
(2016) 05 DEL CK 0254

In the Delhi High Court

Case No : CS (OS) No. 764 of 2015.

**Telefonktiebolaget Lm Ericsson(Publ) - Plaintiff @HASH Lava
International Ltd. - Defendant**

Date of Decision : 16-05-2016

Acts Referred:

Citation : (2016) 68 PTC 427

Hon'ble Judges : Manmohan Singh, J.

Bench : Single Bench

Advocate : Mr. C.S. Vaidyanathan, Mr. Sandeep Sethi and Ms.Prathiba M. Singh, Senior Advocates with Mr. Chander M. Lall, Ms. Saya Choudhary Kapur, Mr. Ashutosh Kumar, Ms. Meetali Agarwal, Ms. Sutapa Jana, Mr.Devanshu Khanna and Mr. Nikhil Chawla, Advocates, for the

Final Decision : Disposed Off

Judgement

Manmohan Singh, J. - The plaintiff has filed the suit for infringement of registered patents.

2. No interim order was passed.

3. When the written statement filed by the plaintiff to the counter-claim was taken on record by order dated 9th December, 2015, the defendant challenged the said order before the Supreme Court who expedited the trial in the present matter. The trial had been fixed by this Court in view of the order dated 16th December, 2015 passed by the Supreme Court in SLP(C) Nos. 34886-34887 of 2015 titled as "Lava International Limited v. Telefonaktiebolaget LM Ericsson" wherein the directions were passed to decide the suit as expeditiously as possible and preferably within six weeks from the date of filing of replication/written submissions. Accordingly, as the replication was filed by the defendant on 4th January, 2016, the period of six months, therefore, expires in July, 2016.

4. During the hearing of the interim application, without prejudice, many suggestions were given by the defendant through counsel i.e. (i) overall settlement in the suit, (ii) proposal made by the defendant for deposit of

substantial amount as security with the Registrar General of this Court if the plaintiff would not press the injunction application and in case the settlement is not arrived at in the main suit, the trial in the suit be completed within 3-4 months.

5. In order to show its bona fide, counsel for the defendant had handed over the proposed schedule for trial on behalf of the defendant on 29th January, 2016 :-

Stage

Time Granted

Tentative Date

1.

Submission of List of Witnesses by the parties

10 days

10th February, 2016

2.

Filing of Evidence by way of affidavits by the parties.

4 weeks

9th March, 2016

3.

Recording of Evidence and cross examination of witnesses before Commissioner

4 weeks (About 2 weeks each party)

23rd March, 2016 onwards and to be concluded by 1st May, 2016

4.

Filing of written arguments by the parties

2 weeks

15th May, 2016

5.

Commencement of oral arguments

To be fixed as per convenience of the Court.

6. There was no consensus about the quantum of amount offered by the defendant as security in the application. Both parties then agreed that injunction application be decided on merit and at the same time, trial may also continue. Accepting their submission, the issues were framed on 2nd February, 2016 in the

suit, counter-claim filed by the defendant and another suit for declaration filed by the defendant prior to the infringement suit originally in Noida Court which has been transferred to this Court after the order of the Supreme Court. On 22nd February, 2016, with the consent of the parties, the schedule for the trial was fixed.

7. Vide order dated 22nd February, 2016 the Court appointed Mr. Dinesh Dayal as the Court Commissioner to record evidence of the parties. Under the case management provisions of the Commercial Courts, Commercial Division, Commercial Appellate Division of High Courts Act of 2015.

8. The following timeline was laid down by this Court, with the consent of both parties:

"??.

i. 4 weeks for filing evidence affidavits in affirmative by both the parties i.e. till 21st March, 2016

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

iii. Thereafter 2 weeks for filing rebuttal evidences i.e. 5th May, 2016;

iv. Commencement of final argument from 30th May, 2016?.."

9. The common evidence of parties is to be led by both parties in the suit, counter-claim and in the suit for declaration filed by the defendant.

