Ctr Manufacturing Industries Ltd vs Sergi Transformer Explosion ... on 23 October, 2015

Author: G.S.Patel

Bench: G.S.Patel

NMS-497-14-CTR-V-SERGI-F02.DOC

gsp/agk/ssm

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO. 497 OF 2014
IN

SUIT NO. 448 OF 2012

CTR MANUFACTURING INDUSTRIES

LIMITED,
a company registered under the provisions of

the Companies Act, 1956 and having its
Registered Office at Nagar Road, Pune 411 004 ... Plaintif

versus

1. SERGI TRANSFORMER

EXPLOSION PREVENTION

TECHNOLOGIES PVT. LTD.,
A company incorporated under the

provisions of the Companies Act, 1956 and
having its Registered Office at 426, Udyog
Vihar, Phase IV, Gurgaon, Haryana, India

2. EASUN MR TAP CHANGERS
PRIVATE LIMITED,
A company incorporated under the
provisions of the Companies Act, 1956 and
having its office at 612 (232), M.T.H.

Road, Thiruinravur, Chennai - 602024
3. EMCO LIMITED,
A company incorporated under the
provisions of the Companies Act, 1956 and
having its office at Plot No. F-5, Road No.
28, Wagle Industrial Estate, Thane ... Defendants

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NMS-497-14-CTR-V-SERGI-F02.DOC

A PPEARANCES
FOR THE PLAINTIFF Mr. Navroz Seervai, Senior Advocate,

with Mr. H.W. Kane, Ms. Gulnar Mistry, Mr. Atul Singh, Mr. Amit Jajoo & Ms. Anaisha Zecharia, i/b M/s. PKA Associates

FOR DEFENDANT NO.1 Mr. I.M. Chagla, Senior Advocate, with Mr. Pradeep Sancheti, Senior Advocate, Mr. Pravin Anand, Mr. Vivek A. Vashi, Mr. Aditya Gupta, Mr. Jehangir Jeejeebhoy, Mr. Aditya Sikka, Mr. Krishnendu Satya & Ms. S. Madraswala, i/b M/s. Bharucha & Partners.

CORAM : G.S.Patel, J.

JUDGMENT RESERVED ON : 4th March 2015

JUDGMENT PRONOUNCED ON : 23rd October 2015

JUDGMENT:

(For convenience, the various sections in the official copy of this judgment begin on new pages, and portions of some section-ending pages may therefore be blank. This is deliberate and is to be ignored.) 2 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC CONTENTS INTRODUCTION .....4 CHRONOLOGY.....8 ELECTRICAL TRANSFORMERS ..... 18 CTR'S PATENT .....24 THE DTL TENDER SPECIFICATIONS ..... 32 CTR'S CASE IN INFRINGEMENT ..... 33 THE CONTESTING EXPERT OPINIONS..... 36 SCHEMATICS .....40 COMBINATION PATENTS & MOSAICING .....46 THE PRESSURE RELIEF VALVE: ESSENTIAL OR NOT?..... 51 THE RELEVANCE OF THE GRANT OF THE PATENT ..... 55 The 'Implausibility' Of CTR's Patent..... 57 SERGI'S DEFENCES ..... 59 Speed of Grant

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INTRODUCTION

1. By any measure, this litigation has had a particularly tortuous history: an ad-interim order, an interim order, three contempt applications, this Notice of Motion itself, innumerable appellate proceedings. In 2014, the contempt applications came before me. These were heard at some length and then, for reasons that do not now matter, parties agreed to go to hearing of the present Notice of Motion.

2. This is an action in patent infringement. The Plaintiff ("CTR") says it has an Indian Patent No. 202302 granted on 3rd August 2006 with a priority date of 16th November 2005 for an explosion and fire detection technology for use in electrical transformers. The patent is described as "A SYSTEM AND METHOD FOR PREVENTING AND/OR DETECTING EXPLOSION AND/OR FIRE OF ELECTRICAL TRANSFORMERS". The 1st Defendant ("Sergi") is the only contestant; and in this judgment, I use the word 'Defendant' to mean only the 1st Defendant. The 2nd Defendant is Sergi's distributor and agent, and the 3rd Defendant, a manufacturer of electrical transformers, is a purchaser of the systems manufactured by either CTR or Sergi.1 CTR claims that Sergi's product, the SERGI 3000, is an infringement. Sergi says it is no such thing, and its product uses a different technology. Sergi claims it has a license But not CTR "and/or" Sergi. This being a patent case, that linguistic abomination, one increasingly condemned in judgments everywhere and by scholars of both law and language (most notably Bryan Garner) as introducing needless ambiguity, and still much favoured by Patents Offices worldwide, rears its head throughout these papers. Canada's Intellectual Property Office as a general rule does not seem to allow the use of this expression, but this, sadly, seems to be an exception.

4 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC to manufacture fire systems in accordance with Indian Patent No.189089 granted on 14th December 2002 to one Phillipe Magnier, whose son Antoine is now Sergi's Managing Director.

CTR says that Sergi's attempt to exploit this licensed patent was a commercial failure, and what Sergi now does is to infringe CTR's Patent. Of course, Sergi denies all this. There is no infringement, it says; the two products are not the same. They differ in many ways, but at least in one crucial element and that is enough to dislodge CTR's claim. Sergi also questions CTR's claim to a patent in

the first place: it has filed a Counter-Claim here and, in the Patent Office, a post-grant opposition to CTR's Patent. There is also said to be a pre-grant opposition yet pending, and, in addition, there is Sergi's Revocation Application before the Intellectual Property Appellate Board. The patent to which CTR lays claim, Sergi says, was incapable of being granted: everything it claims was known in the prior art, including by CTR's own publications. Sergi also says that CTR's plaint is deliberately deceptive and contains crucial omissions. These could not have been accidental, Sergi claims; they were deliberate and they were studied, designed to persuade a court to grant an ad-interim injunction when, had the necessary material been placed, no such order could have been made.

3. The suit was originally filed before the Thane District Court in 2010 as Suit No. 1 of 2010. A Counter-Claim having been filed, it was then transferred to this Court in view of the proviso to Section 104 of the Patents Act, 1970. On that transfer, it was renumbered as Suit No. 448 of 2012. As it stands today, the record before me, the bulk of it digitized, is enormous: by my reckoning, the digital record is nearly 15,000 pages, very possibly more. In addition there are 5 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC compilations and documents tendered during the arguments that ran, albeit sporadically, between January and March 2015 when I heard Mr. Seervai for CTR and Mr. Chagla for Sergi. During the hearings, I was also treated to some visual depictions and even an animation in a seemingly unstoppable loop, more annoying than helpful. Unfortunately, not all this material is sufficiently well-

organized in the record: there are additional compilations, additional affidavits, incessant renumbering of pages and so on. To the extent that I was able, I have attempted to provide accurate cross-

references.

4. I have considered the rival submissions and the material on record and also spent no little time studying the various brochures, charts and specifications; the last of these most especially, since Mr. Chagla contends that there are material variations and changes in the iterations of CTR's Patent applications and its frequent amendments. To the extent that I can, I have also tried to understand the nature of the process involved and how each side presents its technology or method. I have found finally for the Plaintiff, being unable to accept the Defendant's case that there is no infringement or that the Plaintiff's patent was incapable of being granted. On the latter especially the view that I have taken is clearly only prima facie and is not intended to affect any pending application by the Defendant or its Counter-Claim in this very suit.

5. In the following analysis, I have not set out the rival submissions in the sequence in which they were presented. I have instead considered these under distinct heads, set out below. I note this specifically because though Mr. Chagla opened his address with 6 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC an attack on the plaint and his case on suppression, I have preferred to deal with this later in sequence. The reason is that it seems to me that should a case in infringement be made out on the material as it now stands before me, it then makes very little difference whether there is this or that omission in the plaint. At an ad-interim stage, such an argument might be a tilting factor and may result in ad-

interim reliefs being refused; but once all the material is in, an interim order might well follow, the initial declining of ad-interim reliefs notwithstanding. It is of course a different matter if it can be shown that even today, with this welter of material, there is yet not a case on infringement made out.

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6. Ordinarily, I should have begun with a chronological narrative. But the one in this case is so convoluted and so full of conturbations with, as I see it, very little of consequence to the issues before me today that I do not think this to be necessary. It is so long in the telling that it would be little more than a debilitating distraction. There are just a handful of crucial dates and events, and I have chosen instead to highlight only these in the body of this judgment. The full chronology, with the necessary cross-references to the record, is in the first annexure to this judgment; and it is only there for reference, should the need arise. Since the record is in such considerable disarray, I took the liberty of circulating a copy of this chronology to both sides to ensure accuracy in the cross-references to the record.

7. The crucial dates for our purposes are these:

> 7.1 On 5th November 1996, Sergi's director Phillipe Magnier filed an Indian Patent Application for registration of an invention entitled "Method and Device for Preventing/Protecting Electrical Transformer Against Explosion And Fire" under the Patents Act. This was then licensed to Sergi.
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> 8 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC 7.2 On 14th December 2002, Sergi obtained Patent No.189089 in respect of this application.2 Sergi claims to hold corresponding patents in various international jurisdictions.
>
> 7.3 Three years later, on 16th November 2005, CTR filed an Indian Patent Application No. 1425/MUM/2005 for the registration of an invention it called "A SYSTEM AND METHOD FOR PREVENTING AND/OR DETECTING EXPLOSION AND/OR FIRE OF ELECTRICAL TRANSFORMERS".
>
> ig CTR's application was published in the official journal of the Patent Office on 18th November 2005.4 On 20th January 2006, the Patent Office issued a First Examination Report.5 CTR responded with an amendment on 31st January 2006.6 There followed a Second Examination Report on 18th April 2006,7 and changes in response by CTR8 under its letter dated 26th April 2006.9 7.4 In the meantime, Phillipe Magnier, who held Indian Patent No. 189089 and was a Director at Sergi, filed a patent infringement action against CTR as Civil Suit Vol. A, Part (c), p. 118.

Vol. A, Part (a), p. 39.

Vol. A, Part (a), p. 37.

Vol. G-1, pp. 224-226.

Vol. G-1, pp. 227-245.

Thane Dist Ct R&P Vol. II ("D-2"), p. 787; Vol. G-2, Tab 2 Thane Dist Ct R&P Vol. II ("D-2"), p. 1081; Vol. G-2, Tab 5 Thane Dist Ct R&P Vol. II ("D-2"), p. 1141; Vol. G-2, Tab 5 9 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC No.27 of 2006 in the Calcutta High Court. Sergi was the 2nd plaintiff to this suit. The four other defendants to the suit were various corporate purchasers of the competing fire systems. The application for interim reliefs was opposed. On 22nd February 2006, a Single Judge of the Calcutta High Court allowed CTR to continue to sell its product, inter alia recording a statement by Sergi's counsel that the two products were different.10 By an order dated 17th April 2006, the Single Judge of the Calcutta High Court declined to re- hear Sergi's application as a new motion, but clarified that the statement made on 22nd February 2006 on behalf of Sergi would not bind at the final hearing of Sergi's motion. On 7th February 2011, Sergi unconditionally withdrew its suit.

7.5 CTR was granted its Patent No. 202302 on 3rd August 2006 under Section 43 of the Patent Act for "A SYSTEM AND METHOD FOR PREVENTING, PROTECTING AND/OR DETECTING EXPLOSION AND/OR FIRE OF ELECTRICAL TRANSFORMERS."

7.6 Sergi filed what it calls a 'pre-grant opposition' under Section 25(1) of the Patents Act on 20th January 2010.12 Vol. A, Part (a), p. 246.

Vol. A, Part (a), p. 39.

Vol. C, Comp, 5, pp. 229-230, paragraphs 11 and 12.

10 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC 7.7 On 20th January 2010, Delhi Transco Ltd ("DTL") floated tender T/SP.II/2009/44 for the purchase of 64 fire systems.13 The tender notice specified a techno-

commercial bid opening date of 16th February 2010 and a price bid opening date of 16th March 2010. The former was later postponed to 15th March 2010 and the latter to 28th September 2010.

7.8 On 22nd January 2010, Sergi also filed a post-grant opposition under Section 25(2) of the Patents Act.14 7.9 On 12th February 2010, CTR filed Civil Suit No.1 of 2010 before the Thane District Court as an action in patent infringement against Sergi.15 CTR made an application under Order 39 Rules 1 and 2 of the Code of Civil Procedure, 1908 ("CPC") for an ad-interim injunction restraining Sergi from infringing CTR's Patent. This application, numbered as Exhibit "5" before the Thane District Court, is the present Notice of Motion.16 On 15th February 2010, a handwritten purshis or application seeking urgent ex parte ad-interim reliefs was filed on CTR's behalf before the Thane District Court.17 This purshis, numbered as Exhibit 9, says that for the purpose of ad-interim ex parte relief Vol. A, Part (a), p. 251.

Vol. A, Part (b), p. 583; part of Ex.C to the Written Statement.

Vol. C, Comp. 5, from pp. 167-221.

Vol. C, Comp. 5, pp. 198-221; also at Vol. C, Comp. 1, pp. 12-34.

Vol. C, Comp. 5, p. 222.

11 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC only, CTR restricted itself to an application to restrain Sergi from selling its product to DTL.

7.10 On 15th February 2010, the Thane District Court granted ex parte ad-interim reliefs "in terms of the purshis Ex. 9" against Sergi and its distributor (the present 2nd Defendant).18 CTR was directed to comply with the provisions of Order 39 Rule 3 of the CPC and the notices were made returnable on 2nd March 2010.

CTR served the ad-interim order on Sergi on 16th February 2010. Sergi claims to have been informed by the 2nd Defendant of the suit, and it appeared before the District Court on 2nd March 2010, the returnable date. The actual writ of summons in the suit was served on Sergi only on 4th March 2010.19 7.11 On 12th March 2010, Sergi submitted its bid to DTL's tender.20 It says it told DTL about the 15th February 2010 order of the Thane District Court.21 CTR had also submitted a bid. DTL opened the technical bids on 15th March 2010.22 7.12 On 23rd March 2010, CTR filed an application under Order 39 Rules 2-A and 11 of the CPC, numbered then Vol. C, Comp. 5, pp. 223-234; "Order below Ex. 5"

Vol. C, Comp. 1, p. 60, paragraph 7 of Sergi's Reply Affidavit.

Vol. C, Comp. 1, p. 40.

Vol. C, Comp. 1, p. 73.

Vol. C, Comp. 4, Pt II, p. 442.

