

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 20.09.2013

Coram

The Honourable Mr. Justice M. JAICHANDREN
and
The Honourable Mr. Justice M. M. SUNDRESH

Writ Petition Nos. 17539 to 17541, 9729 to 9737 of 2011
& M.P. Nos. 1 to 1/2013 (12 Nos.)

1. Dr. Aloys Wobben
Argestrasse 19, 26607 Aurich,
Germany, represented through his
Constituted Attorney Ms. Vasundhara Raman,
Sriram Layout, Kuppan Road, Cavery Nagar,
Kottivakkam, Chennai-600 041. ... 1st Petitioner in all WPs

2. Wobben Properties GmbH,
Dreekamp 5, 26605, Aurich Germany,
Represented by the Constituted Attorney
Mr. Rakhee Sharma ... 2nd Petitioner in all
the WPs.

(2nd Petitioner impleaded in all the
WPs as per the order of this Court
dated 20.09.2013 by MJJ and MMSJ in
WP Nos. 1 of 2013 in WP Nos. 17539 to
17541, 9729 to 9737 of 2011)

-vs-

1. Intellectual Property Appellate Board,
2nd floor, Guna Complex, Annex-1,
Anna Salai, Teynampet, Chennai-600 018.

2. Enercon (India) Limited,
Plot No. 33, Daman Patiala Road,
Byhimpore, Daman-396210.

3. Controller of Patents, Designs and
Trade Marks, The Patent Office,
Intellectual Property Office Building,
G.S.T. Road, Guindy, Chennai-600 032. ... Respondents in all WPs

Common prayer in WP Nos. 17539 to 17541 of 2011 and WP Nos. 9729 to
9737 of 2011:- Petition filed under Article 226 of the Constitution
of India, pleaded to issue a Writ of Certiorari or Mandamus to call
for the records of the order dated 02.12.2010, 16.11.2010,
18.11.2010, 02.12.2010, 02.12.2010, 18.11.2010, 02.12.2010,

02.12.2010, 02.12.2010, 18.11.2010, 02.12.2010 and 02.12.2010 respectively passed by the first respondent in its proceedings in ORA No.19/2009/PT/CH, ORA No.43/2009/PT/CH, ORA No.40/2009/PT/CH, ORA No.09/2009/PT/CH, ORA No.11/2009/PT/CH, ORA No.20/2009/PT/CH, ORA No.26/2009/PT/CH, ORA No.04/2009/PT/CH, ORA No.25/2009/PT/CH, ORA No.05/2009/PT/CH, ORA No.27/2009/PT/CH and ORA No.38/2009/PT/CH respectively and quash the same and consequently direct the 3rd respondent to restore/reinstate the petitioner's Patent No.IN 202912, Patent No.IN 202885, Patent No.IN 197949, Patent No.IN 202887, Patent No.IN 199045, Patent No.IN 201910, Patent No.IN 198256, Patent No.IN 202947, Patent No.IN 197959, Patent No.IN 200616, Patent No.IN 201008 and Patent No.IN 200280 respectively on the Register of Patents.

For Petitioner : Mr.P.S.Raman, Senior Counsel &
Mr.Sathish Parasaran for Mr.Pravin Anand
Mr.Binny Kalra, Mr.M.S.Bharath Shrawan
Premchandrar, Ms.Saukshyma of Anand &
Anand

For respondents : Mr.Mani Sundar Gopal, SCGSC., for R1&R3
Mr.K.G.Raghavan, Senior Counsel for
Mr.Nikhil Sakhardande, Ms.Swagata Naik,
Mr.R.Parthasarathy, Mr.Ayush Sharona &
Mr.Thriyambak Kannan for R2

COMMON ORDER

M.M.SUNDRESH, J.

W.P.No.17539 of 2011 has been filed for the issuance of a writ of certiorarified mandamus to call for the records of the order, dated 2nd December, 2010, passed by the first respondent in its proceedings ORA No.11/2009/PT/CH and quash the same and consequently, direct the third respondent to restore/reinstate the petitioners' patent No.IN202912 on the Register of Patents in the event that the same is removed subsequent to the filing of the present writ petition.

2. With the same prayer, challenging the similar proceedings, of course with different numbers, other writ petitions have been filed by the very same petitioner. Since all these writ petitions are interconnected on facts and issues, they have been heard together and are given joint disposal by this Common Order.

3. The pivotal issue that looms large before us at this stage is the jurisdiction and its extent of the Intellectual Property Appellate Board in entertaining an application filed under Section 64 of the Patents Act, 1970. To be precise, we are only concerned at this stage with the jurisdiction of intellectual property to decide the validity of an authorisation to come to the conclusion that an agent is duly authorised. While we embark upon this exercise, we

intend to keep away from the factual issues surrounding the case except to the extent required. We adopt this process as we do not wish to arrogate ourself to the position of the Intellectual Property Appellate Board, if we are to hold that it does have the said power and therefore, failed to exercise it. We are also conscious about the fact that we are exercising the power under Article 226 of the Constitution of India and hence, it is prudent to relegate the exercise of validity of the document of authorisation to the authority which is required to do so.

