Abolishing IPAB: An Own Goal?

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With the passing, on 4 April 2021, of The Tribunals Reforms (Rationalisation and Conditions of Service) Ordinance, 2021, the government has abolished statutory tribunals, including the Intellectual Property Appellate Board (IPAB), under The Trade Marks Act, 1999.

The statement of objects and reasons in the tribunals reform bill reads: "With a view to streamline tribunals, the Tribunals Reforms (Rationalisation and Conditions of Service) Bill, 2021, is proposed to be enacted to abolish certain tribunals and authorities, and to provide a mechanism for filing an appeal directly to the commercial court or the high court, as the case may be."

History of the IPAB

The establishment of the IPAB in 2003 was pursuant to article 41 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) to put in place a judicial system for the enforcement of IP rights apart from law enforcement in general. With this specific goal, the Trade Marks Bill, 1999, was tabled in the parliament, which contained the proposal for creation of the IPAB on 15 September 2003. The IPAB was established in India with the powers and duties required for speedy disposal of appeals, rectification, revocation petitions in relation to trademarks, patents, geographical indications and copyright, creating one forum to serve four major areas of IP rights.

The Purpose of Establishing Various

tribunals was also to ensure that the courts are not burdened with such matters, to avoid accumulation and pendency of litigation in the country, and to adjudicate matters using both technical and judicial experts. The idea of a separate tribunal for IP matters was followed in various developed countries including the US, EU, Japan and South Korea, and by virtue of establishing the IPAB, India joined the group of countries having a separate IP appellate tribunal. By virtue of its effective functioning and solving complex issues, the IPAB gained huge visibility and respect globally.

Importance of the IPAB

The IPAB managed a wide range of cases on appeal from the Indian Patent Office (IPO) and the Trade Marks Registry (TMR). These ranged from dismissal/refusal of applications, specialised protests, procedural issues, and translation of relevant guidelines and manuals of the IPO and TMR.

The IPAB was empowered to handle such diverse cases by virtue of having its technical members – who have specialised knowledge, experience and expertise in each field (e.g., patents, trademarks, copyright, plant variety and geographical indications) – sitting together with the judicial member to constitute a bench in deciding cases. The judicial member, being a retired judge of the high court, had significant experience in applying the law and equity to such technical matters, to ensure stable and well-reasoned orders fusing technical and judicial expertise.

The IPAB had several benches across the country, including in Ahmedabad, Chennai, New Delhi, Kolkata and Mumbai, to effectively deal with claims arising out of each jurisdictional IP office. In 2020, pursuant to the pandemic, the IPAB immediately adopted a virtual system of courts for hearing cases, and an online filing system for seamless functioning and speedy disposal of cases, apart from significant savings of time, travel, energy and expenses for physical hearings before the five benches. This paved the way for providing easy access to all stakeholders, ensuring smooth functioning without creating any financial burden to stakeholders and litigants all over the country.

Reports have suggested that the need for the tribunals reforms bill was fuelled by the slow delivery of justice and the burden on the public exchequer by the tribunals, coupled with extended vacancies of technical and judicial members at the IPAB, apart from the establishment of commercial courts and commercial divisions of high courts across India. However, satisfying such a claim with the promulgation of the present ordinance purposes an internal introspection on the following:

(1) The IPAB has had a record of accomplishment in respect of the reversal of decisions made by the IPO. Out of 3,793 cases disposed by the IPAB, only about 3% have been appealed, and less than 1% have been reversed on such appeals;

(2) More often than not, judgments of the IPAB have been upheld by the Supreme Court;

(3) Despite minimum staff, the IPAB recorded its highest ever disposal of cases in trademarks in the year 2018 (663) when a technical member for trademarks was sitting with the chairman;

(4) The IPAB disposed of 181 cases in 2019, and 275 cases in 2020 (in the middle of an unprecedented global pandemic);

(5) The average disposal rate of the IPAB with a full quorum is about 26.7 cases per month. After the appointment of the technical members, in August 2020, with a fully functioning IPAB the rate of

disposal rose to 48.9 per month; and

(6) Pursuant to the ordinance, entrusting the commercial court and commercial divisions of the high courts with such additional responsibilities would significantly add more burden to the courts.

Issues Post-Abolishment

The IP ecosystem in the country now faces the following challenges:

(1) Conflicting decisions/orders passed by different high courts on the same legal issues, creating inconsistent jurisprudence and anomalous situations;

(2) Without the IPAB, IP offices will have no accountability, as the high court will not be able to dispose of appeals, particularly in cases where quick IPAB intervention is required to avoid miscarriage of justice;

(3) Significant investment of time on the aspect of jurisdiction for filing appeals over orders passed by various IP offices, and for filing original revocation/rectification/cancellation proceedings, resulting in forum shopping;

(4) Unavailability of technical members/ experts to decide on patent, trademark, copyright, geographical indication and plant variety matters;

(5) Additional burden on the new commercial courts and commercial divisions of the high courts that are currently combating delays due to the covid-19 pandemic;

(6) Affecting the livelihood of employees and tribunal members, apart from patent agents, trademark agents etc., in times of economic unpredictability and sensitivity;

(7) Abolition of the IPAB will be counter-productive since it will lead to increased costs and delays in adjudication; and

(8) There would be a vacuum in the IP ecosystem as one of the pillars of the system would have been demolished.

The major issues that needed to be addressed for a more efficient IPAB were only to ensure that vacant posts were filled appropriately and in the required timeline. However, despite being faced with challenges of vacancies of judicial members and technical members, the IPAB had managed to stay afloat, and had achieved speedy disposal of matters. However, all these factors appear to have been negated with the passing of the ordinance.

Conclusion

The abolition of the IPAB would be prejudicial to India's credibility as an IP jurisdiction, and would eventually lower the IP standards that have been established over a period of time. India has shown marked growth on the Global Innovation Index over the years, and in 2020 was ranked 48 out of 131 economies featured in the index. The IPAB's abolition would be perceived as a negative indication to companies having business interests in India, and may not align with the government's progressive plan of ensuring "ease of doing business" in India.

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