
(2016) 03 MAD CK 0255

In the Madras High Court

Case No : Application Nos. 2647 and 4539 of 2015 in C.S. No. 979 of 2007

M/s. Bajaj Auto Limited

APPELLANT

Vs

M/s. TVS Motor Company Limited

RESPONDENT

Date of Decision : 28-03-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151
Evidence Act, 1872 — Section 65(a)
Original Side Rules — Order 14 Rule 8
Patents Act, 1970 — Section 64(2)(1)

Citation : (2016) 6 CTC 459 : (2017) 1 ICC 482 : (2016) 67 PTC 488

Hon'ble Judges : Mr. M. Sathyanarayanan, J.

Bench : Single Bench

Advocate : Mr. T.V. Ramanujan, Senior Counsel for Ms. S. Suba Shiny, Advocate, for the Applicant in both Applications; Mr. P.S. Raman, Senior Counsel for Mr. T.K. Baskaran, Advocate, for the Respondent both Applications

Final Decision : Disposed Off

Judgement

Mr. M. Sathyanarayanan, J.—The defendant is the applicant in both applications and these applications have been taken out to eschew certain documents marked as exhibits in the suit, on the ground that the said exhibits are either inadmissible and/or in respect of which, the mode of proof and/or relevancy is under serious doubt and in spite of objections being raised at the time of marking the documents, the same have been received in evidence as exhibits.

2. Since the points urged by the applicant/defendant in these applications, are one and the same, the present applications are disposed of by this common order. For the sake of convenience, the array of parties will be referred as plaintiff and defendant in C.S.No.979 of 2007.

3. The facts leading to the filing of these applications, shorn off unnecessary details, are as follows:-

3(i) The respondent/plaintiff has filed a suit in O.S.No.979 of 2007 against the applicant herein praying for a judgment and decree to declare that the respondent's product viz. TVS Flame, which uses the two spark plug with screw fitted and three valves, does not infringe the Patent No.195904 of Bajaj Auto Limited (applicant herein) and for permanent injunction restraining the defendant from issuance of threats that the plaintiff is infringing the defendant's Patent No.195904 and from interfering with the launch and sale of the product TVS Flame, and also to direct the defendant to compensate the plaintiff a sum of Rs. 1 crore for the damages sustained by it on account of unjustified threats made by the defendant.

3(ii) The applicant viz. M/s. Bajaj Auto Limited, has filed a suit in C.S.No.1111 of 2007 against the respondent herein (M/s. TVS Motor Company Limited), praying for a judgment and decree for permanent injunction restraining the respondent/defendant therein from using the technology or manufacturing/marketing FLAME Motorcycle or any other product that allegedly infringes the applicant's (plaintiff therein) Patent No.195904.

3(iii) The facts relating to the litigation's in the form of above said suits, have been narrated in detail and in extenso in the orders passed in the earlier round of litigation's and reported in 2008 (36) PTC 417 (Mad.) (Bajaj Auto Limited v. Tvs Motor Company Limited) and 2009-3-L.W. 31 (Division Bench) (Tvs Motor Company Limited v. M/s. Bajaj Auto Limited), and therefore, it is not necessary to restate the same once again except to deal with the contentions put forth by the respective learned Counsel appearing for the parties in these applications.

3(iv) In respect of an order passed by this Court in the earlier round of litigation, the plaintiff filed an appeal in Civil Appeal No.6309 of 2009 before the Hon"ble Supreme Court of India. The Apex Court vide order dated 16.9.2009, had directed the hearing of the suit to take place on day-to-day basis. Thereafter, a Division Bench of this Court vide order dated 4.10.2010, made in O.S.A.Nos.132 and 133 of 2010, had directed the plaintiff to produce evidence at the first instance, and thereafter, the documents that are brought on record, have to be marked. This Court vide order dated 10.12.2014, had directed the parties in both suits, to cooperate with the learned Master to complete the trial on or before 30.4.2015.

3(v) On behalf of the plaintiff, Mr. Harne Vinay Chandrakant filed his proof affidavit in lieu of chief-examination, as P.W.1 and according to the plaintiff, the defendant raised very many objections and as a consequence, the trial of the suit could not be proceeded with and therefore, the learned Additional Master No. II directed the plaintiff to approach the learned Judge for appropriate orders as to the objections raised by the defendant.

3(vi) In the above circumstances, the plaintiff filed A.No.413 of 2015 seeking leave of this Court to file certain additional documents, and also took out A.No.414 of 2015 praying for a direction for conducting the trial expeditiously.

3(vii) The learned Judge by a common order dated 17.2.2015, has directed the learned Additional Master No.II to mark the documents and record the objections raised, leaving it open to be decided at the time of final arguments before this Court, and also made it clear that the respective learned Counsel appearing for the parties, shall furnish copies of documents, clarifying the objections raised by the defendant, on or before 19.2.2015.

3(viii) According to the plaintiff, the said order has been complied with and copies of all documents have been produced and the learned Judge after satisfying with the same, has directed the learned Additional Master No.II to proceed with the trial.

3(ix) P.W.1 examined himself in chief on 9.3.2015, before the learned Additional Master No.II, and through him, Exs.P1 to P30 were marked and on 7.4.2015, Exs.P31 to P38 were marked and on 15.6.2015, Exs.P39 to P53 and one material object (M.O.1) were marked and the marking of exhibits and material object were made subject to objections raised by the defendant.

3(x) The defendant aggrieved by the order dated 17.2.2015, passed in A.No.413 of 2015, preferred an appeal in O.S.A.No.100 of 2015. The said appeal was disposed of by a Division Bench of this Court, vide order dated 4.6.2015, and it is relevant to extract the same as under:-

i) It is agreed that the question whether the documents brought on record are admissible in evidence or not and whether this question should be decided at this stage or at a later stage may be urged before the learned Single Judge after marking of all documents, for which the suit will be placed before the learned Single Judge.

ii) For marking the documents, the matter will be listed before the learned Master on 10.06.2015 and with regard to admissibility, proof and relevancy of the documents filed by the original plaintiff could be raised, the suit will be listed before the learned Single Judge on 18.06.2015. Upon such decision being taken by the learned Single Judge with regard to the stage at which admissibility, proof and relevancy could be raised, evidence be recorded.

