Genentech Inc And Others vs Drugs Controller General Of India And ... on 2 March, 2020

Author: V. Kameswar Rao

Bench: V. Kameswar Rao

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      * IN THE HIGH COURT OF DELHI AT NEW DELHI
      %                              Date of decision: 02nd March, 2020

+     CS(OS) 3284/2015
      GENENTECH INC AND OTHERS
                                                          ..... Plaintiffs
                        Through:     Mr. Darpan Wadhwa, Sr. Adv. with
                                     Ms. Niti Dixit, Ms. Samiksha
                                     Godiyal, Mr. N. Mahavir, Mr. Aubert
                                     Sebastian & Mr. Aditya, Advs.

                        versus

      DRUGS CONTROLLER GENERAL OF INDIA AND OTHERS
                                                    ..... Defendant
                  Through: Mr. C.M. Lall, Sr. Adv. with
                           Ms. Bitika Sharma, Ms. Namrita
                           Kochhar, Ms. Nancy Roy & Mr. Luv
                           Virmani, Advs. for D-3
                           Mr. Kamil Khan, Adv. (Local
                           Commissioner)

      CORAM:
      HON'BLE MR. JUSTICE V. KAMESWAR RAO

      V. KAMESWAR RAO, J. (ORAL)
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I.A. 2790/2020 (by defendant No.3 under Section 151 CPC)

1. By this order, I shall decide the instant application filed by the defendant No.3 (for short 'applicant') with the following prayers:-

> "In light of the aforesaid facts and circumstances and in the interest of justice, it is most respectfully prayed that this Hon'ble Court may be pleased to:
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> (a) Direct the Plaintiffs to supply the credentials/details of an independent expert for the purpose of inspection in terms of order dated April 25, 2016 and February 12, 2020;
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> (b) Pass such other and/or further order/s and/or direction/s as may be deemed fit

and proper in the facts and circumstances of the present case."

2. In substance, the prayer of the applicant in the application is that the inspection to be carried out of the applicant's documents in terms of orders dated April 25, 2016 and February 12, 2020 should be, by an independent expert on behalf of plaintiffs.

3. Suffice would it be to state that on an application being IA 25289/2015 of the applicant for filing certain documents in a sealed cover, this Court passed an order dated April 25, 2016. The relevant paras of the order for the purpose of this application are primarily paras 226, 227 and 228. In para 227, this Court had noted the decision of this Court in an earlier suit being CS(OS) 355/2014. Further, this Court in order dated February 12, 2020, went on to hold as under:-

> "2. From the perusal of para 135 of an order passed in earlier suit by this Court, this Court allowed the inspection of the documents by two advocates and expert from the plaintiffs' side in the presence of two advocates from the defendants' side.
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> 3. Today it is suggested by the learned Senior Counsels for the parties that a Local Commissioner be appointed before whom the two advocates and expert from the plaintiffs' side can inspect the documents.
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> 4. Accordingly, this Court appoints Mr. Kamil Khan, Advocate (Mob. No.9899218810), who is present in court as a Local Commissioner before whom the two advocates and expert from the plaintiffs' side shall inspect the documents, when two advocates from the defendants' side shall also be present. The documents shall be produced by the staff of the Registry in a sealed cover for inspection. After inspection is over on a given date, the documents shall be re-sealed. This process shall be followed on every day of inspection. For carrying out the commission the Local Commissioner shall be paid an amount of Rs.25,000/- per day to be shared equally by the parties."

4. Subsequent thereto, when the suit was listed before the learned Joint Registrar on February 17, 2020, the learned counsel for the plaintiffs had given the details of two Advocates and one expert, who shall be inspecting the documents on behalf of the plaintiffs. The name of the expert being Dr. Samir Sagitrao. The issue, which has been raised by the applicant in the present application is with regard to the presence of Dr. Samir Sagitrao, as an expert of the plaintiffs by contending that Dr. Samir Sagitrao is an internal / in-house representative of the plaintiff No.2 Company. It is the case of the applicant and so contended by Mr. Chander Lall, learned Senior Counsel that it is established precedent that confidentiality clubs are constituted with a view to ensure that the sanctity and confidentiality of business and commercially sensitive information / material filed by a party is maintained. According to him, the presence of Dr. Samir Sagitrao would defeat the very said purpose in the present case.

