

(2019) 07 DEL CK 0082

In the Delhi High Court

Case No : Civil Writ Petition No. 5571 Of 2019, Civil Miscellaneous Application
No. 24540, 26833 Of 2019

Mylan Laboratories Limited

APPELLANT

Vs

Union Of India & Ors

RESPONDENT

Date of Decision : 08-07-2019

Acts Referred:

Constitution Of India, 1950 — Article 14, 21
Copyright Rules, 2013 — Rule 3
Trade Marks Act, 1999 — Section 83, 84, 84(2), 84(3), 84(4), 84(5), 84(6), 87, 89, 91, 92, 95, 96, 100
Patents Act, 1970 — Section 115, 116, 116(2), 117(B)
Protection of Plant Varieties and Farmers' Rights Act, 2001 — Section 54, 54(II), 59
Consumer Protection Act, 1986 — Section 16, 16(1B), 20, 20(1A)
Delhi Value Added Tax Act, 2004 — Section 73(1), 73(4), 73(9)
Copyright Act, 1957 — Section 11, 31D

Citation : (2019) 263 DLT 748 : (2019) 10 AD(Delhi) 587 : (2019) 79 PTC 397

Hon'ble Judges : J.R. Midha, J

Bench : Single Bench

Advocate : Rajeshwari H., Gaurang Kanth, Santosh Kr. Pandey, N.K. Ramesh, J.P. Sengh, Rajiv Nayar

Judgement

///

J.R. Midha, J",,,,

1. The petitioner has challenged the order dated 14th March, 2019 passed by the Deputy Controller of Patents and Designs whereby the Controller",,,,

dismissed the pre-grant opposition filed by the petitioner and granted the patent to respondent No.3 in respect of "Methods of Evaluating Peptide",,,,

Mixtures".,,,,

2. The Patents Act provides a remedy of an appeal to the petitioner against the impugned order dated 14th March, 2019 and the petitioner availed the",,,,

same by filing an appeal along with a stay application before Intellectual Property Appellate Board (IPAB) on 17th May, 2019. The petitioner has",,,

approached this Court for urgent hearing of the stay application as IPAB is not functioning because there is no Technical Member (Patents) since",,,

04th May, 2016.",,,

3. Vide order dated 21st May, 2019, this Court directed the Deputy Registrar of IPAB to file the status report with respect to the vacancy position of",,,

the Technical Members of IPAB. The relevant portion of the order dated 21st May, 2019 is reproduced hereunder:-",,,

4. Learned counsel for the petitioner submits that the petitioner filed an appeal against the order dated 14th March, 2019 along with the stay",,,

application before the Intellectual Property Appellate Board (IPAB) on 17th May, 2019. However, the stay application has not yet been taken up for",,,

hearing for lack of Coram.,,,

5. Learned counsel for the petitioner submits that the post of Technical Member of IPAB is lying vacant for a long time due to which no appeals are",,,

being taken up for hearing which has resulted in a logjam. It is submitted that the petitioner's writ petition be taken up for hearing for consideration of",,,

the interim relief. Alternatively, it is submitted that the Chairman being the Judicial Member be directed to hear the matter with liberty to take the",,,

assistance of a scientific expert from the panel of experts under Section 115 of the Patents Act, 1970. Reference is made to Election Commission of",,,

India v. Dr. Subramanian Swamy, (1996) 4 SCC 104; Kwaliti Restaurant v. The Commissioner of VAT, (2012) 194 DLT 195 (DB); Talluri Srinivas",,,

v. Union of India, 2018 SCC OnLine Del 7765 and ST. Appl. No.74 of 2014 titled Bharat Bijlee Limited v. Commissioner Of Trade & Taxes.",,,

6. Learned Standing Counsel for Central Government shall take instructions from the Government with respect to the above submissions. Learned",,,

Standing Counsel shall place on record the status report since when the vacancy of the Technical Members are lying vacant; action taken by the",,,

Government to fill up the vacancies and the reasons for delay in filling up the vacancies. The competent officer of the Central Government shall",,,

remain present in Court on the next date of hearing.,,,

7. The Deputy Registrar of IPAB shall also remain present in Court on the next date of hearing along with the status report as to the number of",,,

pending cases which are not being taken up for hearing for want of Coram. The Deputy Registrar shall also file the status report giving particulars of,,,

the period when the post of Chairman and Technical Members of IPAB remained vacant, since its inception.â??" ,,,

4. On 24th May, 2019, the Deputy Registrar of IPAB handed over the status report in terms of the order dated 21st May, 2019. As per the status",,,

report, IPAB was established on 15th September, 2003. IPAB has jurisdiction to deal with the matter under the Patents Act, Trade Marks Act," ,,,

Copyright Act and Plant Varieties Protection Act. As per Section 84(2) of the Trade Marks Act, the IPAB Bench comprises of one Judicial Member",,,

and one Technical Member. For cases relating to the Patents Act, the Bench shall comprise of a Judicial Member and a Technical Member (Patents);" ,,,

for cases relating to the Trade Marks Act, the Bench shall comprise of a Judicial Member and a Technical Member (Trade Marks); for cases relating",,,

to the Copyright, the Bench shall comprise of a Judicial Member and a Technical Member (Copyright) and for cases relating to the Plant Varieties",,,

Protection, the Bench shall comprise of a Judicial Member and a Technical Member (Plant Varieties Protection). As per the status report, no",,,

Technical Member (Copyright) has been appointed till date. With respect to Patents, the post of Technical Member (Patents) lying vacant since 04th",,,

May, 2016. With respect to Trade Marks, the post of Technical Member (Trade Marks) lying vacant since 05th December, 2018. There is only one",,,

Technical Member relating to Plant Varieties Protection.,,,

5. The report submitted by the Deputy Registrar by IPAB is reproduced hereunder:-,,,

â??I. Establishment of Intellectual Property Appellate Board,,,

1. Central Government in exercise of powers conferred by Section 83 of the Trade marks Act, 1999, established the Intellectual Property Appellate",,,

Board wef.15/09/2003 vide Gazette Notification S.O.1049(E) dated 15/09/2003,,,

2. Vide Gazette Notification S.O.1049(E) dated 15/09/2003, the Central Government, in exercise of the powers conferred by Section 84 (2) specifies",,,