3(xi) The Division Bench has appointed Thiru C.Manickam, a retired District Judge, as the Commissioner to record evidence and complete the process of recording evidence within four months from the date of commencement of such recording.

3(xii) The defendant, pendency of O.S.A.No.100 of 2015, filed A.No.2647 of 2015 for eschewing 16 documents out of 30 documents, which came to be marked through P.W.1 on 19.3.2015. After the disposal of O.S.A.No.100 of 2015, the defendant filed A.No.4539 of 2015 for eschewing 22 documents out of the remaining 23 documents, that were marked through P.W.1 on 15.6.2015.

4. Counter affidavits have been filed in both applications, wherein, it has been stated among other things, that pursuant to the order dated 17.2.2015, passed

by this Court, wherein, the learned Master was directed to record objections and mark documents, the respondent/plaintiff had all documents, which were received on 19.2.2015, by the applicant/defendant, and at that time, there was no objection to the said documents. It is further stated that the applicant had actively participated in the chief-examination, wherein, Exs.P1 to P30 were marked and since the order dated 17.2.2015, passed by this Court, had addressed all concerns of the parties, the applicant/defendant is not put to any prejudice; but, on the other hand, they filed these frivolous applications to drag on the trial of the suit and hence, the applications may be dismissed.

5. The applicant/defendant filed rejoinder affidavits reiterating their stand taken in the applications, and would state that the proof affidavit of P.W.1 contains documents, which were never disclosed, nor referred to in the plaint, or in the affidavit of documents already filed by them, and sequence of events clearly reflect that the respondent/plaintiff is prosecuting the present proceedings in a manner unknown to law resulting in the applicant/defendant raising objections from time to time. It is further stated, merely because copies of intending documents have been furnished, does not imply that the said documents are automatically admissible in law and are entitled to be marked as exhibits and hence, the applicant/defendant prays for allowing the applications.

6. These applications were listed before this Court on various dates.

7. M.P.No.1 of 2015 in O.S.A.No.100 of 2015 was filed seeking clarification of the order dated 4.6.2015. The Division Bench vide order dated 14.10.2015, has clarified the same as under:-

"... At this stage, all that the learned Single Judge is required to consider is whether the question of admissibility, proof and relevancy raised could be decided at this stage or at the final stage"

8. Mr.T.V.Ramanujan, learned Senior Counsel, assisted by Ms. Suba Shiny, Advocate, appearing for the applicant/defendant, made the following submissions:-

(a) In respect of the objections raised regarding admissibility, mode of proof and relevancy as to certain documents, tendered in evidence, the most appropriate and convenient stage to decide the same, would be at the earliest given opportunity i.e., at the time of marking the documents itself as exhibits. The reason is that if the objections are raised, then the party tendering evidence, may have an opportunity to cure any defect, if any, regarding the said evidence, and the decision taken in that regard, at the earliest point of time, may also save the precious time of the Court at the time of advancing final arguments, and the party against whom, such evidence is tendered, may have an opportunity to dispel any doubt, as to the genuineness, truth and validity of the documents that are marked.

(b) Any objection regarding mode of proof, should be decided at the earliest

available opportunity and in the case on hand, the respondent/plaintiff had tendered documents as exhibits and material object, which are photocopies/xerox copies, newspaper clippings, press report, downloads from websites, independent research/secret trial documents, Compact Disc said to have been containing audio video bytes of several interviews, unauthenticated translations, truncated/incomplete documents, photographs and several other documents, of which, P.W.1 is not at all the author and no way concerned with it, and in spite of the said objections, having been raised even at the time of tendering these documents in evidence as exhibits and material object, such exhibits and material object were marked and therefore, the applicant/defendant is put to grave and serious prejudice.

(c) The applicant/defendant in both applications, would also contend that photocopies or xerox copies of Exs.P3, P4, P5, P11, P13 series, P15, P16, P17 and P19 cannot be marked in the absence of any proper and sufficient explanation as to the non-availability of primary evidence.

(d) Xerox copies of newspaper clippings and press reports were also marked as Exs.P11, P13 series, P16, P17 and P19 and without producing the complete newspaper, in which the said news item appeared, coupled with the fact that newspaper articles per se, are in the nature of hearsay evidence, these documents ought not to have been marked at all.

(e) The respondent/plaintiff also produced a Compact Disc containing video bytes/clippings from several television channels/news telecasts, which are incomplete, and the contents of the Compact Disc were stated to be downloaded from an unverifiable source on the Internet and edited by the respondent/plaintiff to suit their convenience and it cannot be allowed to be tendered in evidence as material object, due to the fact that the source has not been disclosed. The video clippings have been edited and compiled and no certificate of authenticity has been provided by any of the news channels.

(f) Similarly, the respondent/plaintiff had marked Exs.P31 to P34, P41 to P43 and P48 to P50, which are several web pages/web downloads, the source or authenticity of which remains unverified, and those contents may be altered by any one at any point of time to suit their need and convenience.

(g) The respondent/plaintiff had also marked English translation of certain documents, which are in foreign language, and certificate of translation as mandated under Order 9, Rule 1 (a) of Madras High Court Original Side Rules, has not been complied with and therefore, the said documents cannot be received in evidence.

(h) Certain incomplete documents viz. Exs.P7, P44, P46 and P47, were marked by the respondent/plaintiff and therefore, the same ought not to have been received in evidence.

(i) Ex.P51 photograph, was also marked and unless and until the Photographer,

who took the photo, is examined as a witness, the authenticity of the same remains doubtful and therefore, the said document should not have been received in evidence.

