

**IN THE HIGH COURT AT CALCUTTA
(Ordinary Original Civil Jurisdiction)
COMMERCIAL DIVISION**

Present:

The Hon'ble Justice Krishna Rao

**IA No. GA 1 of 2018
(Old No. GA 2940 of 2018)**

In

GA No. 971 of 2018

In

RVWO 33 of 2018

With

CS 24 of 2018

SPX Flow Technology Singapore Pte Ltd.

Versus

Sanjay Jain

Mr. Soumabho Ghose

Ms. R.V. Kundalia

Ms. Tiyaana Bhattacharyya

Ms. Aritra Chakraborty

Ms. S. Rai Singhania

... For the plaintiff.

Mr. Sanjeev Kr. Trivedi
 Mr. Shaunak Mitra
 Mr. Aritra Basu
 Ms. Iram Hassan
 Mr. Sanket Sarawagi

... For the defendant.

Hearing Concluded On : 17.01.2024

Judgment on : 08.02.2024

Krishna Rao, J.:

1. The defendant has filed the present application being GA No. 1 of 2018 (Old G.A. No. 2940 of 2018) in RVWO No. 33 of 2018 praying for the following reliefs :

“a) Leave be granted to the petitioner to file Memorandum of Review from the judgment and decree dated 18th September, 2018 passed by the Hon’ble Justice Soumen Sen in G.A. No. 971 of 2018, C.S. No. 24 of 2018 (SPX Flow Technology Singapore Pte Limited Vs. Sanjay Jain), without a certified copy thereof on the petitioner’s following undertakings:

- (i) to have the order admitting the review drawn up, completed and to include a copy thereof in the paper book to be filed herein;*
- (ii) to have the order impugned drawn up, completed and to include a certified copy in the paper book to be filed herein.*
- (iii) to prepare and include a List of Dates pertaining to the question of limitation in the paper book to be filed herein;*

b) Direction upon the department not to draw up and/or issue certified copy of the judgment and decree dated 18th September, 2018, pending disposal of the present application;

c) A Special Officer be appointed and directed to do the following :

- i. Make an inventory and submit a detailed report of the entire stock of unsold Power Team products manufactured by the respondent and lying at the petitioner's godown mentioned in paragraph 19 above;*
- ii. Supervise and ensure repurchase and in the alternative sale of the entire unsold stock of Power Team produces in accordance with clause 20(a) of the Distribution Agreement;*

d) Direction upon the respondent to immediately repurchase and take delivery of the entire unsold stock of Power Team products lying at the petitioner's godown;

e) The respondent be directed to adjust against the amount payable under the decree dated 18th September, 2018 the repurchase price and/or sale proceeds of the entire stock of unsold Power Team products lying at the petitioner's godown and the balance amount be made over to the petitioner;

f) Ad interim orders in terms of prayers above;

g) Such further and/or other order or orders be passed, direction or directions be given as Your Lordships may deem fit and proper."

- 2.** By an order dated 10th October, 2018, this Court directed that the present application shall not be treated as "Review" application and shall be a substantive application for appointment of the Special Officer and for other directions made in prayers (c), (d) and (e) of the application.
- 3.** By an order dated 26th November, 2019, this Court has passed an order for appointment of the Special Officer in terms of prayer c (i) of the application. As per the order, the Special Officer has verified the stocks

of the materials, made inventory and submitted report before this Court.

4. The plaintiff has filed suit against the defendant for a decree of US\$ 1,60,708.16 along with interest. The plaintiff had also filed an application being G.A. No. 971 of 2018 praying for judgment and decree on admission. The defendant has contested the said application by filing affidavit-in-opposition and after hearing of both the parties, this Court has disposed of the said application by an order dated 18th September, 2018, by passing a judgment upon admission by directing the defendant to pay a sum of US\$ 1,60,708.16 together with interest @ of 10% per annum from the date of filing of the suit till realisation. The balance claim of the plaintiff is relegated to the suit.
5. Now in the present application, the defendant is praying for a direction upon the plaintiff to immediately repurchase and to take delivery of the entire unsold stock of Power Team product lying at the godown of the defendant and for adjustment of the amount payable under the decree passed by this Court dated 18th September, 2018.
6. On 15th July, 2005, an International Distribution Agreement was entered between the plaintiff and defendant wherein the plaintiff has appointed the defendant as distributor of "*Power Team*" brand range of the product comprising tools, accessories, components, systems and service parts. The agreement was initially for the period commencing from 15th July, 2005 to 31st December, 2009 and even after the expiry

of the terms of the agreement, the parties agreed to continue with the business relationship and the defendant would place purchase orders on the plaintiff and the plaintiff would effect supplies the same. As per the purchase orders, the plaintiff has supplied the same and the defendant has accepted the goods. The plaintiff has raised invoices upon the defendant but despite several demands, the defendant failed to make payment against the goods supplied and accordingly the plaintiff has filed the present suit.

