Interdigital Technology Corporation & ... vs Xiaomi Corporation & Ors. on 3 May, 2021

Equivalent citations: AIRONLINE 2021 DEL 650

Author: C. Hari Shankar

Bench: C. Hari Shankar

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* IN THE HIGH COURT OF DELHI AT NEW DELHI
Reserved on: 17th December, 2020
Decided on: 3rd May, 2021
I.A. 8772/2020 in
+ CS(COMM) 295/2020
INTERDIGITAL TECHNOLOGY CORPORATION
& ORS. ..... Plaintiffs
Through: Mr. Gourab Banerji, Sr. Adv. assisted by Mr. Pravin Anand, Ms. Vaishali Mittal, Mr. Siddhant Chamola, Ms. Manisha Singh and Ms. Pallavi Bhatnagar, Advs.

versus

XIAOMI CORPORATION & ORS. ..... Defendants
Through: Mr. Neeraj K. Kaul, Sr. Adv. assisted by Mr. Saikrishna Rajagopal, Mr. Siddharth Chopra, Ms. Sneha Jain, Ms. Garima Sahney, Ms. Stuti Dhyani, Ms. Charu Grover, Ms. Anu Paarcha, Mr. Vivek Ayyagari, Dr. Victor Vaibhav Tandon, Mr. Arjun Gadhoke, Mr. Avijit Kumar, Mr. Aniruddh Bhatia, Ms. Pritha Suri and Ms. Chanan Parwani, Advs.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

% JUDGMENT

A. The Issue

1. This judgment adjudicates IA 8772/2020, whereby the plaintiff has sought, (i) an injunction, against Defendant Nos. 1 to 8, restraining

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16:24:51

them from enforcing, against the plaintiff, an anti-suit injunction order dated 23rd September, 2020, passed by the Wuhan Intermediate People's Court, ("the Wuhan Court"), pending final disposal of the present proceedings, (ii) a direction to the defendants to immediately withdraw Case No. (2020) E 01 Zhi Min Chu No. 169.1, filed by them before the Wuhan Court, (iii) a direction, to the defendants, to immediately withdraw the anti-suit injunction application, filed by them, before the Wuhan Court in the aforesaid complaint, and, (iv) imposition, on the defendants, of costs equivalent to the costs likely to be imposed on the plaintiffs by the Wuhan Court.

2. Mr. Gaurab Banerjee, learned Senior Counsel for the plaintiffs/applicants, submits that his clients were not pressing prayer (ii) in the application, and had no objection to the defendants' pursuing their suit/complaint before the Wuhan Court. He submits that his clients are, however, pressing prayers (i), (iii) and (iv).

3. By order dated 9th October, 2020, I had injuncted the defendants, ad interim, from enforcing against the plaintiffs, the directions contained in the order dated 23rd September, 2020, of the Wuhan Court. It was made clear, however, that the observations and findings contained in the said order were only ad interim in nature and were not binding when the application would be taken up for final hearing. The application has, thereafter, been heard finally.

4. Detailed arguments were advanced, on behalf of the plaintiffs/ applicants, by Mr. Gaurab Banerjee, learned Senior Counsel,

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Signing Date:06.05.2021
16:24:51

instructed by Mr. Pravin Anand, learned counsel and, on behalf of the defendants/respondents in the application, by Mr. Neeraj Kishan Kaul, learned Senior Counsel instructed by Mr. Saikrishna Rajgopal, learned counsel.

5. The submissions of learned Senior Counsel have been detailed and varied, and have provided the Court considerable food for thought. Needless to say, in adjudicating the present application, I have treated the case as, effectively, presented on a tabula rasa, and have not taken into account, therefore, the observations and findings contained in the order dated 9th October, 2020 supra.

B. Facts

6. CS(COMM) 295/2020 alleges infringement, by the defendants,

of certain Standard Essential Patents (SEPs), held by the plaintiff and registered in their name. According to the plaintiffs, the defendants manufacture cellular handsets, compliant with 3G and 4G standards which required, for their operation, technology contained in the SEPs held by the plaintiffs. Usage of such technology, without due authorisation, asserts the plaintiffs, amounts to infringement. The plaintiffs acknowledge that, given the peculiar incidents of SEP infringement law, they cannot monopolise, to themselves, the rights to use the SEPs and that, as a trade-off for being granted patent rights in respect thereof, they are also required to allow willing licensees to obtain licences from them, on the basis whereof such licensees could also operate the technology. These licences are, however, required to

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Signing Date:06.05.2021
16:24:51

be granted by the plaintiffs, and availed by the licensees, at rates which are fair, reasonable and non-discriminatory (FRAND). As such, in the suit, the plaintiffs have not sought an absolute injunction, against the defendants, from using the SEPs held by the plaintiffs, but have sought for an injunction in the event the defendants are not willing to obtain licences, from the plaintiffs, for use of the said SEPs, at FRAND royalty rates. The SEPs concerned are Indian patents IN 262910, IN 295912, IN 298719, IN 313036 and IN 320182, referred to, hereinafter, as IN 910, IN 912, IN 719, IN 036 and IN 182, for convenience.

7. Determination of the FRAND rate at which the defendants could obtain licences, from the plaintiffs for using their SEPs is, therefore, unquestionably an inalienable part of the present litigation.

8. Prior to the plaintiffs approaching this Court by way of the present suit on 29th July, 2020, the defendants had filed an SEP royalty rate-setting suit ("the Wuhan Suit" referred to, in the proceedings before the Wuhan Court, as "the complaint"), before the Wuhan Court on 9th June, 2020. The defendants sought, in the said complaint, fixing of a global FRAND royalty rate, on the basis of which they could obtain licence from the plaintiffs, to operate and use the technology covered by the entire patent portfolio of the plaintiffs, which would include the suit patents.

9. Summons, in the present suit, were issued by this Court on 4th August, 2020. On the very same day, the defendants filed an anti-suit

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Signing Date:06.05.2021
16:24:51

injunction application before the Wuhan Court for a restraint, against the plaintiffs, from prosecuting the present suit before this Court.

10. By order dated 23rd September, 2020, the enforcement whereof the present application seeks to injunct, the Wuhan Court issued the following directions:

> "1. Upon service of this ruling, the Respondents InterDigital, Inc. and InterDigital Holdings, Inc. as well as the affiliates thereof shall immediately withdraw or suspend their application for any temporary injunction before the High Court of Delhi at New Delhi of India against the Applicants Xiaomi Communications Co., Ltd., Xiaomi Home Commercial Co., Ltd., and Beijing Xiaomi Mobile Software Co., Ltd. as well as its affiliates in terms of the 3G and 4G SEPs involved in the present case;
>
> 2. Upon service of this ruling, the Respondents InterDigital, Inc. and InterDigital Holdings, Inc. as well as the affiliates thereof shall immediately withdraw or suspend their application for any permanent injunction before the High Court of Delhi at New Delhi of India against Applicants Xiaomi Communications Co., Ltd., Xiaomi Home Commercial Co., Ltd., and Beijing Xiaomi Mobile Software Co., Ltd. as well as its affiliates in terms of the 3G and 4G SEPs involved in the present case;
>
> 3. The Respondents InterDigital, Inc. and InterDigital Holdings, Inc. as well as the affiliates thereof shall not, during the trial of the present case, apply for any temporary or permanent injunction before any courts in either China or any other countries and regions against the Applicants Xiaomi Communications Co., Ltd., Xiaomi Home Commercial Co., Ltd., and Beijing Xiaomi Mobile Software Co., Ltd. as well as its affiliates in terms of the 3G and 4G SEPs involved in the present case;
>
> 4. The Respondents InterDigital, Inc. and InterDigital Holdings, Inc. as well as the affiliates thereof shall not, during the trial of the present case, apply for enforcing any temporary

> or permanent injunction that has been granted or is likely to be granted by any courts in either China or any other countries and regions against the Applicants Xiaomi Communications Co., Ltd., Xiaomi Home Commercial Co., Ltd., and Beijing Xiaomi Mobile Software Co., Ltd. as well as its affiliates in terms of the 3G and 4G SEPs involved in the present case;

5. The Respondents InterDigital, Inc. and InterDigital Holdings, Inc. as well as the affiliates thereof shall not, during the trial of the present case, file lawsuits before any courts in either China or any other countries and regions requesting to adjudicate the royalty rate of the royalty disputes in terms of the 3G and 4G SEPs involved in the present case against the Applicant's Xiaomi Communications Co., Ltd., Xiaomi Homecare commercial Co., Ltd., and Beijing Xiaomi Mobile Software Co., Ltd. as well as its affiliates;

6. Frozen the guarantee fund, RMB 10 million yuan, provided by the Applicants Xiaomi Communications Co., Ltd., Xiaomi Homecare commercial Co., Ltd., and Beijing Xiaomi Mobile Software Co., Ltd. for the behavior preservation application;

7. Other claims in the behavior preservation application of the Applicant's Xiaomi Communications Co., Ltd., Xiaomi Home Commercial Co., Ltd., and Beijing Xiaomi Mobile Software Co., Ltd. shall be rejected.

In the event of the Respondents InterDigital, Inc. and InterDigital Holdings, Inc. violating this ruling a fine of RMB 1 million yuan per day shall be imposed, calculated cumulatively from the date of the violation."

11. By the present application, the plaintiffs seek an injunction, against the defendants, from enforcing, against them, the aforesaid directions issued by the Wuhan Court.

C. Rival Contentions

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Signing Date:06.05.2021
16:24:51

12. Mr. Gaurab Banerji, learned Senior Counsel for the plaintiffs, advanced, essentially, the following contentions:

(i) The impugned order completely divested the plaintiffs of their right to prosecute their suit. The contention, of the defendants, that the order merely delayed recovery of royalty from the defendants, was not correct. The suit of the plaintiffs was not for recovery of royalty against grant of licence, but was for injuncting infringement of the plaintiffs' Indian suit patents, and was preferred under Section 104 of the Patents Act, 1970 ("the Patents Act"). The impugned order of the Wuhan Court effectively restrained the plaintiffs from prosecuting their action for protection of the patents granted by the Indian government

and was, to that extent, also an assault on the sovereign function of the State. It effectively denied, to the plaintiffs, the right conferred by Sections 48 and 108 of the Patents Act, as well as Order XXXIX Rules 1 and 2 of the CPC. The defendants had sought to wrongly contend that the plaintiffs' suit was for settling the FRAND rate for grant of licence for the global portfolio of the plaintiffs' patent. The suit was only directed against infringement of the plaintiffs' Indian suit patents. The mere filing of a FRAND rate setting case in Wuhan could not divest this Court of the powers conferred by Section 108 of the Patent Act or Order XXXIX of the CPC. Reliance was placed, in this context, on the judgments in IPCom GmbH & Co KG v. Lenovo Technology (United Kingdom) Ltd1, Lenovo (United

1 (2019) EWHC 3030 (Pat)

States) Inc. v. IPCom GmbH & Co KG2, Conversant Wireless Technologies S.A.R.L v. Huawei Technologies Co. Ltd.3 (referred to, hereinafter, as "Conversant v. Huawei"), Huawei Technologies Co. Ltd. v. Conversant Wireless Technologies S.A.R.L4 (referred to, hereinafter, as "Huawei v. Conversant") and Unwired Planet International Ltd v. Huawei Technologies (UK) Co Ltd5.

(ii) In this sense, the impugned order was destructive of comity of courts, as it starkly disregarded the rights of the courts in India to decide the claim of infringement of Indian patents, the jurisdiction in respect of which vested in Indian courts alone. Reliance was placed, in this context, on the judgment in SAS Institute Inc. v. World Programming Ltd6. The impugned order effectively injuncted this Court from proceeding with the present suit, or with the injunction application preferred therein, under Order XXXIX of the CPC.

(iii) Mr. Banerji took exception to the defendants having sought to invoke the principle of comity of courts. He submitted that, where the order of the foreign court was in defiance of the public policy of the domestic court, no principle of comity of courts could inhibit the domestic court from protecting itself against the assault on its public policy. For this purpose, he relied on the judgment of the Supreme Court in Satya v. Teja

2 RG 19/21426 - No Portalis 35L7-V-B7D-CBAZK

3 [2018] EWGC 808 (Pat)

4 [2019] EWCA Civ. 38

5 [2020] UKSC 37

Singh7. He also submitted that comity was a two-way street. For this purpose, reliance was placed on IPCom GmbH & Co KG v. Lenovo Technology (United Kingdom) Ltd8, Huawei v. Conversant4 and, Owens-Illinois v. Webb9.

(iv) In this context, the aspects which are relevant for consideration, were

(a) whether the defendants were required to be restrained, during the pendency of the present suit, from pursuing or enforcing the anti-suit injunction order dated 23rd September, 2020 of the Wuhan Court,

(b) whether the defendants were required to be directed to withdraw their anti-suit injunction application, filed before the Wuhan Court, insofar as it impacted the proceedings in this court and IA 6440/2020, filed by the plaintiff for interlocutory injunction under Order XXXIX of the CPC, and

(c) whether the defendants were required to be directed to deposit, with this Court, the amount of fine/penalty which would be payable by the plaintiff in accordance with the impugned order dated 23rd September, 2020 of the Wuhan Court, for continuing to prosecute IA 6440/2020 before this Court.

6 (2020) EWCA Civ 599

7 (1975) 1 SCC 120

8 [2019] EWHC 3030 (Pat)

9 809 S.W.2d. 899 (Tex. App 1991), decided by the Court of Appeals of Texas on 9th July, 1991

The merits of the plaintiffs' plea for interim injunction against infringement of the suit patents, forming subject matter of IA 6440/2020, were irrelevant insofar as the present application was concerned, and the defendants had needlessly advanced detailed submissions thereon.

