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

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FAO(OS) 292/2017 & CM No.41489/2017

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Date of decision : 29th November, 2017

KYK CORPORATION LIMITED & ORS Appellants
Through : Mr. Aayushmaan Gauba, Adv.

versus

VIVEK KOCHHER & ANR ... Respondents
Through : Mr. Umesh Mishra, Adv.

CORAM:
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT (ORAL)

GITA MITTAL, ACTING CHIEF JUSTICE

1. It is submitted by ld. counsels for both the parties that such record of *CS(OS)No.1305/2009 Vivek Kochher & Anr. vs. M/s KYK Corporation Limited & Ors.* as is necessary for consideration of this appeal has been filed along with this appeal.

With the consent of both parties, this appeal is taken up for consideration.

2. We have heard ld. counsels for both the parties.

3. The appellants before us, who are the defendants in

CS(OS)No.1305/2009, assail the order dated 12th October, 2017 (*at page 42*) whereby the Id. Single Judge has dismissed the applications of the appellants/defendants being I.A.Nos.8464/2017, 8465/2017 and 8466/2017.

4. The defendant No.1 filed the first application being I.A.No.8464/2017 under Section 151 of the CPC seeking leave to file the list of witness and affidavit of its witnesses. The second application, I.A.No.8465/2017, was filed under Order VIII Rule 1A of the CPC by the appellant no.1/defendant no.1 seeking leave to file the additional document in the nature of a power of attorney in favour of its constituted attorney Shri Kiran Rajpurohit and bringing on record the said attorney holder. The third application being I.A.No.8466/2017 was filed by the defendant no.1 under Order XVIII Rule 17 of the CPC seeking recalling of the witnesses of the plaintiffs for cross examination.

These three applications were dismissed by the Id. Single Judge by the impugned order dated 12th October, 2017.

5. It is necessary to briefly note the nature of litigation between the parties in order to appreciate the circumstances in which the applications need to be considered.

6. The respondents/plaintiffs filed CS(OS)No.1305/2009 on the original side of this court claiming rights in a trademark 'KYK' alleging the infringement of the trademark and praying for passing of other reliefs against the appellant/defendant no.1 in respect of the trademark 'KYK' with regard to bearings and spare parts for the use of automobiles by the appellants.

7. By an ex-parte ad-interim order dated 22nd July, 2009, the Id. Single Judge restrained the appellants from using the said trademark 'KYK' and trade name 'KYK Corporation Limited'. The prohibition by the order dated 22nd July, 2009 was in the following terms :

“...Accordingly, it is directed that till the next date of hearing the defendants by themselves as also through their directors, proprietor, partner (if any), servant, agents, assigns, representatives and any other acting on their behalf shall be restrained from using, marketing, selling, offering for sale, advertising or displaying directly or indirectly or dealing in any other manner or mode in parts of land vehicles including bearing (Axle) for vehicle wheels and bearings for wheels and all allied and cognate goods under the trade mark KYK and trade name KYK Corporation Limited or any other trademark which is identical or deceptively similar...”

8. The defendant no.1 filed its written statement as well as instituted a counter claim against the respondent no.1. The injunction was also contested by the defendant no.1 by way of two applications being I.A.Nos.11984/2009 and 12427/2009, both filed under Order XXXIX Rule 4 of the CPC.

9. By a detailed judgment dated 1st July, 2010, the Id. Single Judge modified the ex-parte ad interim order dated 22nd July, 2009 and ordered an interim arrangement till disposal of the suit in the following terms :

*“Thus having considered the material on record at length, I am of the prima facie view that looking at the state of evidence that both parties have produced before me, the interim order **dated 22.07.2009 will have to be modified to the extent indicated herein below, as a measure of interim arrangement, during the pendency of the suit.***

*Accordingly, it is directed that the plaintiffs shall manufacture and trade in goods referred in class 7 and 12 under the trade mark KYK (India), while **defendant No.1 shall manufacture and trade in goods referred in class 7 and 12 under the trade mark KYK (Japan).** In so far as the trade names are concerned, **plaintiffs shall include “India” as part of its name, while defendant No.1 shall include “Japan” as part of its name.** Thus, plaintiffs No.2, i.e., the proprietorship concern shall bear the name KYK International (India); and similarly, defendant No.1 shall attach the suffix “Japan” with its name.*

The captioned applications are disposed of in the terms indicated above.”