10. The list of witnesses filed by the defendant on 18th February, 2016 contain these witnesses namely:-

Sl.No.

Name and Address

Remarks

1.

Sunil Bhalla, Founder Director, Lava International Ltd.

To prove the case of the defendant in general and depose in rebuttal in relation to FRAND Negotiations and quantum of damages and all points of rebuttal that may arise.

2.

Mr. GS Madhusudan, Senior Project Advisor/Principal Scientist with the Computer Architecture and Systems Lab, Reconfigurable and Intelligent Systems Engineering (RISE) Group, Department of Computer Science and Engineering, Indian Institute of Technology, Madras

To give expert testimony on the suit patents and their nature in respect of issue 4 as framed by this Court and in rebuttal on issue 2.

3.

Dr. V. Kamakoti, Professor, Department of Computer Science and Engineering, Indian Institute of Technology, Madras.

To give expert testimony on the suit and their nature in respect of issue 4 as framed by this Court and in rebuttal on issue 2.

4.

Such other witnesses as may be required in rebuttal.

11. On 11th March, 2016, both parties appeared before the Court Commissioner. In view of the order dated 22nd February, 2016 passed by this Court and submissions of the parties qua the number of witnesses, schedule for recordal of evidence in affirmative from 28th March, 2016 to 14th April, 2016 was fixed by the Court Commissioner including the timings.

Learned counsel for the plaintiff alleged that thereafter, the defendant agreed to indicate the names of the plaintiff's witnesses whose cross-examination shall be conducted by them along with the names of the rebuttal witnesses within 2-3 days after exchange of witness affidavits between the parties. Accordingly, a schedule for appearance of witnesses was emailed to defendant's counsel.

12. The defendant filed two SLPs on 11th March, 2016 wherein stay of trial was prayed in both the SLPs.

(i). SLP(C) No.7595/2016 impugning the judgment dated 1st March, 2016 passed in the present suit allowing the constitution of the confidentiality club.

(ii). SLP(C) No.7533/2016 impugning the order dated 22nd February, 2016 passed in the present suit whereby issues were framed by the Court.

13. The Supreme Court in the above mentioned SLPs passed the following orders dated 1st April, 2016 whereby:

(i). SLP (C) No.7533/2016 challenging the issues framed in the present suit was dismissed.

(ii). SLP (C) No.7595/2016 was withdrawn by the defendant in view of the statement made by the Counsel of the Plaintiff that they are willing to share the redacted copies of the third party license agreements with the defendant.

(iii). Specific prayer to defer the trial by 2 weeks was rejected and cross-examination was directed to continue.

14. It is submitted on behalf of the plaintiff that the defendant from the day one is trying to prevent the final adjudication of the present suit as well as the adjudication of the interim injunction. It is submitted that the defendant took

more than 4 months in filing its written statement from the date of issuance of the summons in the present suit. It is also stated that after the plaintiff concluded its arguments in the interim injunction application, the defendant took six months' time to conclude its reply arguments. Thereafter, when the plaintiff agreed for an expedited trial in the light of the Supreme Court's order and agreed for a time bound schedule for trial, the defendant is now not ready to complete the trial.

15. It is also submitted that as per the schedule fixed by the Court, when the affidavits were exchanged on 21st March, 2016, counsel for the plaintiff also addressed a letter and an email, specifically enquiring about the names of the witnesses that defendant intends to cross-examine and requesting details of rebuttal witnesses that the defendant wishes to produce. The objections regarding filing of additional documents including the 54 comparable license agreements, annual reports, test reports and test logs in a USB pendrive, curriculum vitae etc., have been placed on record by the defendant before the Supreme Court of India in its SLP(C)No.7595/2016 filed against the order dated 1st March, 2016 of this Court. However, no stay of trial or extension of trial was directed by the Supreme Court.

