Delhi High Court
Vringo Infrastructure Inc. & Anr. vs Indiamart Intermesh Ltd. & Ors. on 5 August, 2014
Author: V.K.Shali

HIGH COURT OF DELHI AT NEW DELHI

+ I.A. No.2112/2014 in C.S. (OS) No.314 of 2014

Decided on : 5th August, 2014

VRINGO INFRASTRUCTURE INC. & ANR. ..... Plaintiffs
Through: Ms. Pratibha M. Singh, Senior Advocate with Ms. Saya Chaudhary, Mr. Ashutosh Kumar & Mr. B. Prashant Kumar, Advs.

Versus

INDIAMART INTERMESH LTD. & ORS. ..... Defendants
Through: Mr. Dushyant Dave & Mr. Sandeep Sethi, Senior Advocates with Mr. Sanjeev Kumar Tiwari, Ms. Valini Panta & Mr. Prateek Sehrawat, Advocates.

CORAM:
HON'BLE MR. JUSTICE V.K. SHALI

V.K. SHALI, J.

1. This order shall dispose of an application being I.A. No.2112/2014 filed by the plaintiffs under Order 39 Rule 1 & 2 read with Section 151 CPC for confirmation of the ad interim stay granted on 03.02.2014 in the present suit.

2. Briefly stated the facts of the case are that the present suit for injunction has been filed by Vringo Infrastructure Incorporation, plaintiff No.1, a wholly owned subsidiary of Vringo Incorporation, plaintiff No.2. The plaintiff No.1 is alleged to have been founded in 2012 and is engaged in innovation and development of telecommunication technologies and intellectual property. It is alleged that plaintiff No.1's research and development efforts have resulted in filing over 25 patent applications in 2013 apart from the fact that the plaintiffs' intellectual property portfolio consists of patents and patent applications covering technologies pertaining to internet search and search advertising, handsets and telecommunications infrastructure and wireless communications. It is alleged that these patents and the patent applications have either been developed internally by the plaintiff No.1 or have been acquired from third parties.

3. The plaintiff No.2 is stated to have been founded in 2006 and till the recent sale of its mobile partnerships and application business in February, 2014, developed and distributed mobile application products and services through partnerships with handset manufactures and mobile network operators. The plaintiff No.2 offers its social and video ringtone mobile applications globally through mobile application stores.

4. In the instant case, the plaintiffs are alleging infringment of patent No.IN 200572 (hereinafter referred as IN '572) which is titled as 'a method and a device for making a handover decision in a mobile communication system'. It is alleged that the aforesaid invention is a method and device for making a handover decision in a mobile communication system comprising of at least one microcell (A, B, C) the coverage area of which is at least one mainly located within the coverage area of another cell (M) as shown herein below in the picture.

5. The method comprises of measuring at a mobile station, a radio signal transmitted by a base station of a microcell and reporting the measurement results at substantially regular intervals and commanding the mobile stations defined as slow moving mobile stations to switch to the base station of a suitable microcell. The application of this device has been explained with the help of following pictorial positions of a base tower in the context of a mobile handset.

MS aAA M

6. On the basis of the aforesaid diagram, it was sought to be explained that if a mobile phone is moving at a very fast speed from one station to another station then, the frequency of that microcell would keep on changing from one microcell to another microcell so that the clarity of sound is not impaired and further the band width in such a case would be occupied more in comparison to a phone which remains stationary or is located within the region of one microcell, where the band width of that microcell would be much less.

7. The plaintiff has alleged that defendant No.3/ZTE Telecom Indian Private Limited is a private limited company incorporated under the laws of India and is wholly owned subsidiary of defendant No.4. The defendant No.4, ZTE Corporation, is a company incorporated under the laws of the People's Republic of China. Defendant No.2 is the Chief Executive Officer of the defendant No.3 and has a principal and strategic control over the business of defendant No.3. It has been alleged that defendant No.4, Chinese company, is involved in the manufacturing and selling of telecommunications equipment and devices such as mobile handsets, dongles, tablets, infrastructure equipment and devices, etc. It is alleged that the defendants are infringing the suit patent of the plaintiffs by manufacturing, importing, selling, offering for sale infrastructure equipment including Base Station Controller examples of which are Base Station Controllers bearing Nos.ZTE ZXG10 iBSC and ZTE ZXG10- BSCV2. It is alleged that these infringing products are being installed and serviced by the defendants.