4. Background Facts:

4.1. To decide the legal issue raised, the basic facts surrounding the case are necessary to be placed on record. As mentioned earlier, we do not wish to go into the facts in detail as they are not required at this stage but perhaps at a later point of time.

4.2. The second respondent is an entity which has its existence through joint venture between two groups viz., family of Mehras (Mr.Yogesh Mehra and Mr.Ajay Mehra) and Enercon GmbH, in which, the petitioner is the sole Proprietor. The petitioner is also the Chairman of the second respondent. 56% of the shares of the second respondent, viz., Enercon (India) Limited, is held by Enercon GmbH, thus, having majority holding. The second respondent is also a licensee of the petitioner.

4.3. Mr.Yogesh Mehra, representing the second respondent, filed an application before the Intellectual Property Appellate Court viz., the first respondent herein, seeking to invoke the powers under Section 64 of the Patents Act 1970, by praying for the revocation of patents. The first respondent returned the papers stating the following:

"GPA/Resolution passed by Board of Directors in favour Shri Mr.Yogesh Mehra has to be filed."

An endorsement, which was made by the learned counsel representing the second respondent, is extracted hereunder:

"As regards the production of Board Resolution authorizing the deponent to represent the Company, it is submitted that since the deponent being the managing Director he is empowered to represent the Company without such Resolution."

Thereafter, the application was numbered and taken on file. The petitioner raised the issue of maintainability of the application filed under Section 64 of the Patents Act 1970 before the first

respondent. At that point of time, Mr.Yogesh Mehra made reliance upon the resolution dated 26.04.2007 said to have been passed on behalf of the second respondent. The petitioner questioned its validity. The first respondent passed the orders in the miscellaneous applications stating that the question of validity or Proprietary will have to be decided at the time of deciding the main application. The petitioner challenged the said decision before this Court. This Court, rejected the contention of the petitioner by holding that all the issues shall have to be decided together. The petitioner approached the Honourable Apex Court. But thereafter, he withdrew his petition. The first respondent, thereafter, passed orders on the application revoking the patents against the petitioner. While considering the issue of maintainability, the first respondent has held that the scope of enquiry under Section 64 of the Patents Act, 1970, is limited and, in the absence of an prohibitory order by any appropriate authority, the resolution, dated 26.04.2007, is deemed to be valid and hence, the same has to be relied upon. The first respondent has also held that the validity of the resolution, dated 26.04.2007, cannot be gone into by it in the absence of any power or authority to do so. Thus, after rejecting the objections on maintainability, the first respondent proceeded on merit and thereafter, cancelled the patents against the petitioner.

4.4. There appears a dispute within the second respondent between the group headed by the petitioner and the Mehra's family headed by Mr.Yogesh Mehra and his brother Mr.Ajay Mehra, who is also incidentally a Director of the second respondent. Mr.Yogesh Mehra and his brother filed a suit on a derivative capacity before the Mumbai High Court in 2667 of 2007 claiming to be the minority shareholders suffering by the wrongful conduct of the second respondent, Enercon GmbH. It appears that a resolution was said to have been passed on 26.04.2007 at the instance of Mr.Yogesh Mehra authorising him to take decisions on certain matters without the prior approval of the Board of Directors. In a subsequent proceeding initiated, it was also relied upon by him. The petitioner questioned the said proceeding by filing an application under Section 45 of the Arbitration and Conciliation Act, 1996.

4.5. It is also on record that the petitioner has filed an application under Sections 397 and 398 of the Companies Act, 1956, seeking to stay the resolution dated 26.04.2007. The Company Law Board has refused to interfere with it by taking note of scope and ambit of Sections 397 and 398 of the Act. It also did not go into the validity of the resolution. The petitioner challenged the same before the Mumbai High Court, which has seized of the matter. Now the petitioner has come forward to file the writ petitions challenging the orders passed by the first respondent by revoking the patent granted.

4.6. Pending disposal of writ petitions, the petitioner obtained interim orders and the same were thereafter, vacated by this Court. The petitioner approached the Honourable Apex Court. While

declining to interfere with the interim orders passed in favour of the second respondent, the Honourable Apex Court was pleased to observe that this Court shall not be influenced by the observations made in the interim orders while deciding the writ petitions finally.

4.7. Applications in M.P.No.1 of 2013(12 Nos.) have also been filed before us to implead the proposed party as the second petitioner in favour of whom the petitioner is said to have assigned his rights.

5. Now these writ petitions have been taken up and arguments have been advanced by both sides on the issue of availability and the extent of power that lies with the first respondent in considering the question of entertaining an application under Section 64 of the Patents Act, 1970. As observed earlier, we have decided to record our finding on this legal issue since we feel that before proceeding further, it has to be settled.