16. The list of witnesses contained names of only three witnesses viz. Mr. Sunil Bhalla, Founder Director, Lava International Limited, Mr. G.S. Madhusudan, Senior Project Advisor/Principal Scientist, IIT Madras and Dr. V. Kamakoti, Professor, Department of Computer Science and Engineering, IIT Madras. It is submitted by the plaintiff that the defendant has filed only two affidavits of witnesses; copies thereof were served to the counsel for the plaintiff on 21st March, 2016. It was only after the cross-examination of all the four plaintiff's witnesses concluded that the defendant has filed the affidavit of Mr. Sunil Bhalla. As per practise and procedure, Mr. Bhalla ought to have been examined as the first witness. But no affidavit of Mr. Bhalla was filed. When the plaintiff started the cross-examination of the expert Mr. Madhusudan on 6th May, 2016, the copy of the affidavit of Mr. Bhalla was served to the counsel for the plaintiff.

17. Counsel for the defendant on 3rd May, 2016 has submitted that his client has filed additional list of witnesses which contained 7 more witnesses in addition to the previous three witnesses. However, he has informed that the defendant would restrict to only 7 witnesses including three witnesses, the details of which are mentioned in the list of witnesses filed on 18th February, 2016 and out of seven, six are expert witnesses and four additional witnesses are now from overseas countries. On 5th May, 2016, the defendant's counsel has handed over the details of fresh schedule for the cross-examination of new witnesses, which may extend the trial beyond July, 2016. According to this schedule, the recording of evidence will itself extend till August/September, 2016. It is submitted by the learned Senior counsel appearing on behalf of the plaintiff that it is evident that by this way the defendant does not want to complete the evidence either as per the schedule fixed by the Court with consent, schedule fixed by the Court

Commissioner or the schedule earlier given by the defendant itself.

18. The reason given by the defendant's counsel is that heavy stake of entire industry is involved and since it is a technical matter, the defendant does not wish to take any risk, rather the defendant has now decided to produce four expert witnesses. The second reason is given that large numbers of documents are filed by the parties, thus, it is visually impossible to complete the evidence in a short period of time. It is also submitted that as per settled law, every party is entitled to fair trial. In the present case, the defendant has not taken any adjournments, thus, no harm would be caused if the trial is re-scheduled.

19. Let me first deal with the pending applications filed by both parties prior to date of framing of issues. Some of them have already become infructuous in view of the progress of trial.

I.A. No.5768/2015

(i) The above mentioned application has been filed by the plaintiff under Order 39 Rules 1 and 2 read with Section 151 CPC seeking ex parte ad-interim injunction against the defendant restraining it from infringing the plaintiff's standard essential patents and being an unwilling licensee.

In the above said application, in view of the technical issue involved, the plaintiff was granted half an hour to present rejoinder arguments vide order dated 29th April, 2016. Counsel for the plaintiff has made the statement that if the Court would commence the hearing in the main suit which is listed on 30th May, 2016, the plaintiff would not press the interim application under those circumstances otherwise the counsel would make rejoinder submissions for half an hour and press the relief in the injunction application. Thus, list this application also on 30th May, 2016.

I.A. No.5769/2015

(ii) The above mentioned application has been filed by the plaintiff under Order 26, Rule 9 and Order 39, Rule 7 CPC seeking appointment of Local Commissioners for ascertaining the nature and extent of the defendant's operation of importing/manufacturing/selling devices which infringe upon the plaintiff's patents.

By order dated 26th March, 2016, at the request of the counsel for the plaintiff, order on this application was deferred. The trial in the matter is in progress. There is no need to keep this application pending. The same is accordingly disposed of. If so required, liberty is granted to the plaintiff to file the fresh application or to review the same.

I.A. No.5773/2015

(iii) The above said application has been filed by the plaintiff under Section 151 CPC seeking to file certain documents including the correspondence exchanged between the parties, which is covered by a Non Disclosure

Agreement as well as claim charts which contain the plaintiff's proprietary information, in a sealed envelope. Further, it is prayed that the same, along with the defendant's infringing devices filed in a trunk, be kept in the safe custody of this Court.

