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

% *Date of Judgment: 31.10.2018*

+ **CM (M) No.1334/2018**

BOMBAY RAYON FASHIONS LTD & ORS..... Petitioners

Through: Mr.Hemant Singh, Advocate with
Ms.Mamta Jha and Mr.Ankit Arvind,
Advocates.

versus

ADVANCE MAGAZINE PUBLISHERS INC....Respondents

Through: Mr.B.B. Gupta, Sr. Advocate with
Ms.Anuradha Salhotra, Mr.Sumit
Wadhwa, Ms.Mallika Ahluwalia and
Mr.Uday Khanna, Advocates.

CORAM:

HON'BLE MR. JUSTICE VINOD GOEL

VINOD GOEL, J. (ORAL)

CM No. 45875/2018 (for exemption)

Allowed, subject to all just exceptions.

CM(M) 1334/2018 & CM No. 45874/2018 (for stay)

1. By this petition under Article 227 of the Constitution of India, the petitioner/defendant has impugned the order dated 08.10.2018 passed by the Court of learned Additional District Judge-05, South-East District, Saket Court, New Delhi ('ADJ'), while disposing of an application under Section 137 read with Section 138 of the Indian Evidence Act, 1872 ('IEA') read with Section 151 of the Code of Civil Procedure, 1908 ('CPC') for re-examination of PW1.

2. The respondent/plaintiff has preferred a Civil Suit vide TM No.16/17 for permanent injunction, infringement of Trade Mark, Account of profits under the Trade Marks Act, 1999 against the petitioner to restrain the petitioner, their representatives etc. from using the trademark 'VOGUE' as part of their trademark 'LINEN VOGUE la classe/LINEN VOGUE' and domain name www.linenvogue.com or any other deceptively similar trademark in relation to goods and services.

3. Admittedly, the Hon'ble Supreme Court has directed by its order dated 04.09.2017 to dispose of the suit within one year.

4. The cross-examination of PW1 Ms.Amrita Singh was concluded before the Local Commissioner. Thereafter, by aforesaid application the respondent/plaintiff sought permission of the learned ADJ to re-examine PW1 which was contested by the petitioner. The learned ADJ noted that the application filed by the respondent/plaintiff *'at the outset it is stated that during course of proceedings senior counsel for plaintiff has fairly conceded that the application appears to be vague and lacks in material particulars, and that plaintiff in his application has failed to disclose any ground for re-examination of the witness.'*

5. During the course of the arguments, learned senior counsel for the respondent/plaintiff restricted his relief to re-examine PW1 only

for the purpose of producing a licence agreement on the record to supplement that Conde Nast India Pvt. Ltd. is their 100% subsidiary, which was testified by PW1 on 07.03.2018 while replying question no.1 to 5 in the cross-examination.

6. The learned ADJ noticed that *“the factum of relationship of the plaintiff vis-a-vis Conde Nast India Pvt. Ltd. was never denied by the witness in her cross-examination. In fact she has consistently deposed that Conde Nast Pvt. Ltd. is a wholly owned subsidiary of the plaintiff; and she specifically deposed to say that ‘we (Conde Nast Pvt. Ltd.) have licence to operates (sic) as 100% subsidiary of Advance Magazine Publishers Inc’.”* Learned ADJ further found that the point as to whether Conde Nast Pvt. Ltd. is a subsidiary of the plaintiff or not, is not substantially in issue and is beyond the pleadings of the defendant. In light of it, the learned ADJ found that the plaintiff is not trying to fill up the lacunae in her deposition by relying upon the judgment of Hon’ble Supreme Court in **Rammi and Ors. Vs. State of Madhya Pradesh, Manu/SC/0596/1999** and two judgments of this Court in **National Agro-Chemical Industries Ltd. Vs. National Research Development Corporation, Manu/DE/0396/2005** and **Jai Pal Shishodia Vs. Poonam Rathore, 2012 (191) DLT 487**. The learned ADJ deemed it expedient to permit the plaintiff to re-examine PW1 and place on record the licence agreement to demonstrate the nature and character of the Conde Nast India Pvt. Ltd. and not on any other aspect. Learned ADJ further directed that the

petitioner/defendant shall have the opportunity to cross-examine the witness on her re-examination.

