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"ARBITRABILITY" AS A ROADBLOCK TO ITS DESTINY, ARBITRATION AS A DISPUTE RESOLUTION MECHANISM UNDER IPR DISPUTES

- Shivam Parmar[1]

ABSTRACT

The growth rate of India is moving at an exponential rate in every sector be it related to development, manufacturing, or innovation. But when the growth increase then the responsibility of the judiciary, legislature, and executive also increases in order to protect, preserve and promote the rights and liability of the owner and consumers. In the sector of information technology in order to protect the intellectual property rights of the owner and also to promote the same, the Indian legislature and judiciary have done major developments in the past few years but the cases of infringement also increasing related to the same. Due to the increased rate of *pendent-lite* of suits in general in India, we have Alternate Dispute Resolution to resolve the disputes in an eminent and faster way. Arbitration is one of the efficient resolution methodologies. But to refer the case to the Arbitration the concept of "Arbitrability" plays a role as the main ingredient. This research article is a small step to determining the Arbitrability of disputes related to the Intellectual Property rights and the various roadblocks to the same along with the analysis of the various judgments of Supreme Court and High Court related to the matter refer to Arbitration when the subject is IPR.

Keywords-

Arbitrability, Intellectual Property Rights, Infringement, *Pendent-lite*, disputes, Information Technology.

[1] Student at University of Petroleum & Energy Studies, Dehradun

INTRODUCTION

Intellectual property rights are considered the saviour of inventions and ideas. During this 21st century, the generation of developments and intellectuals is at the superior level. These intellectual properties are the innovations to determine the future, to protect these developments especially in India the legislature has created various laws, regulations, and frameworks to determine the rights of developers. These intellectual properties are intangible rights as provided in the Black's Law dictionary, 7th Edition.[2] India, in this century, is walking ahead towards the sroadblocks of this path. These IP rights are broadly classified into two main important heads, Patents for inventions and copyrights for literary works, trademarks, and trade secrets.

As the technology moves ahead to achieve its peak, disputes are there to hinder destiny. There are certain Intellectual Property laws in India being enforced since 1947 some are made by the Indian legislatures to protect the IPR of individuals such as the Copyright Act 1947, this law was being considered the oldest law for the protection of literary works, artistic works, musical works, etc. This law was being made for the developments in the field of trade and commerce at a global level, Patent Act 1970, with the main intention to protection of international trade and developments, Trade Mark Act 1999 for the protection of the interest of companies and their goodwill, the Design Act 2000 and many more. During the formation of these legislations the intention of the legislature was very clear, that is to protect and preserve the rights of the intellectual property holders because these developments and inventions help the individual to live life easier.

WHY 'NO' TO LITIGATION

Despite various IP laws in the country disputes arise, due to infringement of the IP rights of the developer by the third party to deceive. Indian Judiciary putting hard efforts in protecting certain infringement but due to the increased rate of Pendete Lite in the country especially in the local courts, the efforts seems to diminish. There are different procedures in the different legislations for various subject matter when it comes to IP rights but the court of the first instance for IP disputes is also considered as the civil court. Despite Intellectual Property Appellate Board and Copyrights Board in order to increase the rate of speedy trial of IP infringements the commercial

[2] The Institute of Chartered Accountant of India v Shaunak H Satyaand Ors., (2011) SCC 650 (India).

Court, Commercial Division, and Commercial Appellate Division of High Courts Act, 2015 created the commercial divisions to adjudicate the matter related to IP subject matter as a commercial dispute and modified the procedure for the same, but also the problem remains the same. There are still huge IP infringements cases are pending in the civil courts of the country and the matters related to patent, copyright, and trademark infringement court only grant a temporary injunction and think that justice is served and cases move ahead for long on but if the parties choose an alternate method to resolve the dispute cases leads to proper adjudication[3].

In the law commission report No 222 titled "Need for Justice, dispensing through ADR" was one highly appreciated report of the commission which mainly focussed on the cases to be referred for Alternated Dispute Resolution by the court for dispensing. The main intention behind this recommendation is to decrease the caseload and increase the efficiency of the speedy trial. Gradual increase in the Intellectual Properties registration also leading to increase in disputes. Increased rate of pendent lite creates hindrance in enjoying IP rights of creators and developers, but Alternate Dispute Resolution can be the essential protector to resolve the dispute because litigation is time-consuming and expensive. The arbitrability and public policy factors limit the scope of the Arbitration to resolve the IP disputes. This article also focuses on dispute resolution through Arbitration when it comes to Intellectual Property Infringement. . India became a member of the TRIPS (Trade Related-Aspects of Intellectual Property Rights) agreement in 1995 after joining WTO and started amending IP laws from time to time to meet the various obligation of this organization and flexibility in dispute resolution was also one of the obligations. In the year 2016 National Policy on Intellectual Property Rights was published with the main intention to protect the new India and Made in India. Protection of creativity, ideas, and intellectuals are the key essentials of the same policy.

