

Why India May Become A Major Patent Litigation Forum

By **Ranganath Sudarshan and Udit Sood** (September 10, 2024, 3:48 PM EDT)

While developments in Europe's Unified Patent Court have been the focus of recent attention for patent litigators, a court further east has been reinventing itself with the goal of becoming a future global hot spot for patent litigation: the Delhi High Court.

Two and a half years ago, the DHC implemented new patent rules to respond to "a high growth in the number of patent related litigations" and create "procedures and mechanisms for simpler, effective and efficient adjudication."^[1] Modeling procedures of some of the world's busiest patent forums, the DHC's patent rules prescribe a front-loaded schedule that requires litigants to state their theories and evidence early in the case.

The DHC has also recently issued a series of pro-plaintiff rulings. For example, the court has recently determined fair, reasonable and nondiscriminatory rates for global standard-essential patent portfolios, awarded preliminary injunctions to SEP holders, weakened controls against anticompetitive behavior involving patent rights, and required accused infringers to deposit significant sums as security.

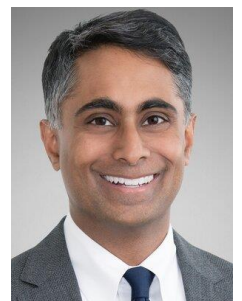
In a March judgment, the DHC awarded royalties to Ericsson for its 2G and 3G standard-essential patents at 10 times the rate found reasonable in the U.S., concluding its 476-page judgment in *LAVA International Limited v. Telefonaktiebolaget LM Ericsson* with a "hope[] that in times to come India will become a leading neutral venue for global SEP resolution."^[2]

Also noteworthy is that India's Patent Office is setting new records for filing activity, with over 100,000 patents granted in a year for the first time last year,^[3] and India now boasting the sixth most busy patent office worldwide, with the largest year-upon-year growth of any major patent office.^[4]

These pro-patent developments are particularly noteworthy for India, a country with a traditional reputation for being anti-patent.^[5]

What is the backdrop to these recent developments? In short, it is India's emergence as a global technology leader.

Last year, India became the fifth largest economy, overtaking the U.K., and it could be third by 2027, surpassing Japan and Germany.^[6] Technology is playing a central role in India achieving the fastest GDP



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growth in the world.[7] Beyond that, geopolitical uncertainties involving China are creating unique opportunities for India, as firms look to diversify their manufacturing bases.

In this article, we discuss reasons why India could become an increasingly important forum for global patent litigation, focusing on several pro-plaintiff developments at the DHC that litigators and companies with significant business exposure in India should know about.[8]

Initiating a lawsuit at the DHC can provide a patentee immediate leverage.

Filing a "plaint" in the DHC triggers a hearing where the judge normally issues summons and considers requests for immediate interim relief. Patent Rule 5 provides judges broad powers at this initial hearing, contemplating issuance of an injunction "[u]pon infringement being prima facie established," except "in exceptional situations," "the court may pass directions for monetary payments instead."

In contrast to the U.S. where preliminary injunctive relief is difficult to obtain, patentees routinely obtain interim injunctions from the DHC. The Supreme Court of India described in its 2009 judgment in *Bajaj Auto Ltd. v. TVS Motor Company Ltd.* the "very unsatisfactory state of affairs" that litigation involving patents "is mainly fought between the parties about the temporary injunction." [9]

Although the DHC has, in response, become more measured in granting interim injunctions, interim orders requiring monetary payments or deposits have become more frequent.

These interim arrangements, or pro tem orders as they are called locally, can be onerous for accused infringers. Consider the 2018 case of *Communication Components Antenna Inc. v. Ace Technologies Corp.*, for example. [10]

There, the DHC granted the patentee an ex parte injunction restraining sale of the accused products. [11] About eight months later, the court allowed the defendant to conduct business subject to furnishing a bank guarantee worth 10% of the accused revenues. [12] A provisional royalty this high could provide significant leverage to the patent holder in patent licensing discussions, encouraging litigators to bring cases in India as part of their global campaigns.

