

SURANA & SURANA AND SHAASTRA IITM INTELLECTUAL PROPERTY LAW MOOT COURT

BEFORE THE HIGH COURT OF JUDICATURE AT MUDHIRAS

(Ordinary Original Jurisdiction)

Injunction Petition filed under Order XXXIX Rule I of Code of Civil Procedure, 1908.

Application No. 123 of 2017

In

CS (Comm) 199a of 2017

GUO INC.

.....*PETITIONER/ PLAINTIFF*

Versus

BASILTRI TELECOM PVT. LTD.

.....*RESPONDENT/ DEFENDANT*

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AFFIDAVIT ON BEHALF THE PETITIONER

I, son of, aged, authorised signatory of Guo Inc. do solemnly affirm and state as follows:

I am the duly constituted authority of the Petitioner. I have been authorised by the petitioner company vide Resolution dated to file the suit along with the interim applications. I am swearing to this affidavit for and on behalf of the petitioner. I am well aware with the facts of the case.

STATEMENT OF JURISDICTION

I state that this Hon'ble Court, being a Chartered High Court is having Original Jurisdiction to entertain this civil suit. The Respondent has got a branch office at Mudhiras which is within the jurisdiction of this Hon'ble Court. I am therefore filing this application in the pending suit under Order XXXIX Rule 1 and Rule 2 read with Section 151, The Code of Civil Procedure, 1908. This Hon'ble Court has got jurisdiction to entertain the application.

STATEMENT OF FACTS

1. Guo Inc., a widget company and owner of a large portfolio of standard essential patents commenced negotiations with Basiltri Telecom Pvt. Ltd., the largest widget manufacturer in India, with the objective of getting the latter to take a license to its standard essential patents.
2. On January 28, 2017, there was a meeting between the two companies, wherein Guo Inc. offered a license to its global portfolio of over 20,000 patents and applications that are essential to widget standards, set by the Widget Standard Organisation, Paris. A sample list of 25 SEPs were shared and Guo Inc. informed Basiltri that they would need to sign a confidentiality agreement, subsequent to which, royalty rates would be disclosed.
3. On March 5, 2017, Basiltri communicates via email to Guo Inc. that they would discuss a license only for Indian patents, subsequent to which, Guo Inc. would have to demonstrate the validity and essentiality of each Indian patent. They expressed their unwillingness to sign a confidentiality agreement, in view of the rates already being public. Guo Inc., however, possesses data to show that Basiltri is exporting to at least China.
4. Basiltri informs that it would like to pay royalty on the price of the components and not the end product, as demanded by Guo Inc. They also want to reduce the duration of the confidentiality agreement and a change of governing law from US to India. Meanwhile, the Managing Director of Basiltri, writes a letter to all widget manufacturers in his capacity as their Association's Chairman where he suggests to convene a meeting at his office on June 20, 2017 to discuss all options, in the wake of, Guo coming after all of them with its patents. He also wishes to discuss on how to increase their exports.
5. Guo is served a show cause notice by the Competition Commission of India, on the basis of information filed by Basiltri, alleging abuse of its dominant position.
6. Basiltri files a revocation petition against Guo's 10 patents, of which two of them were not granted in Japan. Guo is served with notices, in the same.
7. Guo Inc., on August 25, 2017, after Basiltri cancelled its meeting on August 20 at the last minute, files a suit, CS (Comm) 199a of 2017 claiming infringement of Indian patents against Basiltri, before Mudhiras High Court. An application, being application no.123 of 2017 is also filed by Guo seeking interim injunction.

STATEMENT OF ISSUE

- I. WHETHER THE PETITIONER HAS MADE OUT A CASE FOR GRANT OF INTERIM INJUNCTION IN THE SUIT, CS (COMM) 199a OF 2017, INSTITUTED BEFORE THE MUDHIRAS HIGH COURT?**

SUMMARY OF PLEADINGS

I. WHETHER THE PETITIONER HAS MADE OUT A CASE FOR GRANT OF INTERIM INJUNCTION IN THE SUIT, CS (COMM) 199a OF 2017, INSTITUTED BEFORE THE MUDHIRAS HIGH COURT?

The instant matter is a fit case for the grant of interim injunctions, on account of:

A. THE PETITIONER HAVING MADE OUT A *PRIMA FACIE* CASE

Guo Inc. is a holder of Standard Essential Patents, recognized by the Widget Standard Organisation, Paris that contain the required technical specifications that are patentable. There is no valid pre or post grant opposition to the patent. The 6-year Rule laid down by judicial decisions and the general presumption of validity of action of public authorities works in favour of the petitioner. The negotiations were strictly on FRAND terms. The respondent's complaint before the Competition Commission indicates an admission to the validity of the suit patents.

B. THE BALANCE OF CONVENIENCE IS IN FAVOUR OF THE PETITIONER

The petitioner has a vested right under S.48 of the Patents Act,1970 to prevent third parties, who do not have its consent from using its product/process patent. This is enforceable and cannot be restricted. The conduct of the respondent demonstrates the fact that he is an unwilling licensee and therefore, the only relief available to the petitioner to prevent continuing infringement and protect his vested right, is an interim injunction.