(v) That this Court has the power and authority to injunct the impugned order dated 23rd September, 2020 passed by the Wuhan Court, was apparent from the judgment of the Supreme Court in Modi Entertainment Network v. W.S.G. Cricket Pte. Ltd.10 and Dinesh Singh Thakur v. Sonal Thakur11, the judgment of the High Court of Calcutta in Devi Resources Limited v. Ambo Exports Limited12 and the judgment of this Court in U.O.I. v. Vodafone Group PLC United Kingdom13. These decisions held, inter alia, that, where the grant of anti-suit injunction would directly interfere with pending proceedings in a foreign court, the Indian court must be slow in granting injunction. In the present case, however, grant of injunction against enforcement, by the defendants, of the order dated 23rd September, 2020 of the Wuhan Court, would not adversely impact, in any manner, the complaint filed by the defendants in Wuhan. Inasmuch as the order dated 23rd September, 2020, of the Wuhan Court, injuncted the plaintiffs from prosecuting its claim for a restraint, against the defendants,

10 (2003) 4 SCC 341

11 (2018) 17 SCC 12

12 2019 SCC OnLine Cal 7774

13 2018 SCC OnLine Del 8842

from infringing the suit patents and, consequently, effectively rendered the suit futile, on pain of costs of 1 crore for every day during which the plaintiffs continued to prosecute the present proceedings, the order dated 23rd September, 2020 of the Wuhan Court was vexatious and oppressive in its operation and effect.

(vi) Clearly, therefore, a prima facie case was made out in the plaintiffs' favour, for grant of injunction as sought in this application (barring prayer (ii) which the plaintiffs gave up). The consequence of the impugned order was that the plaintiffs would have to suffer continued infringement of the suit patent, without any licence being taken by the defendants and without the plaintiffs being allowed to oppose such infringement before this Court, being the only court competent to adjudicate the lis. The considerations of balance of convenience and irreparable loss, too, therefore, operated to justify grant of injunction, as sought in this application.

(vii) On the aspect of "overlap" of the proceedings pending before this Court in the present suit and in IA 6440/2020 with the complaint filed by the defendants in the Wuhan Court, it was submitted that mere overlap, even if it existed, did not justify issuance of an anti-suit injunction as had been done by the Wuhan Court. Moreover, submits Mr Banerjee, the overlap, if any, was only partial and incidental. It was pointed out that the scope of FRAND inquiry by this Court in IA 6440/2020, or

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16:24:51

even in the main suit, was fundamentally different from the scope of FRAND inquiry which would be carried out by the Wuhan Court while examining the complaint filed by the defendants. This Court would be concerned with the FRAND rate of royalty for grant of licence by the plaintiffs to the defendants for the right to exploit the suit patents as, in the alternative, such exploitation would tantamount to infringement, vulnerable to injunction at law. Per corollary, the very issue of fixation of FRAND rate would arise only if the defendants desired to continue exploiting the plaintiffs' suit patents by obtaining a licence from the plaintiffs. As such, it was submitted that no serious consequence would result even if the appropriate FRAND rates for grant of licence by the plaintiffs to the defendants in respect of the suit patents, were decided by this Court.

(viii) The plaintiff was not seeking any interference with the prosecution, by the defendants, of their complaint before the Wuhan Court. However, the plaintiffs were entitled to seek restoration of the status quo ante before the filing, by the defendants, of their anti-suit injunction application in Wuhan. Reliance was placed, in this context, on the judgement of the Regional Court of Munich in Nokia Technologies Oy v. Continental Automotive Systems Inc.14, and the judgment of

14
In Docket No. 21 O 9333/19

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Signing Date:06.05.2021
16:24:51

the Court of First instance, Paris, in IPCom GmbH & Co KG v. Lenovo (United States) Inc.15

(ix) The fact that the defendants had filed their complaint before the Wuhan Court before the filing of the present suit by the plaintiff before this Court was irrelevant, in view of the difference in the scope of the two proceedings.

(x) The impugned order had been obtained by subterfuge and concealment, and the defendants had also resorted to suppression of material facts from this Court. The plaintiffs were never communicated the fact either of filing of the anti-suit injunction application by the defendants in the Wuhan Court, or of the passing of the order dated 23rd September 2020, and came to know of the said proceeding, and of the said order, only when the order was annexed by the defendants with their reply to IA 6440/2020, filed by the plaintiffs. The defendants had conspicuously concealed, from this Court, the fact of pendency of the complaint at Wuhan and of the anti-suit injunction preferred by the defendants therein. No notice, of the filing of the anti-suit injunction application, was ever served on the plaintiffs, before the order dated 23rd September, 2020, came to be passed by the Wuhan Court. The order was, therefore, effectively passed ex parte.

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16:24:51

(xi) Apart from the above submissions, which were intended to support prayers (i) and (iii) in this application, Mr. Banerjee also seriously pressed prayer (iv), which sought imposition of costs, on the defendants, equivalent to the costs/penalty payable by the plaintiffs in accordance with the order dated 23rd September, 2020, of the Wuhan Court. Emphasis was laid, for this purpose, on the defendants' own submission that they were powerless to restrain the Wuhan Court from enforcing the direction for payment of fine, as contained in the order dated 23rd September, 2020, as the anti-suit injunction application stood disposed of. Once the Wuhan Court had issued directions to the plaintiffs, and had made the directions liable to compliance on payment of fine, the defendants sought to submit that the decision on whether to secure enforcement of its order, or not, by recovery of the said costs from the plaintiffs, vested with the Wuhan Court, and that the defendants had no part to play in this regard. Mr Banerjee submitted that, in that view of the matter, given the fact that the order dated 23rd September,

2020, of the Wuhan Court, had come to be passed owing to sharp practices adopted by the defendants, the plaintiffs were required to be indemnified by the defendants, in the event of the plaintiff being mulcted with fine as envisaged by the order dated 23rd September, 2020. As such, it was submitted that, while the plaintiffs were not insisting on the defendants depositing the said costs upfront, a direction was required to be issued to the defendants to deposit the said costs in this court, to the extent they were enforced against the plaintiffs by the

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Signing Date:06.05.2021
16:24:51

Wuhan Court, by way of execution of the order dated 23rd September, 2020.

13. Responding to the aforesaid submissions of Mr. Gourab Banerji, Mr. Neeraj Kishan Kaul, learned Senior Counsel appearing for the defendants, contended thus:

(i) The order, dated 23rd September, 2020, of the Wuhan Court, did not extinguish the plaintiffs' right either to prosecute its suit for infringement of its Indian patent, or even its application for interlocutory injunction preferred therein. It merely delayed the recovery, by the plaintiffs, of the royalty claimed by it in IA 6440/2020.

(ii) The proceedings before this Court in the present suit, and in IA 6440/2020, not only overlap with, but are identical to, those pending before the Wuhan Court. The claims of the parties before the two fora, as well as reliefs prayed therein, were identical. The considerations of FRAND rate determination, in the two proceedings, were overlapping. The present proceedings before this court were, therefore, bound to interfere with the proceedings in the complaint before the Wuhan Court. In fact, the plaintiffs were exhorting this Court to proceed on a "direct collision path" with the Wuhan Court. FRAND rate determination was an integral part for consideration of the prayer for grant of injunction, in the case of alleged SEP infringement. In this context, Mr. Kaul

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Signing Date:06.05.2021
16:24:51

expostulated, at great length, on the various indicia and incidents of SEP infringement proceedings. He pointed out that, before deciding an application for grant of interlocutory injunction against SEP infringement, the Court was required to

satisfy itself that the asserted patents were valid, essential and infringed, and that, though the plaintiffs had complied with their FRAND obligations, the defendants were unwilling to take a license from the plaintiffs even at the FRAND rate determined by the Court. As such, he submits, determination of the FRAND rate at which the license, for exploitation of their SEPs, was to be granted by the plaintiffs, was a necessary precursor to any finding of infringement by the defendants, which would follow only if the defendants were unwilling to take a licence from the plaintiffs at the FRAND rate so determined by the Court. As such, he submits, the plaintiffs were misleading the court in contending that their claim before the Court was only for injuncting infringement of the suit patents. Mr. Kaul submits that FRAND rate determination was integral to the consideration of the prayer for interlocutory injunction made by the plaintiffs in IA 6440/2020. As such, the issue before this Court, and the Wuhan Court, he submits, were not only overlapping, but were substantially identical.

(iii) If the two Courts were to be permitted to adjudicate their proceedings simultaneously, Mr Kaul submits that there was a possibility of two global FRAND rates being fixed which would result in chaos and would give rise to various vexed issues. In

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Signing Date:06.05.2021
16:24:51

such circumstances, he submits that there were authorities to the effect that, in order to avoid an unseemly race to have the FRAND rate fixed, one of the proceedings was to be kept in abeyance. He also emphasised the principle that the requirement of a FRAND undertaking was in the nature of a contractual derogation of the right of the patent holder to obtain an injunction. The plaintiff, submits Mr. Kaul, was effectively asking the Court to proceed on a premise that any foreign judgement would be per se void if it decided inter se rights, which incidentally affected some rights arising out of Indian law. Given the extent of overlap between the proceedings in IA 6440/2020 and the complaint before the Wuhan Court, Mr Kaul submits that the injunctive order of the Wuhan Court was entirely justified.

(iv) Mr. Kaul further submitted that that anti-enforcement injunction/anti-anti-suit injunctions were extremely rare specie of judicial interdiction, which were not easily to be passed by courts. He submits that, as there was no dispute regarding the competence of the Wuhan Court to pass the impugned order, this Court ought not to interfere therewith, as any such interference would be destructive of the principle of comity of courts.

(v) Apropos the penalty for 1 crore per day, imposed by the order dated 23rd September, 2020, of the Wuhan Court, Mr. Kaul, submits that the said order had been passed only towards

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Signing Date:06.05.2021
16:24:51

enforcement of the directions issued by the Wuhan Court and could not, therefore, be treated as vexatious or oppressive in any manner. He submits that the plaintiffs could not seek to contend that the order of anti-suit injunction passed by the Wuhan Court was vexatious and oppressive merely because of the consequences which would ensue, were the order to be violated by the plaintiffs. In this context, Mr. Kaul exhorts the Court not to interfere with the manner in which a foreign Court ensured compliance with its order, which was essentially a matter within the competence and jurisdiction of the foreign court.

(vi) Apropos the submission of the plaintiffs that the impugned order had been passed behind its back, and without due notice to it, Mr. Kaul submits that the plaintiffs had been duly issued notice of the complaint, by the Wuhan Court, but has deliberately chosen to remain absent. He submits that, in fact, the plaintiffs were guilty of suppression, as they never informed this Court of the pendency of the said complaint despite being fully aware thereof.

(vii) As such, submits Mr Kaul, no case for grant of injunction, as sought in this application, exists.

D. Judgements cited by learned Counsel

14. Admittedly, many of the issues which arise in the present case are res integra, at least insofar as the development of the law in this

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Signing Date:06.05.2021
16:24:51

country is concerned. Extensive reliance has been placed, by learned Senior Counsel on both sides, on decisions rendered in foreign jurisdictions. These must, in the very nature of things, guide appreciation of the issues involved in the present case; accordingly, I am of the opinion that, at the outset, it would be appropriate to examine what has been held in these decisions. Before proceeding to foreign judgements, however, it would be appropriate, at the first instance, to study the decisions of the Supreme Court, this Court and

the High Court of Calcutta, on which learned Counsel placed reliance. Admittedly, the Supreme Court has pronounced, on the aspect of anti-suit injunctions, restraining parties from proceeding with litigations in foreign jurisdictions, primarily in three decisions, viz. O.N.G.C. v. Western Co. of North America16, Modi Entertainment Network10 and Dinesh Singh Thakur11.

O.N.G.C. v. Western Co. of North America16

15. In this case, the High Court first granted an anti-suit injunction and, thereafter, vacated the injunction, against which ONGC approached the Supreme Court.

16. The merits of the dispute between ONGC and the respondent Western Co. of North America ("Western", hereinafter) are not of particular relevance. Suffice it to state that the contract, between ONGC and Western provided for arbitration, to be governed by the

16 (1987) 1 SCC 496

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Signing Date:06.05.2021
16:24:51

Indian Arbitration Act, 1940 ("the 1940 Act"). Disputes arose between ONGC and Western, which were referred to arbitration by an Arbitral Tribunal consisting of two members and an umpire. The two members could not arrive at a consensus, resulting in the umpire passing an award, dated 22nd November, 1985 and a supplementary award dated 28th November, 1985.

17. Western lodged a complaint in the US District Court, for confirming these two awards of the Umpire, and for a judgement against ONGC, for the amount awarded with interest and costs. ONGC, for its part, instituted a petition under Section 30 and 33 of the 1940 Act before the High Court, for setting aside the award rendered by the Umpire. Interim directions, restraining Western from proceeding further with the action instituted in the US Court, were also sought. The learned Single Judge of the High Court first granted interim anti-suit injunction, as sought by ONGC and, thereafter, vacated the order, resulting in ONGC approaching the Supreme Court.

18. The Supreme Court held that sufficient grounds, for restraining Western from prosecuting its proceedings in the US Courts existed, in paras 13 to 15 of the report, which read thus:

"13. The submission is that while the validity of the award is required to be tested in the context of the Indian law if Western Company is permitted to pursue the matter in the American Court, the matter would be decided under a law other than the Indian law, by the American Court. Admittedly, Western Company has prayed for confirmation of the award. The American Court may still proceed to confirm the award. And in doing so the American Court would take into account the American law and not the Indian

law or the Indian Arbitration Act of 1940. And the American Court would be doing so at the behest and at the instance of Western Company which has in terms agreed that the arbitration proceedings will be governed by the Indian Arbitration Act of 1940. Not only the matter will be decided by a court other than the court agreed upon between the parties but it will be decided by a court under a law other than the law agreed upon. Should or should not such an unaesthetic (sic) situation be foreclosed?

14. The last submission is also quite impressive. If Western Company is right in the posture assumed by it in this Court at the time of the hearing that the American Court has no jurisdiction to confirm the award in view of the New York Convention is correct, the resultant position would be this: The award rendered by the Umpire, the validity of which is not tested either by an American Court or an Indian Court will have been enforced by an American Court. It will be an extremely uphill task to persuade the court to hold that a foreign award can be enforced on the mere making of it without it being open to challenge in either the country of its origin or the country where it was sought to be enforced. And that its validity may perhaps be tested for academic purposes in the country of origin after the award is enforced and for seeking restitution later on if possible and if there are assets which can be proceeded against in the country where the award has been enforced. It is essential to emphasise at this juncture and in this context that under the Indian law, an arbitral award is unenforceable until it is made a rule of the court and a judgment and consequential decree are passed in terms of the award. Till an award is transformed into a judgment and decree under Section 17 of the Arbitration Act, it is altogether lifeless from the point of view of its enforceability. Life is infused into the award in the sense of its becoming enforceable only after it is made a rule of the court upon the judgment and decree in terms of the award being passed. The American Court would have therefore enforced an award which is a lifeless award in the country of its origin,

and under the law of the country of its origin which law governs the award by choice and consent.

