

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 15.02.2018

Date of Decision : 14.03.2018

CORAM

THE HON'BLE Mr.JUSTICE M.SUNDAR

A.No.8007 of 2017

in

C.S.No.405 of 2014

M/s.Lehry Instrumentation and Valves Private Limited,
No.78/Old No.51, Sembudoss Street,
Parrys, Chennai-600 001.
Tamil Nadu,
through its Managing Director.

.. Applicant

Vs.

RubINETTERIE Bresciane Bonomi SpA,
Via M.Bonomi 1, 25064, Gussago, Brescia (Italia)
through its Authorised representative
Mr.Federico Salatini

.. Respondent

This application has been preferred under Order XIV Rule 8 of O.S.
Rules read with Section 151 of CPC seeking to eschew the proof
affidavit of P.W.3, Mr.Vincent Jose.

For Applicant : Mr.P.S.Raman, SC
for Mr.M.S.Seshadri

For Respondent : Mr.P.H.Arvind Pandian, SC
for Ms.Gladys Daniel

ORDER

Sole applicant herein is the lone defendant in the main suit.
Lone respondent herein is the sole plaintiff in the main suit.
Parties in this application are referred to by their respective ranks
in the main suit, i.e., C.S.No.405 of 2014 for the sake of
convenience and clarity. The applicant herein besides being referred
to as defendant is also being referred to as 'Lehry' wherever it is
deemed necessary. Equally, the plaintiff is also being referred to as
'RB' wherever necessary.

2 Besides the aforesaid suit C.S.No.405 of 2014 in which the instant application which is being disposed of by this order, i.e., A.No.8007 of 2017 has been taken out, there is one more later suit which is referred to as second suit.

3 The second suit is C.S.No.891 of 2015 and the same has been filed by 'Lehry' against 'RB'. This second suit has been tagged with C.S.No.405 of 2014. To be noted, C.S.No.405 of 2014 has been filed by 'RB' with prayers for injunction against 'Lehry' qua passing off with other usual prayers for accounts, damages and cost. There is also mandatory injunction prayer directing defendant to disclose the identity with full particulars of the manufacturer of alleged counterfeit product, but it is not necessary to delve into all these aspects of the matter considering the limited scope of this application.

4 For the sake of completing the facts, suffice to say that the second suit, i.e. C.S.No.891 of 2015 has been filed by 'Lehry' seeking a declaration that termination of dealership by 'RB' is bad. There is also a money claim regarding redelivery of imported goods imported by 'Lehry' from 'RB'. There is also a prayer for permanent injunction qua publication of defamatory allegations, besides claims for damages and cost. However, as mentioned supra, it is not necessary to delve into these aspects considering the limited scope of this application. Even these facts are being set out here only for the sake of completing the narration of bare minimum facts necessary for a broad understanding of the nature of the litigation.

5 The entire lis in a nutshell is as follows :

(i)RB claims that it is a manufacturer of various kinds of valves.

(ii)Lehry is one of RB's major associates in India since 2005, wherein and whereby Lehry was purchasing valves from RB and selling them in Indian markets.

(iii)RB some time in May 2014 came to know from a complaint from an Indian company about substandard quality in some of its products.

(iv)It is the case of RB that on enquiring further about substandard valve complaint, it came to light that Lehry has been importing substandard valves from China and selling the same in Indian markets by using RB's trademark.

(v)In the second suit, Lehry while denying the

aforesaid allegation has claimed that there is a dealership agreement between RB and Lehry and that the same was wrongfully terminated in bad faith.

6 As far as the stage of the suit is concerned, pleadings have been completed, issues have been framed and trial is under way. RB has commenced the trial. Two witnesses, namely P.W.1 and P.W.2 have already been examined. Now, RB has examined P.W.3 in chief. When I say RB has examined P.W.3 in chief, a proof affidavit of P.W.3 dated 30.11.2017 has been filed. To be noted, P.W.3 is one Vincent Jose, who is described as Director in one Insta Quest Consulting Pvt. Ltd. with office in Noida. This Insta Quest Consulting Pvt. Ltd. is said to be an investigator whose services were deployed by RB pending suit.

