

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on: 14.07.2016

+ **FAO(OS) (COMM) 45/2016, C.M. APPL.23769/2016**

LAVA INTERNATIONAL LIMITEDAppellant

Through: Sh. Parag Tripathi, Sr. Advocate with Sh. Ashok. K. Aggarwal, Sh. Jayant Mehta, Sh. Swapnil Gupta, Sh. Shwetank Tripathi and Ms. Rani Singh, Advocates.

Versus

TELEFONAKTIEBOLAGET LM ERICSSON (PUBL)Respondent

Through: Sh. Gopal Subramaniam, Sr. Advocate with Ms. Prathiba. M. Singh, Sr. Advocate with Sh. Chander. M. Lall, Ms. Saya Chaudhary Kapur, Sh. Ashutosh Kumar, Sh. Raghav Chadha, Sh. Ruhin Koolwal, Ms. Sutapa Jana, Ms. Meetali Aggarwal, Sh. Devanshu Khanna, Sh. Aditya Jayaraj and Sh. Nikhil Chawla, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT

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1. This defendant's appeal questions an interlocutory order of the learned Single Judge dated 10.06.2016 in a patent infringement suit. The

appellant (hereafter referred to as “the defendant”) complains that the impugned order affects its right to defend the suit for infringement of patent instituted by the plaintiff.

2. The facts briefly are that the plaintiff claimed that the appellant/defendant infringed its patents and, in its suit, sought injunctive relief as well as damages. It also claimed a decree for a declaration that the rights offered by it in respect of its portfolio of its standard essential patents are FRAND (Fair, Reasonable and Non-discriminatory in character). The orders of the learned Single Judge were the subject of several previous interlocutory appeals to the Division Bench, on various occasions. The matter even reached the Supreme Court on at least two occasions. On 16.12.2015, the Supreme Court, by its order in SLP No.34886-87/2015 required this Court to decide the suit as expeditiously as possible and preferably within six months from the date the defendants filed their written statement. After that proceeding, and having regard to the pleadings of the parties, the issues were framed in the suit on 02.02.2016. On 22.02.2016, the learned Single Judge fixed the schedule of trial, in the following terms:

“(i) 4 weeks for filing evidence affidavit in affirmative by both the parties, i.e. by 21st March, 2016;

(ii) Thereafter, cross-examination (8 hours per witness), i.e. from 28th March, 2016 to 15th April, 2016;

(iii) Thereafter, 2 weeks for filing rebuttal evidence, i.e. till 5th May, 2016.

(iv) Thereafter, 2 weeks for cross-examination on rebuttal evidence, i.e. from 9th May, 2016 to 24th May, 2016.

(v) Commencement of final arguments from 30th May, 2016.”

Learned counsel for the parties state that once the affidavits are filed, both the parties will intimate each other as to which witness they would cross-examine on the respective dates. They also agree that the parties will try to abide by the schedule fixed by the Court.”

3. On 05.05.2016, the Court noticed that the plaintiff's evidence had been concluded and that the defendant had to produce evidence in the main suit and the counter claim in other proceedings. The defendant had apparently filed affidavit depositions of two witnesses – Madhusudan (DW-1) and Prof. Kamakoti (DW-2). The Court noted that the cross-examination of DW-1 would be conducted between 06-09.05.2016. On 10.05.2016, the Court directed that DW-1 be made available on 13.05.2016 for further cross-examination. On 13.05.2016, the plaintiff stated that the cross-examination of DW-1 would be concluded that day and that the cross-examination of a defence witness – Sunil Bhalla would be recorded on 14.05.2016. On that day, i.e. on 14.05.2016, the cross-examination of DW-1 could not be concluded. The statement and cross-examination of Shri Bhalla, DW-3 was partly recorded. On 16.05.2016, the learned Single Judge who was closely monitoring the trial noted the developments, which had occurred in the proceedings and further that on 03.05.2016, the defendant had submitted an additional list of witnesses containing seven names. At the same time, it was urged on behalf of the defendants that the depositions of only seven witnesses in all would be presented. The Court was informed – on behalf of the defendant that Prof. Kamakoti, one of its witnesses was not available in May