Ahmadabad, Chennai, Delhi, Mumbai and Kolkata as the places at which a bench of the IPAB shall sit." ,,,

3. By Gazette Notification S.O.1049(E) dated 01/10/2003, the Central Government in exercise of the powers conferred by Section 100, notified on",,,

06/10/2003 as the date for transfer of pending proceedings before any High Court to IPAB.,,,

4. Honâ??ble Justice S. Jagadeesan, retired Madras High Court Judge appointed as Chairman who joined IPAB on 15/09/2003.".,,,

5. Shri. Raghbir Singh, retired from Indian Legal Service appointed as Vice-Chairman, joined IPAB on 15/09/2003.".,,,

6. Shri T.R. Subramaniam, retired Joint Registrar of Trademarks appointed as Technical Member of Trade Marks, joined IPAB on 15/09/2003.".,,,

7. IPAB commences its function from 15/09/2003. The bench was constituted by the Honâ??ble Chairman and the Trademark cases transferred from.,,,

the various High Courts were listed before IPAB for hearing and disposed of.,,,

8. Shri T.R. Subramaniam, Technical Member of Trademarks resigned on 20/02/2004. In view of the resignation of Technical Member, the IPAB",,,

became standstill as the bench could not be constituted without Technical Member as per Section 84 of the Trade Marks Act, 1999. To overcome the",,,

above, Trade Marks (Removal of Difficulties) Order, 2004 was published the Gazette Notification Vide S.O. 540(E) dated 28/04/2004. The contents",,,

of Para 2 is reproduced hereunder:.,,,

â??During the vacancy in the office of Technical member, due to leave of absence of a Technical member appointed as such, then a Bench of the",,,

Intellectual Property Appellate Board may consist of the Chairman and the Vice-Chairman.â??.,,,

9. Till the appointment of Technical Member, Mr. Syed Obaidur Rahman on 06/02/2006, the Honâ??ble Chairman and Vice-Chairman constituted the",,,

Bench and conducted the hearings and disposed of Trademarks matters.,,,

II. Geographical Indications.,,,

1. The Central Government vide Gazette Notification S.O. 1051(E) in exercise of the powers conferred of Section 1(3) of Geographical Indication of.,,,

Goods (Registration and Protection) Act, 1999 appointed the 15/09/2003 as the date on which all the provisions of said Act shall come into force.".,,,

2. But the IPAB received the Geographical Indication appeals from the year 2009 only and till date 12 appeals have been disposed of.,,,

3. The Technical Member of Trademarks will join the bench as Technical Member for hearing the Geographical Indication matters along with the.,,,

Honâ??ble Chairman or Vice-Chairman.,,,

III. Patents,,,

1. As per Section 117(B) The Patents Act 1970 the provisions of sub section (2) to (6) Sections 84, 87, 92, 95, 96 of the Trademarks Act, 1999, shall",,,

apply to the Appellate Board in the discharge of its functions under this Act as they apply to it in the discharge of its functions under the Trade Marks,,,

Act, 1999.",,,

2. Vide Gazette Notification S.O .514(E) central government in exercise of the powers conferred by Section 117(G) of the Patents Act, 1970 the",,,

central government notifies 2/4/2007 as the date on which all cases of appeals against any order or decision of the Controller and all cases pertaining,,,

to revocation of patent other than on a counter claim in a suit for infringement and rectification of register pending before any high court shall stands to,,,

Appellate Board.,,,

3. Shri S. Chandrasekar former Joint Controller of Patents & Designs was appointed as Technical Member (Patents) on 02/04/2007 and IPAB,,,

commences its hearing and disposes the patents matters from there on.,,,

IV. Copyright,,,

Vide order File No.7/16/2016-IPR-1 dated 21/06/2016, the Ministry, DPIIT conveyed the approval that in pursuance of Finance Act, 2017 (7 of 2017)",,,

which has come into force on 26th May, 2017, it has been decided to transfer all physical assets and manpower of Copyright Board for being placed",,,

under the physical and administrative control of the Appellate Board under Trademark Act, 1999 (47 of 1999) i.e. Intellectual Property Appellate",,,

Board with immediate effect. Accordingly, the then Acting Chairman had taken over the case files as is where is basis on 6th July, 2017 along with",,,

sanction post, other administrative and accounts documents and physical assets. As on date, total number of 691 cases relates to copyright subject is",,,

pending for adjudication at Delhi and Chennai. The bench could not be constituted to hear the copyright matters for the reason that the post of,,,

Technical Member of Copyright is lying vacant till date.,,,

V. Plant Varieties Protection Appellate Tribunal,,,

1. As per provisions of Chapter VI Section 54(II) PPV&FR Act, 2001, the Plant Varieties Protection Appellate Tribunal having judicial powers to",,,

dispose of appeals made against orders and decision of Plant Varieties and

Farmersâ? Right Authority has not been established as yet. However, Dr.",,,

Onkar Nath Singh, previously holding post of Head, Crop Improvement Division, ICAR-National Rice Research Institute, Cuttack, was appointed as",,,

Technical Member (Plant Varieties Protection Appellate Tribunal) on deputation basis w.e.f. 04/07/2018 by invoking the transitional provision under",,,

Section 59 of PPV&FR Act, 2001 which says:-Transitional Provision :- As contained under Section 59 of PPV&FR, Act-2001 Notwithstanding",,,

anything contained in this Act, till the establishment of the Tribunal under Section 54, the Intellectual Property Appellate Board established under",,,

Section 83 of the Trade Marks Act, 1999 shall exercise the jurisdiction, powers and authority conferred on the Tribunal under this Act subject to the",,,

modification that in any Bench of such Intellectual Property Appellate Board constituted for the purposes of this section for the Technical member",,,

referred to in sub-section (2) of Section 84 of the said Trade Marks Act, the Technical Member shall be appointed under this Act and he shall be",,,

deemed to be the Technical member for constituting the bench under the said sub-section (2) of the section 84 for the purposes of this Act.,,,