(Emphasis by us)

10. The above order was assailed by the respondents by way of FAO(OS)No.566/2010, which was withdrawn by the order dated 7th March, 2013.

11. The appellants appear to have also approached the Intellectual Property Appellate Board (IPAB) seeking cancellation/rectification of the registration of the trademark ‘KYK’ registered under No.1291522 in Class 7 and 949032 in Class 12 under the provisions of the Trade Marks Act, 1999. The IPAB accepted the challenge and by its order dated 10th February, 2012 in ORA/220/2009/TM/DEL & ORA/220/2009/TM/DEL ordered the cancellation of the registered trademark KYK in Class 7 and 12 of the respondent/plaintiff directing it to be cancelled/expunged from the Register of Trademarks.

12. The factual narrative also discloses that the respondent’s challenge to the order of the IPAB by way of WP(C)No.2496/2012

was dismissed by this court by an order passed on 3rd November, 2017.

13. The appellants claim to be the prior user and proprietor of the trademark 'KYK' internationally for more than 50 countries since 1952. Extensive business is also claimed to be carried out globally by the appellant including the India, since 1952. The respondents dispute the prior presence of the appellants in India.

14. The appellants also claim rights in the trademark KYK on the ground that it has all the trappings of a coined expression and an arbitrary and fanciful trademark which is inherently distinctive and has come to be exclusively associated with the appellant.

15. Given the nature of the challenge before us, it is not necessary for us to delineate on the claims of the appellants regarding its entitlement over the trademark in question. It is essential to bear in mind that the appellants are not merely defending the suit filed by the respondents but are asserting rights and claim by way of their counter claim.

16. It is submitted by Mr. Umesh Mishra, Id. counsel for the respondents/plaintiffs that as on date the respondent is in the process of filing an appeal against the order dated 3rd November, 2017. Be that as it may, as on date there is no registration of the trademark in favour of the respondent.

17. So far as proceedings in the suit and counter claim are concerned, issues were framed on 25th March, 2011. The court directed the plaintiff to adduce evidence in the first instance; list of witnesses of the plaintiff was required to be filed within six weeks and

affidavit by way of evidence within 10 weeks.

18. The record shows that this order was not complied with and the belated filing of the affidavit by the respondents was permitted only subject to payment of costs of Rs.30,000/- which was directed by the court on 25th March, 2011. Instead of depositing the costs, the matter was diverted into the consideration of an application being I.A.No.11654/2011 by the plaintiffs/respondents. This application was dismissed by the order passed on 27th January, 2012.

19. Both, the matter of payment of costs and recording of evidence were also delayed at the instance of the respondents/plaintiffs on every date, which is evident from the order sheets in the suit record.

20. On 30th July, 2012, the respondents/plaintiffs sought time on the ground that its witness had not brought the original documents. In these circumstances, the recording of evidence commenced only on 17th January, 2013. The cross-examination of the witness was deferred and not recorded for want of time on 17th July, 2013 and 5th July, 2013. On 18th December, 2013, on request of both sides, the matter was referred to the Delhi High Court Mediation and Conciliation Centre to explore the possibilities of settlement and therefore, was adjourned to 22nd May, 2014 and thereafter to 27th October, 2014.

21. On 7th April, 2015, adjournment was requested by counsel for the defendants on the ground that his father was not well and therefore, the case stood adjourned to 9th September, 2015 for cross-examination of the PW-1. Unfortunately, none appeared in the case on behalf of the appellants/defendants thereafter.

