

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

FRIDAY, THE 15TH DAY OF DECEMBER 2017

THE HON'BLE MR. JUSTICE M.SUNDAR

A.No.8210 of 2017
in
C.S.No.979 of 2007

M/s.TVS Motor Company Limited
Jayalakshmi Estates,
No.29, Haddows Road,
Chennai 600 006
Rep.by its Authorized Signatory
Mr.Harne Vinay Chandrakant ... Plaintiff

-Versus-

M/s. Bajaj Auto Limited
Akurdi,
Pune - 411 035, Maharashtra ... Defendant

A.No.8210 Of 2017:

M/s. Bajaj Auto Limited
Bombay-Pune Road,
Akurdi,
Pune - 411 035, State of Maharashtra
rep.by Mr.S.Ravikumar ... Applicant/Defendant

-Vs.-

M/s.TVS Motor Company Limited
Jayalakshmi Estates,
No.29, Haddows Road,
Chennai 600 006
Rep.by its Authorized Signatory
Mr.Harne Vinay Chandrakant ... Respondent/Plaintiff

Application praying that this Hon'ble Court be pleased
to expunge the following portions of the proof affidavit of
PW3:-

a. Paragraph 7 "According to me, the main thrust of the
invention, as disclosed in the complete specification filed

in 2003, was on the use of twin "spark plugs" and insertion of one of the spark plug through the cam chain side without any mention of valves. However, while amending the complete specification in November 2004, Bajaj modified the thrust of the invention and brought in the limitations of two valves, bore size of the cylinder and sleeve being push fitted. When a claim is amended during prosecution to overcome patentability objection, the elements introduced in order to distinguish the claimed invention from the prior art become essential elements of the claimed invention. Thus, two valves per cylinder is an essential element of the claimed invention. In other words, an engine having three valves per cylinder is specifically disclaimed and any such 3 valve engine will not infringe the claim 1 as granted."

b. Paragraph 8 "since the claims of a complete specification relate to a single invention or a single inventive concept, a comparison of Claim 1 and 6, the two independent claims, shows that the essential elements of the claimed invention are an engine having two valves per cylinder, with bore size between 45 and 70 mm and the sleeve being push-fitted. Claim 7 also strengthens my opinion. To amplify, the use of twin spark plugs is not the inventive concept claimed."

c. Paragraph 9 " Thus, according to me, twin spark plug is not an essential feature of the Claimed invention"

d. Paragraph 10 "The introduction of two valves per cylinder' limitation is an essential feature of the Indian patent 195904 and any three valves per cylinder engine will not infringe any of Bajaj's claims".

e. Paragraph 23 " In light of the prior art there is no inventive feature in an engine having cylinder with bore diameter between 45 mm and 70 mm using twin spark plugs for burning a lean air fuel mixture".

f. Paragraph 24 "According to me, the invention as claimed in Indian Patent 195904 would have been obvious to

a person skilled in the art in the light of 322 patent read with various prior arts discussed above. In my view, the Indian Patent 195904 is thus, invalid".

g. Paragraph 27 "As already stated, the mere presence of three valves in the TVS Engine is enough to show non-infringement of the claims of Indian Patent 195904".

h. Paragraph 28 "Since five limitations of claim 1 are not present in the TVS engine, this claim is not infringed".

i. Paragraph 29 "These limitations are essential features. Two of these three essential features i.e two valves and the sleeve being push fitted, are not present in the "TVS FLAME" and hence there is no infringement.

j. Paragraph 30 "Since the independent claim 1 is not infringed, dependent claims 2 to 5 are also not infringed."

k. Paragraph 31 "Coming to Claim 6, it is seen that this claim differs from Claim 1 in one aspect only i.e., use of only one spark plug is claimed in Claim 6. In the absence of features 1) to 5) of Table 2, the TVS engine does not infringe this claim also."

l. Paragraph 32 "The same holds good for the omnibus claim 7, since the only embodiment shown in the drawings and explained in the description shows these features."

m. Paragraph 33 "Therefore, the TVS engine does not infringe any claim of Indian Patent 195904."

This Applications having been heard on 14.12.2017 in the presence of Mr.T.V.Ramanujam, Senior Counsel for M/s. Arun C Mohan, Vasundhara Arun, Brinda Mohan, R.Prashanthi, Durga V Bhatt and Rittika Reddy, Advocates for the applicant herein and Mr.C.S.Vaidyanathan, Senior Counsel for M/s.T.K.Bhaskar, Advocates for the respondents herein and upon reading the judges summons and the affidavit of S.Ravikumar filed herein and having stood over for consideration till this date and coming on this day before this court for orders in the presence of the said advocates for the parties hereto,

This application coming on this day before this court for hearing the court made the following order:-

The suit herein, i.e., C.S.No.979 of 2007, I am informed, is tagged with another suit, i.e., C.S.No.1111 of 2007. I am also informed that the two suits have been set down for joint trial.

2 Adversaries in the two suits are TVS Motor Company Limited, Chennai and Bajaj Auto Limited, Pune. The ranks of the two adversaries are reversed in the two suits. Therefore, to avoid confusion and for the sake of convenience and clarity, in this order, I shall refer to TVS Motor Company Limited, Chennai as 'TVS' and Bajaj Auto Limited, Pune as 'Bajaj'.