12 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC before the Thane District Court as Misc. App. No. 68 of 2010. This is now Notice of Motion No. 193 of 2013 before this Court.23 Sergi filed two replies dated 26th March 201024 and 3rd April 2010.25 In paragraph 16 of the first of these, Sergi through Antoine Magnier undertook not to sell its products to DTL till the restraint was lifted.26 On 26th March 2010, Sergi wrote to DTL about the pendency of the proceedings.27 7.13 On 16th April 2010, the grant of CTR's Patent No. 202302 was published in the Official Journal of the Patent Office.28 7.14 On 28th September 2010, DTL opened the price bids.

Sergi was declared to be the lowest bidder, L-1.29 On 4th October 2010, Sergi wrote to DTL saying it looked forward to receiving a purchase order.30 On 2nd December

2010, DTL placed a purchase order on Sergi.31 Vol. B. Vol B, Motion 192 of 2013, pp. 58-86.

Vol B, Motion 192 of 2013, pp. 87-91.

Vol B, Motion 192 of 2013, pp. 58, at p. 63.

Vol. C, Comp. 1, p. 74.

Vol. C, Comp. 5, pp. 271-274.

Vol. C, Comp. 4, Pt. II, pp. 442-444.

Vol. B, CTR Additional Affidavit, p. 3.

Vol. C, Comp. 2, p. 16.

13 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC 7.15 On 25th February 2011, the Thane District Court allowed CTR's application for interim relief, Ex. 5.32 The reasoned order on CTR's injunction application Ex.5 was issued by the Thane District Court on 19th March 2011.33 7.16 In the meantime, there were several other proceedings relating to Sergi's application to have its counter-claim taken on record and a preliminary issue framed under Section 9A of the CPC. These details are set out at length in the appended chronology. For the present, it is only necessary to note that the Counter-Claim was taken on record, and, ultimately, it was held that jurisdiction lay with this court since, on filing the Counter-Claim, the suit itself was transferred to this Court under Section 104 of the Patents Act. It was on account of this that a learned single Judge of this Court held on 17th January 201234 that the Thane District Court's orders on Ex. 5, viz., the orders of 15th February 2010 and 25th February 2011 would probably not hold the field.

7.17 CTR filed Appeal (L) No. 40 of 2012 and Appeal (L) 70 of 2012 against this order. Both were disposed of on Vol. C, Comp. 4, Pt. I, p. 237, operative order; Vol. C, Comp. 4, Pt. I, pp. 238-264, judgment and order.

Vol. C, Comp. 4, Pt. I, pp. 238-264.

Vol. E, Order Comp., Pt. I, pp. 95-97; per Vazifdar J, as he then was.

14 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC 16th March 2012.35 The Appeal Court found that the ad-interim and interim orders dated 15th February 2010 (the first ad-interim order on Ex. 5) and 25th February 2011 (the final order on Ex. 5) of the Thane District Court in fact continued in force and survived; and that both orders (including the order of 25th February 2011) were in the nature of subsisting and

binding ad-interim orders. Ex. "5", the present Notice of Motion, was directed to be treated as pending. The appeals were allowed. The judgment and order was stayed for four weeks, subject to Sergi not entering into a fresh contract with another party in respect of the products in question. It was clarified that the stay was to enable Sergi to execute the contract with DTL.36 7.18 On 26th March 2012, CTR filed Special Leave Petition No.10347-10348 of 2012 before the Supreme Court against the order(s) of 16th March 2012. On 25th May 2012, leave was granted in both Special Leave Petitions and these were disposed of with several directions.37 The present Notice of Motion was to be taken up at an early date; so too the suit itself. Till that time, Sergi would be entitled to continue to manufacture and sell its product in accordance with its patent but without infringing CTR's Patent (in accordance with its Vol. E, Order Comp., Pt. I, pp. 98-121.

Vol. E, Order Comp., Pt. I, pp. 122-123.

Vol C, Comp. 4, Pt. II, pp. 326-332.

15 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC undertaking given to the High Court on 15th November 2011).

7.19 On 19th June 2012, Sergi filed a revocation application (ORA No.42/12/PT/MUM) under Section 64 of the Patents Act. This is pending before the Intellectual Property Appellate Board ("IPAB").

8. As matters stand today, therefore:

8.1 The original Ex. 5, now the present Notice of Motion, is for final hearing, uninfluenced by either of the two previous orders of the Thane District Court;

8.2 Sergi's Counter-Claim is on record;

8.3 Sergi's pre- and post-grant oppositions to CTR's Patent are pending before the patents office;

8.4 Sergi's Revocation Application is pending before the IPAB;

8.5 CTR's Notices of Motion under Order 39 Rules 2-A and 11 are pending.

9. I am only required to consider the CTR's first motion for injunctive relief, what was first Ex. "5" before the Thane District Court and is now Notice of Motion 497 of 2014. I am not 16 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC considering the CTR's contempt Notices of Motion No.191-193 of 2013. I am also not required to address the issue of whether Sergi can simultaneously maintain a Counter-Claim, a pre-grant opposition, a post-grant opposition and a revocation application. I will comment on this toward the end of this judgment.

17 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC ELECTRICAL TRANSFORMERS

10. From great power comes great electricity, and electrical transformers are essential in the transmission, distribution and use of AC (alternating current) electrical energy to consumers. Transformer types vary depending on use, from the small ones used in domestic appliances and products, to the very large installations used in power generation and distribution. A transformer is an electrical device that transmits electrical energy between two or more circuits through electromagnetic induction. Typically, it is used to increase (step-up) or decrease (step-down) AC voltages, i.e., to change these voltages within power networks. In power distribution systems, transformers are essential since the resistance of power distribution wires or lines causes an energy loss. By stepping up the power to a higher voltage, transformers are able to mitigate the effects of this loss, yielding economy and efficiency in power distribution. From the point of power generation to final delivery to a consumer, a series of transformers of varying sizes and types are deployed by power distribution companies. Voltages need to be reduced from their initial high levels to levels that can be used domestically (typically 220-240V or 110V). The high voltages of transmission towers (stepped up to make up for transmissions losses) are steadily stepped down at receiving substations, distribution transformers on smaller poles and so on till acceptable power supply is delivered to an industrial or domestic consumer. There are two basic types of transformers, single-phase and three- phase, and there are other variants (core-type, shell-type, berry- type, for instance) as well. We are here concerned, of course, with 18 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC transformers at one end of the scale, those used in power generation and distribution: these are very complex pieces of engineering.

11. All transformers generate heat energy. The large transformers generate very high heat energy, and these require some type of special cooling and insulation. Some are air-cooled, while others use oil or water or some combination of these. The fundamental principles are, first, that an electrical current produces a magnetic field (electromagnetism) and, second, that a changing magnetic field within a coil of wire induces a voltage across the ends of the coil (electromagnetic induction). Changing the current in the coil changes the magnetic flux developed, and this changing magnetic flux induces a voltage in a secondary coil. The simplest transformer might have a soft iron or silicon steel core and windings placed on it. Both the core and the windings are insulated. The entire assembly is founded on Faraday's Laws of Electromagnetic Induction.

12. Stable at high temperatures, transformer oil or insulating oil (also 'dielectric oil'), normally obtained by fractional distillation and subsequent treatment of crude petroleum, provides excellent insulation. It is also used as a coolant and to suppress what is known as 'arcing' and 'corona'. For improved cooling, especially in large power transformers, the oil-filled tanks that are typical in such devices often have external radiators through which the oil circulates by natural convection.

13. Electrical transformers, like almost anything else, are subject to Murphy's Law: if anything can go wrong, it will. Transformers fail. The causes can be many, from insulation failures, internal 19 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC failures, mechanical or system malfunction, ruptures in the equipment, improper installation and maintenance to incorrect grounding, lightning strikes, damage to power lines, prolonged overloading, damage to the core, damage to the winding, and

even, it is reported, small animals across the power lines. Often, the result of a failure is an electric arc between the transformer's conductors, or even between a conductor and the transformer's tank. The electrical arc creates a high-energy short-circuit in the system, and this in turn causes a surge in the coolant oil. That triggers a chemical reaction of gas accumulation, and the pressure within the tank rises sharply and swiftly. The consequences can be catastrophic: often an explosion and, as the oxygen in the air outside meets with the superheated oil, an immediate fire.

14. Oil-filled transformers with a conservator (oil reservoir) may have a gas detector relay. This is called a Buchholz Relay. These have been use at least since the 1940s. The relay was first developed by Max Buchholz in 1921. A Buchholz Relay is a safety device mounted on oil-filled power transformers. It is equipped with an overhead oil reservoir called a 'conservator'. Typically, it is used to detect gas accumulation within the transformer due to corona discharge, overheating, or an internal electric arc. On a slow accumulation of gas, or rapid pressure rise, the Buchholz Relayis designed to trip a protective circuit breaker that disconnects power from the transformer. Transformers without conservators are usually equipped with sudden pressure relays. These perform a function similar to the Buchholz Relay.

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15. At the simplest level, a diagram of an electrical transformer with a Buchholz Relay looks something like this:

16. The Buchholz Relay in an electrical transformer is an oil container fitted to the pipe that connects the main tank to the oil conservator tank. It has two principal elements. The upper element is a hinged float that moves up or down depending on the oil level, rather like the float in any cistern. Typically, the float has a mercury switch, the alignment of which varies according to the float's position. The second element is a baffle plate with another mercury switch. This plate is so fitted (again on a hinge) just ahead of the inlet from the main tank. When oil enters the Buchholz Relay from that inlet at high pressure, the baffle plate's alignment and the mercury switch levels change. There are also gas release valves above the relay. Electrical leads are taken from the mercury switches through a terminal block. The Buchholz Relay is a mechanically activated device. The principle is this: on a transformer failure, the insulating oil is decomposed into Carbon Monoxide and Carbon Dioxide (CO and CO2). These gases accumulate in the upper part of the Buchholz container. That causes the oil level to fall. With that, 21 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC the float takes a lower position, and this triggers the mercury circuit, which in turn triggers an alarm. More severe faults are often accompanied by oil surges. These strike the lower-positioned baffle plate and close the mercury switch attached to that plate. This energizes the trip circuit of the circuit breakers and that allows the faulty transformer to be taken off-grid, isolated from the rest of the power system. While this is the theory, it sometimes so happens that a Buchholz Relay returns a 'false positive': it activates without any real transformer failure. This might happen due to air pockets or bubbles (which force down the oil level). The lower baffle plate mercury switch may also be activated if the velocity of oil delivery is high, though not due to an internal fault, and this trips the circuit. The following diagrams show a typical (and over-simplified) Buchholz Relay:

17. Generally speaking, some safety systems (I am not confining myself here to the two competing devices) detect or sense imminent

22 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC explosion or fire and act to prevent these from occurring; others assist at a slightly later stage, and ensure a quick and safe shut-down or allow a transformer to be taken offline smoothly. In essence, they seem to be warning systems; CTR says its device is an early warning system, one that anticipates an imminent explosion, something that Sergi's does not.

23 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC CTR'S PATENT

18. CTR claims that apart from its domestic patent application, it also applied internationally. In the course of the international application(s), CTR sought the written opinion of an International Searching Authority, established under the Patent Cooperation Treaty, on the novelty, inventive step(s) and industrial applications of the CTR's claim. The ISA is said to have examined CTR's technology and compared it to the prior art including, importantly, Sergi's previous US patent.38 The ISA was of the view that Sergi's patent, "for a method of prevention, protection and detection against explosion and fire" in an oil-filled electrical transformer, detected breaks in electrical insulation using a pressure sensor, depressurizing the coolant in the tank using a valve, and cooling the heated coolant by injecting a pressurized inert gas into the bottom of the tank. This stirred the coolant and prevented oxygen from entering the tank, and hence prevented a fire. In contrast, CTR's Patent was, in ISA's opinion, a method of detecting the possibility of a fire or explosion in advance, before the decomposition of the coolant or dielectric oil into hydrocarbon gases, and in doing so with little to no delay. It was said to be based on a warning feedback by monitoring the incoming and outgoing current in the transformer and using a detected imbalance as a signal to the circuit breaker.

Then the Buchholz Relay signal and the circuit breaker were used to generate a control signal that triggered the draining of the combustible coolant fluid, followed by the injection of nitrogen gas from the bottom of the transformer tank to stir the coolant. The Plaint, pp. 49-50.

24 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC inventive step in this (CTR's Patent) was that the prior art (including Sergi's patent) did not use a Differential Relay to sense an imbalance in the incoming and outgoing current together with the signals from the Buchholz Relay and the circuit breakers to generate a control signal at an early stage. Importantly, Sergi's own initial patent claimed to be faster than the prior art that preceded it.

Other patents were temperature-sensor based; Sergi's was pressure- sensor based; and CTR claims to be even quicker in detection. The ISA report notes that none of the previous patents had all these features in combination. The Differential Relay, the Buchholz Relay and the Circuit Breaker are all integers in transformer safety device design that are central to the present dispute.

19. In paragraphs 13 and 16 of the Plaint, CTR says that the fundamental features of its patent are these:

> 19.1 CTR's Patent provides a first input to a control unit using a differential current-sensing electrical relay to calculate the difference between the input and output current. Arcing in a transformer, for whatever reason, creates an imbalance between the input and output current in the transformer. This almost instantly creates turbulence and a rise in pressure in the transformer tank. CTR's Patent uses a Differential Relay to monitor the difference between the input and output currents. Once detected, a first signal is sent to the control unit. As I understood it, this is essential to CTR's Patent. For, according to Mr. Seervai, the prior art detects defaults that follow the imbalance in the 25 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC input/output currents; they do not detect that imbalance or differential at all.
>
> 19.2 CTR's Patent uses the Buchholz Relay to provide a second input signal to the control unit. Arcing generates high energy within the transformer. This causes turbulence in the coolant oil, and consequent oil surges. This is where the Buchholz Relay comes into play (as explained earlier). CTR's Patent deploys the Buchholz Relay to generate a second input signal.
>
> 19.3 Further, once the Differential Relay detects an imbalance in the input/output current, it signals the circuit breakers, which then trip. Oil surges detected by the Buchholz Relay also trigger a tripping of the circuit breaker.
>
> 19.4 Working in combination, these three signals result in an activation of the safety system mechanism. The transformer is isolated. That stops any further energy feed into the transformer, preventing an explosion.

Also, on receipt of a signal from either source, the control unit sends out a signal that energizes a lifting magnet to drain the coolant and to inject nitrogen gas from the bottom of the tank through a valve. This stirs the coolant, reduces the temperature and drives out the oxygen.