2. The Gazette Notification of establishment of PVPAT is yet to be published by the Central Government. On publication of the notification, the bench",,,

can be constituted with Honâ??ble Chairman and Technical Member PVPAT and the matters will be heard and disposed of.,,,

VI. Present status of IPAB,,,

1. After retirement of Honâ??ble Justice K.N. Basha w.e.f. 13/05/2016, the office of the Chairman was vacant till the appointment of Honâ??ble Justice",,,

Manmohan Singh w.e.f. 01.01.2018. During the period from 14/05/2016 to 31/12/2017, no hearing was conducted as the bench could not be",,,

constituted for the reason that the then Technical Member of Trademarks was only available.,,,

2. After retirement of Shri DPS Parmar, Technical Member (Patents), the post is lying vacant till date, hence the hearing could not be conducted after",,,

04/05/2016 with respect to Patent Cases.,,,

3. No Technical Member was appointed for Copyright, hence no hearing has taken place for copyright cases.",,,

4. After appointment of present Chairman, Honâ??ble Justice Manmohan Singh, the trademark bench was constituted along with the then Technical",,,

Member of Trademarks and 720 cases have been disposed of for the period from 01.01.2018 to 04.12.2018.,,,

5. The post of Technical member of trademarks is lying vacant from 05/12/2018.,,,

6. The Honâ?ble Chairman is conducting sittings at Delhi, Mumbai & Chennai in the absence of Technical Member. But no effective hearing could be",,,

taken place and only administrative orders were passed by the Honâ?ble Chairman in view of Section 84(2) Trade Marks Act, 1999. The section 84",,,

of the Trade Marks Act 1999 is re-produced as hereunder;,,,

â??84. Composition of Appellate Board,,,

(1) The Appellate Board shall consist of a Chairman, Vice-Chairman and such number of other Members, as the Central Government may, deem fit",,,

and, subject to the other provisions of this Act, the jurisdiction, powers and authority of the Appellate Board may be exercised by Benches thereof.",,,

(2) Subject to the other provisions of this Act, a Bench shall consist of one Judicial Member and one Technical Member and shall sit at such place as",,,

S.No.,Name of the Post,From,To

1,Chairman,19/03/2006,28/11/2006

,,11/08/2010,08/05/2011

,,09/08/2013,28/08/2013

,,14/05/2016,31/12/2017

2,Vice-Chairman,15/03/2005,26/02/2006

,,20/03/2008,21/06/2009

,,22/06/2014,Vacant till date

3,Technical Member (Trademarks),21/02/2004,05/02/2006

,,06/02/2011,01/01/2012

,,01/12/2013,04/12/2013

,,,

,,,

,,05/12/2018,Vacant till date

4,Technical Member (Patents),03/12/2010,03/05/2011

,,04/05/2016,Vacant till date

5, Technical Member (Copyright), Vacant, Vacant

relating to Patents has taken place since the last 2 years.,,,

13. The inaction on the part of the Union of India in filling up the vacancies in IPAB is glaring from the face of the record. This has led to a large,,,

number of litigants approaching this Court for urgent hearings. In many cases such as the one at hand, the appeals filed by the litigants are not even",,,

being numbered. This is in complete violation of the right to access to justice as guaranteed under Article 21 of the Constitution of India, according to",,,

the dictum of the Constitution Bench of the Supreme Court in the case of Anita Kushwaha v. Pushap Sudan, (2016) 8 SCC 509.",,,

14. The major reason for the current crisis of pendency and non-functioning of the IPAB is owing to vacancies not being filled up.,,,

15. The other major reason for the high pendency and the non-functioning of the IPAB is owing to the stringent condition in Section 84 of the Trade,,,

Marks Act, 1999. Section 84(2) of the Act inter-alia states that a Bench of the IPAB shall consist of one Judicial Member and one Technical",,,

Member. Thus, as a corollary this Section makes it imperative for an appeal to the IPAB to be heard by a Bench of at least two members.",,,

16. Section 84 makes it virtually impossible for the IPAB to dispose of cases in the absence of the required Coram, as is the case presently. What is",,,

peculiar about section 84 of the Trade Marks Act, 1999 is that it is at contrast with similar provisions, laying down composition of Tribunals, in several",,,

other Acts, which allow those Tribunals to sit in single benches and decide matters.",,,

17. This is not the first time such a crisis has arisen in context of composition of a Tribunal. The Tribunals have time and again faced such a crisis of,,,

non-functioning due to non-filling up of the vacancies. But the approach to fix such a crisis shouldn't be the kind to look for a temporary solution but,,,

one which aims at resolving the issue once and for all.,,,

18. A permanent and more pragmatic solution to the non-functioning of the IPAB is not only to expedite the process of the filling up of the vacancies,,,

in the Tribunal but to amend the Trade Marks Act to bring in the provisions for the IPAB to sit in Single Benches apart from the Bench of two,,,

members (One Judicial and one Technical), as currently prescribed under the Act.",,,

19. Cue must be taken from the Consumer Protection (Amendment) Bill, 2001 which brought in a change to the scheme of the Consumer Protection",,,

Act, 1986 by adding Sub-Section (1B) to Section 16 and Sub-Section (1A) to 20, which empowers the President of the State Commission/National",,,

Commission to constitute a Bench with one or more members. The object and reasons of the Amending Bill of 2001, which was then passed as an",,,

Act, clearly mentions to facilitate quicker disposal of consumer cases as one of the object/reason for amending Section 16 and Section 20 of",,,

Consumer Protection Act.,,,

20. Further provision ought to be made for employing experts as Ad-hoc Members till a member is appointed as a Technical Member under the Act,",,

so as to avoid logjams in the functioning of the Tribunal. For this cue must be taken from Conference Proceedings of "National Initiative to Reduce",,,

Pendency and delay in Judicial System" organized by the Supreme Court of India which took place on 27-28th July, 2018, wherein one of the",,,

solutions deliberated upon for reduction in the pendency and delay in the Judicial System was the introduction of the scheme of appointment of Ad-hoc",,,

judges to the Higher Courts of India.,,,

Relevant Provisions,,,

21. Section 84(2) in the Trade Marks Act, 1999 Section 84"Composition of Appellate Board.",,,

(2) Subject to the other provisions of this Act, a Bench shall consist of one Judicial Member and one Technical Member and shall sit at such place as",,,

the Central Government may, by notification in the Official Gazette, specify.",,,