6. Submissions of the petitioner:

Mr.P.S.Raman, learned Senior Counsel appearing for the petitioner, would submit that admittedly, the petitioner is the Chairman of the second respondent. It is also not in dispute that Enercon GmbH, in which, the petitioner is the sole proprietor, owns 56% of the shareholding of the second respondent. Therefore, what has been done through the first respondent is nothing but an attempt to resolve an internal dispute within the second respondent by seeking to invoke power under Section 64 of the Patents Act, 1970. The conduct of the second respondent as represented by Mr.Yogesh Mehra is reprehensible. There is no explanation as to why a suit was filed by him in a derivative capacity with the averments that Mehra's are minority shareholders suffering at the hands of majority. The existence of resolution itself is doubtful. Even otherwise, such a resolution cannot stand the scrutiny of law. Admittedly, the resolution does not have the consent of the petitioner and other Directors, who form the majority. A resolution has to be passed with the concurrence of the majority of the Directors. The resolution relied upon is contrary to bye-laws which prescribe a clear procedure. If the Board did not authorise and that the resolution in favour of Mr.Yogesh Mehra is not legally valid, then there is no basis for the application. The learned Senior counsel further submitted that there is no explanation as to why a deliberate incorrect statement was made while re-presenting the papers. The applications were numbered only based upon the endorsement made that Mr.Yogesh Mehra is entitled to file them in his capacity as the Managing Director. In other words, but for the endorsement, the applications would not have been taken on file. There is no explanation as to why the resolution was sought to be placed only at a later point of time when the applications were filed by the petitioner questioning the maintainability. The petitioner cannot be faulted for taking a contrary stand and on the contrary, Mr.Yogesh Mehra is the one who is taking contrary stand. The jurisdiction of

the first respondent is different with that of the Company Law Board. The first respondent has got power and authority under the Patents Act, 1970 read with Intellectual Property Appellate Board Rules 2003. A conjoint reading of the provisions of the Trade Marks Act, 1999, with that of the provisions of the Patents Act, 1970, and Intellectual Property Appellate Board Rules 2003 and 2010 would make the position clear. The petitioner's right and authority could not be exercised as no notice which is mandatory was given at the time of introduction of the alleged resolution dated 26.04.2007. The order passed by the earlier Bench is very clear that the first respondent will have to go into the question of validity of the said resolution. Therefore, it is a case, where the first respondent has failed to exercise the jurisdiction vested in it and hence, the orders passed by the first respondent will have to be set aside. The learned Senior Counsel has made a further submission that the principles of doctrine of election and res judicata do not apply to the case on hand. In support of his contentions, the learned Senior Counsel has relied upon the following judgments.

(i) KAMAL KUMAR DUTTA AND ANOTHER V. RUBY GENERAL HOSPITAL LTD. AND OTHERS (2006) 7 Supreme Court Cases 613;

(ii) UNION OF INDIA V. R.GANDHI, PRESIDENT, MADRAS BAR ASSOCIATION (2010) 6 UJ SC 2945; and

(iii) The Order dated 08.07.2013 made by Intellectual Property Appellate Board.

7. Submissions of the second respondent:-

The learned Senior Counsel appearing for the second respondent would submit that it is not as if the first respondent does not have the jurisdiction to go into any issue at the time of entertaining the application filed under Section 64 of the Patents Act, 1970. However, the said jurisdiction is a limited one. In other words, it is well open to the first respondent to go into the existence of a document of authorisation, but not its validity. As there is no dispute regarding existence since the second respondent relied upon it on the earlier occasion, it cannot be said that it has been created. The doctrine of election and estoppel would very well apply. The Company Law Board has rightly refused to exercise its power in favour of the petitioner. It is the said authority, which is competent to decide the validity of the resolution dated 26.04.2007. It is the petitioner, who is taking contrary stand and not the second respondent. The power conferred under Section 64 of the Patents Act, 1970, in so far as entertaining the application is concerned, is only an ancillary and incidental power to the substantive power relatable to the main case. Similarly, the power given to the first respondent under the Rules is also restrictive, being procedural. Therefore, the orders impugned have been correctly passed. The Division Bench, on the earlier

occasion, did not say in specific terms to go into the validity of the resolution dated 26.04.2007. The very same Division Bench has correctly understood the scope and ambit of the orders passed. Even otherwise, a direction cannot be construed contrary to law. There is a difference between a jurisdictional fact and an adjudicatory fact. The issue involved herein is of an adjudicatory fact, for which, the first respondent does not have any power. As the first respondent is a creature of statute, it cannot exceed the power supplied to it under Section 64 of the Patents Act, 1970. Therefore, the learned Senior counsel would submit that no interference is required. In support of his contention, the learned Senior Counsel has placed reliance on the following judgments.

- (i) DWARKA NATH PRASAD ATAL V. RAM RATI DEVI
(1980) 1 Supreme Court Cases 17;
- (ii) VISWANATH TUKARAM V. THE GENERAL MANAGER,
CENTRAL RAILWAY(F.B.) Volume LIX The Bombay Law
Reporter 892;
- (iii) SHRI AMBICA MILLS CO. LTD., V. SHRI S.B.BHATT
AND ANOTHER (1961) 3 SCR 220: AIR 1961 SC 970;
- (iv) CARONA LTD. V. PARVATHY SWAMINATHAN & SONS
(2007) 8 Supreme Court Cases 559;
- (v) UNION OF INDIA AND ANOTHER V. PARAS LAMINATES
(P) LTD. (1990) 4 Supreme Court Cases 453;
- (vi) GAJRAJ SINGH AND OTHERS V. STATE OF U.P. AND
OTHERS (2001) 5 Supreme Court Cases 762;
- (vii) RAVINDRA SINGH V. PHOOL SINGH AND ANOTHER (1995)
1 Supreme Court Cases 251;
- (viii) CELLULAR OPERATORS ASSOCIATION OF INDIA AND
OTHERS V. UNION OF INDIA AND OTHERS (2003) 3
Supreme Court Cases 186;
- (ix) MAHANAGAR TELEPHONE NIGAM LTD. V. TELECOM
REGULATORY AUTHORITY OF DELHI (AIR 2000 DELHI 208);
- (x) SAJJADANASHIN SAYED MD. B.E. EDR.(D) BY LRS.
V. MUSA DADABHAI UMMER AND OTHERS (2000) 3 Supreme
Court Cases 350;
- (xi) SUPER CASSETTES INDUSTRIES LIMITED V. MUSIC
BROADCAST PRIVATE LIMITED (2012) 5 Supreme Court Cases
488;