8. It is the case of the plaintiffs that the suit patent which was originally belonging to Nokia Corporation was assigned to them by a Confidential Patent Purchase Agreement dated 9.8.2012. The necessary documents showing the purchase/assignment of the aforesaid patent in favour of plaintiff No.1 were stated to have been placed on record, which are duly registered in countries where the deal was assigned and in some other countries. The said patent was brought to the notice of defendant No.4 by the plaintiffs vide letter dated 25.9.2012 and the defendant No.4 was requested to seek appropriate license from the plaintiffs for using this and the large number of its patents; however, the said defendant did not approach the plaintiffs seeking a license qua any of the plaintiffs' patents including the suit patent. It is alleged that on the contrary, the defendant No.4

continued to flagrantly infringe not only the patent in question but the number of other patents of the plaintiffs across the globe which has been a source of continuous litigation between the plaintiffs and the defendants not only in India but in UK, Germany, France, Australia, Brazil, Netherlands, Romania, Spain, Malaysia and USA, etc. It is also alleged that as a matter of fact in Germany, Brazil and Romania, injunction orders, preliminary or permanent, have been passed in favour of the plaintiffs. It is alleged that the plaintiffs have placed on record not only the documents in the form of leaflet, literature, brochure of defendant No.4 but also affidavit of a so-called expert person, who has examined the product of the defendants in the light of the patent of the plaintiffs and sworn that the two technologies are the same. It is alleged that analysis of this material will show that there is no marked difference between the technology by the defendant No.4 and the technology which is being used by the plaintiffs.

9. It is alleged that the plaintiff has got prima facie a very good case, that the balance of convenience is also in favour of the plaintiffs, that the plaintiffs are suffering irreparable loss on account of unhindered infringing material being brought, installed, sold, manufactured by defendant No.4 and therefore, the ex parte ad interim injunction granted from infringing the patent mark of the plaintiffs.

10. The defendants had put in their appearance and defendant Nos.3 and 4 have filed their written statement and reply to the application contesting the claim of the plaintiffs that they have been infringing the suit patent of the plaintiffs. On the contrary, it was stated by them that the technology which has been used by defendant No.4 for the purpose of manufacturing, importing and selling the Base Station Controller is different than the one which is adopted by the plaintiffs. It was the case of the defendants that unlike the technology of the plaintiffs in the suit patent where they try to find the user of a cell phone in a particular micro cell, the answering defendants have a technology by virtue of which they measure the average use of the cell phone at a given place for a specified period and then on the basis of that average use, record them and permit shifting from macro to micro cell, thereby permitting the user of the spectrum in a Base Station Controller.

11. Apart from contesting the use of the technology by the defendants on merits, it was also contented by them that the plaintiffs are not entitled to confirmation of the ad interim order dated 3.2.2014 granted in their favour on account of the fact that (i) they are guilty of concealment of fact and (ii) that the plaintiffs, in their cause of action clause, have stated that the cause of action accrued to them in December, 2012 when the notice of cease and desist was given to them while the fact of the matter is that the predecessor-in-interest of the plaintiffs themselves were aware of the fact that the defendants were using a technology allegedly developed by them right from 2002 and not only in India but in different countries and yet, the predecessor-in-interest of the plaintiffs, namely, Nokia Telecommunication had not taken any action against them, therefore, action for infringement which has been initiated by the present plaintiffs against the defendants is not only hopelessly hit by latches and delay but is also barred by limitation. The plaintiffs have also concealed the material fact of having the knowledge of the alleged use of the technology by the defendants way back in the year 2002, if not in 2006, yet, having chosen to file the suit after considerable delay, without any explanation. In such a situation, it was contended that the plaintiffs will not suffer an irreparable loss in case the ad interim injunction is not granted rather the defendants will suffer an irreparable

loss inasmuch as it will have to stop its commercial activity with regard to the sale of the Base Station Controller.

12. I have heard the learned senior counsel Ms. Pratibha M. Singh for the plaintiffs and Mr. Dushyant Dave as well as Mr. Sandeep Sethi, the learned senior counsel for the defendants. I have also gone through the record. The following submissions were urged by the learned senior counsel for the plaintiffs, which were contested by the learned senior counsel for the defendants.

13. The first contention raised by the learned senior counsel for the plaintiffs was that admittedly the plaintiffs have prima facie established that they have a deed of assignment in their favour from the original patentee, Nokia Telecommunication, which is registered as patent No.IN '572. The deed of assignment dated 9.8.2012 has also been placed on record. According to this deed of assignment, not only the right, title or interest in the patent in question were assigned but number of other patents were also assigned to the plaintiffs. It has also been contended that even the right to sue for the past, present and future damages or to take such other action against any of the parties for infringement or otherwise has been conferred on the plaintiffs. It is further stated that this deed of assignment is duly registered in India, at Chennai although, the deed of assignment is also registered in the countries where it was assigned.

14. The learned senior counsel for the defendants had vehemently contended that the deed of assignment was a document which was a sham. It has been contended that the deed of assignment shows that not only the patent in question but a number of other patents have been assigned to the plaintiffs for a value of 10 USD, which is a grossly incorrect value of the patents. It was contended that the original deed of assignment giving the real terms and conditions has not been placed before this court but has been rather withheld from the court. Moreover, the deed of assignment is not properly stamped. It has been contended by them that the value of their patents is worth millions of dollars and the document as such being not valued properly and appropriate stamp duty having not been paid, the document is inadmissible in evidence and deserves to be impounded. It was contended that according to Section 68 of the Act, an assignment is not valid unless the same is in writing and duly executed. Because of the above deficiencies it was urged to be not duly executed. Reliance, in this regard, was placed on Government of Andhra Pradesh & Anr. Vs. P. Laxmi Devi (Smt); (2008) 4 SCC 720 and Malaysian Airlines Systems BHD vs. Stic Travels (P) Ltd.; (2001) 1 SCC

451.

