

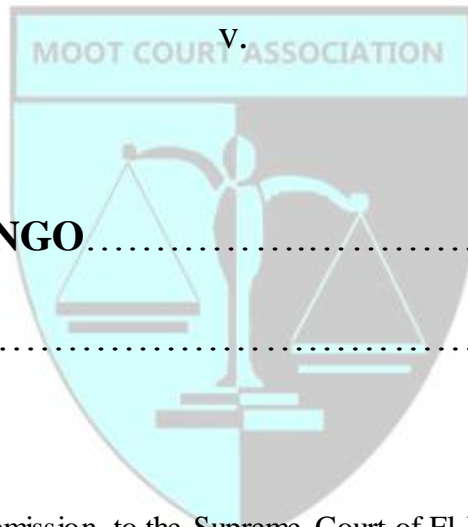
**IN THE HON'BLE SUPREME COURT  
OF EL-MANGO**

**(Under Art. 32 of the Constitution of El-Mango)**

*W.P. No. ....of 2011*

.....  
**SBTS.....Petitioner**

**STATE OF EL-MANGO.....Respondent**



.....  
On submission to the Supreme Court of El-Mango

Memorial on behalf of the Respondent

**COUNSEL FOR THE RESPONDENT**

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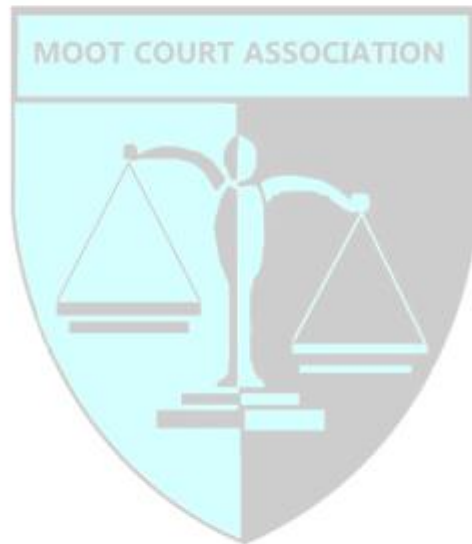
**PRAYER.....25**



## LIST OF ABBREVIATIONS

&	And
AIR	All India Reporter
Art.	Article
Ed.	Edition
EPOR	European Patent Office Reports
<i>et al</i>	<i>et alia</i>
etc.	et cetera
i.e.	id est
Ors.	Others
p.	Page
pp.	Pages
para.	Paragraph
RPC	Reports of Patent, Design and Trademarks Cases
Sec.	Section
SC	Supreme Court
SCC	Supreme Court Cases

SCR	Supreme Court Reporter
Supp.	Supplement
v.	Versus
Vol.	Volume



## INDEX OF AUTHORITIES

### LIST OF BOOKS REFERRED:

1. Pandey, Dr. J. N., *The Constitutional Law of India*, 45<sup>th</sup> Ed., Central Law Agency, 2008
2. Basu Durga Das, *Constitutional Remedies and Writs*, 3<sup>rd</sup> Ed. Kamala Law House, Kolkata, 2009
3. Taraporevala, V. J., *Law of Intellectual Property*
4. Shukla, V. N., *Constitution of India*, 11<sup>th</sup> Ed., Eastern Book Company, Lucknow
5. Vashishth Vikass, *Law and Practice of Intellectual Property in India*, Bharat Law House
6. Jain Rajiv, *et al*, *Law of Patents*
7. Bakshi P. M., *The Constitution of India*, Universal Law Publishing Co. Pvt Ltd., 2011
8. Jennings, *Law of the Constitution*, 3<sup>rd</sup> Ed.
9. Computer Software Patent Application, *Ahuja's IPC*, Vol. 7

### LIST OF LAW LEXICONS REFERRED:

1. Aiyar Ramanatha, P., *Concise Law Dictionary*, LexisNexis Buttersworth Wadhwa Nagpur, 2009

### LIST OF ARTICLES REFERRED:

1. *Patenting of Software*, Naina Krishnamurthy

### LIST OF JOURNALS:

1. All India Reporter (AIR)
2. Supreme Court Reporter (SCR)
3. Supreme Court Cases (SCC)
4. The GNLU Law Review, Vol. 3, Oct. 2010