3 This Commercial Division is also informed that the factual matrix out of which the two suits arise is common. The nucleus or the eye of the storm, if I may say so for both the suits, is a registered Patent, being Indian Patent No.195904 and Bajaj is the grantee of this Patent. This patent application is titled 'An Improved Internal combustion engine working on four stroke principle'. This Indian patent is hereinafter referred to as 'said patent' for the sake of brevity, convenience and clarity. As said patent pertains to an engineering product in the automobile industry, it may be more appropriate to say that the said patent is the 'fulcrum' of the two suits and it is the epicentre of the lis.

4 These two suits, which are a decade old on the Original Side of this Court, were listed before this Commercial Division on 11.12.2017 when an application, i.e., A.No.8210 of 2017, which is being disposed of by this order, was listed for hearing. With regard to jurisdiction of this commercial division, from a perusal of pleadings in the two suits and the submissions made by learned counsel for TVS and Bajaj before this court, it unfurls that both

the suits pertain to alleged infringement of the said patent. While C.S.No.979 of 2007 filed by TVS is regarding groundless threats qua the said patent inter-alia under Section 106 of the Patent Act, 1970, C.S.No.1111 of 2017 filed by Bajaj is inter-alia to injunct TVS from infringing the said patent and this suit has been filed inter-alia under Sections 48, 104 and 108 of the Patents Act, 1970. To be noted, in this suit, validity of said patent has been assailed and put in issue (obviously by way of pleadings in the written statement) by TVS.

5 In the light of the aforesaid narrative, with regard to the two suits, Section 104(1) of the Patent Act, 1970 operates. The lis is also a commercial dispute within the meaning of sub-clause (xvii) of Section 2(1)(c) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (4 of 2016) (hereinafter referred to as 'Act 4 of 2016' for brevity). As section 104(1) of the Patents Act operates, 'specified value' within the meaning of section 2(1)(i) read with section 12 of Act 4 of 2016 is not of any consequence. Therefore, this commercial division has jurisdiction to entertain these two suits and the applications therein in the light of the first proviso to Section 7 of the Act 4 of 2016.

6 Therefore, at the outset, it is made clear that this commercial division (to be noted, commercial division was notified in the Madras High Court with effect from 04.12.2017) has jurisdiction to entertain the aforesaid two suits and the applications therein, which includes the application which will stand disposed of by this order.

7 Mr.T.V.Ramanujan, learned Senior Counsel leading the counsel on record appears for Bajaj, which is the applicant in the instant application. Mr.C.S.Vaidyanathan, learned Senior Counsel leading the counsel on record appears for TVS, which is the respondent in the instant application.

8 I am informed that the said patent has a priority date of 16th July 2002. I am also informed that the said patent is valid till 2020. A patent is valid for 20 years. However, as the submissions are not disputed, in the light of the limited scope of this application, I am not delving further into this aspect of the matter.

9 This commercial division is informed that the said patent inter-alia relates to the use of twin spark plugs for efficient combustion of lean air fuel mixture in small bore (bore diameter ranging from 45 mm to 70 mm) internal combustion engine working on 4 stroke principle. This commercial division is further informed that somewhere in December 2007, TVS launched a motor bike (two wheeler) of 125 CC class under the trademark FLAME powered by a lean burn internal combustion engine of bore size 54.5 mm with a twin spark plug configuration. It is the case of Bajaj that this infringes its said patent.

10 I have already set out supra the prayers in the two suits in a shorter version / single terms. In the light of the very limited scope of this application, suffice to say that the above is the central theme of this lis.

11 Issues were framed in these two suits by this court on 24.11.2009. After several interlocutory applications which were carried in appeals, i.e., intra-court appeals, some travelled through intra-court appeals to the Hon'ble Supreme Court, including proceedings to decide who has to begin the trial, proof affidavit of P.W.1, i.e., Mr.Harne Vinay Chandrakant, was ultimately filed on 23.6.2011. Thereafter also, there have been several interlocutory applications, some of which were carried in appeal by way of intra-court appeals and some were carried to the Hon'ble Supreme Court too.

12 Be that as it may, suffice to state that Mr.C.Manikkam, a retired District Judge was appointed as Sole Commissioner for recording evidence and the trial is under way before the said learned Judge, who shall

hereinafter be referred to as 'Sole Commissioner' for convenience and clarity.

13 P.W.1 (Harne Vinay Chandrakant) has been examined in full. I am informed that P.W.2 is an expert witness and after filing proof affidavit, he fell ill / was indisposed and therefore, could not present himself for cross examination. I am also told that he has to travel to India from Middle East. Therefore, the trial moved on to P.W.3 (Michael Babeluk), who has been described as an expert witness. To be noted, P.W.3 is an Austrian Patent Attorney and he is also said to be an European Patent Attorney since 1993.

14 Proof affidavit of P.W.3 is dated 19.9.2017. Though the proof affidavit is dated 19.9.2017, I am informed that the same was served on Bajaj on 6.11.2017. It is also submitted that the ensuing weekend, i.e., 16.12.2017 and 17.12.2017 (Saturday and Sunday) have been set apart for cross examination of P.W.3 before the Sole Commissioner. Under such circumstances, the instant application, i.e., A.No.8210 of 2017 has been filed by Bajaj on 8.12.2017 and moved before this court on 11.12.2017. TVS has filed a counter affidavit and the matter was taken up for hearing on 13.12.2017 and 14.12.2017.