Notice was issued by order dated 26th March, 2015. Reply is not filed. The prayer made in the application is allowed. The application is disposed of.

I.A. No.7194/2015

(iv) This is an application filed by the defendant under Section 151 CPC seeking dismissal of suit on the grounds that the plaint lacks cause of action. Alternatively, it is prayed that the suit be stayed until the defendant's Noida suit is decided as any order passed herein would lead to deciding that suit and cause prejudice to defendant.

Notice was not issued in the said application. The same was listed to be taken up on 17th April, 2015 by order dated 10th April, 2015 but has not been taken up since. Issues in the suit have been framed. The main suit is listed for 30th May, 2016 for final hearing. The objection of the defendant raised in the application would be considered at the time of final arguments in the suit. The application is accordingly disposed of.

I.A. No.10781/2015

(v) The above mentioned application has been filed by the defendant under Order 8, Rule 1 CPC seeking further time of eight weeks for filing the written statements from the date of filing of the application i.e. 27th April, 2015.

The said application was listed on 20th May, 2015, but was not taken up. The written statement has since been filed by the defendant on 28th July, 2015. This application has become infrutuous and the same is disposed of as such.

I.A. No.16011/2015

(vi) This is an application filed by the defendant under Order 39 Rules 1 and 2 read with Section 151 CPC for stay of the operation of suit patents and restraining the plaintiff from asserting its patents as valid and essential until disposal of the defendant's counter claim in the present suit. The defendant has claimed that the suit patents are invalid for being mere algorithms and are not standard essential.

Notice was issued in the above said application on 3rd November, 2015. Pleadings are complete.

List this application on 30th May, 2016 when the main suit is also listed.

I.A. No.3954/2016

20. After framing of issues and directions for trial were issued, parties have filed many applications.

21. The above mentioned application has been filed by the plaintiff under Section 151 CPC seeking production of Court records at venue of cross-examination as booked by the plaintiff, due to non-availability of space within this High Court premises during the dates fixed as per the order dated 22nd February, 2016 of this Court and the order dated 11th March, 2016 of the Local Commissioner.

As recorded in the order dated 30th March, 2016, the plaintiff reserved its right to press its prayer on the next date in case of unavailability of venue for cross-examination within the Court premises. The application at this stage has become infructuous, as the trial is being recorded very smoothly. The same is disposed of accordingly.

I.A. No.4422/2016

22. This is an application filed by the plaintiff under Section 151 CPC seeking to summon complete patent office records pertaining to the suit patents before the Court Commissioner and to retain copies of the same in the Court record, so the plaintiff may be able to rely upon the complete file wrappers of the suit patents, if required, its intention already reflected in its list of witnesses filed on 17th February, 2016.

Notice was issued by order dated 6th April, 2016. Reply has been filed by the defendant.

List this application on 30th May, 2016.

I.A. No.4590/2016

23. This is an application filed by the plaintiff under Section 151 of the CPC seeking (i) direction from the Court to ensure that the defendant strictly adheres to the trial schedule fixed by order dated 22nd February, 2016 of this Court and 11th March, 2016 of the Court Commissioner; and (ii) Closure of right of the defendant to cross-examine further if it fails to do the same. The defendant consistently failed to adhere to the schedule for cross-examination prescribed by this Court. In particular, the defendant had already conducted the cross-examination of PW-1 for over 11 hours; had already cross-examined PW-2 for in excess of 10; had attempted to curtail the availability of venue for cross-examination; and had failed to conduct cross-examination of any of the plaintiff's witnesses on 2nd April, 2016. Despite the fact that the plaintiff had already produced all its witnesses in a time-bound fashion, the defendant was running woefully behind the aforesaid trial schedule.

Notice of this application was issued to the defendant by order dated 7th April, 2016. The separate detailed order is being passed about the schedule of trial. Thus, the averments made in the application be read with the order being separately passed in the application filed by the defendant for change of schedule. In view of the above, the present application is disposed of.