Section 115 of the Patents Act, 1970",,,

Section 115 "Scientific advisers.,,,

(1) In any suit for infringement or in any proceeding before a court under this Act, the court may at any time, and whether or not an application has",,,

been made by any party for that purpose, appoint an independent scientific adviser, to assist the court or to inquire and report upon any such question",,,

of fact or of opinion (not involving a question of interpretation of law) as it may formulate for the purpose.,,,

(2) The remuneration of the scientific adviser shall be fixed by the court and shall include the costs of making a report and a proper daily fee for any",,,

day on which the scientific adviser may be required to attend before the court, and such remuneration shall be defrayed out of moneys provided by",,,

Parliament by law for the purpose.,,,

Section 116 of the Patents Act, 1970",,,

Section 116 â?"Appellate Board",,,

(1) Subject to the provisions of this Act, the Appellate Board established under section 83 of the Trade Marks Act, 1999 shall be the Appellate Board",,,

for the purposes of this Act and the said Appellate Board shall exercise the jurisdiction, power and authority conferred on it by or under this Act:",,,

Provided that the Technical Member of the Appellate Board for the purposes of this Act shall have the qualifications specified in sub-section (2).,,,

(2) A person shall not be qualified for appointment as a Technical Member for the purposes of this Act unless he-,,,

(a) has, at least five years held the post of Controller under this Act or has exercised the functions of the Controller under this Act for at least five",,,

years; or,,,

(b) has, for at least ten years functioned as a Registered Patent Agent and possesses a degree in engineering or technology or a masters degree in",,,

science from any University established under law for the time being in force or equivalent; orâ??",,,

Relevant Judgments,,,

22. In Anita Kushwaha v. Pushap Sudan, (supra) five Judges Bench of Supreme Court declared the access to justice to be valuable right which",,,

includes effective adjudicatory mechanism. Relevant portion of the said judgment is reproduced hereunder:-,,,

â??29.To sum up: access to justice is and has been recognised as a part and parcel of right to life in India and in all civilised societies around the,,,

globe. The right is so basic and inalienable that no system of governance can possibly ignore its significance, leave alone afford to deny the same to its",,,

citizens. The Magna Carta, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, 1966, the ancient",,,

Roman jurisprudential maxim ubi jus ibi remedium, the development of fundamental principles of common law by judicial pronouncements of the courts",,,

over centuries past have all contributed to the acceptance of access to justice as

a basic and inalienable human right which all civilized societies and,,,
systems recognise and enforce.,,,

xxx xxx xxx,,,

31. Given the fact that pronouncements mentioned above have interpreted and understood the word "life" appearing in Article 21 of the,,,

Constitution on a broad spectrum of rights considered incidental and/or integral to the right to life, there is no real reason why access to justice should",,,

be considered to be falling outside the class and category of the said rights, which already stands recognised as being a part and parcel of Article 21 of",,,

the Constitution of India. If "life" implies not only life in the physical sense but a bundle of rights that makes life worth living, there is no juristic or",,,

other basis for holding that denial of "access to justice" will not affect the quality of human life so as to take access to justice out of the purview,,,

of right to life guaranteed under Article 21. We have, therefore, no hesitation in holding that access to justice is indeed a facet of right to life",,,

guaranteed under Article 21 of the Constitution. We need only add that access to justice may as well be the facet of the right guaranteed under,,,

Article 14 of the Constitution, which guarantees equality before law and equal protection of laws to not only citizens but non-citizens also. We say so",,,

because equality before law and equal protection of laws is not limited in its application to the realm of executive action that enforces the law. It is as,,,

much available in relation to proceedings before courts and tribunal and adjudicatory fora where law is applied and justice administered. The citizen's,,,

inability to access courts or any other adjudicatory mechanism provided for determination of rights and obligations is bound to result in denial of the,,,

guarantee contained in Article 14 both in relation to equality before law as well as equal protection of laws. Absence of any adjudicatory mechanism,,,

or the inadequacy of such mechanism, needless to say, is bound to prevent those looking for enforcement of their right to equality before laws and",,,

equal protection of the laws from seeking redress and thereby negate the guarantee of equality before laws or equal protection of laws and reduce it,,,

to a mere teasing illusion. Article 21 of the Constitution apart, access to justice can be said to be part of the guarantee contained in Article 14 as well.",,,

32. What then is the sweep and content of that right is the next question that must be answered for a fuller understanding of the principle and its,,,

significance in real life situations.,,,

33. Four main facets that, in our opinion, constitute the essence of access to justice are:",,,

(i) the State must provide an effective adjudicatory mechanism;,,,

(ii) the mechanism so provided must be reasonably accessible in terms of distance;,,,

(iii) the process of adjudication must be speedy; and,,,

(iv) the litigant's access to the adjudicatory process must be affordable.,,,

(i) The need for adjudicatory mechanism.,,,

34. One of the most fundamental requirements for providing to the citizens access to justice is to set up an adjudicatory mechanism whether described,,,

as a court, tribunal, commission or authority or called by any other name whatsoever, where a citizen can agitate his grievance and seek adjudication",,,

of what he may perceive as a breach of his right by another citizen or by the State or any one of its instrumentalities. In order that the right of a citizen,,,

to access justice is protected, the mechanism so provided must not only be effective but must also be just, fair and objective in its approach. So also",,,

the procedure which the court, tribunal or authority may adopt for adjudication, must, in itself be just and fair and in keeping with the well-recognised",,,

principles of natural justice.,,,

(ii) The mechanism must be conveniently accessible in terms of distance,,,

36. "Access to justice" as a constitutional value will be a mere illusion if justice is not speedy. Justice delayed, it is famously said, is justice denied.",,,

If the process of administration of justice is so time-consuming, laborious, indolent and frustrating for those who seek justice that it dissuades or deters",,,

them from even considering resort to that process as an option, it would tantamount to denial of not only access to justice but justice itself. In Sheela",,,

