

IN THE HIGH COURT OF JUDICATURE AT MADRAS

M. P. No. _____ OF 2014

IN

W.P. No.1256 OF 2011

SHAMNAD BASHEER

Ministry of HRD Chair Professor of IPR,
West Bengal National University of
Juridical Sciences, NUJS Bhavan, 12LB
Block, Salt Lake City, Sector 3, Kolkatta
700098 now residing at “Nishad”,
Kulathupuzha, Quilon District,
Kerala 691 310.

... **PETITIONER / PETITIONER**

vs.

1. **UNION OF INDIA**

Rep. by its Secretary, Department of
Industrial Policy & Promotion,
Ministry of Industry & Commerce,
Government of India,
Udyog Bhavan, New Delhi 110 011.

2. **INTELLECTUAL PROPERTY
APPELLATE BOARD**

Rep. by its Registrar
Annex – I, Guna Complex, II Floor,
443 Anna Salai,
Teynampet, Chennai 600 018.

3. **INTELLECTUAL PROPERTY RIGHTS
BAR ASSOCIATION**

Rep. by President, K. Rajasekaran
III Floor, YMCA Building,
223 NSC Bose Road,
Chennai 600 001.

... **RESPONDENTS / RESPONDENTS**

AFFIDAVIT OF SHAMNAD BASHEER

I, Shamnad Basheer, aged about 38 years, s/o of M. M. Basheer, residing at
“Nishad”, Kulathupuzha, Quilon District, Kerala 691 310, temporarily come
to Kolkata, do hereby sincerely state and solemnly affirm as follows:

1. I am the Petitioner in the above Writ Petition No.1256 of 2011
challenging the constitutional validity of Chapter XI of the Trade
Marks Act, 1999 and Chapter XIX of the Patents Act, 1970.

2. In the main Writ Petition, the procedure and practice relating to appointment of the Chairperson and Members of the IPAB have already been challenged as not being in conformance with mandatory Constitutional requirements as held in various decisions of the Hon'ble Supreme Court of India as also various High Courts.
3. It is submitted that MP No.1 of 2014 was filed seeking a stay on the further proceedings of the Search-cum-Selection Committee and consequently on any decisions / actions that it may have already taken. I am advised that MP No.1 of 2014 came up for hearing on 06.08.2014 and this Hon'ble Court was pleased to direct the Respondents to file Counter within 1 week, and to specifically answer whether they were willing to appoint retired High Court Judge as Chairman of the said Search-cum-Selection Committee. I am further advised that the Hon'ble Court specifically stated that the Respondents ought not to precipitate matters and present a *fait accompli*, and that the learned Additional Solicitor General, also agreed that no actions would be taken. The matter was then posted to 14.08.2014 for further hearing.
4. It is submitted that MP No.1 of 2014 was filed on the basis of email response to an RTI query. A further RTI query was also filed, and during the day of 06.08.2014, response to this second RTI query was received along with various documents. This Miscellaneous Petition is filed based on the information so received.
5. It is submitted that the said Search-cum-Selection Committee was established by the 1st Respondent under Office Memorandum of the Department of Industrial Policy & Promotion (DIPP), Ministry of

Commerce & Industry, Government of India. A copy of this Office Memorandum No.7/11/2007/IPR-I/IPAB dated “May 2014” has been provided in the RTI response, and it states that “*it has been decided to set up the Search-cum-Selection Committee for the selection to the post of Vice Chairman ... and Technical Member in the IPAB*”, with the composition assailed in MP No.1 / 2014.

6. The supporting documents to the aforesaid Office Memorandum indicate that the discussions for appointment of the Vice Chairman and Technical Member of IPAB commenced at least as far back as 31.12.2013, where the file note records the former IPAB Chairman, Justice Mrs. Prabha Sridevan’s (retired Judge, Madras High Court), objections that the Chairman of IPAB cannot be relegated to the status of a mere ‘member’ of the Search-cum-Selection Committee. This objection is dismissed in a cavalier fashion as follows:

“This issue was examined in the Department and it was decided that the composition could continue as such unless there is legal compulsion, i.e., outcome of a court decision. According to DOPT OM dated 30th July 2007 Ministries / Departments have the discretion to choose the Chairman of the Committee. The said guidelines also state that the Chief Executive of the Organisation of which selection is being made should also be included.”

