant*[7] or by the maxim *lex posterior derogat priori,* it is the Patent Act which shall prevail over the Competition Act in matters relating to the exercise of rights by a patentee under the Patents Act.

CONCLUSION

The judgement in the present case sets a crucial and significant precedent with regards to this conflicting relation between the patent's rights and the competition law in India. We cannot say that there was no attempt made by the court in trying to harmonize between the two legislations. Under section 21 of the Competition Act 2002 whereby other statutory authority can refer a matter to the CCI. It is now left to be observed how well does this judgment of Delhi High Court stand tall.

[5] Section 84 deals with compulsory licensing.
Section 84(6) (iv) says: "as to whether an applicant has made efforts to obtain a license from the patentee on reasonable terms and conditions and such efforts have not been successful within a reasonable period as the Controller may deem fit:"
https://indiankanoon.org/doc/755971/

[6] Section 3 deals with anti-competitive agreements.
Section 3(5) (i) : "the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under-"
(b) the Patents Act, 1970 (39 of 1970);
https://indiankanoon.org/doc/229714/

[7] A Latin term literally meaning "things general do not derogate from things special".

This is a common law principle for construing legislation which holds that a syntactical presumption may be made that where there is a conflict between a general and a specific provision, the specific provision will prevail.
https://content.next.westlaw.com/practical-law/document/Id50051cae1b011e698dc8b09b4f043e0/Generalia-specialibus-non-derogant?viewType=FullText&transitionType=Default&contextData=(sc.Default)#:~:text=A%20Latin%20term%20literally%20meaning,the%20specific%20provision%20will%20prevail.