Barse case [Sheela Barse v. Union of India, (1988) 4 SCC 226]this Court declared speedy trial as a facet of right to life, for if the trial of a citizen",,,

goes on endlessly his right to life itself is violated. There is jurisprudentially no qualitative difference between denial of speedy trial in a criminal case",,,

on the one hand, and civil suit, appeal or other proceedings, on the other, for ought we to know that civil disputes can at times have an equally, if not",,,

more, severe impact on a citizen's life or the quality of it. Access to justice

would, therefore, be a constitutional value of any significance and utility",,,
only if the delivery of justice to the citizen is speedy, for otherwise, the right to
access to justice is no more than a hollow slogan of no use or",,,
inspiration for the citizen.â???,,,
(Emphasis Supplied),,,

23. In Election Commission of India v. Dr.Subramaniam Swamy, 1996 4 SCC 104,
one of the members of the Commission was under disability to hear",,,

the matter on account of the allegations of bias. The Supreme Court invoked the
Doctrine of Necessity and observed that if the choice is between",,,

allowing biased person to act or to stifle the action altogether, the choice must
fall in favour of the former as it is the only way to promote decision-",,,

making. The Supreme Court held that if the two Election Commissioners are able
to reach a unanimous decision, there is no need for the Chief",,,

Election Commissioner to participate but if the two Election Commissioners are
unable to reach a unanimous decision then the doctrine of necessity",,,

may have to be he invoked and Chief Election Commissioner would be compelled
to express his views so that the majority opinion can be formed,",,

notwithstanding the allegations of biasness. The relevant portion of the said
judgment is as under:-",,,

16. We must have a clear conception of the doctrine. It is well settled that the
law permits certain things to be done as a matter of necessity which it",,,

would otherwise not countenance on the touchstone of judicial propriety. Stated
differently, the doctrine of necessity makes it imperative for the",,,

authority to decide and considerations of judicial propriety must yield. It is often
invoked in cases of bias where there is no other authority or Judge to",,,

decide the issue. If the doctrine of necessity is not allowed full play in certain
unavoidable situations, it would impede the course of justice itself and",,,

the defaulting party would benefit therefrom. Take the case of a certain taxing
statute which taxes certain perquisites allowed to Judges. If the validity",,,

of such a provision is challenged who but the members of the judiciary must
decide it. If all the Judges are disqualified on the plea that striking down",,,

of such a legislation would benefit them, a stalemate situation may develop. In
such cases the doctrine of necessity comes into play. If the choice is",,,

between allowing a biased person to act or to stifle the action altogether, the
choice must fall in favour of the former as it is the only way to promote",,,

decision-making. In the present case also if the two Election Commissioners are able to reach a unanimous decision, there is no need for the Chief",,,

Election Commissioner to participate, if not the doctrine of necessity may have to be invoked.",,,

17. We think that is the only alternative in such a situation. We are, therefore. of the opinion that the proper course to follow is that the Chief Election",,,

Commissioner should call a meeting of the selection Commission to adjudicate on the issue of disqualification of Ms. J.Jayalalitha on the grounds alleged,,,

by Dr.Swamy. After calling the meeting he should act as the Chairman but then he may recuse himself by announcing that he would not participate in,,,

the formation of opinion. If the two Election Commissioners reach a unanimous opinion, the Chief Election Commissioner will have the opinion",,,

communicated to the Governor. If the two Election Commissioners do not reach a unanimous decision in the Matter of expressing their opinion on the,,,

issue referred to the Election Commission, it would be necessary for the Chief Election Commissioner to express his opinion on the doctrine of",,,

necessity.â?,,,

(Emphasis Supplied),,,

24. In M/s Kwaliti Restaurant and Ice Cream Co. v. The Commissioner of VAT, Trade and Tax Department, (2012) 194 DLT 195 (DB), the",,,

Assessee therein had its appeal heard by a two-member Appellate Tribunal at a time when the Appellate Tribunal comprised of three members. The,,,

hearing of the appeal was more or less concluded and it was at the stage of final arguments when the third member of the Appellate Tribunal joined,,,

the proceedings. An objection was immediately raised by the Assessee therein to the expansion of the Coram of the Appellate Tribunal to include the,,,

Member (Technical) who had till then been away on account of leave or absence and had not participated in the hearing. With the Appellate Tribunal,,,

negating the objection, the Assessee filed a writ petition in this Court questioning the correctness of the said order of the Appellate Tribunal. This",,,

Court took note of the fact that under Regulation 35(3) of the Appellate Tribunal Regulations, there can be a situation where the full Coram of the",,,

Appellate Tribunal is not available since one or more members could withdraw on the ground of conflict of interest vis-a-vis the subject matter of the,,,

proceedings before the Appellate Tribunal. The relevant portion of the said

judgment is reproduced hereunder:-,,,

8. The Petitioner's grievance is simple enough; it contends that once the Tribunal - which at the relevant time consisted of two functioning,,,

members, the third having gone on leave- heard its appeals, substantially and the arguments of the revenue were scheduled, it was not open, mid-,,,

stream, as it were, for a change in composition of that body. Its argument is of prejudice, since the third member joining the proceeding, does not have",,,,

the benefit of hearing its submissions. The revenue's argument is that the Tribunal is a composite body of three members; whatever its compulsions in,,,

hearing the appeals during the absence of one member, the moment she returned, there is no irregularity in all the three members participating in the",,,,

hearing, so long as the hearing has not concluded. It also argues that there is no power with the Chairman of the Tribunal to constitute benches, or",,,,

hear appeals in composition of less than the full membership of that body.â??,,,

The Court further proceeded to observe that the conspectus of the Delhi Value Added Tax Act, 2004 and the Appellate Tribunal Regulations reveal",,,,

that an Appellate Tribunal discharges judicial functions. Even if there were anomalies in the provisions, anything which tends to undermine the public",,,,

confidence in the Appellate Tribunal has to be â??shunned and wherever necessary, curedâ??. In the facts and circumstances, the Court passed an",,,,

order forbearing the third Member (Technical) from participating in the proceedings in the appeal in question any further and also directed the appeal",,,,

to be disposed of by the Appellate Tribunal comprising two members who heard it at the first place. This decision underscores that the legislative",,,,