22. In these circumstances, opportunity to cross-examine PW-1 was closed on 9th September, 2015. PW-2 was also present before the Joint Registrar. His examination-in-chief was recorded and he was discharged. The plaintiff thereafter examined PW-3 Shri Devender Singh, VAT Inspector, Department of Trade and Taxes and PW-4 Shri Qayamuddin Partner, Metro Bearing Company on 2nd February, 2016. In the absence of representation of the appellant, these witnesses were also discharged after recording of their examination-in-chief. The examination-in-chief of PW-5 and PW-6 was thereafter completed in similar circumstances on 5th April, 2016 and the plaintiff closed its evidence.

23. So far as right of the defendants to lead evidence is concerned, in view of the above default, the leave to lead evidence in the counter claim was also closed by the order dated 12th August, 2016 passed by this court. The matter was directed to be placed in the category of '*Finals*' for arguments.

24. Inasmuch as the matter remained in the category of '*Finals*' for several months before it was actually called out on 7th March, 2017, the Id. Single Judge by the order dated 7th March, 2017 issued court notice to the defendants through counsel for 10th April, 2017. It was only in response to the court notice that counsel for the appellants appeared before the court on 10th April, 2017 and sought time to take instructions.

25. In this background, the aforesaid I.A.Nos.8464/2017, 8465/2017 and 8466/2017 came to be filed which were listed before court for the first time on 28th July, 2017. These applications were

premised on same reasons and gave identical explanation for the non-appearances and the defaults.

26. It has been submitted by the appellants in the applications that the appellant/defendant no.1 is a corporation which is incorporated in the laws applicable in Cho Ski City, Japan and it does not maintain an office in India. For this reason, it had appointed one Mr. Mohan Rajpurohit as the appellants constituted attorney in the case. This Mr. Mohan Rajpurohit, a representative of the appellants, was the sole selling agent. This Mr. Mohan Rajpurohit was coordinating with the counsel and was giving instructions on its behalf for defending the suit and prosecution of its counter claim. In June – July, 2015, Mr. Mohan Rajpurohit resigned from the services of sole selling exclusive distributor in Delhi and commenced his own business in Delhi.

Information of the resignation of Mr. Mohan Rajpurohit and cessation of the association with the appellants agent was not given or brought to the notice of appellant/defendant no.1.

27. In these circumstances, the appellants/defendants remained under the sincere impression that said attorney was taking all steps in the matter to effectively defend the suit and prosecute the counter claim.

28. So far as non-appearance of the counsel is concerned, the appellant discloses that instructions to counsel were being also given by the said constituted attorney and in view of his cessation from service with the distributor of the appellant, the said attorney neglected to also inform the counsel about his resignation and therefore, the counsel received no instructions in the matter resulting

in his absence from the matter on the aforementioned dates.

29. So far as impugned order dated 12th October, 2017 is concerned, it cannot be denied that the Id. Single Judge has rightly observed that if the prayer of the appellant made in the application is accepted, the suit would be put back by two years. However, it is evident from the narration of the dates and the manner in which the plaintiff has prosecuted the case, despite framing of issues on 25th March, 2011, the evidence in the matter was recorded for the first time only on 17th July, 2013. Even after the order dated 12th August, 2016 placing the suit in the category of 'Finals' was passed, it could be taken up for the first time more than seven months later on 7th March, 2017.

30. It cannot be denied that every party has to lead its defence or prosecute its claim diligently. The appellant was bound to have ensured the progress of the case in the matter. It is necessary also to bear in mind that the appellant has been prosecuting its rights in the claimed trademark under the Trade Marks Act. It had initiated proceedings before the Intellectual Property Appellate Board as well as contested the writ petition filed by the respondent in respect to the trademark.

The filing of the counter claim manifests that the appellant is conscious and has been prosecuting its rights against the respondents. Thus, it is not only the matter of cross-examination of the plaintiff's witness but closure of the right of the appellant to lead evidence in support of its counter claim.

31. The appellant has stated that it has received no communication from the counsel regarding the proceedings in the suit. It remained

under the impression that its rights were being protected and it was being represented before the court.

It therefore, cannot be held that the appellant has been negligent in protecting its rights.