### LIST OF WEBSITES REFERRED:

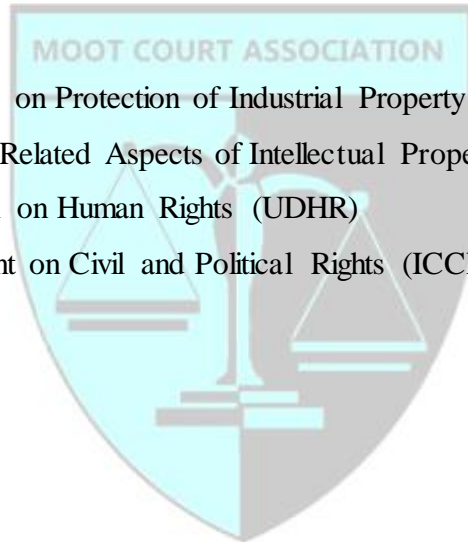
1. <http://eupat.ffii.org/papers/eubsa-swpat0202/tech/> (visited on 2011-8-24)

**LIST OF STATUTES REFERRED:**

1. Constitution of India
2. The Patents Act, 1970
3. The Copyrights Act, 1957
4. The Companies Act, 1956
5. General Clauses Act, 1897
6. Indian Penal Code
7. Income-Tax Act, 1961
8. The European Patent Convention

**LIST OF INTERNATIONAL TREATIES, CONVENTIONS AND AGREEMENTS REFERRED:**

1. The Paris Convention on Protection of Industrial Property
2. Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)
3. Universal Declaration on Human Rights (UDHR)
4. International Covenant on Civil and Political Rights (ICCPR)



**TABLE OF CASES**

<b>S.NO.</b>	<b>NAME OF THE CASE</b>	<b>CITATION</b>
1.	Jasbhai v. Roshan	AIR 1976 SC 578
2.	Hans Muller of Nuremberg v. Superintendent, Presidency Jail, Calcutta and Ors.	1955 AIR 367
3.	Lakshmi v. Hassan Uzzaman,	(1985) 4 SCC 689
4.	Ranji Thomas v. Union of India	(2000) 2 SCC 81
5.	Gupta v. Union of India	AIR 1982 SC 149
6.	Ramsharan v. Union of India,	(1989) Supp 1 SCC 251
7.	Fertilizer Corpn. Union v. Union of India,	(1981) 1 SCC 568
8.	Duryodhan Sahu (Dr.) v. Jitendra Kumar Mishra	(1998) 7 SCC 273
9.	A.K. Mukherji v. Prodip Ranjan Sarbadhikary And Ors.	AIR 1988 Cal 259
10.	David John Hopkins v. Union of India & Ors.,	AIR 1997 Mad 366
11.	Indo-China Steam Navigation Co. Ltd. v. Jasjit Singh, Additional Collector of Customs and Ors.	(1964) AIR 1140
12.	Power Measurements Ltd. v. U.P. Power Corporation Ltd. and Ors.	2003 (2) AWC 1642 b
13.	Lindsley v. Natural Carbonic Gas Co.	(1910) 220 US 61
14.	R.C.Cooper v. Union of India	AIR 1970 SC 564

15.	R.K.Garg v. Union of India	AIR 1981 SC 2138
16.	Re-Special Courts Bill	AIR 1979 SC 478
17.	Air India v. Nargesh Meerza	AIR 1981 SC 1829
18.	Ameeroonisa v. Mahboob	AIR 1953 SC 91
19.	K. Thimmappa v. Chairman Central Board of Directors SBI	AIR 2001 SC 467
20.	Maneka Gandhi v. Union of India	(1978) 1 SCC 248, 284
21.	Ramana Dayaram Shetty v. International Airport Authority	(1979) 3 SCC 498
22.	Kasturi Lal Lakshmi Reddy v. State of J&K	(1980) 4 SCC 1
23.	Ajay Hasia v. Khalid Mujib	(1981) 1 SCC 722, 741
24.	Bishwanath Prasad v. H.M. Industries	AIR 1982 SC 1444, 1447-8
25.	SmithKline Beechams Plc's (Paroxetine Anhydrate) Patent	2003 RPC 855
26.	Biogen v. Medeva	1997 RPC 1, 52
27.	Windsurfing International v. Tabur Marine	1985 RPC 59, 73-74
28.	Fujitsu Ltd.'s Application	1997 RPC 608
29.	Vicom case	(1987) EPOR; 74