intent was that of continuity of the Appellate Tribunal and not its cessation because of a vacancy in its membership. The relevant portion of the said",,,,

judgment is reproduced hereunder:-,,,

9. Facially, the provisions of the Act and Regulations suggest that the Tribunal, whenever it consists of a plurality of members has to hold sittings en-",,,,

banc. However, at the same time, Sections 73 (4) contemplates a situation where a vacancy might arise in the membership of the Tribunal. This is not",,,,

perceived to be an impediment in its functioning or cause such a hiatus as to require a separate provision, to enable the existing members to continue",,,,

with their functioning. Nor does the statute ordain a minimum quorum for the hearing of appeals. It, therefore, appears that the statute is neutral about",,,,

the consequences which follow in the event of a member's absence from the Tribunal for a temporary period, as in this case. This aspect is important," , , ,

because the absence of any prohibition either in the negative form, enjoining members from functioning and hearing appeals during the absence of one" , , ,

of them, or absence of a provision mandating a minimum quorum, implies that the Legislature did not contemplate a logjam, in the Tribunal's" , , ,

functioning. The argument of the revenue about a restrictive class of cases which deals with absence of a member, i.e. in terms of Regulation 35, is" , , ,

insubstantial. For one, that Regulation is not part of the statute; secondly, it states an obvious rule, which all members of judicial and quasi judicial" , , ,

bodies have to follow. Its absence would in no whit undermine the principle it gives shape to. It would be useful to recollect that every Tribunal is" , , ,

clothed with incidental and ancillary powers to effectuate its orders, and W.P.(C) 5621/2012 carry out its functions effectively (Ref. Union of India v" , , ,

Paras Laminates (P) Ltd AIR 1991 SC 696.) Thus, a temporary absence of one of the members of the VAT Tribunal can, by no stretch of the" , , ,

imagination, result in its becoming dysfunctional, or being unable to function." , , ,

xxx xxx xxx" , , ,

14. In view of the above discussion, this Court hereby directs the Delhi VAT Tribunal to forbear hearing of Appeal Nos. 81-83/ATVAT/11-12 in the" , , ,

composition it had on 29-8-2012 and 7-9-2012, and continue the hearing with the two members (i.e. the Chairman and Mr. D.C. Anand) according to" , , ,

its previous composition, when the matter was part heard, and the petitioner's arguments had been concluded, on 27-8-2012. It is clarified that Ms." , , ,

Nita Bali, Member (Administrative) shall not participate in the proceedings; she is however entitled to sit and hear all other cases in which she was a" , , ,

participant, either before her leave of absence, or after her re- joining the Tribunal, except in part heard cases or appeals, like in the present" , , ,

instance.â??" , , ,

(Emphasis Supplied)" , , ,

25. In Talluri Srinivas v. Union of India, Ministry of Corporate Affairs, 2018 SCC OnLine Del 7765, the Division Bench of this Court following" , , ,

Kwality Restaurant (supra) directed the matters to be heard by four members whereas the Chartered Accountants Act, 1947 provides the Appellate" , , ,

Authority to comprise of five members. The relevant portion of the said judgment

is reproduced hereunder:-,,,

19!The CA Act does prescribe that the Appellate Authority will be a body constitute of five persons, but does not prescribe and does not fix a",,,

minimum quorum. The statute is silent on the procedure to be followed and adopted when one or more members cannot participate. In absence of a",,,

provision and stipulation to the contrary, quorum in such cases is in order and complete when majority of the members are present and participate.",,,

Therefore, if one of the members of the Appellate Authority for valid and good reason has recused and does not want to participate, hearing in the",,,

appeal can proceed and would not suffer invalidity on the ground of lack of quorum.,,,

20. In the present case no vacancy has arisen which can be filled up as the said fifth member has neither resigned nor has been removed. There is no",,,

provision in the enactment to fill up ""vacancy"" by recusal in a particular case by any other mode. Temporary absence or recusal of a member in a",,,

particular appeal, would not make the Appellate Tribunal dysfunctional till a new member is appointed, which as recorded above as per the CA Act is",,,

impermissible!.,,,

xxx xxx xxx,,,

33. The rationale behind the Rule is that the litigation cannot be a non sequitur. In other words, there cannot be a litigation system in which it is",,,

impossible to litigate a given case. It is on the aforesaid principle that we have examined the statutory provisions of the CA Act and the effect of",,,

recusal of one member of the five-members of the Appellate Authority and held that recusal will not stall hearing and decision of the Appeal.,,,

Contention of lack of quorum on account of recusal of one member of the five member Appellate Authority for the aforesaid reasons fails and is",,,

rejected.â?.,,,

(Emphasis Supplied),,,

26. In Bharat Bijlee Limited v. Commissioner of Trade and Taxes, (2016) 231 DLT (CN) 2 (DB), the Division Bench of this Court, following Kwalita",,,

Restaurant (supra), directed the hearing to be conducted by two members instead of three members of Appellate Tribunal under Delhi Value Added",,,

Tax Act. The relevant portion of the said judgment is reproduced hereunder:-,,,

17. Turning to Section 73(4) of the DVAT Act, it is seen that the legislative intent is to ensure continuity of the functioning of the AT even if a

vacancy is caused in the membership of the Act. The wording of Section 73(4) of the Act makes this position explicit. It states that the Government

will endeavour to fill up the vacancy as soon as practicable. It does not say that till such time the vacancy is not filled up, the AT cannot

function as such. In the absence of any prohibition in the AT functioning as such with the remaining members when a vacancy is caused, it cannot be

presumed that an AT with a lesser number of members than those appointed initially cannot function as an AT.

xxx xxx xxx

20. In *Kwality Restaurant & Ice Cream Co. v. Commissioner, VAT* (supra), this Court took note of the fact that under Regulation 35(3) of the AT

Regulations, there can be a situation where the full quorum of the AT is not available since one or more members could withdraw on the ground of

conflict of interest vis-a-vis the subject matter of the proceedings before the AT. It was observed by the Court as under:

21. The Court further proceeded to observe that the conspectus of the DVAT Act and the AT regulations reveal that an AT discharges judicial

functions. Even if there were anomalies in the provisions, anything which tends to undermine the public confidence in the AT has to be

and wherever necessary, cured. In the facts and circumstances, the Court passed an order forbearing the third Member (Technical) from

participating in the proceedings in the appeal in question any further and also directed the appeal to be disposed of by the AT comprising two members

who heard it at the first place. The decision in *Kwality Restaurant & Ice Cream Co. v. Commissioner, VAT* (supra) underscores that the legislative

intent was that of continuity of the AT and not its cessation because of a vacancy in its membership.