CONCEPT OF ARBITRABILITY

Arbitration is considered the most effective dispute settling mechanism due to its key ingredients of neutrality, binding nature, and party autonomy. Arbitration helps the disputing party to overcome the procedural aspects of litigation and access to justice, but Arbitration in the matter related to IPR infringement is different because it is difficult to determine whether the matter is

[3] Bajaj Auto Ltd v TVS Motors Company Ltd, (2010) Madras HC 47 (India).

arbitration and run with no jurisdictional error. Historically the IP disputes are not considered arbitrable because such rights are empowered by the sovereign to the individual and advised to resolve through sovereign courts but as soon the time passed many new organizations formed and people focus on the speedy trials. According to New York Convention, the non-arbitrable nature of subject matter amounts to non-enforcement of the arbitral award. To decide the arbitrability nature of the disputes the public policy of the country plays a determining role and the same applies to IP disputes. Determining Arbitrability of the subject matter is always an issue and difficult, though many amendments have been made in the procedural laws to resolve the dispute the confusion remains the same. IP rights are individual rights and owned by the person, which is available to him against the entire world, can be determined as the right in rem but when the disputes occur are filed against the other person who exercises the same rights and develops the subordinate rights and which are against a person (which are right in personam), the thin line between these two rights amounts to confusion in deciding the matter arbitrable or not. Matters related to rights in rem are to be adjudicated by the tribunal or court only.[4]

In the landmark case of Booz Allen Hamilton v SBI Home Finance[5], which is considered as the first case to determine the elaborative conditions for "arbitrability" of matter. SC provided three main ingredients or tests of arbitrability.

- Whether the matter is of such a nature that can be resolved between the parties itself or the subject matter need the public domain to be adjudicated.
- Whether the subject matter in dispute can be resolved through arbitration.
- Whether the disputes fall under the ambit of an arbitration agreement.

Supreme Court cited the non-exhaustive list of certain matters which does not fall under the purview of matter arbitrable, such as matters and liabilities that arise out of criminal offense, matrimonial disputes, disputes related to divorce, judicial separation, restitution of conjugal rights, etc. But when we focus on the arbitrability of IPR disputes, the list did not expressly or impliedly focus. Booz Allen case expressly states that the matters related to right in personam are arbitrable and the matters related to the right in rem, needs to be adjudicated by the courts or

[4] Booz-Allen & Hamilton Inc v SBI Home Finance Ltd., (2011) SCC 564 (India).
[5] Supra;3

tribunal because these matters (of right in rem) are the result of special statutes and falls within the heads of exclusive jurisdiction. Court also emphasized that suits related to right in personam associated with right in rem may be arbitrable but the existence of an infringement of the subordinates rights needs to be examined.

'Booz Allen' does not empathize specifically related to the arbitrability of the IPR infringements disputes but should be considered as the base to determine the arbitrability but the later establishments of high courts and Supreme Court determines the arbitrability of IP disputes to some extent. The main err which reflects before the court while deciding the arbitrability of the matter pertaining to the subject matter of IPR infringements should not contain mala-fide, vexatious, and intention to deceive the court to enforce the arbitration clause.[6] In Ministry of Sound International Ltd. v Indus Renaissance Partners Entertainment Pvt. Ltd.[7], parties entered into an agreement over the non-use of the term 'Ministry', 'Ministry of Sound' but the defendant got it registered, and the plaintiff moves an application for arbitration under Section-8 of the Arbitration and conciliation Act 1996 due to infringement of the license by the other party and no fees for licensing has been paid. Court transfer the matter to arbitration held that IP disputes can be arbitrable. in Eros International Media v Telemax Link[8], the court held that matters related to IP disputes may be considered arbitrable subject to the relief sought connects right in personam. If the IP disputes in the commercial agreement suppose between two parties over copyright or trademark-related and remedy prayed which can be either infringement or passing off, amounts to the right in personam and hence arbitrable also in the case of Lifestyle Equities CV v O D Seatoman Design Ltd[9] tried to clear the ambiguity between the phrases right in rem and right in personam and reasoned that like patent disputes can be arbitrable if the disputes are related to the licensing dispute or infringement (right in personam) but challenging the validity (right in rem) of the patent will not be arbitrable

CONCLUSION

[6] Rakesh Kumar Malhotra v Rajiv Kumar Malhotra & Ors., (2014) Bom 678 (India).
[7] Ministry of Sound International Ltd. v Indus Renaissance Partners Entertainment Pvt. Ltd., (2009) DLT 156 (India).
[8] Eros International Media Ltd. v Telemax Links India Pvt Ltd., (2016) Bom CR 321(India).
[9] CV v O D Seatoman Design Ltd, (2017) Mad PTC 72 (India).

Arbitrability of the Intellectual disputes depends on the nature of the case and is determined on the differentiation of the right in rem and right in personam. Through the total descriptive analysis, we can clarify our thoughts that there is no overall bar on the arbitration of the IP disputes. Arbitration is the key dispute mechanism that protects the right holders from not just the infringement but also their time, expense, and biasness. Indian judiciary is focussing a lot on the modern problems with modern solutions and when it comes to the new India, judicial establishments have also come a long way. From Booz Allen, where no IP-related subject matter was discussed to Eros International were court directly focussed on the arbitrability of IPR infringement disputes.

Indian legislatures should also have to make express provisions in the various laws governing IPR about arbitrations as the key dispute resolution mechanism like we have section-89 under Civil Procedure Code so that the initial matters which are related to the filling petition for adjudging the IPR matters through arbitration be solved, hence we have various judicial pronouncement related to the arbitrability but still a long way to go.