30.	Gale's Application	1991 RPC 305
31.	Raipur Development Authority v Anupam Sakhari Griha Nirman Samiti	(2000) 4 SCC 357
32.	Farbwork Hoechst Attiongesellschaft Vosmals Meister Leucius & Bruning Corporation etc. v. Unicham Laboratories and Other	AIR 1969 Bom 255
33.	Honda Giken Kogyo Kabushiki Kaisha	BL O/318/04, 19 October 2004
34.	M/S. Tvs Motor Co. Ltd. v. M/S. Bajaj Auto Ltd.	Civil Appeal No. 6309 of 2009



## **STATEMENT OF JURISDICTION**

The Petitioner has approached this Hon'ble Court under Article 32 of the Constitution of El-Mango. The Respondent submits to the Jurisdiction of the Court.



## STATEMENT OF FACTS

**Blueland Technology Solution (BTS)** is a leading Software and Technology giant in the world having its registered corporate office in USA. **El-Mango** is a state located in Asia and that has adopted the same legal structure as that of Republic of India. **BTS** developed an innovative software (a computer program) to help medical practitioners in their profession. This was the first of its kind as commented by few of the doctors who Beta-Tested the same. Market Survey of BTS showed that the sales of this software would help the development of Medicine industry and also BTS' profit shall go up by 10%.

BTS, to secure monopoly Rights, filed Patent Application for the said software in USA and successfully got the same. **BTS** appoints **SBTS**, a company situated in El-Mango as its Agent to file for Patent in El-Mango. Patent was denied in El-Mango for the reason that The Patents Act, 1970 explicitly prevented patenting of software or computer program. **SBTS'** appeal before the Intellectual Property Appellate Board (**IPAB**) was also dismissed for the same reason. Similar Software patents were rejected for several other companies in El-Mango.

Hence BTS files a Writ Petition under Art.32 before Hon'ble Supreme Court.

## STATEMENT OF ISSUES

1. **The Petitioner does not have the locus standi to file the present writ petition before this Court under Art. 32 of the Constitution of El-Mango**
2. **Arguendo, denial of software patenting is not a violation of Art. 14 of the Constitution and section 3 of the Patents Act, 1970 is constitutional**
3. **Arguendo, the computer programme developed by BTS is not patentable under the Patents Act, 1970**



## SUMMARY OF ARGUMENTS

### **1. The Petitioner does not have the locus standi to file the present writ petition before this Court under Art. 32 of the Constitution of El-Mango**

It is humbly submitted before this Hon'ble Court that the Petitioner does not have the locus standi before this Court. This is because only a person aggrieved can approach this Court under its Writ Jurisdiction. SBTS is not a person aggrieved and is therefore not entitled to have a standing in this Hon'ble Court. The only instance where locus standi is relaxed is when the petition is a PIL. However, the present petition cannot be treated as a PIL.

### **2. Arguendo, denial of software patenting is not a violation of Art. 14 of the Constitution and section 3 of the Patents Act, 1970 is constitutional**

It is humbly submitted that there is no unjust or arbitrary discrimination in the section 3 of the Patents Act, 1970. The section is a reasonable classification and is not violative of Art. 14 of the Constitution. Also, purposive construction of the section leads to validation of the law.

### **3. Arguendo, the computer programme developed by BTS is not patentable under the Patents Act, 1970**

It is humbly submitted that the computer programme developed by BTS is not patentable under the Patents Act even if section 3 was declared unconstitutional. This is because it lacks the inventive step, i.e., it does not make any technical contribution to the industry.

## ARGUMENTS ADVANCED

### **1. The Petitioner does not have the locus standi to file the present writ petition before this Court under Art. 32 of the Constitution of El-Mango**

Locus standi means a place of standing, a right of appearance in a Court of Justice. It signifies the right to bring an action and to be heard.<sup>1</sup> In the present instance, SBTS is an assignee only under the Patents Act and therefore cannot file a writ petition on behalf of BTS in the capacity of an assignee. BlueLand Technology Solution also does not have the locus standi to appear before this Hon'ble Court because it is a foreign company which cannot make a valid claim to the Fundamental Rights guaranteed under the Constitution.