(xii) NATIONAL INSURANCE CO. LTD., V. MASTAN AND
ANOTHER (2006) 2 Supreme Court Cases 641;

(xiii) CHETAK CONSTRUCTION LTD. V. OM PRAKASH AND
OTHERS (1998) 4 Supreme Court Cases 577; and

(xiv) The Order dated 09.03.2012 made by Intellectual
Property Appellate Board.

8. DISCUSSION:

As proposed by us in the preceding paragraphs, we are concerned only with the extent of power that lies with the first respondent in deciding the issue of its jurisdiction while entertaining an application under Section 64 of the Patents Act, 1970, that is, to the validity of the resolution said to have been passed on 26.04.2007. Before embarking upon the said exercise, we would like to make it clear that we are not very much concerned with the submissions made, on the conduct of the parties in taking different stands, doctrine of election and the issue of res judicata.

We feel that these issues are irrelevant and unnecessary for deciding the power of the first respondent. The parties are always at liberty to raise different contentions before different forums. They are one of fact to be appreciated. Whatever may be the stand of a party, if a statutory body has power, it has to exercise the same. Therefore, merely because the parties have taken different stands to suit their convenience, the same will not have a bearing on the jurisdiction of a forum to entertain. Similarly, on the issue of doctrine of election and issues of estoppel, we do not find them sufficient to reject the writ petitions. The question in this case is one of jurisdiction. It is the second respondent, represented by Mr. Yogesh Mehra, who moved the first respondent though the petitioner took objections on maintainability. At that point of time, Mr. Yogesh Mehra produced the resolution. Therefore, considering the abovesaid fact, we do not find any application of doctrine of election. The reasoning given by us earlier also would apply to this question as well. Like wise, we do not find any res judicata that would arise in this case. The power of adjudication and the function of the first respondent is defined statutorily as that of the Company Law Board. They operate on different fields and therefore, their waters do not mix with each other even though they may run on the same channel. In other words, the first respondent will have to decide the issue only to satisfy itself as to whether, the application before is maintainable in law or not. For that purpose, it has to exercise its jurisdiction. Merely because its exercise overlaps on the power of another statutory authority, it cannot be said that such a power cannot be used. Further more, on a reading of the decision of the Company Law Board, we do not find any specific finding in favour of any of the parties touching upon the validity of the resolution dated 26.04.2007. Therefore, we do not wish to go into the hypothetical question on the binding nature of a decision rendered by another competent authority on the first respondent. Suffice it to

state that there is no res judicata that would arise, that too, between two statutory bodies. Hence, we make it clear that there is no impediment for us to decide the main issues that have been raised before us. Incidentally, we also hold that the first respondent cannot be estopped from exercising its power on the doctrine of election and res judicata.

9. PROVISIONS OF ENACTMENTS:-

In order to answer the question raised, we feel that it is imperative to analyse and dissect at length, the various provisions contained under the Trade Marks Act, 1999, the Patents Act, 1970 and the Intellectual Properties Appellate Board Rules 2003 and 2010. Therefore, we intend to take up the re-enactments one by one.

(a) Section 92 of the Trade Marks Act, 1999:-

(i) It is our endeavour to understand the scope and ambit and the extent of power available to the first respondent under the Trade Marks Act, 1999. Chapter 11 of the Trade Marks Act, 1999, deals with the establishment, composition powers and procedures of the Appellate Board. Section 91 of the Trade Marks Act, 1999, provides for an appeal to the Appellate Board by a person aggrieved. Section 92 of the Trade Marks Act deals with the procedure and powers of the Appellate Board. It specifically states that the Appellate Board shall not be bound by the procedure laid down in the Code of Civil Procedure, 1908. On the contrary, it shall be guided by the principles of natural justice. Further more, subject to the provisions of the Act and Rules, it shall have powers to regulate its own procedure. Section 92(2) of the Trade Marks Act empowers the Appellate Board to exercise all the powers vested in a Civil Court under the Civil Procedure Code while trying a suit in respect of receiving evidence, issuing commissions for examination of witnesses, requisitioning any public record and any other matter which may be prescribed. Under Section 92(3) of the said Act, any proceeding before the Appellate Board shall be deemed to be a judicial proceeding.

