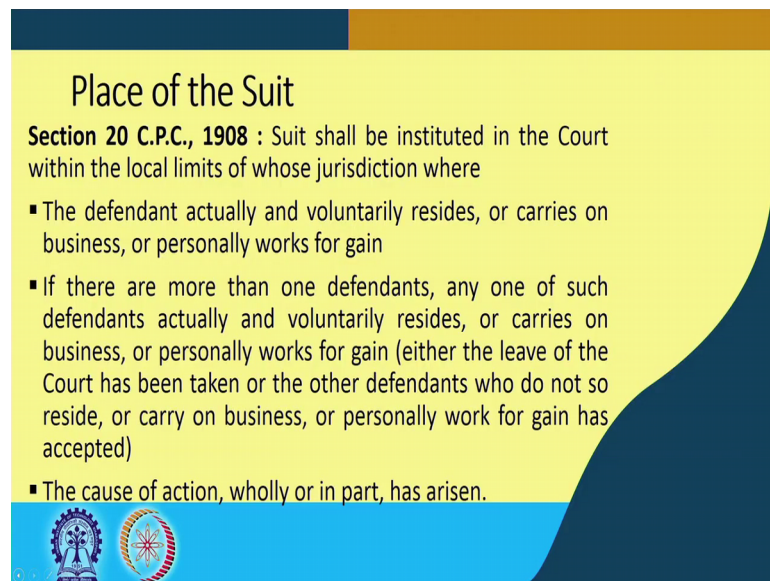


Patent Search for Engineers and Lawyers
Prof. Shreya Matilal
Rajiv Gandhi School of Intellectual Property Law
Indian Institute of Technology, Kharagpur

Lecture – 38
Judicial Enforcement

Let me begin with the slides in which I have left, we ended with the last class.

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Place of the Suit

Section 20 C.P.C., 1908 : Suit shall be instituted in the Court within the local limits of whose jurisdiction where

- The defendant actually and voluntarily resides, or carries on business, or personally works for gain
- If there are more than one defendants, any one of such defendants actually and voluntarily resides, or carries on business, or personally works for gain (either the leave of the Court has been taken or the other defendants who do not so reside, or carry on business, or personally work for gain has accepted)
- The cause of action, wholly or in part, has arisen.

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Now, we were talking about the Place of Suit. Now, to be very precise a suit patent infringement, suit can be filed where the defendant resides carries on business or works for again. It can also be filed where the cause of action has fully or in part has arisen.

To give you an example, suppose the patented article the infringe article is being produced in Kolkata and the infringed article is being sold in Mumbai. In that case the patent holder has the choice, he can file the patent infringement suit in Kolkata, he can also find the patent infringement suit in Bombay.

Suppose, the infringer stays in Bombay the person who is making the infringing article stays in Kolkata, the person who is selling the infringement article stays in Bombay in that case also the defendant that multiple defendant, the first infringer is the person who is manufacturing the infringing article, the second defendant is the defendant who is selling the article both of them are infringing the rights of the patent holder under section

48. And therefore, again the suit can be filed in Kolkata, it can also be filed in Mumbai. Now, let me begin how such becomes important here and for that actually we need to understand what is revocation.

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Search Becomes Relevant for the Defendant as he can take the defence of invalidity in an infringement suit

Who can seek Revocation?

- Any Person Interested.
- The Central Government.
- A defendant making the counter-claim of revocation in a suit for the infringement.

Who can Revoke?

- The Intellectual Property Appellate Board (IPAB).
- The High Court on a counter claim in a suit for infringement.

We have seen that the very idea of patent is to ensure that it does not shrink the public domain and there are checks and balances throughout the life of the patent. The first challenge comes before the grant and we know that is actually called the objection under 25, 1 of the patent act which is called pre-grant opposition.

Thereafter, after the grant of patent there is an one year window period within that still it is possible for any member of the public to object to the patent and this is called what you called the post grant opposition and which has been embodied which has been enumerated in section 25, 2 of the patent act.

Now, in addition to that throughout the life of the patent it is always open for any member of the public to challenge the validity of the patent and what is known as revocation of patent and which has been embodied in section 64 of the patent act.

Now, who can actually; if you if you look into section 64 of the patent act you will find that, in fact, three categories of litigants can challenge it. Number 1, any person who is interested that means, any member of the public can file a start and revocation proceeding seeking revocation of the patent. The central government can do it. And as

we have understood from the previous class that it is also possible for a person against whom a patent infringement suit has been filed to claim a revocation in the form of a counter claim.

Now, who are the authorities? Who are the tribunals and which are the courts, who can do it normally when a standalone revocation proceeding has been started? As per the provision of section 64, it has to be initiated before the intellectual property appellate board and which is situated in the city of Chennai.

However, whenever a revocation is claimed in the form of a counter claim in a suit, the even if the prior revocation proceeding is pending before the intellectual property board, all papers because the moment the patent holder has filed a patent infringement suit against the person who has initiated revocation proceeding before IPAB. IPAB has to transfer all documents to the relevant high court where the patent infringement suit is being tried. And in that case the high court would not only be looking into the issue of infringement, but the high court would also be looking into the issues of revocation.