And despite disfavoring interim injunctions, the Supreme Court of India has broadly approved of pro tem orders, particularly in cases that accuse non-Indian companies. [13]

Holders of SEPs appear to be taking advantage of pro tem orders. In *Atlas Global v. TP Link* last year, the DHC observed that "the parties have been in negotiations for almost two years," that "[l]itigation has ensued ... both in the US as also in Germany," and that defendants continue to use "the Wi-Fi 6 technology without paying any royalty." [14] This constituted "a prima facie case for putting in place some pro-tem measure." [15]

A recent case attempts to restore some balance. In *Guangdong OPPO Mobile Telecommunications Corp. Ltd. v. Interdigital Technologies Corp.*, an appellate DHC bench in May held that "the principal objective of the pro tem order [is] to secure the plaintiffs," and that these orders are not "to be imposed as punitive measures." [16] The court clarified that "[i]t is thus necessary that in a contested case the court form a prima facie [view] before granting any interim relief." [17] Notwithstanding this holding, local practitioners expect that pro tem orders may remain broadly available.

Defendants must rapidly present a robust defense and may have to divulge sensitive information.

A defendant must file a "written statement" (i.e., answer) "within thirty days from the date of service of summons." The Code of Civil Procedure contemplates that this time may be extended up to 120 days from service, and in practice courts liberally grant extensions.

But the DHC has held accused infringers to the 30-day deadline strictly. For instance, the court in *Kubota Corporation v. Godabari Agro Machinery And Services* last year held that the defendants' written statement "be positively filed within 30 days," and that "Defendants shall also file [an] affidavit of admission/denial of the documents of the Plaintiff, without which the written statement shall not be taken on record."^[18]

The patent rules impose additional burdens. Patent Rule 3.B(ii) directs that the written statement "shall contain a response to the Plaintiff's claim chart as also a technical analysis." Patent Rule 3.B(v) provides that, without prejudice to other defenses, "[i]f the Defendant is willing to take a license, the quantum of royalty shall also be specified." Patent Rule 4.B(ix) calls for a statement of accounts relating to accused products.

And Patent Rule 3.B(xi) requires disclosure of "[d]etails of any licenses and cross licenses entered into by the Defendant, its group companies, affiliates etc. relevant to the allegedly infringing product including royalties paid or received." The DHC recently enforced this rule in *Atlas Global v. TP Link*, while additionally requiring disclosure of "any license in relation to ... patents [that] are [essential to the] WiFi-6 and/or IEEE802.1ax standards."^[19]

Also of note is Patent Rule 5(i)-(ii), which contemplates "appointment of a Local Commission for inspection" of defendants' premises/facilities. Patent Rule 8(i) allows the court to "seek the assistance of an independent technical expert."

Kubota v. Godabari Agro Machinery illustrates the inquisitorial nature of these rules. At the first hearing, the court ordered the defendants to "place before the Court the total quantity of the impugned products that have been imported till date, and the details of the importers," and to "disclose the quantum and sales figures of the impugned products."^[20]

Additionally, the court appointed two experts to inspect the defendants' machines and "compare the impugned product components ... with the granted claims of the suit patents."^[21] The court and party experts were directed to conduct their inspection "within 10 days" and file their reports "independently within two weeks after execution of the inspection."^[22]

Pro-plaintiff developments continue at the DHC.

In a recent verdict in a closely watched SEP case, the DHC found that defendant Lava International failed to negotiate with Ericsson in good faith for a license to 2G and 3G SEPs.^[23] Finding that damages should "be assessed on the basis of the entire portfolio of patents and not just the asserted suit patents," the court imposed a flat royalty rate of 1.05%, amounting to damages of approximately \$29 million.^[24]

This is easily the largest royalty award by an Indian court in any IP case in recent memory, and perhaps ever. In terms of the rate, as a reference point, in December 2017, U.S. District Judge James Selna of the U.S. District Court for the Central District of California found lower rates ranging from 0.090% to 0.3% of net selling price to be reasonable for Ericsson's 2G and 3G SEPs.^[25]

Of additional note, the DHC appears to be using its discretion to discard procedural formalities that were otherwise defendant friendly. For example, Section 12A of the Commercial Courts Act, 2015, contemplates a "mandatory" presuit mediation. But there is an exception for cases where urgent interim relief is sought, and this has incentivized plaintiffs to seek an interim injunction and/or a pro tem arrangement.

