

**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

**M. P. NOS.1 & 2 OF 2014**

**IN**

**W.P. No.1256 OF 2011**

**SHAMNAD BASHEER**

**... PETITIONER**

**VS.**

**1. UNION OF INDIA**

**2. INTELLECTUAL PROPERTY APPELLATE BOARD**

**3. INTELLECTUAL PROPERTY RIGHTS BAR  
ASSOCIATION**

**... RESPONDENTS**

**COMMON REPLY AFFIDAVIT**

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 Chennai, 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. MP No.1/2014 challenges the formation, composition, and proceedings of the Search-cum-Selection Committee established to appoint a Vice Chairman and Technical Members to IPAB, and MP No.2/2014 seeks to restrain the 1<sup>st</sup> Respondent from considering any applicants and/or making any appoints to the IPAB posts of Vice Chairman, and Technical Member.
2. The 1<sup>st</sup> Respondent has filed its Counter Affidavits in both MP No.1/2014 and MP No.2/2014, and since much of the averments in the said Counter Affidavits are similar, a Common Reply Affidavit is filed.

3. The 1<sup>st</sup> Respondent's Counter Affidavits set out the statutory provisions under challenge in the Writ Petition. The 1<sup>st</sup> Respondent seeks to justify the constitutionality of these provisions and the selection process in making appointments to IPAB based on the impugned provisions. There is no dispute as to the content of these provisions. The challenge is to the validity of these provisions, and hence the 1<sup>st</sup> Respondent is required to justify this existence within the constitutional framework. It is submitted that a response to a challenge on constitutional validity of a statute cannot be that the statute exists. It is submitted that the 1<sup>st</sup> Respondent's failure to justify the constitutionality of these provisions makes it clear that it admits their invalidity.
  
4. In relation to the appointment of IPAB Chairman under s.85(6) Trade Marks Act, the 1<sup>st</sup> Respondent states that the "*recommendations of Chief Justice of India are submitted for approval by the Appointments Committee of Cabinet and the Chairman is appointed.*" It is clear therefore that the 1<sup>st</sup> Respondent does not believe it is bound by the decision of the Chief Justice of India (CJI), or at the very least bound to achieve a consensus with the CJI on the appointment of Chairman IPAB. The 1<sup>st</sup> Respondent clearly believes that it may approve or reject the CJI's recommendations, and as such it is open to the 1<sup>st</sup> Respondent to make the final decision and appointment any person of its choosing (subject to s.85(1) Trademarks Act according to the Counter Affidavit). It is submitted that this is clearly a subversion of the very provision the 1<sup>st</sup> Respondent seeks to rely on to justify its appointments process. The mandate in s.85(6) Trade Marks Act explicitly states that "*no*

*appointment ... shall be made except after consultation with the Chief Justice of India.*” It is submitted that even assuming for the sake of argument that s.86(5) Trademarks Act is valid, the ‘consultation’ must be an effective and real consultation, which can be achieved only as prescribed in the *NCLT Case*, i.e., by establishing a committee consisting of the CJI (or his nominee) having casting vote, another Supreme Court Judge or High Court CJ and two bureaucrats of related departments. If ‘consultation’ is not interpreted as above stated, s.86(5) Trademarks Act falls woefully short of the mandate prescribed in *NCLT Case* which is to the effect that a judicial majority must prevail in the appointment of tribunal members. The 1<sup>st</sup> Respondent cannot render the ‘consultation’ to a mere formality and then choose to approve or reject the candidates recommended by the judicial majority of the selection committee prescribed by the *NCLT Case*.

5. In relation to the composition of the Search-cum-Selection Committee and appointment process of Vice Chairman and Members to IPAB, the 1<sup>st</sup> Respondent relies on its Office Memorandum dated 30 July 2007. It is submitted that the Office Memorandum cannot supersede a judgement of the Supreme Court, and cannot form the basis for the constitutionality of the impugned appointment process. Further, the 1<sup>st</sup> Respondent has justified its continued reliance on the Office Memorandum on the basis that it awaits a court decision negating such process. It is submitted that it is incomprehensible as to how the 1<sup>st</sup> Respondent, in the same breath, can state that it has taken into consideration the decision of the Delhi High Court in LPA No.86/2013

but has decided to await the outcome of a court decision. The 1<sup>st</sup> Respondent has not bothered to explain as to how the Delhi High Court's decision in LPA No.86/2013 is not considered a 'court decision'. Moreover, it is submitted, that the callous manner in which the 1<sup>st</sup> Respondent has chosen to reconstitute the Search-cum-Selection Committee after specifically considering the decision of the Delhi High Court is a clear indication of the 1<sup>st</sup> Respondent's contempt for the judiciary.