7 The instant application, i.e., A.No.8007 of 2017 has been taken out by Lehry with a prayer to eschew the entire proof affidavit of P.W.3.

8 To be noted, the instant application has been filed on 04.12.2017, that very day on which Commercial Division was notified in this Hon'ble Court. The prayer for eschew has been made by invoking Section 151 of Code of Civil Procedure, 1908 ('CPC' for brevity). However, after notification of Commercial Division in this Hon'ble Court on 04.12.2017, it is not necessary to take recourse to Section 151 of CPC as there are specific provisions for this purpose now available in CPC itself as amended by the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (hereinafter referred to as 'Act 4 of 2016'). Those specific provisions are Order XIX Rule 4 sub-rule (2) and Rule 5 sub-rule (i) of CPC. Though the instant application has been filed under Section 151 CPC, I treat the same as an application inter-alia under Order XIX Rule 4(2) and Order XIX Rule 5(i) of CPC.

9 The instant eschew application filed by Lehry is predicated on three grounds. Three grounds are as follows :

(i)RB earlier took out an application in A.No.2556 of 2017 under VII Rule 14 sub-rule (3) of CPC with a prayer to file as many as 14 additional documents and one material object in the form of CD containing data. This application was dismissed by this Court on 24.7.2017 mainly on the ground that documents and material object sought to be marked were in possession

of plaintiff from June 2014, they were not filed earlier and that the application has been filed after cross examination of other witnesses. The instant proof affidavit of P.W.3 which is being sought to be eschewed talks about serial Nos.1 and 2 which are derived from the aforesaid material object, i.e., CD containing data which is serial No.15 in the list of documents and material object that were being sought to be filed under A.No.2556 of 2017. RB having failed in its attempt to file certain documents belatedly is now getting a witness, i.e., P.W.3 to talk about those documents and mark the documents through P.W.3.

(ii)The evidence of P.W.3 is not supported by pleadings.

(iii)Proof affidavit of P.W.3 is in contravention of Section 59 of the Evidence Act, 1872.

10 RB's answer to the above three points are as follows :

(i)What was sought to be filed earlier was a zip file containing huge data pertaining to all bills of entry at that relevant point of time, whereas P.W.3 is now talking only about specific bills of entries under which alleged counterfeit products were imported from China by Lehry.

(ii)With regard to marking of documents, it is very fairly submitted by Mr.P.H.Arvind Pandian, learned Senior counsel appearing for RB that they will not mark even these documents if Lehry agrees to cross examine P.W.3 and proceed with the trial without insisting on this eschew application. In fact, learned senior counsel for RB went a step further and said if this commercial division agrees with his submission and if it dismisses the eschew application, RB will still consider proceeding with the matter if Lehry gets along with trial without delay by agitating the matter further.

(iii)It is incorrect to say that the proof affidavit of P.W.3 is not supported by pleadings and there are in fact abundant pleadings in this regard.

(iv)This is not in contravention of Section 59 of the Evidence Act as this is not a case of proving through

oral evidence and what is required to be established is by documents.

11 The submission made by learned senior counsel for RB that they will not mark documents listed in the proof affidavit of P.W.3 which are objectionable (to be particular, serial Nos.2 to 10, 13 to 19) though very fair, does not further the case of RB in the instant application in the light of RB having suffered order dated 24.7.2017 in A.No.2556 of 2017.

12 With regard to the complaint of Lehry that deposition of P.W.3 as contained in the proof affidavit dated 30.11.2017 which is being sought to be eschewed not being supported by pleadings, I have no difficulty or hesitation in holding that this can never be a ground for a prayer to eschew a proof affidavit. However, I am not going into this question in the instant case as RB has suffered an order in A.No.2556 of 2017 and has given a quietus to the same.