To be very precise revocation is nothing, but a de-novo assessment of the validity of the patent de-novo assessment of all the criterias of patentability. And therefore, the revocation is basically also a de-novo search it might happen that you may not be a person or an individual who was involved in the filing of patent. But after the filing of what you call patent infringement suit you may be asked to search and see to what extent the patent is valid. And this search is actually again a search with regard to all the criterias which makes an invention patentable.

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Some of the Grounds of Revocation (invalidity)

- The invention was claimed in a valid claim of earlier priority date contained in the complete specification of another patent. [S64(1)(a)]
- The patent was obtained wrongfully in contravention of the rights of the petitioner. [S64(1)(c)]
- Invention does not fall within patentable subject matter [S64(1)(d)]
- The invention is not new (publicly known or publicly used or published before) [S64(1)(e)]

Now, let us see some of the grounds. I am not getting into details and as you can just to reflect that what are the grounds on which revocation can be claimed. And it is actually a long section it is a long provision. I will highlight some of the provision in order to suit that how such becomes relevant.

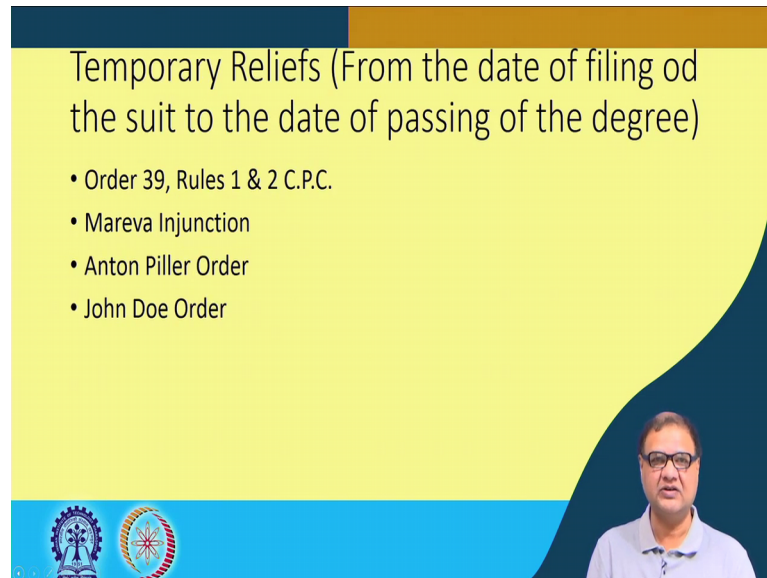
Number 1, for example, 64 1 a of the patent acts is that the invention was claimed in a valid claim of earlier priority date contained in the complete specification of another patent. So, see this is actually again a question of priority date and priority date of an invention which is reading on the existing on the patent in respect of which revocation has been claimed.

Then again if you see that the patent was obtained wrong fully in contravention of the right of the petitioner. Then again the third point if you look into it is a basically saying that the patent is not falling within this patentable subject matter. So, it is something which is not which is which is to which section 3 is applicable.

So, this can happen then again there is actually another ground the patent is not new, so it is it is publicly known or publicly used or public, published before again this is actually a prior art search. So, what do we can understand from here, that patent search is not something which is required when to when you are filing a patent or when you are basically responding to an office action or when somebody says that actually you challenge it before opposition. But patent search is something which can be done at any

stage during the life of the patent to see, to ensure that the patent is invalid or to actually support that the patent is completely valid.

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In this regard, actually I think it is also important to look into some of the issues like what are the things which can happen what because since we are discussing about patent infringement suit and then in the in the coming class I will be discussing about the issues that what is direct for primary patent infringement or literal patent infringement and what is non-literal patent infringement. And in that context I will bring in the issue of doctrine of equivalence. And in that context also patent search becomes very important.

So, here since we are discussing about enforcement of patent try to patent infringement suit and since this is also a course for the liars, I would, I will spend few minutes on what are the reliefs which are available in the in a patent infringement suit. As we know that the first set up relief comes when the suit is filed and as we know that it takes actually a 1 to 2 years time or in certain cases 3 years time to completely decide a case.

So, during this period from the date of filing of the suit to the date of disposal of the suit the innumerable orders are past, and some of the orders are very important orders which basically protects the patent holder. And the general provision as you know that order 39, rule 1 and 2 which talks about temporary injunction, and the way temporary injunction is applicable in any suit.

Say for example, in case of a property related suit, in case of actually other suit, similarly it is also applicable in case of patent infringement suit, whereby the defendant could be temporary restrain from manufacturing the porter product and the process that is infringing the patent.

In addition to that, there are certain spatial remedies which are applicable in respect of intellectual property, and these remedies are like wherever injunction then it is we know about Anton Piller Order and we also know about a John Doe Order. So, what are those let us spend few minutes on that.