15. We are of the opinion that the appellant ONGC, should not be obliged to face such a situation as would arise

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Signing Date:06.05.2021
16:24:51

in the light of the aforesaid discussion in the facts and circumstances of the present case. To drive the appellant in a tight corner and oblige it to be placed in such an inextricable situation as would arise if Western Company is permitted to go ahead with the proceedings in the American Court would be oppressive to ONGC. It would be neither just nor fair on the part of the Indian Court to deny relief to ONGC when it is likely to be placed in such an awkward situation if the relief is refused. It would be difficult to conceive of a more appropriate case for granting such relief."

(Italics and underscoring supplied)

19. This is an important decision as it identifies one situation in which allowing the proceedings in the foreign court to continue would be "oppressive". The Supreme Court found the continuation of the proceedings initiated by Western in the US Court to be oppressive as, despite the award forming subject matter of the dispute being required to be made rule of court by the court in India under the 1940 Act, if Western were to be allowed to continue prosecuting the proceedings initiated by it in the US Court, ONGC would be driven to a "tight corner" once the award was enforced by the US Court, which would, consequently, be oppressive in nature. The two considerations which, to the mind of the Supreme Court, justified grant of anti-suit injunction, qua the proceedings in the US Court were, therefore, (i) the Indian Court being the proper court, for seeking enforcement of, or for challenging, the award and (ii) the difficulties which ONGC would face if the US Court were, without jurisdiction, to proceed to enforce the award.

Modi Entertainment Network v. W.S.G. Cricket Pte Ltd10

Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

20. The dispute, in this case, emanated out of an announcement, by the International Cricket Council (ICC), for organising a cricket tournament in Kenya, for which W.S.G. Cricket Pte Ltd ("WSG", hereinafter) was granted exclusive license to grant commercial rights.

Exclusive license was, thus, granted, by WSG, to the second appellant before the Supreme Court (whose identity is not forthcoming from the judgement) on 21st September, 2000. Said second appellant assigned its rights to the first appellant, Modi Entertainment Network ("Modi", hereinafter). Modi was required, under the agreement, to pay a minimum guaranteed amount of US $ 35 lakhs.

21. Cross suits resulted. On 9th May, 2001, Modi sued WSG in the High Court of Bombay, claiming damages for loss of advertising revenue due to illegal threats by WSG. On 22nd November, 2001, WSG sued Modi before the Queen's Bench Division of the High Court in England ("the English Court", hereinafter), praying for a decree against Modi, for payment of the minimum guaranteed amount under the agreement. Modi entered appearance before the English Court on 9th January, 2002 and, on 15th January, 2002, applied to the Bombay High Court for an anti-suit injunction against WSG, restraining it from proceeding with the action in the English Court, pleading that the proceedings before the English Court were vexatious and oppressive.

22. The application was allowed by a learned Single Judge of the High Court of Bombay, who granted ad interim anti-suit injunction as

sought. The Division Bench set aside the order of the learned Single Judge. Modi appealed to the Supreme Court.

23. The Supreme Court, at the outset, observed, in para 10 of the report, thus:

> "The courts in India like the courts in England are courts of both law and equity. The principles governing grant of injunction -- an equitable relief -- by a court will also govern grant of anti-suit injunction which is but a species of injunction. When a court restrains a party to a suit/proceeding before it from instituting or prosecuting a case in another court including a foreign court, it is called anti-suit injunction. It is a common ground that the courts in India have power to issue anti-suit injunction to a party over whom it has personal jurisdiction, in an appropriate case. This is because courts of equity exercise jurisdiction in personam. However, having regard to the rule of comity, this power will be exercised sparingly because such an injunction though directed against a person, in effect causes interference in the exercise of jurisdiction by another court."
>
> (Emphasis supplied)

24. The Supreme Court went on, thereafter, to refer, inter alia, to the judgements of the House of Lords in Carron Iron Co. v. Maclaren17, Castanho v. Brown & Root (U.K.) Ltd18, Airbus Industrie GE v. Patel19 and Spiliada Maritime Corpn v. Cansulex Ltd20, the Privy Council in SNI Aerospatiale v. Lee Kui Jak21 and its own earlier decision in O.N.G.C.16, to lay down the following principles (in para 24 of the report):

17 (1855) 5 HLC 416

18 (1981) 1 All ER 143 (HL)

19 (1998) 2 All ER 257 (HL)

20 (1986) 3 All ER 843 (HL)

21 (1987) 3 All ER 510 (PC)

> "(1) In exercising discretion to grant an anti-suit injunction the court must be satisfied of the following aspects:
>
> (a) the defendant, against whom injunction is sought, is amenable to the personal jurisdiction of the court;
>
> (b) if the injunction is declined, the ends of justice will be defeated and injustice will be perpetuated; and
>
> (c) the principle of comity - respect for the court in which the commencement or continuance of action/proceeding is sought to be restrained - must be borne in mind.
>
> (2) In a case where more forums than one are available, the court in exercise of its discretion to grant anti-suit injunction will examine as to which is the appropriate forum (forum conveniens) having regard to the convenience of the parties and may grant anti-suit injunction in regard to proceedings which are oppressive or vexatious or in a forum non-conveniens.
>
> (3) Where jurisdiction of a court is invoked on the basis of jurisdiction clause in a contract, the recitals therein in regard to exclusive or non-exclusive jurisdiction of the court of choice of the parties are not determinative but are relevant

factors and when a question arises as to the nature of jurisdiction agreed to between the parties the court has to decide the same on a true interpretation of the contract on the facts and in the circumstances of each case.

(4) A court of natural jurisdiction will not normally grant anti-suit injunction against a defendant before it where parties have agreed to submit to the exclusive jurisdiction of a court including a foreign court, a forum of their choice in regard to the commencement or continuance of proceedings in the court of choice, save in an exceptional case for good and sufficient reasons, with a view to prevent injustice in circumstances such as which permit a contracting party to be relieved of the burden of the contract; or since the date of the contract the circumstances or subsequent events have made it impossible for the party seeking injunction to prosecute the

Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

case in the court of choice because the essence of the jurisdiction of the court does not exist or because of a vis major or force majeure and the like.

(5) Where parties have agreed, under a non-exclusive jurisdiction clause, to approach a neutral foreign forum and be governed by the law applicable to it for the resolution of their disputes arising under the contract, ordinarily no anti-suit injunction will be granted in regard to proceedings in such a forum conveniens and favoured forum as it shall be presumed that the parties have thought over their convenience and all other relevant factors before submitting to the non-exclusive jurisdiction of the court of their choice which cannot be treated just as an alternative forum.

(6) A party to the contract containing jurisdiction clause cannot normally be prevented from approaching the court of choice of the parties as it would amount to aiding breach of the contract; yet when one of the parties to the jurisdiction clause approaches the court of choice in which exclusive or non-exclusive jurisdiction is created, the proceedings in that court cannot per se be treated as vexatious or oppressive nor can the court be said to be forum non-conveniens.

(7) The burden of establishing that the forum of choice is a forum non-conveniens or the proceedings therein are oppressive or vexatious would be on the party so contending to aver and prove the same."

25. Ultimately, in the case before it, the Supreme Court dismissed the appeal of Modi, relying on the jurisdiction clause (albeit non-

exclusive) contained in the agreement between Modi and WSG, conferring jurisdiction on English courts to adjudicate on disputes. That aspect is not of particular relevance to the present case, as there is no agreement between the plaintiffs and the defendants, on the basis of which the issue of jurisdiction can be determined.

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By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

Dinesh Singh Thakur v. Sonal Thakur11

26. This case involved a matrimonial dispute. The appellant before the Supreme Court was the husband, and the respondent, the wife. Consequent to marital relations souring, the husband filed a petition for divorce, against the wife, before the Family Court, Gurugram. Subsequently, the wife filed a petition for divorce, against the husband, before the Florida District Court. The husband, thereupon, filed a second suit before the Gurugram Court, seeking an anti-suit injunction, restraining the wife from prosecuting her divorce petition before the Florida Court. Ex parte ad interim injunction, in the said terms, was initially granted by the learned District Judge, Gurugram who, subsequently, vacated the injunction. The challenge, to the said vacation order, by the husband, was dismissed by the High Court, resulting in the husband approaching the Supreme Court. The Supreme Court, therefore, delineated the only issue arising before it for consideration as whether the husband was entitled to a decree of anti-suit injunction against his wife.

27. The Supreme Court held, in paras 12 and 13 of the report, that the principles governing grant of anti-suit injunction were the same as those which apply to grant of injunction per se, but that anti-suit injunctions were not to be readily granted, as they interfered with the exercise of jurisdiction by a foreign court. In the facts before it, the Supreme Court held that there was no material, on the basis of which it could be concluded that continuation of the proceedings in the Florida Court would result in grave injustice to either of the parties.

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By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

In this context, the fact that the husband was residing in Florida was also taken into account. Equally, it was held, declining injunction, as sought by the husband, would not result in defeating the ends of justice or perpetuating injustice. In the circumstances, the prayer for anti-suit injunction, of the husband against the wife, was declined.

Devi Resources Ltd v. Ambo Exports Ltd12

28. This decision dealt essentially with an anti-arbitration, rather than an anti-suit injunction, and involved facts which are vitally different from those in the present case. Mr Banerjee, however, relies on the following passages from the judgement, and it is difficult to characterize the reliance as misplaced:

> "55. Just as the legal trinity of justice, equity and good conscience casts a duty on a court to see that a party before it is not unfairly prejudiced, the principles of comity, the respect for the sovereignty of a friendly nation and the need for self-restraint should guide a court to issue an injunction of such nature only in the most extreme and gross situations and not for the mere asking. A court must be alive to the fact that even an injunction in personam in such a situation interferes with the functioning of a sovereign or a private forum which may not be subject to the writ of that court. At the same time, despite placing such an onerous burden on a court assessing the propriety of such an injunction, the authority of such a court, unless it is of very limited jurisdiction, cannot be doubted, particularly if it is a High Court in this country exercising its original civil jurisdiction. That is not to suggest that a Civil Judge (Junior Division) may lack the authority, it is only that such an injunction may rarely be sought at that level.
>
> 56. The very purpose of law is to right a perceived wrong. In course of a court righting such wrong, at times, something more than adjudicating the immediate lis is also called for. It would be futile for a court to proceed steadfastly towards a decree in a civil suit if, in the mean time, the subject-matter of the decree is wasted or destroyed. In doing justice in accordance with law, the court will also try and preserve the subject-matter of the lis so that the beneficiary of the final verdict can enjoy the fruits thereof. It is the general authority of a sovereign forum as a court - as opposed to a private forum or a forum of limited jurisdiction as a tribunal - that it enjoys certain powers which are incidental to the court's obligation to do justice. Such power inheres in a court by virtue of the court being the face of the sovereign while dispensing justice. Thus, despite no law providing for an anti-suit or an anti-arbitration injunction, the general equitable jurisdiction of granting an injunction encompasses the authority to grant an anti-suit or anti-arbitration injunction or even an anti-anti-suit injunction. But such an injunction is issued only in the most extreme of cases where the refusal of

> the injunction may result in palpable and gross injustice in the meanest sense."
>
> (Italics and underscoring supplied)

Satya v. Teja Singh7

29. The dispute, in this case, was also between a husband (the respondent before the Supreme Court) and his wife (the appellant before the Supreme Court). The husband, who had left for USA for higher studies in 1959, obtained a decree of divorce, against his wife, from a court in Nevada in December 1964. A month later, in January 1965, the wife filed an application under Section 488 of the Code of Criminal Procedure, 1973, against her husband, for maintenance. The husband contended that, as the marriage stood dissolved by the divorce decree passed by the Nevada Court in December 1964, before the institution, by his wife, of the application for maintenance, no such application would lie. The learned Magistrate held that she was not

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Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

bound by the divorce decree, and granted maintenance to the wife. This decision was confirmed by the learned Additional Sessions Judge. The High Court, however, reversed the decision, holding that, as the husband was domiciled in Nevada, the divorce decree passed by the Nevada Court was within jurisdiction. In this backdrop, the Supreme Court, which was approached by the wife in further appeal, held that the principal issue arising for consideration was the recognition to be granted to the divorce decree of the Nevada Court. The lis forming subject matter of controversy before the Supreme Court was, therefore, essentially different from that before this Court.

30. The Supreme Court made, however, certain pertinent observations, which are relevant to the case at hand. Adverting, first, to the concept of conflict of laws, in private international law, the Supreme Court held that it was "a truism to say that whether it is a problem of municipal law or of conflict of laws, every case which comes before any "must be decided in accordance with law". Even if, in a given case containing a foreign element, the law of a foreign country was required to be applied in a given situation, for deciding the case, such recognition, to the law of the foreign country was accorded, not as an act of courtesy, but on considerations of justice. The Supreme Court held that "it (was) implicit in that process, that the foreign law must not offend against our public policy". On the aspect of comity, the Supreme Court entered (in para 17 of the report), the following critical observations:

> "The phrase "comity of nations" which owes its origin to the theory of a Dutch Jurist, John Voet, has, however, been

widely criticised as "grating to the ear, when it proceeds from

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By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

> a court of justice" [De Nova, (1964) 8 American Journal of Legal History, pp. 136, 144 citing the early American author, Livermore]. Comity, as said by Livermore is a matter for Sovereigns, not for Judges required to decide a case according to the rights of parties."

In para 18 of the report, the Supreme Court went on to observe that "no country is bound by comity to give effect in its courts to depose laws of another country which are repugnant to its own laws and public policy". This principle, which essentially applies to the application of laws of one country, to persons situated in another would, in my opinion, apply equally to the recognition required to be accorded to the order or decree passed by a foreign court, vis-à-vis considerations of public policy.