I.A. No.4648/2016

24. The above mentioned application has been filed by the plaintiff under Section 151 CPC seeking closure of right of the defendant to further cross-examine PW-1 beyond 12th April, 2016, and to conclude the cross-examination of all of plaintiff's witnesses by 14th April, 2016 as per the prescribed schedule. This was prayed after the defendant had cross examined PW-1 for nearly 20 hours, as opposed to the 8 hour limit prescribed by this Court, and when the defendant's counsel had failed to assure the plaintiff that the cross-examination of PW-1 would be concluded by 12th April, 2016. Further, the conduct of the defendant had made it virtually impossible to comply with the deadline fixed by the Supreme Court, and the schedule fixed thereafter by this Court and by the Court Commissioner.

Notice was issued by order dated 12th April, 2016. The defendant was ordered to conclude the cross of PW-1 by the said date. The cross of PW-4 was ordered to start by 13th April, 2016. The defendant was directed to attempt to finish the cross-examination by 14th April, 2016. In the instance that the cross-examination is not concluded by 14th April, 2016, the cross-examination may be extended to 16th April, 2016.

The plaintiff's evidence is now concluded. No further order at this stage is required. Liberty is granted to the plaintiff to raise this issue at the stage of final arguments if so required.

The application is accordingly disposed of.

I.A. No.4795/2016

25. This is an application filed by the defendant under Section 151 CPC seeking striking of evidence of PW-1, including the evidence by way of affidavit and the subsequent cross-examination, off the record, and closure of right of plaintiff to furnish PW-1's evidence. The defendant's purported grounds include inter alia delay in filing of complete affidavit, defects in legalization of the affidavit, and introduction of new documents as part of the affidavit.

The objection raised in the application would be considered at the stage of final hearing of the suit. Liberty is granted to the defendant to argue the said issue.

The application is accordingly disposed of.

I.A. No.4797/2016

26. The present application has been filed by the defendant under Section 151 CPC seeking striking of evidence of PW-2, including the evidence by way of affidavit and the subsequent cross-examination, off the record and correction of order dated 7th April, 2016 particularly with regard to the 8 hours per witness limit reiterated in the schedule reproduced within said order. The defendant's purported grounds include inter alia defects in legalization of the affidavit, introduction of new and voluminous documents as part of the affidavit, its inability to complete the cross-examination of PW-2 within the time limits set by

this Court, and the need for analysis of the same by the defendant's technical expert.

The objection raised in the application would be considered at the stage of final hearing of the suit. Liberty is granted to the defendant to argue the said issue.

The application is accordingly disposed of.

I.A. No.5394/2016

27. The plaintiff has filed the above mentioned application under Section 151 CPC seeking closure of cross-examination of the plaintiff's witnesses by the defendant and fixing a schedule for the cross-examination of defendant's witnesses. This was prayed because the defendant refused to continue with cross-examination of PW-4 and PW-3 in violation of the order dated 12th April, 2016 of this Court and instead filed another application seeking to further delay the trial on ambiguous grounds.

The defendant was directed to conclude the cross-examination of PW-4 on 18th April, 2016 and 19th April, 2016 after which witness will be discharged. Also cost of Rs. 1,00,000/- was fixed upon the defendant. The said order was passed by the Vacation Judge.

This application has become infructuous after the completion of cross-examination of PW-4 and the same is disposed of as such.

I.A. No. 4796/2016

28. The above mentioned application has been filed by the defendant under Section 151 CPC seeking listing of its applications filed on 8th April, 2016 vide Diary Nos.116896/2016 (I.A. No. 4795/2016), 116911/2016 (I.A. No. 4797/2016) and another application filed on 13th April, 2016 (5395/2016).

The orders are being passed in the pending applications. Nothing survives in the present application and the same is disposed of as such.