15. The learned senior counsel for the plaintiffs while meeting this argument had contended that a redacted copy of the agreement was placed before the court and it was prepared to submit the original copy giving the real terms and conditions; however, the document being confidential in nature, they did not want it to be seen by its competitors so as to prejudice the interest of the plaintiffs. It was also contended by Ms. Singh, the learned senior counsel that so far as the payment of appropriate stamp duty on the document is concerned, it is at best an irregularity and, therefore, the document itself could not become inadmissible in law. Reliance in this regard was placed in support of their propositions on Gold Developers Pvt. Ltd & Anr. vs. M/s Nitishree Infrastructure

passed in CS (OS) No.1560/2010 on 26.09.2013; M/s Pradip Trading Co. vs. The State of Bihar; AIR 1974 Pat 315 and SMS Tea Estates vs. Chandmari Tea Company; (2011) 14 SCC 66.

16. The second submission which was raised by the learned senior counsel for the plaintiffs was with regard to prima facie the patent of the plaintiffs being infringed by the defendants. In this regard, it was contended that violation of the patent of the plaintiffs is ex facie evident from the brochure, leaflet and other literature which have been placed by them on record belonging to the defendants. In addition to this, they have also filed an affidavit of Mr. Regis J. Bates JR as an expert, who has categorically stated that the patent of the plaintiffs has been infringed by the defendants. It has been further contended that no evidence of an expert has been filed by the defendants in rebuttal, therefore, prima facie, the affidavit of Mr. Regis J. Bates cannot be ignored.

17. Per contra, the learned senior counsel, both Mr. Dave and Mr.Sethi, had contended that the affidavit which has been filed by the plaintiffs cannot be treated to be an affidavit of an expert. In this regard, it was contended by the learned senior counsel for the defendants that a perusal of the affidavit shows that the incumbent had a decree of management while he is testifying his affidavit as an expert on science. In this regard also, he has categorically stated in the last paragraph of his affidavit that he does not have any special knowledge about the patent law or its violation and thereby contending that the affidavit of the plaintiffs cannot be treated as a conclusive evidence to establish the infringement of the patent of the plaintiffs.

18. It was contended by both the learned senior counsel for the defendants that they have already filed a counter claim for revocation of the patent of the plaintiffs for violation of various statutory provisions under Section 64 of the Patents Act, 1970, and the patent in question not being innovative in nature. It was also contended by them that the plaintiffs themselves have admitted that the defendants have sold the equipment under the patent which they are selling to the various telecommunication companies in India worth Rs.17 crores while as the plaintiffs in the plaint have not averred anywhere that the patent which was allegedly registered in their name was being commercially exploited by them. It has been contended that Section 122 of the Patents Act, 1970, clearly lays down that any person who has got the patent registered under its name is under an obligation to comply with the provisions of Section 146 of the Act by virtue of which it is required to file a statement giving the workable details of the patent which has been registered in its name. It is contended that this provision has been violated. The sanction to this is a heavy fine, which may extend to Rs.10 lacs.

19. The third contention which has been urged by the learned senior counsel for the plaintiffs is that in case the plaintiffs' interest is not protected, it will cause irreparable loss to them though the balance of convenience is in their favour. In this regard, it has been contended that the plaintiffs had earlier also filed a suit for infringement in which an ex parte ad interim stay was granted by this very court which order was subsequent thereto was modified by the Division Bench by putting the defendants to various terms and conditions. Accordingly, it has been contended that the order of 3.2.2014 deserves to be confirmed.

20. I have thoughtfully considered the submissions by the respective sides and have gone through the relevant record apart from the judgment cited by both the parties. I feel that the following points need to be dealt with before the court arrives at a view as to whether the interim order dated 3.2.2014 deserves to be confirmed or not?

PRIMA FACIE CASE

21. There is no dispute about the fact that the plaintiffs have claimed themselves to be the owner of the patent No.IN '572 which is duly registered by controller of patents in India vide deed of assignments dated 15.3.2013 and 12.4.2013. This device is known as 'A method and a device for making handover decision in a mobile communication system'. The case in nutshell is that this device has been innovated essentially for the purpose of maintaining the voice clarity of a cell phone in a fast moving situation where on account of certain wavelengths of the user or phone, the micro and the macro cell work in such a tandem that the clarity of voice over the mobile for the recipient of the call is maintained. It is the case of the plaintiffs that while doing so, the use of the cell phone from minute to minute is constantly observed by the unit and the system functions according to the innovation of its own. It is alleged that this technology has been copied or rather infringed by the defendants. Though, a different diagram is used and the only change which they claim while presenting the same technology is that they claim that they take the average of the use of the cell phone and thereby the system of change from micro to macro and vice-versa takes place, so as the recipient cell phone is concerned. For this purpose, the plaintiffs have purported to have relied upon the brochure and the literature which has been filed in court and it is claimed that the leaflets, the brochures and the literature which is being published by the defendants in order to explain its technology, if compared with the patented technology of the plaintiffs, is a replica of the same.