Enercon (India) Ltd v Enercon GmBH22

31. The issue in controversy in this case was completely alien to the controversy before this Court in the present instance. The Supreme Court was concerned, in this case, with the fixing of the locus of the "seat" of arbitration between the parties, as courts having jurisdiction over the seat of arbitration would, proprio vigore, also have jurisdiction to oversee the arbitral proceedings.

32. The defendants, however, relying on certain observations made by the Supreme Court, in paras 127 to 129 of the report, dealing with the undesirability of having the same subject matter being decided by two courts of concurrent jurisdiction. In the case before the Supreme

22 (2014) 5 SCC 1

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Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

Court, the English High Court, having initially granted an anti-suit injunction, injuncting the continuance of the proceedings in India, much later vacated the injunction. I do not deem it necessary to examine, in detail, the passages from this decision, on which the defendants' place reliance, for the simple reason that, in the present case, the cause canvassed by the plaintiff before this Court is fundamentally different from the cause canvassed by the defendants before Wuhan Court. The applicability of the decision in Enercon22

might have warranted consideration, were this Court and the Wuhan Court, concerned with the same lis. This Court is, however, concerned with the aspect of infringement, by the defendants, of the plaintiffs Indian patents, whereas the Wuhan Court is not concerned with the aspect of infringement at all. On the aspect of infringement, therefore, there is no question of any possibility of conflicting decisions between this Court and the Wuhan Court. The reliance, by the defendants, on the judgement in Enercon22 has, therefore, to be characterised as misplaced.

Foreign judgements, relied upon by the parties

IPCom v Lenovo Technology (UK)1

33. IPCom sought, in this case moved before the UK High Court, injunction against continuance, by Lenovo, of anti-suit injunction proceedings initiated by Lenovo against IPCom in the California District Court. To that extent, the issue before the High Court in this case was similar to that before me, the only difference being that

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By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

injunction in respect of the anti-suit injunction proceedings pending before the foreign court was in that case, sought while the anti-suit injunction application was pending, whereas, in the present case, the anti-suit injunction application has proceeded to judgement, and injunction, against enforcement thereof, is sought.

34. IPCom was the proprietor of EP 268, a European Patent, which was an SEP. IPCom alleged infringement, of said European Patent, by certain Lenovo companies based in the UK ("the UK Companies", in short). IPCom offered to license the use of its patent to Lenovo on terms which, according to it, were FRAND, but Lenovo was, according to IPCom, "holding out", meaning that it was merely protracting the exercise, without either accepting or rejecting the offer categorically. In March 2019, IPCom made a final offer, indicating that, if the offer was not accepted by Lenovo by 15th March, 2019, IPCom would seek injunction. A day earlier, i.e. on 14th March, 2019, the US Companies of the Lenovo group filed proceedings, before the California District Court, against IPCom, seeking fixation of a global FRAND rate for IPCom's patent portfolio. IPCom filed its infringement proceedings, in the Patent Court in the UK on 2nd July, 2019. On 18th September, 2019, Lenovo filed an application, in the US proceedings, seeking an anti-suit injunction, restraining IPCom from proceeding to prosecute its infringement proceedings anywhere outside the US, which included the UK Patents Court. IPCom retaliated, by moving an application before the UK Patents Court on

25th October, 2019, seeking a prohibition against Lenovo from prosecuting "any application before any court which seeks directly or

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Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

indirectly to prevent (the High Court) from making directions for the conduct of these proceedings, or any order in relation to the UK claim", or prevent IPCom from pursuing the UK claim to trial.

35. The High Court held, at the outset, that its jurisdiction, to grant an anti-anti-suit injunction, was not disputed, and that the principles of law, governing grant of anti-anti-suit injunctions were broadly the same as those which apply to grant of an anti-suit injunction. The Court, thereafter, went on to dilate on the principles for grant of anti-suit injunction, and also observed that "the less that an anti-anti-suit injunction granted in England would interfere with the foreign proceedings to which it (was) directed, the more likely it (was) that the court (would) exercise its discretion to grant such an injunction". The following observations, in paras 45 and 46 of the decision of the High Court, are of seminal importance in the present case, as they underscore the difference in the proceedings before the High Court and the California District Court, to dispel the notion that grant of anti-anti-suit injunction, in the form of proceedings would impede or inhibit the latter:

> "45. In resolving this matter, I think it is important to keep in mind the relief that IPCom is seeking. Often an anti-suit injunction (or an anti-anti-suit injunction) would affect the entirety of the proceedings brought or contemplated in another jurisdiction. In the present instance that would not be the case if I were to make the order sought.
>
> 46. The substantive action before the US Court has been brought by US Companies and it concerns only the settlement of a global FRAND license and 2 US patents. It does not directly concern the issues in the present action, namely the infringement and validity of the UK designation of EP `268."

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Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

(Emphasis supplied)

36. Equally seminal is para 48 of the decision, which emphasises the position that the relief sought in the High Court - for injunction against infringement of EP `268 - could not be sought before any other forum, and certainly not before the California District Court:

> "The application before me is directed at the substantive

> question of which Court should [determine] the issues of infringement and validity of EP 268. The first matter I must consider is whether England is clearly the more appropriate forum in which to decide those issues. Very clearly, it is. The grant of patent is an act which can be performed only by a state. Therefore the validity of a patent is an issue reserved for the course of the granting state, at least in Europe... It would surprise me to learn that the rules of jurisdiction applicable in the US court would allow that court to decide whether EP 268 is validly registered in the UK."
>
> (Emphasis supplied)

37. Paras 50 and 51 went on to elucidate why, in the opinion of the UK Patents Court, allowing the anti-suit injunction application, preferred before the California District Court, to continue to be prosecuted by Lenovo, would be oppressive and vexatious to IPCom in the UK, thus:

> "51. The only realistic means a patentee of the standard essential patent has to move things forward is to bring an action for infringement. That is what IPCom has done in this Court in relation to EP 268. If the present action were to be brought to a halt, that means of bringing pressure would vanish altogether. Other potential advantages to IPCom of this action, referred to by Mr. Vanhegan, would also fall away.
>
> 52. I take the view that it would be vexatious and oppressive to IPCom if it were deprived entirely of its right to litigate infringement and validity of EP `268 and thereby be deprived of those advantages."
>
> (Emphasis supplied)

38. The judgement concludes by observing that the fact of prior institution of the California proceedings was immaterial, and that grant of anti-anti-suit injunction, as sought, would not interfere with the principal of comity, as "it would in no way interfere with the bulk of the issues before the US Court".

Lenovo (United States) v. IPCom2

39. This was a decision of the Court of Appeal in Paris ("the Paris Court", in short), again emanating from the anti-suit injunction application filed by Lenovo before the California District Court supra.

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Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

The relief granted by the Paris Court to IPCom was more drastic than that granted by the UK High Court. Observing that "IPCom was likely to see itself prohibited by the Californian judge, with regard to the faculty offered by its law, to initiate and/or to pursue any action for patent infringement against the companies of Lenovo group and/or their customers to protect the French part of the EP `268 patent, that it owns and particularly before the French courts", the Paris Court of Appeal characterised "such an impediment (as) a manifestly unlawful disturbance as long as it infringes the right for the holder of an industrial patent to access the only judge competent to rule on the

infringement of its title", disregarding all statutory provisions, entitling the patent holder to so agitate.23

40. Lenovo sought to contend, before the Paris Court of Appeal - as have the defendants sought to contend before me - that the anti-suit injunction, as sought by Lenovo from the California District Court was only temporary, for the duration of the proceedings before the Californian Court. This contention was summarily dismissed, by the Paris Court of Appeal, thus:

> "58. If the Lenovo companies maintained that this prohibiting measure is only temporary and only lasts for the time of the proceedings before the American judge, such a stay, having regard to the duration thereof which might take several years, but also of its uncertain outcome, compared to the limited duration of protection granted to the owner of a patent, which in this case expired on February 15, 2020, amounts to a concrete deprivation of the right for its holder to avail and protect his industrial property title before its expiration, knowing that it is not disputed that the Californian judge is not seized and could not in any event rule on such an action for infringement which is of the exclusive jurisdiction of the Paris Court of First Instance."

23 As cited by the Paris Court of Appeal,

(i) Article L. 611-1 of the Intellectual Property Code according to which "any invention may be the subject of an industrial property title issued by the Director of the National Institute of industrial property which confers on its owner or his successors in title and exclusive right of exploitation",

(ii) Article L. 615-1 of the Intellectual Property Code which provided that "any infringement of the rights of the owner of the patent, as defined in Articles L. 613-3 to L. 613-6 constitutes an

infringement",
(iii) Article 1 of Protocol 1 of the European Convention on Human Rights, according to which "every natural or legal person is entitled to the peaceful enjoyment of his possessions" and not to be deprived thereof "except in the public interest and subject to the conditions provided for by law and by the general principles of international law",
(iv) Article 17 of the Charter of Fundamental Rights of the European Union which expressly included intellectual property in this protection and
(v) Articles 6 § 1 and 13 of the European Convention on Human Rights, which provided to "everyone" "the right... To have their case heard fairly, publicly and within a reasonable time by an independent and impartial tribunal, and to the right to an effective remedy before a national authority".

59. Thus, the only appropriate way to put an end to the manifestly unlawful disturbance was indeed to order the Lenovo companies to withdraw under penalty the "anti-suit" motion filed before the Californian judge, being moreover observed that it in no way prejudices the continuation of the lawsuit initiated by the Lenovo companies before the Californian court, the subject of which is distinct since it does not relate to the infringement of the patented dispute and that the outcome of the infringement action in France is not without interest for the Californian judge, supposing that he recognises himself finally competent to rule on the responsibility of IPCom and the fixing of a FRAND license."

41. The Paris Court of Appeal went on, after observing that the application, of Lenovo, before the California District Court, for anti-suit injunction "characterises the manifestly unlawful disturbance... in view of the disturbance it generates by infringing a fundamental right", to direct Lenovo "to withdraw under penalty" the anti-suit injunction application.

SAS Institute Inc6

42. The facts, in this case, were somewhat involved, but it is necessary to refer to them. SAS, based in North Carolina, developed the software known as the SAS System. This software enabled users to write and run applications in a language known as the SAS Language. World Programming Ltd (WPL) created a product known as the World Programming System (WPS). The WPS emulated the SAS System as closely as possible, so that programs, of the customers of WPS, could be executed, when run on WPS, as on the SAS System. For this purpose WPL took a license of the SAS Learning Edition

By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

from SAS. The terms of the license prohibited the use of the software to produce a competing product. Violating this, WPL sought to replicate the functionality of the SAS System in its own WPS Software.

43. SAS sued WPL in England, alleging copyright infringement and breach of contract. The claims were rejected by a single Judge, on the ground that the terms of the license granted by SAS to WPL, for the SAS Learning Edition were null and void. SAS's appeal, against this decision, was also dismissed. These proceedings have been referred to, in the judgement of the Court of Appeal, as "the English proceedings".

44. SAS also sued WPL, alleging, inter alia, copyright infringement and breach of contract, in a North Carolina court. The North Carolina court allowed SAS's claim of breach of contract, but dismissed its claim of copyright infringement. An additional claim, by SAS against WPL, on the ground of fraud in failing to abide by the license terms despite representation to the contrary, was also allowed. Successive appeals, preferred by WPL, were dismissed by the first appellate court and, thereafter, by the Supreme Court. SAS moved the English court, for enforcement of the judgement of the North Carolina court, to the extent of damages granted on the ground of fraud and under the North Carolina Unfair and Deceptive Trade Practices Act (UDTPA), to the tune of US $ 26 million. The claim for enforcement was dismissed by a learned Judge on 13th December, 2018, on various grounds. Permission to appeal, thereagainst, was also declined. SAS, therefore,

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By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

became disentitled to recognition or enforcement of the North Carolina judgement in the English court.

45. SAS, thereafter, filed a Writ of Execution against WPL, for enforcement of the North Carolina judgement in the Central District of California. Californian law provided for enforcement by orders for assignment and turnover. Assignment implied requiring the judgement debtor to assign, to the decree holder, specified assets, and turnover orders directed the judgement debtor to transfer, to the levying officer, who was a United States Marshal, specified assets. The first application of SAS, for execution, was directed only at receivables from WPL customers in the US. However, in the pleadings, SAS indicated that it was reserving its rights to amend the assignment order, once SAS obtained information regarding WPL sales outside the US of which, too, submitted SAS, the California

Court could order assignment. WPL moved an anti-suit injunction application before the English court, for restraining SAS from seeking assignment orders regarding customers and receivables of WPL in England. The anti-suit injunction application was dismissed on the ground that no order, containing any such direction, had been passed by any court in the US.

46. Yet another application for assignment was filed by SAS before the California court on 18th June, 2018. The California court indicated its intention to pass an Assignment Order and a Turnover Order, as sought by SAS. The Assignment Order was to require WPL to assign, to SAS, all rights to payment due or to become due from companies

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By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

identified on SAS's Customer List, the satisfaction of the judgement passed by the North Carolina Court for a total of US $ 79,129,905.00, and the Turnover Order was to require WPL to transfer, to the US Marshal, all receivables arising from business conducted between WPL and its customers. It was an admitted position that there was a substantial risk that the California Court would pass these orders.

47. WPL applied, in the English Court, for an interim anti-suit injunction. On 21st December, 2018, a learned Judge of the English Court (Knowles, J.) granted injunction as sought, prohibiting SAS from taking steps to seek either of the aforesaid proposed orders or any similar relief from any court in the US, and, additionally, prohibiting SAS from taking any step before any US court to restrain the anti-suit injunction application filed by WPL in the English Court.

48. In March 2019, the North Carolina court passed an order in favour of SAS, preventing WPL from licensing WPS to new customers in the US, till the judgement for US $ 79 million was satisfied. An appeal, preferred thereagainst, by WPL, was dismissed by the Court of Appeal. Critical comments were entered, in the said decision, on the English Court undermining the finality of the judgement of the California court.

49. By order dated 27th September, 2019, another learned Judge of the English Court (Cockerill, J.) refused to continue the interim anti-suit injunction granted by Knowles, J. on 21st December, 2018. WPL appealed, against the said decision, to the Court of Appeal.