(ii) It is seen that the provisions contained under Section 92 of the Trade Marks Act, 1999, are applicable to the Appellate Board constituted under the Patents Act, 1970 as per the specific provisions contained under Section 117-B of the Patents Act, 1970. Therefore, we have to examine the scope and ambit of the powers conferred under the Trade Marks Act, 1999. Under Section 92 of the Trade Marks Act, 1999, the first respondent is not bound by the procedure laid down under the Code of Civil Procedure. Therefore, it goes without saying that the powers of the first respondent are rather wide and not confined to the Civil Procedure Code. In other words, the Appellate Board can exercise the power under the Civil Procedure Code and also go beyond it. This is not the end of it. Section 92 also says that the first respondent shall be guided by the principles of natural justice. Principles of natural justice inhere

in them both human and natural law. They are the basic principles of law which are bound to be followed. Therefore, when the legislature makes a reference to principles of natural justice, then such an exercise of power is not restricted by the Civil Procedure code. Hence, we have no hesitation in holding that while exercising power, the first respondent-Board is entitled to have its own procedure. The only fetter that would come in the way of the first respondent in exercising its powers is when the Act or Rule prohibit it. Such a power given to the first respondent is akin to a power of the Civil Court under the Civil Procedure Code while trying a suit. It extends to receiving evidence, issuing commission for an examination of the witnesses, etc. Now we come to the question of receiving evidence. Such an evidence can be oral or documentary in relation to the matters of fact under enquiry. These matters of fact can be facts in issue or relevant facts. When once this evidence is received by the Appellate Board, could it be said that it can only receive them but cannot go beyond them. An authorisation filed will have to be construed as an evidence. In other words, can it be said that the first respondent does not have the power or authority to go into the validity of the evidence produced. The evidence is required only in relation to the matters of fact under enquiry. The matter of fact under enquiry in the present case on hand is to the validity of the resolution dated 26.04.2007. When an evidence is produced before it, the first respondent is bound to consider the same and decide upon it. For that purpose, it has to act as a Civil Court. It is precisely for this reason Section 92 of the Act declares the proceedings of the first respondent as judicial proceedings. When once a proceeding under Section 92 is declared as judicial, then the power would start from the time of filing till the final adjudication. A restricted interpretation would make the provision of Section 92 of the Act and the other provisions of law as otiose and redundant. The first respondent merely checks and satisfies its own jurisdiction and nothing else. Production of an evidence is different from its proof of validity.

(iii) A procedural law will have to be read in consonance with a substantive law. The object behind a procedural law is to aid a substantive law. The procedural law is required to exercise, a substantive power. Therefore, it is also possible to understand a substantive power through the procedural law, as such, a procedural law having wide power would throw light on the scope and extent of a power available in a substantive law.

(iv) Therefore, on a reading of Section 92 of the Trade Marks Act, 1999, as a whole, we have no hesitation in coming to the conclusion that the powers of the first respondent are rather wide enough to decide its own jurisdiction by going into the validity of the document produced before it to satisfy itself that an authorisation is valid in law.

(b) Provisions of the Patents Act, 1970:

(i) Section 2 Sub Clause (s) of the Patents Act, 1970, defines a person which "includes the Government". Section 2(f) defines a person interested, which includes a person engaged in, or in promoting, research in the same field as that to which the invention relates. Section 64 under Chapter XII of the Act deals with "Revocation of patents". It specifies that a patent can be revoked on a petition of any person interested. Chapter XIX deals with appeals to the Appellate Board. Under Section 116 of the Act, the Appellate Board established under Section 83 of the Trade Marks Act, 1999, shall be the Appellate Board for the purposes of the Patent Act, 1970. Section 117-A deals with "Appeals to Appellate Board against the orders passed under various provisions of the Act. Section 117-B of the Act deals with the procedure and power of the Appellate Board. It specifies that Section 92 of the Trade Marks Act, 1999, shall apply to the Appellate Board in discharge of the functions under the Patent Act, 1970. Section 117-C of the Act deals with the bar of jurisdiction of Court as well as the other authority to exercise any power in relation to the matters referred to under Sections 117-A or 117-D. Section 117-D of the Act provides for a procedure for an application for rectification, etc, before the Appellate Board for a patent under Section 71 and 64 of the Act as the case may be. These are all the provisions governed under the Patents Act, 1970, which are relevant for the purpose of the issues raised before us.

(ii) Coming to the definition clause, it is very clear that the definition of "a person" mentioned under Section 2(s) of the Act is very wide. It merely includes the Government as it is only illustrative. But such a person will have to be a person in the eye of law both actual and juristic. Therefore, there is no difficulty in appreciating the fact that the second respondent Concern, being a juristic person, would come under the purview of Section 2(s) of the Act. But, the question for consideration is as to whether such a person is to be represented by whom and a further question is the extent of the power available to the first respondent to go into the same. Under Section 64 of the Act, a patent can be revoked only on a petition by any 'person interested'. Now, the moot question is what is a petition by a 'person interested'. In order to understand the scheme of the Act and the powers of the Board, we have to primarily rely on the provisions contained under Chapter XIX of the Act, which deals with the functions and powers of the Appellate Board. Now, coming to Section 117-B of the Act, it clearly states that provisions of Section 92 of the Trade Marks Act, 1999 shall apply to the Appellate Board in discharge of the functions under the Patents Act, 1970. Therefore, as we discussed earlier, the power conferred under Section 92 of the Trade Marks Act, 1999, will have to be imported to and vested with the first respondent in deciding an application under Section 64 of the Patents Act, 1970.

