

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 02.01.2019

Date of Decision : 29.01.2019

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

Application Nos.5585 and 5586 of 2017
in
C.S.No.215 of 2015

1.Quintessential Designs India Pvt. Ltd.,
Represented by its CEO Mr.Syed Layak Ali,
5th Floor, Status Quo,
38, Sterling Road,
Nungambakkam,
Chennai-600 034.

2.QDSeatoman Designs Pvt Ltd.,
Represented by its Director Mr.Syed Layak Ali,
5th Floor, Status Quo,
38 Sterling Road,
Nungambakkam,
Chennai-600 034.

.. Applicants in both Applications

Vs.

1.Puma Sports India (Pvt.) Ltd.,
No.509, CMH Road,
Indira Nagar,
Bengaluru – 560 038.

2.PUMA SE,
PUMA Way 1,
91074 Herzogenaurach,
Germany.

.. Respondents in both Applications

O.A.No.5585 of 2017 is filed under Order XIV Rule 8 of Original Side Rules read with Order XVI Rule 1 read with Section 151 of Civil Procedure Code, 1908, seeking to permit the applicants to delivery the interrogatories as mentioned in para 26 of the affidavit filed in the application for the respondents to answer.

O.A.No.5586 of 2017 is filed under Order XIV Rule 8 of Original Side Rules read with Order XVI Rule 1 read with Section 151 of Civil Procedure Code, 1908, seeking (a) to issue Subpoena to Mr.Madhuresh Singh, Authorised Representative of the respondent/defendant No.1 to give oral evidence and be cross examined before this Court in the present suit; (b) to issue Subpoena to Mr.Atul Bajaj (Director Merchandising) (Executive Director, Product, Merchandising, Supply Chain – Puma India) Authorised Representative of the respondent/defendant No.1 to give oral evidence and be cross examined before this Court in the present suit; (c) to issue Subpoena to Mr.Vibhu Gupta (Head – India Vertical / SMU (Apparel, Accessories) Authorised Representative of the respondent/defendant No.1 (presently working with Myntra Designs Pvt Ltd) to give oral evidence and be cross examined before this Court in the present suit; (d) to issue Subpoena to Mr.Jochen Lederhilger, General Counsel and Co-Executor of the Power of Attorney on behalf of the respondent/defendant N.2 to give oral evidence and be cross examined before this Court in the present suit; (e) to issue Subpoena to Mr.Michael Lammermann, CFO, Director of Defendant No.1 and Co-Executor of the Power of Attorney on behalf of the respondent/defendant No.2 to give oral evidence and be cross examined before this Court in the present suit.

For Applicants : Mr.R.Parthasarathy
for M/s.Rohan George

For Respondents : Mr.Chinmoy Pradip Sharma
for Mr.A.R.Ramanathan

COMMON ORDER

This is a common order which will govern both these applications.

2 In the main suit, i.e., C.S.No.215 of 2015, there are two plaintiffs and two defendants. Plaintiffs 1 and 2 are applicants 1 and 2

respectively in both these applications. Defendants 1 and 2 are respondents 1 and 2 respectively in both these applications. Plaintiff No.1 (Quintessential Designs India Pvt. Ltd.) shall hereinafter be referred to as 'QDI', plaintiff No.2 ('QD Seatoman Designs Pvt. Ltd.') shall hereinafter be referred to as 'QDS', first defendant 'Puma Sports India (Pvt.) Ltd.' shall hereinafter be referred to as 'Puma India' and second defendant 'PUMA SE, Germany' shall hereinafter be referred to as 'Puma Germany' for the sake of brevity, clarity and convenience. In this common order, besides the abbreviations mentioned herein, parties in these two applications shall also be referred to by their respective ranks in the main suit wherever it is considered necessary.

3 As mentioned supra, plaintiffs have taken out these two applications. One application, i.e., A.No.5585 of 2017 is with a prayer for delivery of 46 interrogatories and this application shall hereinafter be referred to as 'interrogatories application' and the other application, i.e., A.No.5586 of 2017 is one seeking issuance of subpoena to five persons and the said application shall hereinafter be referred to as 'subpoena application', for the sake of brevity, convenience and clarity.

4 Interrogatories application has been taken out under Order XVI Rule 1 of 'The Code of Civil Procedure, 1908' ('CPC' for brevity), this is not a correct provision and there is a request in the hearing to treat this application to be one under Order XI Rule 2 CPC and it shall be so treated. To be noted, subpoena application is under Order XVI Rule 1 CPC.

5 Before this Commercial Division deals with these two applications, it may be necessary to notice some short facts and a brief

trajectory qua the main suit.

6 Plaintiffs and defendants were companions in commerce (now estranged) and their relationship is traceable to January of 2013. To be precise, 09.01.2013 when representatives of first plaintiff (QDI) and Mr.Vibhu Gupta, representing Puma India (first defendant) met, followed by another business meeting on 25.01.2013. In a nutshell, the business was with regard to bottom wear apparels for Spring of 2014. On 13.02.2013, plaintiffs, i.e., QDI and QDS organised an exhibition of all their services, i.e., Full Services for defendants and in this exhibition of Full Services on 13.02.2013, Puma India (first defendant) was represented by one Mr.Atul Bajaj. Thereafter, 32 physical samples obviously all bottom wear apparels relatable to 25 designs were delivered by plaintiffs to defendants on 02.07.2013. According to plaintiffs, they came to know on 07.08.2013 that there were no takers in the exhibition / road show and they did not get any orders regarding the aforesaid 32 samples relatable to 25 designs, but about four months later, on 06.12.2013, they came to know that defendants are selling the aforesaid apparels using plaintiffs' designs and samples.

7 According to plaintiffs, this is a clear case of infringement of plaintiffs' copyright. It is plaintiffs' case that their business transaction with the defendants includes full services vendor arrangement as well as tech packs arrangement.