15 The prayer in the instant application is to expunge certain portions of proof affidavit of P.W.3. To be noted, paragraphs 7, 23, 24, 28, 29, 30, 31, 32 and 33 are sought to be expunged in their entirety. With regard to paragraphs 8, 9, 10, and 27, some parts of the said paragraphs are sought to be expunged.

16 The application for expunging the aforesaid portions of proof affidavit of P.W.3 is predicated primarily on four grounds viz., that portions and paragraphs in entirety which are sought to be expunged are (i) argumentative, are (ii) conclusions qua issues in lis, (iii) they touch upon interpretation of Indian Patent Law

and (iv) they parrot the pleadings of TVS.

17 In the counter affidavit filed by TVS, the application is resisted disputing the aforesaid grounds. I shall deal with the same infra.

18 Mr.T.V.Ramanujan, learned Senior Counsel appearing for Bajaj, which is the applicant in the instant application, made submissions which can be broadly summarised as follows :

(a)A proof affidavit is though an affidavit within the meaning of Order XIX of the Code of Civil Procedure, 1908 ('CPC' for brevity), it is filed under Order XVIII Rule 4 of CPC and therefore, it does not lose the character or trappings of examinations in chief, i.e., deposition. In other words, it is submitted by the learned senior counsel that the proof affidavit stands in a different footing qua an affidavit per se.

(b)P.W.3 does not qualify as an expert witness within the meaning of Section 45 of the Indian Evidence Act, 1872, as he is only a Patent Attorney and not a technocrat.

(c)The aforesaid portions of the proof affidavit of P.W.3 which are sought to be expunged, deserve to be expunged as they are argumentative, conclusions qua issues in the lis, are interpretations of the Indian Patent Laws and they parrot the pleadings of TVS.

19 The submissions of Mr.C.S.Vaidyanathan, learned Senior Counsel, in response to the aforesaid submissions, can be broadly summarised under the following heads :

(a)The proposition that the proof affidavit stands in a different footing qua an affidavit per se is not disputed, one need not take the

aid of Section 151 of CPC for such a prayer as this being commercial division, power is available under Act 4 of 2016.

(b) In the light of Section 3 of the Patents Act, 1970, P.W.3 will certainly qualify as an expert witness and this submission is made without prejudice to the stand that it is outside the scope of the instant application.

(c) With regard to portions which are sought to be expunged, it is submitted that those which are described to be argumentative are, in fact, the reasons / inferential process for arriving at conclusions, those that are said to be conclusions are not binding conclusions, but are opinions subject to the ultimate judgment of this court and it does not turn on interpretation of the Indian Patent Law, but is a reference to the relevant provisions to support the opinions. Technical terms cannot be varied and therefore, there is no parroting of pleadings of TVS.

20 Having set out the rival submissions broadly, I now look at the submissions in detail.

21 Mr.T.V.Ramanujan, learned Senior Counsel pressed into service a judgment of the Bombay High Court in **Banganga Cooperative Housing Society Ltd. and others Vs. Vasanti Gajanan Nerurkar and others** reported in **MANU/MH/1020/2015** for the proposition that such an application seeking to expunge portions of the proof affidavit is maintainable under Section 151 CPC. For this purpose, paragraph 14 of the said judgment was referred to, which reads as follows :

"14. I do not think there is any authority for the proposition that no objection can be taken to any part of the Evidence Affidavit,

and that the whole of it, irrespective of what it purports to contain, must be treated as 'evidence'. Indeed *Ameer Trading and FDC Ltd* both suggest the converse is true and this position at least is undisturbed even in *Rasiklal Manikchand*. The option available to the Court is to order a redaction of so much of the affidavit as does not constitute evidence properly so-called. This is self evident from the provisions of Order XVIII Rule 4, which reads as follows:

"ORDER XVIII - HEARING OF THE SUIT AND EXAMINATION OF WITNESSES

1. ...

2. ...

3. ...

4. **Recording of evidence-** (1) In every case, the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence:

Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with affidavit shall be subject to the orders of the Court.

(2) The evidence (cross-examination and reexamination) of the witness in attendance, whose evidence (examination-in-chief) by affidavit has been furnished to the Court shall be taken either by the Court or by the Commissioner appointed by it:

Provided that the Court may, while appointing a commission under this sub-rule, consider taking into account such relevant factors as it thinks fit:

(3) The Court or the Commissioner, as the case may be, shall record evidence either in writing or mechanically in the presence of the Judge or of the Commissioner, as the case may be, and where such evidence is recorded by the Commissioner, he shall return such evidence together with his report in writing signed by him to the Court appointing him and the evidence taken under it shall form part of the record of the suit.

(4) The Commissioner may record such remarks as it thinks material respecting the demeanour of any witness while under examination:

Provided that any objection raised during the recording of evidence before the Commissioner shall be recorded by him and decided by the Court at the stage of arguments.

(5) The report of the Commissioner shall be submitted to the Court appointing the commission within sixty days from the date of issue of the commission unless the Court for reasons to be recorded in writing extends the time.

(6) The High Court of the District Judge, as the case may be, shall prepare a panel of Commissioners to record the evidence under this rule.

(7) The Court may by general or special order fix the amount to be paid as remuneration for the services of the Commissioner.

