

## A Critique of the Indian Patent Assignments Regime: Pre-Invention Assignments and Employee's Inventions

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Employer-Employee relations have become a key component of technological development. The Employer, who is more often than not an institution, provides its skilled employees with the financial and technical resources which enable them to create inventions. However, in India, the employer faces difficulty in obtaining the right to file for a patent of such an invention due to two reasons. Firstly, a contract assigning in advance the interests of an employee to an employer is not termed as an "actual assignment" and the same is considered as an "Agreement to Assign". As the beneficial interest of the assignor does not immediately pass, there exists a need to execute an "Actual Assignment" when the invention comes into existence. Secondly, unlike Section 17 of the Copyright Act 1957, the Patents Act 1970 does not provide for a right to apply for a patent to employers for an employee's invention which is created in the course of his employment. This research paper argues for the remedy of either of the above two mentioned defects in the Patent Act, 1970. Furthermore, the research paper analyses *Darius Rutton Kavasmaneck v Gharda Chemicals Limited* and *Board of Trustees of the Leland Stanford Junior University v Roche Molecular Systems, Inc.* which displays the unfavourable consequences of leaving the above mentioned defects in any Patent regime.

**Keywords:** UK Patents Act, 1977, The Copyright Act 1957, The Patents Act 1970, Employer-employee relationship, Pre-invention assignments

In the modern world of scientific development, "inventions" have come to be increasingly spurned out of "Employer-Employee Relationships". Such relationships require extension of high cost equipment, cooperation from co-workers, trade secrets of the company to its employees. In such circumstances, it becomes imperative to provide for a mechanism which protects the interests of the employer in any of the developments which may result in the course of this employee-employer relationship. Investing the right in an employer to file a patent on an invention resulting through this relationship is therefore, the need of the hour. Such a legal framework can be established in two ways, either by legitimising the validity of Pre-Invention assignments or by entitling the employer with the inventions which result from an employer-employee relationship if the same has been made within the course of employment of the employee and within the normal duties assigned to him.

Apart from providing a robust protection to the employers, these parameters would further incentivise

greater investment within institutions by allowing the institutions to capitalize the economic potential of its own inventions. This paper attempts to examine each of these approaches. The first part of this research paper would deal with the enforceability of 'Pre-Invention Assignments' within India. It has been observed that assignments prior to the creation of an invention do not bestow upon the assignee the right to file an application for such an invention. Thus, employees may wilfully disregard such contracts of assignments and cause pecuniary harm to their employers. The second part shall deal with 'Entitlement of Employee's invention to Employers'. The paper would explore relevant provisions in the UK Patents Act, 1977 which provide for first ownership rights to an employer, if an employee makes an invention during the course of employment while utilizing the resources provided by an employer.

### Legal Position of Pre-Invention Assignments

A universal practice has been established wherein employers require employees involved in technical work to sign agreements which would assign in advance the rights to any invention which the

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employee may create during the course of his employment.<sup>1</sup> Such 'pre-invention' assignments are treated differently within India and England.

### United Kingdom

Section 30(6) (a) of the UK Patents Act, 1977 ('UK Act') applies to an assignment of the right to file an application for a patent. The section stipulates that an assignment or a mortgage shall be valid only if it is in writing and signed by or on behalf of the appropriate parties.<sup>2</sup> In the United Kingdom, the right to file an application for a patent, in respect of an invention, may be validly assigned before the invention has been made.<sup>3</sup> Furthermore, under Section 7 (2) (b) of the UK Act, a patent for an invention may be granted to any person who was, at the time of the making of the invention, entitled to the whole of the property in it by virtue of any enforceable term of any agreement entered into with the inventor before the making of that invention.<sup>4</sup> Consequently, where such an agreement has been entered into, it is not necessary to execute an assignment of the right to apply for the patent after the invention has actually been made.<sup>5</sup> The UK Copyright, Designs and Patents Act 1988 asserts the same position in the case of assignment of copyrights.<sup>6</sup>

In *KCI Licensing v Smith & Nephews*<sup>7</sup> Arnold J. considered Section 7 (2) (b) of the UK Act and held, that it is possible to assign the legal title in an invention before it is made, rejecting the submission that a purported assignment of a future invention only took effect as an agreement to assign.

### India

Under the Indian Patents Act ('Patents Act'), an assignment of a right to apply for a patent has to be reduced to the form of a duly executed document embodying all the terms and conditions regulating the rights of the parties.<sup>8</sup> Furthermore, a 'proof of the right to make the application' has to be furnished where a patent application is made by virtue of assignment of the right to apply for the patent.<sup>9</sup> As there exists no provision analogous to that of Section 7 (2) (b) of the UK Act under the Patents Act, it can thus be derived that Indian law does not allow a pre-invention assignment to take effect.

