Lava International Limited Vs Telefonaktiebolaget Lm Ericsson (Publ)

Court: DELHI HIGH COURT

Date of Decision: July 14, 2016

Acts Referred: Civil Procedure Code, 1908 (CPC) - Order 28 Rule 3

Citation: (2016) 7 ADDelhi 173 : (2016) 3 MIPR 212

Hon'ble Judges: Mr. S. Ravindra Bhat and Ms. Deepa Sharma, JJ.

Bench: Division Bench

Advocate: Sh. Parag Tripathi, Senior Advocate with Sh. Ashok. K. Aggarwal, Sh. Jayant Mehta, Sh. Swapnil Gupta, Sh. Shwetank Tripathi and Ms. Rani Singh, Advocates, for the Appellant; Sh. Gopal Subramaniam, Sr. Advocate with Ms. Prathiba. M. Singh, Sr. Advocate wit

Final Decision: Dismissed

Judgement

Mr. S. Ravindra Bhat, J.â€"This defendant"s appeal questions an interlocutory order of the learned Single Judge dated 10.06.2016 in a patent

infringement suit. The appellant (hereafter referred to as ""the defendant"") complains that the impugned order affects its right to defend the suit for

infringement of patent instituted by the plaintiff.

2. The facts briefly are that the plaintiff claimed that the appellant/defendant infringed its patents and, in its suit, sought injunctive relief as well as

damages. It also claimed a decree for a declaration that the rights offered by it in respect of its portfolio of its standard essential patents are

FRAND (Fair, Reasonable and Non-discriminatory in character). The orders of the learned Single Judge were the subject of several previous

interlocutory appeals to the Division Bench, on various occasions. The matter even reached the Supreme Court on at least two occasions. On

16.12.2015, the Supreme Court, by its order in SLP No.34886-87/2015 required this Court to decide the suit as expeditiously as possible and

preferably within six months from the date the defendants filed their written statement. After that proceeding, and having regard to the pleadings of

the parties, the issues were framed in the suit on 02.02.2016. On 22.02.2016, the learned Single Judge fixed the schedule of trial, in the following

terms:

(i) 4 weeks for filing evidence affidavit in affirmative by both the parties, i.e. by 21st March, 2016;

(ii) Thereafter, cross-examination (8 hours per witness), i.e. from 28th March, 2016 to 15th April, 2016;

(iii) Thereafter, 2 weeks for filing rebuttal evidence, i.e. till 5th May, 2016.

(iv) Thereafter, 2 weeks for cross-examination on rebuttal evidence, i.e. from 9th May, 2016 to 24th May, 2016.

(v) Commencement of final arguments from 30th May, 2016.

Learned counsel for the parties state that once the affidavits are filed, both the parties will intimate each other as to which witness they would

cross-examine on the respective dates. They also agree that the parties will try to abide by the schedule fixed by the Court.

3. On 05.05.2016, the Court noticed that the plaintiff''s evidence had been concluded and that the defendant had to produce evidence in the main

suit and the counter claim in other proceedings. The defendant had apparently filed affidavit depositions of two witnesses - Madhusudan (DW-1)

and Prof. Kamakoti (DW-2). The Court noted that the cross-examination of DW-1 would be conducted between 06-09.05.2016. On

10.05.2016, the Court directed that DW-1 be made available on 13.05.2016 for further cross-examination. On 13.05.2016, the plaintiff stated

that the cross-examination of DW-1 would be concluded that day and that the cross-examination of a defence witness - Sunil Bhalla would be

recorded on 14.05.2016. On that day, i.e. on 14.05.2016, the cross-examination of DW-1 could not be concluded. The statement and cross-

examination of Shri Bhalla, DW-3 was partly recorded. On 16.05.2016, the learned Single Judge who was closely monitoring the trial noted the

developments, which had occurred in the proceedings and further that on 03.05.2016, the defendant had submitted an additional list of witnesses

containing seven names. At the same time, it was urged on behalf of the defendants that the depositions of only seven witnesses in all would be

presented. The Court was informed - on behalf of the defendant that Prof. Kamakoti, one of its witnesses was not available in May 2016. The final

order on the request for deferment of his cross-examination was made - rather, the case was directed to be taken up on 25.05.2016. The

defendant again requested that its witness would not be present on the date scheduled, i.e. 28/29.05.2016. However, the Court again deferred

orders to 30.05.2016 with respect to Prof. Kamakoti and did not accede to the request for postponement. The Court also observed that:

As far as other witnesses are concerned, no scanned signed copies of their affidavits have been produced by defendant. Four days more time is

granted to the defendant to produce the same. However, the learned counsel for the defendant submits that the defendant may not be able to

produce the scanned signed copies of the remaining witnesses by 29th May, 2016. The appropriate order will be passed in relation to those

witnesses on 30th May, 2016 when the main suit is listed.

4. The order precluding the rights of the defendant with respect to its witness - Prof. Kamakoti became the subject matter of an earlier

interlocutory appeal - FAO(OS) (Comm) 39/2016. The Court permitted the cross-examination of Prof. Kamakoti on 01.06.2016 by its order

dated 27.05.2016. On 10.06.2016, the learned Single Judge made the impugned order limiting the appellant/defendant''s rights to adduce

evidence in rebuttal. The Court inter alia directed as follows:

25. From the overall facts and circumstances of the case, it appears that the defendant wishes to produce more witnesses as additional

evidence/rebuttal evidence in relation to the subject matter of FRAND agreement. The plaintiff has not denied that the evidence sought to be

produced is different that the evidence produced of DW-1 & DW-3, i.e. Mr. G.S. Madhusudan and Dr. V. Kamakoti. The statement was also

made earlier by the learned counsel for the plaintiff that in case the evidence of these witnesses is not led, the plaintiff will also not produce the

rebuttal evidence. It is not denied by the counsel for plaintiff that the right for rebuttal evidence was also reserved by the parties.

26. It is also pertinent to mention that as per the original schedule contemplated as agreed between the parties, in fact, both the parties were given

time to file their respective evidence in affirmative simultaneously. Learned counsel for the defendant has also stated that in the affirmative evidence,

the plaintiff has filed large number of documents including the test reports and logs. Therefore, in order to give a fair chance, the defendant is

granted last one more opportunity to rebut the evidence on the issue of FRAND Agreement. Learned counsel for the defendant has also agreed

that these witnesses may not be permitted to be shown all the 54 agreements in the original position. The said agreements would be shown to the

said witnesses directly after deletion of relevant portion in view of the order passed by the Supreme Court. Thus, the order in this regard be passed

accordingly, however subject to the cost of Rs. 50,000/- as the defendant has failed to file the evidence of these witnesses despite of time granted.

27. The opportunity is being given in the interest of justice, equity and fair play coupled with the fact of assurance given by the learned counsel for

the defendant on behalf of his client that the defendant be granted final opportunity to file the affidavits on or before 29th June, 2016 and in case

the said affidavits are not filed, the evidence of the defendant shall be treated as closed and even if the affidavit(s) of witness(s) are filed and the

witness(s) would not present under any circumstances before Court when the matter is fixed for tendering the evidence and for cross-examination,

the defendant agrees that the evidence of the said witness(s) be treated as closed. As the order is being passed after ten days when the statements

were made therefore the time is extended upto 6th July, 2016.

28. As it is a technical matter coupled with the fact that the right to rebuttal was reserved by the parties when the schedule was arranged as well as

affirmative and rebuttal evidence of DW-2 was concluded before the evidence of affirmative of DW-3, one final opportunity is granted to the

defendant to file affidavit(s) as additional evidence of the rebuttal evidence on or before 7th July, 2016. An advance copy of the said affidavit(s)

shall be given to the learned counsel for the plaintiff by 4th July, 2016 who will file the affidavit as response/rebuttal evidence, if so required, by

25th July, 2016. The evidence of the witness(s), whom affidavits are filed, would be recorded by the same Court Commissioner from 18th July,

2016 to 26th July, 2016 (12 hours per witness). It would be the responsibility of the defendant to produce them before the Court Commissioner

who will produce all details to the plaintiff''s counsel.