22. As far as the present case is concerned, the Court finds that it is only on account of the vacancies created by the removal of the two of the three

members comprising the AT, that the remaining single Member (Judicial) had to function as AT with effect from 1st August 2013. Since he was the

only member, there was no question of constituting benches by issuing a notification under Section 73 (9) of the DVAT Act. Also in terms of Section

73(1) of the DVAT Act, since one or more members could function as an AT, there was no illegality attached to the single Member functioning as an",,,

AT. This is also in consonance with the legislative intent behind Section 73 (4) of the DVAT Act which contemplates continuity of the proceedings,,,

before the AT notwithstanding the vacancies created in its membership.,,,

xxx xxx xxx,,,

29. The Court is of the view that on a collective reading of Section 73(1), (4) and (9) of the Act together with the AT Regulations, the position that",,,

emerges is that as long as there is only one remaining member of the AT by virtue of the others being either removed or the vacancies not being filled,,,

up, such member can, subject to being otherwise qualified, validly function as an AT.",,,

xxx xxx xxx,,,

32. The result of the above discussion is that the Court negatives the plea of the Assessee and holds that the single Member (Judicial) could validly,,,

function as the AT between 1 st August 2013 and 20th July 2014. Further, even assuming that during the aforementioned period he lacked jurisdiction,",,

the de facto doctrine would apply and the decisions taken by him during the said period shall not be invalidated.â??,,,

(Emphasis supplied),,,

27. In *Radio Next Webcast Pvt. Ltd. v. Union of India*, (2018) 254 DLT 660, this Court held that the absence of Member Technical (Copyright),",,

does not in any manner impinge upon the jurisdiction of the Appellate Board as constituted under Section 83 of the Trade Marks Act and a conjoint,,,

reading of Section 11 of the Copyright Act and Section 83 of the Trade Marks Act clearly indicates that the Appellate Board as constituted under,,,

Section 83 of the Trade Marks Act would also have the jurisdiction to perform the functions under the Copyright Act as well. The relevant portion of,,,

the said judgment is reproduced hereunder:-,,,

â??1. The petitioner has filed the present petition, inter alia, impugning an Administrative Order dated 16.05.2018 (impugned order) passed by the",,,

Registry of Intellectual Property Appellate Board (hereafter â??the Appellate Boardâ?) declining to place the petitionerâ?s application filed under,,,

Section 31D of the Copyright Act, 1957 (hereafter â??the Copyright Actâ?) before the Appellate Board. The impugned order indicates that the",,,

petitioner's application is declined on the ground that there is no technical member (copyright) to place the application before the Appellate Board,,,

and, therefore, till such time that a technical member (copyright) is appointed, the matters relating to Copyright Act would not be listed before the",,,

Appellate Board.,,,

2. Ms. Shiva Lakshmi, counsel appearing for the respondents states that steps are being taken for appointing a technical member (copyright) in terms",,,

of Rule 3 of the Copyright Rules, 2013 and states that advertisement for such posts have been issued and is it expected that such appointment would",,,

be made shortly.,,,

3. Although, a technical member (copyright) has not been appointed as yet, it is not disputed that the Appellate Board is functional and is hearing the",,,

matters with regard to the Trademarks Act, 1999 as well as the Patent Act, 1970.",,,

4. The only question that falls for consideration of this Court is whether the Appellate Board, as presently constituted, has the jurisdiction to examine",,,

matters relating to the Copyright Act.,,,

xxx xxx xxx,,,

10. Having stated the above, it may be apposite for the respondent to also appoint a member technical (copyright), however, a vacancy in this regard",,,

does not in any manner impinge upon the jurisdiction of the Appellate Board as constituted under Section 83 of the Trade Marks Act.,,,

11. A conjoint reading of Section 11 of the Copyright Act and Section 83 of the Trade Marks Act clearly indicates that the Appellate Board as,,,

constituted under Section 83 of the Trade Marks Act would also have the jurisdiction to perform the functions under the Copyright Act as well. There,,,

is no dispute that an Appellate Board has been validly constituted in terms of Section 84 of the Trade Marks Act and is now functional. Thus, it is also",,,

required to "exercise the jurisdiction, powers and authority conferred on it by or under this Act the Copyright Act".,,,

12. In the aforesaid view, the impugned order is unsustainable and is, accordingly, set aside. It is directed that the petitioner's application be placed",,,

before the Appellate Board as is currently constituted. The Appellate Board shall examine the same in accordance with law.,,,

13. The petition is disposed of in the above terms. All pending applications stand

disposed of.â??,,,

28. In Natco Pharma Limited v. Union of India, S.L.P.(C) Nos.1323-1337/2008, there was no Technical Member in the Intellectual Property",,,

Appellant Board (IPAB). The Supreme Court vide order dated 01st October, 2008 appointed Dr. P. C. Chakraborti, Deputy Controller of Patents &",,,

Designs as Technical Member (Patent) of IPAB for hearing the particular appeal. The relevant portion of the order is reproduced hereunder:-,,,

â??A piquant situation has arisen in this case on account of absence of Technical Member in the Intellectual Property Appellant Board (IPAB),,,

constituted under the provisions of Section 116 of the Patents Act, 1970.",,,

On 2nd April, 2007, Central Government appointed S.Chandrasekaran as Technical Member (Patent) of IPAB vide notification of even date. On 3rd",,,

April, 2007, notification was issued notifying 2nd April, 2007 as the date for transfer of appeals pending before any High Court to IPAB. The appeals",,,

were transferred to the IPAB by the High Court vide its order dated 4th April, 2007.",,,

On 16th June, 2007, Misc. Petition Nos.1 and 2 of 2007 were filed by respondent No.4 herein before IPAB praying for the appointment of another",,,