I.A. No. 4899/2016

29. This is an application filed by the plaintiff under Order XVA Rule 5 read with Section 151 CPC seeking preponement of cross-examination of PW-3, and issuance of appropriate direction to the Defendant to produce its witnesses for cross-examination immediately thereafter. This prayer was made in order to ensure compliance with the order dated 16th December, 2015 of the Supreme Court and the schedule fixed by order dated 22nd February, 2016 of this Court and the order dated 11th March, 2016 of the Local Commissioner.

Reply has been filed by the defendant. The cross-examination of PW-3 was directed to begin from 1st May, 2016 and be completed on or before 4th May, 2016. The Court by order dated 25th April, 2016 has reaffirmed the schedule initially prescribed vide its order dated 22nd February, 2016. Cross-examination of rebuttal witnesses to be conducted between 9th May, 2016 and 24th May,

2016 and final arguments scheduled to begin from 30th May, 2016.

The court vide its order dated 5th May, 2016 directed DW-1 to be cross-examined between 6th May, 2016 to 9th May, 2016. The court vide its order dated 10th May, 2016 has passed the order to take the affidavit of Mr. Bhalla DW-2 on record and fixed the date of his cross-examination as per order dated 13th May, 2016. The Court is passing the detailed order in the defendant's application for fixing the fresh schedule of trial of the defendant, thus, the prayer made in the application would be considered in that portion of the order. The application is disposed of.

I.A. No.5002/2016

30. This is an application filed by the defendant under Section 151 CPC seeking striking of evidence of PW-3 off the record, and closure of right of plaintiff to lead evidence of PW-3. The defendant's purported grounds include inter alia defects in legalization of the affidavit and introduction of new and voluminous documents as part of the affidavit.

The evidence of PW-3 is concluded. The Court Commissioner who has recorded the evidence has also recorded the objections of the defendants. The said objections would be considered at the time of final hearing of the suit.

The application is disposed of.

I.A. No.5003/2016

31. This is an application filed by the defendant under Section 151 CPC seeking striking of evidence of PW-4 off the record. The defendant's purported grounds include inter alia defects in legalization of the affidavit and introduction of new documents as part of the affidavit.

The evidence of PW-3 is concluded. The Court Commissioner who has recorded the evidence has also recorded the objections of the defendants. The said objections would be considered at the time of final hearing of the suit.

The application is disposed of.

I.A. No.5470/2016

32. This is an application filed by the defendant under Section 151 CPC seeking permission to add new witnesses, including leave to file affidavit of DW-2 Sunil Bhalla, setting of a fresh schedule for cross-examination and leave to place on record new documents.

The defendant has relied upon principles of natural justice to aver that in order to fulfil the defendant's right to cross-examination, the reliefs as prayed must be granted.

Notice was issued vide order dated 3rd May, 2016. Reply was filed. The court vide its order dated 5th May, 2015 directed DW-1 to be cross-examined between

6th May, 2016 to 9th May, 2016. The Court vide its order dated 10th May, 2016 has taken the affidavit of DW-2 on record and fixed the schedule of his cross-examination by order dated 13th May, 2016. The contents of the application may also be read along with the averments made in I.A. No.4899/2016 filed by the plaintiff. Both parties have made their submissions on 10th and 13th May, 2016. The Court Commissioner is now recording the evidence of the defendant on day-to-day basis. The defendant seeks liberty to change the schedule of trial which was fixed with the consent of the parties. Let me first mention the factual position of the case and relevant dates of events.

33. The schedule for directions for trial was fixed with the consent of the parties. Order XVA of the Commercial Act mandates that the Court will pass the orders for a Case Management Hearing including at the time of framing of the issues, list of witnesses to be examined by the parties, fixing the date on which the affidavit(s) is to be filed by the parties, fixing the date for recording the cross-examination of the witnesses as well as the date of arguments.

34. The Commercial Courts, Commercial Division and Commercial Appellate Division in High Courts Ordinance, 2015 was promulgated on 23rd October, 2015 and after the assent of the President on 31st December, 2015, it came on the Statute Book as the Commercial Courts, Commercial Division and Commercial Appellate Division in High Courts Act, 2015 (4 of 2016) (hereinafter referred to as the "Commercial Act").