C. REFUSAL OF INJUNCTION WOULD RESULT IN IRREPARABLE INJURY TO THE PETITIONER

By the time, the suit is decided and the revocation petitions before the Appellate Board are disposed off, the validity of the patents itself will expire. Guo would, thus, be prevented from asserting and enjoying a vested right under law. This would also mean that Guo is denied of the royalty rates he could have claimed from other widget manufacturers in India. Therefore, the injury suffered by Guo Inc. would indeed be irreparable if interim relief is not granted.

ARGUMENTS ADVANCED

I. THE PETITIONER HAS MADE OUT A CASE FOR GRANT OF INTERIM INJUNCTION IN THE SUIT, CS (COMM) 199a OF 2017, INSTITUTED BEFORE THE MUDHIRAS HIGH COURT.

1. The petitioner, Guo Inc., a widget company that was a widget manufacturer and owner of a large portfolio of Standard Essential Patents, has after an apparent failure of negotiations filed civil suit, CS(Comm) 199a of 2017, claiming infringement of its Indian patents no.2222b, 2222e, 2222f and 2222g against Basiltri Telecom Pvt. Ltd (hereinafter 'Basiltri'), the largest widget manufacturer in India. In addition, Guo Inc. also filed an application, being application no.123 of 2017, in CS(Comm) 199a of 2017, seeking interim injunction.

CONCEPT OF INTERIM/TEMPORARY INJUNCTIONS

2. The word 'injunction' means a court order commanding or preventing an action.¹An interim /preliminary / temporary injunction is issued before or during trial to prevent an irreparable injury from occurring before the court has a chance to decide the case.² Section 108 (1) of The Patents Act, 1970, provides that the court may grant injunction, in any suit for infringement, subject to such terms, if any, as the court thinks fit.³ Moreover, there is an independent remedy under Order XXXIX Rule 1 of the Code of Civil Procedure, 1908, to seek temporary injunctions in a civil suit.
3. The Madras High Court in *Bajaj Auto Ltd. v. TVS Motor Company Ltd.*,⁴ held that normally in cases of interlocutory injunction, including any patent action, the principle is the same, viz, (i) The plaintiff must show/prove a prima facie case that the patent is valid and infringed. (ii) The balance of convenience is in favour of the plaintiff; and (iii) Irreparable loss that may be caused to the plaintiff by not granting an order of injunction.
4. The instant matter is a fit case for grant of interim injunction, since **[A.]** The petitioner has made out a *prima facie* case, **[B.]** the balance of convenience is in favour of the petitioner and **[C.]** refusal of injunction would result in irreparable injury to the petitioner.

¹ Injunction, *Black's Law Dictionary*, (10th ed. 2014).

² Interim Injunction, *Black's Law Dictionary*, (10th ed. 2014).

³ Section 108 (1), Patents Act, 1970.

⁴ *Bajaj Auto Ltd. v. TVS Motor Company Ltd.*, 2008 (36) PTC 417 (Mad).

A. THE PETITIONER HAS MADE OUT A *PRIMA FACIE* CASE

5. *Prima facie* case is not to be confused with *prima facie* title which has to be established, on evidence in the trial. *Prima facie* case is merely a substantial question raised, *bona fide*, which needs investigation and a decision on merits.⁵

i. HOLDER OF STANDARD ESSENTIAL PATENTS RELATING TO WIDGETS

6. Guo Inc. is a holder of Standard Essential Patents that adhere to the widget standards set by the Widget Standard Organization.⁶ The Widget Standard Organization is a Standard Setting Organization, like the European Telecommunications Standards Institute, is entrusted with the responsibility of monitoring the interactions between competing companies in arriving at appropriate technical standards, ensuring transparency and inclusive decision making at every stage. This ensures compatibility and interoperability in the international marketplace.
7. Standard Essential Patents are ‘patents essential to implement a specific industry standard’.⁷ In *Microsoft v. Motorola*⁸, the Court defined a given patent to be essential to a standard if use of the standard requires infringement of the patent, even if acceptable alternatives of that patent could have been written into that standard.
8. Clause 4.1 of the Widget Standard Organization Intellectual Property Rights Policy⁹ mandates that “*each MEMBER shall use its reasonable endeavours, in particular during the development of a STANDARD or TECHNICAL SPECIFICATION where it participates, to inform ETSI of ESSENTIAL IPRs in a timely fashion.*”¹⁰ Clause 15(6) of the Policy defines the term ‘essential’ as applied to IPR means ‘that it is not possible on technical (but not commercial) grounds, taking into account normal technical practice and the state of the art generally available at the time of standardization, to make, sell, lease, otherwise dispose of repair, use or operate Equipment or Methods which comply with a Standard without infringing that IPR. For the avoidance of doubt in exceptional cases where a Standard can only be implemented by technical solutions, all of which are infringements of IPRs, all such IPRs shall be considered Essential.’