5. Mr. Lall laid stress on the fact that the documents to be inspected contain confidential information and test data generated by the applicant relating to the main clinical and pre-clinical

tests of its biosimilar drug to Trastuzumab. The said data is confidential and was generated for the purpose of the Drugs Authority to analyze and approve it and the said data is confidential qua any other competitor including the plaintiffs herein. It is his submission that grave prejudice and irreparable injury would be caused to the applicant if any internal person of the plaintiff companies under the garb of being claimed as an expert, has access to the said documents. In support of his submission, he has relied on a notification dated October 16, 2018 issued by this Court, wherein this Court, in exercise of its powers under Section 129 of the Code of Civil Procedure and Section 7 of the Delhi High Court Act, 1966 made certain amendments in the Delhi High Court (Original Side) Rules, 2018. The said amendments include the amendments to Chapter VII whereby Rule 17 was incorporated to the existing Rules. Rule 17 of the Rules reads as under:-

> "17. Confidentiality Club - When parties to a commercial suit wish to rely on documents / information that are commercially or otherwise confidential in nature, the Court may constitute a Confidentiality Club so as to allow limited access to such documents / information. In doing so, the Court may set up a structure / protocol, for the establishment and functioning of such Club, as it may deem appropriate. An illustrative structure / protocol of the Confidentiality Club is provided in ANNEXURE F. The Court may appropriately mould the structure / protocol of the Club, based upon the facts and circumstances of each case."

6. He also refers to the illustrative structure / Protocol of Confidentiality Club as provided in Annexure F, which inter-alia reads as under:-

> "b) Each party shall nominate not more than three Advocates, who are not and have not been in-house lawyers of either party, and not more than two external experts, who shall constitute the Confidentiality Club.

Members of the Confidentiality Club alone shall be entitled to inspect the Confidential Documents / Information.

xxxx xxxx xxxx

e) During recordal of evidence with respect to the

Confidential Documents / Information, only members of the Confidentiality Club shall be allowed to remain present."

7. It is his submission by referring to Annexure F that it is only an external expert, who shall constitute the Confidentiality Club and the expert Dr. Samir Sagitrao, being an internal, not external expert, cannot be part of the Confidentiality Club. In support of his submission, he has relied upon the judgment of this Court in the case of Telefonaktiebolaget LM Ericsson (PUBL) vs. Xiamo Technology & Ors. CS(COMM.) 434/2016 decided on October 24, 2017, wherein this Court acknowledging the disclosure of any document regarding the invention being confidential only allowed access to an advocate or to an independent expert mutually agreed upon.

8. I may also refer to sub-section 3 of Section 103 of the Patent Act :

> "Section 103. Reference to High Court of disputes as to use for purposes of Government. -
>
> Xxx Xxx (3) If in such proceedings as aforesaid any question arises whether an invention has been recorded, tested or tried as is mentioned in section 100, and the disclosure of any document regarding the invention, or of any evidence of the test or trial thereof, would, in the opinion of the Central Government, be prejudicial to the public interest, the disclosure may be made confidentially to the advocate of the other party or to an independent expert mutually agreed upon."

The above section contemplates a situation where the disclosure of any document regarding the invention may be made confidentially only to an advocate or to an independent expert mutually agreed upon. The reason probably is in today's world of globalization, where competition is at its peak, the organizations may not be inclined to disclose trade secrets/confidential agreements or its details, it had entered with different parties lest may cause serious prejudice to such parties because of competition involved. A trade secrets may make or break a company hence need to be protected. Once such disclosure is made or is misused by a competitor no order of the Court can save the company from loss or could retrieve it to its original position. Even the Patrick McKillen (supra) para 41 notes:

> "41. In patent and similar cases it may be necessary to limit severely the officers or employees of a party who may have access to the evidence."

9. The law discussed above rather furthers the argument of the plaintiff that such confidential club though can be created but the access to information may be restricted, especially in patent cases. Hence there is no impediment if the confidential club is created and its access is limited with procedure to be adopted as below:

> (i) All confidential license agreements relating to similarly placed parties be permitted to be filed in a sealed cover and be kept in the safe custody of the Registrar General;
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> (ii) Each party be directed to provide on an affidavit, a list of no more than five lawyers (who are not and have not been in-house lawyers of one of the parties) and no more than three external expert witnesses, who alone will be entitled to see the aforesaid confidential documents/patent license agreements;
>
> (iii) Said lawyers and expert witnesses will be bound by confidentiality orders passed by this Court and will not make copies or disclose the contents of the said aforesaid confidential documents/patent license agreements to anyone else or anywhere else, including in other legal proceedings, oral and written communications to the press, blog publications etc., so that the spirit of the confidentiality regime would be

preserved;