2016. The final order on the request for deferment of his cross-examination was made – rather, the case was directed to be taken up on 25.05.2016. The defendant again requested that its witness would not be present on the date scheduled, i.e. 28/29.05.2016. However, the Court again deferred orders to 30.05.2016 with respect to Prof. Kamakoti and did not accede to the request for postponement. The Court also observed that:

“As far as other witnesses are concerned, no scanned signed copies of their affidavits have been produced by defendant. Four days more time is granted to the defendant to produce the same. However, the learned counsel for the defendant submits that the defendant may not be able to produce the scanned signed copies of the remaining witnesses by 29th May, 2016. The appropriate order will be passed in relation to those witnesses on 30th May, 2016 when the main suit is listed.”

4. The order precluding the rights of the defendant with respect to its witness – Prof. Kamakoti became the subject matter of an earlier interlocutory appeal – FAO(OS) (Comm) 39/2016. The Court permitted the cross-examination of Prof. Kamakoti on 01.06.2016 by its order dated 27.05.2016. On 10.06.2016, the learned Single Judge made the impugned order limiting the appellant/defendant’s rights to adduce evidence in rebuttal. The Court *inter alia* directed as follows:

“25. From the overall facts and circumstances of the case, it appears that the defendant wishes to produce more witnesses as additional evidence/rebuttal evidence in relation to the subject matter of FRAND agreement. The plaintiff has not denied that the evidence sought to be produced is different that the evidence produced of DW-1 & DW-3, i.e. Mr. G.S. Madhusudan and Dr.V. Kamakoti. The statement was also made earlier by the

learned counsel for the plaintiff that in case the evidence of these witnesses is not led, the plaintiff will also not produce the rebuttal evidence. It is not denied by the counsel for plaintiff that the right for rebuttal evidence was also reserved by the parties.

26. It is also pertinent to mention that as per the original schedule contemplated as agreed between the parties, in fact, both the parties were given time to file their respective evidence in affirmative simultaneously. Learned counsel for the defendant has also stated that in the affirmative evidence, the plaintiff has filed large number of documents including the test reports and logs. Therefore, in order to give a fair chance, the defendant is granted last one more opportunity to rebut the evidence on the issue of FRAND Agreement. Learned counsel for the defendant has also agreed that these witnesses may not be permitted to be shown all the 54 agreements in the original position. The said agreements would be shown to the said witnesses directly after deletion of relevant portion in view of the order passed by the Supreme Court. Thus, the order in this regard be passed accordingly, however subject to the cost of Rs.50,000/- as the defendant has failed to file the evidence of these witnesses despite of time granted.

27. The opportunity is being given in the interest of justice, equity and fair play coupled with the fact of assurance given by the learned counsel for the defendant on behalf of his client that the defendant be granted final opportunity to file the affidavits on or before 29th June, 2016 and in case the said affidavits are not filed, the evidence of the defendant shall be treated as closed and even if the affidavit(s) of witness(s) are filed and the witness(s) would not present under any circumstances before Court when the matter is fixed for tendering the evidence and for cross-examination, the defendant agrees that the evidence of the said witness(s) be treated as closed. As the order is being passed after ten days when the statements were made therefore the time is extended upto 6th July, 2016.

28. As it is a technical matter coupled with the fact that the right to rebuttal was reserved by the parties when the schedule

was arranged as well as affirmative and rebuttal evidence of DW-2 was concluded before the evidence of affirmative of DW-3, one final opportunity is granted to the defendant to file affidavit(s) as additional evidence of the rebuttal evidence on or before 7th July, 2016. An advance copy of the said affidavit(s) shall be given to the learned counsel for the plaintiff by 4th July, 2016 who will file the affidavit as response/rebuttal evidence, if so required, by 25 th July, 2016. The evidence of the witness(s), whom affidavits are filed, would be recorded by the same Court Commissioner from 18th July, 2016 to 26th July, 2016 (12 hours per witness). It would be the responsibility of the defendant to produce them before the Court Commissioner who will produce all details to the plaintiff's counsel."