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Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

50. The Court of Appeal noted, at the outset, that the Assignment and Turnover Orders, if made by the California Court, would require WPL to assign, to SAS, debts due from customers situated in UK and that the Turnover Order, if made, would require WPL to transfer, to the US Marshal, debts due from banks situated in the jurisdiction of the English Court. Conversely, however, it was also noted that the interim anti-suit injunction granted by Knowles, J. resulted in preventing SAS from seeking assignment of debts due from US customers, situated in the US, from the California Court. The Court of Appeal noted, relying on the judgement of the House of Lords in Societe Eram Shipping Co. Ltd v. Cie Internationale de Navigation[24], that it was not open to a court in one sovereign state to, for the purposes of execution of its judgement, proceed against assets situated within the jurisdiction of another sovereign state or compel the parties before it to do acts against such assets. The following exhortation, in more empirical terms, is to be found in para 71 of the judgement:

> "It is important also that these principles are recognised internationally. Lord Hoffman referred to a "general principle of international law that one sovereign state should not trespass on the authority of another." Lord Millett described the exercise of an exorbitant enforcement jurisdiction as contrary to generally accepted norms of international law".
>
> (Emphasis supplied)

Having said that, it must be noted that the Court of Appeal was returning these observations in the context of Mareva injunctions,

[24] (2004) 1 AC 260 (HL)

against assets situated within the territory of another sovereign state. No such specific situation obtains in the case before me.

51. While it was necessary to provide the aforesaid factual backdrop, in order to appreciate the ultimate decision of the Court of Appeal, what is of particular significance is the view of the Court on the aspect of anti-enforcement injunctions, as this Court is also, in the present case, seized with one such situation. Paras 92 and 93 of the judgement of the Court of Appeal observed thus:

> "92. Before I do so, I need to refer to the cases dealing with anti-enforcement injunctions. These are cases where the foreign proceedings have proceeded as far as judgement and the unsuccessful defendant seeks an injunction from the English court to restrain the successful claimant from enforcing the judgement. Ms Carss-Frisk submitted that such injunctions may only be granted in exceptional cases,

supporting the judges approach that, in general, it would be necessary for an applicant to show conduct akin to fraud or, at any rate, of similar gravity. Mr Raphael acknowledged that such injunctions would be rare, but submitted that exceptionality was not a distinct jurisdictional requirement.

93. In my judgement there is no distinct jurisdictional requirement that an anti-enforcement injunctions will only be granted in an exceptional case. Such injunctions will only rarely be granted, but that is because it is only in a rare case that the conditions for the grant of an anti-suit injunction will be met and not because there is an additional requirement of exceptionality. That accords, in my judgement, with the approach of Lawrence Collins LJ in Masri v. Consolidated Contractors International (UK) Ltd (No. 3) [2008] EWCA Civ 625, [2009] QB 503 at [94], where he commented that such injunctions would only be granted in rare cases, or in exceptional circumstances, but did not identify this as a distinct jurisdictional requirement. In any event, exceptionality would be a vague and somewhat elastic criterion and (if it matters) it is hard to see why this case,

with its complex procedural history, should not be regarded as exceptional."

(Emphasis supplied)

Thus did the Court of Appeal demystify the concept of an anti-enforcement injunctions and the theory that such an injunction followed only in "exceptional" cases. I find myself entirely in agreement with the observation that "exceptionality would be a vague and somewhat elastic criterion". Categorising the instance as, in which a particular jurisdiction is to be exercised as "exceptional" or "rare", without - as is most often the case - spelling out or delineating the "exceptional" or "rare" circumstances, in my opinion, introduces uncertainty in the law, and leaves the room open for arbitrary exercise of discretion. There are, of course, circumstances which justify such categorisation; awarding of the death sentence being, in the Indian legal system, being the instance which comes most readily to mind. Conferment of judicial discretion is, at times, both inevitable and necessary; these times, however, in my view, must be select and far between.

52. Having thus impliedly disapproved the principle that anti-enforcement injunctions could be granted only in "exceptional" cases, the Court of Appeal went on to reproduce the following passages, from Ecobank Transnational Inc v. Tanoh25, which are significant,

given the controversy before me:

"118. In short, the cases in which the English courts have granted anti-enforcement injunctions are few and far between. Of the two examples to which we were referred, one was

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(2016) 1 WLR 2231

based on the fraud of the respondent and the other involved an attempt to execute the judgement when, after it had been obtained, the respondent had promised not to do so. Knowles J suggested another circumstance where an injunction might be granted, namely where the judgement was obtained too quickly or to secretly to enable an anti-suit injunction to be obtained, a circumstance far removed from this case. No example has been cited to us of a case where an anti-enforcement injunction has been granted simply on the basis that the proceedings sought to be restrained were commenced in breach of an exclusive jurisdiction or arbitration clause.

119. This dearth of examples is not surprising. If, as has been heretofore been thought to be the case, an applicant for anti-suit relief needs to have acted promptly, an applicant who does not apply for an injunction until after judgement is given in the foreign proceedings is not likely to succeed. But he may succeed if, for instance, the respondent has acted fraudulently, or if he could not have sought relief before the judgement was given either because the relevant agreement was reached post judgement or because he had no means of knowing that the judgement was being sought until it was served on him. That is not this case."

(Emphasis supplied)

53. The Court of Appeal went on to make certain telling observations on the concept of comity, which remains a tantalisingly elusive concept, especially in the context of anti-suit injunctions. Many and varied have been the shades of judicial opinion, on the comity concept, and paras 100 to 112 of the judgement in SAS Institute6 provide a valuable addition thereto. The relevant portions thereof merit reproduction, thus:

"100. Comity is undoubtedly an important consideration in this case ...

Signing Date:06.05.2021
16:24:51

> 101. ... To grant an injunction which will interfere, even indirectly, with the process of a foreign court is therefore a strong step for which a clear justification must be required.
>
> *****
>
> 103. When an anti-suit injunction is sought on grounds which do not involve the breach of contract, comity, telling against interference with the process of a foreign court, will always require careful consideration. The mere fact that things are done differently elsewhere does not begin to justify an injunction. It is evident in the present case that the anti-suit injunction granted by Robin Knowles J is viewed by the United States courts as an unwelcome interference with the process. That is inevitably a cause for concern and regret. However, as Toulson LJ's summary explains, comity will be of less weight by the order made or proposed to be made by the foreign court involves a breach of customary international law.
>
> *****
>
> 108. Third, comity requires that in order for an anti-suit injunction to be granted, the English court must have a "sufficient interest" in the matter in question. As Lord Goff explained in Airbus26 at 138 G-H:
>
> > "As a general rule, before an anti-suit injunction can properly be granted by English court to restrain a person from pursuing proceedings in a foreign jurisdiction in cases of the kind under consideration in the present case, comity requires that the English forum should have a sufficient interest in, or connection with, the matter in question to justify the indirect interference with the foreign court which an anti-suit injunction entails."
>
> 109. Often that sufficient interest will exist by reason of the fact that the English court is the natural forum for determination of the parties dispute. But as Lord Goff was careful to emphasise at 140 B-D, this is only a general rule,

26 Airbus Industrie G.I.E. v. Patel, (1999) 1 AC 119

> which must not be interpreted too rigidly. In a case where the injunction is sought in order to protect the jurisdiction of the

process of the English courts, the existence of a sufficient interest will generally be self-evident. Indeed, the need to protect the jurisdiction of the court has been described as "the golden thread". In Masri (No. 3)27 at [86] Lawrence Collins LJ said this:

> "In Bank of Tokyo Ltd v. Karoon (Note) (1987) TC 45, 58, Robert Goff LJ referred to Judge Wilkey's statement in Laker Airways Ltd v. Sabena Belgian World Airlines (1984) 731 F 2d 909, 926-927 that anti-suit injunctions were most often necessary (a) to protect the jurisdiction of the adjoining court, or (b) to prevent the litigant's evasion of the important public policies of the forum, and concluded (1987) AC 45, 60:
>
> > 'without attempting to cut down the breadth of the jurisdiction, the golden thread running through the rare cases where an injunction has been granted appears to have been the protection of the jurisdiction; and injunction has been granted where it was considered necessary and proper for the protection of the exercise of the jurisdiction of the English court.'"

111. Fourth, however, comity is a two-way street, requiring mutual respect between courts in different states. This need for mutual respect means that comity requires recognition of the territorial limits of each court's enforcement jurisdiction, in accordance with generally accepted principles of customary international law , which I have already described. Lord Bingham explained this in Societe Eram26 at [26]:

> "If (contrary to my opinion) the English court had jurisdiction to make an order in a case such as the present, the objections to its exercising a discretion to do so would be very strong on grounds of principle, comity and convenience: it is ... inconsistent with the

27 Masri v. Consolidated Contractors International (UK) Ltd (No. 3) [2008] EWCA Civ 625, [2009] QB 503

> comity owed to the Hong Kong court to purport to interfere with assets subject to its local jurisdiction..."

112. Just as it is inconsistent with comity for the English court to purport to interfere with assets subject to the local jurisdiction of another court, so it is inconsistent with comity

for another court to purport to interfere with assets situated here which are subject to the jurisdiction of the English court."

(Emphasis supplied)

54. The Court of Appeal went on, thereafter, to apply the principles, enunciated by it, to the facts. At the outset, the Court of Appeal held that there was no justification for grant of any anti-suit injunction, preventing SAS from enforcing the judgement of the North Carolina court against the assets of WPL situated in the US. On the issue of grant of anti-suit injunction, in respect of any order or prospective order relating to assets of WPL situated in the UK, i.e. debts from UK customers, paras 124 and 125 of the judgement of the Court of Appeal are of considerable significance:

"124. Debts due from United Kingdom customers are situated in this jurisdiction. Accordingly, as I have explained, for SAS to seek an order for the assignment of such debts in circumstances where the North Carolina judgement will not be recognised or enforced in this jurisdiction would be exorbitant interference with the jurisdiction of the English court, in the light of the internationally recognised principles for the territorial allocation of enforcement jurisdiction which I have described. For that reason such an order could also be characterised as vexatious. If necessary, therefore, I would conclude that the criteria for an anti-suit injunction to restrain SAS from seeking such an order are satisfied. Such an injunction would be necessary to protect the territorial enforcement jurisdiction of the English court.

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16:24:51

125. It would remain to consider whether such an injunction should be refused as a matter of discretion, having regard to issues of comity, delay and submission. Of these, comity would present the most serious obstacle but, for the reasons I have explained, would not in my judgement prevent the grant of injunction. It is notable that SAS has not so far sought, and the United States courts have not indicated that they would be prepared to grant, an Assignment Order extending to debts due from WPL customers in the United Kingdom. It may be that this forbearance involves some recognition of the exorbitant effect of such an order and the proper role of the English court in relation to such debts. Whether or not that is so, such an order would be exorbitant in the sense that I have described, which means that relatively little, if any, weight should be given to comity as a factor telling against the grant of an injunction. While it would be a matter of regret to grant

an injunction which would risk causing offence to a United States court, it would in my judgement be our duty to do so."

55. In conclusion, the Court of Appeal injuncted SAS from seeking an Assignment Order, or a Turnover Order, relating to debts, or funds held in banks, in the UK.

Conversant v. Huawei3, Huawei v. Conversant4 and Unwired Planet International5

56. These were successive appeals, with Conversant v. Huawei3 being decided by the UK Patents Court, Huawei v. Conversant4 being decided by the Court of Appeal and Unwired Planet International5 by the UK Supreme Court. On the aspect of forum conveniens, however, all three decisions were ad idem.

57. Conversant Wireless Licensing SARL ("Conversant", in short) commenced proceedings against Huawei and ZTE in England in July

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Signing Date:06.05.2021
16:24:51

2017, seeking a declaration that the global license at which it was offering its SEPs to Huawei and ZTE was on FRAND terms and, in the alternative, seeking determination of FRAND terms. Additionally, injunctions, against UK patents of Conversant being exploited by Huawei and ZTE, pending determination of FRAND terms, were also sought. Huawei and ZTE challenged the jurisdiction of the English courts to determine these issues raising, inter alia, the ground of forum non conveniens. Henry Carr J. rejected the jurisdiction challenge raised by Huawei and ZTE. The following paras, from the opinion of Carr J, are relevant:

"65. In my judgment, the characterisation of these claims as foreign portfolio infringement claims, or worldwide royalty claims, is inaccurate. They are claims for infringement of four United Kingdom patents, and the English court is clearly the appropriate forum in which these cases should be tried....

66. The fact that these are claims for infringement of UK patents is a matter of substance, not form. Of course, the object of the proceedings is to obtain the relief sought in the claim form, in these cases either a global FRAND license or a FRAND injunction, but this does not differentiate these proceedings from other cases before the English court; the reliefs sought is generally the object of the proceedings.

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68. I agree with Birss J that there is no such thing as a

portfolio right. That mischaracterises the claim, as it is not the cause of action suit upon. These claims are concerned with infringement of UK patents, and the relief that should be granted if infringement is established. If one or more of the four patents in suit is held to be valid and infringed, then the Court will consider what relief should be granted. Conversant says that it is willing to grant a license on FRAND terms and (subject to some equivocation) the Defendants say that they are willing to take a license on

FRAND terms. There is a dispute between the parties as to whether a global license would be FRAND.

69. ...Whether such relief should be granted in the present case will be a matter for the FRAND trial, if liability is established. If these claims were stayed on the basis of forum non conveniens, then the consequence would be that the English court could not decide upon infringement of UK patents, and could not decide what relief it would be appropriate to grant where such patents are infringed. That, in my judgment, would not be in the interests of all the parties and the ends of justice."

(Emphasis supplied)

58. The Court of Appeal, in the appeal against this decision, observed thus, towards the commencement of its discussion:

"97. It is clear that one may get different answers to the forum conveniens questions depending on the level of generality at which one characterises the dispute. It is possible to define the dispute both in a way which is too specific and in a way which is too general. Thus, to define a dispute in a way which focuses on the relief which would be granted in the English court was to define it too specifically. On the other hand, to define the dispute in so general a way that the claimant is left to pursue a claim based on a different property right and different underlying facts in the foreign forum is, in my judgment, likely to define it too broadly."