(iv) The parties i.e. the Plaintiff and the Defendant No.l and Defendant No. 2 will be allowed to inspect said patent license agreements only through the confidentiality club members and no copies will be made of such confidential documents/license agreements. After the inspection, the aforesaid confidential documents/patent license agreements be resealed and again deposited with the Registrar General of this Court;

(v) Direct that during recordal of evidence w.r.t aforesaid confidential documents/patent license agreements etc. only members of the confidentiality club shall be present;

(vi) During proceedings of this Court, when the said documents are being looked at, would be in camera to the effect that only members of the confidentiality club be permitted to be present.

(vii) The parties would give copies of the aforesaid confidential documents/patent license agreements to the members of the confidentiality club only after redacting the confidential information including the name of the parties. However, the rates/products will not be redacted.

(viii) Any evidence by way of affidavit/witness statement which may contain aforesaid confidential information/terms of the agreement(s) shall be kept in a sealed cover and would only be accessible to the members of confidentiality club. However, a party filing such evidence by way of affidavit would give to the opposite party a copy of such affidavit after redacting the confidential information/ terms of the agreement(s);"

8. He also referred to Telefonaktiebolaget LM Ericsson (PUBL) vs. Lava International Ltd., IA No. 2192/2016 in CS(OS) 764/2015, decided on March 01, 2016, wherein this Court had only permitted Lawyers, who are not in-house Lawyers and two external experts to see the confidential documents / patent license agreements of the other party, by referring to para 14 of the order, which reads as under:-

"14. Under these circumstances, it is directed that within one week, each party is directed to provide on an affidavit, a list of not more than three lawyers (who are not and have not been in-house lawyers of one of the parties) and not more than two external expert witnesses, who alone will be entitled to see the aforesaid confidential documents/patent license agreements. They (members of club) would be bound by confidentiality orders passed by this Court and shall not make copies or disclose the contents of the said aforesaid confidential documents/patent license agreements to anyone else or anywhere else, including in other legal proceedings, oral and written communications to the press, blog publications etc., so that the spirit of the

confidentiality regime would be preserved. The inspection can only be done through the confidentiality club members and no copies will be made of such confidential documents/license agreements. After the inspection, the aforesaid confidential documents/patent license agreements be resealed and again deposited with the Registrar General of this Court. It is also made clear that during recordal of evidence with respect to aforesaid confidential documents/patent license agreements etc., only the members of the confidentiality club shall be present. The proceedings of this Court, when the said documents are being looked at, would be in camera to the effect that only the members of the confidentiality club be permitted to be present.

9. Similarly, he has also relied upon the order in CS(OS) 1425/2016 and connected matter Dolby International AB & Anr. v. GDN Enterprises Private Limited & Ors. decided on August 04, 2017 in support of his submission.

10. On the other hand Mr. Darpan Wadhwa, learned Senior Counsel appearing for the plaintiffs would contest the application by stating that the present application is nothing but an application seeking modification of earlier order of this Court dated February 12, 2020. He states that the order passed by this Court on February 12, 2020, is primarily relying upon the order dated April 25, 2016, wherein in para 227, this Court had referred to the order passed in CS(OS) 355/2014, which permitted the inspection to be carried out by the Advocates / expert from the plaintiff's side. According to him, a reading of para 135 of the said order, as reproduced in the order dated February 12, 2020 clearly reflects that the intention of the Court allowing the inspection on behalf of the plaintiff by two Advocates / expert is to include the in-house expert. In fact, it is his submission that this Court had granted liberty to the plaintiffs, after inspection, to amend its pleadings, if so required, which is possible if an internal expert is allowed to inspect the documents.

He also states that even assuming, an external expert is only allowed to inspect the documents, in that eventuality, if the pleadings are required to be amended, the same shall be possible if that external expert divulges to the plaintiffs, the contents of the documents, so inspected. In fact, he has relied upon the judgment of the Co- ordinate Bench of this Court in the case of Transformative learning Solutions Pvt. Ltd. vs. Pawajot Kaur Baweja & ors. CS(COMM) 817/2018 decided on July 17, 2019, more specifically paras 21 to 23 to contend, if the plaintiff is not allowed to inspect the documents of the defendants then the plaintiff would be unable to establish its claim in the suit.

