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## One more blow to those misinterpreting the Enercon decision of the Supreme Court - infringement lies despite a pending post grant

Vaishali Mittal (Anand and Anand) · Monday, March 9th, 2020

Recently the Hon'ble Delhi High Court in its judgement of CDE Asia Limited v. Jaideep Shekhar and Anr. CS (COMM) 124/2019 has interpreted and clarified the observations made by the Hon'ble Supreme Court in its judgement of Alloy's Wobben and Anr. Vs. Yogesh Mehra and Ors.

The Hon'ble Supreme Court had observed in the aforesaid judgement that only the culmination of procedure contemplated under section 25 (2) of the Patents Act i.e. post grant opposition bestows the final approval of the patent. Further, the Supreme Court also observed that it is unlikely and quite impossible, that an "infringement suit" would be filed while the proceedings under Section 25(2) are pending, or within a year of the date of publication of the grant of a patent.

The Hon'ble Delhi High Court clarified this position of the Hon'ble Supreme Court and held that the aforesaid judgement was in relation to the fact that two parallel remedies cannot be invoked by a party which may result in conflicting decisions.

Further, the Court clarified that as per the Hon'ble Supreme Court, it was unlikely and quite impossible that an infringement suit would be filed while the proceedings under Section 25(2) of the Patent Act are pending or within a year of the date of publication of the grant of a patent. However, the Hon'ble Supreme Court did not discuss the situation where infringement of the suit patent occurs or is alleged soon after the grant of patent. Moreover, the same was not even an issue before the Supreme Court, and thus, the Supreme Court did not hold that a suit for infringement within one year of grant of the patent would not be maintainable and would be liable to be rejected as premature.

The Hon'ble Delhi High Court further stated that the rights in favour of a patentee is available to its benefit on grant of the patent under Section 48 of the Patent Act, even though the said right may not have finally crystallized pending post-grant opposition, in view of the judgement of Alloy's Wobben.

The court was thus, of the opinion that in view of the subsistence of the right of the patentee as per Section 48 of the Patent Act, and there being an alleged infringement,

the patentee is not required to wait for one year period to sue for infringement.

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