The Delhi High Court<sup>10</sup> recognised the need for an actual assignment after an agreement to assign under section 19(1) of the Copyright Act, 1947 ('Copyright Act'). The Delhi High Court stated that under Section

18 of the Copyright Act there can be an assignment of an existing work and an assignment of a future work<sup>11</sup>; however the assignment of future works shall be treated as an agreement to assign and not an actual assignment.<sup>12</sup> The Court stated that an actual assignment which passes all the interests of the assignor to the assignee can only be made in conformity with the provisions of Section 19 of the Copyright Act.<sup>13</sup> These observations can be extended to patents law as well since Section 19(1) of the Copyright Act<sup>14</sup> and Section 68<sup>15</sup> of the Patents Act which deal with the basic requirements of an assignment deed appear to be analogous

Despite the fact that the Copyright Act accommodates the assignment of future works<sup>16</sup>, the Delhi High Court has held that such assignments are merely an agreement to assign and therefore they only create rights in equity.<sup>12</sup> Furthermore, there exist additional requirements such as the work which is to be assigned has to be a work properly identified and designated before the relevant assignment is entered into.<sup>17</sup> Thus, even if we discount the interpretation of Section 18 of Copyright Act which states that assignment of future works shall always be an agreement to assign<sup>12</sup> there exists a bar upon entering into a general contractual term which assigns all future work created by an author due to the requirement of specifically identifying the work being assigned. However, the Copyright Act remedies this defect by providing first owner rights to employers in certain cases.<sup>18</sup>

Due to the similar nature of the provisions of the Patent Act and the Copyright Act it appears that even in the case of Patents, the assignment of a future invention would be termed as an agreement to assign; which would only create rights in equity rather than an actual statutory assignment.

There exist significant differences between an actual assignment and an agreement to assign. In an actual assignment, the interest, whether absolute or partial, passes along with the beneficial interest.<sup>19</sup> Whereas, the agreement to assign or other vernacular for the same being 'assignment in equity' exists independent from the actual assignment.<sup>20</sup>

The differences have been further enunciated in *Stewart v Casey*<sup>21</sup> by Fry L.J. as:

*"That an agreement which does not exhibit the intention of the parties that the property shall pass at once does not take effect as an equitable assignment at once, but only when, from the terms of the*

*agreement, it can be gathered that the intention of the parties is that the equitable property shall pass. On the other hand, where the intention is that the property shall pass either at once or upon the satisfaction of some condition, then the equitable property does pass at once or upon satisfaction of that condition, as the case may be”.*

An agreement to assign is, therefore, an agreement which contemplates that a further document of assignment is to be executed. It takes effect as equitable assignment<sup>22</sup> while giving an immediate enforceable right for formal assignment.<sup>23</sup>

### **The Issues in the Indian Legal Position**

The inability of the Patents Act and Copyright Act to recognize assignments with regard to future inventions and future works result in an unnecessary complexity. The need to file another assignment, while a pre-existing contract of assignment exists, which would constitute as an ‘actual assignment’ within the meaning of Section 68 of The Patents Act and Section 19 of the Copyright Act appears to be a mere procedural hindrance.

Furthermore, the same poses a practical impediment to persons who are under an employer-employee relationship and have entered into such an agreement. It would be relevant to give a simple illustration to explain the above point.

Company A has employed Mr. B for conducting research on a specific problem, during the course of which B invents a new technology. In the present scenario, even if the employment agreement mentions that all inventions of the employee would belong to the employer, B would still have to sign the application form in order to assign this specific patent to the company.

The second instance is a case where B, after making the said invention, refuses to ratify the said form or is not in a position to do so. In such circumstances, the employer, even after investing significant resources in the development of that technology, would be devoid of the right to earn royalty from such invention.

To provide for such instances, the law is required to be in line with Section 7 (2) (b) of the UK Act, by making pre-invention agreements valid. Such a provision provides a sense of security to the assignee, an assurance to the entitlements of the benefits arising out of research incentivises the employers to invest more in such inventions.