#### **1.1 Fundamental Rights cannot be assigned**

Fundamental Rights guaranteed by the Part III of the Constitution are personal individual rights. These rights cannot be assigned, i.e., a person cannot file a writ petition on behalf of another save in the case of Public Interest Litigation. In the case, *Jasbhai v. Roshan*,<sup>2</sup> the Supreme Court held that only a person who has interest in the subject-matter of the application may apply. In the case, *Hans Muller of Nuremberg v. Superintendent, Presidency Jail, Calcutta and Ors.*,<sup>3</sup> the Supreme Court held that only a person aggrieved can impugn any given piece of legislation under 32. Therefore, it is evident that only a person aggrieved can file a writ Petition under Art. 32. This implies that there cannot be an assignment of fundamental rights. Assignment stops with property rights. In the present instance, the petition before this Hon'ble Court has been filed by SBTS. SBTS was appointed by the BTS as an assignee in respect of filing of a Patent Application. Assignment stops with that. Since, SBTS is not the person aggrieved but BTS is, the petition is not maintainable.

#### **1.2 Consequently, the present Petition cannot be treated as a Public Interest Litigation**

A PIL should be filed by a public spirited individual. A petitioner cannot in absence of locus standi ask the Court to treat the matter as a PIL though a community

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<sup>1</sup>Aiyar Ramanatha, P., *Concise Law Dictionary*, LexisNexis Buttersworth Wadhwa Nagpur, 2009

<sup>2</sup>AIR 1976 SC 578

<sup>3</sup>1955 AIR 367

of people might be benefitted by the judgement of the Court. A PIL is maintainable only when it complies with the following conditions:

- i. The Court cannot exercise the power of PIL to espouse the cause of unnamed and undisclosed persons, unless the petitioner may be held to possess a representative capacity.<sup>4</sup>
- ii. If the affected party do not wish intend to challenge the action or omission, it cannot be attacked in PIL.<sup>5</sup>
- iii. The PIL must be in favour of those that are unrepresented or underrepresented.<sup>6</sup>
- iv. A party having personal interests in the prayer cannot approach the Court with PIL.<sup>7</sup>

From this, it is evident that in the present instance, the Petition filed by BTS is not a PIL in that it does not represent any underprivileged group who cannot approach the Court and because there are personal interests in the prayer.

### **1.3 *Arguendo*, Art. 14 can be availed of by persons only when there is no reliance on Art. 19**

Part III of the Constitution lists the Fundamental Rights. There are two categories of Fundamental Rights that comes to light on a close perusal of the Articles which embody them. One set of rights are available only to citizens such as Arts. 15, 16, 19, etc. Few others are available to ‘persons’ generally. One such Article that can be availed by persons generally is Art. 14. These fundamental rights using the word ‘person’ are by their nature and intent available only to natural persons.<sup>8</sup> The word “persons” have been accorded different meanings by different statutes. The General Clauses Act 1897,<sup>9</sup> the Indian Penal Code,<sup>10</sup> and the Income Tax Act, 1961<sup>11</sup> contemplate a person to be a company.

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<sup>4</sup>Lakshmi v. Hassan Uzzaman, (1985) 4 SCC 689

<sup>5</sup>Ranji Thomas v. Union of India, (2000) 2 SCC 81

<sup>6</sup>Gupta v. Union of India, AIR 1982 SC 149; Ramsharan v. Union of India, (1989) Supp 1 SCC 251; Fertilizer Corp. Union v. Union of India, (1981) 1 SCC 568

<sup>7</sup>Duryodhan Sahu (Dr.) v. Jitendra Kumar Mishra (1998) 7 SCC 273

<sup>8</sup>Shukla, V.N., *Constitution of India*, Eastern Book Company, 11<sup>th</sup> Ed., 2010, p. 35

<sup>9</sup> Section 3(42)

<sup>10</sup>Section 11

<sup>11</sup>Section 2 (31)

The fundamental right to equality does extend to foreigners; however foreigners and citizens cannot be placed on the same pedestal.<sup>12</sup> The ambit of Art. 14 is restricted to the territory of India, i.e., it can be claimed by persons within India.