(j) The respondent/plaintiff did not produce specific certificates in compliance of Section 65-B of the Indian Evidence Act, in respect of Ex.P10 series, P14, P22, P28, P31, P32, P33, P34, P41, P42, P43, P48, P49 and P50, and in the absence of such certificates as mandated under the above said provision, these documents ought not to have been received in evidence.

(k) The respondent/plaintiff has marked Ex.P24 - Technical Collaboration Agreement dated 13.11.2000; Ex.P25 design report of AVL written by Angerer Bernd; Ex.P26 Technical Collaboration Agreement dated 25.6.2004 and Ex.P27 Revised Technical Collaboration Agreement dated 10.6.2005, and the said agreements have not been stamped in accordance with the Indian Stamp Act, and the contents of the said documents pertain to secret trial/research between the respondent/plaintiff and a third party and the same is not in consonance with Section 64(2)(1) of the Patents Act.

9. It is the primordial submission of the learned Senior Counsel appearing for the applicant/defendant, that the judgment rendered by the Hon"ble Supreme Court of India and reported in (2001) 3 SCC 1 : AIR 2000 SC 1158 (Bipin Shantilal Panchal v. State of Gujarat And Another), cannot be pressed into service for the reason that the said judgment came to be rendered on the facts and circumstances of that case and that the Hon"ble Supreme Court felt, trial of the criminal case is unnecessarily getting prolonged and in the light of the same, has rendered the said judgment and it has no application to the case on hand and the subsequent judgment rendered by the Hon"ble Supreme Court of India and reported in 2013 (3) KLJ 59 (Supreme Court) (State of N.C.T. of Delhi v. Mukesh), has clarified the same and in the judgment rendered by the Full Bench of Bombay High Court and reported in 2008 (6) MH.L.J. 886 (Hemendra Rasiklal Ghia v. Subodh Mody), it has also been observed that the view expressed in Bipin Shantilal Panchal case (cited supra), is based on the peculiar factual matrix arising out of criminal trial, which was prolonged for almost ten years in breach of fundamental right of the accused guaranteed under Article 21 of the Constitution of India, and reliance was placed upon three Judge Bench judgment of the Apex Court reported in (1972) 1 SCC 9 (P.C. Purushothama Reddiar v. S. Perumal), which was followed in (2003) 8 SCC 752 (R.V.E. Venkatchalla Gounder v. Arulmighu Viswesaraswamy And V.P. Temple And Another) and AIR 2004 SC 4082 (Dayamathi Bai v. K.M. Shaffi).

10. It is the further submission of the learned Senior Counsel appearing for the applicant/defendant, that Order 18, Rule 4 of the Code of Civil Procedure speaks about recording of evidence by the Commissioner and the said Rule makes it abundantly clear that the objections as to the admissibility, relevancy and mode of proof are to be decided immediately after the documents are tendered in evidence, and not at a later stage of trial along with the final arguments on

merits and therefore, the objections raised, cannot be deferred to the final arguments and must be decided then and there, for the reason that the record of proceedings will be burdened with documents/evidence, which prima facie, ought not to have been received in evidence, and in the event of eschewing these documents, only the relevant exhibits will be made available so as to enable the Court to appreciate the same and give it's decision and moreover, if the objections raised as to the mode of proof, are sustained, the concerned party, who wants to mark the documents, may also have an opportunity to cure the defects pointed out, and in the event of mode of proof being postponed, till arguments, the party, who is raising the objections, will be put to serious prejudice.

11. The learned Senior Counsel appearing for the applicant/defendant, has placed reliance upon the following decisions:-

(i) 2008 (6) MH.L.J. 886 (Bombay Full Bench) (Hemendra Rasiklal Ghia v. Subodh Mody);

(ii) (2010) 8 SCC 423 (Shalimar Chemical Works Limited v. Surendra Oil And Dal Mills (Refineries) And Others);

(iii) 2002-4-L.W. 147 (Tamil Nadu Industrial Development Corporation Ltd. v. N. Swaminathan);

(iv) 2010 (9) SCC 712 (M. Chandra v. M. Thangamuthu And Another);

(v) 2011 (4) SCC 240 (H. Siddiqui v. A. Ramalingam);

(vi) AIR 1959 SC 1376 (Gullapalli Nageswararao And Others v. State of Andhra Pradesh);

(vii) 1988 (3) SCC 319 (Laxmi Raj Shetty And Another v. State Of Tamil Nadu);

(viii) AIR 1994 SC 1733 (Quamarul Islam v. S.A. Kanta And Others);

(ix) AIR 1975 SC 1788 (Zb Bukhari v. B.R. Mehra);

(x) AIR 1986 SC 3 (Ram Singh And Others v. Col Ram Singh);

(xi) 2006 (11) SCC 1 (Jagjit Singh v. State of Haryana And Others);

(xii) 76 F Supp. 2d 773 (1999) (St. Clair v. Johnny's Oyster And Shrimp, Inc.)

(xiii) 2014 (10) SCC 473 (Anvar P.V. v. P.K. Basheer And Others).

12. Per contra, Mr. P.S. Raman, learned Senior Counsel, assisted by Tvl. T.K. Baskar and K. Harishankar, Advocates, appearing for the respondent/plaintiff, would submit that the only intention of the applicant/defendant is to procrastinate the trial and the order dated 14.10.2015, made in M.P.No.1 of 2015 in O.S.A.No.100 of 2015, also makes it clear that this Court is required to consider whether the question of admissibility, proof and relevancy raised, could be decided at this stage or at the final stage and even prior to the filing of the

proof affidavit, the parties have inspected the documents in and around 2011, and no objection was raised by the applicant/defendant even at that time and upon their satisfaction as to the contents of the documents, that were sought to be marked, proof affidavit of P.W.1 has been filed.

13. It is the further submission of the learned Senior Counsel appearing for the respondent/plaintiff, that the order dated 17.2.2015, made in O.S.A.No.100 of 2015, was virtually passed on consent, as all the objections raised by the applicant herein, were noted, and the grievance expressed by them regarding non-furnishing of copies of certain documents, have been addressed and copies have also been and at the time of reporting compliance, no objection was raised by the applicant as to the documents, and in spite of the order dated 10.12.2014, passed by this Court, directing the parties to cooperate with the expeditious disposal of the suits, the applicant/defendant for obvious reasons, is preventing the Court from doing so.