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20. The principal difference between the two patents, Mr. Seervai says, is in the timing. CTR's system does not await a pressure build- up. That, according to him, is an event that occurs later, though perhaps only fractionally. But that minute delay makes all the difference. CTR's system 'senses' an imminent pressure build up, before or just as it starts, and responds instantly. CTR's system thus 'kicks in' at two early stages: when there is arcing, because this is typically a precursor of the problems that follow; and before or at the very start of the pressure build-up. CTR's system is electrical:

> the Differential Relay is, by definition, an electrical device. This is in distinction to Sergi's patented system of a pressure sensor, a mechanical device; one that is, according to CTR, prone to frequent malfunctions and inherently unreliable. CTR's control unit collects 'data' (meaning input signals) from the Differential Relay, the Buchholz Relay and the Circuit Breakers.39

21. It is important to note here that CTR's case is not patent-

versus-patent. It is that Sergi is now manufacturing a product not according to its own patent, but in infringement of CTR's. Sergi, on the other hand, claims that CTR's Patent itself was wrongly granted; that there is nothing novel or inventive about any of it; that all of it was known to the prior art; nd that known integers have only been shuffled about to give the impression of inventiveness; and that it does not do what it claims, viz., to provide an early warning system. Indeed, Mr. Chagla's submission is that on any reading of CTR Complete Specification Patent No.202302, "Summary of the Invention", Vol. G-1, pp. 6-28 at pp. 10-11.

27 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC the material, CTR's Patent cannot possibly provide any reduction in detection time at all. The patent itself is vulnerable, he says.

22. CTR's complete specification40 sets out what, according to it, is the 'prior art', including in Sergi's Indian Patent No.189089. That patent uses a pressure sensor as a means for detection. Other patents are also explained. According to CTR, all these use 'pressure means'. These, CTR claims, come late in time sequence after much damage is done; specifically 'tearing'. None of them, it says, teaches a system or method to detect or prevent tearing without delay, before it occurs. CTR's system is said to operate before the coolant oil's decomposition. Specifically, it claims that its system is 'devoid of pressure sensors, temperature sensors or vapor sensors'.

The complete specification sets out 14 'claims': there were originally 16 in the provisional specification, but these seem to have been merged and then split during the patent grant process to yield the final 14.

23. Sergi's Indian Patent No. 18908941 also claims to reduce time. It specifically says that the patent uses a pressure-sensor means to detect a break in the electrical insulation of the transformer and then triggers a partial draining of the coolant, and the cooling of the tank by the injection of a pressurized inert gas to stir the coolant and flush the oxygen.

Document at Thane Dist. Ct. R&P Vol. II ("D-2"), pp. 1029-1080; Vol. G-1, pp. 6-28.

Plaint, pp. 73-89.

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24. On 24th July 2009, CTR obtained an expert technical opinion from Dr. D.B. Talange and Dr. S. S. Dambhare, respectively Professor & Head and Associate Professor of the Department of Electrical Engineering, College of Engineering, Pune.42 The Talange-Dambhare opinion was in response to CTR's request of 17th July 2009 to determine if the Sergi 3000 system (from Sergi's catalogue) was identical or substantially similar to CTR's Patent No.202302. The opinion was based on the catalogue description, Sergi's Patent No.189089, CTR's Patent No. 202302, Sergi France's catalogue, and a technical drawing of the Sergi 3000. The Talange-Dambhare opinion was unequivocal on this: that CTR's Patent's novelty lay in its use of the current-imbalance sensing

Differential Relay; and the use of the Buchholz Relay's oil surge relay feature. These, the opinion said, were absent in the Sergi India Patent and the Sergi France catalogue. The Sergi India catalogue however claimed to have both these features. The report concluded that the Sergi France catalogue product was in consonance with the Sergi India Patent; that the Sergi France catalogue product did not show the novel features of CTR's Patent; and that the Sergi India product in its catalogue did show the novelties of CTR's Patent. In other words, the Sergi 3000 product sold in India did not accord with its patent, but was identical or substantially similar to CTR's Indian Patent.

25. In addition, CTR relies on two affidavits of one T.R. Subramanian, Controller-General of Patents and Trade Marks from 1996 to 1998. The first of these is dated 26th March 2010 in the Plaint, pp. 248-250.

29 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC present Notice of Motion.43 The second is dated 10th January 2012 and was filed as Exhibit "E" to CTR's further affidavit dated 16th January 2012 in its Notice of Motion No.665 of 2011.44 The two affidavits differ in important respects: the second followed the DTL tender and Mr. Subramanian then had for his examination copies of drawings submitted by Sergi to DTL, the DTL tender and so on.

The questions put to him were also different: the first related to the validity of CTR's Patent, and the second was an examination of whether the Sergi (India) 3000 product infringed the CTR Patent. I will return to the second affidavit shortly.

26. In the first affidavit, Mr. Subramanian was of the view that CTR's Patent combined the Differential Relay, the Buchholz Relay and the Circuit Breaker for delivering three input signals to the control unit, and the control unit in turn triggered a fire extinguishing system. The system, he said, detected the possibility of explosion and fire well in advance before decomposition of combustible coolant oil set in. He was, in 2010, of the considered view that this was a clear technical advancement. He also saw Sergi's Patent No.189089 as being 'completely different' since it operated on a:

> pressure sensitive system which operates at a later stage when the pressure inside the transformer tank is static or after a fire or rupture has taken place in the transformer. The pressure system Motion paperbook, pp. 73-81.
>
> ^ 30 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC thereafter operates the fire extinguishing system.

(Emphasis added) Specifically, Mr. Subramanian took the line that although all the integers in CTR's Patent taken individually were known to the prior art, no previous system or device used them in this unique combination array. The earlier systems operated to disconnect power supply to the transformer, but provided no method of detecting an explosion or fire. He also specifically opined, in March 2010 that Sergi's product had adopted the novel and inventive features of CTR's Patent and that there was a clear case of infringement.

31 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC THE DTL TENDER SPECIFICATIONS

27. The DTL Tender contained technical specifications of the fire protection system.45 It required a "Nitrogen Injection Fire Prevention Cum Extinguishing System" ("NIFPES"). Clause 2.5 related to "Activation of the NIFPES", and clause 2.5.2 spoke of "the Auto Mode":

> 2.5.2 Auto Mode
>
> a) For Prevention of Fire : i) Differential Relay Operation ig ii) Buchholz Relay parallel with Pressure Relief Valve or RPRR (Rapid Pressure Release Relay)
>
> iii) Tripping of all concerned breakers is a pre-requisite for initiation of system activation
>
> b) For Extinguishing Fire : i) Fire Detector
>
> ii) Buchholz Relay paralleled with Pressure Relief Value or RPRR.

iii) Tripping of all connected breakers is a pre-requisite for initiation of system activation.

Motion paperbook, pp. 82-121; from p. 111.

32 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC CTR'S CASE IN INFRINGEMENT

28. Mr. Seervai says that on a plain reading, these specifications eliminated any product that accorded with Sergi's Patent No.189089 since that did not feature a Differential Relay, a Buchholz Relay and a Circuit Breaker working in tandem like this. Indeed, he says, this was a bespoke specification that only a device in accordance with CTR's Patent could meet.

29. During the hearings, Mr. Seervai handed in colour copies of the Sergi France brochure for its Sergi 3000 product and the Sergi India brochure for ostensibly the same thing. On an inner page of each is a flowchart or diagram. The French brochure does not show a Differential Relay at all. On the Fire Prevention side, it also does not show a Buchholz Relay being deployed. It only shows a pressure sensor. We must bear in mind that we are here concerned with the fire prevention patent, not the fire extinguishing patent; for, on the fire extinguishing side, the Sergi France brochure does have a Buchholz Relay (and this seems logical). Sergi's Indian brochure is markedly different. It is also ostensibly for the Sergi 3000 product, one that is, therefore, presumably in accordance with the Sergi Patent No. 189089. But the flowchart or diagram in the Indian brochure now shows, in prevention mode, the deployment of both a Differential Relay and a Buchholz Relay, along with a Pressure Relief Valve and a Master Trip (circuit breaker). It claims that the Buchholz Relay and the Pressure Relief Valve are alternates to each other, but the Differential Relay and the Master Trip must work in conjunction ("and").

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30. What Sergi India has done, Mr. Seervai says, is not to tack on a Differential Relay and a Buchholz Relay to their product. They have simply abandoned their product and are using one that is CTR's. It was impossible for Sergi to obtain the DTL contract without infringement.

31. One of the reasons for this, CTR says in paragraph 22 of the Plaint, is the very great success of its patented commercial offering. Many State Electricity companies professed their approval, as did the Central Electricity Authority, a statutory body. The patent was said to have set a new benchmark. This success eroded the market for Sergi's competing product based on its Patent No. 189089; and this led Sergi, or so CTR says, to all manner of desperate moves, including filing the patent infringement action in Calcutta to which I have previously referred.

32. CTR's case in infringement is set out in paragraphs 23 to 27 of the Plaint. Of course, it is repeated at several places through this mountainous record, but I do not think it is necessary at the stage of the Motion to minutely examine each of these assertions.

33. Till 2007, Sergi manufactured its product in accordance with its own Patent. Then, seeing the success of CTR's rival offering, and having failed through the Calcutta patent infringement act to stop its onward march, Sergi wholly abandoned its patented 34 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC product. It then put the Sergi 3000 into the market and this was and is, CTR says, nothing but a slavish copy of CTR's Patent.46

34. CTR says that the essential integers of Sergi's product are the same as those in CTR's Patent.47 I understand this to mean the deployment of the Differential Relay and the Buchholz Relay with an oil surge sensor, in the unique manner of CTR's Patent. CTR says that Sergi's brochures and the flowchart in those shows this. These two essential features of CTR's Patent do not exist in Sergi's patent; they do in the Sergi 3000 sold in India.48 Plaint, paragraph 23, Vol. A, p. 19.

Plaint, paragraph 24, Vol. A, pp. 19-20.

Plaint, paragraph 25, Vol. A, pp. 20-21.

35 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC THE CONTESTING EXPERT OPINIONS

35. I believe this is a good place to attempt a small excursion into the contesting 'expert' opinions placed on record. I have already discussed some of the material that CTR relies on in its Plaint; specifically, the Talange-Dambhare opinion and Mr. Subramanian's first affidavit. I take up now Mr. Subramanian's second affidavit of 10th January 2012 filed in Notice of Motion No. 665 of 2011.49 Here, Mr. Subramanian specifically directed himself to the question of infringement. He considered, among other documents, the DTL tender, Sergi's drawings submitted to DTL, the two contesting patent specifications and the Sergi 3000 brochure. The questions to him were whether or not the Sergi 3000 product sold to DTL accorded with Sergi's Indian Patent No.189089; and whether or not the Sergi 3000 product agreed to be sold to DTL was identical or substantially similar to CTR's Indian Patent No.202302. He formed the opinion CTR's Patent was indeed unique and novel. It used its various integers in a special way for its intended purpose. In contrast, the Sergi Indian

Patent was entirely pressure sensor based.

The activation trigger was only the pressure sensor. He concluded that the Sergi Patent did not accord with Sergi's Indian patent, and that the product offered by Sergi was identical, or at least substantially similar, to CTR's Indian Patent No. 202302. The features described in Sergi's brochure did not figure in its patent; but they did and do form part of the essential technical specifications and novelty of CTR's Patent.

Motion No. 665 of 2011 paperbook, pp. 320-324.

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36. I find it very difficult to fault Mr. Subramanian's reasoning and train of thought in either of his affidavits, and I am equally unable to simply jettison the Talange-Dambhare opinion. All these seem to me to be entirely consistent with CTR's depiction of its Patent and the complete specification of CTR's Patent. The obvious inconsistency between Sergi's French brochure and its Indian brochure is simply inexplicable at least to this extent: that while the French brochure describes a system or method that accords with Sergi's Patent No. 189089, the Sergi India brochure does not and is a clear departure from it. On the face of it, the Sergi India product brochure hews very closely to CTR's Patent.

37. The matter should really have ended at this; and very little more was required. Mr. Chagla however mounts a frontal assault on the CTR patent itself: there is, he says, nothing so very novel or unique about it. All its integers are, and even at the time of the application, were known to the prior art. CTR's mere re-

arrangement of these well-known integers with their well- documented and well-established functions is by no means a novelty sufficient to sustain a patent; and if there is no properly granted patent, Sergi's deployment of those very integers cannot possibly constitute infringement. What CTR claims as being novel on the priority date of 16th November 2005 was also previously disclosed by CTR itself in its brochures, Mr. Chagla claims, formed part of the prior art, and was fully anticipated.

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38. In opposition to CTR's experts, he relies on the opinions of one Rajiv Bhatnagar, a consulting patent agent,50 and of one Gaurav U. Phadnis, a lawyer with a bachelor's degree in mechanical engineering and a master's degree in intellectual property and competition law.51 I rather got the impression that Sergi invokes both opinions with no great enthusiasm, and perhaps understandably: Mr. Chagla has more substantial points of defence. Indeed, I would disregard Bhatnagar's opinion entirely on one solitary ground: in saying that the Buchholz Relay has been used since the 1950s (which nobody denies; indeed, possibly earlier), he says that 'several of these facts are reported on Wikipedia (a respected technical encylcopedia on the Internet)'. That is, I imagine, enough to tell us of the reliability of his opinion even prima facie. In any case, all that he

says is that the many integers are known to the art, a matter that takes us nowhere. What is, however, of interest is that he does not mention the use in a particular combination or sequence of these known integers, as if to suggest that they can be randomly deployed and will still yield the same final result. I imagine that to be completely incorrect. Phadnis's opinion is in response to specific questions put to him: whether the Differential Relay and the Buchholz Relay are known to the prior art (they are; no opinion was needed on this); whether the validity of the CTR patent can be challenged (I expect anything can be challenged; the question should properly be whether it can be successfully challenged); and finally, whether the Sergi 3000 system as shown in the brochure infringes CTR's Patent. What he does not Motion paperbook, pp. 127-129 Motion paperbook, pp. 130-187.