It is humbly submitted that a person can approach this Court for remedy only when a right he is entitled to has been violated. It is pertinent to note that Art. 14 can be claimed by a foreign company only when the right which it claims as being violated thereby giving rise to inequality is one which is available to persons generally. However, if a person approaches this Hon'ble Court and has to rely on a right that is available only to citizens, that person per se does not have a standing in this Court. In the present instance, the application for patent is directly connected to the right of monopoly which comes under the fundamental right to practice any trade business or profession, guaranteed by Art. 19 (1) (g) of the Constitution. Since the petitioner BTS has to fall back on this provision of law granted only to citizens to allege inequality, it does not have the locus standi in this Court.

In the case, *Indo-China Steam Navigation Co. Ltd. v. Jasjit Singh, Additional Collector of Customs and Ors.*,<sup>13</sup> the Supreme Court has held that where the a foreign company alleges inequality under Art. 14 but needs to rely on Art. 19 which is guaranteed only to citizens, the claim cannot stand.

In the case *Power Measurements Ltd. v. U.P. Power Corporation Ltd. and Ors.*,<sup>14</sup> it was held by the Court that the Petitioner cannot claim a right under Art. 19 in the garb of Art. 14 because Art. 14 extends to all persons including foreign companies while Art. 19 is available only to citizens.<sup>15</sup>

In the present instance, SBTS is a foreign company within the meaning of Section 591 of the Companies Act, 1956. However, it is not a company incorporated in El-Mango, so it cannot claim the right under Art. 19 that is guaranteed expressly to

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<sup>12</sup>A.K. Mukherji v. Prodip Ranjan Sarbadhikary And Ors., AIR 1988 Cal 259; David John Hopkins v. Union of India & Ors., AIR 1997 Mad 366

<sup>13</sup>(1964) AIR 1140

<sup>14</sup>2003 (2) AWC 1642 b

<sup>15</sup>146 (2008) DLT 455



citizens only. The Petitioner cannot make a claim that denial of software patenting is a violation of Article 14 when the right to claim software patenting necessarily rests on the fundamental right under Art. 19. Therefore, the claim of the Petitioner is untenable as it is not available to persons generally but to citizens particularly.

#### **1.4 National Treatment of individuals mentioned under the International Instruments cannot be given a broad connotation**

The Paris Convention on the Protection of Industrial Property and the Agreement on Trade Related Aspects of Intellectual Property Rights do call for national treatment of individuals. However, this cannot be taken as a ground for filing a writ petition. The Patents Act, 1970 and the various amendments that have been made by the Parliament from time to time are to comply with the various requirements of these International instruments. The Patents Act lists what inventions are not patentable and this is applied without any discrimination as to nationals and non-nationals. Section 3 (k) which says that software programme is not patentable applies to foreigners as well as to the nationals of El-Mango and therefore, the principle of National Treatment mentioned in the International Instruments are complied with. There is also a special Tribunal IPAB established for the purposes of hearing appeals from the Controller. So, there is no violation of any International agreement.

## 2. Arguendo, denial of software patenting is not a violation of Art. 14 of the Constitution and section 3 of the Patents Act, 1970 is constitutional

Article 14 of the Constitution of El-Mango provides: The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. No State can assure absolute and unfettered rights. Every right including the right to equality is subject to restrictions imposed by Law.

### 2.1 Article 14 is subject to reasonable restrictions

Equality before law means that among equals the law should be equal and equally administered, that like should be treated alike.<sup>16</sup> Equal Protection of the laws mean subjection to equal law, applying to all in the same circumstances.<sup>17</sup> Therefore, equal law can be applied only to those in similar circumstances.<sup>18</sup> Article 14 does not prohibit reasonable classification. The Supreme Court has laid down the test to check if a classification is reasonable or not. It has been held in a number of cases that for a classification to be reasonable,<sup>19</sup> it should

- i. Be found on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and
- ii. The differentia must have a rational relation to the object sought to be achieved by the Act

Also in the case, *Maneka Gandhi v. Union of India*,<sup>20</sup> the Supreme Court held that Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. This principle was reiterated in *Ramana Dayaram Shetty v. International Airport Authority*,<sup>21</sup> *Kasturi Lal Lakshmi Reddy v. State of J&K*<sup>22</sup> and *Ajay Hasia v. Khalid Mujib*<sup>23</sup>.

