



PUBLIC INTEREST AND INTERIM INJUNCTION -A PROGRESSIVE PERSPECTIVE

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II. LITERATURE REVIEW

I. INTRODUCTION

India has witnessed a number of suits or actions brought by patentees against pharma patent infringement, nonetheless major chunk of these litigations haven't received final judgement since these litigations are yet to go through the trial process due to diverse factors. The cornerstone of the pharma patent holders in the preliminary level is to obtain an instant, interim injunction against defendants. The concatenation of various legal pronouncements over the years have evolved a three-factors criteria that a court should contemplate on, at the time of granting interim injunction. In addition to that, a fourth and a crucial factor was also embraced subsequently by the Indian Courts i.e. "public interest". As against, providing public interest principle its appropriate place, courts have merely positioned it as the fourth factor. This research paper elucidates on this preliminary stage of granting interim injunction, confined to pharmaceutical patent infringement. The paper also bridges the research gaps by addressing issues and discussing various possible remedies.

Shamnad Basheer, Jay Sancklecha, Prakruthi Gowda (2014)¹, have analysed various aspects of infringement suits and granting of injunctions. The paper has focused on the tenets of granting interim injunction and the significance of the initial stage of the same. They have also furnished details and have provided comparative analysis of different countries laws. The research work also throws light on the TRIPS and has provided opinion on the same.

Sandeep Rathod (2016)², has analysed the preliminary stage of granting interim injunction specifically in the cases of pharmaceutical patent infringement. The researcher has elucidated on the three factors considered at the time of granting interim injunction. The study has also provided statistics of the same. In addition to that, the study also has touched on legal framework.

Pankhuri Agarwal (2018)³, has examined different facets of public interest in pharmaceutical patent infringement cases.

¹ Shamnad Basheer, Jay Sancklecha, Prakruthi Gowda, Pharmaceutical Patent Enforcement: A Developmental Perspective, SSRN, (Feb. 27, 2022, 1.20PM), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2535763.

² Sandeep Rathod, Injunctions in Indian Pharmaceutical Patent Infringement Actions: Some Observations, SSRN, (Mar. 01, 2022, 12.35PM),

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2758327.

³ Pankhuri Agarwal, Understanding the Public Interest Element of the Injunction Analysis in Patent Infringement Cases, De-Coding Indian Intellectual Property Law, Spicy IP, (Feb. 26, 2022, 10.35AM), <https://spicyip.com/2018/05/understanding-the-public-interest-element-of-the-injunction-analysis-in-patent-infringement-cases.html>.



The article has specifically spoken about healthcare segment with regards to life saving drugs and affordability. The author has analysed various cases to comprehend the multifaceted concept of public interest.

Swaraj Paul Barooah (2020)⁴, the author has yet again explored a new angle of public interest principle. This study has examined the pandemic situation and its impact on granting interim injunction in pharmaceutical patent infringement matters. The author also has briefed about the evolution of public interest in Indian jurisprudence.

III. RESEARCH GAP

This research paper has studied and analysed numerous other research articles, journals, editorials and commentaries associated with the current topic. Aforementioned literature review has helped the current research by furnishing essential details regarding various facets of the topic. The gap in these reviews and research is that these works have been unsuccessful in explicating the concept of public interest while granting interim injunction in pharmaceutical patent infringement. Furthermore, public interest per se has an autonomous and significant role in ascertaining interim injunctions. The aforesaid research works are also silent on this aspect as well. This research paper aims to bridge this gap and shed light on the initial stage of securing interim injunction.

IV. OBJECTIVE

⁴ Swaraj Paul Barooah, The Public Interest Defence, and the Public Interest Offence – What Is The Way Forward In This Pandemic?, De-Coding Indian Intellectual Property Law, Spicy IP, (Feb. 27, 2022, 9:20 AM), <https://spicyip.com/2020/09/the-public-interest-defence-and-the-public-interest-offence-what-is-the-way-forward-in-this-pandemic.html>.

The primary purpose of this research paper is to delineate the initial stage of granting interlocutory relief with regards to pharmaceutical patent infringement in form interim injunction. With the advancement of time a unique aspect called public interest has come to light as a factor to be considered at the time of granting injunction specifically in case of pharma patent infringement. The paper intends to discuss this aspect coupled with other factors related to the topic in a comprehensive manner.

V. STATEMENT OF PROBLEM

The concept of public interest has been embraced by the Indian Courts while granting interim injunction. The jurisprudence on this concept related to pharmaceutical patent infringement is still evolving with the progression of time. The term public interest is considered to be broad ranging and subjective, courts are expected to define its application and limitation on case to case basis. There is need for more clarity on its application. Public interest factor alone has an autonomous role to play at the time of granting injunction. In addition to that, research in this regard is limited. Thus, the paper aims to highlight various facets of this topic.