35. It is mandated that the time limit for completion of the trial is necessary under the Scheme of the Commercial Act and the Court can pass the order for day-to-day trial as well as for Case Management Hearing during the trial. The Court can even pass any order relating to the monitoring of recording the evidence by a Commission or any Authority and also would be entitled to issue a direction or to pass any order for the purposes of managing the case.

Under sub-Rule (8), the power is given to the Court with regard to consequence of non-compliance with the orders. The said power covers for foreclosure of the parties' right to file the affidavit, conduct cross-examination of witnesses, dismiss the plaint or allow the suit where such compliance is wilful, repeated.

36. In the present case, apparently, the schedule was fixed in the presence and with the consent of the parties. From time to time, the Court has been managing the trial in the matter, as the final date of argument is fixed on 30th May, 2016.

37. The dates have already been fixed for the purpose of tendering the affidavit of Mr.Bhalla and his cross-examination. As far as the other witness, namely, Prof. Kamamkoti, Expert from IIT Madras is concerned, the affidavit has already been filed by the defendant. The defendant is insisting that the said witness would appear before the Court Commissioner on 1st June, 2016 to 3rd June, 2016 for the purpose of cross-examination. It is submitted by the defendant that he cannot appear for the reason mentioned in the application as well as in the e-mail written by him. The said request is strongly opposed by the learned Senior

counsel appearing on behalf of the plaintiff who states that the said technical expert witness is not attending his office and he can adjust the time so that his cross be completed in time as per the schedule fixed by the Court. Even, the plaintiff is ready to visit Chennai for the purpose of his tendering the evidence and cross-examination.

38. There is a force in the submission of the learned counsel for the plaintiff who has submitted that the said witness is not required in his office; he is on vacations and if he is busy for evaluation of papers, he can spare some time for the purpose of recording the cross-examination, his affidavit is already filed. The witness must be aware about the dates of trial. Even otherwise, the witness cannot suggest the date of his cross-examination. It is for the Court to fix the schedule of trial. Thus, one final opportunity is granted to the defendant to produce the said witness on 20th and 21st May, 2016 before the Court Commissioner in Delhi or to accept the suggestion given by the plaintiff to complete his cross-examination at Chennai, but in that case, all the expenses shall be borne by the defendant as already recorded in my earlier orders. The defendant to inform the learned counsel for the plaintiff by 18th May, 2016. In case the said witness is not available in Delhi, his cross-examination would be conducted in Chennai. The defendant would make the necessary arrangements for the same.

39. With regard to the second witnesses, namely, Dr. Ray Perryman ? President and CEO of the Perryman Group, Mr.Shankar Iyer ? Vice President and Head of Intellectual Property Practise, Cornerstone Research, Washington, Mr.Tony Khindria, Founder Partner of Lexacova and the Authorised Representative/ concerned Officer of Mediatek Inc., manufacturer of Chipsets, as already mentioned that their names were not mentioned in the first list of witnesses. Learned counsel for the defendant states that he has discussed with the witnesses by e-mail who have given their respective dates to appear before Court. The short affidavit is filed the affidavit in the registry along with the correspondence exchanged between them. The argument of the learned counsel for the defendant is strongly opposed by the learned Senior counsel appearing on behalf of the plaintiff who submits that the defendant is applying all tactics so that the trial be adjourned and the schedule fixed is disturbed. Even, the Court Commissioner, the order of whom is acknowledged, is ready to complete the evidence but the defendant is creating many hurdles for its trial. He says that even as of today, the witnesses have not filed their affidavits and in the absence thereof, no indulgence should be granted to the defendant to produce the additional evidence. In fact, the witnesses on their own are suggesting to the Court to fix the dates as per their convenience and the said act of the defendant is not permissible in law. Counsel says that they are nobody to direct the Court to fix the dates in the month of July, 2016 when the schedule is already existed prior to the said date.