38 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC seem to have been shown is Sergi's French brochure. Phadnis then provides a tabular comparison of the two patents and his opinion. In this, he speaks only about the various components or integers but not about the manner in which they are made to work together. The flaw in this analysis lies, I think, in his opinion that there is no great novelty in claiming that the Differential Relay senses an imbalance in the input and output currents, because that is precisely what the function of the Differential Relay is in the first place. This begs the question. CTR does not claim that the Differential Relay is being adapted to do something other than what it is supposed to do. It claims that the result of that function, an electrical signal, is for the first time being used to provide an input signal to a control unit, something that has never been done before. This seems to have escaped Phadnis; and, indeed, the very same thing could be said about the Pressure Sensor or Pressure Relief Valve in Sergi's patent. Neither of these opinions is persuasive.

39 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC SCHEMATICS

39. Before I turn to the next set of submissions, I think it would be useful to set out some of the schematics that have been placed on record. There are very many of these scattered through the record. Others have been tendered. Some are illegible and it is not possible to reproduce these here. During arguments, Mr. Chagla tendered two such schematics, one on 12th February 2015 and another revised version on 16th February 2015. I have taken only the latter. I have also included the schematics from the Sergi's French and Indian brochures, and one flowchart that is in CTR's Written Statement to Sergi's Counter-Claim. Between these, I believe the contesting claims are sufficiently clear. These are set out on the pages that follow.

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40. The first is a block diagram of CTR's Patent annexed to the Plaint.52 Plaint, Vol. A, p. 89-A. 41 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC

41. The second is a flowchart from the Written Statement to the Counter-Claim.53

42. This seems clearly to show that the CTR Patent claims to act ahead in time of the Sergi Patent. The reference to the Elin technology is a reference to the previous international license relating to

fire extinguishing. We are concerned with the novelty of the methods at the point above the 'transformer explosion' step in the ladder depicted above.

Vol. A, p. 344 42 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC

43. Sergi's French brochure has this schematic:

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>
> 44. The Sergi India brochure shows this:
>
> 45. Now these last two images clearly demonstrate that the Sergi India product brochure shows key elements that the Sergi France brochure does not show at all on the prevention and detection side:
>
> specifically, the Differential Relay and the Buchholz Relay. Further, while CTR claims to use the Buchholz Relay to sense an oil surge, and says that Pressure Relief Valve is irrelevant and can be tacked on without making any difference at all (Mr. Seervai says it sends no 'signal' but is only an alarm), the Pressure Relief Valve is a mechanical (non-electrical) device that is admittedly essential to Sergi's original patent and as shown in the Sergi France brochure.

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46. Mr. Chagla's second comparative chart shows this:

47. Here we see the differences as Mr. Chagla perceives them.

According to him, in the Sergi product, the Differential Relay or the Buchholz Relay or the Pressure Relief Valve trips the circuit breaker;

the Differential Relay also sends a signal to the Control Unit; either the Buchholz Relay or the Pressure Relief Valve also sends a signal to the Control Unit; and the Circuit Breaker also sends a third signal to the Control Unit. He says this is faster and more efficient than CTR's claim; and there is nothing very unique or novel about any of it. It is faster because, according to him, since the CTR claim works in series and needs simultaneous signals from all three inputs to the Control Unit, it is much slower.

45 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC COMBINATION PATENTS & MOSAICING

48. This formulation is strenuously disputed by Mr. Seervai. The law does not, he says, require every integer of a patent to be novel:

the whole can be both greater and more novel than the sum of its parts. To dislodge a granted patent, the defendant in such an infringement action must do more than merely assert a lack of novelty or simply show that some, or even all, integers are previously known. Once the plaintiff has shown that he holds a validly granted patent and that it prima facie appears to be an inventive step, there can be no finding for a defendant's contention that the patent is a mere arrangement or re-arrangement of known devices only on a defendant making that assertion. To succeed, that defence must be backed with scientific literature, and persuasive expert opinion.54 Section 3 of the Patents Act tells us what are not inventions, and among the various categories listed is this:

Section 3 -- What are not inventions The following are not inventions within the meaning of this Act, --

```
(a)      ...

(f) the     mere   arrangement   or   re-
arrangement   or   duplication  of  known
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devices each functioning independently of one another in a known way;

Strix Ltd v Maharaja Appliances Ltd., MIPR 2010 (1) 0181 (Del), per S. Muralidhar J.

46 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC I think the words I have emphasized form a limitation to the defence. It is not enough to show (as both Sergi's experts seem to do) that the patent has known devices or integers. Nor is it enough to show that those devices perform the functions for which they were intended; that, at least, is obvious, for if they did not, they would not be used and would be mere surplusage. It must also be shown that every one of these integers functions independently of every other one and does so in a manner that is known. I cannot possibly arrive at that finding. The material before seems clearly to indicate that CTR's use of the Differential Relay, the Buchholz Relay and the Master Trip or Circuit Breaker, all previously known to the art, have been used in a completely unique and novel fashion.

They do not work independently of each other in a known way; and the patent lies precisely in the combination of their use, the timing, and the manner in which their known functions are deployed to deliver a stated result. 'Mosaicing', cobbling together bits and pieces, is not in and of itself a complete defence to a patent infringement action except in very limited circumstances. In short, to succeed, the charge of mosaicing must itself be self-evident and plain, one that can be put together by "an unimaginative man with no inventive capacity".55 The cobbling together must be so

obviously non-inventive that 'he who runs can read'.

49. There is a vast body of law, both here and in other jurisdictions, on this. For combination patents, the issue for J. Mitra & Co. Pvt. Ltd. v Kesar Medicaments & Anr., 2008 (36) PTC 568 (Del.), per Sanjay Kishan Kaul J (as he then was), citing Terrell on Patents, 16th ed., 2006, in turn quoting Reid LJ in Technograph v Mills & Rockley, [1972] RPC 346 at 355.

47 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC determination is whether the combination of the integers was at the relevant time obvious, not whether each integer regarded in isolation was obvious.56 In contemporary terms, the test is to see whether this combination of integers from the myriad previous publications that constitute the prior art is an obvious selection.

50. In M/s Bishwanath Prasad Radhey Shyam v Hindustan Metal Industries,57 the Supreme Court dealt with this question in a patent infringement action relating to a new device and method of manufacturing utensils. There too, as here, the defence of mosaicing was raised. The Court held that to be patentable, an improvement on what was previously known, or a combination of matters previously known, must be more than mere workshop improvement.

It must be an 'inventive step'. It must produce a new result, a new article or a better or cheaper article (or result) than before. It is permissible to combine old, known integers such that in the new combination and their inter-dependency or interrelation they produce a new process or an improved result. A mere collection of old integers that does not involve an inventive faculty does not qualify. It is not the 'new-ness' of purpose or the novelty of application that is relevant; there must be novelty in the mode of application. That mode must display some ingenuity. When it is said that the patent is precisely such a non-inventive, self-evident mosaic, and that what it does is 'obvious', then that defence of 'obviousness' must be construed strictly and objectively. It must be Davison, Mark J, Ann L. Monotti and Leanne Wiseman; Australian Intellectual Property Law, Cambridge University Press, paragraph 13.8.1 (1979) 2 SCC 511; under the Patents & Designs Act, 1911.

48 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC shown to be something that does not naturally suggest itself; it must not be the obvious or natural suggestion of the previously known.

51. The integers may be known, but they may be arranged or re- arranged in some previously unknown and non-obvious manner to deliver a new or improved result. It is not enough to say merely in opposition that each of the integers was previously known. Their rearrangement must be one that suggests itself for the defence to succeed.

52. In Gandhimati Appliances Ltd v L. G. Vardaraju,58 a Division Bench of the Madras High Court said in the context of a patent- claim contest about wet grinders that it is accepted as sound law that a mere juxtaposition of old (meaning known) integers so that each performs its own proper function independently of any of the others is not a patentable combination; but where these old, known integers are so placed together as to have a working interrelation producing a new or improved result, then there is patentable subject matter in the idea of the working interrelation brought about by such a collation of these integers.

53. Incidentally: that paragraph in Gandhimati Appliances cites Diplock LJ in Reymes-Cole v Elite Hosiery Company Ltd,59 but I suspect incorrectly.60 That decision, though of Diplock LJ with (2000) 3 MLJ 85; per R. Jayasimha Babu and Mrs. Prabha Sridevan JJ; paragraph 29 of the MLJ report.

[1965] RPC 102 The citation in the MLJ report ("1965 RPC 117") is also incorrect; the correct citation is [1965] RPC 102.

49 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC Willmer LJ delivering a separate but concurring judgment, was one that related to a particular type of closed-toe hosiery or stocking. It did not contain any such passage, as indeed it could not, because no such question arose there. The seeming error notwithstanding, I still believe the proposition to be correctly stated.

50 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC THE PRESSURE RELIEF VALVE: ESSENTIAL OR NOT?

54. This legal position, too well-settled now I take it to admit of any meaningful dispute, leads ineluctably to another legal consequence: once it is found that there is a validly granted patent, i.e., that there is prima facie inventiveness and novelty, and the defence of mosaicing fails, then it is always necessary to compare the patent (or patented device) to the device said to be an infringement. If the latter adds merely non-essential or superfluous elements, or makes trifling variations, the charges of piracy and infringement are not deflected.61

55. This necessarily takes us to the question of the Pressure Relief Valve or PRV and Mr. Chagla's claim that it is 'essential' to the DTL Tender. The PRV is wholly disclaimed by CTR, which says it forms no part of its invention. Yet the PRV was required by DTL, according to Mr. Chagla, and Sergi's product and patent both featured it. Sergi did not, therefore, tack on something wholly redundant and claim its product to be different; it supplied what was necessary, essential and called for, something not superfluous or redundant, and something that is entirely missing in the CTR patent. If Sergi uses something that CTR actively disclaims, Mr. Chagla says, then there can be no infringement; otherwise, the patent is invalid.

Raj Parkash v Mangat Ram Choudhary, AIR 1978 Del 1 51 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC

56. I do not think this is an entirely correct reading of the DTL tender specification. In fact, I think it is entirely incorrect. The DTL Tender's Technical Specifications do not in fact mandate a PRV.

They do mandate a Differential Relay, and they mandate a Buchholz Relay with a PRV or a Rapid Pressure Release Relay (RPRR). The essentials of this tender specification are the Differential Relay, the Buchholz Relay and a tripping system. The PRV or the RPRR are alternatives for use with the Buchholz Relay. I have earlier explained, as best I could, the functioning of a Buchholz Relay, and this is precisely the reason why I felt it necessary to do so. The Buchholz Relay is not, in the DTL specification, an alternative to the PRV or the RPRR. It is to be used with either a PRV or a RPRR,

and that is necessary because of the functioning of the Buchholz Relay in the first place. Consequently, the addition of the PRV to CTR's Patent is utterly inconsequential. A device on that patent would just as easily work without a PRV (to which, in any case, the DTL specification itself allows an alternative). But the system that DTL called for cannot possibly work without a Differential Relay or a Buchholz Relay. Those are essential. It also cannot work with merely a PRV or even with a PRV and a Buchholz Relay. Therefore, what Sergi has 'tacked on' is not something inconsequential. The fact that the Differential Relay was a known integer makes no difference in this case. Its deployment in the manner in which CTR's Patent uses it is prima facie a novel and inventive method returning an improved result. When I look beyond the patent, as courts must sometimes do, I find that there is compelling material to support what CTR says.

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57. The degree of inventiveness is irrelevant. Slight alterations or improvements may yield dramatically important results and might be the result of very great ingenuity. In Canadian Electric Co Ltd v Fada Radio Ltd,62 the Privy Council said just this and went on to hold that sometimes it is the combination itself that is the invention; if the invention requires independent thought, ingenuity and skill, producing in a distinctive form a more efficient result, there is the subject matter of a patent. A new combination of well known devices, and their application to a new or more useful end, may require invention to produce it and may be good subject matter for a patent. If all of this, including that combination and that result, are shown convincingly to be in the public domain, of course no patent can result. But that is hardly the case here. No one claims that a Differential Relay, a Buchholz Relay and a Circuit Breaker were used in this manner at any time prior to CTR's Patent. Even Sergi does not say this. All it says is that the Differential Relay is known; the Buchholz Relay is known; and therefore, putting them together lacks all inventiveness. This is a quite incorrect reading of the law, which suggests just the reverse.

58. The Differential Relay's use in conjunction with the Buchholz Relay seems to me to be the 'pith and marrow' of CTR's Patent (an expression to which I will return presently); and, to use the words of Wadia J in Lallubhai Chakubhai v Chimanlal & Co.,63 what Sergi seems to have done is to take from CTR the substance of its invention. Wadia J said that sometimes a patent is infringed by the AIR 1930 PC 1 AIR 1936 Bom 99 53 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC taking of only a part; but that depends on whether part so lifted and for which protection is sought is a new and material part, especially in the case of a combination. I read the word 'part' in this phrasing not to mean an individual integer per se but a portion of the patent. This has been the law for a very long time: if the defendant really has taken the substance and essence of the plaintiff's combination, its 'pith and marrow', the mere fact that certain parts are added or omitted does not mean there is no infringement.64 Proctor v Bennis, [1886] 36 Ch. 740 54 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC THE RELEVANCE OF THE GRANT OF THE PATENT

59. Further, the grant of the patent supports CTR, and while the grant of a patent is no guarantee of its validity, it is a material consideration for the determination of a prima facie case; that is to say, it is not to be ignored entirely. In Gandhimati Appliances,65 the Madras High Court considered this aspect of the matter and held that a plaintiff is always entitled, at a prima facie stage, to rely on the

secured patent as prima facie proof of validity. The plaintiff's burden of proof is more rigorous if it holds no patent. But the grant of a patent does not render it absolutely inviolate; the burden remains on the plaintiff to show a prima facie case for interlocutory relief. The defendant can always question the validity of the patent. When it is able to show some grounds, and here we must have regard to the decision of Muralidhar J of the Delhi High Court in Strix Ltd as to what is required of the defendant in such a demonstration, then the mere grant of the plaintiff is not in and of itself sufficient to warrant interim relief. Mr. Chagla is perhaps correct in his submission, based on the Division Bench decision of the Delhi High Court in F. Hoffman La Roche Ltd & Anr. v Cipla Ltd.,66 that at the interim stage he is not required to demonstrate invalidity; that will await the trial. He only needs to show prima facie vulnerability of the patent. The fact that the patent-grant process is a rigorous one is not a complete answer. This finding in Hoffman La Roche is, in my judgment, to be (2000) 3 MLJ 85 2009 (110) DRJ 452 (DB), per AP Shah CJ and S. Muralidhar J.

55 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC carefully parsed lest it be read counter to the classic dictum of Diplock LJ in American Cyanamid v Ethicon Ltd,67 also a patent case:

> The instant appeal arises in a patent case. Historically there was undoubtedly a time when in an action for infringement of a patent that was not already "well established", whatever that may have meant, an interlocutory injunction to restrain infringement would not be granted if counsel for the defendant stated that it was intended to attack the validity of the patent.
>
> Relics of this reluctance to enforce a monopoly that was challenged, even though the alleged grounds of invalidity were weak, are to be found in the judgment of Scrutton L.J. as late as 1924 in Smith v.
>
> Grigg Limited ([1924] 1 K.B. 655); but the elaborate procedure for the examination of patent specifications by expert examiners before a patent is granted, the opportunity for opposition at that stage and the provisions for appeal to the Patent Appeal Tribunal in the person of a patent judge of the High Court, make the grant of a patent nowadays a good prima facie reason, in the true sense of that term, for supposing the patent to be valid, and have rendered obsolete the former rule of practice as respects interlocutory injunctions in infringement [1975] 2 WLR 316 : [1975] AC 396

56 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC actions. In my view the grant of interlocutory injunctions in actions for infringement of patents is governed by the same principles as in other actions. I turn to consider what those principles are.

American Cyanamid was cited before the Division Bench hearing Hoffman La Roche, and this is so noted. The distinction, I think, is that thin line that the Division Bench drew between an assault on the invalidity of the patent, something that in the old days a defendant only needed to state he intended to seek in order to wholly defeat an injunction application in a patent infringement action, and a defence at that interim stage that demonstrated prima facie the vulnerability of the patent. The Hoffman La Roche finding is not inconsistent with American Cyanamid in this respect; it may

indeed be a necessary evolution of it. These are two sides of the coin: on one, a plaintiff is not automatically entitled to an injunction only on the ground that he has a patent not yet invalidated; on the other, by merely saying that the patent's validity is proposed to be challenged, a defendant cannot defeat an injunction claim but must prima facie demonstrate vulnerability, and he must do so in the manner suggested by Muralidhar J in Strix Ltd.

The 'Implausibility' Of Ctr's Patent

60. Mr. Chagla then attempts to show that the patent as granted is implausible in what it claims. He bases this on the fact that CTR clearly says that the three essential integers of its patent work in series; they must all work in interdependence; and once each of 57 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC them is required to return a result to fire a control mechanism (the use of the word 'and' as opposed to 'or'), then there is no question of saving time or anticipating a result. Waiting for three distinct inputs to feed in is bound, Mr. Chagla says, to return a slower and not a faster response time. In contrast, the Sergi 3000 uses either the Buchholz Relay or the PRV, and this makes it faster. I do not think this is even remotely accurate. The homegrown diagrams that purport to compare the CTR Patent and the Sergi 3000 (reproduced earlier, in paragraph 46) that Mr. Chagla tendered are needlessly confusing. I also think they are somewhat inaccurate, at least on the Sergi side of the fence. The Sergi India brochure gives us a much clearer picture; and closely read, it shows no material difference at all. For the Sergi 3000, as produced, also requires three inputs from

(i) the Differential Relay, (ii) the Buchholz Relay or the PRV and

(iii) the Master Trip (or Circuit Breaker). The only 'or' here sits between the Buchholz Relay and the PRV. That does not mean that a signal trifecta is not required by the Control Unit in the Sergi 3000 product. Indeed, viewed like this, the Sergi 3000 product is in every way indistinguishable from the CTR Patent.

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61. I turn now to the remaining defences. Some of these are, perhaps of necessity, intertwined or at least overlapping. I have tried to segregate them to the extent possible, and to order them in a sequence that seemed to me logical. In doing this, I have kept firmly in mind the fact that I am here concerned with an interim application for injunctive relief. I am not trying the suit. Straight away, that means one thing: I do not assess the validity of the patent, despite Mr. Chagla's exhortations that I should; I address myself only to seeing whether he is able to make out a sufficient case of vulnerability, following the principle set out in Hoffman La Roche and harmonizing it with the pronouncement in Gandhimati Appliances.

Speed of Grant

62. Mr. Chagla's submits that CTR obtained its patent with, if not ungodly, at least uncommon despatch in a mere eight and a half months, as opposed to the many years the process usually takes.

To demonstrate this, Mr. Chagla (despite, I think, his own reservations and perhaps driven to it by some of his juniors with a pronounced penchant for over-simplification) treated me on 13th February 2015 to a long and colourful diagram. I mean that literally: three A3 size sheets pasted together, folded and re-folded. The chart has deceptively bright but distinctly menacing arrows that point inexorably to nether regions. I took the chart on file, but with not much more enthusiasm than that with which Mr. Chagla tendered 59 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC it.68 For the chart is as long on hope as it is on sticky tape, and certainly seems to be something of a hunt for the snark. I do not believe it makes the slightest difference at this stage when or how quickly the patent was granted, and the submission on this seems to me to just hang in the air with no foundation to shore it up. That entire argument is completely defeated with just two words:

> therefore what? Merely decrying speed of examination is to advocate sloth, inefficiency, mediocrity and ineptitude. A patent is not improved for having been several years or a decade or more in the granting of it; conversely, it is not invalid for having been granted quickly. Indeed, I should imagine that in a world and at a time when the existing technology changes every nano-second, speed in examination that does not sacrifice accuracy and diligence must be the norm and not the exception. It is devoutly to be wished for.
>
> Prosecution History Estoppel: The Gillette Defence
>