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Mareva Injunction

- Mareva Injunction is a temporary remedy created by the English Court in *Mareva Compania Naviera SA v International Bulkcarriers*, [1980] 1 All ER 213.
- This order is passed when there is a danger that the defendant (fly-by-night pirates) may transfer his assets out of the jurisdiction of the court.
- This has emerged as an effective tool in most Commonwealth jurisdictions to freeze the assets so that the defendant to an action cannot dispose of or remove his assets from the jurisdiction of the court so as to frustrate judgment.
- Since this order should be sparingly used as the order highly detrimental to the defendant and often granted at *ex parte* hearings, based on the affidavit of the plaintiff.

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See first of all this Mareva injunction is something which has been created by the English court. As you can see in this screen, it has been created by the English court in the case of Mareva Company versus International Bulk Carriers. So, this is actually this the decision comes from the famous English Judge Lord Denning. Now, what is this order? This order is basically passed when there is a danger that the defendant is actually would be moving the assets from the jurisdiction of the court.

Suppose, we know that at the end of the process if the plaintiff that means, the patent holder wins the case, the defendant would be required to pay damages and then if he can actually ensure that more property is available within the jurisdiction of the court the decree which has been passed, cannot be enforced by cannot be enforced then the decree becomes infructuous. Because as you know that after the passing of the decree the degree

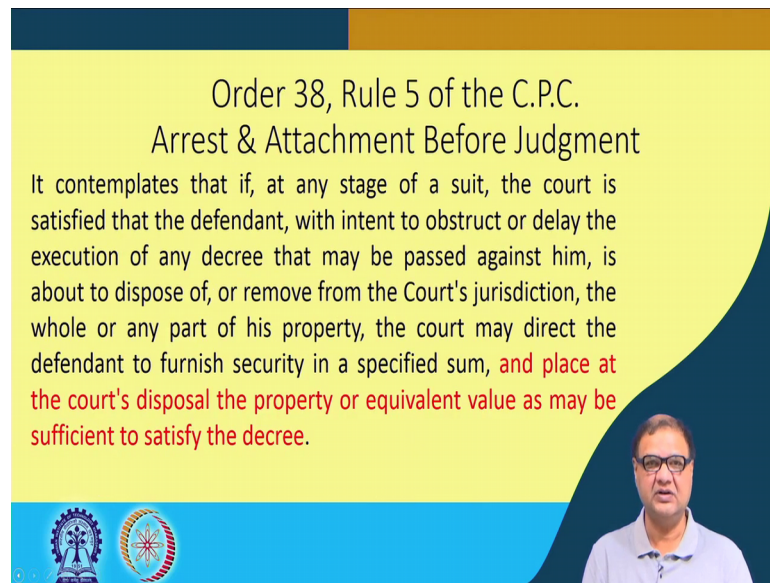
holder has to approach the same court where the trial has begun, and he has to initiate a proceeding under order twenty one of civil procedure court.

Now, what is the order? This is actually an order whereby the, what where what will happen? That there is a likelihood, that the defendant would remove all assets from the jurisdiction of the court. So, as to ensure that the decree past against him is frustrated, in such a situation in Mareva injunction what happens the court process a decree, thereby the court actually fridges the asset of the defendant. It can be actually the court can pass an order asking the bank to freeze the bank account, it can actually create it can pass an order thereby the defendant can be restrained from what you call sitting all the immovable properties which he has in the jurisdiction.

Now, this is actually a this is a highly detrimental to the interest of the defendant if we look into from the prospective public weighty. And therefore, this order is sparingly used by the court. And normally, this order is short on day one when the plaint is file and it is actually passed ex-parte without hearing the defendant, and normally this is actually this is best on a petition which is the supported by an affidavit.

Therefore, when the court is absolutely sure that the defendant is going to run away from the jurisdiction of the court defendant is going to remove all assets moveable, immovable cash from the jurisdiction of the court, this order is being passed. And remember this order the validity of the order begins when the data of the order and this order remains build the disposal of the suit.

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Order 38, Rule 5 of the C.P.C.
Arrest & Attachment Before Judgment