### **Legal Position of Inventions Resulting Out of Employer-Employee Relationship**

The Patents Act, 1970 does not provide for the entitlement of inventions to employers if the same is made by an employee performing his normal duties under the course of his employment. However, the position with respect to the same is different in the United Kingdom. Furthermore, even the Copyright Act 1957 provides an employer the right over the work created by an author during the course of the author’s employment under a contract of service.<sup>24</sup>

#### **United Kingdom**

In the United Kingdom ownership of inventions as between the employer and employee is governed by the Act and not by a contract.<sup>25</sup> Section 39 of the UK Act governs the entitlement of inventions made by an employee to the employer in certain circumstances. The Section states that an invention made by an employee shall be taken to belong to the employer if, but only if:

*(a) It was made in the course of the normal duties of the employee or in the course of duties specifically assigned to him (but outside his normal duties) and the circumstances in either case were such that an invention might reasonably be expected result therefrom<sup>26</sup>*

*(b) It was made in the course of the duties of the employee which duties were such as to give rise to a special obligation to further the interests of the employer’s undertaking.<sup>27</sup>*

Where Section 39(1) applies, there can be no question of the employee retaining beneficial ownership against the employer.<sup>28</sup> Under this provision, a person claiming to be entitled to an invention devised by another must demonstrate a relevant connection between him and the inventor.<sup>29</sup>

The provision was thoroughly examined by the Court in *LIFFE v Pinkava*.<sup>29</sup> In this case, the employee (Pinkava) had been employed by LIFFE to devise new products of a certain type (but not of the type in question). LIFFE had assigned to Pinkava a further task to consider how to develop products of the relevant kind, and in July 2004, Pinkava had made the inventions. Pinkava claimed ownership over the inventions which was contested by his employer. The judge held that the inventions had been made in the course of duties specifically assigned to Pinkava and not in the course of his normal duties.<sup>30</sup> The trial judge also held that the circumstances were such that

the employer might reasonably expect an invention to be created. Both sides appealed before the Court of Appeal. The Court of Appeal unanimously held that the inventions were made in the course of the employee's normal duties and otherwise upheld the trial court ruling. The following propositions on Section 39 (1) (a) emerge from the Court of Appeal:

a) The key question was what was it that the employee was employed to do? The section focuses on the employee's "duties", i.e. obligations. The primary source of a duty is the contract of employment.<sup>30</sup>

b) However, the contract is not the sole arbiter of the duty. The contract and the general nature of the job call for examination. Contracts evolve and the actions of employer and employee over time can give rise to an expansion or contraction. In the end one is asking whether an employee is employed to innovate and if so what general sort of area his innovation duties cover.<sup>31</sup>

In another ruling, it was held that if an employee applies for a patent in his own name, he will hold it on trust for the employer and can be ordered to transfer the same to the employer.<sup>32</sup> Alternatively, the employer may within two years<sup>33</sup> of the grant of the patent to the employee, apply to revoke the same and make a fresh application for a patent which will be treated as having been filed on the date of filing of the earlier patent.<sup>34</sup>

### Copyright Act, 1957

The position of an 'employer' under the Copyright Act 1957 is much different from the one under the Patents Act 1970. Section 17 of The Copyright Act provides that, unless there is an agreement to the contrary, the first ownership of a copyright lies with an employer in case of the work being made by the author in the course of his employment under a contract of service.<sup>35</sup> For instance, a proprietor of a newspaper, magazine or similar periodical shall be the first owner of a copyright in the literary, dramatic or artistic work produced by the author provided that such work has been made in the course of his employment and under a contract of service or apprenticeship.<sup>36</sup>

The general principle is that when something is done or produced by a person in the employment of another then what he does or produces is a part of the business or duty assigned to him as an employee. The copyright in the work so produced, therefore,

will, in the first instance, be the property of the employer.<sup>37</sup> The same principles have been reiterated by the present U.K. Copyright, Designs & Patents Act 1988.<sup>38</sup> On the termination of the employment, the employee is entitled to the ownership of copyright in the works created subsequently, and the former employer has no right in such copyright.<sup>39</sup>

### Issues due to the Position under Patents Act, 1970

Unlike the Copyright Act and the UK Patent Act, the current Indian Patent regime does not provide for any mechanism by which inventions by employees are attributable to employers if the same are created within the "course of employment". This leads to difficulties in the sense that the employer has to run the danger of an employee utilizing the resources provided by him and then the employer may be left out of the economic advantages of the Invention so conceived by the employee during the "course of his employment" or which was done so specifically to further the interest of the employers undertaking. It is thus, stated that the Patents Act must replicate a provision that is similar to its UK counterpart. The provision which may be introduced within the Indian Patent Act need not be a complete replication, but at least a minimal degree of protection by virtue of a statute must be incorporated within the Patents Act.