6. With respect to the relevance of the *NCLT Case*, the 1<sup>st</sup> Respondent has taken the view that the decision is limited to specific provisions of the Companies Act and does not apply to the IPAB as the parent provisions in the Trademarks Act and Patent Act have not been held unconstitutional. It is submitted that the principles set out in the *NCLT Case* are but a reiteration of well established law. It is submitted that the *NCLT Case* comprehensively reviews the precedents and culls out the salient principles regarding the establishment and composition of tribunals. It is submitted that these principles are sought to be relied upon in the present Writ Petition. It is submitted that references made by the Petitioner to the *NCLT Case* are but markers to the principles set out therein which in any event are but crystallisation of well established precedent. It is submitted that there are numerous decisions of High Courts, and of the Supreme Court, which cite, and rely upon, the statement of law in the *NCLT Case*, with respect to the establishment and composition of tribunals. It is submitted that the failure of the 1<sup>st</sup> Respondent to be aware of the law, of the principles set out the *NCLT*

*Case*, and the manner in which the *NCLT Case* has been relied upon by various Courts, is in itself a clear indication of the limitations of bureaucrats in their knowledge and understanding of the law and legal principles and is in itself a ground to remove and preclude any bureaucratic interference or dominance in the appointment of members to judicial bodies.

7. The 1<sup>st</sup> Respondent has sought to justify its failure to advertise the vacancy on the grounds that the prescribed qualifications limit the pool of applicants and hence applications were sought only through the Chairman IPAB and Secretary, Department of Legal Affairs. It is submitted that this justification ignores the very statutory provisions relied upon by the 1<sup>st</sup> Respondent. There is nothing in s.85 Trademarks Act to limit the applicants pool to those present serving in the IPAB or Department of Legal Affairs. It is not inconceivable that a person may have been a member of Indian Legal Service holding a post of Grade I or higher for 5 years at some point in their bureaucratic career, and may now be serving in another department. Similarly a former Judicial / Technical Member of IPAB may also be eligible. Hence an advertisement may have achieved a deeper pool of applicants. The 1<sup>st</sup> Respondent's failure to advertise the post has illegally restricted the quantity and quality of applicants, in violation of the very Office Memorandum it relies upon to justify the impugned appointment process.
8. The 1<sup>st</sup> Respondent admits that the IPAB exists to hear appeals from the decisions of the Registrar of Trademarks, Geographical Indications

and Patents. It is submitted that appeals under the Designs Act are also submitted to the IPAB. Having admitted that the IPAB hears ‘appeals’, the 1<sup>st</sup> Respondent contradicts itself by stating that the IPAB matters are “*largely technical in nature*”. It is submitted that the matters dealt with by the IPAB were previously dealt with by the High Courts. The jurisdiction of the High Courts was transferred to the IPAB. The powers and functions of the IPAB are similar to that exercised by the High Courts in relation to the same subject matters. It is submitted that when the jurisdiction and powers of the IPAB are those formerly vested with the High Courts, it is absolutely fallacious for the 1<sup>st</sup> Respondent to term the same as ‘technical matters’. These are all clearly judicial matters requiring the application of judicial mind. Most determinations under patent law (*eg.* whether an alleged invention is patentable) or trademark law (*eg.* whether a trademark is registrable) are primarily questions of law predicated on underlying facts. In fact, the impugned provisions themselves require that only a retired Judge of High Court be appointed IPAB Chairman, and further create the posts of Judicial Members of IPAB. If the work was largely technical, then there would have been no need for the legislature to specifically mandate judicial personnel be appointed to the IPAB. The statute in fact permits an ILS officer with a mere 3 year track record in the service and with absolutely no prior IP experience or exposure to be appointed as a “judicial” member deciding on what the respondent claims to be allegedly “technical” issues. It is submitted that these absurd averments in the Counter Affidavit would only establish that the 1<sup>st</sup> Respondent

does not espouse the validity of the impugned provisions, and the same may be held unconstitutional.

9. 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 IPAB which is a judicial body with powers that affects matters of larger public concern.
10. 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 this Hon'ble Court may be pleased to set aside the Search-cum-Selection Committee and restrain the 1<sup>st</sup> Respondent as prayed for in MP Nos.1 & 2 of 2014 in W. P. No.1256 of 2011 and thus render justice.

Solemnly affirmed at Chennai this  
the 2<sup>nd</sup> day of September 2014 and  
signed his name in my presence.

Before me

Advocate