Technical Member in place of S.Chandrasekaran on the ground that the said Member had earlier filed an affidavit in the matter taking a particular",,,

position in the dispute which has a direct bearing on the case in hand.,,,

It is under these peculiar facts and circumstances of the case and, particularly, in view of the fact that the controversy involved before IPAB is",,,

concerning crystal modification of a N-Phenyl-2-Pyrimidineamine derivative and since the dispute is regarding patentability of the process as well as,,,

the product that we are of the view that such complicated disputes need to be resolved by IPAB which must have a Technical Member in it.,,,

In the above facts and circumstances of this case only and without making our order a precedent for future cases, we called for a panel/list of",,,

Controllers duly qualified under Section 116 of the Patents Act, as amended by the Patents (Amendment) Act, 2006.",,,

From that list submitted to us, we have opted for the name of Dr.P.C.Chakraborti, Deputy Controller of Patents & Designs, who holds post- graduate",,,

degree of M.Sc.(Chemistry) as well as Ph.D.,,,

We, accordingly, direct that all preliminaries will be completed by the parties in

the month of October, 2008 and the IPAB duly reconstituted under our",,,
orders, which would include Dr. P.C.Chakraborti, would hear and decide the
pending Appeal Nos.TA/001/2007/PT/CH to TA/005/2007/PT/CH",,,
preferably in the month of November, 2008. We direct the IPAB to list the above
Appeals before it for directions on 3rd November, 2008. The matter",,,
will be heard and disposed of on day- to-day basis.,,,

As a special case, Dr.P.C.Chakraborti will continue to be the Member of the said
Board till the hearing and final disposal of the said appeals. He will",,,
be the Member of the IPAB only for the said Appeals.â???,,,

29. In Kudrat Sandhu v. Union Of India, W.P.(C) No(s).279/2017, the Supreme
Court vide order dated 11th May, 2018 extended the term of the",,,

President and the other members of National Consumer Disputes Redressal
Commission (NCDRC) till fresh appointments are made by the Central,,,
Government.,,,

30. In Rojer Mathew v. South Indian Bank Ltd , S.L.P.(C)15804/2017, the
Supreme Court vide order dated 29th May, 2019 extended the term of a",,,

Judicial Member of National Consumer Disputes Redressal Commission by one
year or till the process of fresh appointment is completed, whichever",,,
is earlier.,,,

Discussions and Findings,,,

31. IPAB was established on 15th September, 2003. IPAB has jurisdiction to deal
with the matters under the Patents Act, Trade Marks Act,",,

Copyright Act and Plant Varieties Protection Act. As per Section 84(2) of the
Trade Marks Act, the IPAB Bench comprises of one Judicial Member",,,

and one Technical Member (Trade Marks). For cases relating to the Patents Act,
the Bench shall comprise of a Judicial Member and a Technical",,,

Member (Patents); for cases relating to the Copyright, the Bench shall comprise
of a Judicial Member and a Technical Member (Copyright) and for",,,

cases relating to the Plant Varieties Protection, the Bench shall comprise of a
Judicial Member and a Technical Member (Plant Varieties Protection).",,,

32. This Court is pained to note that no Technical Member (Copyright) has been
appointed till date. The post of Technical Member (Patents) is lying",,,

vacant since 04th May, 2016 whereas the post of Technical Member (Trade
Marks) is lying vacant since 05th December, 2018. IPAB has only one",,,

Technical Member relating to Plant Varieties Protection.,,,

33. About 3935 cases are pending adjudication before IPAB across all its Benches. However, cases relating to trademarks, copyrights and patents are",,,

not being taken up as there is no Technical Member relating to those specialties. The term of a patent is only 20 years and in many cases, due to lack",,,

of Coram, the patents have expired and the matters have become infructuous and rights of parties have been severely prejudiced.",,,

34. Section 84(2) of the Trade Marks Act provides that the IPAB Bench shall comprise of a Judicial Member and a Technical Member. However,",,,

the Statute is silent on the procedure to be followed and adopted when there is a vacancy of a Technical Member or a Technical Member is there but,,,

he cannot participate.,,,

35. This Court is of the view that the doctrine of necessity has to be invoked in the present case. The legislative intent is of the continuity of IPAB and,,,

not its cessation because of a vacancy in its technical membership. If the post of the Technical Member is lying vacant, IPAB can proceed to hear the",,,

urgent matters and the orders passed would not suffer invalidity on the ground of lack of Coram.,,,

36. Applying the doctrine of necessity and following the principles laid down in Election Commission of India (supra), Kwaliti Restaurant (supra),",,,

Talluri Srinivas (supra) and Bharat Bijlee Limited (supra), this Court holds that the Chairman, IPAB and the Technical Member (Plant Varieties",,,

Protection) are competent to hear the urgent matters relating to the Patents, Trade Marks and Copyright till the vacancies of other Technical",,,

Members are filled up and the orders passed would not suffer invalidity on the ground of lack of Coram.,,,

37. If the Technical Member (Plant Varieties Protection) is not available for any reason or recuses, Chairman, IPAB can proceed to hear the urgent",,,

matters.,,,

38. In Patent matters, the Chairman, IPAB is at liberty to take the expert opinion of a scientific advisor from the panel of scientific advisors notified",,,

under Section 115 of the Patents Act.,,,

39. The Chairman, IPAB shall ensure compliance of these directions to ensure continuity of the functioning of the IPAB.",,,

Conclusion,,,

40. The Chairman, IPAB and the Technical Member (Plant Varieties Protection) are directed to take up the stay application of the petitioner for",,,

hearing in terms of this order and endeavor to decide the same within a period of six weeks.,,,

41. The Chairman, IPAB and the Technical Member (Plant Varieties Protection) are at liberty to take up other urgent matters relating to the Patents,",,

Trade Marks and Copyright.,,,

42. List for directions on 20th August, 2019.",,

43. The petitioner's submission mentioned in paras 8.2 and 8.3 and the suggestions of the learned amicus curiae shall be considered on the next date,,,

of hearing.,,,

44. Copy of this judgment be sent to respondent No.3.,,,

Copy of this judgment be given dasti to counsel for the parties under signatures of Court Master.,,,