The provisions of rules 16, 16-A, 17 and 18 of Order XXVI, in so far as they are applicable shall apply to the issue, execution and return of such commission under this rule."

22 In this regard, a judgment of the Supreme Court reported in **AIR 2004 SC 2093: (2004) 11 SCC 168** being **Shipping Corporation of India Ltd. Vs. Machado Brothers and others** was also pressed into service.

23 Mr.T.V.Ramanujan, learned Senior Counsel pressed into service another judgment of the Bombay High Court in **Harish Loyalka and another Vs. Dileep Nevatia and others** reported in **MANU/MH/0429/2014 = 2014 (4) ABR 545** for the proposition that averments which are argumentative in nature have to be eschewed. For this purpose, paragraphs 20, 21 and 22 of the said judgment were cited, which read as follows :

"20.Consequently matters that are (i) argumentative or in the nature of submissions and pleadings etc.; (ii) matters that are wholly irrelevant and also not to the personal knowledge of the deponent or witness; and (iii) matters that are demonstrably hearsay, must all be excluded. They cannot form part of the examination-in-chief on affidavit required by CPC Order 18, Rule 4. Where an evidence affidavit purports to contain such material, a court must endeavour to bring that affidavit into conformity with the provisions of the

Order 18 and Order 19 of the CPC and of the Evidence Act. A non-conforming evidence affidavit is anathema to our system of law.

21. There is another reason for this approach. The Evidence Act restricts what evidence may be led as examination in chief. The provisions of CPC Order 18 Rule 4 are procedural. The Evidence Act is substantive law. Procedural law cannot expand the ambit and scope of or override substantive law. That could also never have been the legislative mandate of the 2002 amendments to Order 18 Rule 4 of the Code of Civil Procedure, 1908.

22. In the present case, a very large portion of the present affidavit is precisely of this impermissible nature. It is argumentative. It contains submissions. It contains traverses in the nature of pleadings of statements made in the written statement. None of this can be permitted to find place in an affidavit in lieu of examination in chief. Mr. Nevatia will have the widest latitude in arguments. There, pointing to the pleadings and evidence, both documentary and oral, he may invite the Court to draw such conclusions or arrive at such findings as are in his submission appropriate. But that does not mean that his evidence affidavit can be more than the law permits."

24 A judgment reported in **1935 (52) RPC 171** being a judgment of House of Lords in ***British Celanese, Ltd. Vs. Courtaulds, Ltd.*** case was pressed into service to say that the area or territory in which an expert witness may legitimately move is still doubtful qua patent cases. This judgment was also pressed into service to say that an

expert witness shall not be asked what the specification means and the question that does not become more admissible if it takes the form of asking the expert witness what it means to him as an engineer or as a chemist.

25 Another English judgment reported in **1897 (14) RPC 46** being **Brooks Vs. Steele and Currie** was also relied on to say that the nature of invention for which a Patent is granted must be ascertained from the specifications and has to be determined by a Judge and not by the jury or by any expert or other witnesses.

26 An American judgment being a judgment of United States Court of Appeals, Federal Circuit in **Del Mar Avionics, Inc., Vs. Quinton Instrument Co., [836 F.2d 1320 (1987)]** was also pressed into service to say that the Court's obligation is to weigh the expert and the other testimony and it is not for an expert to do so.

27 A judgment of the Supreme Court of India in **Ramesh Chandra Agrawal Vs. Regency Hospital Limited and others** reported in **(2009) 9 SCC 709** was also pressed into service to say that the value of any expert evidence is only advisory and cannot travel beyond that.

28 Finally, another American judgment in **Minnesota Mining & Mfg. Co. Vs. Carborundum Co. [155 F.2d 746 (1946)]** being judgment of Circuit Court of Appeals, Third Circuit was pressed into service to say that issues of this nature cannot be decided by experts, but should be decided by Court.

29 In response, Mr.C.S.Vaidyanathan, learned Senior counsel, placed a list of dates and events containing 60 serial numbers. This according to him has chronicled the trajectory of the litigation in the last one decade and this was placed before the Court by Mr.C.S.Vaidyanathan, learned Senior Counsel to say that Bajaj has been repeatedly delaying the proceedings by filing a barrage of

applications and the intention is to ensure that the lis does not see the light of the day at all or at least for the period of validity of said patent. The validity of the patent, which according to him is upto the year 2020 as set out supra. Pitching his submissions a little higher, it was submitted by learned Senior Counsel for TVS that the instant application, i.e., A.No.8210 of 2017 has been filed with the objective of derailing the trial.

30 Thereafter, as a corollary and continuation of the above submissions, Mr.C.S.Vaidyanathan, learned Senior Counsel referred to Act 4 of 2016 and said that the objective behind creation of commercial divisions is to expedite such hearings, more so in the light of international perception of litigation time in India. Furthering his submissions, learned Senior Counsel circulated a paper captioned 'Hot tub doctrine' and a case management schedule for the instant suits.