⁵ Dalpat Kumar & Anr. v. Prahlad Singh & Ors., AIR 1993 SC 276.

⁶ Problem Statement, p. 3.

⁷ European Commission, Memo/14/322 (Apr. 29, 2014), *Antitrust decisions on standard essential patents (SEPs) - Motorola Mobility and Samsung Electronics - Frequently asked questions*, http://europa.eu/rapid/press-release_MEMO-14-322_en.htm (last visited Nov. 20, 2017).

⁸ *Microsoft Corp. v. Motorola Inc.*, 696 F.3d 872 (9th Cir. 2012).

⁹ Clarification 25, Clarifications to Problem Statement.

¹⁰ 4.1, Annex 6, ETSI Intellectual Property Rights Policy, Apr. 5, 2017.

9. Clause 15(11) defines ‘standard’ ‘to mean ‘any standard adopted by ETSI including options therein or amended versions and shall include European Standards (ENs), ETSI Standards (ESs), Common Technical Regulations (CTRs) which are taken from ENs and including drafts of any of the foregoing, and documents made under the previous nomenclature, including ETSs, I-ETSs, parts of NETs and TBRs, the technical specifications of which are available to all Members, but not including any standards, or parts thereof, not made by ETSI’. Clause 15(12) defines ‘technical specification’ to mean ‘any Technical Specification (TS) adopted by ETSI including options therein or amended version including drafts, the Technical Specifications of which are available to all Members, but not including any technical specifications, or parts thereof not made by ETSI and it has to comply with a “*Standard*” and, therefore, a declaration of essentiality, to be valid, has to identify the Standard or Technical Specification against which an IPR is being declared as essential. The declaration of essentiality is required to be made to ETSI in a prescribed ISLD form.’
10. In the present case, Guo Inc. being a holder of Standard Essential Patents, with due adherence to the widget standards set by the Widget Standard Organization, Paris, would have naturally undergone the process of identifying the particular Standard or Technical Specification that it uses to be essential. Only once this is identified and proved, is a declaration of essentiality before the Standard Setting Organization considered to be valid; after which it is recognized as a standard. Once a technical specification is recognized as a standard, it is not possible to use that standard without infringing the patent. It is not the respondent’s case that they are not adhering to the above standards. Therefore, there is a *prima facie* case that leans in favour of the petitioner, on the issue of infringement of its patents.

ii. TECHNICAL EFFECT – SOFTWARE & HARDWARE OF INFRINGED PATENTS

11. The petitioner is willing to submit the claim charts under seal to this Hon’ble Court. It has also showed willingness to share the same with the respondent on 28th January 2017 and had full intention to display it to them in March 2017, provided they sign a confidentiality agreement with the petitioner in regard to the same and the essentiality of patents.¹¹ The suit patents under dispute are SEPs that read on to the Widget Standards 1; Widget Standards 2; and Widget Standards 3.¹² The respondent infringes the suit patents

¹¹ Problem Statement, p. 3.

¹² Clarification 3, Clarifications to Problem Statement.

also by exporting the same to China without obtaining any license from the petitioner.¹³ It is essential to this application that the suit patents be examined so as to grant an injunction against the respondent from export, sale of the Widget handsets which infringe the suit patents. The suit patents cannot be implemented on a general-purpose computer and only be implemented in a specialised mobile system. The petitioner has made proper declarations to ETSI qua essentiality to telecommunication standards of suit patents. The petitioner has also made general and specific declarations as per ETSI IPR Policy. Clause 4.3 of the ETSI IPR Policy specifically provides that declaration of only one member of a patent family is sufficient as the same by virtue of clause 6.2 of the policy shall be read to imply a global declaration pertaining to all members of the concerned patent family.

12. 2222 b- Suit Patent with Patent No. 2222b filed on 21.09.1999 in India for the purpose of ‘Conserving bandwidth by limiting videos communicated in a network.’¹⁴ The patents 3333b and 4444b belong to the same family as 2222b, they are filed in China and United States respectively.¹⁵ A similar patent (US8214862 B1) conserves bandwidth by comparing video stream from multiple device handsets and sends it across the network to be suitably processed and the best possible source is identified. Other device video transmissions are discontinued. But, such source is allowed to transmit to all the destination devices of all the truncated devices thereby conserving; the bandwidth and power requirements. Several apparatuses are involved which are for content selection, network signal aggregation and bandwidth reduction.
13. 2222g – The suit patent invention title is ‘High Speed Data transmission protocol and system’¹⁶ and is used in telecommunication devices. A similar patent (‘WO1996027959 A1’) works in the manner that the high-speed data signal is divided in the transmitter into parallel sub-channels (two or more sub channels can be allocated) for the transmission over the radio path, to be restored in the receiver. The splitting up of data through various channels will allow for increased data transmission services. The protocol is the method in which such data transmission can be split up in the transmitter and regrouped in the receiver. This involves physical hardware component in the handset. The system refers to the apparatus, product which is tangible in nature. The method is the way the process works and will fall under process patent. The process patent can be implemented in the

¹³ Clarification 3, Clarifications to Problem Statement.