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<sup>16</sup>Jennings, *Law of the Constitution*, 3<sup>rd</sup> Ed., p. 49

<sup>17</sup>Lindsley v. Natural Carbonic Gas Co., (1910) 220 US 61

<sup>18</sup>Shukla, V.N., *Constitution of India*, Eastern Book Company, 11<sup>th</sup> Ed., 2010, p. 46

<sup>19</sup>R.K.Garg v. Union of India, AIR 1981 SC 2138; Re-Special Courts Bill, AIR 1979 SC 478; Air India v. Nargesh Meerza AIR 1981 SC 1829; R.C.Cooper v. Union of India, AIR 1970 SC 564; Ameroonisa v. Mahboob, AIR 1953 SC 91; K. Thimmappa v. Chairman Central Board of Directors SBI, AIR 2001 SC 467

<sup>20</sup>(1978) 1 SCC 248, 284

<sup>21</sup>(1979) 3 SCC 498

<sup>22</sup>(1980) 4 SCC 1

<sup>23</sup>(1981) 1 SCC 722, 741

In the present instance, the Act in question is the Patents Act, 1970 and the impugned section is section 3. Section 3 declares what is not patentable. To test whether this is a violation of right to equality, the test of reasonable classification and arbitrariness have to be applied. When applied, it is evident that the impugned section is not a violation of Article 14.

Firstly, there is an intelligible differentia in the classification. Secondly, this differentia should have a rational relation to the object sought to be achieved by the Act. It is pertinent to note that the object of the Patents Act as provided by the Preamble of the Act is to amend and consolidate the Law relating to Patents. In keeping with this object the section 3 was enacted. To declare a thing to be an invention certain considerations should be had in mind. The object of the Patent Law as has been laid down in *Bishwanath Prasad v. H.M. Industries*<sup>24</sup> is to encourage scientific research, new technology and industrial progress. Grant of an exclusive privilege to own, use or sell the method or the product patented for a limited period, stimulates new inventions of commercial utility. An invention once patented becomes the patentee's sole property for 20 years and so there needs to be a balance in order that further invention be not stifled.<sup>25</sup> In *Biogen v. Medeva*,<sup>26</sup> the Court held that a patent cannot be claimed for a mere idea or principle because this would stifle further research in the field. A computer programme per se is not patentable. This is because the development in the field of computer technology should not be prevented by letting patent protection expand out of control.<sup>27</sup>

It is and always has been the principle in Patent Law that mere discoveries or ideas are not patentable, but those discoveries or ideas which have a technical contribution or technical aspect are patentable.<sup>28</sup> A computer programme without

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<sup>24</sup>AIR 1982 SC 1444, 1447-8

<sup>25</sup>SmithKline Beechams Plc's (Paroxetine Anhydrate)Patent, 2003 RPC 855; Windsurfing International v. Tabur Marine, 1985 RPC 59, 73-74

<sup>26</sup>1997 RPC 1, 52

<sup>27</sup>Computer Software Patent Application, *Ahuja's IPC*, Vol. 7, p. VII

<sup>28</sup>Taraporevala, V. J., *Law of Intellectual Property*, p. 23

technical contribution is not patentable as was held in *Fujitsu Ltd.'s Application*.<sup>29</sup> In the *Vicom case*,<sup>30</sup> it was held that an application relating to a method of digitally processing images by a program run on a computer is not an invention. In *Gale's Application*,<sup>31</sup> the applicant had discovered an improved method of calculating a square root number with the aid of a computer. It was held that there was no novel technical effect produced either on a process or on the operation of the computer effect as in essence, he put the instructions on a ROM, a silicon chip.

The Copyrights Act, 1957 provides that computer programme means a set of instructions expressed in words, codes, schemes or in any other form, including a machine readable medium, capable of causing a computer to perform a particular task or achieve a particular result.<sup>32</sup> This cannot be patented because if these were patented, it gives the inventor monopoly rights and therefore even if another person comes up with this programme that might lead to another research, he cannot do so thus stifling research in a growing field.