31 After making such submissions *qua bona fides* of the application under consideration, learned Senior Counsel turned to the merits of the matter. Adverting to submissions made by Mr.T.V.Ramanujan that an application of this nature is maintainable under Section 151 of CPC, it was submitted that one need not turn to Section 151 CPC as this commercial division has powers in this regard under Act 4 of 2016. Saying so, learned Senior Counsel referred to Section 16 of the Act 4 of 2016 which deals with amendments to CPC, he referred to the amendment made to CPC by Act 4 of 2016 (as set out in the schedule to Act 4 of 2016) and particularly, to the amendment made by way of Order XV-A captioned 'Case Management Hearing'. Specific reference was made to Rule 6 of Order XV-A. According to learned Senior Counsel, sub-clauses (g), (m) and (n) of sub-rule (1) of Rule 6 of Order XV-A of CPC which were inserted by Act 4 of 2016, this Commercial Division has all powers to entertain an application of this nature and even expunge any deposition or any averment made in the

affidavit. To be noted, entire Order XV-A was inserted into CPC by Act 4 of 2016.

32 Thereafter, referring to submissions by learned Senior counsel for Bajaj that portions of certain paragraphs and paragraphs in entirety which are sought to be expunged being 'argumentative', 'conclusions', 'interpretation of the Indian Patent Laws' and 'parroting pleadings', it was submitted that they are merely an 'inferential process', 'opinions', 'necessary reference' and 'technical language' in that order. It was also submitted by the learned Senior counsel that the two sides which were weighed by the expert to arrive at a particular conclusion have to necessarily be set out before expressing an opinion. Articulating the pros and cons and the two opposing ideas that weighed in the mind of the expert witness for arriving at the conclusion cannot be categorized as argumentative is his submission.

33 It was reiterated that portions sought to be expunged are not conclusions, but are opinions and the ultimate arbiter would be the Court. It was also submitted that inferential process has been articulated so as to enable the court to evaluate the same and come to a conclusion as to whether the opinion expressed by the expert witness is tenable and acceptable or untenable and unacceptable. It was also urged that merely because an expert witness has expressed opinions in his examination in chief, that would not mean that it is the final say in the matter. It was asserted that the final say in the matter will ultimately be that of the Court

34 Thereafter, Mr.C.S.Vaidyanathan, learned Senior Counsel pressed into service an American judgment in **Rockwater Ltd. Vs. Technip France SA (formerly Coflexip SA), Technip Offshore UK Limited (formerly Coflexip Stena Offshore Limited) [(2004) EWCA Civ 381]** being a judgment of the Court of Appeal (Civil Division), dated 1st April 2004. This judgment was relied on to emphasis the role and

primary function of an expert witness. Relying on this judgment, it was submitted that it is permissible for an expert witness to opine even on an 'ultimate question' in a patent action.

35 After concluding the submissions, the counsel on record for TVS circulated some judgments. However, for the purpose of capturing the proceedings before this commercial division / hearing as comprehensively as possible, I deem it appropriate to refer to these case laws also.

36 Paragraphs 18 and 19 of the judgment of the Supreme Court in ***State of H.P. Vs. Jai Lal and others*** reported in ***(1999) 7 SCC 280*** were relied on for driving home the nature and role of an expert. Paragraph 5 of a judgment of Calcutta High Court in ***Amiya Kumar Majumdar Vs. Gouri Prosad Ghosh [(1989) 1 Cal LJ 261]*** and paragraph 6 of another judgment of Calcutta High Court in ***Mustaque Ahmed Khan Vs. Mahammad Nasim [(2011) 1 Cal LJ 455]*** were referred to regarding relevance of evidence to be considered. Paragraph 5 of the judgment of the Calcutta High Court in ***Shreeprokash Mishra Vs. Sabitri Santhaliay [2012 SCC Online Cal 6712]*** was referred to regarding when there can be expunging. Paragraph 28 of the decision of Court of Appeals for the Federal Circuit [***Willi Moeller Vs. Ionetics, Inc [MANU/USFD/0186/1986]***] judgment, paragraph 25 of another judgment of Court of Appeals for the Federal Circuit {***Donald L. Snellman Vs. Ricoh Company, Ltd. [MANU/USFD/0181/1988]***} and paragraphs 21 / 42 of the judgment of the same Court of Appeals for the Federal Circuit {***Advanced Cardiovascular Systems, Inc. Vs. Scimed Life Systems, Inc. [MANU/USFD/0154/1989]***} were referred to regarding the expert opinion in patent litigations.

37 With regard to citations pressed into service by both sides, which have been discussed herein above, for the purpose of convenience, I am also referring to the same

briefly and precisely under the caption 'Case Laws' infra in this order.

CASE LAWS :

37(a) With regard to case laws pressed into service by Mr.T.V.Ramanujan, learned senior counsel are concerned, three judgments, namely, two Bombay High Court judgments being **Banganga Cooperative Housing Society Ltd.** and **Harish Loyalka** case and one Supreme Court judgment in **Shipping Corporation of India** (citations have been set out supra) were relied on for advancing the proposition that an application for expunction of this nature is maintainable under Section 151 of CPC. In the light of the position that has emerged in the hearing now that this commercial division has specific powers in this regard under Order XV-A and amended Order XIX of CPC as amended by the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (4 of 2016), it is not necessary to examine these judgments in great detail.