- 7.** As per report of the Special Officer, the defendant has provided a chart to the Special Officer of the entire stocks kept in the godown and the Special Officer has verified all the stocks and found that all the stocks available at the godown were labelled with the name “SPX POWER TEAM”.
- 8.** The defendant has relied upon the Clause 20(a) of the agreement and submitted that the plaintiff’s obligation to re-purchase the unsold stock at the price on the terms mentioned in the agreement and it is also the obligation of the plaintiff to compensate the defendant for the loss and damages suffered by the defendant on account of the plaintiff’s breach.
- 9.** The defendant says that on 10th September, 2018, a trademark infringement notice in respect of trademark “Power Team” was issued by the plaintiff to the defendant but the said notice does not in any manner indicate or mention that the goods lying with the defendant

were not those of the plaintiff and only called upon the defendant not to use the trademark.

10. The defendant says that it is impossible for the defendant to sell the Power Team stock because plaintiff had wrongly refused to issue test and guarantee certificates and authorization letters without which the customers would buy from the defendant.
11. The defendant says that the plaintiff had not challenged the order passed by this Court dated 10th October, 2018 and the order dated 26th November, 2019 wherein this Court directed that the instant application be treated as substantive application and the Special Officer was appointed relying upon the agreement as well as Clause 20(a) of the agreement.
12. The defendant relied in support of his case relied upon ***The Weekly Law Reports, November 19, 1971 of the Court of Appeal in the case of Acrow (Automation) Ltd. -vs- Rex Chainbelt Inc and Another*** and submitted that the plaintiff has committed unlawful act after supplying the goods had not allowed the defendant to sell by issuing notices of trademark and infringement and thus this Court can pass an order in an interlocutory application as prayed for by the defendant.
13. The defendant relied upon the judgment reported in ***(2014) 3 Cal LT 510 (Uco Bank -vs- Saumyendra Roy Chaudhury & Ors.)*** and submitted that there is no rule of law which prevents the Court from

granting relief on an interlocutory application although the same might amount to granting the final relief claimed in the suit.

14. The plaintiff says that the application filed by the defendant is not maintainable as the defendant has filed an application for Review of the judgment dated 18th September, 2018 but this Court by an order dated 10th October, 2018 treated the Review application as a substantive application in terms of prayers (c), (d) and (e) and the defendant has not pressed the prayer for review i.e. prayers (a) and (b). The plaintiff says that the defendant has not pressed the Review application and the present application being interlocutory application is filed in the Review application and thus no interlocutory application survive. The plaintiff relied upon the judgment reported in **(2008) 2 SCC 507 (Ajay Mohan and Others -vs- H.N. Rai and Others)** and submitted that once an application is withdrawn without reserving their liberty to move fresh application would clearly attract the principles of res judicata.
15. The plaintiff says that the agreement had already expired at the time of institution of the suit and Clause 12 of the agreement stipulates that the “Power Team” Trade mark has to be used with an appendage for a limited period with limited right. The plaintiff says that the agreement is to be read as a whole and the repurchase clause cannot be read in isolation.
16. The plaintiff says that subsequent to the agreement coming to an end in view of the efflux of time, the obligation inter se the parties was not

in terms of the distributorship agreement but only principal to principal basis. The plaintiff says that the defendant cannot seek enforcement of the sole Clause 20(a) as the same is impermissible. The plaintiff says that the defendant has not filed any counter claim for Specific Performance of Contract.

17. The plaintiff relied upon the following judgments:

a. AIR 1925 PC 45 (William Graham -vs- Krishna Chandra Dey).

b. AIR 1924 Pat 81 (Abdul Haq -vs- Mohammad Yehia Khan and Ors).

c. AIR 1973 Mad 393 (Subramania -vs- Kanappa Udayar)

d. (2023) 1 SCC 355 (Katta Sujatha Reddy -vs- Siddamsetty Infra).

18. The plaintiff says that the defendant has filed the counter claim after the present application was filed and in the counter claim, the defendant has only claim business loss, damages and mandatory injunction. The plaintiff says that the goods were supplied after the contract was determined by efflux of time.

19. The plaintiff says that the defendant was selling spurious and infringing goods which did not belong to the plaintiff and the relief of the mandatory injunction with regard to take back the goods cannot be passed without ascertaining the origin of the goods. He says that the

defendant has rely upon some purported print out from the alleged website of the plaintiff where the site name is allegedly “spxpowerteam” and the veracity of the said website is questionable.

20. The plaintiff says that the Special Officer has verified the goods as per the list provided by the defendant and in the report the Special Officer mentioned that all the stocks were labelled as “SPX POWER TEAM” whereas the Trade Mark is only “Power Team” and the plaintiff denied that the goods are of the plaintiff.

21. The plaintiff has raised the issue that the application filed by the defendant is not maintainable as the present application is filed in a review application but the plaintiff has not pressed the review application. The defendant has filed a separate Memorandum of Review being RVWO No. 33 of 2018 along with the present application being G.A. No. 2940 of 2018 in RVWO No. 33 of 2018 in C.S. No. 24 of 2018. By an order dated 10th October, 2018, this Court has passed the following order:

“This application shall not be treated as ‘Review’ and a substantive application for appointment of Special Officer and for other directions made in prayers (c), (d) and (e) of the petition. Mr. Mitra has stated that petitioner is not pressing for prayers (a) and (b).