¹⁴ Clarification 37, Clarifications to Problem Statement.

¹⁵ Problem Statement, p. 3.

¹⁶ Clarification 37, Clarifications to Problem Statement.

apparatus and the patent infringement can happen with both the product and process independently leading to different claims. This is vital for transmission of data across various handsets and there needs to be a set protocol and standard so that sent data via radio waves are properly received by the receiver on the other end which could be another transceiver or even the base station.

14. 2222 f – This also involves the apparatus and the method through which the data is transmitted through frames across a network. There are similar patents where the method involves capturing and selectively filtering data packets or frames transmitted between stations (mobile radio stations), it may have apparatus for the purpose of network monitoring and filtering the essential data frames as required with an input and output mechanism. The apparatus is to be essentially integrated with the method so as to achieve the desired effect. This doesn't fall prey to Section 3 (k) of the Patents Act, 1970.
15. 2222 e – This involves error detection in downlink transmission which extensively works with the widget handset in an integrated manner. There are similar patents (US7430178 B2) where method and system performs a concealment operation on the error data block when the error data block is transmitted to and judged to be cyclic redundancy check fail in the receiving side, wherein the CRC code of the error data block has a predetermined bit pattern which causes a downlink radio section to exclude the error data block from being used as a basis for performing a downlink power control operation based on the predetermined bit pattern of the CRC code. This cannot work independently of the apparatus which involve logic processors, signal filters, memory chips to hold on to data in case of loss and radio receiver unit. The claim charts must be taken in to consideration to look at the violation of suit patent.
16. It is submitted the mere mention of an algorithm or a mathematical formula in a patent document should not be inferred to mean that the invention is nothing but an algorithm. The similar issue was dealt by the Delhi High Court in *Telefonaktiebolaget Lm Ericsson (Publ) v. Intex Technologies (India) Limited*¹⁷ and *Telefonaktiebolaget Lm Ericsson (Publ) v. Lava International Ltd.*¹⁸ and the Court concluded that mere presence of algorithm or mathematical formula in a patent document should not be construed as rendering the patent invalid.

¹⁷ Telefonaktiebolaget Lm Ericsson (Publ) v. Intex Technologies (India) Limited, 2015(62) PTC 90 (Del).

¹⁸ Telefonaktiebolaget Lm Ericsson (Publ) v. Lava International Ltd., 2016 (67) PTC 596 (Del).

iii. NO VALID PRE-GRANT AND POST GRANT OPPOSITION TO THE PATENT

17. The instant case does not disclose any pre-grant opposition to the patents registered by Guo Inc. in India. Only now, has Basiltri filed a revocation petition of its Indian patents before the Intellectual Property Appellate Board, bringing an abrupt end to negotiations. Basiltri has been using Guo's patents since it commenced business in 1998-99¹⁹. It seems highly unlikely that the largest widget manufacturer in India and also an exporter of widget handsets²⁰ is completely unaware of the existence of the global portfolio of over 20,000 patents and applications essential to widget standards that Guo Inc. holds. Further, Section 43(2) of the Patents Act, 1970 provides that the Controller shall publish the fact that the patent has been granted and thereupon the application, specification and other documents related thereto shall be open for public inspection.
18. *Arguendo*, even if it is assumed that Basiltri was completely clueless about the existence of patents, it was brought to its notice by a communication sent on August 15, 2016, by Guo Inc.²¹ Tactics to delay the negotiation process were employed by Basiltri. However, the negotiation process began and at no instance did Basiltri dispute the validity of the patents. It was after a year of negotiating, and a refusal to take a license on the terms and rates suggested by Guo Inc, was a revocation petition filed by Basiltri; these casts aspersions on the *bona fide* nature of their claim that the patents are to be revoked.
19. Moreover, there is an apparent intention of 'inducement to infringe' on the part of Basiltri. This can be inferred from the letter sent by the Managing Director of Basiltri, Mr. Gopal, who also happens to be the Chairman of the Association of Widget Manufacturers.²²

iv. PRESUMPTION OF VALIDITY OF ACTION OF PUBLIC AUTHORITY

20. Under Section 114, illustration (e) of the Indian Evidence Act, 1872, there is a presumption that all judicial and official acts have been regularly performed. As per the Latin maxim, *omnia praesumuntur rite at solenniter esse acta donec probetur in contrarium* which means 'everything is presumed to be rightly and duly performed until the contrary is shown'. It follows that all actions of a public authority are presumed to be valid unless proved otherwise. It will be presumed that the Examiner under the Patents Act has conducted the examination properly and exercised due diligence.

¹⁹ Clarification 21, Clarifications to Problem Statement.

²⁰ Clarification 24, Clarifications to Problem Statement.

²¹ Problem Statement, p. 1.

²² Problem Statement, p. 6.