The lack of existence of such a provision results in situations which are highly unfavourable to Employers. The next part of this research paper shall examine two such situations which have arisen in *Darius Rutton Kavasmaneck v Gharda Chemicals Limited*<sup>40</sup> and *Board of Trustees of the Leland Stanford Junior University v Roche Molecular Systems, Inc.*<sup>39</sup> These two case studies shall further highlight the need for legitimizing pre-invention assignments and entitling the employer with the right to file for a patent of an invention if the same has been created within the course of employment of the employee.

### A Case Study: *Darius Rutton Kavasmaneck v Gharda Chemicals Limited*<sup>41</sup>

The case had been brought up by a minority shareholder, the plaintiff, on behalf of the Company, M/s. Gharda Chemical Industries ("Company"), against the Managing Director of the Company, ("A").

A, who is also a shareholder of the Company is liable to contribute 20% of the Capital, receives 40% of the profits while the rest 60% are distributed among other shareholders according to the

Shareholders Agreement. This is because the Company is dependent on 'A's expertise in the field of research of chemicals for its functioning. The case was brought up after the plaintiffs received a notice informing them about an agreement that has been entered between the Company and 'A', under which the Company acknowledges that the A owns and shall continue to own any invention that he has invented/ conceptualized during his tenure as the Managing Director of the Company and the Company shall not claim any ownership over such inventions.

It was later discovered that 'A' had claimed patent ownership over various inventions for which he had used the resources of the Company. The Court held that the plaintiffs claim could not be accepted in the present case, and the patent ownership or profits therefrom cannot be granted to the employer Company.

The following reasons could be derived out of the judgment:

1. Justice Shriram observed, "I was not shown anything in Indian statute that recognizes that employee patents belong to the employer."<sup>i</sup> Hence, refusing to accept the English Law Principle on the matter. Since, in his words, "while the British Law has a bare provision in this regard, the Indian statute is silent."
2. Due to the abovementioned silence of Indian statute on this matter, the Court had to look into the balance of convenience. It was observed that since the impugned Patents were obtained back in 2008, and the life of a Patent is only 20 years, it would be better to maintain the status quo. This is because if the ownership of patent is sought to be changed at this point, the patent may be at risk as per the provisions of Section 64 (b) of Patents Act, 1970.
3. 'A' has never demanded a royalty from the Company to use the invention. Hence, the Company has nothing to lose in the present situation.
4. The inventions were not a part of the purpose of employment of 'A', since he was not specifically assigned this job by the Company and this doesn't fall under his duties in the capacity of Managing Director of the Company.

It may be noted at this stage that had Section 39 (b) of the UK Patents Act, 1977 had been applied in the present case, it would have resulted in a different outcome. One of the reasons why the Court was convinced that the inventions should not belong to the Company in the present case is because a Managing Director is not expected to be involved in research

and development. However, Section 39 (b) recognises the fact that the invention of an employee, whose duties could reasonably include furthering the interest of the employer's undertaking, also belongs to the employer. Hence, in the present case, if Section 39 (b) of the UK Patents Act, 1977 was present in the country, the inventions may go to the Company.

The debate about ownership of patents between an employer and an employee may be relatively new in the Indian legal system, but it has been well established on an international level that it is important to make sure the employer, who provides the ultimate resources for the invention and its future improvements, is granted the control of such invention. There is no doubt that India needs to encourage scientific as well as technical inventions. The sheer lack of jurisprudence on Patent Law in India is the first indication showing the lack of such encouragement to make inventions in the country.

In order to improve this condition, ensuring the employers a control of their employee's inventions is a small but significant step. Many articles<sup>42</sup> and case laws<sup>43</sup> have stressed upon the social value of the employer's resources and facilities.

In the Goodyear Tyres case<sup>44</sup>, the Court observed, "*It is feared that if the Company is to be denied of the fruits of its success, it will cease to subsidize failure and experimental departments will go.*" In other words, if the employer is not given the profits of invention even after investing in a research, he would stop such investments.<sup>45</sup>

In *Standard Parts Co. v Peck*,<sup>46</sup> the Supreme Court of U.S.A granted an employer the patent rights to the employee's invention, observing that the employer has a greater bargaining power in the case because of his financial contributions to the invention.<sup>47</sup> Therefore, it is clear that if there had been a corresponding section to Section 39 of Patents Act, 1977 in the Indian Law, the Court would have definitely reached a much progressive decision.