8 Seeking inter-alia injunctive reliefs qua alleged infringement of copyright, instant main suit was filed by plaintiffs on 13.3.2015. On 25.3.2015, an interim order restraining defendants qua

infringement of copyright came to be passed. This was an ex parte interim order. Defendants entered appearance, filed vacate injunction application and the matter was contested. After full contest, injunction and vacate injunction applications came to be disposed of by a common order dated 23.06.2015, wherein and whereby products already launched and in circulation in the market were allowed to be exhausted and there was an injunction with regard to fresh production and marketing. The order was carried in appeal by way of intra court appeals, i.e., O.S.A.Nos.215, 216 and 235 to 237 of 2015. These five intra court appeals came to be disposed of by a common order by a Division Bench of this Court vide order dated 18.02.2016, wherein the aforesaid interim order passed by the learned Single Judge on 23.06.2015 was not disturbed, but time lines were drawn for expediting trial in the main suit. Besides time lines, also to be noted, a retired District Judge, who had also served as Registrar (Judicial) of this Court, was appointed as Commissioner for recording oral and documentary evidence.

9 Trial commenced before the Commissioner on 03.11.2016 when one Syed Layak Ali, Director in QDI and QDS (plaintiffs 1 and 2 respectively) deposed, he was cross examined and there was no more witnesses on plaintiffs' side. On defendants' side, one Saurabh Sehgal was examined as D.W.1 on 16.02.2017 and at this stage, these two applications came to be filed by plaintiffs on 11.09.2017. I have already referred to prayers in these two applications supra. It is not set out here again to avoid repetition. Defendants filed a common counter affidavit on 30.10.2017 and completed pleadings in these applications.

10 Post completion of pleadings in the aforesaid manner, these applications were heard out.

11 Mr.R.Parthasarathy, learned counsel on behalf of plaintiffs and Mr.Chinmoy Pradip Sharma, learned counsel on behalf of defendants were before this Commercial Division. I heard both learned counsel.

12 Arguments of learned counsel for plaintiffs in these two applications are as follows :

(a) The aforesaid facts on behalf of plaintiffs were reiterated to say that copyright in the drawings for the apparels qualify as artistic work within the meaning of Section 2(o) of the Copyright Act, 1957 ('CR Act' for brevity). Interim injunction was granted with regard to as many as 23 such intellectual property rights, intra court appeals were taken out and a Division Bench had directed trial to be expedited and if these applications are not opposed, trial can be concluded swiftly.

(b) In the pleadings of defendants, the denials are vague and that has necessitated filing of instant interrogatories application.

(c) None of these 46 interrogatories are scandalous and if these 46 interrogatories are answered, it may not even be necessary to cross examine defendants' witness.

(d) Five persons to whom subpoena is sought to be issued are well versed with the facts which constitute the central controversy in this lis, it is imperative that subpoena is to be issued for complete adjudication in this lis and therefore, prayer deserves to be acceded to.

(e) Person withholding best evidence is not helping the Court and therefore, it is necessary to accede to these prayers.

(f) Laws governing subpoena are similar to that of interrogatories and prayers in both these applications deserve to be acceded to.

13 Opposing these applications, submissions made by defendants are as follows :

(a) Defendants are not withholding best evidence, it is always open to plaintiffs to urge that adverse inference should be drawn if defendants withhold best evidence.

(b) It follows as a sequel and corollary to the preceding argument that these applications were taken out by plaintiffs only with the intention of delaying and protracting the suit besides being attempts to defeat and diffuse time lines drawn up in the intra court appeals for expediting trial.

(c) An application for interrogatories operates in two parts or in other words, two stages, wherein and whereby a party to the lis seeking interrogatories should get leave of the Court (this according to the learned counsel is first part) and thereafter, serve interrogatories on defendants, defendants should be given an opportunity to object to each of the interrogatories to which they have objection and thereafter, a decision has to be taken on the objections (this according to learned counsel is second part). As plaintiffs have not sought leave to serve interrogatories, the language in which the prayer is couched is impermissible and the interrogatories application deserves to be dismissed on this technical ground also.

(d) There can be no two ways that interrogatories and subpoena applications are similar in nature and in this view of the matter, both these applications deserve to be dismissed.

(e) Interrogatories application and subpoena application are necessarily in the nature of proceedings which can be resorted to at discovery stage, i.e., pre-trial stage. In the instant case, the main suit is at a very advanced stage and interrogatories application and

subpoena application at this stage militates against the very concept of they being vehicles which can be pressed into service at discovery stage.

(f) The defendants have already put a witness in the box and that witness, i.e., Saurabh Sehgal (D.W.1) is yet to be cross examined. These two applications are predicated on the assumption that D.W.1 will not answer certain questions. All these are in the realm of surmises and conjectures and that cannot be the basis for pursuing these two applications.

(g) The plaintiffs (QDI and QDS) had slapped criminal complaints against defendants with regard to issues in this lis. These criminal complaints have been put in abeyance by orders of this Court essentially owing to pendency of the instant case. Applications which are now being pursued by plaintiffs are in the nature of eliciting self incriminating answers which shall be used as a handle in the criminal complaints. It was the further say of learned counsel for defendants that the moment the interrogatories are answered, it will trigger a spate / barrage of further criminal complaints based on answers. According to learned counsel for defendants, this is a clear abuse of enabling provisions under the CPC.