14. The learned Senior Counsel for the respondent/plaintiff on merits of the applications, would contend that the photocopies of the documents were referred to in the plaint and even at the time of filing the written statement, no express objections were raised and as already pointed out, even at the time of furnishing of these documents, pursuant to the order passed in O.S.A.No.100 of 2015, the applicant kept quiet and therefore, it is not open to them to contend otherwise, and that too, after the commencement of trial, and insofar as the compliance of Section 65-B of the Indian Evidence Act, necessary certificate has been given and the legality of the same can be tested only at the time of arguments.

15. It is the further submission of the learned Senior Counsel for the respondent that the primordial issue to be considered, relates to the stage of deciding the objections as to the admissibility, relevancy and proof of documents and the judgment of the Hon"ble Supreme Court of India in (2001) 3 SCC 1 Bipin Shantilal Panchal case (referred to supra), is a complete answer to all the objections put forth on behalf of the applicant, for the reason that the Indian Evidence Act is applicable both to criminal as well as to civil proceedings and the Hon"ble Supreme Court of India in paragraph No.15 of the said judgment, has also observed that deciding the objections at the later stage, will have two advantages viz. (i) the time in the trial Court, during the stage of taking evidence, would not be wasted on account of raising such objections and the Court can continue the examination of witnesses and the witnesses need not wait for long hours and (ii) the superior Court, when the same objection is re-canvassed and reconsidered in appeal or revision, against the final judgment of the trial Court, can determine the correctness of the view taken by the trial Court regarding that objections, without bothering to remit the case to the trial Court again for fresh disposal and the said course would not cause any prejudice to the parties to the litigation and would not act to their misery or expenses.

16. It is also contended by the learned Senior Counsel for the respondent/plaintiff that the procedure/principle enunciated in Bipin Shantilal Panchal case,

has been uniformly followed by this Court in various decisions reported in (2011) 7 MLJ 916 (Manickam v. Chinnasamy And Others); 2012 (6) CTC 194 (Lalitha And Another v. Singaram And Others) AND 2013 (2) CTC 864 (G. Ramamoorthy v. M.S.R. Sivakumar And Another), and therefore, the judgment rendered by the Full Bench of Bombay High Court, may not have any relevancy and applicability to the facts of the present case and in any event, it is not open to the High Court to take a different view from that of the ratio laid down by the Hon"ble Supreme Court of India, as it may amount to judicial indiscipline.

17. In sum and substance, it is the submission of the learned Senior Counsel appearing for the respondent/plaintiff, that any objection as to the admissibility, proof and relevancy of documents, can be decided at the time of final arguments and if any document is eschewed at an early stage and in the event of either the trial Court or the Appellate Court having found that the said documents are to be taken in evidence, then, once again, it may delay the conclusion of the proceedings and if the judgment in Bipin Shantilal Panchal case, is followed, it is always open to the Court to eschew the marked exhibits from consideration and in that event, neither the plaintiff, nor the defendant would be put to any prejudice and prays for dismissal of these applications with exemplary cost.

18. This Court has carefully considered the submissions made by the respective learned Senior Counsel appearing for the parties, and also perused the materials placed as well as the judgments cited before it.

19. The respondent/plaintiff filed A.Nos.413 and 414 of 2015 seeking the leave of this Court to file additional documents and for expeditious trial of the case respectively. It was contended by the learned Senior Counsel appearing for the respondent therein/applicant herein, that the order directing the learned Master to admit documents subject to proof and relevancy, may not work out as specific objections were raised with regard to the certificate as contemplated under Section 65-B of the Indian Evidence Act, and marking of press reports and other documents viz. Exs.P24 to P27, under Section 64(2)(1) of the Patents Act. The learned Judge after taking into consideration, the rival submissions, has directed the learned Master to mark the documents and record the objections raised, leaving it open to be decided at the time of final arguments before this Court, and also made it clear that the learned Counsel appearing for the plaintiff the respondent herein, shall furnish copies of documents clarifying the objections raised by the defendant the applicant herein, on or before 19.2.2015. The defendant/applicant herein, made a challenge to the order dated 17.2.2015, made in A.No.413 of 2015, by filing O.S.A.No.100 of 2015, and the said appeal was disposed of on 4.6.2015, in the terms as extracted above. Later on, the Division Bench of this Court vide order dated 14.10.2015, made in M.P.No.1 of 2015 in O.S.A.No.100 of 2015, clarified that the learned Single Judge is required to consider whether the question of admissibility, proof and relevancy raised, could be decided at this stage or at the final stage.

20. In the light of the above said clarificatory order, the primordial question that

arises for consideration, is whether the question of admissibility, proof and relevancy raised by the applicant/defendant, with regard to Exs.P2 to P5, P7, P10 series, P11, P13 series, P14, P15 to P17, P19, P21, P22, P24, P25, P26 to P28, P31 to P34, P35 to P38, P39 to P44, P45, P46 to P50, P51 and P53, could be decided at this stage or at the time of final arguments"

21. PHOTOCOPIES:-

21(i) The first objection raised, is with regard to the marking of photocopies of documents and according to the applicant/defendant, Exs.P3 to P5, P11, P13 series, P15 to P17 and P19 are xerox copies of documents and since no explanation has been offered as to the non-marking of the original documents/non-availability of primary evidence, the said documents have to be eschewed from evidence. A Single Bench of this Court in the judgment reported in (2015) 2 MLJ 42 (Home Missionary Society of India And Others v. Vepery Auxiliary), has considered the similar issue and placed reliance upon the following decisions:-

- (i) (2007) 6 MLJ 893 (Amutha Beellarmine Corera v. Elsie Villavarayer);
- (ii) (2007) 4 MLJ 958 (Yashoda v. K. Shobha Rani);
- (iii) AIR 1966 SC 1457 (Roman Catholic Mission v. State of Madras) And
- (iv) (2010) 8 SCC 423 (Shalimar Chemical Works Ltd. v. Surendra Oil And Dal Mills).