21. In the case of *P.J. Ratnam vs. D. Kanikaram & Ors*²³, the Supreme Court of India held that there would be a presumption of regularity in respect of official and judicial acts and it will be for the party who challenges such regularity to plead and prove his case. In *Zeenat vs. The Principal of Prince of Wales Medical College*²⁴, it has been held that:

".....There is a presumption that every person whether in his private or official character does his duty and unless the contrary is proved, it is presumed that all things are rightly and regularly done. This presumption applies with greater force to official acts. Further it can hardly be controverted that the burden of proof is on the person who maintains that the apparent state of things is not the real state of things. In the cases under consideration, the petitioners, in my opinion, have failed to rebut the presumption or discharge the burden...."

22. In the case of *Narayan Govind Gavate & Ors. v. State of Maharashtra & Ors.*²⁵, the Supreme Court held that:

".....True presumptions, whether of law or of fact, are always rebuttable. In other words, the party against which a presumption may operate can and must lead evidence to show why the presumption should not be given effect to. If, for example, the party which initiates a proceeding or comes with a case to Court offers no evidence to support it, the presumption is that such evidence does not exist. And, if some evidence is shown to exist on a question in issue, but the party which has it within its power to produce it, does not, despite notice to it to do so, produce it, the natural presumption is that it would, if produced, have gone against it. Similarly, a presumption arises from failure to discharge a special or particular onus."

23. A patent application undergoes a detailed examination by the examiner, who generally has domain knowledge in which the application is concerned. The application is then placed before a Controller who is much experienced in the field with subject expertise. The application is published in a patent journal, which enables any person interested to file a pre-grant opposition. Under Section 8 of the Patents Act, an onus is cast upon the applicant to disclose applications filed in foreign countries corresponding to the Indian application. The Controller can also seek the examination reports and documents in such

²³ P.J. Ratnam v. D. Kanikaram & Ors., AIR 1964 SC 244.

²⁴ Zeenat v. The Principal of Prince of Wales Medical College, AIR 1971 Patna 43, ¶6.

²⁵ Narayan Govind Gavate & Ors. v. State of Maharashtra & Ors. (1977) 1 SCC 133, ¶22.

foreign jurisdictions. The Controller is thus aware of the objections raised in other countries.

24. In the instant case, despite one of the suit patents not being granted in the country of Japan, the Controller after due examination as per the statutory requirement granted patents to Guo Inc. By applying the rationale given above, as per Evidence Act and judicial decisions, there is a reasonable ground for validity of Guo Inc's patents.

v. APPLICABILITY OF THE SIX YEAR RULE

25. The Madras High Court in *V. Manicka Thevar v. Messes. Star Plough Works, Melur*²⁶, laid down the Six-year rule when it comes to granting interim injunctions in patent infringement suits. According to this rule, a court will not grant an interim injunction in the case of recently granted patents – with 'recent' being less than six years. The rule presumes that patents older than six years as valid and therefore removes the need to examine the validity of the patent at the interim stage. This decision has been subsequently followed by various High Courts. In *Bilcare Ltd. v. The Supreme Industries Ltd.*²⁷, the Delhi High Court reiterated that it will proceed upon the presumption of validity of patent if the same is more than 6 years old. The date of grant of one of the suit patents 2222b was 2004; 13 years have expired since²⁸. The date of grant of the other three patents have not been specified.
26. Section 43(1). of the Patents Act, 1970 mandates that the patent shall be granted expeditiously to the applicant when the application has not been found to be in contravention to any of the provisions of the Act or it has not been refused by the Controller. Neither of the above factors is attracted in the particular circumstance. Moreover, Section 53 of the Patents Act, 1970 lays down that the tenure of a patent expires after 20 years period starting from the date of filing of the application. It is, therefore, unlikely that six years have not been passed since the grant of the above patents. Therefore, there is *prima facie* presumption of validity of the suit patents.

vi. CONTRADICTION STANDS ADOPTED BY THE RESPONDENT

27. The respondent at different points of time have adopted contradictory stands before different *fora*. Before the CCI, Basiltri has filed a complaint against Guo Inc. alleging abuse of dominant position in the negotiations by forcing Basiltri to sign a confidentiality

²⁶V. Manicka Thevar v. Messes. Star Plough Works, Melur, AIR 1965 Mad 327.

²⁷Bilcare Ltd. v. The Supreme Industries Ltd., 2007 (34) PTC 444 (Del).

²⁸Clarification 28, Clarifications to Problem Statement.

agreement, by claiming royalties based on the price of the end products, and by offering a license only for its global portfolio²⁹. This is indicative of the fact that Basiltri recognizes Guo Inc.'s patents as valid. If not, there is no necessity to approach the Competition Commission. Moreover, the letter that the Managing Director of Basiltri, Mr. Gopal sent to the other widget manufacturers demonstrates their acceptance of the validity of the patents; the words 'Guo is coming after all of us with its patents' shows this³⁰. However, they have simultaneously filed for revocation of all of the patents before the Intellectual Property Appellate Board.