59. Regarding the nature of the lis, it was, thereafter, observed as under [in para 98(v)]:

"Where a SEP owner brings proceedings for infringement against an implementer in one jurisdiction in respect of the SEPs which it owns there and makes good its case, two outcomes might follow. First, if the evidence establishes that a willing licensor and a willing licensee in the position of the parties would agree a FRAND license in respect of that

jurisdiction but the SEP owner refuses to offer it such a license no injunction should be granted. If on the other hand,

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By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

the implementer refuses to enter into the FRAND license for that jurisdiction that the SEP owner can properly seek an injunction to restrain further infringement there. Secondly, however, if the evidence establishes that a willing licensor and a willing licensee in the position of the parties would agree a global FRAND license, that such a license would conform to industry practice and that it would not be discriminatory but the SEP owner refuses to grant such a license to the implementer then once again it should be denied an injunction. If on the other hand, the implementer were to refuse to enter into such a license then the SEP owner should be entitled to an injunction in that jurisdiction to restrain infringement of the particular SEPs in issue in those proceedings."

60. Thereafter, expressing its agreement with the view of Carr J., the Court of Appeal went on to hold thus:

"104. If one characterises the case in the way in which the judge characterised it, with which I agree, then it seems to me that the forum conveniens question answers itself. The fact that the dispute concerns UK patents is a matter of substance and not a form. Resolution of the dispute will involve determining infringement, essentiality and validity of UK patents. A UK forum is clearly the most appropriate forum, indeed the only possible forum, for this dispute to be tried. The further evidence of Chinese law, if admitted, could not influence this outcome. Even taken at its highest it does not suggest that the Chinese court could inquire into the validity of UK patents.

*****

110. The fallback positions advanced by the appellants are not, to my mind, properly applications of the forum non conveniens principal at all. As the analysis in Unwired CA28 shows, consideration of the offers made by the parties against the FRAND criterion is an embedded part of the determination of whether Conversant is entitled to relief for infringement of their UK SEPs. Whether one views

28 Unwired Planet International Ltd v. Huawei Technologies Co Ltd, (2018) EWCA Civ 2344

Digitally Signed

By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

consideration of these offers as a precondition for liability or relief, or part of the defence which the appellants will offer to the claim, it is not a claim which is capable of being treated separately for forum conveniens purposes."

(Italics and underscoring supplied)

61. The matter travelled up to the UK Supreme Court. For the purposes of the present dispute, paras 95 and 96 of the opinion of the Supreme Court alone merit reproduction, thus:

"95. The question how the dispute should be defined has been the main bone of contention between the parties, both in this court and in the courts below. Is it, as the appellants say, in substance a dispute about the terms of a global FRAND license, or is it, as the respondent maintains, both in form and in substance about the vindication of the rights inherent in English patents, and therefore about their validity and infringement, with FRAND issues arising only as an aspect of the alleged contractual defence? Thus far the respondent has had the better of that argument, both before the judge and the Court of Appeal. At the heart of the analysis which has thus far prevailed is the recognition that the owner of a portfolio of patents granted by different countries is in principle entitled to decide which patents (and therefore in which country or countries) to seek to enforce, and cannot be compelled to enforce patents in the portfolio granted by other countries merely because a common FRAND defence to the enforcement of any of them raises issues which might more conveniently be determined in another jurisdiction than that which exclusively regulated the enforcement of the chosen patents.

96. Were it necessary to choose between the rival characterisations of the substance of the dispute, we would have agreed with the choice made by the courts below. But we think, like the judge, that there is a compelling reason why the appellants must fail on this issue which would apply even if the appellants' characterisation had been correct, so that the dispute was in substance about the terms of a global FRAND license. A challenge to jurisdiction on forum conveniens

grounds requires the challenger to identify some other forum which does have jurisdiction to determine the dispute. Even in a case where permission is required to serve out of the

> jurisdiction, so that the burden then shifts to the claimant to show that England is the more appropriate forum, that still requires there to be another candidate with the requisite jurisdiction. In the present case, China is the only candidate which the appellants have put forward."
>
> (Emphasis supplied)

62. Thus, in these paras, the UK Supreme Court emphasized two important principles, viz. that

> (i) the holder of the SEPs was entitled to sue for infringement of the SEPs in the country where the SEPs were granted, even if fixation of a global FRAND rate was one of the issues which would arise for consideration in that case, and that exercise could more conveniently be undertaken by the court in another country, as the dispute raised by the SEP holder was essentially of infringement of the patents, and not fixation of the terms of a global FRAND license, and
>
> (ii) a challenge to jurisdiction on the ground of forum conveniens could succeed only if the challenger were to cite another forum which would be more convenient for the lis to be adjudicated.

Ecobank Transnational Inc25

63. Mr. Kaul referred me to various paras of the decision of the UK Court of Appeal in Ecobank Transnational Inc25. I do not deem it necessary to refer to the said paras in detail, primarily because they

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By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

essentially emphasize the exceptional nature of anti-enforcement injunctions, regarding which Mr. Banerjee, too, does not seriously join issue - though, he would submit, anti-enforcement jurisdiction is not as exceptional as Mr. Kaul would seek to make it out to be. It is not necessary to refer in detail to these paras, because, after entering the aforesaid cautionary note, the Court of Appeal returned the findings reproduced in para 118 (supra), in which they set out the circumstances in which anti-enforcement injunction could be granted, and on which Mr. Banerjee places reliance.

Sun Travels & Tours Pvt Ltd v. Hilton International Manage (Maldives) Pvt Ltd29

64. This was a decision of the Singapore Court of Appeal. Mr. Kaul places reliance thereon, and has invited my attention to paras 3,

37, 43(b) and (c), 50, 58, 59, 62, 65, 66, 68, 69, 89, 90, 97, 98, 99, 101, 105, 107, 108, 110 and 114 of the judgment.

65. A dispute, between Sun Travels & Tours Pvt. Ltd. ("Sun", in short) and Hilton International Manage (Maldives) Pvt. Ltd. ("Hilton", in short), was referred to arbitration, resulting in two awards, both in favour of Hilton. Hilton sought to enforce the awards in the Maldives. Sun sued Hilton, in the Maldives Court, re-agitating issues already decided in the arbitral proceedings. The Maldivian court passed the judgment in favour of Sun, whereunder substantial damages were awarded to Sun, totally contrary to the awards

29
(2019) SGCA 10

consequent on the arbitral proceedings. Hilton's application for enforcement of the awards was rejected by the Maldivian court, in view of the aforesaid judgment, passed by it in favour of Sun. Hilton, thereupon, applied, to the Singapore High Court, for an anti-suit injunction against Sun. While holding that the proceedings had travelled beyond the stage in which an anti-suit injunction could be granted, the High Court, nevertheless, granted an anti-enforcement injunction against Sun, preventing it from relying on the Maldivian judgment. Sun appealed to the Singapore Court of Appeal, resulting in the judgment under discussion.

66. Para 37 of the judgment of the Court of Appeal sets out the prayers contained in the anti-suit injunction application preferred by Hilton. Para 43 enumerates the reasons for the judgment of the High Court. Paras 58 to 63 set out the submissions of learned Counsel for the parties. Interestingly, para 58 reveals that Hilton had actually participated in the Maldivian proceedings, which proceeded to the judgment of which Hilton now sought injunction from the Singapore High Court. Paras 64 to 68 set out the grounds on which anti-suit injunction could be granted. Inasmuch as the Supreme Court of India, as well as various High Courts, have elucidated the law, as applicable in this country with respect to anti-suit injunctions, with sufficient clarity, it is hardly necessary to refer to the principles contained in these paras. Suffice it to state that a reading of paras 64 to 68 reveals that there is no real difference in the law relating to grant of anti-suit injunctions as it is applied in Singapore, vis-à-vis the law as it applies in India. Para 69 cautioned that, even though anti-suit injunctions are

operate in personam, they nevertheless indirectly interfere with foreign proceedings, which was inconsistent with normal relations between friendly sovereign states. For this reason, anti-suit injunctions, it was advised, were to be granted with caution. Again, on this principle, there can be no two views.

67. Paras 89 and 90 recognised the difference between anti-enforcement injunctions and anti-suit injunctions, and opined that the degree of caution, while considering a prayer for anti-enforcement injunction, was required to be greater than when considering a prayer for anti-suit injunction, "because of the way they interfere with foreign proceedings". Paras 97 and 98 referred to the principles in Ecobank Transnational Inc25. Thereafter, the Court of Appeal noted thus:

> "Notably, because an anti-enforcement injunction proscribes the enforcement of foreign judgment on pain of contempt proceedings in the jurisdiction where the injunction is granted, granting an anti-enforcement injunction is comparable to nullifying the foreign judgment or stripping the judgment of any legal effect when only the foreign court can set aside or vary its own judgments."
>
> (Emphasis in original)

68. Para 101 noted the circumstances, enumerated in Ecobank Transnational Inc25, in which anti-enforcement injunction could be granted. Para 105 considered the circumstances of fraud and lack of knowledge of the foreign proceedings until the delivery of the foreign court judgment, but did not dilate thereon. Para 108 considered the

impact of delay on a prayer for anti-suit or anti-enforcement injunction, and para 110 proceeded to observe thus:

> "In our judgment, this explains why a case where the applicant had no means of knowing that the judgment was being sought until it was delivered constitutes an exceptional situation where an anti-enforcement injunction may nevertheless be granted. Without knowledge, they can be no dilatoriness that would make the applicant's conduct in equitable or unconscionable."

Finally, para 114 of the judgment sets out the following three principles, on the aspect of grant of anti-suit and anti-enforcement injunctions:

> "(a) First, we stress again the importance of comity, and that comity considerations may potentially apply even in

cases where anti-suit relief is sought for a breach of the arbitration or exclusive jurisdiction clause, particularly where there has been delay in seeking relief.

(b) Where there has been extensive delay, the foreign court would have expended vast amounts of judicial time and costs, and respect for the operations of foreign legal systems entails caution in exercising the jurisdiction to enjoin a party from relying on the foreign court's decision.

(c) This consideration is amplified when an anti-enforcement injunction is sought after issuance of a court judgment and such injunctions should generally be refused; not least for want of sufficient promptitude. Further, two additional considerations come into the picture: first, such an injunction would preclude other foreign courts from considering whether the judgment in question should be recognised and enforced; and secondly, it would be an indirect interference with the execution of the judgment in the jurisdiction where the judgment was given and where the judgment can be expected to be obeyed.

(d) There is, therefore, an additional requirement to show that there are exceptional circumstances that warrant the exercise of the court's jurisdiction. Such recognised

exceptions include cases of fraud and cases where the applicant had no knowledge that the judgment was being sought until after the judgment was rendered. In respect of these exceptions, the equities of the case lie in favour of granting the anti-enforcement injunction."

(Italics and underscoring supplied)

Microsoft Corp. v Motorola Inc.30

69. Mr. Kaul places considerable reliance on this decision, of the United States Court of Appeals.

70. In October 2010, Motorola sent letters to Microsoft, offering to license, inter alia, various SEPs, of which Motorola claimed ownership, and which were essential to the H. 264 standard. This list included, apart from US patents, patents granted or filed in other jurisdictions including Australia, Canada, China, France, Germany and Great Britain. German patents EP 667 and EP 384, US patents US 374, US 375 and US 376 were included therein. Microsoft responded by filing a breach of contract suit against Motorola in the

Washington District Court on 9th November, 2010, alleging that royalty terms proposed by Motorola in its offer were unreasonable and in breach of its FRAND obligations, of which Microsoft was a beneficiary. Motorola filed a suit, against Microsoft, on the very next day, i.e. 10th November, 2010, before the Wisconsin District Court, alleging infringement of its patents US 374, US 375 and US 376. The

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696 F. 3d. 872 (9th cir. 2012)- judgment dt 28th September, 2012, by the US Court of Appeals, 9th Circuit

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Signing Date:06.05.2021
16:24:51

Wisconsin District Court transferred the patent case to the Washington District Court, which consolidated the cases.

71. Several months later, Motorola sued Microsoft in the Mannheim Regional Court, Germany ("the German court"), alleging infringement of the EP 667 and EP 384 patents. Microsoft moved the Washington District Court for an anti-suit - rather, an anti-enforcement - injunction, restraining Motorola from enforcing any injunctive relief it might obtain from the German court. This was granted by the Washington District Court vide order dated 12th April, 2012, subject to Microsoft furnishing a security bond for US $ 100 million as collateral. Less than a month thereafter, by order dated 2nd May, 2012, the German Court held that (i) Microsoft did not have any license to use the patents of Motorola, (ii) Motorola's FRAND commitment to the ITU did not create any contract enforceable by Microsoft, as Microsoft was a third party to the contract and (iii) Microsoft had infringed the EP 667 and EP 384 patents of Motorola. Consequently, Microsoft was injuncted from offering, marketing, using or importing any computer software involving use of the EP 667 and EP 384 patents of Motorola.

72. On 14th May, 2012, the Washington District Court granted an anti-enforcement injunction, barring Motorola from enforcing any injunctive relief granted by the German court, with respect to the European patents in issue in the said proceedings, reasoning that (i) the anti-suit injunction proceeding brought before the Washington District Court by Microsoft would be dispositive of the German

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Signing Date:06.05.2021
16:24:51

infringement action filed by Motorola, (ii) there was a possibility of

inconsistent judgments and (iii) though Motorola's commitments to the ITU involved approximately 100 patents held by it, the German proceedings were initiated by Motorola only in respect of two of the said patents, seeking injunctive relief in respect of the said two patents before the Washington District Court could adjudicate on the propriety of injunctive relief in the FRAND context, i.e. the precise issue brought before the German court by Motorola, which raised concerns of forum shopping and vexatious litigation. Note was also taken of the fact that Microsoft and Motorola were both US corporations and that the facts took place within the jurisdiction of the US Court.

73. Motorola appealed. Given the extent of reliance placed by Mr. Kaul on the decision of the Court of Appeal, it is necessary to understand how, and why, the Court of Appeal decided as it did.