21(ii) In paragraph No.8 of the above cited judgment, it has been observed that Firstly, there is no application filed by the plaintiff under Section 65(a) of the Indian Evidence Act, seeking permission to mark those documents, which are admittedly the photocopies, the originals of the same said to be in the custody of the other side. Secondly, the above said order (1.7.2014) also did not discuss the objections raised by the defendants through their memo, dated 16.6.2014. It is well settled that photocopies cannot be marked as a primary evidence. However, if they are sought to be marked as secondary evidence under the circumstances as contemplated under Section 65(a) of the Indian Evidence Act, 1872, then the party who seeks to mark those secondary evidence must file an application under Section 65(a) of the said Act and seek permission of the Court. In this case, no such application was filed. That being the factual position, I am of the view that the impugned order of the Court below, dated 1.7.2014 marking Exs.A-1 to A-16 (Exs.A-3 to A-16 marked with objection on the side of the defendants), cannot be sustained and consequently, the same is liable to be set aside. The learned Judge having held so, granted liberty to the respondent/plaintiff therein to file an application under Section 65(a) of the Indian Evidence Act, 1872, before the trial Court, seeking permission to mark photocopies of those documents and as and when such an application is filed, it is open for the petitioners/defendants therein to file their counter affidavit to the said application, and the Court below shall consider the said application and pass orders on the same, on merits and in accordance with law.

21(iii) A perusal of the proof affidavit of P.W.1 would prima facie disclose that no such leave has been obtained in the form of an application under Section 65(a) of the Indian Evidence Act.

21(iv) It is the stand of the respondent/plaintiff that in the light of the order passed in A.Nos.413 and 414 of 2015, copies of documents have been to the applicant/defendant and they did not raise any objections and thereafter only, the said documents were marked as exhibits and therefore, it is not open to them to take such a stand and in any event, the admissibility, relevancy and mode of proof can be decided at a later point of time during the course of arguments. However, in the light of the decisions rendered by the Hon''ble Supreme Court of India and reported in AIR 1966 SC 1457 (Roman Catholic Mission v. State of Madras) and (2010) 8 SCC 423 (Shalimar Chemical Works Ltd. v. Surendra Oil And Dal Mills), which was followed by this Court in the above cited decision, this Court is of the view that the objection as to the marking of xerox copies of the documents referred to, is to be decided now itself.

22. WEB-PAGES:-

22(i) It is the submission of the learned Senior Counsel appearing for the applicant/defendant, that Exs.P31 to P34, P41 to P43 and P48 to P50 are web-pages/web downloads, the source or authenticity of which remains unverified, and therefore, it cannot be relied on by either party.

22(ii) In (2008) 10 SCC 535 (Reliance Infocomm Ltd. v. Bharat Sanchar Nigam Limited And Others), a Civil Appeal was filed against the directive issued by the Telecom Regulatory Authority of India, and the question that arose for consideration, was whether unlimited cordless service of the appellant viz. Reliance Infocomm Ltd., is covered under the definition of WLL(M) service as defined in Regulation 2(xxviii) of the Telecommunication Interconnection Usage Charges Regulations, 2003, which defines WLL(M) as limited mobility service using WLL technology within short distance charging area (SDCA)?. The Hon''ble Supreme Court has decided the said issue on 30.4.2008, and while dismissing the civil appeal, has placed reliance upon Wikipedia and Whatis.com''s Encyclopedia of Technology Terms and arrived at a decision.

22(iii) The learned Senior Counsel appearing for the applicant/defendant, has placed reliance upon (2008) 1 SCC 382 (Commissioner Of Customs, Bangalore v. Acer India (P) Ltd.), which came to be decided on 12.10.2007, and it was observed that Wikipedia is an on-line encyclopedia and information can be entered therein by any person and as such, it may not be authentic.

22(iv) In the light of the subsequent judgment reported in (2008) 10 SCC 535 (cited supra), wherein, Web Satellites viz. Internet Sources and Internet Sites, have been relied upon, and therefore, the objection as to the marking of the said exhibits, can be decided at the time of final arguments.

23. CLIPPINGS OF NEWS PAPERS AND PRESS REPORTS:-

23(i) The learned Senior Counsel appearing for the applicant/defendant, raised an objection as to the marking of newspaper clippings and press reports, viz. Exs.P11, P13 series, P16, P17 and P19, respectively. Section 81 of the Indian Evidence Act, 1872, deals with presumption as to the Gazettes, newspapers, private Acts of Parliament and other documents. In the decision reported in (2004) 3 SCC 363 (B. Singh v. Union of India), the Hon''ble Supreme Court of India held that A newspaper is not one of the documents referred to in Section 78(2) of the Evidence Act by which the allegation of fact can be proved, and the presumption of genuineness attached under Section 81 of the Evidence Act to a newspaper report cannot be treated as proof of the facts reported therein. A statement of fact contained in a newspaper is merely hearsay and, therefore, inadmissible in evidence in the absence of the maker of the statement appearing in Court and deposing to have perceived the fact reported.

23(ii) In the light of the above, the objection as to the marking of the said exhibits, is to be decided now itself.

24. TRANSLATION FOR DOCUMENTS IN OTHER LANGUAGES:-

24(i) A contention has been put forth on behalf of the applicant/defendant, with regard to some of the documents, which are in the language other than Tamil and English and came to be marked as exhibits, and in the absence of the author of the translation not being examined and in the light of the unverified and incomplete documents being marked, the same have to be eschewed from evidence.

24(ii) It is a settled position of law that the Rules of procedure are handmaid of justice and the objection raised, is only with regard to the mode of proof and therefore, the said issue can be considered at the time of advancing final arguments.