22. This comparison prima facie, at this stage, cannot be done by the court as it essentially involves scientific evidence which needs great deal of specialized knowledge in telecommunications and experience as to how the cell phone technology functions. This can be opined by an expert, who has experience in the field of telecommunication and help the court in understanding the patent, its technology viz-a-viz the technology which has been adopted by the defendants. There is no dispute about the fact that the technology of the plaintiffs is patented but unlike under Section 31 of the Trade Marks Act, 1999, there is no presumption of validity in favour of the plaintiffs that the technology is patented by the plaintiffs. Therefore, the plaintiffs have to prima facie prove that the infringer is using the same technology which is patented by them and not the respondents. This onus is very heavy on the plaintiff to be discharged in the first instance. The plaintiffs must establish such acts as will prima facie satisfy the court that there are strong and prima facie reasons for acting on the supposition that the patent is valid. It has been held in National Research Development Corporation of India vs. The Delhi Cloth & General Mills Co. Ltd. and Ors.; AIR 1980 Delhi 132 that the most cogent evidence for this purpose is either that there has been a previous trial in which patent has been held to be valid or that the patentee has worked the patent and enjoyed the same without dispute, either from the defendants or anyone. The defendants have set up a counter claim for revocation of the patent under Section 64 of the Act. Therefore, it cannot be said that the plaintiffs are having a prima facie good case on the basis of the registration of the patent alone. It is required to do something more. This something more is being sought to be shown by an affidavit by

the plaintiffs which claims to be an affidavit of an expert.

23. The plaintiffs, in order to show that their technology is being infringed, have filed the affidavit of Mr. Regis J. Bates JR, who is claimed to have been associated with TC International Consulting, Inc. (TCIC) for the last more than 40 years and holding different positions. He has stated that he has a degree in Business Management from Stonehill College in Easton, Massachusetts and had additional credentials towards the same from Lehigh University in Bethlehem, Pennsylvania and St.Joseph's Colelge in Philadelphia, Pennsylvania. He claims to have completed the coursework but not the thesis for the MBA. He is claiming himself to be the founder and President of TC International Consulting, Inc. (TCIC), based in Phoenix, Arizona. He has held the position in the company since its inception in October, 1989. TCIC is a full service consulting and training firm specializing in communications and computer convergence. Before taking up the assignment with TCIC, he was employed in different companies with different designations dealing in telecommunication products, services, computers etc. Thus, he claims to have been involved with the telecommunications industry for more than 45 years and has seen the development and growth of the various technologies, infrastructure, legal, regulatory and technical services. He claims that his books and seminars have been used by more than 166 colleges and universities around the globe though he does not give the names of his books or research papers which he might have written. He is claiming himself to be familiar with mobile (wireless networks) telecommunications technology including paging, cellular (wireless telephony), GSM, WCDMA, CDMA, CDMA 2000 and UMTS.

24. He further claims to have been approached by the plaintiffs in November, 2013 and was requested to analyze Indian patent No. IN 200572 that stands registered in the name of Vringo Infrastructure, Inc., plaintiffs herein, which deals with the devices known as handing over in a mobile communications system in comparison to ZTE ZXG10 iBSC and ZTE SXG10 BSC(V2) which are the Base Station Controllers. For the purpose of providing his opinion, he has enlisted various documents furnished to him which he claims to have examined and then opined that in his opinion, there is some kind of an infringement of the patent which is registered in the name of the plaintiffs by the defendants which technology is being sold by them under the aforesaid two variants i.e. ZTE ZXG10 iBSC and ZTE SXG10 BSC(V2). But immediately after opining so, he says that he is not a patent attorney and does not purport to provide expert opinions in this report on Indian patent law. Therefore, this one sentence in his affidavit that his opinion does not purport to be opinion on the Indian patent law completely, robs his opinion of any value which is sought to be attached to the same by the plaintiffs that their technology which is patented in the form of IN '572 is being infringed by the defendants. Moreover, the affidavit filed by the plaintiffs is in the nature of self favouring admission which is not relevant under Section 21 of the Evidence Act. The said Section makes self harming admissions relevant except in three contingencies which are mentioned in the proviso. Obviously, the case of the plaintiffs does not fall in any of these contingencies.