(iii) Coming to Section 117-C of the Act, it specifically states that no Court or Authority shall have or be entitled to, exercise any jurisdiction, powers or authority in relation to the

matters referred to in Sub Section 2 of Section 117-A or Section 117-D of the Act. The provision is very clear to the extent of ousting the jurisdiction of any Court. It not only ousts the jurisdiction of the Court inclusive of the Civil Court, but also, any other authority as well. Therefore, under Section 117-C of the Act, the powers of the first respondent Board are rather wide. Further more, Section 117-C makes a reference to any jurisdiction of the Court or authority. In other words, if a matter involves an application for rectification or an application for revocation, then such an issue can never be taken up before any other forum. That is why, Section 117-C of the Act makes a specific reference to any jurisdiction, power or authority to be exercised by any Court. This can be meant only on the substantial issues covered under Sections 64 or 71 of the Act as the case may be. However, we are of the view that when an application itself is not maintainable, then the power shall have to be exercised by the first respondent for all practical purposes. In other words, such a power cannot be divided to be made to exercise in a partial manner by giving a narrow interpretation on the powers of the first respondent not to go in to the issue of maintainability of an application as it would lead to absurdity making the very power in-operative. We are also of the view that the question of maintainability involves a substantial issue. One has to see the net result. Ultimately, the Board has to decide as to whether a patent has to be revoked or not. When the application is rejected by it as not maintainable then resultantly, the relief is rejected. This is exactly the functioning of the Board. No doubt, it is true that the extent of exercise of power is one of fact and therefore, we do not propose to express anything on it in general terms. When Section 117-C of the Act bars the jurisdiction of the Court, then the powers of the Court will have to be imported to the first respondent. It can be exercised at the time of entertaining the application or at the time of deciding the issue regarding the nature of relief to be granted on merits. Therefore, we do not have any hesitation in holding that under the Patents Act, 1970, the first respondent is duty bound to go into the validity of the resolution passed when it is questioned on sufficient grounds, for the purpose of satisfying itself about the due authorisation by the second respondent in favour of Mr.Yogesh Mehra.

(c) Intellectual Property Appellate Board (Procedure) Rules 2003 and

2010:

(i) Rule 2(c) of the Intellectual Property Appellate Board (Procedure) Rules 2003 defines "agent", according to which, he is "a person duly authorised by an applicant to present his application". Rule 8 deals with the procedure relating to documents accompanying an application or appeal. It also states that all evidence shall be in the form of affidavits. Rule 8(3) stipulates that when the party is represented by an authorised representative, a copy of the authorisation to act as the authorised representative shall be appended to the application or appeal.

(ii) Now coming to the Intellectual Property Appellate Board (Patents Procedure) Rules, 2010, Rule 5 deals with "documents to accompany appeal or application". It also says that every application shall be accompanied by the evidence relied on by it in support of the application in the form of affidavits with Exhibits. The Intellectual Property Appellate Board (Procedure) Rules 2003 has been framed in exercise of power conferred under Section 92 of the Trade Marks Act, 1999, whereas, the Intellectual Property Appellate Board (Patents Procedure) Rules, 2010, has been framed in exercise of power conferred under Section 117-H of the Patents Act, 1970. We are referring to the subsequent Rules only for the purpose of showing that there is not much difference between them except that the latter is of clarificatory in nature. In the case on hand, the second respondent has filed an application under the Intellectual Property Appellate Board (Procedure) Rules, 2003.

(iii) The Rules define an authorised agent as a person duly authorised by an applicant. We would like to give emphasis to the word "duly authorised". A mere authorisation by itself may not be sufficient but it shall be duly authorised in favour of the agent. This is an issue, which has to be considered by the first respondent and no one else. If we construe this rule in consonance with the relevant enactments under the patents Act, 1970, as well as the Trade Marks Act, 1999, then the position is rather clear that it is incumbent upon the first respondent to satisfy itself that an agent is duly authorised. Perhaps that is the reason why, the Registry of the first respondent raised a query asking for authorisation, which was not produced by the second respondent at the time of numbering the application. We do not propose to express anything on that except by saying that the first respondent is duty bound to satisfy itself about the due authorisation especially when a cloud is raised over it. A due authorisation would mean a proper authorisation in law. It also means that the authorisation has to be obtained by following a proper procedure. Further, Rule 8 stipulates that a copy of the authorisation shall be appended to the application or appeal. This would only mean that it is mandatory to file authorisation, which is duly executed and hence, once it is filed, the first respondent will have to satisfy about its due execution. In this connection, we would like to make it clear that the manner of satisfaction only lies with the Board and therefore, it need not conduct a roving enquiry in each case. However, when certain issues are raised on an authorisation, then, it has to consider the same on the facts of each case. In this context, we do not find any repugnancy or excessive legislation that has been incorporated into the Rules. We are also of the view that the Rules have been introduced in consonance to the enactments. If we are to hold that the Board is a Civil Court, then such a power has to be conferred upon it. Therefore, on a conjoint reading of the Rules and the provisions of Trade Marks Act, 1999, and the Patents Act, 1970, we have no difficulty in appreciating the position of law that the powers of the first respondent is rather wide to satisfy itself on the question of due authorisation.