25. ELECTRONIC EVIDENCE:-

25(i) It is contended that the marking of Exs.P10 series, P14, P22, P28, P31 to P34, P41 to P43 and P48 to P50 cannot be allowed for the reason that the respondent/plaintiff did not produce specific certificate as mandated under Section 65-B of the Indian Evidence Act. In response to the said submission, it is contended on behalf of the respondent/plaintiff, that necessary certificates under Section 65-B of the Evidence Act, were submitted along with the said exhibits.

25(ii) In the judgment reported in (2014) 10 SCC 473 (Anvar P.V. v. P.K. Basheer And Others), it has been held that any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65-A, can be proved only in accordance with the procedure prescribed under Section 65-B, which deals with the admissibility of the electronic record and only if the conditions mentioned under Section 65-B(2) are satisfied, it may be received in evidence and under Section 65-B(4) of the Evidence Act, the following conditions have to be fulfilled:-

- (a) There must be a certificate which identifies the electronic record containing the statement;
- (b) The certificate must describe the manner in which the electronic record was produced;
- (c) The certificate must furnish particulars of the device involved in the production of that record;
- (d) The certificate must deal with the applicable conditions mentioned under Section 65-B(2) of the Evidence Act; and
- (e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

25(iii) According to the respondent/plaintiff, necessary certification has been done by a person occupying a responsible official position. Therefore, the point urged on behalf of the applicant/defendant in this regard, can be thrashed out at the final stage of the proceedings.

26. AUDIO-VIDEO RECORDING:-

26(i) An objection was raised with regard to the audio-video recording in the form of Compact Disc (CD) containing compilation of video bytes/clippings from several television channels" programmes/news telecasts. According to the learned Senior Counsel appearing for the applicant/defendant, the said CD has been stated to be downloaded from an unverifiable source on Internet and edited by the respondent/plaintiff to suit their convenience and no certificate of authenticity has been provided by any of the news channels to prove that the interviews were conducted or aired by them. In support of his submission, the learned Senior Counsel relied upon the decisions reported in AIR 1975 SC 1788 (Zb Bukhari v. B.R. Mehra); AIR 1986 SC 3 (Ram Singh And Others v. Col Ram Singh) And 2006 (11) SCC 1 (Jagjit Singh v. State of Haryana And Others).

26(ii) Per contra, the learned Senior Counsel appearing for the respondent/plaintiff, would submit that pursuant to the orders passed in A.Nos.413 and 414 of 2015, copies of documents have been to the applicant/defendant and immediately, on receipt of the same, no objection was raised by them; but, however, at the time of marking the exhibits, objections were raised and the concerned exhibits have been marked subject to objections and the tenability of the same can be gone into at the time of final arguments.

26(iii) In AIR 1975 SC 1788 (ZB Bukhari v. B.R. Mehra), for proving corrupt practise, tape record speeches were relied upon and on the facts of the case, the Hon"ble Supreme Court of India has held that the tape record had been prepared and preserved safely by an independent authority viz. the police, and not by a party to the case and the transcripts from the tape records, shown to have been duly prepared under independent supervision and control, very soon afterwards, made subsequent tampering with the cassettes easy to detect and the tape

records were primary evidence of what was recorded and the transcripts could be used to show what the transcriber had found recorded there at the time of transcription and this operated as a check against tampering and they could be used as corroborative evidence.

26(iv) In AIR 1986 SC 3 (Ram Singh And Others v. Col. Ram Singh), admissibility as to the tape recorded statement was considered and the conditions of admissibility of such a statement are enumerated as under:-

(1) The voice of the speaker must be duly identified by the maker of the record or by others who recognise his voice. In other words, it manifestly follows as a logical corollary that the first condition for the admissibility of such a statement is to identify the voice of the speaker. Where the voice has been denied by the maker it will require very strict proof to determine whether or not it was really the voice of the speaker.

(2) The accuracy of the tape recorded statement has to be proved by the maker of the record by satisfactory evidence direct or circumstantial.

(3) Every possibility of tampering with or erasure of a part of a tape recorded statement must be ruled out otherwise it may render the said statement out of context and, therefore, inadmissible.

(4) The statement must be relevant according to the rules of Evidence Act.

(5) The recorded cassette must be carefully sealed and kept in safe or official custody.

(6) The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbances.

26(v) The Hon''ble Supreme Court of India on the facts of the above said case, has held that the voices that were recorded at number of places, were not very clear and there was tremendous noise while the statements have been recorded and there were erasures here and there in the tape and besides, the voice recorded was not very clear and the Deputy Commissioner who recorded the statements on tape, clearly admitted in his evidence, that he did not place the recorded cassette in proper custody.

26(vi) In 2006 (11) SCC 1 (Jagjit Singh v. State of Haryana And Others), with regard to the decision of the Speaker to disqualify a Member for defection, the interviews in the news channels, were relied upon and on the facts of the case, the Hon''ble Supreme Court of India has held that the television channels produced the certificates and the original CD received from the concerned news channel, has also been used and despite the opportunity having been afforded, the respondent did not avail the same.

26(vii) In (2010) 10 SCC 512 (Man Kaur v. Hartar Singh Sangha), it has been held that where a party to the suit does not appear in the witness box and states his own case on oath and does not offer himself to be cross-examined by the

other side, a presumption would arise that the case set up by him, is not correct.

26(viii) The Court having considered the rival submissions and the above cited decisions, is of the view that the above said objection mainly pertains to the mode of proof and the same can be gone into at the time of arguments.

27. PHOTOGRAPH:- The applicant/defendant also raised an objection as to the marking of Ex.P51 photograph, stating that the same cannot be allowed to be marked as the respondent/plaintiff has not brought the photographer as a witness to depose before the Court and to produce the negative of the same. In the considered opinion of the Court, the said objection can also be gone into at the time of final arguments to be advanced, as it pertains to the mode of proof.