25. Even otherwise also, a perusal of the entire affidavit of Mr. Regis J. Bates JR, in my considered opinion, cannot be the basis of terming him to be an expert in telecommunications which is form of a science so as to make his affidavit admissible under Section 45 of the Indian Evidence Act, 1872. The reason for this is that before his opinion in the form of the present affidavit could be termed to be the opinion of an expert, he ought to have some basic degree in science or telecommunication or

B.Tech engineering dealing in telecommunication and electronics and thereafter some research work having been conducted by him which would have qualified him to be an expert within the definition of Section 45 of the Patents Act, 1970. On the contrary, he only has a degree in business administration and his holding of different assignments and posts only shows that though he was employed by various telecommunications or computer companies, but the nature of work was essentially of a 'generalist', as a management consultant so as to boost the sales of a particular technology or a product rather than that of an expert in telecommunication. He has also not shown any special technical knowledge about the telecommunication or the technology in question and by simply stating that he has written books or research papers would not be good enough to term him an expert in the light of the fact that the opinion of an expert under Section 45 of the Evidence Act, 1872, is relevant.

26. It may also be noticed that the legislature in its wisdom was cognizant of the fact that the patent law may deal with very intricate inventions in science, technology, communication, pharmaceutical apart from various other fields which the courts may not be very familiar with where a suit for infringement is brought about, that is why a provision for appointment of a scientific advisor has been made under Section 115 of the Patents Act, 1970 to seek their expert assistance. A perusal of Rule 103 of the Patents Rules, 2003 would show that before a person is qualified to be claimed as a scientific advisor, he must fall in all the three categories which are as under:

> "a) He holds a degree in science, engineering or technology or equivalent;
>
> b) He has at least fifteen years practical or research experience; and
>
> c) He holds or has held a responsible post in a scientific or technical department of the Central or State Government or in any organization."

27. So far as Mr. Regis J. Bates JR is concerned, he certainly cannot be called a Scientific Advisor under clauses (a) and (c). He certainly has professed to have the experience of 45 years in the field of telecommunication, but this also falls short of displaying in his affidavit that he has any practical or research experience to qualify him as a Scientific Advisor under clause (b). In my considered view, he is not the kind of person who qualifies to be a Scientific Advisor in terms of clause

(b) of the aforesaid Section also, who can be said to be having the requisite qualifications or parameters in the said sub-Section and who can be termed to be a scientific advisor within Rule 103. I am of the view that a Scientific Advisor is nothing but essentially an expert in his own field in terms of Section 45 of the Evidence Act, 1872. If Mr. Regis J. Bates cannot be termed to be a Scientific Advisor on the parameters of Rule 103 of the Patent Rules, prima facie he can certainly not be called 'an expert', as is sought to be done by the plaintiffs. Therefore, I cannot accept his affidavit as an affidavit of an expert to hold that the plaintiffs have been able to make a prima facie case of the defendants infringing their patent. Moreover, when he himself is admitting that he is not a patent attorney and does not purport to provide expert opinions in his affidavit and further that his opinion along with own knowledge is based on the documents provided to him by the plaintiffs. Therefore, I feel that the plaintiffs have not been able to make out a prima facie case, which is the first

requirement before an injunction is granted in favour of the plaintiffs.

BALANCE OF CONVENIENCE

28. The next point to be considered while granting injunction in favour of a party is as to whether the balance of convenience is in favour of the plaintiffs. This is one of the essential requirements to be established by the plaintiffs before an injunction is granted. While examining the question of balance of convenience, a number of factors will have to be taken into account by the court depending on the facts and situations of each case. In the instant case, for example, the balance of convenience to be established by the plaintiffs would entail examination as to whether it is marketing the patented product in the Indian market, whether it has approached the court with clean hands without concealment of material facts and whether there has been any delay in approaching the court, etc.

29. Examined in this background, the case of the plaintiffs is that they had a patent, duly registered in the year 2012 bearing No.IN '572 which is known as 'a method and a device for making a handover decision in a mobile communication system'. This patent has been assigned to them by Nokia Telecommunication in the year 2006 but what is important and noticeable is that though this has been assigned to them by Nokia Telecommunication by a registered document in 2006 but curiously enough Nokia, despite having known the fact that their patent was being allegedly infringed by defendant Nos.3 and 4, did not chose to seek any damages from them as no suit or proceeding was ever filed by them before the assignment of this patent in favour of the plaintiffs.

30. It is not the case of the plaintiffs that Nokia Telecommunication was not aware of the alleged patented technology being infringed by defendant Nos.3 and 4. On the contrary, the plaintiffs own case in paragraph 16 of the plaint is that defendant No.4 is one of the largest manufacturer and seller of telecommunication equipment and supplier in India to major industries. These major industries have also been identified by the plaintiffs in India as BSNL, Aircel, Vodafone, Reliance Communication, Airtel, etc. That being the position, the plaintiffs have further stated that these Base Station Controllers to the tune of Rs.17 crores have already been sold by the defendants to these companies while the plaintiffs have not at all disclosed in the plaint that technology which is patented by Nokia Telecommunication and which has been assigned to them by the said company, is being commercially exploited by them. The Division Bench of the High Court of Delhi in Franz Xaver Huemer vs. New Yash Engineers; AIR 1997 Delhi 79 has observed that a foreigner, who has registered patents in India and who has not kept them in use in India, thereby seriously affecting market and economy in India, cannot, in equity, seek temporary injunction against others from registering the use of patented device.