14 Before this Commercial Division deals with the aforesaid rival submissions made by plaintiffs and defendants, it is necessary to notice one aspect of the subpoena application. That aspect pertains to the question as to the manner in which the witness will be examined if the prayer in the subpoena application is acceded to. To enhance clarity, I deem it appropriate to set out that the neat question is, 'Whether witnesses to whom subpoena is issued will be examined as plaintiffs' witnesses (P.Ws) or as defendants' witnesses (D.Ws) or as Court witnesses (C.Ws.)?' To be noted, this question is hypothetical and hypothetical to the limited extent that it is only in the event of prayer in subpoena application being acceded to as it pertains to modalities for examination of witnesses. Though this neat question is hypothetical at this stage of this order, in my considered view, it is necessary to have a clear and categoric answer to this question before embarking upon the exercise of dealing with rival submissions made by plaintiffs and defendants, as the answer to this neat question will have a certain bearing on deliberations, touching upon rival submissions. In other words, dealing with this neat question even before embarking upon the exercise of dispositive reasoning qua subpoena prayer and deciding whether subpoena prayer is to be acceded to is not putting the cart before the horse as answer to this neat question will have a certain bearing in dispositive reasoning qua subpoena application that is to follow. Therefore, this Commercial Division put this question to both learned counsel on either side.

15 Before this Commercial Division adverts to the response and answers the counsel on either side gave to the aforesaid neat question

qua modalities raised by this Court, it is necessary to amplify and set out with further clarity the reason as to why this Commercial Division has referred to the aforesaid neat question, as hypothetical and amplifying in this regard. The question arises only in the event of the prayer in the subpoena application being acceded to either in full or in part. In the event of the prayer in the subpoena application being ultimately negatived, the question does not fall for consideration at all. To this extent, as this question is being examined as part of deliberations which are ultimately going to decide the outcome of the subpoena application, it has been described as hypothetical. This takes us to the response and answers of counsel on either side.

16 The response of counsel for plaintiffs can be summarised as follows :

(a) The application though under Order XVI Rule 1 of CPC should be treated as one under Order XVI Rule 14 and witnesses who are called should be examined as Court witnesses. In other words, it is plaintiffs' counsel's say that the witnesses who are summoned (if the prayer in the subpoena application is acceded to either in full or in part) should be examined as CWs and both plaintiffs' and defendants' counsel will have the right of cross examination.

17 In contradistinction, submissions of defendants' counsel can be summarised as follows :

(a) If the prayer in the subpoena application is acceded to either in full or in part, the witnesses who are summoned cannot be examined as court witnesses as they are associated with plaintiffs. To put it differently, learned counsel submitted that if individuals associated with plaintiffs are examined as court witnesses, it will lead to a situation where plaintiffs will cross examine persons associated with them which according to learned counsel, is impermissible. Learned counsel also added that the plaintiffs are attempting to summon defendants' employees / ex-employees and therefore, they certainly cannot be examined as PWs.

18 A careful analysis of the differing stands which the two parties have taken with regard to modalities of examination of witnesses seen in the context of illuminating submissions made by learned counsel on both sides leads to three different situations.

19 The three scenarios which emerge are as follows :

(a) A witness summoned in subpoena application may be directly a party to the lis. To put it differently, the witness summoned may be arrayed as party in the suit.

(b) A witness or witnesses summoned in a subpoena application may not be directly a party to

the lis, but may either indirectly be a party to the lis or may be persons or entities claiming under party / parties to the lis. A typical example is when a juristic person, i.e., a company is a party to the lis and when an individual who is either an employee or ex-employee of a company is summoned. Another typical example is, a natural person, who is not a party to the lis may be a power of attorney agent or assignee of a party to the lis.

(c) The witness who is summoned in a subpoena application may not be a party to the lis directly and may not be a party to the lis indirectly also. In other words, the witness so summoned may be a complete stranger to the lis.

20 In the aforesaid three scenarios, with regard to the first scenario, i.e., the witness summoned in subpoena application being a party to the lis, it does not present any difficulty. The witness so summoned shall be examined either as P.W or D.W., depending on whether the party to the lis is the plaintiff or one of plaintiffs or defendant or one of the defendants. Obviously, the adversary, i.e., plaintiff or defendant as the case may be, will have the opportunity to cross examine the witness so summoned. With regard to co-plaintiff or co-defendant cross examining such a witness, the usual procedure under CPC should be adopted or in other words, co-plaintiff or co-defendant should establish that there is conflict of interest necessitating

cross examination and obtain orders of Court subject of course to the Court being satisfied about there being actual conflict of interest.

21 With regard to the third scenario also, as there is a straight forward answer, this Commercial Division shall deal with the same before dealing with the second scenario.

22 In the third scenario, as the witness / witnesses summoned is / are total stranger/s to the lis, witness/s shall be examined as CWs and obviously, both parties to the lis, i.e., plaintiffs and defendants will have an opportunity to cross examine the witness. When the witness is examined as a CW, the Court shall put necessary questions to the witness which shall be recorded and the same shall be the basis for cross examination by both sides.

23 The second scenario, unlike scenarios 1 and 3, presents a problem. When the witness is not a party to the lis directly, but is indirectly associated with one of the parties, the issue as to whether the witness should be examined as P.W. or D.W is incapable of a straight answer, which can be static and which can be applied in all situations. There may be cases where the witness summoned is an ex-employee of one of the parties to the lis, i.e., at the time of inception of suit the witness so summoned may have been in good terms with the party to the lis and on the date of being summoned, the relationship might have turned sour. In such a situation, if a witness is

permitted to be examined as P.W. or D.W., depending on the witness's original association, in the name of cross examination, the adversaries seeking subpoena can lead the witness and have a host of answers recorded without they having to elicit the same in cross examination in every sense of the term. If the witness is examined as court witness, both parties including the one in whose favour the witness is deposing will have the benefit of cross examination and such a party putting leading questions again militates against the very concept of cross examination in trial. Therefore, in scenario No.2, the witness cannot be examined as court witness, but whether the witness will be examined on plaintiffs' side or defendants' side, i.e., PW or DW is a matter which will have to be decided by the court concerned on a case to case basis depending on the way the issues emerge and unfold in a given case.