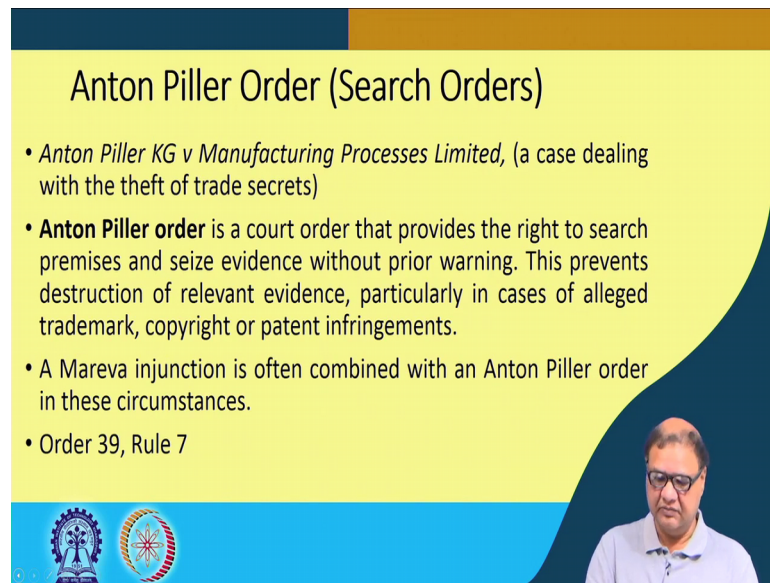
It contemplates that if, at any stage of a suit, the court is satisfied that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him, is about to dispose of, or remove from the Court's jurisdiction, the whole or any part of his property, the court may direct the defendant to furnish security in a specified sum, and place at the court's disposal the property or equivalent value as may be sufficient to satisfy the decree.

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Next actually in our CPC also we have a provision although which is not directly talking about Mareva injunction, the remedy which has been propounded by the English court. But this is order 38 rule 5 of civil procedural court, which says that I will read out the relevant portion it contemplates that at any stage of the suit the court is satisfied that the defendant to the intent to obstruct or delay the execution of the decree that may be passed against him is about to dispose of or remove from the court's jurisdiction the whole or any part of the property, the court may direct defendant to furnish security in a specified sum. So, here what is happening? Here instead of freezing the asset the court is asking the defendant to pro produce a bank guarantee or and to give some kind of financial guarantee.

But as we know that section 151 of the civil procedure court gives under that position the courts including the trial court, they have inherent power and there is there is no way we can actually prevent the court from actually passing an order under 151 of civil procedure court, restraining the bank from allowing the defendant to use the account. So, if a free account freezing order can also be passed under section 151 of civil procedural court.

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Anton Piller Order (Search Orders)

- *Anton Piller KG v Manufacturing Processes Limited*, (a case dealing with the theft of trade secrets)
- **Anton Piller order** is a court order that provides the right to search premises and seize evidence without prior warning. This prevents destruction of relevant evidence, particularly in cases of alleged trademark, copyright or patent infringements.
- A Mareva injunction is often combined with an Anton Piller order in these circumstances.
- Order 39, Rule 7

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Now, the another type of remedy, the most difficult is actually what will happen, the moment the defendant the infringer comes to know that a suit has been file against the infringer he would actually destroy all evidence. Say for example, duplicating machines and other thing to ensure that the allegation of infringement has not been is the plaintiff fails to prove the allegation of infringement.

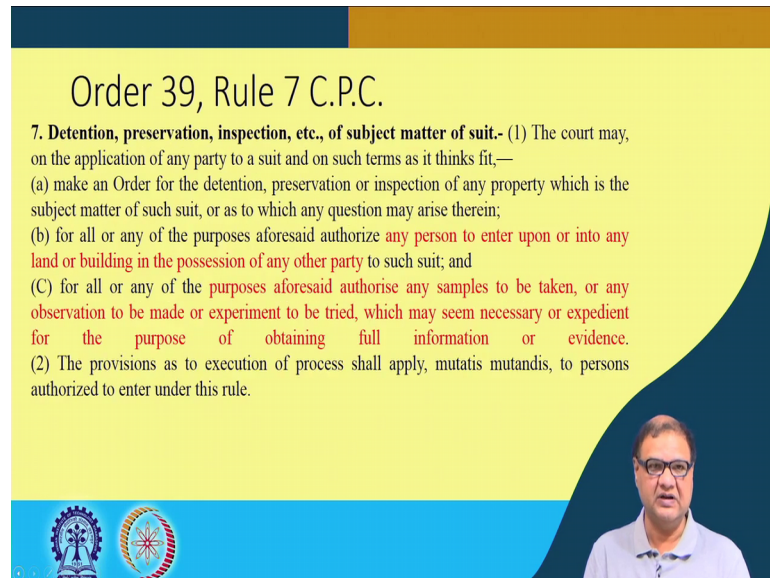
Keeping in mind, that kind of destruction of evidence which can be used for the purpose of implicating the defendant. Defendant actually what he does? He basically destroys the evidence. Now, before he comes to know that a suit has been file, if an inspection team goes to the facility where the infringing activities are carried on and if that team collects the evidences in that case that evidence can be used for the purpose of implicating the defendant.

See, if the defendant comes to know that infringement suit has been file he will destroy evidence. But the do the day 1, when the suit is file if the court is so satisfied if the court passes an order and normally the court appends and a court officer court officer may be an advocate and in and an advocate whose are independent practitioner and the court can ask that advocate to go and inspect the facility of the defendant and collect all material evidence is there. And so, this is known as what you call Anton Piller Order.

And we have seen a very often a Mareva injunction and Anton Piller is Anton Piller Order is you suit simultaneously. Similarly, in our laws, so we have a provision that is

order 39, rule 7 or the civil procedure court and which is almost similar to what the English understanding of Anton Piller Order says.