31. Mr. Sethi, the learned senior counsel for the defendants has cited this judgment to contend that the plaintiffs themselves have admitted in the plaint that defendant Nos.3 and 4 are one of the major players and suppliers of Base Station Controller equipments to the tune of Rs.17 crores to known telecommunication players in India and curiously without even making any averment in the plaint that this patent was being used by them in India, clearly disentitled them to the grant of injunction as the balance of convenience is in favour of the defendants and not the plaintiffs.

32. This argument was sought to be repelled by Mrs. Pratibha M. Singh, the learned senior counsel for the plaintiffs by contending that in the rejoinder, the plaintiffs have not only given the names of various players like NSN (Noika), Alcatel, Samsung, etc., as licensees of the plaintiffs but as also using the patent of the plaintiffs and manufacturing equipment on the basis of the said patent and supplying in India. It is also stated that they have also been complying with the various provisions of the Patents Act and the rules framed there under by furnishing requisite information to the patents office. Thus, the case of the plaintiffs is that a patent may be commercially exploited either by the patentee or by its licensee. Reliance in this regard was placed on N.R.D. Corporation of India vs. D.C. & G. Mills Co.; AIR 1980 DEL 132.

33. I have carefully considered this submission. I find considerable force in the contention of Mr. Sethi, the learned senior counsel for the defendants. In the first instance, the replication is not a part of pleading and, therefore, the case of the plaintiffs was that they had a patent in respect of a particular technology, which is being infringed by the defendants, who have gone to the extent of selling equipment on the infringed patented technology to the tune of Rs.17 crores.

34. It is the case of the plaintiffs that they had made it known to the defendants that they must obtain a license from them and pay the license fee but there is not an iota of averment in the plaint that they have been commercially exploiting the patent. It was incumbent on them to have at least made averment in the plaint as to how and to what extent they were exploiting their patented technology. No facts and figures in this regard have been given by the plaintiffs. Therefore, simply when the defendants have taken a defence that the patented technology of the plaintiffs is not being infringed and according to the plaintiffs' own averments, the defendants are selling the equipment in a huge quantity and amount to the Indian telecommunication players, the plaintiffs cannot try to cover up their deficiency by referring to the averments made in the rejoinder to contend that it is supplying and using patented technology through different players and also stating that the requisite statements are being filed with the patent office. This should have been averred in the plaint itself rather than in rejoinder because latter is not a part of the pleadings. A party cannot be permitted to raise an argument which is not even pleaded. Rejoinder is an opportunity given to the plaintiffs for explanation, refutation, implication and not to set up a new case. In any case, even if these averments of the plaintiffs are taken on their face value, it becomes a debatable issue which needs to be adjudicated by the court but prima facie the balance of convenience does not turn out to be in favour of the plaintiffs or rather it turns out to be in favour of the defendants as any restraint on the defendants from manufacturing, selling or distributing the product which they are doing and which according to the plaintiffs is infringement of their patent, would cause harm to them. Therefore I feel, on this score also, I must hold against the plaintiffs. So far as the non-filing of the suit against the defendant Nos.3 and 4 for infringement is concerned, that also becomes important notwithstanding the fact that under the document of assignment, the right to sue, even for the previous alleged infringement, is treated to have been transferred to the plaintiffs. I feel that this point also needs to be seen in the light of Sections 109 and 110 of the Patents Act, 1970, which reads as under:-

> "109 Right of exclusive licensee to take proceedings against infringement. -

> (1) The holder of an exclusive licence shall have the like right as the patentee to institute a suit in respect of any infringement of the patent committed after the date of the licence, and in awarding damages or an account of profits or granting any other relief in any such suit the court shall take into consideration any loss suffered or likely to be suffered by the exclusive licensee as such or, as the case may be, the profits earned by means of the infringement so far as it constitutes an infringement of the rights of the exclusive licensee as such.
>
> (2) In any suit for infringement of a patent by the holder of an exclusive licence under sub-section (1), the patentee shall, unless he has joined as a plaintiff in the suit, be added as a defendant, but a patentee so added as defendant shall not be liable for any costs unless he enters an appearance and takes part in the proceedings."
>
> xxxxxxxxxxxx "110 Right of licensee under section 84 to take proceedings against infringement. - Any person to whom a licence has been granted under section 84 shall be entitled to call upon the patentee to take proceedings to prevent any infringement of the patent, and, if the patentee refuses or neglects to do so within two months after being so called upon, the licensee may institute proceedings for the infringement in his own name as though he were the patentee, making the patentee a defendant; but a patentee so added as defendant shall not be liable for any costs unless he enters an appearance and takes part in the proceedings."