24 Having discussed the question regarding modalities of examining the witnesses if summoned in subpoena application and having given an answer by categorising the same as three possible scenarios, this Commercial Division now moves on to the pivotal question in these two applications, i.e., whether prayers in interrogatories and subpoena applications deserve to be acceded to.

25 Rival submissions made by either side in this regard have already been summarised and set out supra in this order. As rival submissions have already been set out supra, this Commercial Division deems it appropriate to give an enumeration of case laws that were pressed into service by both sides.

26 On the side of plaintiffs, following case laws were placed

before this Commercial Division :

Sl.No.	Case Laws
1	Musammat Lal Kunwar Vs. Chiranji Lal [L.R. 37 I.A., 1 (1909)]
2	Gurbakhsh Singh Vs. Gurdial Singh [XXXII The Calcutta Weekly Notes 119]
3	Gopal Krishnaji Ketkar Vs. Mohamed Haji Latif [AIR 1968 SC 1413]
4	Yasodamma Vs. Inderchand Vimalchand Jain [AIR 1974 Kant 100]
5	Iswar Bhai C. Patel Vs. Harihar Behera [(1990) 3 SCC 457]
6	Kaliaperumal Vs. Pankajavalli [1999-1-L.W. 660]
7	Yashpal Sawhney Vs. Gandotra Traders [AIR 1995 J&K 32]
8	Union of India Vs. Ibrahim Uddin [(2012) 8 SCC 148]
9	Dhanalakshmi Vs. Malliga, N. [2014 (2) CTC 680]
10	Manisha Lalwani Vs. D.V. Paul [AIR 2015 MP 20]
11	Balbir Singh Vs. Harinder Kaur [(2017) 188 PLR 505]
12	Veerabadran Chetty Vs. Nataraja Desikar [ILR (1905) 28 Mad 28]
13	Mahunt Shatrugan Das Vs. Bawa Sham Das [AIR 1938 PC 50]
14	Mange Ram Vs. Brij Mohan [(1983) 4 SCC 36]
15	Sri Awadh Kishore Singh Vs. Sri Brij Bihari Singh [AIR 1993 Pat 122]
16	Kosuru Kalinga Maharaju Vs. Kosuru Kaikamma [(1999) 6 ALD 789]
17	Sri Aurobindo Ashram Trust Vs. Kamal Dora [2000-3-L.W 22]
18	National Insurance Co. Ltd. Vs. M/s.Susru Sea Foods [2005 (1) A.P.L.J. 71 (HC)]
19	Kokkanda B.Poondacha Vs. K.D. Ganapathi [(2011) 12 SCC 600]
20	Jamaitrai Bishansarup Vs. Raj Bahadur Motilal Chamaria [AIR 1960 Calcutta 536]
21	Ganga Devi Vs. Krushna Prasad Sharma [AIR 1967 Orissa 19]
22	Raj Narain Vs. Indira Nehru Gandhi [(1972) 3 SCC 850]
23	Thakur Prasad Vs. Md. Sohayal [AIR 1977 Patna 233]
24	Janaki Ballav Patnaik Vs. Bennett Coleman & Co. Ltd. [AIR 1989 Orissa 216]
25	G.M. Pens International Limited Vs. Ramesh Kumar Jain [MANU/TN/2222/2009 = 2009 (41) PTC 591 (Mad)]

26	A.No.8129 of 2014 in C.S.No.220 of 2009 dated 30.04.2015 [Madras High Court]
27	A.Shanmugam Vs. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam [(2012) 6 SCC 430]
28	State Bank of India Vs. S.N.Goyal [(2008) 8 SCC 92]
29	Marthanda Varma Vs. Rama Varma [1998 (1) KLJ 92]
30	Kishori Lal Vs. Chunni Lal [1909 (9) CLJ 172]

27 Enumeration / list of case laws placed before this

Commercial Division by defendants is as follows :

Sl.No.	Case Laws
1	D.Babu Vs. K.A.Dinachandran [2013 (1) CTC 881]
2	Dr.Amitabha Sen Vs. M/s.Sports World International Ltd. [AIR 2008 Delhi 118]
3	M/s.Oil and Natural Gas Corporation Ltd. Vs. Vijay Mahajan [(2017) 237 DLR 158]
4	G.Nanchil Kumaran Vs. Govindasamy Reddiar [2000-1-L.W. 233]
5	P.Kolanda Gounder Vs. State of Tamil Nadu [(2009) 5 CTC 314]
6	Raj Narain Vs. Indira Nehru Gandhi [(1972) 3 SCC 850]
7	M/s.AFL Developers Pvt. Ltd. Vs. Veena Trivedi [ILR (2000) II Delhi 117]
8	K.Meenakshisundaram Vs. S.R.Radhakrishna Pillai [AIR 1960 Madras 184]
9	Kaliaperumal Vs. Pankajavalli [1999-1-L.W. 660]
10	Union Bank of India Vs. Muthiah [(1999) 1 MLJ 679]
11	Sri Aurobindo Ashram Trust Vs. Kamal Dora [2000-3-L.W 22]
12	V.K.Periasamy @ Perianna Gounder Vs. D.Rajan [2001-2-L.W. 396]
13	Varadharajan Vs. Saravanan [2003-2-LW 731]
14	Salem Advocate Bar Association Vs. Union of India [(2003) 1 SCC 49]
15	N.Srinivasan Vs. Vidya Durai [2011 (3) CTC 444]
16	Tirumuruga Real Estate Vs. Dhanraj Kochar [2011 (3) MWN (Civil) 80]
17	Ravichandran Vs. Sundara Kumar [2017-1-L.W. 360]