7. Learned counsel for the petitioner has relied upon the judgment of the Hon'ble Supreme Court in **Vadiraj Naggappa Vernekar Vs. Sharadchandra Prabhakar Gogate, (2009) 4 SCC 410**, to urge that the main purpose of Order XVIII Rule 17 CPC is to enable the Court, while trying a suit, to clarify any doubt which it may have with regard to the evidence led by the parties and this provision is not intended to be used to fill up the omissions in the evidence of the witness, who has already been examined. He also cites another judgment of Hon'ble Supreme Court in **Pannayar Vs. State of Tamil Nadu, (2009) 9 SCC 152**, to urge that the purpose of re-examination is only to get clarification on some doubts created in the cross-examination. One cannot supplement the examination-in-chief by way of re-examination and for the first time, start introducing totally new facts, which have no concern with the cross-examination. He submits that under the garb of re-examination, the respondent/plaintiff wants to introduce new facts and file a document, which was never filed before the framing of issues.

8. *Per contra*, learned senior counsel for the respondent/plaintiff argued that there is no illegality or infirmity in the impugned order. He has placed on record a copy of the licence agreement dated 01.02.2007 during the course of argument, which is taken on record. Copy thereof has been supplied to the learned counsel for the

petitioner. He has drawn the attention of the court to the following cross-examination of PW1 conducted on 07.03.2018 particularly to question nos. 36 and 37 and answers thereof: -

“Q36. Is it correct that you have not produced any document on the record which authorises Conde Nast India to use the Trademark Vogue under the licence from Advance Magazine Publishers Inc.?”

Ans. No document has been provided, however, same can be made available for Advance Magazine.

Q37. Is there any reason why you chose not to produce it on the record?

Ans. As stated earlier Conde Nast India is part of Conde Nast International which is further part of Advance Magazine Publishers Inc.”

9. He argued that in the cross-examination of PW1, it is the defendant company which has himself asked PW1 for the particular document by which the respondent/plaintiff is authorized to use the trademark ‘VOGUE’.

10. I have heard the learned counsel for the parties.

11. In order to meet rival contentions of the parties, it would not be out of place to advert to Section 138 of IEA, which reads as under: -

“138. Order of examinations. — Witnesses shall be first examined-in-chief, then (if the adverse

party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction of re-examination. — The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.”

12. The above statutory provision permits re-examination on matters referred in cross-examination and even if a new matter is introduced in re-examination, of course by permission of the court, the opposite party may further cross-examine the witness upon that matter. The Hon’ble Supreme Court after referring to the relevant provision of law i.e. Section 138 of IEA in **Rammi’s case** (*supra*) held as under: -

“17. There is an erroneous impression that re-examination should be confined to clarification of ambiguities which have been brought down in cross-examination. No doubt, ambiguities can be resolved through re-examination. But that is not the only function of the re-examiner. If the party who called the witness feels that explanation is required for any matter referred to in cross-examination he has the liberty to put any question

in re-examination to get the explanation. The Public Prosecutor should formulate his questions for that purpose. Explanation may be required either when the ambiguity remains regarding any answer elicited during cross-examination or even otherwise. If the Public Prosecutor feels that certain answers require more elucidation from the witness he has the freedom and the right to put such questions as he deems necessary for that purpose, subject of course to the control of the court in accordance with the other provisions. But the court cannot direct him to confine his questions to ambiguities alone which arose in cross-examination.”

13. Apart from this, Section 165 of IEA empowers the court for the production of any document or thing and neither the parties nor their agents shall be entitled to make any objection to any such order.

14. In view of the above discussion, I do not find any infirmity or illegality in the order of the learned ADJ particularly when it is already directed by the learned ADJ that the petitioner shall have the right to further cross-examine PW1 after her re-examination and thus, the petitioner is not going to be prejudiced at all.

15. The petition is accordingly dismissed with no orders as to costs. The application, being CM No. 45874/2018 is also disposed of.

VINOD GOEL, J.

OCTOBER 31, 2018
“shailendra”