#### **A U.S.A. Case Study: *Board of Trustees of the Leland Stanford Junior University v Roche Molecular Systems, Inc.***

To elaborate more on how having a provision entitling employers the inventions of their employees under circumstances is essential for the Patent Law, it would be relevant to discuss a widely criticised judgment of the United States Supreme Court; *Board*

*of Trustees of the Leland Stanford Junior University v Roche Molecular Systems, Inc.*<sup>48</sup>

The case is between a Company, Cetus, and a University, Stanford. Dr. Holodniy, the employee-inventor, was employed at the University as a research fellow. He was sent to Cetus to study about the Nobel Prize winning research being undertaken by the Company which was working on developing methods for quantifying blood borne levels of HIV.

He had a contract with both the University and the Company. In the former, he had “agreed to assign” his future inventions resulting from such employment to the University while according to the latter contract, he “agreed to assign and hereby assigned” all his inventions made as a consequence of access to Cetus. Dr. Holodniy developed a suitable procedure while working with Cetus’ employees, and later returned to Stanford and tested the same using the employees and resources of the University. The patent was later acquired by Stanford.

Later, Roche Molecular Systems acquired the aforementioned research related activities, and the benefits from contracts like the one between Cetus and Dr. Holodniy. They started using the patented technology for producing certain HIV kits which became very famous in the market. The dispute was whether the patent ownership was with the University or with the Company.

Chief Justice Roberts delivered the opinion of the Court with these words, “*Since 1790, the patent law has operated on the premise that rights in an invention belong to the inventor. The question here is whether the University and Small Business Patent Procedures Act of 1980, commonly referred to as the Bayh-Dole Act, displaces that norm and automatically vests title to federally funded inventions in federal contractors. We hold that it does not.*”

In 1980, Congress passed the Bayh-Dole Act to “promote the utilization of inventions arising from federally supported research,” “promote collaboration between commercial concerns and non-profit organizations,” and “ensure that the Government obtains sufficient rights in federally supported inventions.”<sup>49</sup> To achieve these aims, the Act allocates rights in federally funded “subject invention” between the Federal Government and federal contractors (“any person, small business firm, or nonprofit organization that is a party to a funding agreement”).<sup>50</sup> The Act defines “subject invention” as “any invention of the contractor conceived or first actually reduced to

practice in the performance of work under a funding agreement.”<sup>51</sup>

The judgment thus, seeks to limit the application of the above Act to situations where there is an express provision of assignment, and not agreement to assign, in the employment contract. Some implications of this judgment are provided here under.<sup>52</sup> These implications are of immediate relevance to the issue at hand since they arise out of the situation where the person who is investing in the invention is not given the control of the same.

1. Public entities, and in turn the Federal Government, risks losing the right to several patents just because of differently drafted contracts.
2. The decision also increases the potential for post-invention issues regarding patent ownership. Hence, discouraging the public and private entities to contribute in research and inventions.
3. Private investment in these activities will be actively discouraged because of uncertainties about ownership of the inventions.
4. The decision ultimately puts a cloud on the ownership of inventions and will have a negative impact on a society that looks to universities for research and inventions.

### Conclusion

There exists an inherent flaw with the Indian Patent regime as there exists no provision which may provide Employers, whether they are Universities or Companies, a right to the inventions created by their employees during the course of their employment. Thus, such rights depend upon assignment deeds, wherein only an actual assignment and not an agreement to assign shall constitute as an assignment. An employer runs the risk of the fact that he may not be assigned the Patent by virtue of the employee having an actual assignment with any other person. The Indian Patent Regime deters employers by making them face the risk of employees retaining the right to apply for a Patent with respect to the inventions that can be attributed to the resources provided by the employers.

This research paper propagated two methods by which such a risk can be eliminated:-

- 1) By legitimising the effect of Pre-Invention assignments as valid assignments.
- 2) By entitling the employer with the inventions which result from an employer-employee relationship if the same has been made within the course of

employment of the employee and within the normal duties assigned to him.

It is stated that the adoption of the above mentioned provisions within the Patent Act, 1970 would ensure a greater degree of control with regard to the Patents for employers and would in effect, incentivise greater investment within research institutions and companies which engage in research. The same becomes obvious with view to the fact that if the research institutions and companies are ensured that the inventions that they invent would become an economic asset for their own utilization, rather than for the betterment of their employees, they would invest more in research. Thus, an issue similar to that of *Darius RuttonKavasmaneck v Gharda Chemicals Limited*<sup>41</sup> wherein an employee utilized the resources provided by the company to create and own inventions would not arise again.

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