5. It is urged that the impugned order disallowing the defendant of its right during the trial is erroneous because the witness required to be examined is a representative of Mediatek which supplies chip sets for the phones sold by the appellant. Since the appellant urges in its defence that the suit patents are neither essential nor have been infringed by the handsets manufactured by Mediatek, it is vital that the representative of the said concern should be permitted to depose in the proceedings.

6. It is contended by Sh.ParagTripathi, learned senior counsel for the appellant that the impugned order is erroneous inasmuch as the right to call a witness from Mediatek has been denied by reason of non-disclosure of his or her name and other particulars. Contending that Mediatek was referred to at all material times when the list of witness was filed and relied upon, it is stated that the plaintiff cannot surely complain that it would be caught by surprise, that it would be put to prejudice or that the appellant would unfairly benefit if such witness in fact deposes in the proceedings.

7. Learned counsel contends that the impugned order in effect contradicts a previous order and all previous proceedings whereby the particular reference to the appellant to adduce the depositions of its witnesses was recognized. It is highlighted that the impugned order strikes at the root of the appellant to lead rebuttal evidence. Learned counsel states that the appellant cannot lead its rebuttal evidence without knowing what the plaintiff deposes.

8. It is emphasized that the impugned order- since it precludes rebuttal evidence was in fact made after conclusion of hearing in respect of an earlier stage, i.e. cross-examination of the defendant's witnesses. Characterizing the latest stage to be the third phase in the trial, learned counsel submitted that the impugned order to the extent it enjoins the defendant or prevents it from leading rebuttal evidence irrevocably prejudices it even though the stage for making such ruling had not arisen.

9. Mr. Gopal Subramanian, learned senior counsel for the plaintiff, urges that this court should not interfere with the impugned order. It is argued that the present proceeding is currently latest in the series of nine appeals filed by the defendant to the Division Bench. Learned senior counsel points out that the defendant had chosen, previously to question every order of note made by the learned Single Judge.

10. Mr. Subramanian argues that the defendant is attempting to stall and prolong the proceeding. Highlighting that the defendant was aware that it was under a duty to disclose the name and identity of its witnesses, learned counsel submitted that opportunity had been granted in mid May itself to the defendant/appellant to file copies of affidavit depositions, either in original,

or scanned copies. It is submitted that neither did the defendant file such evidence, of Mediatek's representative, nor even disclose who such representative was. Counsel urges that the defendant was always aware that it had to rebut the plaintiff's case and indeed had done so, through the witnesses, who did depose in that regard. Lastly, learned senior counsel submitted that the copy of Mediatek's e-mail clearly states that its employees would not be available when the plaintiff wants them and that besides, even till date, the affidavit evidence of such witness is not forthcoming. In these circumstances, urged counsel for the plaintiff, this court should not grant any further leeway; the defendant has not been placed under serious inconvenience or disadvantage as to warrant appellate interlocutory intervention.

11. Order XVIII Rule 3 of the Code of Civil Procedure reads as under:-

"3. Evidence where several issues:- Where there are several issues the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party; and, in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case."

The above provision in effect provides that where several issues are framed and burden to prove some of the issues lies on the other party, the party beginning has the option to produce its evidence on those issues, or reserve it by way of answer to the evidence produced by the other party. In such case,

the party beginning may produce evidence on those issues after other party has produced all his evidence. In other words, the right of rebuttal i.e. in answer to the evidence of other side is available to the party beginning where the onus of some issues is on other party and the other party has led evidence on such issues. It is a matter of record that the defendant has led evidence in the form of depositions of three witnesses. The defendant had opportunity to rebut the plaintiff's evidence as well as further its counter claim and undeniably did so, in the proceeding. It complains that precluding it from producing the evidence of Mediatek's representative is prejudicial to its interest.