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Order 39, Rule 7 C.P.C.

7. Detention, preservation, inspection, etc., of subject matter of suit.- (1) The court may, on the application of any party to a suit and on such terms as it thinks fit,—

(a) make an Order for the detention, preservation or inspection of any property which is the subject matter of such suit, or as to which any question may arise therein;

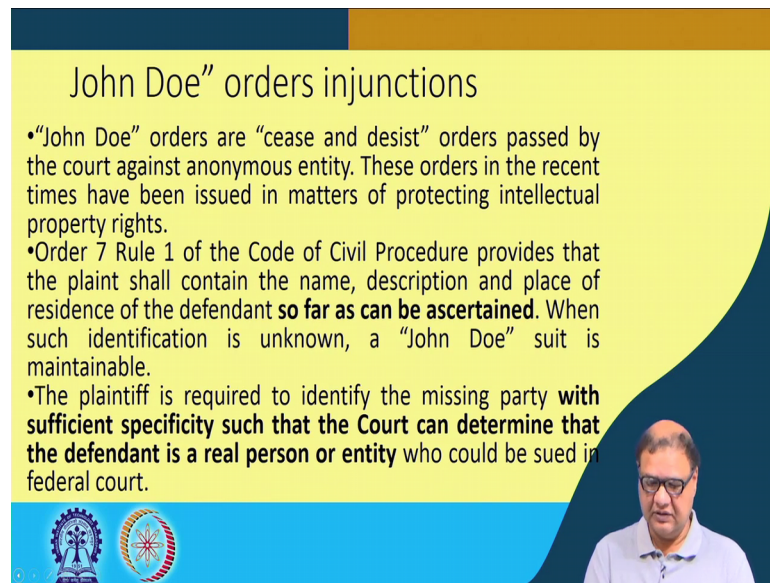
(b) for all or any of the purposes aforesaid authorize any person to enter upon or into any land or building in the possession of any other party to such suit; and

(c) for all or any of the purposes aforesaid authorise any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.

(2) The provisions as to execution of process shall apply, mutatis mutandis, to persons authorized to enter under this rule.

What is this understanding? It says, that see for the purpose of the here the most important provision is this, for what is for any of the purposes fore set, any person to enter upon or into any land or building in the position of the other party that the suit. For, what is the? The provision is actually for the purpose of collecting the any obtaining full information or evidence, a person can enter the premises of any person and that any person includes the defendant. So, it is also possible for a court to pass an order under article, under order 39 rule 7 which is very similar to what you called the Anton Piller Order.

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John Doe" orders injunctions

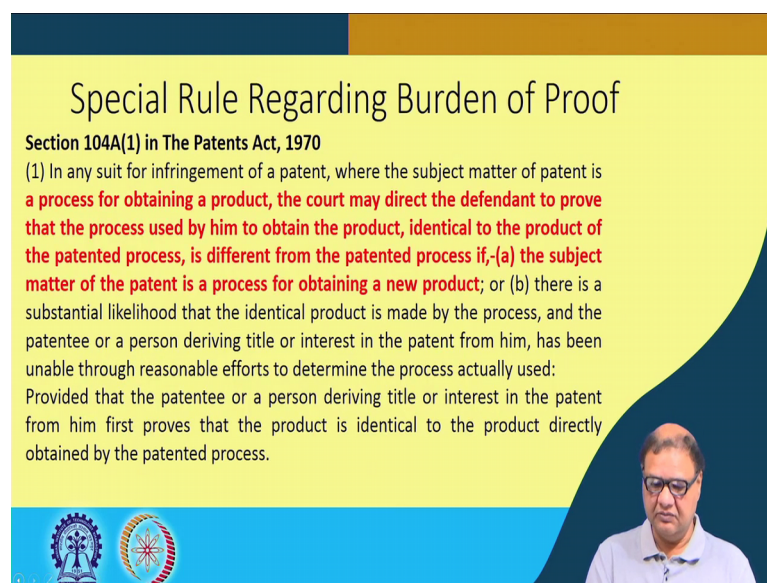
- "John Doe" orders are "cease and desist" orders passed by the court against anonymous entity. These orders in the recent times have been issued in matters of protecting intellectual property rights.
- Order 7 Rule 1 of the Code of Civil Procedure provides that the plaint shall contain the name, description and place of residence of the defendant **so far as can be ascertained**. When such identification is unknown, a "John Doe" suit is maintainable.
- The plaintiff is required to identify the missing party **with sufficient specificity such that the Court can determine that the defendant is a real person or entity** who could be sued in federal court.

Now, here another provision is very important that is what do you call John Doe. Here, there are there are situations where the patent holder does not know who is infringing. He is aware that somebody is infringing, but he is not able to find out the entity of that person. In that case also it can be the suit can be file against unknown defendant and this filing of a suit against unknown defendant is called what you call John Doe Order.