35. It is the case of the plaintiffs themselves in the rejoinder that they had given the license to exploit their patented technology to certain parties. Once the patented technology is admitted by the plaintiffs to have been licensed to its franchisee which, in the instant case, happens to be NSN (Nokia), Alcatel, Samsung, etc., it is expected that these licensees, if they are aggrieved by the infringement of the patent, would also complain because ultimately it is their sales of the patented item which is going to be affected meaning thereby that in the instant case, if the technology of the plaintiffs was, for example, licensed to Alcatel to manufacture the Base Station equipment and the same patented technology was being infringed by defendant Nos.3 and 4 by calling it a Base Station Controller then, the overall sales of Base Station equipment of Alcatel would have been affected and if their sales would have been affected, they would have certainly complained to the patentee, namely, Vringo. This is not the case here. While as the fact of the matter is that there is no complaint from the licensee to the original patentee regarding infringement. If there is no complaint made by the licensee to the original patentee and similarly, no action was brought by the original patentee before assignment to the plaintiffs, it becomes an important fact which cannot be ignored. This becomes a triable issue as to whether the technology of the plaintiffs is being infringed or not by defendant Nos.3 and 4 and at this point of time, the court cannot assume that the technology of the plaintiffs is being infringed. Therefore, this also tilts the balance of convenience in favour of the defendants rather than the plaintiffs. On this score also, I must go in favour of the defendants and not in favour of the plaintiffs.

IRREPARABLE LOSS

36. The third condition which must be satisfied before the plaintiffs are granted an injunction against the defendants is that it must establish that non-grant of ad interim injunction to the plaintiffs would result in irreparable loss to the plaintiffs. An irreparable loss is a loss which cannot be compensated in terms of money. Conversely meaning a loss which can be calculable in terms of money or for which money can be adequately compensated, can never be said to be an irreparable loss.

37. No doubt under Section 48 of the Patents Act, the rights of the patentees are given, which includes the right of the patentees to the exclusive right to prevent third parties, who do not have its consent from making, using, offering for sale, selling or importing, that is, for the purpose of sale in India meaning thereby, the patentee has a right to get an injunction but that right is not an absolute right and a mandatory right. It has to be read in the larger scheme of the Act and Section 108 of the Patents Act also deals with the reliefs in a suit for infringement which clearly lays down that the court may grant, in a suit for infringement, an injunction subject to such terms, if any, as the court may think fit at the option of the plaintiffs. Both these Sections read as under :-

> "48. Rights of patentees (1) Subject to the other provisions contained in this Act, a patent granted before the commencement of this Act, shall confer on the patentee the exclusive right by himself, his agents or licensees to make, use, exercise, sell or distribute the invention in India.
>
> (2) Subject to the other provisions contained in this Act and the conditions specified in section 47, a patent granted after the commencement of this Act shall confer upon the patentee -
>
> a. where the patent is for an article or substance, the exclusive right by himself, his agents or licensees to make, use, exercise, sell or distribute such article or substance in India;
>
> b. where a patent is for a method or process of manufacturing an article or substance, the exclusive right by himself, his agents or licensees to use or exercise the method or process in India."
>
> xxxxxxxxxx "108. Reliefs in suits for infringement The reliefs which a court may grant in any suit for infringement include an injunction (subject to such terms, if any, as the court thinks fit) and, at the option of the plaintiff, either damages or an account of profit."

38. A conjoint reading of the aforesaid two Sections would clearly show that though the patentee has prima facie a right to obtain an injunction but that injunction is not necessarily to be granted as a matter of course. It can be refused in case a party can adequately be compensated in terms of money or the court can sufficiently protect the interest of the plaintiffs by passing certain other directions.

39. The learned senior counsel for the plaintiffs has relied upon a number of judgments to contend that money is not adequate relief and injunction must follow. These are, Micromax Informatics Limited vs. Telefonaktiebolaget LM Ericsson (PUBL); 2013 (56) PTC 592 (Del), Strix Limited vs. Maharaja Appliances Limited; MIPR 2010 (1) 0181, Hindustan Lever Limited vs. Eureka Forbes; ILR (2008) Supp. 6 Delhi 1, Bayer Corporation & Ors. vs. Union of India & Ors.; 2009 (41) PTC 634 (Del.), etc.

40. I have gone through these judgments. In the facts of the present case, as I have already held that the plaintiffs have not been able to show a prima facie case, therefore, merely because injunction was granted in the facts of certain reported cases is no ground to say that injunction must follow in this case also.