Patent Rules 3.A and 4.A require detailed allegations and evidence from a plaintiff, including "[p]recise claims versus product (or process) chart mapping or in the case of SEPs, claim chart mapping through standards." But the DHC recently dismissed these requirements as mere "formalities" and "guidelines," such that noncompliance does not necessitate dismissal of the suit.[26]

The DHC has also left unchecked conduct that may elsewhere lead to antitrust penalties. Ericsson and Monsanto have long been involved in disputes relating to the jurisdiction of the Competition Commission of India to investigate and penalize misuse of IP rights. While the DHC had in 2016 affirmed certain powers of the CCI in this respect, on July 13, 2023, an appellate bench of the DHC reversed.[27] The court held the CCI has no independent jurisdiction to investigate antitrust violations committed using patents.[28] The Supreme Court of India is now considering this question.[29]

These developments matter to U.S. stakeholders.

As seen above, these recent, generally pro-plaintiff developments at the DHC create incentives for plaintiffs to assert patent rights in India. With U.S.-India trade ties deepening every year, patent disputes in India are likely to become more commonplace.

This will be of relevance to a variety of U.S. stakeholders: for example, companies with significant sales, and therefore royalty exposure, in India. Additionally, for firms whose primary competitors are in India, the prospect of offensive patent litigation could be attractive. Beyond that, companies engaging in global patent litigation campaigns may choose to add India to the mix to create increased leverage in settlement discussions.

Overall, given the rising importance of India in global technology supply chains, companies that operate in India, or are looking to enter the market, would be well advised to develop an India-specific patent strategy.

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[1] Patent Rules, Background.

[2] Lava International v. Telefonaktiebolaget LM Ericsson, CS(COMM) 1148/2016 (DHC, Mar. 28, 2024).

[3] <https://www.worldipreview.com/inta-2024/a-record-breaking-year-for-ip-filings-in-india>.

[4] <https://www.wipo.int/edocs/pubdocs/en/wipo-pub-943-2023-en-wipo-ip-facts-and-figures-2023.pdf>.

[5] <https://www.fiercepharma.com/legal/on-india-trip-u-s-diplomat-cites-concern-about-anti-patent-actions> (Mar. 6, 2014).

[6] <https://www.bbc.com/news/world-asia-india-68823827>.

[7] <https://www.blackrock.com/us/financial-professionals/insights/exploring-india-economy>.

[8] Neither author of this article holds an active license to practice law in India, and nothing in this article should be taken as legal advice pertaining to Indian law.

[9] *Bajaj Auto Ltd v. TVS Motor Company*, 2009 (9) SCC 797, available online at <https://indiankanoon.org/doc/1176027/>.

[10] C.S. (COMM) 1222/2018 (DHC, Nov. 2, 2018).

[11] *Id.*

[12] C.S. (COMM) 1222/2018 (DHC, July 12, 2019), available online at <https://indiankanoon.org/doc/181712592/>.

[13] SLP (C) No. No. 21938/2019 (SC, Sept. 21, 2019), available online at <https://indiankanoon.org/doc/108138778/>.

[14] CS (COMM) No. 575/2023 (DHC, Aug. 28, 2023).

[15] *Id.*

[16] FAO (OS) (COMM) No. 47/2024 (DHC Appellate Bench, May 31, 2024).

[17] *Id.*

[18] C.S. (COMM) 655/2023 (DHC, Sept. 21, 2018).

[19] CS (COMM) No. 575/2023 (DHC, May 10, 2024), available online at <https://indiankanoon.org/doc/138534084/>.

[20] CS(COMM) 655/2023 (DHC, Sept. 21, 2023), available online at <https://indiankanoon.org/doc/38707658/>.

[21] *Id.*

[22] *Id.*

[23] *Lava International v. Telefonaktiebolaget LM Ericsson*, CS(COMM) 1148/2016 (DHC, Mar. 28, 2024).

[24] *Id.*

[25] See TCL Commc'n Tech. Holdings, Ltd. v. Telefonaktiebolaget LM Ericsson, No. CV 15-2370 JVS(DFMX), 2018 WL 4488286, at *52 (C.D. Cal. Sept. 14, 2018).

[26] Novartis v. Zydus Healthcare Limited (DHC, Dec. 12, 2022), available online at <https://indiankanoon.org/doc/56115659/>.

[27] Telefonaktiebolaget LM Ericsson v. Competition Commission of India, 2023 SCC OnLine Del 5022.

[28] Id.

[29] See Indu Bhan, "SC agrees to consider CCI plea against Monsanto, Ericsson" (Mar. 2, 2024), available online at <https://economictimes.indiatimes.com/news/company/corporate-trends/sc-agrees-to-consider-cci-plea-against-monsanto-ericsson/articleshow/108147629.cms>.