18	Waghji Thackersey Vs. Khatao Rowji [1886 ILR (X) Bombay 167]
19	Neckram Dobay Vs. The Bank of Bengal [1887 ILR (XIV) Calcutta 703]
20	Krishna Ayyar Vs. Madhava Panikkar [AIR 1921 Mad 381]
21	Gobinda Mohun Roy Vs. Magneram Bangur & Co. [AIR 1940 Cal 331]
22	Jugal Raj Gandotra Vs. Yashpal Sahni [AIR 1999 J&K 21]
23	Rofe Vs. Kevorkian [(1936) 2 All.E.R. 1334]
24	Ramrameshwari Devi Vs. Nirmala Devi [(2011) 8 SCC 249]
25	Parker Vs. Wells [1881 (XVIII) CD 477]
26	Fennessy Vs. Clark [1887 (XXXVII) CD 184]
27	Hennessy Vs. Wright [1890 (XXIV) QBD 445]
28	G.Baktavatchalam & Co. Vs. C.Abdul Rahman & Co. [2016 (3) CTC 1]

28 Rival submissions which have been set out supra and case laws pressed into service on both sides will be dealt with together infra in the course of dispositive reasoning. To be noted, in the enumeration / list of case laws, three case laws, namely, **Kaliaperumal Vs. Pankajavalli [1999-1-L.W. 660]**, **Sri Aurobindo Ashram Trust Vs. Kamal Dora [2000-3-L.W 22]** and **Raj Narain Vs. Indira Nehru Gandhi [(1972) 3 SCC 850]** cases find place in both enumeration / list as both sides placed before this Commercial Division these three case laws.

29 A perusal of enumeration / list of case laws will reveal that a large number of case laws have been placed before this Commercial Division by both sides. Though it is a long list, only those case laws which were pressed into service in detail and only those case laws which this Commercial Division considers most relevant and most appropriate / applicable to decide these applications, shall be dealt with. In other words,

enumeration / list of case laws has been set out supra only with the intention of capturing with completeness the nature of hearing before this Commercial Division.

30 Interrogatories and subpoena applications in this suit cannot be tested by applying the normal and usual yardsticks which have been laid down in a catena of authorities in this regard. The reason is, the trajectory of this suit and interlocutory applications thus far has already been mentioned supra. Along with main suit, i.e., at the time of inception of main suit, plaintiff took out interlocutory applications and an interim order inter-alia qua infringement of copyright was granted on 25.3.2015, defendants entered appearance, filed counter as well as vacate injunction application and post full contest, injunction and vacate injunction applications came to be disposed of by a common order dated 23.6.2015, wherein and whereby interim order was inter-alia made absolute. This was carried in appeal by way of intra court appeals being O.S.A.Nos.215, 216, 235 to 237 of 2015. These intra court appeals came to be disposed of by a Division Bench headed by Chief Justice of this Court Hon'ble Mr.Justice Sanjay Kishan Kaul (as His Lordship then was), vide order dated 18.02.2016. The order dated 18.02.2016 reveals that it is a consent order. In other words, it is an order passed by mutual consent. A further careful perusal of the said order of Hon'ble Division Bench reveals that clear and categorical time lines for disposal of the main suit right upto fixing of date for final hearing of arguments before learned Single Judge have been drawn up by mutual agreement, such time lines are adumbrated in paragraph

1 of the said order by way of nine sub paragraphs and the same reads as follows :

“We have heard learned counsel for parties. On instructions from the respective parties, the following agreed order is passed:

1. The common additional affidavit filed by the appellants affirmed on 16.02.2016 stands withdrawn unconditionally expressing regret for the same;
2. The interim order passed would remain in force till the decision post trial, subject to the caveat that the existing stock, which has been permitted to be sold, of the original defendants which now still remains is stated to be in the range of about 25, which can be sold, but accounts have been kept and are being maintained by the original defendants in respect of the same;
3. The observations made in the impugned order are naturally tentative in character being at the interlocutory stage and no evidence having been led. They must certainly not affect the final verdict in the suit;
4. In order to proceed expeditiously in trial, it was found that even the written statement has not been filed as yet. The defendants to file their written statement within one (1) week. The replication thereto be filed within three (3) weeks;
5. The original documents will be filed by the parties in their possession within six (6) weeks;
6. The suit be listed before the learned Single Judge for framing of issues on 07.04.2016;
7. The case shall be listed before the learned Master for exhibiting of documents on 21.04.2016;
8. In view of the fact that the Boards of the Masters is already heavy, the trial be recorded by a retired Judicial Officer with a cost to be borne equally by both the parties. Mr. V. Ramamurthy, former Registrar-Judicial of

this Court, is appointed as the Commissioner to record evidence and the fee of the Commissioner will be Rs. 1,00,000/- (Rupees one lakh only) apart from out-of-pocket expenses. The Commissioner will endeavour to conclude the evidence at the earliest, preferably within three (3) months from the first date fixed before the Commissioner, as it is stated that the parties will have about two witnesses each;

9. On conclusion of trial, the matter will be placed before the learned Single Judge for fixing a date for final hearing of the suit."

31 It is to be noted that as mentioned supra, a retired District Judge, who had also served in the Registry of this Court as Registrar (Judicial), has been appointed as Commissioner for recording evidence as the boards of Additional Masters are heavy. Therefore, considering the mutual agreement, common concern to expedite disposal of the main suit is overwhelmingly clear. A further careful perusal of the order of Hon'ble Division Bench reveals that in the light of such detailed time lines for disposal of the main suit right upto the hearing of final arguments before learned Single Judge being drawn up, interim orders being made absolute by learned Single Judge in the interlocutory applications were left untouched. In other words, interim orders were not disturbed owing to time lines being drawn up by consent. This means that interims orders are operating in favour of plaintiff even as of today.