32. On a consideration of the above, we are of the view that the delay which could result, if the appellant was granted opportunity to bring on record its documents; recall of plaintiff's witness for cross-examination and an opportunity to lead evidence can be compensated by imposition of costs upon the appellant. Even otherwise expedition can be lent to completion of these proceedings by appointment of a Local Commissioner. In the given facts and circumstances of the case, we are of the view that the right to defend the suit and to prosecute the counter claim ought not to be defeated by closure of opportunity which has been sought by the appellant.

33. Ld. counsel for the appellant submits that the appellant would have no objection, if a Local Commissioner is appointed for recording of the evidence at the costs of the appellant.

34. In view of the foregoing facts and circumstances, it is directed as follows:

- (i) Subject to payment of costs of Rs.2,00,000/- to be paid within three weeks from today, the order dated 12th October, 2017 is hereby set aside and quashed. The costs shall be equally apportioned between the respondent and the Delhi High Court Bar Association Lawyers' Social Security & Welfare Fund. Proof of payment of deposit of costs shall be placed before the Id. Single Judge in CS(OS)No.1305/2009.
- (ii) I.A.No.8465/2017 is also consequently allowed and the power

of attorney dated 19th July, 2017 filed by the appellant is permitted to be brought on record of the suit subject to it being proved in accordance with law.

(iii) I.A.No.8466/2017 is allowed and the five witnesses are permitted to be recalled for cross-examination by the appellant. So far as PW-1 & PW-2 are concerned, it is submitted by Id. counsel for the respondents that these witnesses shall be produced for cross-examination on behalf of the appellant on date which may be fixed for the purpose by the Local Commissioner. So far as Pw-3 to 6 are concerned, in case the appellant seeks to cross-examine these witnesses, it shall be the responsibility of the appellant to take steps in the nature of filing the application(s) and process fee for summoning these witnesses on dates which may be fixed by the Local Commissioner for this purpose.

(iv) As a result, I.A.No.8464/2017 is allowed and defendant no.1 is permitted to file the list of witnesses within two weeks. The appellant shall file examination-in-chief on affidavits of its witnesses within four weeks thereafter and produce the witness for recording of statement of cross-examination by the defendant on all dates as may be fixed by the Local Commissioner. In case the appellant is not in a position to file examination-in-chief of affidavit of any witness, it may produce the witness for recording of oral testimony on dates which may be fixed by the Local Commissioner. In case the appellant/defendant no.1 seeks issuance of summons for any witness, it shall take steps in accordance with law for the same.

(v) The parties shall be permitted to lead rebuttal evidence, if any,

in the suit and counter claim.

(vi) We hereby appoint Shri H.S. Sharma (Retd. District Judge, Mobile No. 9910384647) as Local Commissioner for recording the evidence in the case. The fees of the Local Commissioner is fixed at Rs.1,50,000/- lakhs at this stage. It shall be open to the Id. Single Judge upon receipt of the record of the Commission, to assess sufficiency and make appropriate orders for additional fees if called for.

(vii) The Local Commissioner shall proceed expeditiously in the matter.

(viii) It shall be the responsibility of the appellant/defendant no.1 to bear all secretarial expenses for the Local Commissioner and make arrangement for the same for recording of the evidence.

(ix) As submitted by the parties, the court official who would be required to produce the record on all dates fixed by the Local Commissioner shall be paid a sum of Rs.1,000/- for each date of visit.

(x) It is made clear that the costs which we have imposed and the expenditure incurred on execution of the Commission shall form part of the costs which are finally awarded in the suit.

(xi) The parties shall appear before the Local Commissioner on 16th December, 2017 for fixing the dates for further proceedings.

(xii) In view of the above, this case need not be shown in the category of '*Finals*' in the cause list on the original side.

This appeal is allowed in the above terms.

CM No.41489/2017

In view of the order passed in the appeal, this application does not survive for consideration and is disposed of.

ACTING CHIEF JUSTICE

C.HARI SHANKAR, J

NOVEMBER 29, 2017

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