Therefore, in order that further research can be promoted in the software field, computer programmes are per se not patentable. However, when there is a technical contribution to the industry, or when there is a computer programme combined with hardware, it is patentable.<sup>33</sup> It is therefore humbly submitted that in order that further research in a field be not stifled, stringent laws regarding patenting is necessary and therefore, software patenting is not permissible save where there is a technical contribution. Thus, there is an intelligible differentia in the classification provided by section 3 of the Patents Act, 1970 and this differentia does have a nexus to the object sought to be achieved by the Act. Therefore, the Section 3 of the Act passes the test of reasonable classification and is not arbitrary and is therefore not in violation of Art. 14.

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<sup>29</sup>1997 RPC 608

<sup>30</sup>(1987) EPOR; 74

<sup>31</sup>1991 RPC 305

<sup>32</sup>Section 2 (ffc)

<sup>33</sup>*Patenting of Software*, Krishnamurthy Naina

## 2.2 Purposive construction of the Patents Act, 1970 validates the Act

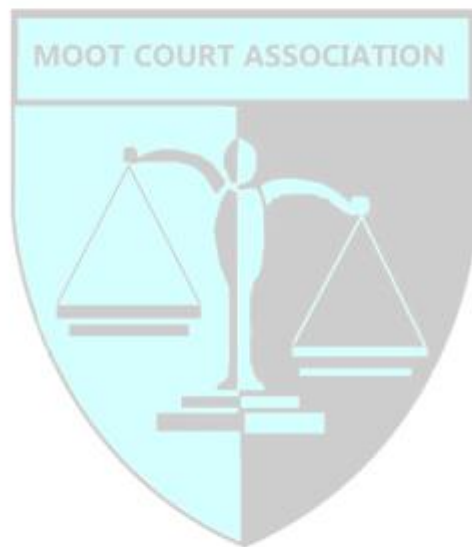
In order to justify this provision of the Patents Act, 1970, purposive interpretation of the Act needs to be adopted. In *Raipur Development Authority v Anupam Sakhari Griha Nirman Samiti*, the Court took into consideration, the Heydons Rule of Interpretation that lays down the principle that Courts must see:

- i. What was the law before making of the Act
- ii. What was the mischief or defect for which the law did not provide a remedy
- iii. What is the remedy that the Act has provided
- iv. What is the reason for the remedy

The law before making of the Act was that there was no proper legislation to suit to the situations existing in El-Mango. The law was brought to consolidate and amend the law relating to Patents. The object of the law was to promote research and afford protection to inventors and their inventions. Section 3 was also brought to promote this ideal, so as to keep mere discoveries and inventions out of the purview of patent law so that patenting of the same might not lead to suppression of research.

Section 83 of the Patents Act is reflective of the purpose of the Act. It speaks about the general considerations to be kept in mind by the Controller while granting patent. Subsection (c) says that the Controller should see to it that the protection and enforcement of patent rights contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations. Again subsection (d) of the same section provides that the patents should act as instruments to promote public interest specially in sectors of vital importance for socio-economic and technological development of India. Therefore, it should be noted that the main consideration to be taken into account about the purpose behind section 3 of the Act is whether there would be technological advancement and promotion of public interest for the development of the country. If section 3 is removed then these purposes of the Act underlined above would not be met.

So applying the rule of purposive construction, it can be established that in order to promote the purpose of the law, the section can be upheld and it does not constitute a violation of Art. 14 of the Constitution. It should be noted that the purpose of the Act would be marred if the section was declared unconstitutional.



### **3. Arguendo, the computer programme developed by BTS is not patentable under the Patents Act, 1970**

Assuming but not conceding that Section 3 of the Patents Act is unconstitutional, the software developed by BTS is still not patentable under the Act. This is because of the software programme created by BTS does not satisfy the other relevant provisions of the Act.

#### **3.1 The software developed by BTS lacks the inventive step required**

According to 2(j) of the Patents Act, an invention means a new product or process involving an inventive step and capable of industrial application. There are three key ingredients<sup>34</sup> in this section and if these are present, patent can be granted. They are

- a. Novelty
- b. Utility
- c. Inventive Step

In the present instance, though it can be said with reservation that there is novelty and utility to the software programme developed, it can be said firmly that there is no inventive step.