32 Before this Commercial Division proceeds further, pausing here for a moment, it will not be out of place to mention that time lines drawn up by Hon'ble Division Bench are virtually in the nature of 'Case

Management Hearing' ('CMH' for brevity) under Order XV-A of amended CPC as amended by 'The Commercial Courts Act, 2015' ('said Act' for brevity), though Commercial Division had not been notified in this Court on the date of the order of Hon'ble Division Bench. This is being stated only to lay emphasis on the factor that parties agreed for such swift time lines with the objective of expediting disposal of the main suit even when there was no statutory requirements in this regard. Therefore, the consent order made before Hon'ble Division Bench is by the own volition of the parties and is absolutely voluntary. Be that as it may, interestingly it now has a statutory flavour in the light of CMH provision under Order XV-A of amended CPC as amended by said Act.

33 In the aforesaid backdrop, the strong argument that is being advanced by learned counsel for defendants is that plaintiff without adhering to swift time lines after agreeing to the same has been delaying disposal of the main suit by filing a barrage of applications. To put it differently, it is the emphatic submission of learned counsel for defendants that defendants agreed for such an order in the intra court appeals before Hon'ble Division Bench only because time lines for expediting disposal of suit itself were drawn up. Furthering this submission, learned counsel for defendants submitted that if that was not the case, defendants would have urged that interim orders which were made absolute should have been examined on merits. Extending this submission and elaborating on this submission, learned counsel for defendants submitted that plaintiff having got interim orders and having got interim orders made absolute before learned

Single Judge, agreed for expediting time lines for disposal of main suit only to avoid the interim orders in their kitty being tested on merits by Hon'ble Division Bench and that they are delaying and dragging on the matter endlessly while keeping absolute the interim orders in their kitty safe and operating.

34 A further sequel and buttressing aspect in this regard is, complaining of violation of these interim orders and perjury, plaintiff had filed contempt petitions and sub applications therein and miscellaneous applications for perjury before the same Division Bench vide contempt petition Nos.2077 to 2079 of 2016, sub applications therein and miscellaneous applications therein. These contempt petitions came to be disposed of by a common order dated 29.6.2016. While disposing of contempt petitions, the same Hon'ble Division Bench has held 'We note with regret that the trial in the suit has not proceeded as the plaintiffs have not filed their affidavits of evidence. We are informed that in the intermittent period, re-thought processes have created seven applications to be dealt with by the learned Single Judge.' Thereafter, Division Bench went on to express its anguish by saying ', but this process must end somewhere'.

35 A perusal of the order reveals that Division Bench gave a quietus to all interlocutory applications in the suit which were pending as on that date, contempt petitions were not pressed and it was held that perjury application will be tried along with the main suit. After doing so, Division Bench in categoric terms held 'We do not want the original scheme of things

to be diverted, i.e., expeditious trial of the matter.'

36 Therefore, these two applications, namely interrogatories and subpoena applications cannot be dealt with by applying the normal and usual yardsticks / parameters / ingredients for testing such applications. These two applications have to necessarily be seen in the light of aforesaid trajectory of suit, interlocutory applications and intra court appeals arising therefrom, thus far.

37 As already alluded to supra, only those case laws which are of utmost relevance and which in the considered opinion of this Commercial Division need to be referred to are being discussed in a nutshell as these two applications are being tested in the light of the aforesaid trajectory of the suit and applications therein thus far and in the light of the two orders of the Division Bench in the two sets of intra court appeals / contempt and perjury applications.

38 Therefore, with regard to interrogatories application, two judgments on the side of plaintiffs are discussed. One is ***Raj Narain Vs. Indira Nehru Gandhi*** reported in (1972) 3 SCC 850 and the other is ***G.M. Pens International Limited Vs. Ramesh Kumar Jain and others*** reported in MANU/TN/2222/2009. ***Raj Narain*** case was referred to, to say that though all questions that may be relevant during cross examination do not qualify as interrogatories, interrogatories can be served when they have close connection with 'matters in question'.

which are to be looked into for acceding to the prayer in interrogatories. The sum and substance of **G.M. Pens** supra is that the Court is expected to look into the facts and significance of interrogatories set to be delivered as well as relevance of documents sought to be summoned.

40 With regard to **Raj Narain** case, it arose out of election laws where applicability of CPC itself is on a different footing. Therefore, in the instant case, it may not be appropriate to place much reliance on **Raj Narain** case. With regard to **G.M. Pens**, a careful perusal of the case law reveals that it has been held in **G.M. Pens** that interrogatories cannot be made to cause prejudice to opposite party.

41 On the side of defendants, two 19th century case laws being **Fennessy Vs. Clark** [1887 (XXXVII) CD 184] and **Hennessy Vs. Wright** [1890 (XXIV) QBD 445] can be looked into.

42 In **Fennessy** case, the principle is that for a prayer for interrogatories to be acceded to, plaintiff and defendant's liability on the grounds alleged have to be first established. This is Chancery Division judgment. In **Hennessy** which is Queen's Bench Division judgment, the broad principle is that interrogatories which are fishing in nature shall not be allowed.

43 As mentioned supra, these two English case laws are 19th century case laws, but are of some relevance in terms of broad principle.

44 One Indian case law on the side of defendants being **G.Nanchil Kumaran Vs. Govindasamy Reddiar** reported in **2000-1-L.W.**

233 is of relevance. Sum and substance of the principle laid down in **Nanchil**

Kumaran case is that the main objective of interrogatories is to save expenses and shorten the litigation by enabling a party to obtain from opponent the information as to the facts and material regarding the question in dispute between them.

45 In the instant case, in the light of the trajectory of the suit, interlocutory applications thus far and two orders of Division Bench which have been alluded to supra, interrogatories have the exact reverse result on the litigation. Instead of shortening the litigation, it is virtually lengthening the litigation.