(d) Cumulative Analysis and its effect:-

(i) To understand how the first respondent-Board shall perform its role, a combined study of the provisions referred to above is required.

(ii) Section 64 of the Patents Act, 1970 deals with the substantive power of the Board. Such a power has to be exercised in dealing with an application filed by a person interested. The Intellectual Property Appellate Board (Procedure) Rules, 2003, deals with the procedure in deciding an application filed under Section 64 of the Patents Act, 1970. One such requirement is an authorisation from a principal in favour of an agent. The definition section prescribes for an authorisation duly executed. Therefore, it mandates a due authorisation. Section 92 of the Trade Marks Act, 1999, read with the provision contained in Chapter XIX of the Patents Act, 1970, specify the powers and functions of the Board to decide an application filed under Section 64 of the Patents Act, 1970. They substantially deal with the procedural law in the functioning of the Board. The Board while exercising such powers is untrammelled by the provisions of the Code of Civil Procedure. Therefore, the powers of the Board traverse beyond what is conferred by the Code of Civil Procedure. The status of the case is that of a civil suit. From the above heady mixture of powers conferred by various provisions, we could draw only one conclusion, "the powers of the Board are rather wide".

(iii) Now if we apply such powers to the case on hand, the emerging fact is obvious, that the Board is entitled and duty bound to go into the validity of the resolution. We do not find any substance in the statement made that the Board cannot encroach upon the powers conferred on some other authority as it lacks such a power. Once we hold that a validity of an authorisation has to be gone into to satisfy as to whether it is duly done, then a refusal by the Board to go into it but merely acknowledging its existence would amount to abdication of its power. By doing so, the Board might end up making a decision of an authorisation without even satisfying itself as to whether it is duly executed or not. In other words by deciding an application on merits the authorisation becomes valid automatically. Such a narrow interpretation would lead to absurdity. Like a surgeon perusing the medical records and examining a patient before touching his knife, the Board has to perform its role before getting into the issues on merit. The question as to whether a "lis" is maintainable or not has to be decided by the Court before which it is laid. Hence, we hold that a harmonious construction of all the provisions discussed by us at length would lead to vesting of power with the Board.

10. Jurisdictional Fact, Adjudicatory Fact and a Fact in Issue:-

The learned counsel appearing for the respondents submits that the first respondent, being a Tribunal with limited jurisdiction, cannot usurp a power not vested in it. We are of the

view that the issue raised by the petitioner is a jurisdictional fact. Board's powers are also incidental as well as ancillary. We have to give effect to the legislative intent enshrined under the provisions of the enactments. The powers of the first respondent are explicit and expressive. The powers are also implied. The proceedings before the first respondent are judicial proceedings. Therefore, we do not find any force in the contentions raised by the learned counsel appearing for the respondent. As discussed earlier, the difference between a jurisdictional fact, fact in issue and adjudicatory fact are rather thin. A jurisdictional fact may also involve an adjudicatory fact and it can also be a fact in issue. But a jurisdictional fact is also a prelude to an adjudicatory fact on merits and a fact in issue pertaining to a relief. For example, the question as to whether the authorisation is valid or not is a jurisdictional fact. It also becomes an adjudicatory fact for the purpose of deciding as to whether the resolution is in accordance with law or not. In that context, it also becomes a fact in issue, that is, the validity of the resolution. In other words, here an adjudicatory fact and a fact in issue get merged with the jurisdictional fact. This is only for the purpose of entertaining an application. If this stage is crossed and the case is taken up on merits, then the issue of jurisdictional fact goes and it becomes one of an adjudicatory fact and fact in issue. Considering the abovesaid question of law, it has been held by the Honourable Apex Court in CARONA LTD. V. PARVATHY SWAMINATHAN & SONS (2007) 8 Supreme Court Cases 559) as follows.

"JURISDICTIONAL FACT AND ADJUDICATORY FACT

29. But there is distinction between 'jurisdictional fact' and 'adjudicatory fact' which cannot be ignored. An 'adjudicatory fact' is a 'fact in issue' and can be determined by a Court, Tribunal or Authority on 'merits', on the basis of evidence adduced by the parties. It is no doubt true that it is very difficult to distinguish 'jurisdictional fact' and 'fact in issue' or 'adjudicatory fact'. Nonetheless the difference between the two cannot be overlooked.

36. It is thus clear that for assumption of jurisdiction by a Court or a Tribunal, existence of jurisdictional fact is a condition precedent. But once such jurisdictional fact is found to exist, the Court or Tribunal has power to decide adjudicatory facts or facts in issue."

11. Similarly, in UNION OF INDIA AND ANOTHER V. PARAS LAMINATES (P) LTD., (1990) 4 Supreme Court Cases 453), the Honourable Apex Court, while considering the powers of the Tribunal, was pleased to hold in the following manner.