The learned Counsel for the petitioner has submitted that without filing written statement with the counter claim these prayers cannot be entertained, inasmuch as the goods are not perishable in nature, there is no urgency for which a Special Officer at this stage should be appointed.

Affidavit-in-opposition shall be filed on or before 16/11/2018, affidavit-in-reply, thereto if any, on or before 26/11/2018.

The matter shall appear under the heading "Motion Adjournment" on 3rd December, 2018."

- 22.** This Court by the said order clarified that this application shall be treated as substantive application as per prayers (c), (d) and (e). Prayers (d) and (e) of the present application reads as follows :

"d. Direction upon the respondent to immediately repurchase and take delivery of the entire unsold stock of Power Team products lying at the petitioner's godown;

e) The respondent be directed to adjust against the amount payable under the decree dated 18th September, 2018 the repurchase price and/or sale proceeds of the entire stock of unsold Power Team products lying at the petitioner's godown and the balance amount be made over to the petitioner."

After the order passed by this Court dated 10th October, 2018 by an order dated 26th November, 2019, appointed a Special Officer and the plaintiff has accepted the said order and not challenged the order of appointment of Special Officer. This Court by an order dated 10th October, 2018, has categorically stated that the present application is a substantive application and thus the submission made by the plaintiff that the application is not maintainable has no merit.

- 23.** The defendant has prayed for the relief in terms of Clause 20(a) of the agreement which reads as follows :

“20. Rights and Obligations Upon Termination.

(a) Within thirty (30) days after termination of this Agreement, Fluid Power, agrees to repurchase from the Distributor, at the net price paid by the Distributor, plus actual transportation charges and import duties paid by Distributor thereon, any or all saleable products and/or parts held in stock by Distributor, and Distributor shall return to Fluid Power free of charge all such Products and parts which Fluid Power has made available to the Distributor free of charge.”

The agreement was effective from 15th July, 2005 to 31st December, 2009. Even after the said period the defendant continued to place the purchase orders to the plaintiff and the plaintiff supplied the same on a principal to principal basis. As regards the admitted claim of the parties, this Court by an order dated 18th September, 2018, passed an order directing the defendant to pay an amount of US\$1,60,708.16 to the plaintiff with interest at the rate of 10% per annum from the date of filing of the suit till realisation.

After the order passed by this Court dated 18th September, 2018, the defendant has filed written statement alongwith counter claim. In the counter claim, the defendant has prayed for following reliefs:

- “(a) Decree for a sum of Rs. 9,50,15,728.2 as pleaded in paragraph 78 herein;*
- (b) Interim interest and interest upon judgment @18% till full realization;*
- (c) Decree for mandatory injunction directing the plaintiff to immediately repurchase and take delivery of the entire unsold stock of Power*

Team Products lying with the defendant at the net price paid by the defendant plus actual transportation charges and import duties thereof and decree for such sum as would constitute the net price of such stock plus actual transportation charges and import duties paid by the defendant as pleaded in paragraph 59.”

The defendant in his counter claim prayed for loss of business and damages. Prayer (c) of the counter claim and prayers (d) and (e) of the present application are more or less same. At the time of hearing of the matter on 10th October, 2018, the Learned Counsel for the defendant has submitted before this Court that without filing written statement with counter claim the prayer of the defendant cannot be entertained, goods are not perishable in nature and there is no urgency.

By an order dated 18th September, 2018, this Court passed decree for US\$ 1,60,708.16 together with interest and the balance claim of the plaintiff is relegated to the suit. It is well settled law that the Court can pass interim relief in the nature of final relief but such power is required to be used sparingly and with utmost caution.

In the present case, it is the specific case of the plaintiff that the agreement was expired due to efflux of time but respondent continued to place purchase orders on the plaintiff even after the expiry of the period mentioned in the agreement and the plaintiff had supplied the same on a principal to principal basis. It is admitted that the claim of

the product supplied to the defendant after the expiry of the period mentioned in the agreement.

The plaintiff issued notices with regard to trademark and infringement. As per the case of the plaintiff that the labels appearing on stocks are as “SPX POWER TEAM” but the Trade Mark of the plaintiff is only “Power Team” and the goods are not of the plaintiff. It is also found from the record that the suit is at the stage of witness action of the plaintiff.

- 24.** Considering all the above facts and circumstances, this Court finds that it would not be proper for this Court to grant relief to the defendant in the interlocutory application as the contentions raised by the plaintiff is required to be decided only after the trial of the suit.
- 25.** The defendant had filed RVWO No. 33 of 2018 for review of the order passed by this Court in GA No. 971 of 2018 in CS No. 24 of 2018 dated 18th September, 2018 but the petitioner has not pressed the Review application, accordingly, **RVWO No. 33 of 2018 is dismissed.**
- 26.** In view of the above, **GA No. 1 of 2018 (Old No. G.A. 2940 of 2018)** is also **dismissed.**

(Krishna Rao, J.)