74. The Court of Appeal examined the issue from the perspective of the criteria laid down in its own earlier decision in E & J Gallo Winery v. Andina Licores S.A.31 ["Gallo", hereafter], which were, firstly, "whether or not the parties and the issues are the same in both the domestic and foreign actions, and whether or not the first action is dispositive of the action to be enjoined"; secondly, "whether at least one of the Unterweser factors applied" and, thirdly, "whether the injunction's impact on comity is tolerable". The Unterweser factors, in turn, were a disjunctive list of considerations which could justify a

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By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

foreign anti-suit injunction, first articulated in In re Unterweser Reederei GMBH32, which were regarded, by the Court of Appeal in Seattle Totems33 as instructive. These factors were whether the foreign litigation would (i) frustrate a policy of the forum issuing the injunction, (ii) be vexatious or oppressive, (iii) threaten the issuing court's in rem or quasi in rem jurisdiction or (iv) prejudice other equitable considerations. Applying these criteria, the Court of Appeal upheld the decision of the Washington District Court, observing thus:

> (i) Microsoft's claim before the Washington District Court including its claim that the FRAND commitment of Motorola precluded grant of injunctive relief would, if decided in favour of Microsoft, determine the propriety of enforcement, by Motorola, of the injunctive relief obtained in Germany.
>
> (ii) The District Court had found at least two Unterweser factors to apply, as (a) the German proceedings were vexatious

or oppressive and (b) the German proceedings prejudiced equitable considerations. Neither of these findings could be regarded as erroneous, meriting interference. Motorola's contention that the very grant of injunction, by the German court, indicated that the German proceedings could not be regarded as vexatious, was rejected, observing that "litigation may have some merit and still be vexatious, which is defined as "without reasonable or probable cause or excuse; harassing;

31 446 F. 3d. 984, 989 (9th Cir. 2006)

32 428 F. 2d. 888, 896 (5th Cir. 1970)

annoying"34. Even while the Washington District Court proceedings were underway, relating to the entire portfolio of patents of Motorola, Motorola initiated separate proceedings in Germany for enforcement of two of the said patents. This was regarded, by the District Court, as a procedural manoeuvre designed to harass Microsoft with the threat of injunction and to interfere with the District Court's ability to decide the issues properly brought before it. The Court of Appeal, interestingly, observed that as "although the District Court's interpretation of Motorola's litigation decisions may not be the only possible interpretation, it is not "illogical, implausible, or without support from inferences that may be drawn from the facts in the record", and, therefore, it could not be held "that the District Court abused its discretion at this stage of the Gallo31 analysis". It may be relevant to note that the Court of Appeal did not proceed to examine the correctness of the finding, of the District Court, regarding satisfaction of the second Unterweser factor, of the German litigation prejudicing equitable considerations.

(iii) The impact of the grant of anti-suit injunction on comity was tolerable.

75. Significantly, a specific contention was urged by Motorola, before the Court of Appeal, that the grant of anti-suit injunction by the

33 652 F. 2d. 855

34 Black's Law Dictionary (9th edition)

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Signing Date:06.05.2021
16:24:51

District Court disabled Motorola from enforcing its German patents before the only forum competent to rule in that regard. This argument was rejected by the Court of Appeal, in the following terms:

> "Motorola further alleges that the anti-suit injunction must be overturned because it has disabled Motorola from enforcing its German patents in the only forum in which they can be enforced. This argument exaggerates the scope of the injunction, which leaves Motorola free to continue litigating its German patent claims against Microsoft as to damages or other non-injunctive remedies to which it may be entitled. Indeed, depending on the outcome of the District Court litigation, Motorola may well ultimately be able to enforce the German injunction too."

For reasons which I would elucidate hereinafter, I am unable to subscribe to the reasoning contained in the afore-extracted passage from the decision of the Court of Appeal.

E. Analysis

Categories of injunctions qua foreign proceedings and the law in that regard

76. Injunctions, of legal proceedings in foreign climes, may, plainly, take one of the three forms. There are anti-suit injunctions, in which the Court injuncts the party from proceeding with the main suit, pending before the foreign Court; "anti-anti-suit injunctions" [which, frankly, should more correctly be called "anti-anti-suit injunction-injunctions"], where the Court injuncts the party from proceeding with the anti-suit injunction application filed before the foreign Court to

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Signing Date:06.05.2021
16:24:51

injunct the "local" proceedings, and "anti-enforcement injunctions", where the Court injuncts one of the parties before it from enforcing, against the other, a decree or order passed by a foreign Court.

77. Anti-enforcement injunctions would also fall within two categories; the first, where the order, the enforcement of which is sought to be injuncted, is an order in the main suit/complaint/other proceeding in the foreign Court and, the second, where injunction is

sought of an anti-suit injunction order passed by the foreign Court.

78. Plainly, the present case falls within this last, select, category.

79. There is, to my knowledge, no precedent, in this country, dealing with this category of cases. Of the judgments cited before me by learned Counsel for the parties, the only judgments which deal with "anti-enforcement injunctions", where the applicant seeks injunction of enforcement, against it, of a foreign order, are SAS Institute, Ecobank Transnational Inc25, Sun Travels & Tours29 and Microsoft Corp.30

80. Referring to "anti-enforcement injunctions" as "anti-anti-suit injunctions" would, in my view, be a misnomer. It would not be correct to equate a prayer for injuncting the opposite party from continuing to prosecute a proceeding pending in a foreign Court, with a prayer for injuncting execution of an order passed by the foreign Court. It would be completely unrealistic for a Court not to recognise the distinction between these two categories of cases. Even on the

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By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

aspect of immediacy and urgency, there is a fundamental qualitative distinction between them. This is obvious, and I need hardly dilate on the topic. In plainspeak, there is really no comparison between a prayer for restraining further prosecution of proceedings pending in a foreign Court, with a prayer for restraining execution, against the Indian litigant, of an order passed by a foreign Court.

81. Execution - as is apparent even from this case - presents a real, live and imminent danger. As the discussion heretofore reveals, the pre-eminent test, in the matter of grant of anti-suit injunctions, is whether the foreign proceedings are "vexatious or oppressive". The extent to which the "vexatious or oppressive" test may apply, in the case of an anti-enforcement injunction, in my view, may itself be a somewhat vexed issue. No proceeding is pending before the foreign Court, once the matter reaches the anti-execution injunction stage. In the present case, for example, the Wuhan Court has disposed of the anti-suit injunction application of the defendants. No question, therefore, remains, of injuncting the defendants from further prosecuting the said application. The issue is whether the defendant should be permitted to enforce, against the plaintiffs, the order passed by the Wuhan Court on the said anti-suit injunction application.

82. The tests which would govern consideration of an application for anti-execution injunction, as compared to anti-suit injunction, do

not, so far as I am aware, find any authoritative delineation, at least in any decision of any Indian court. Learned Senior Counsel for the parties before me, too, with all their vast knowledge and experience of

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By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

this branch of the law, have not been able to cite any such authority. The issue appears, therefore, to be in a sense res integra.

83. Having said that, the tests for grant of anti-suit injunction are not entirely irrelevant, where anti-enforcement injunction is sought, for the simple reason that the enforcement is itself an order passed in the suit - or, as in the present case, in the anti-suit injunction application filed before the Wuhan Court. Except that, in the present case, the proceeding, of execution of the order passed in which stay is being sought, is not the original complaint filed by the defendants before the Wuhan Court, but the anti-suit injunction application filed in the said complaint. In view thereof, in my opinion, the present application of the plaintiffs has to be examined on two touchstones (or "issues"), viz.

(i) whether the plaintiffs are entitled to seek a restraint against execution or enforcement, by the defendants, of the order dated 23rd September, 2020, passed by the Wuhan Court, and

(ii) whether a case for injuncting the defendants from prosecuting the anti-suit injunction application, filed by them before the Wuhan Court, in which the order dated 23rd September, 2020 came to be passed, could be said to have existed, had the plaintiffs approached this Court when the application was still pending.

Issue (ii) retains relevance, even though the anti-suit injunction application filed by the defendants before the Wuhan Court stands disposed of, for the simple reason that, owing to the filing and

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Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

dependency of the anti-suit injunction application having never been disclosed to the plaintiffs by the defendants, despite ample opportunities in that regard having existed, the plaintiffs were denied an opportunity to seek any restraint against the defendants proceeding with the application, or even from contesting the application in Wuhan. This has resulted in the order dated 23rd September, 2020, being passed by the Wuhan Court. The defendants have, therefore, resorted to unfair practice in securing the order dated 23rd September, 2020 behind the back of the plaintiffs (as would be elucidated in greater detail hereinafter), and it would be contrary to the most basic norms of natural justice and fair play to allow the plaintiffs to be prejudiced for that reason. I am, therefore, convinced that the scope

of examination, in the present case, has also to extend to assessing whether a case for grant of "anti-anti-suit injunction injunction", restraining the defendants from prosecuting the anti-suit injunction application filed by them before the Wuhan Court, could be said to have existed, had the plaintiffs approached this court for such relief at that stage. To that extent, therefore, the principles governing grant of anti-suit injunction, as enunciated by this Court, are also to be borne in mind, while considering the present application of the plaintiffs.

84. On whether anti-enforcement injunctions constitute an even more exceptional sub-classification, vis-à-vis anti-suit injunctions of proceedings in a foreign jurisdiction, there is a division of opinion. The Singapore Court of Appeal, in Sun Travels & Tours29 advocates a "greater degree of caution" while dealing with a prayer for anti-enforcement injunction, as compared to a prayer for anti-suit

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Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

injunction. The reason adduced for this additional cautionary note in the judgment is, however, "the way in which" anti-enforcement injunctions "interfere with foreign proceedings". To my mind, the extent of interference with foreign proceedings is greater, in the case of anti-suit injunctions, as compared to anti-enforcement injunctions as, in the former case, a running proceeding is sought to be halted in its tracks, whereas, in the latter, the court, having rendered the judgment of which enforcement is being sought to be injuncted, is already functus officio, till such time as it is moved for enforcement or execution of its order. The court does not, therefore, retain any lien (ordinarily) over the case, and the proceedings, in which the order has been passed, have already come to a close. I cannot, therefore, subscribe to the view, expressed by the Singapore Court of Appeal, that a greater degree of circumspection is required when dealing with a prayer for anti-enforcement injunction, as compared to a prayer for anti-suit injunction. As already noted earlier in this judgment, the UK Court of Appeal, in SAS Institute6 did not subscribe to the view that anti-enforcement injunctions were to be granted only in exceptional cases. In my considered opinion, the entire discussion of whether the case before the court is, or is not, "exceptional" may have had significance at some prior point of time but has, by now, become somewhat disingenuous, not to say anachronistic. Plainly said, at the end of the day, the interests of justice must prevail. If rendering of justice, in a given case, requires an anti-enforcement injunction to be issued, the Court should not hold back its hands, on some perceived notion of lack of "exceptionality" in the case. This would result in

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Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:06.05.2021

16:24:51

perpetuation of injustice. Justice, it is well settled, is the highest to which the law can attain.

85. The three principal decisions of the Supreme Court, on the aspect of anti-suit injunctions, are O.N.G.C.16, Modi Entertainment Network10 and Dinesh Singh Thakur11.

86. These decisions have already been examined earlier in this judgment. O.N.G.C.16 provides a textbook example of when continuation of the proceedings in the foreign Court, or any order or decree resulting therein, could be treated as "oppressive" to the Indian anti-suit injunction applicant. That case revolved around two arbitral awards, rendered under the Arbitration Act, 1940 ("the 1940 Act"). Under the 1940 Act, an arbitral award was not enforceable unless and until it was made the rule of court, under Section 17 thereof, but was amenable to challenge under Section 30 and 33. ONGC challenged the awards before the High Court, under the said provisions. In the meanwhile, the respondent Western Company of North America, which was the beneficiary of the awards, approached the American Courts, for confirmation thereof, even while accepting that the 1940 Act applied. The Supreme Court held that, as the American Court was bound to decide the application of the respondent Western Company in the light of American law which, even as per Western Company, did not apply as it accepted the applicability of the 1940 Act, allowing the proceedings in the American Court to continue and, possibly, result in an order which would be de hors the 1940 Act, would be oppressive to ONGC, which would, thereby, be "driven to a tight

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Signing Date:06.05.2021
16:24:51

corner" and "place in an inextricable situation". Another situation, in which continuation of the proceedings in the foreign Court were held to be "oppressive" was where the Indian litigant was required to defend the same cause of action, in the Indian court as well as the foreign Court.35 Modi Entertainment Network10 emphasized, in the first instance, the fact that an anti-suit injunction was but another specie of injunction which would, therefore, be governed by the general principles applicable to grant of injunctions (which principle was reiterated in Dinesh Singh Thakur11). Injunctions, it was pointed out, were, by nature, equitable relief. Though, in para-24 of the report, the Supreme Court enumerated, in seven distinct points, principles governing grant of anti-suit injunction, most of those principles apply to cases where the relationship between the parties was contractual in nature, and the contract contained, or did not contain, an exclusive jurisdiction clause. The principles that one may take home, for the purposes of the present dispute, from Modi Entertainment Network10, are that anti-suit injunctions are ordinarily to be granted where the foreign proceedings are "oppressive or

vexatious", or where declining injunction would result in defeating the ends of justice and perpetuating injustice.

87. An important decision on anti-suit injunctions, specifically in the context of patent infringement, was rendered by a Division Bench of this Court in Magotteaux Industries Pvt Ltd v. AIA Engineering Ltd36. This decision, too noted the fact that where the nature of the

35 Ref. Essel Sports Pvt Ltd v B.C.C.I., 2011 (178) DLT 465 (DB), which also held that, ultimately, the law that would apply would be the law enunciated in Modi Entertainment Network10.