28. In *Telefonaktiebolaget LM Ericsson v. Intex Technologies (India) Limited*³¹, the Delhi High Court, held that filing of complaint before Competition Commission of India on the ground of dominant position of the plaintiff amounts to admission that the plaintiff's suit patents are essential and valid; otherwise, there is no occasion to file the complaint. This particular case is strikingly similar to the case at hand; simultaneous petitions were filed in the IPAB for revocation. The Court, held:

“140. On one hand defendant gave the impression to plaintiff that it wanted to obtain a license for plaintiff's essential patents which were being used by it in various telecommunication devices (mobile handsets/tablets/dongles etc.) being imported and sold by defendant in India, and on the other hand it filed Complaint/Information before the CCI and Revocation Petition before the IPAB (taking two different self-serving stands). The said conduct of the defendant would show that there was no bona fide intention on part of defendant.

144. It is equally well-settled that the party cannot be allowed to approbate or reprobate at the same time so as to take one position, when the matter is going to his advantage and another when it is operating to his detriment and more so, when there is a same matter either at the same level or at the appellate stage.”

29. In the case of *Dwijendra Narain Roy v. Joges Chandra De*³², the Division Bench of the Calcutta High Court has succinctly held:

“It is an elementary rule that a party litigant cannot be permitted to assume inconsistent positions in Court, to play fast and loose, to blow hot and cold, to

²⁹ Problem Statement, p.6.

³⁰ Problem Statement, p.6.

³¹ *Telefonaktiebolaget Lm Ericsson (Publ) v. Intex Technologies (India) Ltd.*, 2015(62) PTC 90 (Del), ¶¶ 140,144.

³² *Dwijendra Narain Roy v. Joges Chandra De*, AIR 1924 Cal 600.

approbate and reprobate to the detriment of his opponent. This wholesome doctrine, applies not only to successive stages of the same suit, but also to another suit than the one in which the position was taken up, provided the second suit grows out of the judgment in the first.”

30. Therefore, it is submitted that the proceeding before IPAB does not have any bearing in deciding the present interim application. The proceedings before the Competition Commission, are a factor that denote the acceptance of validity of the patent by the respondent itself.

vii. STRICT ADHERENCE TO FRAND TERMS

31. In order to prevent discriminatory behaviour by patent-holders, they are permitted to license their patents only on fair, reasonable and non-discriminatory terms (FRAND). As a member of the Widget Standard Organization, it is submitted that as per clause 6.1 of the IPR policy, an IPR owner is required to give an irrevocable written undertaking, that it is prepared to grant irrevocable licences on FRAND terms, to be applied fairly and uniformly to similarly placed players. Basiltri has alleged that Guo is abusing its dominant position;

- i. by forcing Basiltri to sign a confidentiality agreement,
- ii. by claiming royalties based on the price of the end products, and
- iii. by offering a license only for its global portfolio.

a. Confidentiality Agreement

32. Non-Disclosure Agreements (NDAs) are antecedent to any negotiation process, and are a versatile and valuable tool for both licensor and licensee to protect confidential information. NDAs provide firms, a method to collaborate yet maintain their competitive strategy and advantage with respect to others. It is contended that NDAs *per se* do not lead to abusive conduct. Courts in other jurisdictions have also held NDAs to be non-discriminatory³³. In the case of *Microsoft Corp. v. Commission*³⁴, the Court held that,

“Non-discriminatory does not mean that Microsoft must impose the same conditions on every undertaking seeking such licenses.”

³³Microsoft Corp. v. Commission, Case T-201/04, 2007 E.C.R II-3601, at 811.

³⁴ *Id.*

33. NDAs can be entered into to protect several other confidential information. Public disclosure of confidential information would bring down competitive and strategic advantages of all parties involved and would disincentivise innovation.

b. Royalty based on price of end product

34. Determination of Reasonable Royalty is one of the contentious issues. In *Telefonaktiebolaget LM Ericsson v. Mercury Elecs. & Anr.*³⁵, the Court used the net sales price of the downstream device as a royalty base, which comports with recent judicial trends and sound economic reasoning. It is submitted that smallest saleable patent pricing unit (SSPPC) theory was proposed by Judge Radar in *Cornell IP*³⁶ as a narrow evidentiary safeguard to avoid jury confusion, considering the particular facts presented in the case. It was developed as an evidentiary principle and not as a substantive rule, to offset perceived tendency of jurors to overestimate, while apportioning damage claims.

35. Further, limiting the value of SEPs to SSPPC would be ignoring the vast functional benefits contributed by these SEPs to the end device. Hence, the net sale price of the end device or Entire Market Value Rule (EMVR) would be the right measure to quantify the functional value added by the SEP to an end-device. It is contended that royalties based on end product would be the preferred measure to determine royalties as it would account for the functional value of a SEP and it would also take into account the value added by the portfolio to an end device. Therefore, the same cannot be considered as a ground for abuse of dominant position.

c. License for global portfolio

36. It is submitted that the offer from Guo is for a license to a global portfolio which has patents and applications that are essential to Widget standards. However, Basiltri is willing to procure license only for the Indian patents. It is evident that Basiltri being the largest widget manufacturer is exporting its products³⁷ to other countries including China³⁸. Therefore, a license to the global portfolio would be essential.