And then as we see that order 7 rule 1 which talks about plaints, it says that that civil procedure court it provides that it should contain the name, description and place and place of residents of the defendant then the most important part so far as ascertain, can be ascertain. So, if after all reasonable effort, if the plaintiff has is unable to ascertain who is the defendant? Still he can file a suit and which is allowed in Indian court also, it is known as John Doe order. And in one case, the Indian court has said that you will be calling it Ashok Kumar order.

Now, here one point is very important. The plaintiff is required to identify the missing party with sufficient specificity such that the court can determine that the defendant is a real personal identity who could be suit in a court. So, this is what the American court has said in one case, and it is I think it is this principle equally applies in India.

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Special Rule Regarding Burden of Proof

Section 104A(1) in The Patents Act, 1970

(1) In any suit for infringement of a patent, where the subject matter of patent is **a process for obtaining a product, the court may direct the defendant to prove that the process used by him to obtain the product, identical to the product of the patented process, is different from the patented process if, - (a) the subject matter of the patent is a process for obtaining a new product; or (b) there is a substantial likelihood that the identical product is made by the process, and the patentee or a person deriving title or interest in the patent from him, has been unable through reasonable efforts to determine the process actually used:**

Provided that the patentee or a person deriving title or interest in the patent from him first proves that the product is identical to the product directly obtained by the patented process.

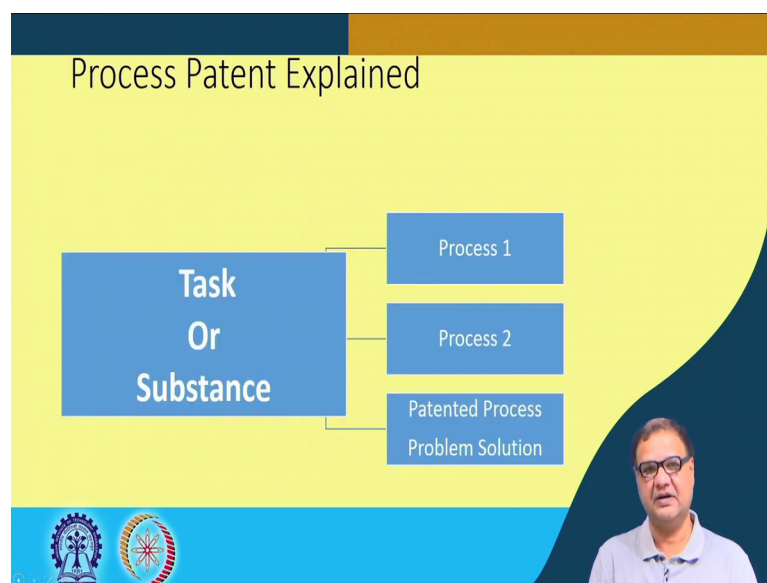


Now, here there is again such comes into play when it comes to the evidence, the burden of proof is concerned. See, we know that there are we have understood by now, that there are two kinds of patents which are issued in India, one is a product patent and another is a process patent.

Now, there is certain special rule with regard to the burden of proof in case of a process patent. Now, what is this burden of proof? The burden of proof is actually when the plaintiff files a suit for infringement of process patent. It is normally what is the rule is this that in any suit the rule is this that he who alleges a fact must prove it. So, if the plaintiff is alleging that the defendant has violated is light, the normal general rule is this it is for the plaintiff to establish it is for the plaintiff to prove that the defendant has validate is right, but when it comes to process patent it is reverse.

So, what it says that section 104 capital a sub clause one of the patent act tells us, that in a suit for infringement of power patent where the subject matter of patent is a process for obtaining a product, the court may direct the defendant to prove that the process used by him to obtain the product identical to the product of the patented process is different from the patented process. So, let us come to a let us try to understand this with the help of an example.

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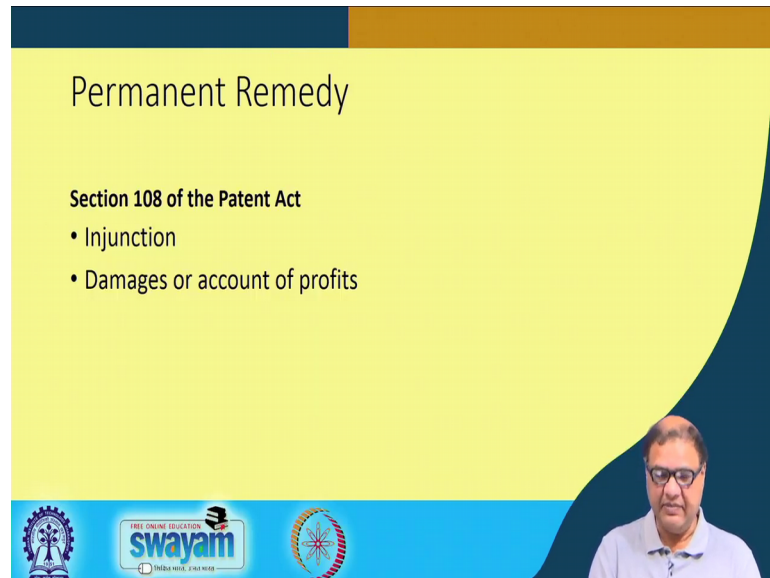
Suppose, a task has been implemented by two known processes and those processes are in public domain. A person comes out with an improvement there upon which addresses a technical problem. And let us say that the new process actually addressed a long field need it is actually it has made sufficient technical contribution and it has solve an existing problem. The person who has come out with the new process he can apply for a patent and he would be enjoying a patent right over that process. However, what is the product which is coming up coming from that process would not be I would not be protected.