40. As already mentioned, the defendant along with the fresh application for

proposed new schedule of trial had also filed the fresh list of witnesses containing total 10 witnesses. However, it was later agreed to examine 7 witnesses, as the names of three witnesses were already available in the first list of witnesses and direction of trial is given in this regard. However, apart from these three witnesses, the defendant intends to produce four additional expert witnesses. The details of re-schedule suggested by the defendant are given as under :-

S.No.

Witness

Availability

1.

Prof. Kamamkoti, technical expert from IIT Madras whose Affidavit is already on record.

1st June, 2016 to 3rd June 2016.

2.

Dr. Ray Perryman, President and CEO of the Perryman Group, an economic research and analysis firm based in Waco, Texas, USA

In the month of July upon reopening of High Court on 7th July, 2016.

3.

Mr. Shankar Iyer, Vice President and Head of Intellectual Property Practise, Cornerstone Research, Washington

From 7th July, 2016 till 18th July, 2016

4.

Mr. Tony Khindria, Founder Partner of Lexacova Partner of Lexacova a law firm based in France

July, 2016 Lexacova,

5.

Authorised representative/concerned officer of Mediatek Inc., which is manufacturer of chipsets

In the month of July, 2016 after reopening of High Court on 7th July, 2016.

Copies of the emails exchanged between the counsel for the defendant and the witnesses are also annexed along with the affidavit of Mr. R.S. Bedi. Counsel submitted that as earlier informed to this Court, now even Mr. Tony Khindria is no longer available on 23rd May, 2016 to depose at New Delhi. The defendant insists to fix the new schedule to enable the defendant to produce the expert witnesses.

41. As mentioned above, earlier the defendant agreed to produce the evidence of Mr. Tony Khindria on 23rd May, 2016. Now, the said witness is not available as submitted by the counsel. It appears from the affidavit of Mr. R.S. Bedi, representative of the defendant and e-mail exchanged between the defendant's counsel and said new witnesses, they intend to give the details of dates which are convenient to them. In fact, they are suggesting the new dates when the defendant's application to amend the list of witnesses and to change the schedule is sub-judice. Their affidavits are not filed by the defendant. One of the witnesses, namely, Dr. Ray Perryman has mentioned in the e-mail that "Please send documents as soon as possible and I will send retainer invoice" and that he would work for the defendant. Mr. Tony Khindria, who was to be produced on 23rd May, 2016, has sent the e-mail suggesting for fixing the schedule of his evidence between 15th July, 2016 and 22nd July, 2016.

42. Despite of copies of correspondences exchanged between the counsel for the defendant and the proposed expert witnesses, it is not sure that even if the trial is postponed, would they be appearing before Court for the purpose of cross-examination, as no affidavits are filed.

The defendant itself has given the details of dates for the purpose of cross-examination in January, 2016. The defendant was aware about the case of the plaintiff and its own case. The defendant earlier did not give their names in its first list of witnesses filed in February, 2016. The defendant has not filed affidavit(s) despite of having the knowledge that the final date of hearing of the suit is fixed for 30th May, 2016. The plaintiff has also to produce rebuttal evidence. Without filing of affidavit, the trial cannot be adjourned merely on the ground of filing fresh application.

43. Under these peculiar facts and circumstances of the case, I am of the view that the final view on the prayer made in the application would be taken on 23rd May, 2016, subject to the condition that the defendant would file the affidavit/ scanned signed copies of the affidavit(s) by 23rd May, 2016. In failure to comply with the aforesaid direction on behalf of the defendant, liberty is granted to the parties to mention the matter on 23rd May, 2016 at 4.15 p.m. so that the directions are passed for further progress of the trial, i.e. for rebuttal evidence on behalf of the plaintiff.

44. Copies of this order be given dasti, to the learned counsel for the parties, under the signatures of Private Secretary.