28. The learned Senior Counsel appearing for the applicant/defendant, placed heavy reliance upon 2008 (6) MH.L.J. 886 (Full Bench) (Hemendra Rasiklal Ghia v. Subodh Mody), where the question that arose for a decision by the Full Bench of Bombay High Court, was Whether objections as to the admissibility or mode of proof of evidence, oral and documentary, should be decided upon when raised or whether decisions thereon can be deferred to a later stage?. The Full Bench has considered the rival submissions and also taken note of various decisions rendered by the Hon"ble Supreme Court of India including Bipin Shantilal Panchal case, as well as by it, and observed as follows:-

61. Considering the provisions of law referred to above, it is not possible to reject the document admitted and exhibited in terms of Rule 4 in exercise of powers under Rule 6 Order 13 of Civil Procedure Code. A document can be exhibited in evidence only when such a document is admissible in evidence and not otherwise. If admissible document is exhibited on establishing its proof then such document cannot be de-exhibited or rejected. This is abundantly clear from the provisions of law contained in Rules 4 and 6 of Order 13 read with Para-524 of the Civil Manual. In fact, provisions of law contained in Rule 4 are to be read with Rule 6 Order 13 of Civil Procedure Code and cannot be considered to be referable to two different stages. The question of exhibiting the document under Rule 4 can arise only if the document is found to be admissible in evidence and in case it is found to be not admissible, the same is to be rejected in terms of Rule 6 Order 13 read with para-524 of Civil Manual. There is no provision enabling the Court to postpone the objection regarding admissibility or proof of document, as such one can safely rule that the question as to admissibility of document should be decided at it arises and should not be reserved until the judgment of the case is given.

62. The various judgments of the Privy Council, the Supreme Court and various High Courts referred to herein above lean in favour of determining the question as to admissibility of document at the time of its reception or at the earliest possible opportunity. The reason is that if the Court allows the objection, the party tendering the evidence may take such steps as may be advised to get the lacunae remedied. Once inadmissible evidence is admitted on record, it is

impossible to say what its effect may be on the mind of the person, who hears it. It creates atmosphere of prejudice affecting fair trial. It may, unconsciously, be regarded by judicial minds as corroboration of some piece of evidence legally admissible and thereby obtain for latter quite undue weight and significance.

....

71. The admissibility of the document in evidence may be broadly classified into three classes- (i) that objection to the document which is sought to be proved is itself insufficiently stamped and the objection relates to deficiency of stamp duty of the document; (ii) where the objection does not dispute admissibility of document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient; and (iii) the objection that the document which is sought to be proved is ab initio inadmissible in evidence.

....

74. In the second category of the case, the objection should be taken when the evidence is tendered. Once the document has been admitted in evidence and marked as an exhibit, the objection that it should not be admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. This proposition is rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would enable the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object become fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons; firstly, it enables the Court to apply its mind and pronounce its decision on the question of admissibility there and then; and secondly, in the event of finding of the Court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence.

75. If the objection to the proof of document is not decided and the document is taken on record giving tentative exhibit, then the right of the cross-examiner is seriously prejudiced. Once the document is used in cross-examination, then the document gets proved and can be read in evidence as held by the Supreme Court in the case of *Ram Janki Devi v. M/s. Juggilal Kamlapat*, 1971 (1) SCC 477. If the cross-examiner decides not to cross-examine based on unexhibited document and, ultimately, at the fag end of the trial, the document is held to be admissible and proved, then, the cross-examiner as rule of fair play would be

entitled to further opportunity to cross-examine based on that document resulting in delayed trial defeating the very object and purpose of the amendment to the Civil Procedure Code.

76. In the third case merely because a document has been marked as "an exhibit", an objection as to its admissibility is not excluded. It is available to be raised even at later stage or even in appeal or revision. There is no question of inadmissible documents being read into evidence merely on account of such documents being given exhibit numbers in affidavit filed by in examination-in-chief or while recording oral evidence. For example in case of unregistered sale-deed or gift-deed or lease-deed requiring registration, no evidence of the terms thereof can be given. On the ground of public policy, evidence derived from unpublished official records of the State cannot be given except with the permission of the head of the department concerned as laid down under section 123 of the Evidence Act. Such a document, therefore, can be tentatively exhibited and the decision thereon can be postponed till the suit reaches the stage of judgment. However such objection has also to be decided before the judgment is delivered. The objection to the admissibility of such evidence can always be taken at any stage of the suit.

77. Thus, we hold and rule that ordinarily an objection to the admissibility of the document in first and second categories of cases (excluding third type of case) has to be taken before the document is exhibited which, necessarily, postulates decision on the objection then and there. In other words, whether document is admissible or inadmissible is matter which should always be ruled upon at the time when the document is being proved or put in or the question asked to the witness. Such practise and procedure is fair to both parties.

....

82. While taking above view, we are also conscious of the another three Judge Bench judgment of the Supreme Court in the case of Bipin Shantilal Panchal (supra) followed by another judgment in the case of State v. Navjot Sandhu (supra); wherein the view taken is that whenever any objection is taken regarding admissibility of the material or any item of oral evidence such objection should be decided at the last stage of the final judgment. The said judgments were followed by the learned single Judge of this Court in the case of Boman P. Irani (supra).

83. The procedure suggested by three Judge Bench of the Apex Court in the case of Bipin Shantilal Panchal (supra) for being followed is little different than the view expressed by the another three Judge Bench judgment of the same Court in the case of P.C. Purushothama Reddiar v. S. Perumal (supra) followed by two Division Benches of the Supreme Court in the cases of R.V.E. Venkatachalam Gounder and Smt. Dayamathi Bai v. K.M. Shaffi (cited supra).