5. It is urged that the impugned order disallowing the defendant of its right during the trial is erroneous because the witness required to be examined

is a representative of Mediatek which supplies chip sets for the phones sold by the appellant. Since the appellant urges in its defence that the suit

patents are neither essential nor have been infringed by the handsets manufactured by Mediatek, it is vital that the representative of the said

concern should be permitted to depose in the proceedings.

6. It is contended by Sh. Parag Tripathi, learned senior counsel for the appellant that the impugned order is erroneous inasmuch as the right to call

a witness from Mediatek has been denied by reason of non-disclosure of his or her name and other particulars. Contending that Mediatek was

referred to at all material times when the list of witness was filed and relied upon, it is stated that the plaintiff cannot surely complain that it would be

caught by surprise, that it would be put to prejudice or that the appellant would unfairly benefit if such witness in fact deposes in the proceedings.

7. Learned counsel contends that the impugned order in effect contradicts a previous order and all previous proceedings whereby the particular

reference to the appellant to adduce the depositions of its witnesses was recognised. It is highlighted that the impugned order strikes at the root of

the appellant to lead rebuttal evidence. Learned counsel states that the appellant cannot lead its rebuttal evidence without knowing what the plaintiff

deposes.

8. It is emphasised that the impugned order- since it precludes rebuttal evidence was in fact made after conclusion of hearing in respect of an

earlier stage, i.e. cross-examination of the defendant''s witnesses. Characterizing the latest stage to be the third phase in the trial, learned counsel

submitted that the impugned order to the extent it enjoins the defendant or prevents it from leading rebuttal evidence irrevocably prejudices it even

though the stage for making such ruling had not arisen.

9. Mr. Gopal Subramanian, learned senior counsel for the plaintiff, urges that this court should not interfere with the impugned order. It is argued

that the present proceeding is currently latest in the series of nine appeals filed by the defendant to the Division Bench. Learned senior counsel

points out that the defendant had chosen, previously to question every order of note made by the learned Single Judge.

10. Mr. Subramanian argues that the defendant is attempting to stall and prolong the proceeding. Highlighting that the defendant was aware that it

was under a duty to disclose the name and identity of its witnesses, learned counsel submitted that opportunity had been granted in mid May itself

to the defendant/appellant to file copies of affidavit depositions, either in original, or scanned copies. It is submitted that neither did the defendant

file such evidence, of MediatekÃ¯Â¿Â½s representative, nor even disclose who such representative was. Counsel urges that the defendant was always

aware that it had to rebut the plaintiff"s case and indeed had done so, through the witnesses, who did depose in that regard. Lastly, learned senior

counsel submitted that the copy of MediatekÃ¯Â¿Â½s e-mail clearly states that its employees would not be available when the plaintiff wants them and

that besides, even till date, the affidavit evidence of such witness is not forthcoming. In these circumstances, urged counsel for the plaintiff, this

court should not grant any further leeway; the defendant has not been placed under serious inconvenience or disadvantage as to warrant appellate

interlocutory intervention.

11. Order 18, Rule 3 of the Code of Civil Procedure reads as under:-

3. Evidence where several issues:- Where there are several issues the burden of proving some of which lies on the other party, the party

beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other

party; and, in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the

other party may then reply specially on the evidence so produced by the party beginning; but the party beginning will then be entitled to reply

generally on the whole case.

The above provision in effect provides that where several issues are framed and burden to prove some of the issues lies on the other party, the

party beginning has the option to produce its evidence on those issues, or reserve it by way of answer to the evidence produced by the other party.

In such case, the party beginning may produce evidence on those issues after other party has produced all his evidence. In other words, the right of

rebuttal i.e. in answer to the evidence of other side is available to the party beginning where the onus of some issues is on other party and the other

party has led evidence on such issues. It is a matter of record that the defendant has led evidence in the form of depositions of three witnesses. The

defendant had opportunity to rebut the plaintiff''s evidence as well as further its counter claim and undeniably did so, in the proceeding. It complains

that precluding it from producing the evidence of MediatekÃ¯Â¿Â½s representative is prejudicial to its interest.