46 Besides the aforesaid case, one case which was heavily relied on by the plaintiff need to be mentioned, i.e., **Jamaitrai Bishansarup Vs. Rai Bahadur Motilal Chamaria** reported in **AIR 1960 Calcutta 536**. This is a case where a Single Judge of Calcutta High Court relied on what Justice Tomlin wrote in **Sutherland (Duke) Vs. British Dominions Land Settlement Corporation** case. Tomlin's view that administering of interrogatories is a step which is more often desirable than undesirable and is to be encouraged rather than to be discouraged, because they not infrequently bring an action to an end at an earlier stage than otherwise would be the case, to the advantage of all parties concerned was relied on. As already alluded to supra, such principles came into play when the trajectory of the suit and interlocutory applications in a case takes the normal course or in other words, when other determinants remain constant. This has no application in a case like this where both parties have agreed to strict time lines by their own volition. Even Justice Tomlin's observation in **Sutherland (Duke)** case will make it clear that

interrogatories are intended to shorten the proceedings. In the instant case, because of the peculiar trajectory, interrogatories are virtually lengthening the trial.

47 Besides this, the submission of defendants that interrogatories are not intended to shorten the length of trial, but are intended to file successive criminal complaints cannot be brushed aside. The principle that interrogatories cannot be used as incriminating vehicles qua adversaries was laid down by this Court in **K.Meenakshisundaram Vs. S.R.Radhakrishna Pillai** reported in **AIR 1960 Madras 184**.

48 With regard to Subpoena application, it will suffice to refer to one judgment on either side as the whole issue turns heavily on whether adversaries can be summoned by way of subpoena.

49 On the side of plaintiffs, a century old judgment of Privy Council in **Kishori Lal Vs. Chunni Lal** case reported in **1909 (9) CLJ 172** was pressed into service to say that the opponent can be summoned. It was submitted that **Kishori Lal's** principle has been repeatedly referred to in several subsequent judgments. A perusal of the facts in **Kishori Lal** case reveals that the matter pertains to a Pardanashin lady.

50 On the side of defendants, a case law of this court in **D.Babu Vs. K.A.Dinachandran** reported in **2013 (1) CTC 881** written by a learned Single Judge of this court was referred to. In this case, it was held that plaintiff cannot seek issuance of summons to contesting defendants, who did not choose to come before this Court.

51 In the considered opinion of this Commercial Division, it

may not be necessary to delve into these aspects of the matter any further in this case as the clincher with regard to the question as to whether these interrogatories and subpoena applications have to be acceded to is whether plaintiffs are able to show that there has been any change in circumstances post 26.09.2016 which is the date on which the Division Bench passed the second order.

52 A thorough examination of rival submissions reveals that plaintiffs are unable to show any changed circumstances which have changed post 26.09.2016. To go a step further, plaintiffs have not been able to show that there are any changed circumstances after 18.02.2016, i.e., after first order of Hon'ble Division Bench in intra court appeals where time lines were drawn up. To be noted, 'changed circumstances' necessitating subpoena and interrogatories applications or in other words, circumstances which did not exist on 18.02.2016 or on 26.09.2016.

53 When plaintiffs by their own volition (to be noted when CMH of said Act was not operating in this Court) had agreed for expediting the trial by agreeing for time lines for every step and stage of the trial, there is nothing to show that the same was done without giving a thought to the present interrogatories and subpoena applications. Further more, the present interrogatories and subpoena applications alone are not interlocutory applications that have been filed after the orders of Hon'ble Division Bench. As alluded to supra, a barrage of applications had been filed. As plaintiffs by their own volition had agreed for expediting trial and time lines, an extremely heavy burden is cast on plaintiffs to demonstrate and convince the court that

there were changed circumstances which have necessitated filing of instant applications. In the alternative, plaintiffs should at least be able to show that there was some impediment or some thing that prevented plaintiffs from visualizing the need and necessity qua the present interrogatories and subpoena applications being perceived at the time of agreeing to time lines before the Division Bench. In this view of the matter, a strong and emphatic submission made on behalf of defendants is that plaintiffs, after agreeing for time lines before Division Bench not once, but twice and even after Division Bench expressed its anguish about time lines not being adhered to and reiterating that the main objective was to expedite the trial, are filing barrage of applications only with the intention of delaying and if possible derail the trial. To buttress this emphatic submission, it is strongly reiterated that plaintiffs are having interim orders that have been absolute (interlocutory applications) in their kitty and these applications are being pressed into service to extend the benefit of these orders to the longest possible period of time.

54 A judgment of Hon'ble Supreme Court in ***Ramrameshwari Devi Vs. Nirmala Devi*** reported in **(2011) 8 SCC 249** can be referred to for stressing the importance of proceeding with the trial in the main suit once interim orders are granted. Hon'ble Supreme Court in paragraph 46 held as follows :

“46.It is also a matter of common experience that once an ad interim injunction is granted, the plaintiff or the petitioner would make all efforts to ensure that injunction continues indefinitely. The other appropriate order can be to limit the life

of the ex parte injunction or stay order for a week or so because in such cases the usual tendency of unnecessarily prolonging the matters by the plaintiffs or the petitioners after obtaining ex parte injunction orders or stay orders may not find encouragement.“

55 A further careful analysis of the dynamics and dimensions of these two applications reveal that no prejudice or hardship would be caused to plaintiffs as it is always open to them to canvass that adverse inference should be drawn if defendants withhold best evidence or if the witness who ought to have been examined does not enter the witness box. It is clear that this should have been the thought while agreeing for time lines before Division Bench.

56 It is also to be noted that defendants even stretched their arguments and went as far as saying that they would not have agreed for time lines if plaintiffs had made it clear that such a course will be adopted in the suit.