7. It is submitted that it appears from the file notes that this was put up for further approval, and on 26.02.2014 the Department of Personnel & Training (Estt. (RR) Division) has disposed of the issue as follows:

“The proposed Search-cum-Selection Committee by administrative ministry for the both posts includes Chairman IPAB as member of Committee. It has been observed that the

then Chairman IPAB had an issue of composition of the Search-cum-Selection Committee and have stated that the Chairman IPAB could not be a Member in the committee chaired by the Secretary DIPP. The administrative department have examined the issue and decided that this composition could continue as such unless there is a legal compulsion, i.e., outcome of a Court decision.”

8. Thereafter on 05.03.2014 it appears to have been determined that:

“There is no court decision or court case pending on the composition of the Search-cum-Selection Committee for selection of the Technical Members and Vice Chairman in IPAB. The issue raised by the then Chairman, IPAB on the composition of the Committee earlier had been examined in this Department and decided at the level of Secretary, DIPP that the present Search-cum-Selection Committee should continue unless there is compulsion i.e. outcome of a court decision.”

whilst however also noting that the Hon’ble Delhi High Court in LPA No.86 / 2013 by order dated 08.04.2013 had directed the 1st Respondent to *“keep the said report in mind while constituting a Selection Committee in future.”* The ‘report’ referred to by the Hon’ble Delhi High Court is the objections filed by the previous IPAB Chairman, Justice Mrs. Prabha Sridevan (retired Judge, Madras High Court) that the Chairman IPAB ought to chair the selection committee as well.

9. It is submitted that it is utterly puerile for the 1st Respondent to state that *“there is no court decision”* and that the *“present Search-cum-Selection Committee should continue unless there is compulsion i.e. outcome of a court decision.”* The above extracted file note clearly

refers to the Order of the Hon'ble Delhi High Court dated 08.04.2013 wherein the 1st Respondent is directed to “*keep the said report in mind while constituting a Selection Committee in future.*” The 1st Respondent has blithely ignored the very ‘*outcome of the court decision*’ it disingenuously claims to await.

10. Finally on 01.05.2014, the Department of Personnel & Training (Estt. (RR) Division) appears to have approved the formation of the present Search-cum-Selection Committee.
11. Another illegality in the appointments sought to be made by constituting the present Search-cum-Selection Committee is that the post has not been advertised in any manner, nor have any applications been sought, other than for two letters dated 25.02.2014 addressed by Joint Secretary, DIPP to (a) Secretary Department of Legal Affairs, and (b) present Chairman IPAB, Mr. Justice K. N. Basha (retired Judge, Madras High Court). Further, the letters are very different in content and attitude. The letter addressed to Secretary, Department of Legal Affairs, requests “*a panel of names ... for being considered for appointment to the post of Vice Chairman*” whilst the letter addressed to the present Chairman, IPAB, only requests “*the names of eligible and willing Members of IPAB for consideration for the post of Vice-Chairman.*”
12. The above clearly militates against the principles set out in the *NCLT Case*, as submitted in the main WP and in MP No.1 / 2014, and not repeated herein only for brevity. The Hon'ble Supreme Court in the *NCLT Case* explicitly set out principles for the appointment of

Chairman and all other Members (Judicial and Technical) by any name called (including the artifice of Vice Chairman) to Tribunals. It is clearly impermissible to suborn a retired High Court Judge to the role of a collection agent of resumes from within the tribunal he chairs. More pertinently, who exactly is the Search-cum-Selection Committee searching for? If only the bureaucrat is entitled to suggest a panel for consideration, it would certainly be more likely that only bureaucrats would be on such panel, and ultimately only a bureaucrat would be appointed to the post. If the only non-bureaucrat, *i.e.*, IPAB Chairman, is restricted to simply forwarding the names of willing applicants from a closed set, then in reality there is no 'search' for a suitable candidate being conducted by the IPAB Chairman. This belies the very name, *Search-cum-Selection Committee*. It would be only logical, and should be mandatory, that every member of the Committee is actively carrying out both 'search' and 'selection' functions, or at the very least is entitled to do so. If the function of the committee is only to 'select' from the pool of bureaucrats ready for post-retirement sinecures, then clearly the 1st Respondent is playing a farce.

