

PATENT LITIGATION BETWEEN ZTE AND VRINGO



Vringo had filed two different law suits against **ZTE** in **High Court of Delhi**. One law suit was filed by Vringo Infrastructure Inc. against ZTE in November 2013. In this lawsuit, the Vringo alleged that that ZTE had infringed Vringo's Indian patent 243980 ('980 patent). The '980 patent relates to provisioning for a mobile station operable with a network and a packet data serving node. An injunction was granted on Nov. 8, 2013 which injunction was later removed. When the injunction was vacated, ZTE was asked to pay bond of approximately \$800,000 and provide accounting by way of affidavit.

In January 2014, Vringo filed another law suit in High Court of Delhi against ZTE and Indiamart Intermesh Ltd., a distributor of ZTE products. The law suit alleged infringement of Indian patent 200,572, ('572 patent). The '572 patent related to making a handover decision in a mobile communication system." In February, the Court granted an ex-parte preliminary injunction, restraining ZTE and its officers, directors, agents, distributors and customers from importing, selling, offering for sale, advertising, installing, or operating any infringing devices.



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In August, 2014, the injunction granted to Vringo was vacated as there was no prima facie case, the balance of convenience was in ZTE's favour and there was no irreparable harm. However, the conditions of bank guarantee etc. were imposed on ZTE's future sales. This case is also a major judicial pronouncement on the issue of injunction, standard of a person to be expert in the field in issue, framework for determining balance of convenience in patent cases, guidelines for what could be included in rejoinder. The ruling of the court on these issues is summarized herein below:

Prima Facie case: ZTE contended that the *prima facie* comparison between the patent and the allegedly infringing base station cannot be done by the court at this stage as it essentially involves scientific evidence which needs great deal of specialized knowledge. It cannot be said that the plaintiffs are having a *prima facie* good case on the basis of the registration of the patent alone. It is required to do something more. This something more may be an affidavit by the plaintiffs which claims to be an affidavit of an expert.

That the plaintiffs have not been able to establish a *prima facie* case about the patent of the plaintiffs being violated by defendant Nos.3 and 4 from the evidence which has been produced. Therefore, without permitting the parties to adduce evidence, this issue cannot be decided & Prima Facie case cannot be held to be established.

Standard of person to be expert: The person ought to have some basic degree in science or telecommunication or B. Tech engineering dealing in telecommunication and electronics and thereafter some research work having been conducted by him which would have qualified him to be an expert within the definition of Section 45 of the Indian Evidence Act, 1970. If a person only has a degree in business administration and his holding of different assignments and posts only shows that though he was employed by various telecommunications or computer companies, but the nature of work was essentially of a 'generalist', as a management consultant than he cannot be regarded as an expert in telecommunication.



Thus the court concluded that the affidavit could not be treated as expert affidavit and accordingly, Vringo was not able to make out a *prima facie* case, which is the first requirement for an injunction.

Balance of Convenience: The court held that the balance of convenience is not in favour of the plaintiffs because the assignor/original patentee, namely, Nokia Telecommunication as well as the licensee to whom the patented technology has been given to be commercially exploited by the plaintiffs, have not chosen to complain about the use of the technology by defendant Nos.3 and 4, either prior to the assignment or even after the grant of license.



Irreparable Loss: The court held that the plaintiffs will not suffer an irreparable loss in case injunction granted stands vacated because the interest of the plaintiffs can be sufficiently protected by the directions passed by the Division Bench in F.A.O.

No.573/2013 between the same parties relating to conditions of bank guarantee regarding future sales.

Rejoinder: A party cannot be permitted to raise an argument in rejoinder which is not even pleaded in the plaint. Rejoinder is an opportunity given to the plaintiffs for explanation, refutation, implication and not to set up a new case.



Later, Vringo file an appeal against the above mentioned order of the Single Judge of High Court of Delhi before the Division Bench of the High Court of Delhi. The appeal was only with respect to certain observations in the order of Single Judge.

First issue in the appeal was who is an expert under Section 45 of the Indian Evidence Act.

One of the observations made by the Court was that expert ought to have had a basic degree in science; technology or engineering and also research experience and the opinion of a management consultant in the telecommunications field could not be regarded as an “expert opinion” under Section 45 of the Indian Evidence Act. The Division Bench held, *“it is accepted and recognized that a person could be an expert in an area of specialized knowledge by experience and he or she need not hold a degree in the field of specialized knowledge. A person can also become an expert by virtue of one’s avocation or occupation.”* As per the order of Division Bench, an expert needs not have a specialized degree.

The Second issue was that the Single Judge had in its order noted that the licensees of Vringo’s patent, such as NSN, Alcatel, etc were aware of the sale of products by ZTE and had not objected thereto. Vringo appealed that this observation be struck down as such observations may constitute a finding against them in the form of estoppel or waiver.



The Division Bench of Delhi High Court clarified that such a finding should not be construed as estoppel, but was only made in order to establish the balance of convenience.