57 This Commercial Division is of the considered view that it is high time that time lines adumbrated in the two orders of Hon'ble Division Bench dated 18.02.2016 and 26.09.2016 are adhered to in letter and spirit by concluding the trial before the Commissioner and having final arguments in the main suit heard out before the learned Single Judge (this Commercial Division) without any further loss of time.

58 The question of costs of these two applications is left open to be decided in the main suit.

59 Owing to all that have been set out above and in the

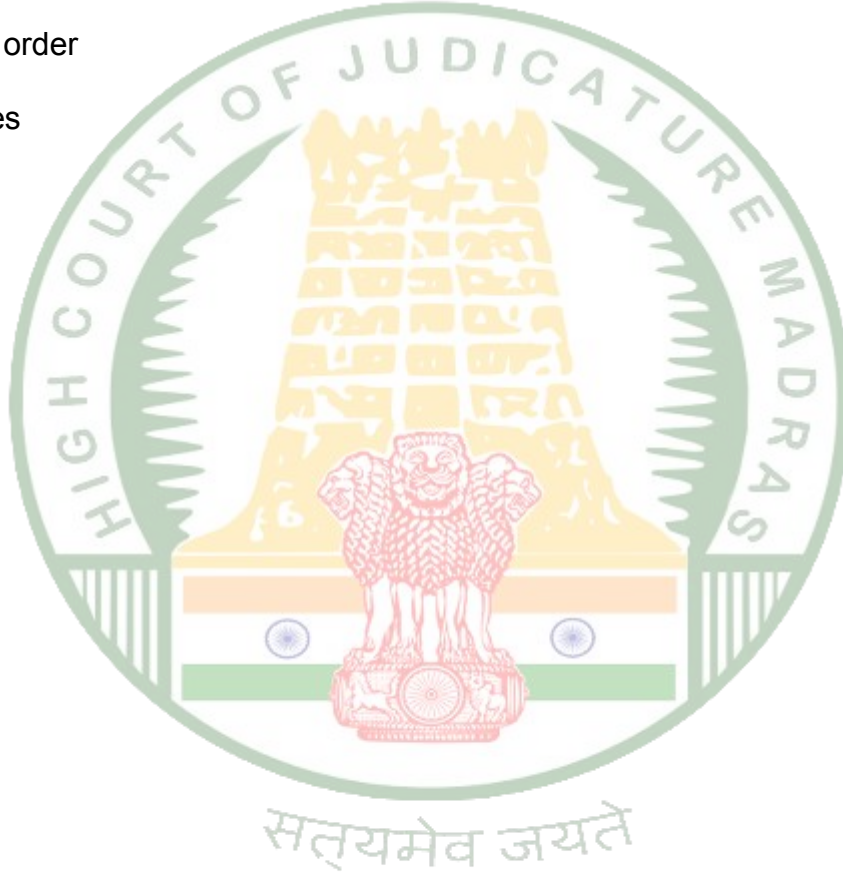
light of the narrative / discussion supra, both applications, i.e., interrogatories application and subpoena application being A.Nos.5585 and 5586 of 2017 fail and are dismissed.

29.01.2019

Speaking order

Index : Yes

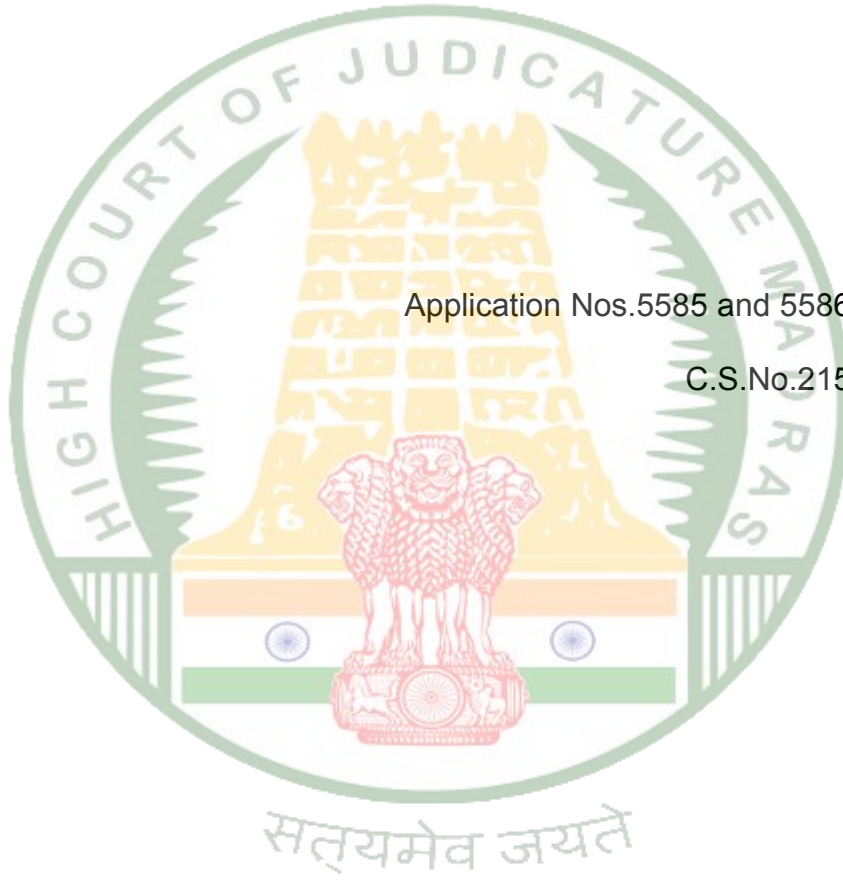
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M.SUNDAR, J.

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order in
Application Nos.5585 and 5586 of 2017
in
C.S.No.215 of 2015

29.01.2019

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