37(b) Three other judgments pressed into service by Mr.T.V.Ramanujan, learned Senior counsel, namely, one English judgment and two American judgments being **Brooks Vs. Steele and Currie** (English), **Del Mar Avionics, Inc** and **Minnesota Mining & Mfg. Co.** (American) were relied on for advancing the proposition that construction qua patent claim has to be ultimately decided by the Court. As there is no dispute with regard to this proposition and as I have also no hesitation in accepting this proposition, suffice to state that aforesaid principle in these judgments which are of persuasive value are acceptable in this lis. Two more judgments were pressed into service by Mr.T.V.Ramanujan, learned senior counsel for supporting the proposition that an expert witness cannot make a statement amounting to conclusion of law. One is **Ramesh Chandra Agrawal's** case, which is a judgment of the Supreme Court of

India. On facts, this judgment pertains to the alleged negligence on the part of a Doctor in treating a patient. In other words, it is a medical negligence case where expert evidence was let in. This does not pertain to patent litigation, but however, the proposition that an expert witness cannot make a statement amounting to conclusion of law is indisputable.

37(c) The other judgment pressed into service for supporting the same proposition is **British Celanese, Ltd's** case reported in **1935 (52) RPC 171**. To be noted, this pertains to a process patent. The scope of what an expert witness can actually be heard to say has been articulated very crisply by Lord Tomlin. As I cannot put it better than Lord Tomlin, I deem it appropriate to borrow his language. Relevant portion reads as follows :

"He is not entitled to say nor is Counsel entitled to ask him what the Specification means, nor does the question become any more admissible if it takes the form of asking him what it means to him as an engineer or as a chemist. Nor is he entitled to say whether any given step or alteration is obvious, that being a question for the Court."

In the light of the factual matrix of this case, I have no difficulty in accepting the above principle.

37(d) With regard to the judgment that was pressed into service in the hearing by Mr.C.S.Vaidyanathan, learned senior counsel, the same is an American judgment in **Rockwater Ltd.'s** case (supra). This pertains to a process patent. As alluded to supra, this was pressed into service by learned senior counsel to buttress the proposition that an expert witness can opine even on 'ultimate question'. As there is no dispute about 'can opine' and as there is no dispute that the Court will be the ultimate arbiter and that the court would take the ultimate decision, I have no

difficulty in accepting this principle in the light of the factual matrix of this case.

37(e) With regard to other judgments circulated by TVS, **Jai Lal** case, **Amiya Kumar Majumdar** case and **Mustaque Ahmed Khan** case were circulated for the principle regarding the role of an expert and as to when relevance of his evidence can be considered. **Jai Lal** case is one where a particular variety of Apples in Himachal Pradesh were destroyed by the Government as they were prone to a particular disease. **Amiya Kumar Majumdar** case is a defamation suit where relevance of evidence of the plaintiff himself was an issue. **Mustaque Ahmed Khan** case is a suit regarding eviction and here again the evidence of the plaintiff himself was in question. As it has been submitted by learned Senior counsel for the TVS before me that the expert witness in patent litigations are in a different realm and also in the light of the factual matrix of these cases, I am not delving into these case laws by holding that these case laws do not help TVS in the instant case.

37(f) **Shreeprokash Mishra** case was circulated to highlight when expunction can be allowed. This again is an ejectment suit and expunction of evidence of plaintiff was sought. Owing to this factual matrix, I am not delving into this judgment by holding that this case law does not help TVS in the instant case.

37(g) Three more American case laws, viz., **Willi Moeller** case, **Donald L. Snellman** case and **Advanced Cardiovascular System, Inc's** case were circulated with regard to scope of expert opinion in patent litigation. These judgments and the principles culled out therein have persuasive value on Indian courts. I am not delving into these case laws for two reasons. One reason is I am leaving open the question as to whether P.W.3 will qualify as an

expert witness at all. The second reason is, there is no dispute before me that the opinions expressed by an expert witness do not by themselves become conclusive, but are only aid for the court to take a final call.

38 It was submitted before me by Mr.C.S.Vaidyanathan, learned Senior Counsel appearing for TVS that they have already given a list of witnesses and there are only three witnesses on their side. It was further submitted that P.W.2, who was indisposed, is also now available for cross examination.

39 On the side of Bajaj, this commercial division was given a copy of list of witnesses in the course of reply submissions, there are three witnesses.

40 Going back to the Case Management Schedule, an order made by a learned Judge of the Delhi High Court presiding over the Commercial Division in CS(OS)No.764 of 2015 was placed before me to impress upon this commercial division that stiff, tight and short time lines are in fact being prescribed by commercial divisions for expediting hearings. This admits of no exception and requires no qualification.

41 It was reiterated that the case management hearing has to be held in the instant case. It was submitted by Mr.C.S.Vaidyanathan, learned Senior counsel that it is mandatory to hold case management hearings. I am unable to accept that it is mandatory. The reason is, with regard to transferred cases, it is the discretion of the commercial division and that the same is clearly engrained in sub-section (4) of Section 15 of the Act 4 of 2016. I am also of the view that such discretion has been vested with the commercial division by statute under Section 15(4) of the Act 4 of 2016 and such an extra width in the batting crease has been given to the commercial division as cases that are being transferred may be transferred at different stages and such cases may include cases at a very advanced stage

which are in the anvil of disposal. I deem it appropriate to extract section 15(4) which reads as follows :

15.Transfer of pending cases.

* * * * *

(4)The Commercial Division or Commercial Court, as the case may be, may hold case management hearings in respect of such transferred suit or application in order to prescribe new timelines or issued such further directions as may be necessary for a speedy and efficacious disposal of such suit or application in accordance with Order XIV-A of the Code of Civil Procedure, 1908 (5 of 1908)."