13. Eventually, the present Search-cum-Selection Committee held a meeting on 13.05.2014 and it was "*informed that four candidates had applied for the post of Vice Chairman, IPAB*" comprising (a) Mrs. Usha, the just retired Vice Chairman (seeking re-appointment), (b) Mr. DPS Parmar, the current Member Technical (Patents), and two bureaucrats, (c) Mr. R Raghupati, Additional Secretary, Department of Legal Affairs, and (d) Mr. Prabhakar Singh, Joint Secretary and

Legislative Counsel, Legislative Department. It may be noted that only 3 of the 4 members of the Search-cum-Selection Committee attended the meeting. The DG, CSIR did not attend the meeting.

14. The meeting was adjourned on account of a difference of opinion on whether or not Mrs. Usha could be appointed. The only trained legal mind on the committee, with any real experience of the canons of interpretation, the present Chairman IPAB, Mr. Justice K. N. Basha (retired Judge, Madras High Court) was of the view that her appointment was permissible, and that *NCLT Case* should be strictly followed in the appointments. However, the Secretary, Department of Legal Affairs opposed the appointment on the basis that “*the Law Ministry has been taking a consistent stand that in the absence of any specific provision in the concerned Act, reappointment is not possible.*” The Committee therefore has referred the matter to the Department of Legal Affairs with a request for an opinion from a Law Officer on the issue. It is submitted that both under the Trade Marks Act and the *NCLT Case*, as noted by the learned Chairman IPAB, Mr. Justice K. N. Basha (retired Judge, Madras High Court), it is permissible for Ms. Usha, if otherwise eligible, to be appointed as Vice Chairman. It is submitted that this is a well established point of law that needs no debate or opinion from a Law Officer. It is submitted that the request for an opinion on the bogey of re-appointment is nothing more than a tactic to subordinate the views of the learned Chairman IPAB, Mr. Justice K. N. Basha (retired Judge, Madras High Court). It is submitted that this is completely contrary to the *NCLT Case* wherein the

underlying principle made clear is that judicial views must reign supreme in the appointments to tribunals.

15. It is submitted that the decision in the *NCLT Case* holds the field on the law relating to tribunals, and the prescriptions laid down by the Hon'ble Supreme Court in that decision are the minimum mandatory requirements to be followed in the establishment, composition and appointments to tribunals, including the IPAB to which this Writ Petition relates. With respect to the qualifications of Members (Technical / Judicial) to be appointed to the tribunal, the Hon'ble Supreme Court (*NCLT Case*, para.120) has made it clear that tribunals must be dominated by Judicial Members and that Technical Members are not necessary unless specific technical inquiry needs to be carried out. Candidates for appointment as Judicial Members must have established and proven legal experience measuring up to the standards of a Judge, and mere legal knowledge is insufficient. Hence bureaucrats are excluded from consideration for appointment as Judicial Member in tribunals, and may be appointed only as Technical Members, if such post is necessary, and even then, only from those holding rank of Secretary or Additional Secretary or higher. It is submitted that there has been absolutely no application of mind on whether a 'Technical Member' is at all required in relation to Trade Marks. It is submitted that there is absolutely no 'technical inquiry' required in relation to Trade Marks and hence no basis for appointment of any 'Technical Members'.

16. It is submitted that, in view of the *NCLT Case*, of the said 4 candidates, only Ms. Usha appears to be likely eligible, whilst the other 3 are clearly ineligible for appointment as Vice Chairman which is a *Judicial* post under sec.2(k) Trade Marks Act. Mr. Parmar, being a Technical Member (Patents) has degrees in science and an LLB, but nowhere in his application does he claim any experience as an advocate or judge. In fact his resume shows him to be a career bureaucrat commencing with his first employment as Junior Field Officer in the Rubber Board. The other 2 applicants, being bureaucrats, are clearly ineligible for appointment as Vice Chairman since it is a *Judicial* post.
17. It is submitted that the entire above scheme mooted by the 1st Respondent for appointing the Vice Chairman and Technical Members to IPAB does not satisfy the mandatory requirements as stipulated by the Hon'ble Supreme Court and accordingly ought to be set aside.
18. It is submitted that the above scheme adopted by the 1st Respondent is the outcome of an Office Memorandum dated 30.07.2007. This Office Memorandum sets out the "*principles [to] be kept in view by all concerned while setting up Selection Committees and Search-cum-Selection Committees (for posts in autonomous organisations).*" With respect to autonomous bodies such as the IPAB, this Office Memorandum *inter alia* states:
- (a) The principles generally applicable to department recruitments would apply, such as:
- (i) Immediately after a post is created, Recruitment Rules for the same should be framed if the post is likely to continue

for one year or more. Procedure of Search Committee cannot be a substitute for the normal recruitment process.