13 With regard to Section 59 of Evidence Act, in the light of the earlier order in A.No.2556 of 2017, wherein and whereby RB's prayer to belatedly file 14 documents and one material object was turned down, the question as to whether evidence which has to be let in by way of documentary evidence is being substituted with oral evidence, need not be gone into in the instant application. This is more so as RB has not assailed the order dated 24.7.2017 in A.No.2556 of 2017 and has given a quietus to the same.

14 One other important aspect of the matter is a detailed order dated 15.12.2017 made by this Commercial Division (authored by me) in ***M/s.Bajaj Auto Limited Vs. M/s.TVS Motor Company Limited*** reported in ***2018-1-L.W. 624*** and ***2018 (1) CTC 849*** [A.No.8210 of 2017 in C.S.No.979 of 2017], in the by now famous TVS Vs. Bajaj patent suit, was pressed into service by RB. Specific reliance was placed by learned senior counsel on paragraphs 44 to 52 of my order. I deem it appropriate to extract paragraphs 44 to 52 which read as follows :

"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 as 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."

15 In the normal circumstances, I would have disposed of this application in the same lines as that of the order in expunction application in TVS Vs. Bajaj patent suit reported judgment authored by me. To be noted, relevant paragraphs in my aforesaid TVS Vs. Bajaj order regarding expunction have been extracted and reproduced supra. However, what comes in the way of my adopting that course in this case is the order dated 24.7.2017 made in A.No.2556 of 2017 (before notification of Commercial Division) by another learned Single Judge of this court. A.No.2556 of 2017 is an application in this suit taken out by RB inter-alia under Order VII Rule 14(3) of CPC which pertains to filing / production of documents belatedly. As would be evident from the discussions supra, some of the documents which were sought to be produced / filed vide earlier application have been referred to in the instant proof affidavit. Though it has been very fairly submitted on behalf of RB that those documents will not be marked if Lehry proceeds with cross examination, a perusal of proof affidavit which is sought to be expunged reveals that P.W.3 has certainly spoken about those documents. No doubt, earlier application was only a permission for filing / producing documents and any documents filed / produced are subject to proof and relevance, but having suffered an order, i.e., order dated 24.7.2017, wherein and whereby A.No.2556 of 2017 was dismissed, it may not be appropriate to permit P.W.3 to speak about it by way of oral evidence when RB has given quietus to that order. This is in the light of the fact that RB has not preferred an appeal against the aforesaid order dated 24.07.2017 made in A.No.2556 of 2017. Not having filed an appeal, if this expunction application is dismissed, RB which did not file an appeal against the order not permitting it to file / produce certain documents, will now be permitted to speak about those documents by way of oral

evidence through P.W.3. Therefore, I have no option other than allowing this expunction application on this one ground.

16 Before parting with this case, I deem it appropriate to write about one aspect that this application has brought into focus. According to me, trial should progress at brisk pace without being interrupted by interlocutory applications. When trial is in progress, interlocutory applications should be taken out only when it is completely unavoidable, when it becomes imperative and this is a basic concept. When trial is in progress, more so when it is mid way, any question can be recorded with an objection in the trial for being decided later in the main suit. This is a time honoured principle in trial that has been reiterated and restated repeatedly by Hon'ble Supreme Court in a long line of authorities. Therefore, filing of interlocutory applications when trial is under way should be avoided and the tendency to file a barrage of applications for every single issue that arises in trial necessarily deserves to be seen as an interruption and slowing down the pace of the trial.

17 In the light of the narrative supra, this expunction application is allowed owing to the order of this court dated 24.7.2017 made in A.No.2556 of 2017 (before notification of Commercial Division).

18 This application is allowed. Evidence in chief of P.W.3 filed by way of proof affidavit dated 30.11.2017 is expunged. There shall be no order as to costs.

Sd/- M.S.J.

vvk

14.03.2018

//Certified to be true copy//

Dated at Madras this the day of 2017.

TR : 19.03.2018

COURT OFFICER(O.S.)

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