42 However, in the instant case, I am inclined to accept the plea of Mr.C.S.Vaidyanathan, learned Senior counsel that case management hearing is necessary in the instant case. Mr.T.V.Ramanujan, learned Senior Counsel on 13.12.2017 sought time to get instructions on that, but placed a response on case management schedule in continuation of reply on 14.12.2017. I deem it appropriate to dispose of this instant application on merits now and fix a case management hearing in the ensuing week. There is one more reason for me to adopt such a course. Though I accept the request of Mr.C.S.Vaidyanathan, learned senior counsel to hold case management hearings (while not accepting the submission that it is mandatory in transferred cases), P.W.3 is an expert witness and I am informed that he has already left Europe and is travelling / on his way to India. The cross examination is fixed for this weekend, i.e., 16.12.2017 and 17.12.2017 (Saturday and Sunday) before the Sole Commissioner as set out supra. Therefore, this application needs to be disposed of one way or the other without further delay.

43 By way of further reply, learned Senior counsel

Mr.T.V.Ramanujan referred to Rule 103 of the Patents Rule, 2003 and said that it is not necessary to have an expert witness, but inputs can be taken from the scientific advisor. It was also submitted by learned Senior counsel that it cannot be argued that the proof affidavit will stand as it is and that the adversary should fill up the laches by cross examination.

44 Notwithstanding the elaborate submissions that were made before this commercial division, I am of the considered view that this application turns on a very narrow compass . That narrow compass is whether any prejudice would be caused to Bajaj if expunction is not allowed. There is absolutely no fetters or restrictions with regard to cross examination. Bajaj can cross examining P.W.3 on each and every aspect of the matter including probing questions touching upon whether P.W.3 will qualify as an expert witness at all. I do not want to elaborate much on the possible questions in this direction even by way of illustration as trial is under way. In this regard, though it was submitted that an expert witness is normally not discredited, I have no hesitation in taking the view that an expert witness may not be discredited, but there is no limitation when it comes to discrediting the evidence / deposition of an expert witness. Further more, portions of proof affidavit sought to be expunged, in my view, appear to be considered opinions of P.W.3 and those portions which are alleged to be argumentative are merely articulating the nature of consideration which have worked in the mind of P.W.3 while arriving / for at such opinions. Such opinions can attain the status of conclusions qua issues in this lis only if the court ultimately accepts those conclusions. The considerations for P.W.3 to express such opinions have to be necessarily not just put before, but articulated before the court for such evaluation. Beyond all these, post deposition, at the time of final arguments in the suit, enlightening submissions of learned counsel will be before

this commercial division on the deposition of P.W.3 and as to whether the opinions of P.W.3 have to be ultimately accepted at all. The final arbiter is the Court.

45 With regard to the allegation that P.W.3 is parroting the pleadings of TVS, he has to again withstand the cross examination. Though P.W.3 is a Patent Attorney, in the instant case, he is not appearing as Attorney, but as a witness. As a witness, P.W.3 has to necessarily answer the questions put to him in cross examination as long as those questions perambulate within what he has stated in the proof affidavit and as long as it is relevant. As a witness, if P.W.3 refuses to answer the questions or if the answers are not convincing, the inevitable legal consequence is that the so-called conclusions, which in my view are only opinions, will not be accepted by the Court. In other words, merely because P.W.3 expresses an opinion, it does not mean that it conclusively decides any issue at lis. Once P.W.3 touches upon a technical aspect and expresses the same as his considered opinion, he can be confronted not only by way of questions, but even with material that may run contrary to his opinion. If done so, then it is for the Court to decide whether P.W.3, convincingly advanced his opinion or has whittled and failed to be convincing.

46 With regard to whether P.W.3 qualifies as an expert witness, in the light of Section 45 of the Indian Evidence Act, 1872 and Section 3 of the Patents Act, 1970, which have been pitted against each other by the the adversaries before me, I leave this question open, so that the cross examination is completely unfettered. In other words, I do not want to express any view as the same might either stifle or strengthen the cross examination depending on the opinion I express.

47 With regard to repeating, Mr.T.V.Ramanujan, learned senior counsel submitted that the tabular column in paragraph 24(b), a portion of paragraph 28(b) and a portion

of paragraph 30(b) of the written statement of TVS in C.S.No.1111 of 2007 have been repeated in paragraphs 11, 7 and 10 respectively of the proof affidavit. I have compared the proof affidavit of P.W.3 and the aforesaid portions of the pleadings of TVS. To my mind, it does not appear to be an exact repetition as contended. Besides this, these are technical issues pertaining to engineering equipment. Therefore, the language cannot be different depending on the author, unlike a literary work where the language in which a particular concept is articulated can vary vastly and be completely different depending on the author, though it is articulation of the same concept.

48 Owing to all that have been stated supra, I have no hesitation in holding that no prejudice or hardship, whatsoever, will be caused to Bajaj if the prayer for expunction is not acceded to. This coupled with the need to expedite this Intellectual Property Rights ('IPR' for brevity) litigation which is a decade old and which has now just come into the fold of the Commercial Division have weighed in my mind in disposing of this application in the manner set out infra.