> 63. A more substantial defence is the one on prosecution history estoppel. Mr. Chagla took me through the original application, the various examination reports and then the complete specification, submitting along the way a chart showing the changes or amendments made from time to time. The purpose of this exercise, shortly put, was to demonstrate that the PRV was essential to the Sergi product and patent; was actively disclaimed by CTR in its patent; and yet was an essential requirement of the DTL tender. Mr. Chagla laid a very great emphasis on CTR's use of the phrase File G-2, Tab D.

60 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC "and/or other sensing means" in relation to the Buchholz Relay to say that even CTR acknowledged the need for a PRV or an RPRR in its patent application amendments, but took these out later. CTR thus narrowed its claim to finally yield a complete disclaimer of the PRV. Since the PRV is an essential component, Mr. Chagla argues, it is not open to CTR to invoke the doctrine of equivalents to claim infringement in regard to the surrendered territory. Prosecution history estoppel is not restricted to amendments intended to avoid prior art but also applies to a narrowing amendment made to satisfy any statutory requirement or the demands of an examination report from the Controller's office.69 This is generally correctly stated as a principle in law, but on the facts before me I do not think it is at all correct, because its starting assumption, viz., that the PRV is essential to the DTL Tender, is not. CTR disclaimed the PRV as irrelevant, and it maintains that position. Mr. Seervai says, and I think quite correctly as I have already discussed, that the essential element is not the PRV at all, which is one of the substitutes possible with the Buchholz Relay, but the combination of the Differential Relay and the Buchholz Relay. CTR makes no claim to exclusivity in either of these integers on their

own, as indeed it cannot. Mr. Chagla's argument seems to me to overlook the well settled law on combination patents. Once I arrive at this finding, the next argument, that CTR is confined to a system without the PRV, and can claim no infringement in a system that does have the PRV,70 Festo Corporation v Shoketsu Kinzoku Kogyo Kabushiki Co. Ltd. et al., 535 US 722 (2002); Mabuchi Motors K.K.'s Patents, [1996] RPC 387; Scimed Life Systems Inc v Advanced Cardiovascular Systems Inc, 232 F.3d 1337 White & Ors. v Dunbar & Ors., 119 US 47 (1886) : 30 L.Ed.303 : 1886 SCC Online US SC 220.

61 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC cannot hold; simply because the PRV is a substitutable (and in that sense superfluous) element.

64. Indeed, viewed like this, one of the authorities cited by Mr. Chagla is actually against him. In Rodi and Wienenberger AG v Henry Showell Ltd.,71 the House of Lords had before it a claim relating to an expanding watch bracelet. In separate judgments, both Morris LJ and Upjohn LJ said that one who borrows the substance of a patented invention cannot escape the consequences by making immaterial variations. The question is whether an essential feature has been infringed. There will still be infringement if non-essential integers are omitted, added or replaced (the 'pith and marrow' doctrine). The only escape is for the defendant to show that the patentee plaintiff constricted his claim by excluding something essential; and when the defendant added that essential integer, he was not guilty of infringement. But this latter portion cannot, as we have seen, apply to the present case in relation to the PRV.

65. The finding on the PRV being non-essential also undermines Mr. Chagla's invocation of the Gillette Defence, drawn from Gillette Safety Razor Company v Anglo-American Trading Company Ltd.72 If CTR's claims were so wide as to include the PRV, then, according to Mr. Chagla, the patent must fail for lack of novelty and for having been known to the prior art. If, on the other hand, the patent cannot cover the use or deployment of the PRV, which is essential, then there is simply no infringement. Again, this argument is based on a [1969] RPC 367 30 RPC 465 62 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC finding, as a matter of fact or admission, that the PRV is indeed essential to the DTL tender and to the entire system(and possibly to the CTR patent as well). Although Gillette, too, was a case where a specification as filed was amended, and restricted after the amendment, it was not a case of a combination patent of this type. I must note that CTR is quite categorical in its assertion that the functions of each component are interdependent and the system cannot function unless all the components work in this inter- dependency producing a cumulative result; and that this is not a mere collation of integers performing independently.73 The Gillette Defence has no application to the present case.

Pre-Publication

66. There is then the question of pre-publication. Given the priority date of 16th November 2005, if Sergi is able to show that CTR's Patent, as claimed and as specified, was published, known and anticipated, and not saved by any of the statutory provisions regarding anticipation in Chapter VI of the Patents Act,74 it cannot possibly claim infringement. Mr. Chagla relies on two sets of documents to establish this: first, what I will call an 'iteration chart', a chronological tracing of the evolution of

the CTR patent; and secondly, a bundle of CTR's brochures. The first of these, the 'iteration chart', is an annexure to CTR's Affidavit in Reply to Sergi's revocation application before the IPAB.75 Mr. Chagla references an entry of 2004 (before the priority date of 16th Written Statement to the Counter-Claim, Vol. A, pp. 309-310.

No submissions on Chapter VI of the Act were advanced on either side.

Vol G-3, pp. 384-388.

63 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC November 2005) to say that the technology claimed by CTR was known well before. I do not think this is correct. That entry76 relates to "fire prevention and extinguishing", not "explosion detection";

and it is the latter that is the subject matter of CTR's Patent. The details of that subject matter are to be found on the next page77 and these show that the first development of the explosion prevention subject technology was in 2006, after the priority date. The previous fire prevention and extinguishing technologies were under license from Elin; not so the explosion detection and prevention technology.

It is in 2006 that for the first time for explosion prevention shows the use of a Differential Relay; a Buchholz Relay (oil surge mode) or a PRV or a RPRR (later disclaimed); and a master trip or circuit breaker for transformer isolation. I do not think it is possible to compare the fire prevention and extinguishing methods with the explosion detection and prevention ones in the manner Mr. Chagla suggests; these seem to me to be very different things.

67. This disjunct also carries forward to the CTR brochures that Mr. Chagla shows. There is in the same volume a statement of flier preparation, followed and preceded by various brochures.78 A look at two of these is enough: there is a flier of April 200079 and another of October 2006.80 Mr. Chagla insists these are the same. Indeed they are not. The first, of 2000, is in relation to fire prevention and extinguishing, while the second relates to explosion detection. That Vol. G-3, p. 387, internal page 120.

Vol. G-3, p. 387, internal page 121.

Vol G-3, pp. 451-452, internal pages 184-185.

Vol G-3, p. 459, internal page 192.

Vol G-3, p. 463, internal page 196.

64 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC is not the only difference. The performance and function of the Differential Relay differs too (a trip as opposed to a signal); their purposes are different.

68. One of the documents on which Mr. Chagla relies is of July 2004. It is supposedly a CTR flier and it discloses the prior art, he says;81 and therefore the patent is not just vulnerable, it simply could not have been granted. However, this is also for fire prevention and extinguishing. But that is not all. CTR says this was a document annexed by Sergi to its plaint in the Calcutta High Court suit it filed against CTR for patent infringement. The document, it says, is entirely fabricated and no such flier was ever issued.82 Given the fate of that suit (withdrawn) and particularly the interim applications made by Sergi and their outcome, and given too the nature of the contesting assertions, I do not think it is possible to regard this document as being in any way determinative. Whether or not there was fabrication must await trial.

Sergi: Suppression In Ctr's Plaint

69. I am not especially impressed by Mr. Chagla's submissions on suppression and misdirection in the Plaint and his extended exposition on this aspect of the matter. He took me through paragraph 17 of the Plaint,83 and the annexures to the Plaint to say that when CTR first moved Court it did so not on its complete Plaint, p. 203, Vol. A. Written Statement to Counter-Claim, Vol. A, pp. 315-316.

Vol. A, p. 11-15.

65 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC specification but on its provisional specification, one that had later suffered at least two amendments. He read this with the specifications and claims to show that the claims had altered between the time of the application and so had the specification. Specifically: although there was earlier a reference to 'other sensing means' and to the PRV 'and/or' the RPRR, CTR later disclaimed the PRV entirely. His submission was that on a cold reading of the Plaint as it stands, the distinct impression is that CTR's Patent includes the PRV, and conceals the fact that this has been disclaimed;

and that it is on this basis, and this basis alone, that CTR has laid its case in infringement.

70. All this might have been of some consequence had I been hearing an application by CTR for ad-interim reliefs. Today, there is little wind in these sails. CTR's final, complete specification is on record; it was filed, though late, before the Thane District Court even before the case was transferred to this Court. What I must consider therefore is the material that is before me, and not, as Mr. Chagla's argument seems to suggest, a stripped-down version of it, pared to just the original Plaint and ignoring everything else. I imagine that would be a most unreasonable and unacceptable way of approaching a matter of this complexity and with this much material on record.

71. Indeed, I do not read the Plaint as being quite so shocking (so to speak) as Mr. Chagla would have it, and I imagine that courts must be somewhat more fault-tolerant than this. To arrive at Mr. Chagla's destination, a finding of deliberate and material suppression must be returned; one designed to yield an otherwise 66 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC impossible judicial outcome. An accidental omission or oversight of something immaterial, and the non-disclosure at an initial stage of something that is now very much front-and-centre seems to me not to fit these parameters. It is not possible to read the Plaint today in isolation, to take if off-line as it were. The

completeness of disclosure on the record is sufficient insulation (so to speak) against this charge.

72. For these reasons, and given my finding on an application of the 'pith and marrow' rule, I find Mr. Chagla's reliance on various authorities on 'fraud' and on withholding of material documents to be of little assistance. Maganlal Kuberdas Kapadia v Themis Chemicals Ltd84 was, for instance, an appeal against an ad-interim order. We are well beyond that stage now; and, as I said earlier, at the ad-interim stage, without so complete a record, these considerations may have been of consequence. Similarly, the frequently cited S. P. Chengalvaraya Naidu v Jagannath85 was a case about a litigant's fraud and the withholding of a document vitally relevant to the litigation and obtaining a preliminary decree on that basis. Given this 15,000 page record, I seriously doubt that such an allegation can subsist today. Prestige Lights Ltd v State Bank of India86 also stands on a markedly different footing: when a borrower claimed his representation under Section 13(3-A) of the SARFAESI Act had not been considered, it was found as a finding of fact that the claim of such a representation having been made was only an afterthought. So when Mr. Seervai says that the 'suppression' Appeal No. 332 of 1991 decided on 22nd April 1991.

AIR 1994 SC 853 (2007) 8 SCC 449 67 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC alleged must be a material suppression, one that will tilt the scales in the present litigation, I believe he is completely correct.87 The non-

disclosure of the immaterial is immaterial. Once all the material is before the Court, such allegations of suppression are of no consequence.88 It is, however, of some consequence that this charge comes to be made so late in the day, at a stage when it has lost all relevance by the simple account of such a massive disclosure, or even over-disclosure of the material. I must note that the charge is also misdirected: the body of the Plaint is not, I think, incorrect in the way it sets out the claims. The wrong specification seems to have been annexed, but even at the time of the hearings before the Thane District Court, Sergi does not seem to have made too much of this: it filed a detailed affidavit with 10 grounds of defence. This was not among them.

Arunima Baruah v Union of India, (2007) 6 SCC 120 SJS Business Enterprises (P) Ltd. v State of Bihar & Ors., (2004) 7 SCC 68 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC THE 'PITH AND MARROW' RULE OF CONSTRUCTION

73. Not only must I look at the complete or final patent specification, but I must, and I think this is well accepted in this branch of the law, have regard to what has for a very long time been called the 'pith and marrow' of the invention. This is an expression that can be traced back to Clark v Adie,89 also a combination patent case, where the House of Lords said that the court should look to the 'pith and marrow' of the invention to see whether a patent infringement had occurred. The law then evolved to Catnic Components Ltd. v. Hill & Smith Ltd.,90 a House of Lords decision that was another watershed in which Diplock LJ, borrowing quite openly from doctrines of statutory interpretation, advocated a 'purposive' approach to construction. That now-legendary passage is still worth reproducing:

> My Lords, a patent specification is a unilateral statement by the patentee, in words of his own choosing, addressed to those likely to have a practical interest in the subject matter of his invention (i.e. "skilled in the art"), by which he informs them what he claims to be the essential features of the new product or process for which the letters patent grant him a monopoly. It is called "pith and marrow" of the claim. A patent specification should be given a purposive (1877) 2 App Cas 315 [1982] RPC 183 69 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC construction rather than a purely literal one derived from applying to it the kind of meticulous verbal analysis in which lawyers are too often tempted by their training to indulge. The question in each case is: whether persons with practical knowledge and experience of the kind of work in which the invention was intended to be used, would understand that strict compliance with a particular descriptive word or phrase appearing in a claim was intended by the patentee to be an essential requirement of the invention so that any variant would fall outside the monopoly claimed, even though it could have no material effect upon the way the invention worked.

74. I read the emphasized portion to mean two things: first, as casting a duty on the court to ascertain just what it is over which the patentee claims monopoly, i.e., to determining what is essential to the patent, its 'pith and marrow'; and, second, to deciding whether the removal of that so-called essential (or those so-called essentials) would defeat an infringement claim even if it made no difference to the final result. This is not to be read, in my judgment, as proposing that the addition of a superfluous element saves infringement. It is instead a test of seeing whether the removal of what the patentee claimed to be essential would have no material effect on the way the device worked.

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75. What do we find when we look at the complete specification (the patent as finally granted)?91 I believe it is wholly irrelevant at this stage that the original 16 claims were reduced to 15 (the last being deleted), and those 15 then, by a process of merging claims 1 and 2, and claim 8 with claim 9, and splitting claim 15 into two, became for all intents and purposes 14 claims. Read together, those claims make it clear that CTR has wholly eliminated and therefore disclaimed the PRV. It insists on the two critical integers I have mentioned earlier working together. These, working together, form the 'pith and marrow' of CTR's Patent. Removing either of them cannot meet either the DTL tender requirements or deliver the same result. Adding something superfluous to them does not defeat infringement. That might have been defeated had it been possible to show that removing any of these integers would still generate the same result; for then those integers would clearly be non-essential. Even Sergi does not claim this. It, too, in its Sergi 3000 product demands the use of all three integers; but it adds to this the PRV:

> like marzipan, this is only possibly attractive, certainly distracting but in no way essential.

76. In Reymes-Cole v Elite Hosiery Co Ltd,92 Diplock LJ said that "points of construction are short; judgments about them ought to be." That was in a pithier and more concise age, one not so bedevilled by the ready availability of far too much case law and information. To that expression, I might only add: so must arguments on construction.

Document at Thane Dist. Ct. R&P Vol. II ("D-2"), pp. 1029-1080; Vol. G-1, pp. 6-28.

[1965] RPC 102 71 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC THE ARRIVAL OF THE UNLIKELY SCENARIO FROM ALOYS WOBBEN

77. I must clarify that it is my understanding that I am not, at this prima facie stage, required to assess the validity of the patent, or whether Sergi can maintain its pre- and post-grant oppositions, its application for revocation of the patent and its Counter-Claim all at the same time. I have subsequently clarified this to both sides, and that issue is pending in this very matter before another court. It is not, therefore, necessary to consider the impact of the Supreme Court's decision in Dr. Aloys Wobben & Anr. v Yogesh Mehra & Ors.,93 except to note that it over-rules the decision of the Delhi High Court that was relied on by Mr. Justice Gavai in this very litigation while deciding Civil Revision Application No.185 of 2011 (against the District Court's order refusing to take the Counter-Claim on record) on 6th June 2011.94 I need only note that the present litigation is unusual because it is precisely the situation that the Supreme Court said was unlikely ever to arise: where there are, pending all at once, a post-grant opposition (and also a pre-grant opposition, it seems), a Counter-Claim and an application for revocation. If the grant of a patent is not determinative and does not yield an injunction for the asking, it must follow that the mere pendency of a Counter-Claim, oppositions or revocation applications cannot defeat an injunction claim either.

(2014) 15 SCC 360 : 2014 SCC Online SC 484 See list of dates appended; Reported in 2011 (47) PTC 521 (Bom) : 2011 (5) Bom CR 806; copy at Vol. E, Orders Comp. Pt. I, pp. 39-78.

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78. THE FATAL CONTRADICTION IN SERGI'S DEFENCE