Inventive step as defined in section 2 (ja) of the Patents Act means a feature of an invention that involves technical advance as compared to the existing knowledge or having economic significance or both and that makes the invention not obvious to a person skilled in the art. The two main requirements to be complied with in this section are:

- a. Technical advancement to the existing knowledge or economic significance
- b. Non-obviousness to a person skilled in the art

It can be established at the outset that there is no technical contribution to the software industry by this computer programme developed by BTS.

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<sup>34</sup>Farbwerk Hoechst Attiongesellschaft Vosmals Meister Leucius & Bruning Corporation etc. v. Unicham Laboratories and Other, AIR 1969 Bom 255

There is no definition for the term technical advancement even under the European Patent law.<sup>35</sup> However, the importance of this requirement has been reiterated in *Fujitsu Limited's Application*<sup>36</sup> and *Vicom case*.<sup>37</sup>

In the *Fujitsu Limited's Application*, it was held that the concept of technical contribution is at the heart of patent law. In the case, *Honda Giken Kogyo Kabushiki Kaisha*, the invention related to a man-hour management system which manages man-hours for producing a product, and more particularly to a man-hour management system which offers man-hour information effective to diminish the numbers of man-hours in each individual process unit and between processes. The application for patent was rejected on the ground that the computer programme with no technical contribution.<sup>38</sup>

In the case, *M/S. Tvs Motor Co. Ltd. v. M/S. Bajaj Auto Ltd.*<sup>39</sup> the Court emphasized the 'technical advance' necessary to constitute an inventive step and said that the technical advance which had not so far fallen into public domain in an industrial application and which was not obvious before its pronouncement, such technical advance though may be miniscule in nature could still be recognised as an invention. However, in the present instance, there is no technical advancement in the software developed by BTS and the patent can therefore not be given.

In the present instance, there is no technical contribution to the software industry. There is no technical advancement that could be contributed by the grant of the Patent to the Petitioner. Since, there is no technical contribution in the present case, it is submitted that Patent cannot be granted to the Petitioner.

### **3.2 Patent has to be refused for the software developed by BTS**

In the present instance, the invention made by the Petitioner lacks technical contribution that is an essential step to qualify the term inventive step which is a part

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<sup>35</sup><http://eupat.ffii.org/papers/eubsa-swpat0202/tech/> (visited on 2011-8-24)

<sup>36</sup>Supra 29

<sup>37</sup> Supra 30

<sup>38</sup>BL O/318/04, 19 October 2004

<sup>39</sup>Civil Appeal No. 6309 of 2009



of the definition of invention as mentioned under the Patents Act, 1970. Therefore, due to lack of inventive step, the software developed by BTS is not patentable.

It cannot be contended by the Petitioners that there is a loss of revenue for the state off El-Mango for refusing patents for computer programmes. This is because of the following reasons:

- a. The reason for not granting of patent to software is to see that further research is not curbed. Therefore, the State in order to achieve the object of Patent Law has to bear with the loss
- b. It has been found that many companies prefer copyrights for computer programme protection than patenting.<sup>40</sup>

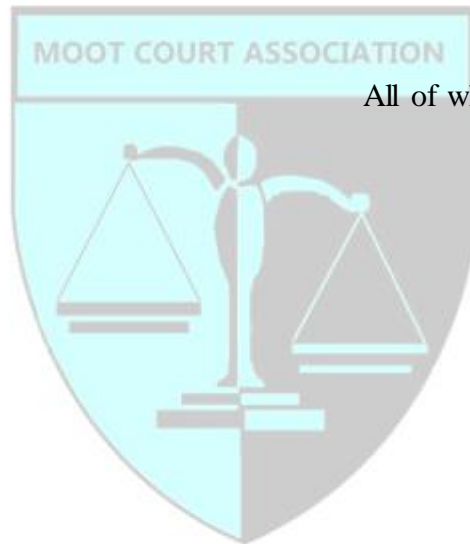


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<sup>40</sup>*Patenting of Software*, Naina Krishnamurthy

## **PRAYER**

Wherefore, in the light of the issues raised, arguments advanced and authorities cited, it is humbly submitted before this Hon'ble Court to dismiss the petition as devoid of all merits and to pass any other order or orders as this Hon'ble Court deems fit and proper in the circumstances of the case and in the light of equity and thus renders justice.



All of which is respectfully submitted

Counsel for the Respondent