So, suppose in that case a patented process is there, it has the he got a process patent, in that case that in order to prove that the process patent has been violated the plaintiff is just required to file the suit and if the plaintiff is satisfy, if the plaintiff is able to satisfy the court the court will plus the burden on the defendant to prove that he has not he is not using that process for the purpose of coming out with the product.

Now, why it is like this? See, to be very precise, it is not possible for the plaintiff to know whether the defendant is following the known process that is process number 1 or process number 2. He is thinking that the defendant is using the patented process over which he has actually, or he has section 48 rights. And therefore, what he does? He did it is up to the defendant to show that he is not using the patented process rather than he is

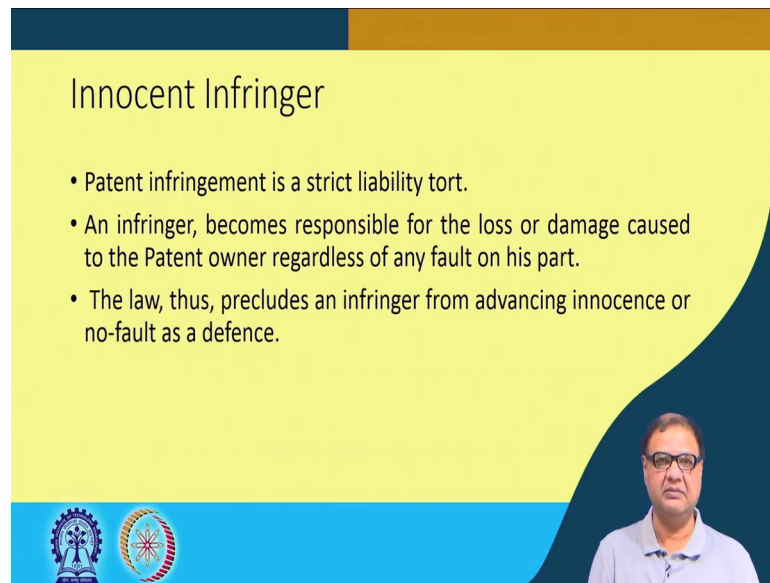
using the known process which is process 1 or process 2, and therefore, the burden of proof is on the defendant. Now, with this let us go forward.

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In a patent infringement suit, the remedies which are what are the permanent remedies? The permanent remedies are, the permanent remedies are injunction and damages or accounts of profit. So, injunction is the first remedy, thereby the defendant is prevented from further infringing the product and then whatever if since he has violated the rights of the patent holder, he is required to pay damage. If he is not required to pay damage the court can ask him that the profit which he has met so far, but through the infringement that profit must be handed over to the plaintiff. Now, in this regard let us look into some other issues.

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Innocent Infringer

- Patent infringement is a strict liability tort.
- An infringer, becomes responsible for the loss or damage caused to the Patent owner regardless of any fault on his part.
- The law, thus, precludes an infringer from advancing innocence or no-fault as a defence.

Is it possible for the defendant to say that I am an innocent party, I was not aware that I am infringing patent right? The answer is no. Innocent infringement defense is no defense in an intellectual property litigation. It is no defense in a patent infringement application. Why? Because patent infringement is a strict liability tort.

In this regard I just want to mention what is a strict liability tort. Strict liability tort is a tort where the whether the defendant is at fault or whether he has no fault the court will not take into consideration. For example, this is actually also known as the Rylands versus Fletcher Tort. If I am dealing with something which is by nature hazardous in that case no matter whether I have taken proper care or not, if that hazardous substance creates actually injury to someone else irrespective of my care I will be liable and this is called strict liability tort.

We have seen that it is also there in case of motor vehicles act which is actually a statutory damage is there, no matter whether the person, who has who is involving the accident whether he has taken reasonable precaution or even though he is not negligent still he is required to pay statutory damage.

Similarly, in case of patent also the defendant he cannot say that I am innocent and therefore, do not impose any liability on me. So, from these however, there is a provision and this provision is very interesting which is then in section 111.

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Lesser degree of treatment

Section 111 of the Patent Act

- No damage or account of profit
- Only injunction

Section 111 (1)
In a suit for infringement of patent, damages or an account of profits shall not be granted against the defendant who proves that at the date of the infringement he was not aware and had no reasonable grounds for believing that the patent existed.