VI. ANALYSIS

Injunction is considered as an equitable remedy provided as a court order, in order to do, or refrain from doing certain acts. Interim injunction is form of interlocutory relief, the cornerstone of this form of remedy is to



shield the patentee against the grievance caused by violation of his/her rights. It is often known that patent infringement cases encompass enormous amount at stake and also involves composite scientific know-how, the courts are necessitated to provide well-grounded judicial wisdom and an unwavering benchmark is to be followed by the courts at the time of granting interim injunction. More often than not, it is seen that the end result of the applications for interim injunction is dispositive of the result of the whole litigation⁵.

With evolution of time and series of legal pronouncements, the three factor test has been embraced by the courts while deciding interim injunctions. The granting of interim injunction is dependent on the applicant demonstrating the test. The three factors are:

- i. Prima facie case, that is the applicant would be granted a permanent injunction, provided the case went to the trial entirely based on the proof submitted at the time of hearing the said application.
- ii. In case the application for interim injunction is not granted then it would lead to an irreparable and non – compensable damage to the applicant.
- iii. Balance of convenience – that it should favour the applicant, meaning if the interim injunction is not granted to applicant then he/she would face acute inconvenience, as opposed to that the other party (non – applicant), i.e. the non-

applicant wouldn't face any kind of inconvenience.

Public Interest – the fourth factor test

Besides the usual three factor test, another crucial factor that is rightly considered by the Indian courts while deciding pharmaceutical patent infringement matters is public interest. With the evolution of Indian jurisprudence, the courts have considered public interest as a distinct factor and also a factor perused in balance of convenience test. Public interest has a significant and an autonomous role to play while deciding interim injunction, particularly in case of pharma patent infringement. Rather it has been reduced to an ancillary factor employed to act as a tiebreaker.

On that account, the public interest being positioned as the fourth factor, that the plaintiff (patentee) should be obligated to prove to the court that it wouldn't be detrimental or harmful to public interest if the interim injunction is granted. Nevertheless, this obligation seldom falls on the plaintiff, in actual practice. The entrenchment of the three factor criterion is reckoned to be adequate. As corollary to that public interest is often wielded as an instrument by the defence to argue that the fourth and crucial factor is not in agreement with the plaintiff and therefore they solicit the court to decline the grant of interim injunction. There is another compelling element called as *credible challenge test* that has to be satisfied by the defendant for the authenticity of the asserted

⁵ Victor Vaibhav Tandon, Back to the Drawing Board: Indian Courts' Tryst with Public Interest Principle in Pharmaceutical Patent Infringement, De-Coding Indian Intellectual Property Law, (Feb. 27, 2022, 11.11AM), <https://spicyip.com/2020/11/back-to-the-drawing-board-indian-courts-tryst-with-public-interest-principle-in-pharmaceutical-patent-infringement.html>.



patent, that is because of fact that public interest factor per se wouldn't make a potent defence⁶.

Public interest in India

As discussed earlier, in the matters of pharmaceutical patent infringement apart from the three factor test, a fourth factor i.e. the public interest is also taken into account while granting interim injunction. The general principle in this regard is that the patented commodity must be priced reasonably or economically and the public must have sufficient access to that product.

The first and foremost paramount discussion regarding public interest in matters of pharma patent infringement happened in the case *Roche v Cipla*⁷. Here, the Delhi High Court was of the opinion that public interest is a critical element in the matters of life saving drugs. In this case, the court also had an opportunity to contemplate with regards to the balance of public interest in two ways i.e. between permitting the access to the public to a lifesaving drug (anti – cancer drug), the public interest if the interim injunction is granted to ratify the patent during an ongoing infringement action. The court culminated that the degree of damage or harm the patent owner would endure can be determined on monetary basis⁸.

Having said that, the injury and loss that the public has to endure as a consequence of not granting a lifesaving drug would result in cutting short the lifespan of numerous lives who have nothing to do with suit. Thus, this kind of damage is irreparable and non – compensable because of the fact that the damage caused cannot be reimbursed in monetary terms. This decision was trailblazing since it explored a new dimension which was not touched until then. The concept of credible challenge test as mentioned before also emerged from this particular case. In furtherance, this test was reinforced in form of judgements in many cases such as *Bristol-Myers Squibb v. JD Joshi*⁹, *Bristol-Myers Squibb Company & Anr. v. Ramesh Adige*¹⁰, *Bristol-Myers Squibb Company & Anr. v. D. Shah*¹¹ and *Novartis v. Cipla*¹².