37. In *Apple Inc. v. Motorola, Inc.*³⁹ the Federal Circuit suggested that injunctive relief should be given when a third party unilaterally refuses to pay a FRAND royalty or unreasonably delays negotiations – a position that has found support from the Federal Trade

³⁵ *Telefonaktiebolaget LM Ericsson v Mercury Elecs. & Anr.*, CS (OS) 442/2013.

³⁶ *Cornell University v. Hewlett-Packard Co.*, 609 F. Supp. 2d 279 (N.D.N.Y. 2009).

³⁷ Problem Statement, p. 6.

³⁸ Problem Statement, p. 5.

³⁹ *Apple Inc. v. Motorola, Inc.*, No. 12-1548 (Fed. Cir. 2014).

Commission and the International Trade Commission. Therefore, it is crystal clear that the terms put forth by Guo during its negotiations did not depart from FRAND terms and has not abused its dominant position.

B. BALANCE OF CONVENIENCE IS IN FAVOUR OF THE PETITIONER

i. CONCEPT OF VESTED RIGHT

38. In *Dalpat Kumar And Another vs Prahlad Singh And Others*⁴⁰, the Supreme Court, with respect to ‘balance of convenience’ laid down that while granting or refusing to grant injunction, the Court, should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that it is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the Court considers that pending the suit, the subject-matter should be maintained in *status quo*, an injunction would be issued. Thus, the Court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit.
39. A *prima facie* case has been established that Guo Inc’s standard essential patents have been infringed by Basiltri. The patents have been got by Guo using the rightful means and it has not been revoked till date. In such a circumstance, till date, Guo holds valid patents and is a patentee as per the Patents Act, 1970. Section 48 of the Patent Act, therefore applies. Section 48 of the Act provides a patentee, the exclusive right to prevent third parties, who do not have its consent from using its product/process patent. This is a vested right granted by a statute and is therefore, enforceable. The Supreme Court, in *Howrah Municipal Corporation. & Ors. v. Ganges Rope Co. Ltd. & Others*⁴¹, enunciated that ‘*With the long usage, the said word 'vest' has also acquired a meaning as an absolute or indefeasible right.*’ Thus, in case the Court does not grant ad interim injunction, Basiltri, will continue to infringe Guo’s patents; thus rendering Guo’s vested right as per law, a nullity.
40. The Division Bench of the Delhi High Court in the case of *Telemecanique & Controls (I) Limited v. Schneider Electric Industries SA*⁴², has held as under:

⁴⁰ *Dalpat Kumar And Another v. Prahlad Singh & Ors.*, AIR 1993 SC 276.

⁴¹ *Howrah Municipal Corp. & Ors. v. Ganges Rope Co. Ltd. & Ors.*, (2004) 1 SCC 663.

⁴² *Telemecanique & Controls (I) Limited v. Schneider Electric Industries SA*, 2002 (24) PTC 632 (Del), ¶30.

“It has to be appreciated that undoubtedly patent creates a statutory monopoly protecting the patentee against any unlicensed user of the patented device. Thus, once a violation is established in case of a registered patent, subject of course, to the patent being used, it will not be permissible to contend that the said patentee is not entitled to an injunction. A monopoly of the patent is the reward of the inventor. It is also to be appreciated that law of the patent is slightly different from the law of copyright and trademark as the patent is granted only for a period of 14 years.”

41. In the case of *Strix Limited v. Maharaja Appliances Ltd*⁴³, it was held:

“It was contended by learned counsel for the Defendant that at an interlocutory stage, the Defendant should be held to have discharged its burden of raising a ‘credible challenge’ to the validity of the Plaintiff’s patent by merely pointing out the existence of the European Patent. This court is unable to agree. In order to raise a credible challenge to the validity of a patent, even at an interlocutory stage, the Defendant will have to place on record some acceptable scientific material, supported or explained by the evidence of an expert, that the Plaintiff’s patent is prima facie vulnerable to revocation. The burden on the Defendant here is greater on account of the fact that there was no opposition, pre-grant or post-grant, to the Plaintiff’s patent.”

42. In *Hexal Australia Pty Ltd. v. Roche Therapeutics Inc.*⁴⁴, a judgment relied upon in the Intex Case⁴⁵ it was held that where the validity of a patent is raised in interlocutory proceedings, the onus lies on the party asserting invalidity to show that want of validity is a triable question.

43. At no point did the respondent question the validity of the patent, during negotiations. Moreover, it has instituted proceedings before the Competition Commission, thereby indicating its own admission of the validity of patents. Therefore, to sustain a claim of invalidity of the patent, the petitioner has to place on record scientific evidence, supported or explained by evidence of expert. *Arguendo*, that is something, the Court should look into in the civil suit, by taking evidence. At this juncture, there has been a case made out for granting interim relief.

⁴³ *Strix Limited v. Maharaja Appliances Ltd.*, MIPR 2010 (1) 181, ¶22.