41. In this regard, it has been brought to the notice of the court that there had already been a litigation initiated by the plaintiffs against defendant Nos.3 and 4 in respect of violation of trade mark and the copyright with regard to another patent which resulted in passing of an order by the Division Bench in F.A.O. No.573/2013 where the present defendants were put to certain terms which are as under, apart from fast tracking the trial itself :-

> "(i) to (iv).....
>
> (v) The Customs authorities shall continue to give intimation to the plaintiffs, of the ZTE consignments imported by ZTE India (Defendant No.2) or any other importer from ZTE China (Defendant No.3) as per the Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007. The plaintiffs may inspect the same and inventorize ZTE's CDMA products within a period of two days from the date of intimation by the Customs office.
>
> (vi) After inspection and inventorization, the products will be released by the Customs authorities to ZTE or the concerned importer.
>
> (vii) ZTE China (Defendant No.3) will deposit a bank guarantee in favour of the Registrar General of this Court for a sum of Rs. 5 crores or for a sum of Rs. 2.5 crores and secure the remaining Rs.2.5 crores by way of security offered to the satisfaction of the Registrar General within two weeks. Further, for future sales, a Director on behalf of the Defendant Nos. 2 and 3, duly authorized by way of a Board Resolution, shall file an affidavit disclosing the quantum of CDMA devices which are being sold by them in India along with the revenues earned from them on a quarterly basis along with an undertaking that they will pay all sums as may be determined by this Court. The appellants/defendants shall file accounts in accordance with the learned Single Judge's directions at S. No.(iii) of the order dated 08.11.2013 and further sales till date, within four weeks from today. The appellants shall also file accounts and supporting material, including copies of Bills of Entry and Sale Invoices, and the relevant auditor's report for each quarter during the pendency of the suit. On the accounts being filed, the plaintiffs are at liberty to seek further security or directions

from the learned Single Judge."

42. Coming back to the facts of the present case, I feel, in totality of circumstances, the injunction which has been granted in favour of the plaintiffs vide order dated 3.2.2014 ought not to be continued in the instant case on account of the following reasons :-

(i) That the plaintiffs have not been able to establish a prima facie case about the patent of the plaintiffs being violated by defendant Nos.3 and 4 from the evidence which has been produced. Therefore, without permitting the parties to adduce evidence, this issue cannot be decided.

(ii) That the balance of convenience is not in favour of the plaintiffs because the assignor/original patentee, namely, Nokia Telecommunication as well as the licensee to whom the patented technology has been given to be commercially exploited by the plaintiffs, have not chosen to complain about the use of the technology by defendant Nos.3 and 4, either prior to the assignment or even after the grant of license.

(iii) That the plaintiffs will not suffer an irreparable loss in case injunction granted stands vacated because the interest of the plaintiffs can be sufficiently protected by the directions passed by the Division Bench in F.A.O. No.573/2013 between the same parties. The conditions specified in the said order at serial No.(iii) to (vii) shall be mutatis mutandis applicable to the facts of the present case as well.

43. In addition to the aforesaid points, there were number of other points which were urged by the respective sides in order to support their submissions for grant or vacation of the stay order. These were delay in filing the suit for infringement, alleged concealment by the plaintiffs in filing the suit, inadequate payment of stamp duty on the assignment document, suit being barred by Order II Rule 2 CPC, etc. Judgments were also cited on these aspects. Since I have already formed a view on the basis of three basic parameters with regard to grant or non-grant of injunction, I feel that it is not necessary that the court should embark on deciding these points also which have been urged before this court. Accordingly, the said points are not dealt with.

44. In addition to this, I feel that this is a fit case where a panel of three scientists should examine the two technologies, one which is claimed by the plaintiffs to be patented and the other which is being used by defendant Nos.3 and 4 as allegedly infringing the plaintiffs' technology, that this court feels that the panel which conducts the examination of the technologies be experts in the field of telecommunications and a report of the same be submitted. I, therefore, feel that a letter needs to be addressed to the heads of IIT Delhi, Delhi College of Engineering and Netaji Subhash Chander Bose to suggest the name of one Professor or Associate or Assistant Professor meeting the qualification of Rule 103 of the Patent Rules, who shall form a panel of three Scientific Advisors or experts, who would examine the two technologies and submit a report to the court for its consideration. The panel shall give an opportunity to both the parties to file their technologies and give a presentation only once for the purpose of explaining their technologies. The Professor of IIT Delhi will be the Chairman and the Coordinator of the panel and would decide the venue, date and time of the meeting, etc. The fee of each member is tentatively fixed at Rs.1,00,000/- each apart from other

expenses incurred by them. The report be submitted within six weeks from the date of the first meeting.

45. With these directions, the application under Order 39 Rule 1 and 2 CPC stands disposed of inasmuch as the order of ex parte ad interim stay stands vacated, however, the defendant Nos.3 and 4 are put to certain terms and conditions before manufacturing, importing or selling their product in India. Expression of any opinion may not be treated as an expression on the merits of the case.

C.S. (OS) No.314 of 2014 List before the Roster Bench for directions on 1st September, 2014.

V.K. SHALI, J.

AUGUST 05, 2014 'AA'