The defence of public interest – a new dimension

The recent ongoing pandemic has proved to be a crucial time period to test the principle of public interest in India. Furthermore, to manifest the above mentioned statement a case worth discussing is *Indoco Remedies v. Bristol Myers Squibb*. In the said case the high court of Delhi granted interim injunction, on finding the fact that Indoco

⁶ Dinesh Kumar Sharma, India: Patent Infringement Litigation In India And Interim Injunctions: Jurisprudence On "Public Interest" Continues To Evolve!, Mondaq, (Mar. 02, 2022, 2.30PM), <https://www.mondaq.com/india/patent/575348/patent-infringement-litigation-in-india-and-interim-injunctions-jurisprudence-on-public-interest-continues-to-evolve>.

⁷ F.Hoffman-La Roche V. Cipla Ltd, (2009) 40 PTC 125 (Del).

⁸ Essenese Obhan and Ayesha Guhathakurta, India: Pandemics, Public Interest And Patent

Infringement In India, Mondaq, (Mar. 03, 2022, 5.32 PM),

<https://www.mondaq.com/india/patent/1016430/pandemics-public-interest-and-patent-infringement-in-india>.

⁹ Bristol Myers Squibb and Anr v JD Joshi and Anr, (2015) 64 PTC135 (Del).

¹⁰ Bristol Myers Squibb Company & Anr v Dr BPS Reddy & Ors, CS(OS) No. 2680/2008.

¹¹ Bristol Myers Squibb Company & Ors v Mr D Shah & Anr, CS(OS) No. 679/2013.

¹² Novartis v Union of India, (2013) 6 S.C.C 1(India).



Remedies drug ‘*Apixabid*’ was in infringement of a patented drug of Bristol Myers Squibb which was in association with *Apixabid*.

The concept of public interest is debated in this particular case because of its autonomous role in deciding interim injunction. As soon as the injunction was ordered, Indoco Remedies appealed to the conscience of the court with the principle of public interest, they pleaded the court to grant permission to sell 58,000 strips of the drug they had manufactured before the interim injunction was issued. Another argument put forward by Indoco Remedies, pointed out that this drug was essential in the treatment of COVID – 19 and that the ongoing pandemic situation called for higher demand of the drug. Besides, they also contended that an application u/s 84 of Indian Patent Act, 1970 for compulsory licence is taxing as a result it would be time consuming considering the pandemic conditions.

The High Court of Delhi was not convinced with the arguments that were put forward by Indoco Remedies, thereby turning down the request to lift the said injunction. Accordingly, the court pinpointed that the evidence provided by Indoco Remedies was not sufficient to show beyond doubt that there was any genuine insufficiency of *Apixabid* in the country or rather it was unreasonably priced. It was expressly mentioned by the court that the material presented before the court did not demonstrate any overwhelming public interest.

The also court elucidated that “*supposed or perceived public interest is not adequate to lift the injunction, unless the injunction order is prima facie unsustainable on merits*”. Yet another new facet of principle of public interest was brought to light by the Delhi

High Court with this case. This further unfolds several other possibilities as to what amounts to “*overwhelming public interest*”. This case is also a representation of the evolution of jurisprudence on this principle with time.

Highlight of the above discussion

First of all, the granting order has to demonstrate ‘*prima facie unsustainable on merits*’ to have the injunction lifted. Secondly, it is explicitly stated that “*reasonable affordability*” and “*availability*” are considered as grounds for public interest for which evidence can be submitted having said that there is a possibility of other cumulative factors that might constitute as “*overwhelming*” public interest, which can circumvent the prior condition of establishing *prima facie unsustainable on merits*. Nevertheless, the proof for the same must be presented. This case also highlights the aspect that the court holds a great amount of discretion while handling cases of public interest.

VII. CONCLUSION

To conclude, on paper it is concordant that the interim injunctions are to be seldomly granted. In furtherance, interim injunctions are expected to be granted only in cases of exception, but the line of demarcation has been blurred while implementing the same in reality. It is by now comprehensible that the public interest principle is not just black and white. In some circumstances there is a possibility that public interest is in agreement with the patentee and in some circumstances there is a probability for multidimensional exercise of public interest which favours the defendant.



The jurisprudence on the concept of public interest is unceasingly developing, in addition to that public interest has taken a distinct shape as against other factors considered while granting interim injunction. This is undoubtedly because of its unique role that this factor has to play while deciding the injunction. The objective of the research paper was to comprehend the importance of public interest while granting interim injunction with reference to that it is desired that in coming times the decisions of the court must indicate the clear judicial application of factors that administer the grant of an interim injunction and as a result furnish some details with regards to the hinderance involved while granting the injunction.

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