79. I return finally to what seems to me to lie at the heart of the present case: and that is a contradiction inherent in Sergi's defence. Sergi claims the PRV to be essential to both its product and its patent. But if it is essential it cannot possibly be sidelined with an "or" as is shown in Sergi India's brochure and even in the comparative chart. It cannot be an alternative. It must necessarily be deployed, without fail, every single time. That is not even what Sergi puts forth in its own documentation, and I do not think it is enough to say "look, we use the PRV and CTR does not, therefore there is no infringement", unless it is shown that the PRV is not optional. The DTL tender makes it optional, and even Sergi's use of it, marked with the word "OR" makes it so. Clearly, this puts the matter beyond the pale. The PRV fails the Catnic test and fails it utterly.

80. In its Written Statement to the Counter-Claim, CTR points out that worldwide Sergi has abandoned the PRV for a 'rupture disc',95 but this has not been commercialized. Consequently, the

only apparent use of the PRV is to somehow try and dodge the bullet, as it were, to escape CTR's claim on infringement. That small and irrelevant addition affords no defence.96 Vol. A, p. 304.

Beecham Group Ltd v Bristol Laboratories Ltd, [1967] 16 RPC 406 73 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC GENERAL PRINCIPLES

81. As I see it, the principles one may legitimately draw in a combination patent infringement case are these:

81.1 The invention cannot be a mere arrangement or re-

arrangement of previously known integers all functioning independently in a known way;

81.2 These integers, though all themselves previously known, may be combined in a previously unknown way, acting inter-dependently, each of them essential, to produce a new and improved result.

81.3 Each of the integers must be essential. If any one can be taken out without affecting the final result, it is not essential.

81.4 If a patent claim is overbroad, and for that reason, includes in the sweep of the case for infringement the defendant's invention, i.e., by including every single non-essential and essential addition, then the patent may be prima facie invalid for want of novelty. No person can claim such a monopoly as would result in a bar to future improvements. If the patent is, on the other hand, so narrow that it excludes the addition of another essential integer, then there is no infringement.

74 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC 81.5 Where a patent has been granted on the patentee disclaiming a particular integer, i.e., by saying it is not essential to his product, then the addition of that non-

essential integer does not, per se, defeat the claim for infringement. It must be shown that the additional integer is essential, required and returns a result that is as or more efficient than that produced by the patent. Adding something superfluous to the essential integers does not defeat an infringement claim. It must be shown that what is added is also essential and that it satisfies the previous tests of interdependency, producing as good a result or a new and improved result.

81.6 The patent must be read in a purposive manner to determine what constitutes its 'pith and marrow'.

81.7 At an interim stage, a Court is not required to examine the validity of a patent so much as its vulnerability; and this is to be tested not on a mere say-so, but with the aid of cogent and persuasive technical and scientific material, including reliable expert opinions and other data.

81.8 The fact that a patent has been granted is not wholly immaterial at an interim stage. While the grant is not a complete answer to a charge of prima facie invalidity or vulnerability, it is still a factor to be considered and 75 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC given appropriate weight; just how much is fact-

dependent.

81.9 The speed of grant of a patent is wholly irrelevant, particularly if it is made without a substantiated (and substantial) case on illegality and mala fides.

76 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC CONCLUSIONS & SUMMARY OF FINDINGS

82. I find for the Plaintiff, CTR, because: the DTL tender specification required the Differential Relay, the Buchholz Relay (with a PRV or a RPRR), and a Circuit breaker; the Sergi patent did not feature the Differential Relay; the PRV is not essential, even on Sergi's demonstration (the use of the word 'or') either to the CTR patent, to Sergi's product or the DTL tender; the addition of the PRV is a non-essential addition; the pith and marrow of CTR's invention is the two integers working interdependently to produce what is, prima facie, a dramatically improved result at the stage of a explosion detection (not fire extinguishing or fire detection and prevention); Sergi has entirely abandoned its patent and has adopted CTR's; Sergi could not have met the DTL bid without such an infringement.

77 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC THE BALANCE OF CONVENIENCE AND OTHER DETERMINANTS FOR INTERIM RELIEF

83. Where lies the balance of convenience? The answer suggests itself: it cannot possibly lie with Sergi, and the fact that it has been allowed to continue with the DTL tender (on non-infringing terms) is now not as material as the question once might have been. The Notice of Motion is in wider terms. Sergi cannot possibly be permitted to continue with what I have found to be a clear case of infringement. That being said, there is to my mind an overwhelming prima facie case, and it is difficult to see how CTR might be able to recoup its losses by a decree in damages; those losses are possibly beyond computation.

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84. The Motion succeeds. There will be an interim order in the following terms, broadly in keeping with of prayer clauses (a), (b) and (e) of the Notice of Motion:97 that pending the hearing and final disposal of the suit:

> (a) Defendants Nos. 1 and 2 shall not, directly or indirectly, or through any party or person acting on their behalf, infring the Plaintiff's patent No.202302 by making, using, offering for sale, or selling either the impugned Sergi 3000 product or any other similar infringing product that contains the identical or substantially similar system of a principal of a Differential Relay and a Buchholz Relay (oil surge feature);

(b) Defendants Nos. 1 and 2 are not to infringe the Plaintiff's Patent No. 202302 by using the method provided under that Patent by manufacturing, selling or offering for sale either the impugned Sergi 3000 product or any other product that infringes the Plaintiff's patent and from using, offering for sale or selling any product that is obtained directly by the method provided under Plaintiff's Patent.

There is an error in numbering. There are no prayers (c) and (d).

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(c) the 1st and 2nd Defendants shall not circulating and submitting to any third parties, including purchasers, lessees or persons inviting tenders (and including government bodies) any technical brochures, literature, pamphlets, fliers, drawings, specifications or other printed or audio-visual material that displays and shows the identical or substantially similar method as that of the Plaintiff's Patent No.202302, i.e., the principal of the Differential Relay and the Buchholz Relay (oil surge method) as set out in the Plaintiffs' patent.

80 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC COSTS

85. I have long believed that costs must follow the event, and that our courts are altogether too timorous in the matter of costs. The delays in our system are legendary and these result in as many frivolous or untenable defences as there are frivolous, mischievous and vexatious lawsuits. The trajectory of this litigation's history is a case in point. For five years, the litigation has shuttled between the District Court in Thane and the Supreme Court via this Court. A colossal record has been generated; a small forest was probably destroyed en passant. In all this time, CTR has been attempting to protect its patent from the depredations of its sole competitor. Both sides have deployed large teams of legal counsel, and that, as we know, comes at no little cost. When one of these parties succeeds, and it does not matter which for this purpose, not to award costs is, I think, a step in the wrong direction. It encourages useless defences and false suits. Parties must know that there is a very real risk in financial terms should they fail. In Haldyn Glass Works Pvt Ltd v Oriental Fire & General Insurance Co Ltd,98 I considered this question in the context of a suit that I decreed against an insurance company. The first appeal was admitted, as indeed it had to be as a matter of course, and while the actual order of costs may have been stayed (though I believe there was an order of deposit of the decretal amount), there is as yet no final determination on the issue of costs, one that I took separately. In doing so, I referenced Section 35 of the Code of Civil Procedure, 1908, the relevant High Court (Original Side) Rules, the provisions of the Bombay Pleaders Act, 1920 and Suit No. 2716 of 1986 decided on 16th April 2014.

81 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC numerous decisions of the Supreme Court and of High Courts:

Manindra Chandra Nandi v Aswini Kumar Acharjya,99 Salem Advocates Bar Association v. Union of India ("Salem-II"),100 Ashok Kumar Mittal v. Ram Kumar Gupta and Anr.,101 Vinod Seth v. Devender Bajaj and Anr.,102 Sanjeev Kumar Jain v

Raghubir Saran Charitable Trust & Ors.103 and Shri Dilipkumar Hirachand Jain v Dena Bank & Ors.104 among them. I cited Sanjeev Kumar Jain in which the Supreme Court said (with emphasis added):

"27. The mandate of Sub-section (2) of Section 35 of the Code that where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing is seldom followed in practice by courts. Many courts either do not make any order as to costs or direct the parties to bear their respective costs without assigning or recording the reasons for giving such exemption from costs. Unless the Courts develop the practice of awarding costs in accordance with Section 35 (that is, costs following the event) and also give reasons where costs are not awarded, the object of the provision for costs would be defeated.

Prosecution and defence of cases is a time consuming and costly process. A 60 Ind Cas 337 : ILR (1921) Cal 427 (2005) 6 SCC 344 : AIR 2005 SC 3353 (2009) 2 SCC 656 (2010) 8 SCC 1 (2012) 1 SCC 455 2013 (6) Bom CR 127, per Ghuge, J.

82 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC plaintiff/petitioner/ appellant who is driven to the court, by the illegal acts of the Defendant/Respondent, or denial of a right to which he is entitled, if he succeeds, to be reimbursed of his expenses in accordance with law. Similarly a Defendant/Respondent who is dragged to court unnecessarily or vexatiously, if he succeeds, should be reimbursed of his expenses in accordance with law. Further, it is also well recognised that levy of costs and compensatory costs is one of the effective ways of ig curbing false or vexatious litigations."

86. The Supreme Court emphasized the need for 'realism' in approaching the question of costs. It would, I believe, be wholly unrealistic to let this matter pass with the usual order requiring each side to bear its own costs. That might have been the correct thing to do had I found the case poised on an edge, and, being forced by the duties of my office, elected for one side over the other. I have arrived at no such finding. I have found there to be no merit at all in the defence. To permit this to pass without any real consequence is directly contrary to the mandate of the Supreme Court.

87. I am mindful that the Supreme Court in Sanjay Kumar Jain itself says that the award of costs must be within the confines of the governing rules, but where those rules speak to a bygone era, one that is hardly recognizable and is itself unrealistic in today's times, no court required first and last to render this thing we call 'justice', I believe we must free ourselves of these manacles from a prelapsarian 83 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC age when a rupee actually meant something. After all, these are not indigent parties, persons or bodies lacking means. To the contrary: they have at their command quite extraordinary financial resources.

Those who can pay, must.

88. But so long as those Rules remain, and remain unchanged, it is not permissible to award costs beyond them. That is the only reason I am unable to award the costs that I might otherwise have thought reasonable. The Plaintiff will be entitled to costs in accordance with the Rules.

89. Mr. Chagla applies for a stay saying that the matter has been pending for some time and the injunctions I have granted will result in considerable commercial distress to Sergi. Mr. Kane for the Plaintiff says that Sergi has agreed not to infringe, even before the Supreme Court, and therefore is unaffected by the present order, one that relates to no particular tender or contract. All that Sergi is restrained from doing is continuing with the infringement, and that is something it has already agreed not to do. I believe Mr. Chagla may have a point when he says that the finding I have returned holds Sergi's product to be infringing and he is surely entitled to test this. Given that the Court's Diwali vacation starts just a week from now, the operation of this order is stayed till 23rd November 2015.

(G.S. PATEL, J.) 84 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC ANNEXURE : CHRONOLOGY

1. On 5th November 1996, Sergi's director Philippe Magnier filed an Indian Patent Application for registration of an invention entitled "Method and Device for Preventing/Protecting Electrical Transformer Against Explosion And Fire" under the Patents Act. On 13th December 1996, Magnier licensed this patent, then yet under process, to Sergi (France). On 14th December 2002, Magnier obtained Patent No.189089 in respect of this application.105 Magnier/Sergi (France) claim to hold corresponding patents in various international jurisdictions including France; USA;

European Patent Office (EPO), which covers Belgium, Switzerland, the UK and some other European countries; Austria; Germany; South Africa; Sweden; Mexico; and Colombia.

2. On 27th February 2001, one Elin Energieversorgung of Austria filed an opposition to the Board of Appeal of the European Patent Office (EPO) inter alia on the ground that Elin held a prior patent. That opposition seems to have been rejected on 15th December 2004, notified on 28th January 2005. Elin had licensed its prior patent to CTR, but this seems to have expired.

3. Three years later, on 16th November 2005, CTR filed an Indian Patent Application No. 1425/MUM/2005 for the registration of an invention it called "A System and Method For Preventing Vol. A, Part (c), p. 118; for consistency, footnote numbers are continued from the main body of the judgment.

85 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC And/Or Detecting Explosion And/Or Fire Of Electrical Transformers".106 CTR's application was published in the official journal of the Patent Office on 18th November 2005.107 On 20th January 2006, the Patent Office issued a First Examination Report.108 CTR responded with an amendment on 31st January 2006.109 There followed a Second Examination Report on 18th April 2006,110 and changes in response by CTR111 under its letter dated 26th April 2006.112

4. In the meantime, Philippe Magnier, who held Indian Patent No. 189089 and was a Director at Sergi (France), filed a patent infringement action against CTR as Civil Suit No.27 of 2006 in the Calcutta High Court. Sergi (France) was the 2nd plaintiff to this suit. The four other defendants to the suit were various companies as purchasers of the competing fire systems. The application for interim reliefs was opposed. On 22nd February 2006, a Single Judge of the Calcutta High Court allowed CTR to continue to sell its product in accordance with law, inter alia recording a statement by counsel for Sergi (France) that the two products were different.113 By an order dated 17th April 2006, the Single Judge of the Calcutta High Court declined to re-hear the application by Sergi (France) as a new motion, but clarified that the statement made on 22nd February Vol. A, Part (a), p. 39.

Vol. A, Part (a), p. 37.

Vol. G-1, pp. 224-226.

Vol. G-1, pp. 227-245.

Thane Dist Ct R&P Vol. II ("D-2"), p. 787; Vol. G-2, Tab 2 Thane Dist Ct R&P Vol. II ("D-2"), p. 1081; Vol. G-2, Tab 5 Thane Dist Ct R&P Vol. II ("D-2"), p. 1141; Vol. G-2, Tab 5 Vol. A, Part (a), p. 246.

86 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC 2006 on behalf of Sergi (France) would not bind at the final hearing of the motion; all contentions were kept open. On 7th February 2011, Sergi (France) unconditionally withdrew its suit. This is stated here only for completeness, and will find place again in the correct chronological order.

5. On 1st August 2006, the Patent Office wrote to CTR saying its application had been found in order for a grant, but cautioning it that the Letters Patent would follow only after the disposal of any pre-grant opposition; and that CTR could initiate infringement proceedings only after that grant was issued.114

6. CTR was granted its Patent No. 202302 on 3rd August 2006 under Section 43 of the Patent Act for "A SYSTEM AND METHOD FOR PREVENTING, PROTECTING AND/OR DETECTING EXPLOSION AND/OR FIRE OF ELECTRICAL

TRANSFORMERS."

7. On 15th December 2008, the 1st Defendant ("Sergi") filed an application under the Right to Information Act 2005 enquiring about CTR's Patent application status. On 30th January 2009, the Patent Office replied, saying that Patent No. 202302 had been granted on 3rd August 2006. On 9th May 2009, Sergi enquired of the Mumbai Patent Office if this grant had been notified and, on 1st July 2009, Sergi's lawyers wrote to the Central Public Information Officer repeating this query.116 On 21st July 2009, the Assistant Vol. G-1, p. 246/51.

Vol. A, Part (a), p. 39.

Vol. A, Part (b), p. 298.

87 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC Controller of Patents & Designs and Central Public Information Officer responded to Sergi's lawyers saying that CTR's application and grant had not been notified under Section 43(2) of the Patents Act, and that this was inadvertent.117

8. Sergi filed what it calls a 'pre-grant opposition' under Section 25(1) of the Patents Act on 20th January 2010.118 On the same day, Sergi also filed a post-grant opposition under Section 25(2) of the Patents Act.119 Both oppositions were served on CTR on 30th January 2010.

9. On 20th January 2010, Delhi Transco Ltd ("DTL") floated tender T/SP/11/2009/44 for the purchase of 64 fire systems.120 The tender notice specified a techno-commercial bid opening date of 16th February 2010 and a price bid opening date of 16th March 2010. The former was later postponed to 15th March 2010 and the latter to 28th September 2010.

10. On 11th February 2010, CTR filed Civil Suit No.1 of 2010 before the Thane District Court as an action in patent infringement against Sergi.121 CTR made an application under Order 39 Rules 1 and 2 of the Code of Civil Procedure, 1908 ("CPC") for an ad- interim injunction restraining Sergi from infringing CTR's Patent.

This application, numbered as Exhibit "5" before the Thane Vol. A, Part (b), p. 304.

Vol. C, Comp, 5, pp. 229-230, paragraphs 11 and 12.

Vol. A, Part (b), p. 583; part of Ex. C to the Written Statement.

Vol. A, Part (a), p. 251.

Vol. C, Comp. 5, from pp. 167-221.

88 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC District Court, is the present Notice of Motion.122 On 15th February 2010, a handwritten purshis or application seeking urgent ex parte ad- interim reliefs was filed on CTR's behalf before the Thane District Court.123 This purshis, numbered as

Exhibit 9, says that for the purpose of ad-interim ex parte relief only, CTR restricted itself to an application to restrain Sergi from selling its rival product to DTL under the latter's tender.

Vol. C, Comp. 5, pp. 198-221; also at Vol. C, Comp. 1, pp. 12-34.

Vol. C, Comp. 5, p. 222.