12. When issues were struck and parties were directed to conform to a time schedule, in view of the imperative nature of the Supreme Court's order, it is undeniable and a matter of record that the list of witnesses – both in the affirmative and in rebuttal evidence, was filed in court. Though the defendant urges now that the impugned judgment is not founded on sound reasoning, insofar as it assumes that the witnesses' identity should be disclosed, the fact remains that it was always aware of two essential facts: one, that it had to lead evidence in support of its counter claim as well as in defence of the suit and two, that time was fixed for filing affidavit deposition. The proceedings before the Local Commissioner and the orders of the learned Single Judge would reveal that the plaintiff had in fact concluded its deposition in the first week of May itself. Almost the entirety of that month was spent in cross-examination of two defence witnesses (including the deposition of Prof. Kamakoti who had expressed unavailability in the entire month of May, which led to a series of orders and an order of the Division Bench). At that stage itself, the Court had required

the defendant to file deposition of its witnesses in affidavit- through scanned copies. The defendant did not avail of that opportunity. Ultimately, in the impugned order, the learned Single Judge held that barring the evidence in relation to FRAND- on which the plaintiff had led and for which rebuttal evidence is essential, there can be no further witness testimony on behalf of the defendant. This court is of opinion that given the context and background of the dispute, there is no question of failure of justice or unfairness to the defendant.

13. The original schedule mandated by the learned Single Judge – in the light of the Supreme Court’s order requiring conclusion of trial within 6 months from end December, 2015- was that recording of evidence would be concluded and final arguments would commence from 30th May, 2016. The plaintiff, experienced difficulties in cross-examination of the defendant’s witnesses, and moved applications to facilitate that process – e.g., I.A. No.5394/2016 being one such. The record would reveal that the learned Single judge closely monitored the process, at times listing the suit even on the same day that the Local Commissioner did (for the purpose of recording evidence). The defendant’s witness stated inability to be subjected to cross-examination- which led to a further series of orders. In the case of the witness in question, the learned Single Judge noticed that neither the list of witnesses nor any other material on record, revealed the identity of Mediatek’s official. Regardless of whether the identity of such official is relevant, what is clear from the record is that the defendant had sufficient time to produce the affidavit of such representative. This Court notices that Mediatek’s representative had been mentioned in the original list of witnesses filed in Court. Therefore, it was possible for the defendant to have

made arrangements, in the light of the depositions it wished to present and in the light of the plaintiff's evidence, which had ended by May, 2016. Instead, it relied on the e-mail correspondence with Mediatek, which expressed both skepticism about its representative's ability to depose in such matters and in any case, expressed constraints with respect to availability of its employees and officers.

14. Significantly, the learned Single Judge also noted that the deposition of the defendant's witness was both in furtherance of its own case as well as in rebuttal of the plaintiff's evidence. If all these aspects were to be considered as well as the imperative that the Court conclude the trial in a time-bound manner, the only inference which can be drawn is that acceding to the defendant's requests would mean further prolongation of an already delayed trial. This court is also unimpressed with the submission that the learned Single Judge made a direction in respect of a phase of the trial which he was not overseeing. The learned Single Judge, presiding over the trial had the authority to ensure that every such order as was necessary for the parties to adhere to the timelines, was made. The trial of a suit is an indivisible process, even though for convenience it is scheduled in a particular order; as one monitoring the progress of such process, the learned Single Judge could make orders regardless of the "phase".

15. *Wander Limited v. Antox India (Pvt.) Limited*¹ and *Mohd. Mehtab Khan & Ors. v. Khushuma Ibrahim & Ors*² are two rulings of the Supreme Court which direct the appellate courts to exercise caution while dealing with interlocutory determinations of courts of first instance. *Sans* serious or

¹(1990) Suppl. SCC 727

²(2013) 9 SCC 221

palpable untenability of trial courts' orders, intervention should be desisted. These judgments bind the court. There is, in the opinion of this court, nothing so serious or unreasonable as to warrant appellate interdict because the defendant feels that it is seriously prejudiced.

16. In the light of the above discussion, there is no merit in the appeal. It is therefore, dismissed with no order as to costs.

Order *dasti*.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

JULY 14, 2016