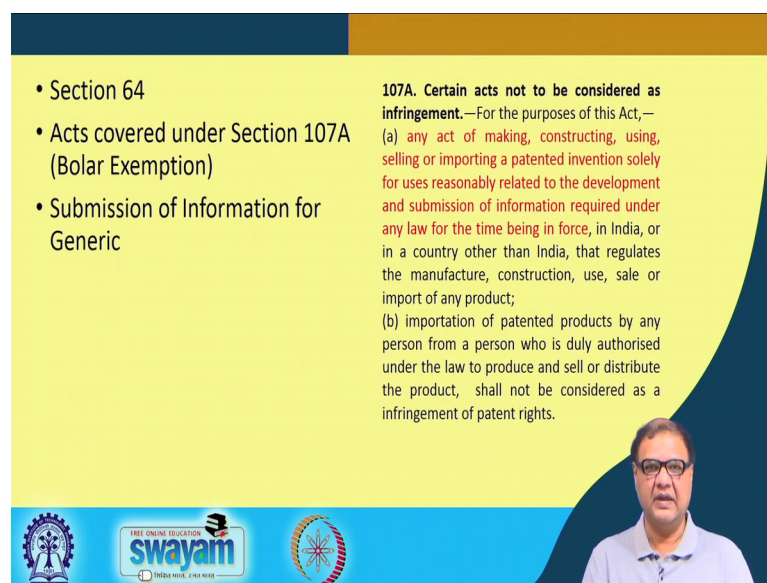
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It says that if 111, subsection 1 of the patent act which says that if in a suit for infringement patent or in a suit for infringement of patent damages or account for profit shall not be granted against the defendant who proves that at the date of the infringement he was not aware and had no reasonable ground for believing that the patent existed.

So, in a patent infringement suit, if the defendant really comes forward and proves that he is innocent in that case he cannot be absorbed from the liability, the court will pass an order of injunction restraining him from further infringing product. However, if the court is so, court is satisfied that he is really an innocent infringement infringer in that case the court will not impose any damage or will not ask him to show accounts of the profits.

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- Section 64
- Acts covered under Section 107A (Bolar Exemption)
- Submission of Information for Generic

107A. Certain acts not to be considered as infringement.—For the purposes of this Act,—
(a) any act of making, constructing, using, selling or importing a patented invention solely for uses reasonably related to the development and submission of information required under any law for the time being in force, in India, or in a country other than India, that regulates the manufacture, construction, use, sale or import of any product;
(b) importation of patented products by any person from a person who is duly authorised under the law to produce and sell or distribute the product, shall not be considered as a infringement of patent rights.

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swamyam
— SWAMYAM NIKET, 7 HRS WEEK —

Now, here actually the first we need to know what are the what are the defenses in a patent infringement suit and with this I will conclude. See, as we have seen the first line of defense is claiming revocation under 64. And in addition to that there are certain except exemptions from what we call the liability from patent infringement. And the most important provision which is also known as the Bolar, India's Bolar exemption section 107 capital A of the patent act.

What it says? That it says that for the for the purpose of this act any act of making, constructing, using, selling, or importing a patented invention solely for uses reasonably related to the development and submission of information required under any law for the time being enforced in India or importation of patented products by any person from a person who is duly authorized under the law to produce or sell or distribute the product shall not be considered as infringement of patent rights.

We know that India is the largest market, is the largest producer of generic drugs in India in the world. Now, suppose as you know that the government of India also wants the doctors to prescribe generic drugs. Suppose, a so long the patent is valid, so long the patent is effective no one can come out with a generic product. However, it does not stop a generic manufacturer from doing further research on that product, so that once the patent expires, once the patent is no is at the one of the one of the patented invention has fallen in public domain that generic manufacturer can produce the product and he can

produce it at a lower cost, he can come out with a better version all this is possible. So, patent act in fact allows that.

So, here also in order to claim this kind of Bolar exemption against the generic companies must be advised about the nature scope and the force squares of the patent right. So, here we need to understand, that look at patent. Patent is actually patent claims are nothing, but the boundaries of the patent owners right.

In the real property context what we see that when someone is buying a land, we normally in that sell did with the schedule who says that on the on the eastern side such and such land, on the western side this has this is the land, on the east on the south southern side this is the land. So, we give a boundary, the patent claims in a patent specification exactly performs the role of laying down the fence of the patentees right. And laying down the fence of the patentee's right is the most important thing.

But however, it is understood that anyone who is working beyond that fence, he anyone who is walking around he should be allowed and that is the policy of the patent law. Keeping in mind this therefore, section 107 A of the patent act has created an exception.

So, there are databases patent databases where you will find that it is possible to do technology mapping, patent mapping to understand the scope of the patent right of others so that a person can find out the zone where he or where that where he can work for a further development or to come out with a new invention. So, patent search is important to create a map and it is as we have seen it is important at every stage of the patent life of the patent. Thank you so much. And we will continue with the remaining part in the coming class.