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11. On 15th February 2010, the Thane District Court granted ex parte ad-interim reliefs "in terms of the purshis Ex. 9"against Sergi and its distributor (the present 2nd Defendant).124 CTR was directed to comply with the provisions of Order 39 Rule 3 of the CPC and the notices were made returnable on 2nd March 2010. CTR served the ad-interim order on Sergi on 16th February 2010.

Sergi claims to have been informed by the 2nd Defendant of the suit, and it appeared before the District Court on 2nd March 2010, the returnable date. The actual writ of summons in the suit was served on Sergi only on 4th March 2010.125

12. On 12th March 2010, Sergi submitted its bid to DTL's tender.126 It says it told DTL about the 15th February 2010 order of the Thane District Court.127 CTR also submitted a bid. DTL opened the technical bids on 15th March 2010.128

13. On 20th March 2010, Sergi filed its Written Statement129 and reply130 to CTR's suit and injunction application respectively.

14. On 23rd March 2010, CTR filed an application under Order 39 Rules 2-A and 11 of the CPC, numbered before the Thane Vol. C, Comp. 5, pp. 223-234; "Order below Ex. 5"

Vol. C, Comp. 1, p. 60, paragraph 7 of Sergi's Reply Affidavit.

Vol. C, Comp. 1, p. 40.

Vol. C, Comp. 1, p. 73.

Vol. C, Comp. 4, Pt II, p. 442.

Vol. A, Pt. (b), from p. 255.

Vol. B, Notice of Motion 497 of 2014 (present Motion), pp. 29-58, numbered as Ex.22 before the Thane District Court.

90 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC District Court as Misc. App. No. 68 of 2010. This is now Notice of Motion No. 193 of 2013 before this Court.

15. Sergi filed two replies dated 26th March 2010131 and 3rd April 2010.132 In paragraph 16 of the first of these, Sergi through Antoine Magnier (Philippe Magnier's son) undertook not to sell its products to DTL till the restraint was lifted.133 On 26th March 2010, Sergi wrote to DTL about the pendency of the proceedings.134 In its first Affidavit in Reply to Notice of Motion 193 of 2013 (dated 26th March 2010 and filed on 30th March 2010), Magnier fils said there was no breach of the ex parte ad-interim order of 15th February 2010 because it had not actually sold any products to DTL but merely offered to sell them, and there was no restraint against the making of such an offer. CTR filed a rejoinder dated 8th April 2010.135 That same day, Sergi filed its counter-claim in the suit. This was not then taken on file on account of some objections.

16. On 13th April 2010, the Thane District Court passed an order on CTR's M.A. No.68 of 2010 (now Motion No. 193 of 2010),136 saying that the application would be heard with Ex.5, the application for interim relief. The hearing was adjourned to 16th April 2010.

Vol. B, Motion 192 of 2013, pp. 58-86.

Vol. B, Motion 192 of 2013, pp. 87-91.

Vol. B, Motion 192 of 2013, pp. 58, at p. 63.

Vol. C, Comp. 1, p. 74.

Vol. C, Comp. 1, pp. 92-107; also at Vol. B, Motion 193 of 2013, pp. 92-

107. Vol. C, Comp. 1, pp. 50-51.

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17. On 16th April 2010, the grant of CTR's Patent No. 202302 was published in the Official Journal of the Patent Office.137

18. On 22nd April 2010, CTR filed a copy of its patent with the specifications as granted in the Thane District Court proceedings. This was taken on record as Exhibit 48.138

19. On 3rd July 2010, Sergi filed an application for leave to have its counter-claim taken on record.139 This was numbered as Ex. 57.

On 7th August 2010, the Thane District Court directed that this application would be heard along with CTR's application for interim relief (Ex.5, the present Notice of Motion).140

20. In the meantime, DTL's Tender Committee met on 7th June 2010, 3rd August 2010 and 10th August 2010. It evaluated the three bids received, from CTR, Sergi and one Vendere. Sergi was said not to meet certain Pre-Qualification criteria. The Committee noted the respective legal documents, copies of orders and notices being received from both CTR and Sergi. It thus resolved to co-opt the GM (Legal) to assist the Tender Committee.141 The Committee met again on 13th September 2010.142 The GM (Legal) was present.

Vol. C, Comp. 5, pp. 271-274.

Ex. 48 at Thane Dist Ct R&P Vol. IX, p. 679; Document at Thane Dist. Ct. R&P Vol. II ("D-2"), pp. 1029-1080; Vol. G-1, pp. 6-28;

Vol. C, Comp. 4, Pt. I, pp. 206-209 Vol. C, Comp. 4, Pt. I, p. 113.

Vol. C, Comp. 4, Pt. II, pp. 439-441.

Vol. C, Comp. 4, Pt. II, pp. 435-438.

92 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC Noting the pending disputes, the Committee concluded that CTR and Sergi were the only two techno-commercially viable bidders.

21. On 1st September 2010, Sergi filed Writ Petition No. 6994 of 2010 against the Thane District Court's order of 7th August 2010 deferring Sergi's application for taking its counter-claim on record.

The writ petition was disposed of by an order dated 15th September 2010.143 The order of the Thane District Court was undisturbed, with observations to the effect that should the District Court find that Section 104 of the Patents Act applied, it would not pass orders in the other applications; and, conversely, on finding that that section would not apply, the District Court would then hear the applications.

22. On 28th September 2010, DTL opened the price bids. Sergi was declared to be the lowest bidder, L-1.144 On 4th October 2010, Sergi wrote to DTL saying it looked forward to receiving a purchase order.145

23. On 17th September 2010, in view of the clarifications of this Court in its order of 15th September 2010 on Sergi's writ petition, Sergi filed an application under Section 9A of the CPC questioning the jurisdiction of the Thane District Court since it had lodged a Vol. C, Comp. 4, Pt. I, pp. 114-116.

Vol. C, Comp. 4, Pt. II, pp. 442-444.

Vol. B, CTR Additional Affidavit, p. 3.

93 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC counter-claim. The application was allowed on 12th November 2010 and the preliminary issue was framed.146

24. On 2nd December 2010, DTL placed a purchase order on Sergi.

25. On 9th December 2010, CTR filed another Misc. App. No. 319 of 2010 also under Order 39 Rules 2-A and 11 of the CPC (now numbered as Notice of Motion No. 192 of 2013).148 An ex parte ad-

interim order was obtained on that day issuing notice to Sergi and restraining it from complying with the purchase order.149 On 10th December 2010, Sergi made the required security deposit with DTL. On 14th December 2010, it was served with the ex parte ad-

interim order dated 9th December 2010. Sergi filed A.O. No. 1446 of 2010 against this order. That appeal was disposed of on 24th December 2010 allowing Sergi to apply to the District Court for a variation permitting it to submit drawings to DTL.150 The application was made and, on 28th December 2010, rejected.151

26. On 1st January 2011, the Thane District Court decided the preliminary issue of jurisdiction in part, holding that it continued to have jurisdiction over the suit, but without deciding the question of Vol. C, Comp. 4, Pt. I, pp. 117-118.

Vol. C, Comp. 2, p. 16.

Vol. C, Comp. 2.

Vol. E, Orders Comp. Pt. II, pp. 1-2.

Vol. C, Comp. 4, Pt. I, pp. 121-125.

Vol. C, Comp. 4, Pt. I, pp. 126-139.

94 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC jurisdiction in respect of Sergi's counter-claim, keeping that in abeyance.152

27. Sergi appealed the order of 28th December 2010. Its A.O. (St) No.33478 of 2010 was disposed of on 11th January 2011.153 The appeal was partly allowed; the impugned order was set aside; Sergi's application to submit drawings to DTL was allowed, but with the direction that Sergi would take no further steps in execution of the contract till CTR's interim application (Ex. 5) was disposed of. This was to be done within four weeks. An application for stay of the order was rejected. CTR's

Special Leave Petition No.1919 of 2011 to the Supreme Court was dismissed on 20th January 2011.154

28. Sergi then filed a Civil Revision Application No.62 of 2011 against the Thane District Court's order dated 1st January 2011 on the jurisdiction issue. That was allowed by Mr. Justice Gavai on 2nd February 2011, directing the District Court to decide the jurisdictional issue in view of Section 104 of the Patents Act before 11th February 2011.155 CTR's Special Leave Petition No. 4214 of 2011 against this order in civil revision failed on 15th February 2011.156 Vol. C, Comp. 4, Pt. I, pp. 140-165; read with the observations in paragraph 30 at pp. 162-163.

Vol. C, Comp. 4, Pt. I, pp. 166-184; Per B.R. Gavai J.

Vol. C, Comp. 4, Pt. I, pp. 185-186.

Vol. C, Comp. 4, Pt. I, pp. 187-200.

Vol. C, Comp. 4, Pt. I, pp. 204-205.

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29. On 7th February 2011, Sergi unconditionally withdrew its patent infringement suit filed in the Calcutta High Court.

30. On 18th February 2011, the Thane District Court rejected Sergi's application for leave to take its counter-claim on record and held that it continued to have jurisdiction over the suit.157 On 23rd February 2011, Sergi filed Writ Petition No. 1608 of 2011 impugning this order. This was later converted into Civil Revision Application No. 185 of 2011.

31. On 25th February 2011, the Thane District Court allowed CTR's application for interim relief, Ex. 5.158 Only the operative part was pronounced and made available. On 28th February 2011, Sergi sought a six-week stay on the order and a restraint against CTR from circulating or publishing it. This was refused.159 Sergi filed A.O. No.246 of 2011 against the order of 25th February 2011. On 3rd March 2011 and 11th March 2011, the High Court declined to give the A.O. priority hearing. Sergi filed Special Leave Petition No.8384-8385 of 2011 against the High Court orders, contending that the reasoned judgment had even till then not been made available. On 17th March 2011, the Supreme Court issued notice, directed the filing of a reply and, in the meantime, stayed the operation of the Thane District Court's order dated 25th February 2011.160 Vol. C, Comp. 4, Pt. I, pp. 210-236.

Vol. C, Comp. 4, Pt. I, p. 237, operative order; Vol. C, Comp. 4, Pt. I, pp. 238-264, judgment and order.

Vol. C, Comp. 4, Pt. I, pp. 265-267. Also at Vol. C, Comp. 5, pp. 293-295.

Vol. C, Comp. 4, Pt. II, pp. 270-271.

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32. The reasoned order on CTR's injunction application Ex.5 was issued by the Thane District Court on 19th March 2011.161

33. As Sergi continued its product, SERGI 3000, for sale on its website and in brochures, CTR filed a third application Misc. App. No. 87 of 2011 before the Thane District Court (now numbered as Notice of Motion No. 191 of 2013 in this court) under Order 39 Rules 2-A and 11 of the CPC.

34. Magnier filed a separate post-grant opposition on 15th April 2011 before the Controller of Patents against CTR's Patent No. 202302.

35. On 2nd May 2011, the reasoned judgment of the Thane District Court being now available, the Supreme Court disposed of Sergi's Special Leave Petitions.162 The matter was remanded to the High Court, liberty being reserved to Sergi to amend the Memo of Appeal and take new grounds. Sergi's application for interim reliefs in appeal were directed to be disposed of in six weeks.

36. In May 2011, Sergi apparently met with DTL and since there was a stay from the Supreme Court, commenced supply of its product.163 Vol. C, Comp. 4, Pt. I, pp. 238-264.

Vol. C, Comp. 4, Pt. II, pp. 272-276.

Vol. C, Comp. 4, Pt. II, pp. 378-380.

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37. Civil Revision Application No. 185 of 2011 (against the District Court's order refusing to take the counter-claim on record) was argued and judgment reserved on 3rd May 2011. The judgment was pronounced on 6th June 2011.164 The impugned order dated 18th February 2011 was set aside and Sergi's application to have its counter-claim taken on record was allowed. A stay was sought, and it was directed that the suit would not be transferred to the High Court for six weeks.

38. CTR went to the Supreme Court in Special Leave Petition No. 18224 of 2011. The six-week stay on transfer was extended for another two weeks.165 On 20th June 2011, the stay was extended for a further two weeks. On 27th June 2011, after hearing parties in A.O. 246 of 2011, this Court held that the six-week stay granted by Mr. Justice Gavai on the suit transfer would end on 18th July 2011, while the six-week stay by the Supreme Court on the interim injunction would end on 4th July 2011. The Court therefore extended the stay on the injunction order till the next date.166 CTR filed Special Leave Petition No. 18220 of 2011 against this order. After some extensions, on 2nd August 2011, the Supreme Court dismissed the Special Leave Petitions for non-prosecution. All interim orders were vacated.167 Vol. E, Orders Comp. Pt. I, pp. 39-78; Reported in 2011 (47) PTC 521 (Bom) : 2011 (5) Bom CR 806 Vol. C, Comp. 4, Pt. II, p. 277.

Vol. C, Comp. 4, Pt. II, pp. 282-283.

Vol. C, Comp. 4, Pt. II, pp. 280-281.

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39. On 23rd August 2011, this Court passed an order in Sergi's A.O. No. 246 of 2011 against the order of 25th February 2011 allowing CTR's application for interim relief, Ex.5. The Court said that now that the counter-claim had been filed, the Thane District Court no longer had jurisdiction, and whether or not the impugned order continued in force could only be decided by this court. The appeal was found to be infructuous.168 The order was slightly modified on 9th September 2011 on an application for speaking to the minutes of the previous order, recording that the lack of continued jurisdiction in the Thane District Court was a submission made by Sergi.169 A further correction to a date noted in the order was made on 23rd September 2011.170

40. On 29th August 2011, the Thane District Court allowed the application for transfer of the suit and took the counter-claim on record. An order directing the transfer followed on 1st October 2011.171

41. On 11th November 2011, CTR filed Notice of Motion No.655 of 2012 seeking inter alia to restrain Sergi from entering into any contracts with the Rajasthan Raj Vidyut Prasaran Nigam Ltd ("Rajasthan Electricity Board") pursuant to its tender. On 15th November 2011, this Court recorded Sergi's undertaking that it would manufacture and sell products only in accordance with its own know-how and Patent and public domain material, and that, in Vol. C, Comp. 4, Pt. II, pp. 284-287.

Vol. C, Comp. 4, Pt. II, pp. 288-289.

Vol. C, Comp. 4, Pt. II, p. 290.

Vol. A, Pt. (a), p. 253-A. 99 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC any event, it would not infringe CTR's Patent.172 This order extended to Rajasthan Electricity Board and Bharat Petroleum Corporation Limited. On 28th November 2011, this was extended to DTL.173 CTR filed an Additional Affidavit in this Notice of Motion seeking urgent reliefs, saying that Sergi had made applications to Rajasthan Electricity Board to include its name as a vendor of a product that was an infringement. Ad-interim reliefs were refused on 17th January 2012.174 The Court observed that prima facie the orders of the District Court did not operate as on that date.

42. CTR filed Appeal (L) No. 40 of 2012 and Appeal (L) 70 of 2012 against this order. Both were disposed of on 16th March 2012.175 The Appeal Court found that the ad-interim and interim orders dated 15th February 2010 (the first ad-interim order on Ex.5) and 25th February 2011 (the final order on Ex. 5) of the Thane District Court in fact continued in force and were not rendered infructuous; i.e., that they continued to be valid and subsisting; and that the final order of 25th February 2011 should be treated as an ad- interim order itself. Ex. "5", the present Notice of Motion, was directed to be treated as pending. The appeals were allowed. The judgment and order was

stayed for four weeks, subject to Sergi not entering into a fresh contract with another party in respect of the products in question. It was clarified that the stay was to enable Sergi to execute the contract with DTL.176 Vol. E, Order Comp., Pt. I, pp. 92-94.

Vol. E, Order Comp., Pt. I, pp. 94A-94B.

Vol. E, Order Comp., Pt. I, pp. 95-97.

Vol. E, Order Comp., Pt. I, pp. 98-121.

Vol. E, Order Comp., Pt. I, pp. 122-123.

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43. The Controller of Patents did not take Sergi's pre-grant opposition on record. Sergi filed Writ Petition No. 2308 of 2011 in this Court against that decision, also urging that CTR's Patent had been granted with uncommon despatch. At the hearing of that petition, Sergi placed the order dated 27th January 2012 passed by the Senior Joint Controller of Patents and Designs. That order noted that certain documents sought to be produced by Sergi were not to be taken on record. By its order dated 6th March 2012, the Division Bench of the High Court in the Writ Petition allowed Sergi to file those documents within two weeks but granted no further relief. 177

44. On 22nd March 2012, CTR moved to speak to the minutes of the appellate order dated 16th March 2012. It sought a clarification that order would not prejudice CTR's contempt applications. The Appeal Court clarified that its order only meant that the ad-interim injunctions would 'revive' four weeks from 16th March 2012.178

45. On 26th March 2012, Sergi filed Special Leave Petition No.10347-10348 of 2012 before the Supreme Court against the order(s) of 16th March 2012. On 9th April 2012, the Supreme Court issued notice and, in the meantime, directed that the appellate order enabling Sergi to execute its contract with DTL, would continue to operate subject to the conditions in that order.179 Mohit S. Shah CJ (as he then was), and R. M. More J; order copy not on record.

Vol. E, Order Comp., Pt. I, pp. 124-125.

Vol. C, Comp. 4, Pt. II, pp. 324-325.

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46. CTR filed its counter-affidavit in these Special Leave Petitions. On 25th May 2012, leave was granted in both Special Leave Petitions and these were disposed of with several directions.180 The present Notice of Motion was to be taken up at an early date; so too the suit itself. Till that time, Sergi would be entitled to continue to manufacture and sell its product in accordance with its patent but without infringing CTR's Patent (in accordance with its undertaking given to the High Court on

15th November 2011).

47. On 19th June 2012, Sergi filed a revocation application (ORA Nno.42/12/PT/MUM) under Section 64 of the Patents Act. This is pending before the Intellectual Property Appellate Board ("IPAB").

48. There are a few additional intervening facts to be noted. Though neither of them have any impact on the present proceedings, these are shortly stated for completeness. The first of these is that Sergi has filed a civil suit in the Delhi High Court against CTR for infringing Sergi's Patent No. 189089. There is some disagreement between the parties as to the present status of that suit. CTR says it filed an application under Order VII Rule 11 of the CPC for rejection of the plaint, and obtained an order dated 16th April 2014 on that application inter alia staying the suit and directing the Registrar of Patents to decide the issue of the license claimed by Sergi. That order was challenged in CTR's appeal before the Division Bench, and orders are reserved. CTR however contends Vol. C, Comp. 4, Pt. II, pp. 326-332.

102 of 103 NMS-497-14-CTR-V-SERGI-F02.DOC that the suit is pending at the stage of admission and denial of documents.

49. Second, there is an order dated 30th October 2012 (B.P. Dharmadhikari J) on CTR's perjury application in Civil Application No.1282 of 2012 in A.O. No.102 of 2011. The Court found a prima facie case to have been made out against Sergi and Antoine Magnier warranting action under the Code of Criminal Procedure, 1973. Sergi has filed Special Leave Petition No.37703 of 2012 against this order. On 11th December 2012, the Supreme Court stayed the order. The Special Leave Petitions are pending.

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