84. Now the question arises as to which of the two views this Court should follow. The view expressed in Bipin Shantilal Panchal (supra) by the Apex Court

is based on the peculiar factual matrix arising out of criminal trial which was prolonged for almost 10 (Ten) years in breach of fundamental right of the accused under Article 21 of the Constitution of India guarantying speedy and expeditious trial. The same view was followed in the case of State v. Navjot Sandhu (supra) involving more or less similar facts surfaced in a criminal trial. The question referred for our consideration arises out of civil proceedings governed by the provisions of the Civil Procedure Code. It is well settled that if certain things are required to be done by the Statute in a specific manner, then it cannot be done in any other manner as ruled by the Apex Court in the case of Nazir Ahmed v. King Emperor, AIR 1936 PC 243; State of Uttar Pradesh v. Singhara Singh, AIR 1964 SC 358 followed by this Court in Vanmala S. Aney v. National Education Society, Khamgaon, 1982 Mh.L.J. 403. Thus, mandate of Order 13 Rules 3 and 4 read with Order 18, Rule 4 (1) and consensus of judicial opinion compel us to fall in line with the view expressed in R.V.E. Venkatachalam Gounder and Smt. Dayamathi Bai v. K.M. Shaffi (both cited supra).

85. Apart from the above, the principles of stare decisis squarely applies to the case on hand. In Mishri Lal v. Dharendra Nath, (1999) 4 SCC 11 (paras 14-22), the Supreme Court referred to its earlier decision in Maktul v. Manbhari, AIR 1958 SC 918 on the scope of doctrine of stare decisis with reference to Hulsbury's Laws of England and Corpus Juris Secundum and held (at SCC p.18 para-14) that-

"a decision which has been followed for a long period of time, and has been acted upon by persons in the formation of contracts or in the disposition of their property, or in the general conduct of affairs, or in legal procedure or in other ways, will generally be followed by courts of higher authority other than the court establishing the rule, even though the court before whom the matter arises afterwards might be of a different view."

86. Assuming that it is possible to take different view or work out different procedure as suggested in Bipin Shantilal Panchal; as long as long as principle laid down in P.C. Purushothama Reddiar v. S. Perumal; R.V.E. Venkatachalam Gounder and Smt. Dayamathi Bai v. K.M. Shaffi (all cited supra) has been consistently followed in our country in civil matters, as observed in Mishri Lal (supra), it will be worthwhile to let the matter rest since a large number of parties have modulated and continue to modulate their legal relationships based on the settled law.

29. However, the Full Bench of Bombay High Court after holding so, in paragraph No.87, has observed that However, by way of exception, the objection relating to the admissibility of the document requiring resolution of complex issues, having the effect of arresting progress of the matter, or if the admissibility of the evidence is dependent on receipt of further evidence, then, in such cases the trial Court can, in the interest of justice, defer the issue of deciding admissibility of the document.

30. The Bombay High Court has also placed reliance upon AIR 1978 SC 1393 (Ram Ratan v. Bajarang Lal), wherein the Hon''ble Supreme Court of India has observed that in a given circumstance, a document can be exhibited with the endorsement made by the learned trial Judge objected, allowed subject to objection, clearly indicating that the objection has not been judicially determined and the document was tentatively marked.

31. The Full Bench of Bombay High Court after taking note of the said judgment, in the very same paragraph, has observed that This procedure is to be followed only in exceptional circumstances. Ordinarily, the objection to the admissibility of the document should be decided as and when raised without reserving the question as to admissibility of the document until final judgment in the case. We may make it clear that omission to object to a document, which in itself is inadmissible in evidence, would not constitute such document in evidence. It is also duty of the Court to exclude all irrelevant evidence even if no objection is taken to its admissibility by the parties. The question of relevancy of the document being a question of law can be raised and decided at any stage of the proceeding.

32. The Full Bench of Bombay High Court has also taken note of Order 18, Rule 4 of Code of Civil Procedure and in paragraph No.88, observed as follows:-

"88. The cases; wherein Court Commissioner is appointed to record cross-examination, the Court may decide the question of admissibility of document or proof of such document before the matter is sent for recording of evidence to the Commissioner in the form of cross-examination or re-examination or, in a given case, the Court may decide that question at a subsequent stage. The Court, obviously, has a discretion of recording cross-examination and re-examination itself. During the cross-examination, if the document is produced and the question leading to its admissibility is raised, then, the Commissioner cannot rule the point as to admissibility of the evidence. In such case, the Court Commissioner is expected to record objection and can give tentative exhibit to the document subject to the decision of the Court. The Court would then be obliged to decide the question before the judgment is delivered so that the party producing evidence could not be deprived of its right to tender evidence or an opportunity of producing fresh evidence or opportunity of making up defects which in many cases could be remedied, if he is told that the objection is allowed.

33. It is not in dispute that the Hon''ble Supreme Court of India vide judgment dated 16.9.2009, made in Civil Appeal No.6309 of 2009, has directed to carry out the hearing of the suit on day-to-day basis, and this Court vide order dated 10.12.2014, has also directed the parties in the suit, to cooperate with the learned Master to complete the trial on or before 30.4.2015. In the light of the Full Bench judgment of Bombay High Court coupled with the fact that in spite of fixation of time by the Hon''ble Supreme Court of India as well as by this Court to expedite and conclude the trial, the suits are yet to be disposed of and continue to be in the stage of recording evidence.

34. It is to be pointed out, as observed by the Full Bench of Bombay High Court in 2008 (6) MH.L.J. 886 (cited supra), the above said objections relating to the admissibility of documents, require resolution of complex issues, which may have the effect of stalling the progress of the trial of the suit, and further, that the admissibility of evidence is dependent on receipt of further evidence. This Court is of the view that in the interest of justice, the said objections can be taken at the time of final arguments. Even for the sake of argument, inadmissible documents were received in evidence, subject to objections, still, it is open to the Court to eschew those documents for consideration, and give a decision based on the quality of evidence tendered by the respective parties.

35. In the light of the factual aspect coupled with the legal position, except the objections raised by the applicant/defendant with regard to the marking of photocopies of certain documents and clippings of newspapers and press reports, the rest of the objections with regard to the marking of other documents, can be decided at the time of final arguments to be advanced by the respective parties.

36. In the result, both the applications are disposed of accordingly.

37. The objections with regard to the receipt of photocopies of certain documents as well as clippings of newspapers and press reports, can be taken up for consideration by this Court before directing the learned Commissioner to proceed further with the recording of evidence. Call the suit on 20.4.2016.