⁴⁴ *Hexal Australia Pty Ltd. v. Roche Therapeutics Inc.*, 66 IPR 325.

⁴⁵ *Telefonaktiebolaget Lm Ericsson (Publ) v. Intex Technologies (India) Limited*, 2015(62) PTC 90 (Del).

ii. CONDUCT OF THE RESPONDENT – UNWILLING LICENSEE

44. It is evident that despite the terms being fair, reasonable, and non-discriminatory, Basiltri wilfully chose to be intransigent and unreasonable by not securing a license. It is submitted that Basiltri has refused to negotiate a FRAND license with Guo Inc. and was uncompromising to pay what has been determined to be a FRAND royalty. The respondent despite many meetings and negotiations for the purpose of execution of a FRAND license, the was evidently avoiding the same and became unwilling licensee as per its overall conduct⁴⁶. As Basiltri has been unresponsive and had cancelled the meeting therefore, it appears *prima facie* that it is an unwilling licensee, in view of the lack of *bona fide* displayed in its conduct during the negotiation between the parties.
45. It is also contended that by filing the complaint with CCI, Basiltri is using time delaying strategies to avoid a binding licensing agreement while continuing to infringe SEPs. An unwilling licensee should not be able to hide behind competition or public good to force the SEP holder into a royalty rate that would make it a compulsory license. Basiltri is an unwilling licensee and therefore, their complaints with regard to licensing terms cannot be entertained.
46. Therefore, the remedy given in certain cases where Court itself seeks to determine FRAND terms has no application, more so, because revocation petitions also have been filed by Basiltri. Therefore, the only remedy that Guo Inc. has at this stage to protect its vested right is an interim injunction; thus, the balance of convenience is in favour of Guo Inc.

C. REFUSAL OF INJUNCTION WOULD RESULT IN IRREPARABLE INJURY TO THE PETITIONER

47. In *Orissa State Commercial Transport Corporation Ltd. v. Satyanarayan Singh*⁴⁷, the Orissa High Court held that ‘Irreparable injury’ means such injury which cannot be adequately remedied by damages. The remedy by damages would be inadequate if the compensation ultimately payable to the plaintiff in case of success in the suit would not place him in the position in which he was before injunction was refused. In *Ericsson v Best IT*⁴⁸, the Delhi High Court held:

⁴⁶ Telefonaktiebolaget LM Ericsson (Publ) v. Intex Technologies (India) Ltd., 2015 SCC OnLine Del 8229.

⁴⁷ Orissa State Commercial Transport Corporation Ltd. v. Satyanarayan Singh(1974) 40 Cut LT 336.

⁴⁸ Telefonaktiebolaget LM Ericsson (Publ) v. Best IT World (India) Private Ltd.,2015 SCC OnLine Del 11684, ¶25.

“The monopoly rights of granting the patent are limited. It takes several years (almost 8-10 years) before a patent is even granted. Under Section 25, the acceptance is opposed by any party at the stage of pre-grant patent and by aggrieved party after post granting patent. Patents rights can be asserted only once they are granted. Unless the patent is sealed, the suit for infringement of patent is not maintainable. Passing off remedy is not available in patent law. If 4-5 years are spent in negotiations, then just about 5 years are left for patent protection. Under these circumstances, it is imperative that patent rights should be determined in one way or the other on urgent basis.”

48. In the instant case, Basiltri has been using Guo’s patent since 1998. In practice, the Indian courts have huge backlog of cases and trial takes around 7 years, if not more. Thus, interim arrangements are as important as the final outcome. Further, in practice interim injunction orders help both parties to mediate the dispute and reach settlement. By the time, the suit is decided and the revocation petitions before the Appellate Board are disposed off, the validity of the patents itself will expire. Guo would, thus, be prevented from asserting and enjoying a vested right under law. This would also mean that Guo is denied of the royalty rates he could have claimed from other widget manufacturers in India. *Arguendo*, in practice interim injunction orders help both parties to mediate the dispute and reach settlement.

PRAYER

Application No. 123 of 2017

In

CS (Comm) 199a of 2017

FOR THE REASONS AFORESAID, IT IS HUMBLY PRAYED THAT THIS HON'BLE COURT WILL BE PLEASED TO

- i) Restrain the respondent, its officers, directors, agents, distributors and customers, during the pendency of the suit from manufacturing/assembling, exporting, selling, offering for sale, advertising including through their third-party websites, Widget Handsets and Widget Standard 1, Widget Standard 2, Widget Standard 3 compliant technology/apparatus/devices.
- ii) Issue directions to the Central Board of Excise and Customs to issue appropriate instructions directing the customs authorities at every port including airports in India not to allow the export of Widget Handsets and Widget Standard 1, Widget Standard 2, Widget Standard 3 compliant technology/apparatus/devices by the respondent.

AND PASS SUCH OTHER ORDERS AS THIS HON'BLE COURT MAY GRANT AND THUS, RENDER JUSTICE

Signed on this day of 2017 at Mudhiras

COUNSEL FOR THE PETITIONER/ PLAINTIFF