- (ii) Only in situations where advertisement may not result in adequate response that a Search Committee should be appointed. Search Committee cannot be a substitute for advertisement of posts.
- (iii) Members of the Search Committee should be at least one level above the post to which recruitment is being made.
- (iv) The committee should have persons of appropriate standing having acknowledged expertise in the relevant field of specialisation.

(b) And in addition to the above, *inter alia*:

- (i) Each Ministry / Department shall constitute a Search-cum-Selection Committee chaired by a person of their choice.
- (ii) Extensions in tenure are to be considered by the committee.
- (iii) Recruitment Rules for the post shall be formulated and shall be made widely known before the search.
- (iv) The vacancy shall be widely advertised including on the Ministry / Department website, and a minimum of 4 weeks shall be provided for candidates to respond.

19. It is clear from the file notes provided in the RTI response that the 1st Respondent has not followed even its own Office Memorandum, other than selectively to suit its purpose in appointing a bureaucrat to act as

Chairman of the Search-cum-Selection Committee. No recruitment rules have been framed for the post, though the IPAB was created as far back as 2003. The vacancy was not advertised in any manner. The Search-cum-Selection Committee is headed by a Secretary who is clearly not “*at least one level above the post to which recruitment is being made.*” The committee consisted only of 1 member who had any standing in the relevant field, *i.e.*, IP law / judicial capability.

20. It is submitted that a failure to appoint a Vice Chairman who is a Judicial Member strictly in accordance with the *NCLT Case*, *i.e.*, only those who are Judges or are qualified to be Judges under the Constitution, would make a mockery of the law and the IPAB as an institution.
21. It is submitted that the above clearly establishes the urgent need for immediate intervention by this Hon’ble Court to set right the appointments process followed in respect of a judicial body that affects the real and valuable rights of all stakeholders, whether businesses (big and small), or individuals as creators holding patents that may be sought to be by infringed by vested interests. The IPAB is also the relevant authority under the Designs and GI Acts. Particularly the GI and Patent Acts, raise larger issues of public concern (such as patents for life saving drugs) and GI of goods with national / cultural sensitivity, and it is imperative that only highly qualified individuals who are truly independent be appointed.

22. It is submitted that the scheme adopted by the 1st Respondent is in utter disregard for its own internal rules, *i.e.*, the Office Memorandum, and is a clear violation of the law laid down in the *NCLT Case*.
23. It is submitted that the 1st Respondent's Office Memorandum No.7/11/2007/IPR-I/IPAB dated "May 2014" violates the law laid down in *NCLT Case* and consequently deserves to be set aside. It is submitted that the Search-cum-Selection Committee formed thereunder ought to be directed to be wound up, and the 1st Respondent ought to advertise the vacancy, and call for applications for the post of Vice Chairman and Technical Members of the Intellectual Property Appellate Board, and consider the applications received strictly in accordance with the law laid down by the Hon'ble Supreme Court in *NCLT Case*.
24. It is submitted that there is an urgent need to restrain the 1st Respondent from taking any steps to appoint a Vice Chairman and Technical Members to the IPAB pending disposal of the main Writ Petition.
25. It is submitted that from the above narration of facts and legal principle the Petitioner has made out a strong prima facie case and has shown the grave danger of irreparable harm to the judicial system. It is submitted that the balance of convenience must always lie in favour of securing compliance with public law, and implementing the judgements of the Hon'ble Supreme Court.
26. The Petitioner humbly craves leave to submit further affidavits and documents as may be necessary with the leave of this Hon'ble Court.

Under these circumstances it is prayed that this Hon'ble Court may be pleased to grant an order of INTERIM INJUNCTION restraining the 1st Respondent from considering any applicants or making any appointments to the post of Vice Chairman, and Technical Members, of the Intellectual Property Appellate Board, pending disposal of W. P. No.1256 of 2011, and pass such further or other orders which this Hon'ble Court may deem fit and proper and thus render justice.

Solemnly affirmed at Kolkata this the
_____ day of August 2014 and signed
his name in my presence.

Before me

Notary