11. Having heard the learned counsel for the parties, the only issue, which arises for consideration is whether the Confidentiality Club to be formed shall only include an external expert and not an internal expert, as suggested by the applicant. The answer to this issue can be found only in the order dated April 25, 2016, more specifically para 227, wherein this Court had referred to an order passed in the earlier suit being CS(OS) 355/2014. A reading of para 135 clearly shows that this Court has not limited

the expert to be an external expert. If the Court meant that way, it would have said so. Further, the other part of the order, where a liberty has been granted by this Court for amending the pleadings is only possible, if the plaintiffs are represented by an internal expert, who can help in the amendment of the pleadings in the manner required. That apart, Mr. Wadhwa is right, in stating that even if inspection is carried out by an external expert, still he has to divulge the information acquired from the documents to enable the plaintiff carry out the amendments to establish its claim in the suit. Otherwise, inspection shall loose its relevance, if the outcome of the same is not utilized purposefully by the party, which sought the inspection. I have been told that this order, which was taken in appeal, was not pressed by the applicant. In fact, the said order having attained finality cannot now be re- written at the asking of the applicant. In fact, the grant of prayer of the applicant in this application shall have a bearing on the order already passed in CS(OS) 355/2014.

12. That apart, the reliance placed by Mr. Lall on Rule 17 is misplaced as it primarily applicable to a commercial suit, which is not the case here. In fact, during the arguments, the counsels have made allegations against the other party to say that the other party contends otherwise. I am not concerned with the issue whether the suit is a commercial suit or not. Suffice would it be to state on the nomenclature given to the suit, it is not a commercial suit. In any case, I find that the principles akin to Rule 17 have been made applicable to the case in hand, as is clear from the reading of the order dated April 25, 2016, which incorporate the order passed in CS(OS) 355/2014, inasmuch as the court has directed the constitution of a Confidentiality Club, the Members of which shall be bound by the confidentiality. So, the plea of Mr. Lall by relying upon Rule 17 is inconsequential. In fact, I find the order dated April 25, 2016 and the order passed by this Court in CS(OS) 817/2018 wherein in paras 21 to 23, the Co-ordinate Bench of this Court has held as under, are on similar lines.

"21. A civil lis, governed by the CPC, requires each party thereto to have notice of the case of other, which is required to be met and the CPC does not permit any surprises. The trial and adjudication of a civil lis is regulated by pleadings and evidence, documentaries or otherwise, beyond pleadings is not permitted. The documents of each other are required to be admitted and/or denied and issues on which adjudication is required to be done, struck. No evidence, even if led, beyond pleadings is permitted to be led. Thus, the proceedings require complete disclosure.

22. Of late however, in respect of a certain class of suits, it was felt that documents filed should not be permitted to go in public domain, as happens on filing in the Court. Provision has thus been made for keeping such documents in a sealed cover, for eyes only of a limited number of persons who also agree / undertake not to divulge contents thereof to others. In some cases, as in cases of patent infringement or infringement of copyright in source code of a computer software, the need for a party to a lis to see the document may not arise as the opinion with respect thereto is to be given by the expert only.

> 23. However in the present suit to restrain defendants from using confidential information of plaintiffs and for ancillary reliefs, the defendants are permitted to defend the suit inter alia on the grounds, that the plaintiffs have no copyright in the customers list and even if the plaintiffs have a copyright, the defendants have not infringed the same. I may mention that the suit has been filed as a commercial suit and not as an ordinary suit. This suit, under Section 2(c) of the Commercial Courts Act, 2015, can qualify as a commercial suit only if arising out of intellectual property rights relating to trade marks, copyright, patent, design etc. and not if arising out of property rights or a tort. In such a suit, to ask the defendants to contest the suit without knowing the customers list in which copyright is claimed and without knowing what they are sought to be restrained from doing, would not only be unfair to the defendants but also would be contrary to procedure prescribed by law. The Advocates of defendants and experts, even if any possible in such scenario, cannot be expected to make pleadings, to meet the case of plaintiffs. The non disclosure to the defendant sought by the plaintiffs, in my opinion deprives the defendant of opportunity of being heard and the right to defend the suit."

13. Insofar as the reliance placed by Mr. Lall on the three orders passed by this Court is concerned, the same are distinguishable in the facts of this case, more particularly, in view of the history of litigation between the parties, which includes the order dated April 25, 2016. The application filed by the applicant is dismissed.

14. The inspection, as directed vide order dated February 12, 2020 shall be carried out by the parties from March 03, 2020 onwards.

V. KAMESWAR RAO, J MARCH 02, 2020/ak