49 There is one unique aspect with regard to patent law and litigation arising therefrom. Any invention has to be expressed by way of claims. Highly technical inventions, when expressed by way of claims, are subject to limitations of expression and articulation in a language. In any language, the expression and articulation has certain limitations. Therefore, the need of an expert who may either be an expert qua art of the patent or science and the art of reading such claims will certainly help the court in taking the final call.

50 Out of the portions of the proof affidavit which are sought to be expunged, one that comes closest to the expression 'conclusion' is a part of paragraph 24, which reads as follows :

"24. In my view, the Indian

Patent 195904 is thus, invalid."

51 However, even this portion commences with the expression "In my view,". Therefore, there is not much difficulty in accepting this as an opinion. In this regard, several foreign judgments have been pressed into service. It may be a matter of interest to note that in the English legal system, even judgments are referred to as opinions. Considering the limited scope of this application, I leave it at that.

52 In the light of the discussions supra, I deem it appropriate to dispose of this application with the directions enumerated infra without acceding to the expunction prayer. For the purpose of clarity, I deem it appropriate to set out the order and the directions in the following manner :

(a)The prayer for expunction / prayer to expunge certain portions of the proof affidavit of P.W.3 (Michael Babeluk) dated 19.9.2017 is not acceded to. In other words, the prayer is negatived.

(b)The question as to whether P.W.3 will qualify as an expert witness qua this lis is left open. At the time of final disposal of the suits, submissions inter-alia in the light of cross examination of P.W.3 can be advanced by both sides and this commercial division will take a decision at that point of time.

(c)In cross examining P.W.3, it will be open to Bajaj to put questions touching upon the aforesaid issue as to whether P.W.3 will qualify as an expert witness at all, qua the instant lis.

(d)It will also be left open to Bajaj to assail the evidence of P.W.3 by putting to him not only questions, but even material which may be necessary for disproving the opinions expressed in

the proof affidavit.

(e) Though obvious, it is made clear that the contents of the proof affidavit of P.W.3 or any part of the proof affidavit shall not be read either an argument on behalf of TVS or as any kind of conclusions qua lis by this commercial division while deciding the main suit.

(f) Though obvious, the entire deposition and the answers thereto shall perambulate within the four corners of the contents of the proof affidavit or should at least be relatable to the contents of the proof affidavit. In other words, there shall be no additions and fresh inputs even while answering the questions in cross examination (this should be read in conjunction with (d) supra).

(g) It will be open to Bajaj to canvass in the final hearing of the suit that in the light of answers of P.W.3 in cross examination, evidence of P.W.3 should be eschewed either in full or in part and if Bajaj chooses to do so, this court shall decide that issue also on merits without being swayed by this order.

(h) Considering that this is a commercial division, exercising my rights qua case management, I direct that cross examination of P.W.3 shall be for two days, i.e., on 16.12.2017 and 17.12.2017 and shall be concluded and completed on 17.12.2017. The re-examination, if any, shall be done on the same day, i.e., day on which cross examination is concluded. In other words, the entire deposition of P.W.3 shall be completed on 17.12.2017.

53 This application is disposed of with the above directions. No costs.

54 Let the Registry list the main suits before this commercial division on 08.01.2018 for case management hearing. Registry shall show this matter on 08.01.2018 under the caption 'Case Management hearing'.

55. After I pronounced orders in the aforesaid application, learned counsel on both sides, i.e., Mr.T.K.Bhaskar for T.V.S. Motor Company Ltd. and Ms.Rithika Reddy representing Mr.Arun C.Mohan, learned counsel on record for Bajaj Auto Ltd., made a joint request to the Court.

56. Both learned counsel submit that they accept the order pronounced by this Court, they are giving legal quietus to the order and will be proceeding with the deposition of P.W.3 tomorrow and day after tomorrow (16.12.2017 and 17.12.2017).

57. It is submitted that there is one difficulty in this as the sole commissioner Mr.Manikkam, who is to record evidence, is not available tomorrow and day after tomorrow (16.12.2017 and 17.12.2017), because of some lapse in communication. Therefore, for recording evidence of P.W.3 on 16.12.2017 and 17.12.2017 (Saturday and Sunday) alone, a joint request is made that Mr.J.Krishnamoorthy, Retired District Judge, No.2D, Nutech Krishna, D.No.37, Soundararajan Street, T.Nagar, Chennai-600 017 (Mobile No.9442092363) shall be permitted to function as the Sole Commissioner.

58. The aforesaid is merely an interim arrangement for the aforesaid two days as P.W.3, I am informed, is travelling from Austria / Europe to India only for the purpose of deposing and he has already reached India. Learned Senior counsel for both sides, i.e., TVS and Bajaj, are also outstation Senior counsel and I am informed that they have already left for Chennai and are in transit. Therefore, to avoid delay and inconvenience, solely as a matter of logistics, this interim arrangement for two days shall operate.

59. Registry shall communicate this order to the Arbitration Centre under the aegis of the Madras High Court. This proceedings shall become an addendum to the order passed today and therefore, this will form part of the order pronounced today in the aforesaid application (though as a postscript), as the aforesaid request was made after the order was pronounced.

Sd/- M.S.J

15/12/2017

//Certified to be true copy//

Dated at Madras this the day of 2017.

COURT OFFICER(O.S.)

From 25th Day of September 2008 the Registry is issuing certified copies of the Orders/Judgments/Decrees in this format.