12. When issues were struck and parties were directed to conform to a time schedule, in view of the imperative nature of the Supreme Court''s

order, it is undeniable and a matter of record that the list of witnesses - both in the affirmative and in rebuttal evidence, was filed in court. Though

the defendant urges now that the impugned judgment is not founded on sound reasoning, insofar as it assumes that the witnesses'' identity should be

disclosed, the fact remains that it was always aware of two essential facts: one, that it had to lead evidence in support of its counter claim as well as

in defence of the suit and two, that time was fixed for filing affidavit deposition. The proceedings before the Local Commissioner and the orders of

the learned Single Judge would reveal that the plaintiff had in fact concluded its deposition in the first week of May itself. Almost the entirety of that

month was spent in cross-examination of two defence witnesses (including the deposition of Prof. Kamakoti who had expressed unavailability in

the entire month of May, which led to a series of orders and an order of the Division Bench). At that stage itself, the Court had required the

defendant to file deposition of its witnesses in affidavit- through scanned copies. The defendant did not avail of that opportunity. Ultimately, in the

impugned order, the learned Single Judge held that barring the evidence in relation to FRAND- on which the plaintiff had led and for which rebuttal

evidence is essential, there can be no further witness testimony on behalf of the defendant. This court is of opinion that given the context and

background of the dispute, there is no question of failure of justice or unfairness to the defendant.

13. The original schedule mandated by the learned Single Judge - in the light of the Supreme Court''s order requiring conclusion of trial within 6

months from end December, 2015- was that recording of evidence would be concluded and final arguments would commence from 30th May,

2016. The plaintiff, experienced difficulties in cross-examination of the defendant''s witnesses, and moved applications to facilitate that process -

e.g., I.A. No.5394/2016 being one such. The record would reveal that the learned Single judge closely monitored the process, at times listing the

suit even on the same day that the Local Commissioner did (for the purpose of recording evidence). The defendant''s witness stated inability to be

subjected to cross-examination- which led to a further series of orders. In the case of the witness in question, the learned Single Judge noticed that

neither the list of witnesses nor any other material on record, revealed the identity of MediatekÃ¯Â¿Â½s official. Regardless of whether the identity of

such official is relevant, what is clear from the record is that the defendant had sufficient time to produce the affidavit of such representative. This

Court notices that MediatekÃ¯Â¿Â½s representative had been mentioned in the original list of witnesses filed in Court. Therefore, it was possible for the

defendant to have made arrangements, in the light of the depositions it wished to present and in the light of the plaintiff''s evidence, which had

ended by May, 2016. Instead, it relied on the e-mail correspondence with Mediatek, which expressed both skepticism about its representative''s

ability to depose in such matters and in any case, expressed constraints with respect to availability of its employees and officers.

14. Significantly, the learned Single Judge also noted that the deposition of the defendant''s witness was both in furtherance of its own case as well

as in rebuttal of the plaintiff''s evidence. If all these aspects were to be considered as well as the imperative that the Court conclude the trial in a

time-bound manner, the only inference which can be drawn is that acceding to the defendant''s requests would mean further prolongation of an

already delayed trial. This court is also unimpressed with the submission that the learned Single Judge made a direction in respect of a phase of the

trial which he was not overseeing. The learned Single Judge, presiding over the trial had the authority to ensure that every such order as was

necessary for the parties to adhere to the timelines, was made. The trial of a suit is an indivisible process, even though for convenience it is

scheduled in a particular order; as one monitoring the progress of such process, the learned Single Judge could make orders regardless of the

phase"".

15. Wander Limited v. Antox India (Pvt.) Limited, (1990) Suppl. SCC 727 and Mohd. Mehtab Khan & Ors. v. Khushuma Ibrahim & Ors.,

(2013) 9 SCC 221 are two rulings of the Supreme Court which direct the appellate courts to exercise caution while dealing with interlocutory

determinations of courts of first instance. Sans serious or palpable untenability of trial courts'' orders, intervention should be desisted. These

judgments bind the court. There is, in the opinion of this court, nothing so serious or unreasonable as to warrant appellate interdict because the

defendant feels that it is seriously prejudiced.

16. In the light of the above discussion, there is no merit in the appeal. It is therefore, dismissed with no order as to costs.

17. Order dasti.