"8. There is no doubt that the Tribunal functions as a

court within the limits of its jurisdiction. It has all the powers conferred expressly by the statute. Furthermore, being a judicial body, it has all those incidental and ancillary powers which are necessary to make fully effective the express grant of statutory powers. Certain powers are recognised as incidental and ancillary, not because they are inherent in the Tribunal, nor because its jurisdiction is plenary, but because it is the legislative intent that the power which is expressly granted in the assigned field of jurisdiction is efficaciously and meaningfully exercised,. The powers of the Tribunal are no doubt limited. Its area of jurisdiction is clearly defined, but within the bounds of its jurisdiction, it has all the powers expressly and impliedly granted. The implied grant is, of course, limited by the express grant and, therefore, it can only be such powers as are truly incidental and ancillary for doing all such acts or employing all such means as are reasonably necessary to make the grant effective. As stated in Maxwell on Interpretation of Statutes, (11th edition) "where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution."

12. The learned counsel for the respondents has also made reliance upon the judgment of the Honourable Apex Court rendered in SHRI AMBICA MILLS CO. LTD., V. SHRI S.B.BHATT AND ANOTHER (AIR 1961 Supreme Court 970). We are afraid that the ratio laid down therein does not support the case of the respondents. The facts involved therein are different, as the Honourable Apex Court itself was pleased to hold that the decision is rendered on the facts of the said case. More over, there was no dispute on the relationship of the employer and employee. The jurisdictional issue was on the question of granting relief. The Honourable Apex Court was pleased to hold in the said case that the power was available with the authority under Section 15 of the Payment of Wages Act, 1936 to go into the agreement. Therefore, the said judgment would only help the case of the petitioner.

13. Similarly, the judgment rendered in VISHWANATH TUKARAM V. THE GENERAL MANAGER, CENTRAL RAILWAY, V.T., BOMBAY (Volume LIX The Bombay Law Reporter 892) also does not help the case of the respondents. There also, the issue has arisen touching upon the Payment of Wages Act. Even in the said judgment, the Full Bench of the Mumbai High Court was pleased to hold that it may be necessary for the authority to determine "what the contract was", "what the terms of the contract were", and "what were the wages due under the contract", and also to determine whether, in the first place, there was an employment or not. Therefore, the said judgment also does not help the respondent

but the petitioner.

14. MISCELLANEOUS PETITIONS:

These miscellaneous applications (M.P.Nos.1 of 2013(12 Nos.) have been filed seeking to implead the petitioner as the second petitioner herein. We do not find any reason to reject these applications. Admittedly, there is no objection from the petitioner, who filed these writ petitions. The second respondent would not be prejudiced by these impleading petitions. In any case, it is the second respondent, who has moved the applications before the first respondent. It would also be necessary to resolve the dispute between the parties, including likelihood of third party rights. Therefore, considering the abovesaid fact, we are inclined to allow these impleading applications and accordingly, they are allowed.

15. CONCLUSION:

Accordingly, after analysing the materials before us, we hold that the first respondent has the power and jurisdiction to go into the validity of the resolution dated 26.04.2007 to satisfy itself about the maintainability of the application. Therefore, we are of the view that the orders passed are liable to be set aside and accordingly, they are set aside with a direction to the first respondent to go into the issue of the validity of the resolution passed on 26.04.2007. We adopt this method as we find that the first respondent has failed to exercise its jurisdiction. Once again, we make it clear that we have not expressed anything on merits of the resolution and all our discussions will have to be construed only for the purpose of deciding the jurisdiction of the first respondent. Since we are also of the view that it would be improper to remit the entire matter to the first respondent as the exercise on merit was already done by the Board after affording sufficient opportunities to the parties, we would like to keep the writ petitions pending by directing the first respondent to decide the validity of the resolution dated 26.04.2007 alone within a period of two months from the date of the receipt of the order. The first respondent shall communicate the decision to be rendered on the validity of the resolution dated 26.04.2007 to this court. The parties are also at liberty to file the decision of the first respondent before this Court.

The Registry is directed to post these writ petitions for hearing after the receipt of the decision by the first respondent either from it or through the parties viz., the petitioner as well as the second respondent.

Sd/
Asst.Registrar

//True Copy//

Sub.Asst.Registrar

To

1. Intellectual Property Appellate Board,
2nd floor, Guna Complex, Annex-1,
Anna Salai, Teynampet, Chennai-600 018.

2. The Controller of Patents, Designs and
Trade Marks, The Patent Office,
Intellectual Property Office Building,
G.S.T. Road, Guindy, Chennai-600 032.

3. Enercon (India) Limited,
Plot No.33, Daman Patiala Road,
Byhimpore, Daman-396210.

4. Dr. Aloys Wobben
Argenstrasse 19, 26607 Aurich,
Germany, represented through his
Constituted Attorney Ms. Vasundhara Raman,
Sriram Layout, Kuppan Road, Cavery Nagar,
Kottivakkam, Chennai-600 041.

5. Wobben Properties GmbH,
Dreerkamp 5, 26605, Aurich Germany,
Represented by the Constituted Attorney
Mr. Rakhee Sharma
Office at B-14, Nizammudin East,
New Delhi - 110 013.

6. The Section Officer,
Writ Section, High Court, Madras-104.

12 CC to Mr. M. S. Bharath, Advocate, S.R.No.49820
1 CC to Mr. Lakshmikumaran, Advocate, S.R.No.50117

W.P.Nos.17539 to 17541,
9729 to 9737 of 2011

JJM 24.09.2013

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