36 2008 (155) DLT 73 (DB)

litigation was patent infringement, the principles in Modi Entertainment Network10, relating to contractual disputes and the existence of exclusive jurisdiction clauses therein. The suit filed in this Court, and the complaint filed in the US Court, in Magotteaux Industries36, were both actions against infringement of patents, the Indian action being directed against alleged infringement of Indian patents and the US action being directed against alleged infringement of US patents. This Court held, in paras 57 and 58 of the report, that the courses of action propelling the Indian and the US litigation were different, thus:

> "57. It appears that the causes of action in both the matters are different and occur on different dates which becomes relevant for the consideration of the grant of anti suit injunction. In Suit No. 189/06 there was no specific averment that the respondent has appointed two companies in USA and Italy to deal with the product i.e. composite wear components in question. It was also not alleged by either of the parties that the respondent has actually been exporting the product in question under the infringement of Patent of appellant No. 2 granted in India nor there is any averment by the Appellants or respondent that the respondent is exporting composite wear components from India, and/or two companies appointed by the respondent has imported the goods from U.S.A.
>
> 58. It also appears from the record that M/s. Vega Industries Inc. Ltd. Tennessee, USA and M/s. F.A.R. Fonderie Acciaierie Roiale SPA who are respondents No. 2 and 3 in the complaint under Section 337 of the US Trade Tariff Act of 1930 are not the parties in Suit No. 189/06. The allegation against the respondent and above said two companies made by the Appellants No. 2 and 3 in the Complaint is that the respondent and its two companies manufactured or have manufactured on their behalf and have imported their goods and/or sold composite wear components

Grinding tables for US in vertical roller Mill grinders imported into or sold in US amounts to infringement of re-issuance of Patent No. 39998E. It is also a matter of fact that

the re-issuance of Patent granted in favour of Appellant No. 2 in U.S.A. is subsequent to the suit by the appellants No. 1 and 2 in this court for infringement of patent in India. In view of the above, the proceedings, which are pending in USA are based upon separate cause of action which has occurred on the separate date and it relates to the patent rights granted in foreign nation."

What is, however, of possibly greater significance, in the light of the present controversy, are the observations, in the passages that follow in Magotteaux Industries36, regarding patent rights being territorial in nature, granted by the sovereign State. Following thereupon, in para 67 of the report, this Court concludes thus:

"Not only two causes appear to be different and ground of inconvenience to the respondent does not appear to be correct, it is also noticeable that since the patent law is territorial in nature, therefore, the infringement caused in different countries where the patents are registered and monopoly rights are granted, will lead to a separate cause of action and the mere fact that the appellants has brought one suit of civil nature before this Court for the violation of the patent rights in India will not lead to the conclusion that a party is debarred from filing any action restraining the misuse of the patent/monopoly rights, which are granted in the jurisdiction of some other court."

(Emphasis supplied)

88. Useful markers, to guide the Court seized with the issue of grant, or not grant, of an anti-suit injunction or an anti-enforcement injunction, are also to be found in other Indian decisions, as well as overseas decisions, on which learned Senior Counsel have relied. Though, no doubt, Indian Courts, including the Supreme Court, have pronounced on the circumstances in which anti-suit injunctions may be granted, sufficient room for play in the joints still remains, in view

of the use of the words "oppressive", "vexatious" and "interests of justice". No well delineated boundaries, within which the existence, or non-existence, of these parameters, could be gleaned, are to be found in any judicial authority. Indeed, the moment the ends of justice

are predominant, there can never be any hard or fast rule, or guidelines cast in iron. I find myself, however, in agreement with the following general principles relating to anti-suit and anti-enforcement injunctions, emerging from "foreign" jurisprudence, to which my attention has been invited during the course of arguments:

(i) An anti-suit injunction should be granted only in rare cases, and not for the mere asking. The Court should be mindful of the fact that even an injunction in personam interferes with the functioning of a sovereign forum, not subject to the writ of the court granting the injunction.37

(ii) An anti-suit injunction could only be granted by a Court possessing "sufficient interest" in the lis forming subject matter of the proceedings which it intends to injunct. In other words, qua the said lis, the Court was required to be the natural forum.38

(iii) The possibility of palpable and gross injustice, were injunction not to be granted, remains a definitive test.39 In doing justice in accordance with law, the Court will try and

37 Ref. Devi Resources12

38 Ref. SAS Institute6

preserve the subject matter of the lis so that the beneficiary of the final verdict can enjoy the fruits thereof.39

(iv) Interference with the right to pursue one's legal remedies, before the forum which was competent to adjudicate thereon, amounts to "oppression", especially where there is no other forum which the litigant could approach.39

(v) In patent infringement matters, it was the right of the patent holder to choose the patents which it desired to enforce.40 The only practical relief available to an SEP holder was by way of anti-infringement action.41 The right to seek legal redressal, against infringement, was a fundamental right.42 A proceeding, or an order, which resulted in divesting the patent holder of the authority to exercise this fundamental right, was ex facie oppressive in nature.45 Protection of the jurisdiction of the Court

is also a guiding factor.46

(vi) Comity, as a concept, was grating to the ear, when it proceeded from a court of justice.43 Where the proceeding or order, of which injunction was sought, was oppressive to the applicant seeking injunction, comity was of relatively little importance, as a factor telling against grant of such injunction. Even if grant of injunction, in such circumstances, was likely to

39 Ref. IPCom v. Lenovo1, Lenovo (US) v IPCom2, Huawei v. Conversant4

40 Ref. Unwired Planet5

41 Ref. IPCom v. Lenovo1

42 Ref. Lenovo (US) v IPCom2

43 Ref. Satya7

offend the foreign Court, that consideration could not operate as a factor inhibiting against such grant.44 Considerations of comity were, moreover, subject to the condition that the foreign law, or the foreign proceeding or order was not offensive to domestic public policy45 or customary international law.46 Comity, in any event, was a two-way street.46

(vii) There was no reason to treat anti-execution injunction applications as "exceptional", to the extent that, even if grounds for grant of injunction were made out, the Court would hesitate.46

(viii) Some instances in which anti-enforcement injunction is would be justified are

(a) where the judgment, of the execution of which injunction was sought, was obtained too quickly or too secretly to enable the applicant (seeking injunction) to take pre-emptive remedial measures, including by way of applying for anti-suit injunction while the proceeding was pending,

(b) where the order, of the execution of which injunction was sought, was obtained fraudulently,

(c) where the applicant seeking anti-enforcement injunction had no means of knowing of the passing of the judgment or order against, until it was served on him.45

44
Ref. SAS Institute6
45
Ref. Ecobank25, SAS Institute6

Sun Travels & Tours29, on which Mr. Kaul relied, in fact, even while opining that anti-enforcement injunctions could be granted only in exceptional cases, recognised these three circumstances as justifying grant of anti-enforcement injunction as, in these circumstances, "the equities of the case (lay) in favour of grant of anti-enforcement injunction."

89. The entire controversy in the present case may be divided into two aspects; firstly, whether the Wuhan Court was justified in granting anti-suit injunction, vide its order dated 23rd September, 2020, and, secondly, whether this Court would be justified in injuncting the respondent from enforcing that order against the plaintiffs. The issue of the relief to which the plaintiff, if at all, would be entitled, would, of course, follow thereafter.

Justification of the Wuhan anti-suit injunction order

90. I am acutely conscious of the fact that I am not sitting in appeal over the order, dated 23rd September, 2020, of the Wuhan Court. Nonetheless, one of the factors which has to be borne in mind by this Court, in deciding whether to restrain the defendants from enforcing, against the plaintiffs, the order of the Wuhan Court, is unquestionably the justifiability of such order. If the order is justified, and passed on considerations which are, on their face, legitimate, this Court would be acting in gross excess of its jurisdiction in restraining enforcement

of the order, merely on the ground that such enforcement might prejudice one of the parties before it. I am entirely in agreement with the proposition that a Court, of one sovereign country, should ordinarily be loath to injunct enforcement of an order passed by a Court in another sovereign country; indeed, empirically stated, no such jurisdiction exists at all. Where, however, the order passed by the Court of one sovereign country, without due justification,

entrenches on the lawful invocation of remedies known to law, by a litigant in another sovereign country, the Court in the latter sovereign country is duty bound to protect such incursion on its jurisdiction, and on the fundamental right of its citizen to seek legal redress. No consideration of comity can militate against grant of relief in such a case.

Grounds on which the Wuhan Court granted anti-suit injunction

91. The considerations which weighed with the Wuhan Court, as they emerge from the order dated 23rd September, 2020, are the following:

(i) As licensing negotiations between the plaintiff and the defendants were at the deadlock, the defendants requested the Wuhan Court to "make a judicial decision in accordance with the FRAND rules" to facilitate negotiation and solve the dispute between the plaintiff and the defendants regarding the royalty rates of the SEPs involved. This was "in line with the original

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By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

intention of the FRAND licensing rules and (conformed) to the FRAND principle" and was, therefore, justified.

(ii) As the defendants were registered in China, their main research and development, production and sales base were in China, one of the affiliated defendants was located in Wuhan and the place of implementation of the plaintiff's SEPs by the defendants was in Wuhan, the Wuhan Court was possessed of jurisdiction to deal with the matter. All parties were, therefore, required to cooperate with the Wuhan Court.

(iii) However, the acts of the plaintiff indicated disrespect to the procedure of the Wuhan Court and their intent to interfere with the said proceedings.

(iv) The behaviour of the plaintiffs had caused great damage to the overseas market of the defendants and their affiliates.

(v) Despite having been forwarded copies of the complaint filed by the defendants in the Wuhan Court, evidence materials,

court summons and other procedural documents, by email, on 11th August, 2020 and the 2nd September, 2020, the plaintiffs refused to respond or reply thereto.

(vi) Instead of respecting and coordinating with the Wuhan Court to proceed with the litigation procedures, the plaintiffs started emergency initiation of injunction procedures before this

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Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

Court to exclude the jurisdiction of the Wuhan Court and counteract the proceedings before it, thereby deliberately interfering with the said proceedings.

(vii) The present proceedings pending before this Court "might result in an adjudication conflict with the adjudication of" the Wuhan complaint.

(viii) This, in turn, would "impact the conclusion of a SEP license agreement between the plaintiff and the defendants and lead to difficulties of enforcing the effective adjudication of the case" before the Wuhan Court.

(ix) The present proceedings before this Court would "necessarily impact on the operation" of the defendants and their affiliated companies in the Indian market, resulting "in a great harm to the interests" of the defendants, which was irreparable.

(x) If the Wuhan Court were not to stop the present proceedings in time, there was a possibility that they would "imperil the positive development of the licensing negotiation between the parties", which would further harm the interests of defendants.

(xi) The plaintiffs were Non-Performing Entities (NPEs), which did not produce or manufacture SEP related products,

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Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

and were merely seeking prior profits by FRAND licensing negotiation and litigations.

(xii) Grant of anti-suit injunction by the Wuhan Court would

not result in any substantive harm to the SEPs held or managed by the plaintiffs "except the delay for the (plaintiffs') relief after the breakdown of the licensing negotiation between the parties", and would not affect public interest.

Justification for the Wuhan Court order

92. Of the above observations and findings of the Wuhan Court (for ease of convenience I would refer to them as "findings"), findings (i) and (ii) were observations on the justifiability of the complaint filed by the defendants before the Wuhan Court, and of the jurisdiction of the Wuhan Court to deal with the matter. Neither of these findings, in my view, call for any observation by this Court. They deal with the sustainability, and the maintainability, of the complaint before the Wuhan Court, and had to be met, by the plaintiffs, before the Wuhan Court and adjudicated by that Court. They are of no relevance insofar as the issue of anti-suit injunction or anti-enforcement injunction, is concerned. It is also true that every party is expected to cooperate with proceedings pending before any judicial forum. Findings (iv), (viii), (ix), (x) and (xi) are, with respect, not considerations relevant for grant of anti-suit injunction, either according to the anti-suit injunction law as it exists in this country, or, for that matter, the anti-suit injunction law as it exists in any other jurisdiction. Mr. Kaul has

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Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

not been able to refer to any decision which would justify the grant of anti-suit injunction, as granted by the Wuhan Court, on the ground that (i) the plaintiff's behaviour had caused great damage to the overseas market of the defendants, or that (ii) the present proceedings would impact conclusion of an SEP license agreement between the plaintiffs and the defendants, or that (iii) they would impact the operation of the defendants and their affiliated companies in the Indian market, resulting in harm to the interests of the defendants, irreparable or otherwise, or that (iv) they would imperil the positive development of the licensing negotiation between the parties, thereby harming the defendant's interests, or that (v) the plaintiffs are, allegedly, NPEs (which finding Mr. Banerjee emphatically refutes), or that (vi) the plaintiffs were seeking prior profits by FRAND licensing negotiation and litigations. While reiterating that I am not sitting in appeal over the findings or observations of the Wuhan Court, I merely seek to observe that these factors are not recognised as factors for grant of anti-suit injunction, in any jurisdiction of which I am aware, or any legal authority to which the defendants have drawn my attention. Nor, for that matter, does the order of the Wuhan Court refer to any such decision or authority.

93. The surviving considerations, in the order of the Wuhan Court, are (i) that the acts of the plaintiffs indicated disrespect to the procedure of the Wuhan Court, and an intention to interfere with the said proceedings, (ii) that the plaintiffs, despite being put on notice, had not responded, or caused appearance before the Wuhan Court, (iii) instead, the plaintiffs were seeking, by initiating the present

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Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

proceedings before this Court, to exclude the jurisdiction of the Wuhan Court and deliberately interfere with the Wuhan proceedings, (iv) there was a possibility of an adjudication conflict, were both proceedings to be allowed to continue side by side and (v) grant of anti-suit injunction would not prejudice the plaintiffs in the present proceedings, except to the extent of delay in obtaining relief.

94. Re. plaintiffs' failing to appear in the Wuhan Court despite notice having been issued

94.1 As would become clear from the discussion hereinafter, the plaintiffs were never issued notice of the anti-suit injunction application, before it came to be decided against them. At worst, it could be said that the plaintiffs were issued notice of the complaint filed by the defendants before the Wuhan Court, though, even on this, the plantiffs join issue. Even assuming, arguendo, that the plaintiffs, without due justification, defaulted in responding to the notice issued to them, by the Wuhan Court, on the complaint of the defendants, could that constitute a justifiable basis for the Wuhan Court proceeding to finally decide the anti-suit injunction application without notice to the plaintiffs? No decision, permitting this, has been brought to my notice.

94.2 In so far as the anti-suit injunction proceedings were concerned, the plaintiffs were, plainly, not served with due notice by the Wuhan Court. We are not concerned with the issue of notice having been served, on the plaintiffs, in the Wuhan complaint, as the plaintiffs do

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Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

not seek to injunct the proceedings in the said complaint. The alleged lack of response, by the plaintiffs, to the notice issued in the said complaint, the justification thereof, and the consequences of such alleged failure to respond, if any, are matters relevant to the complaint and the proceedings in the complaint, and not to the anti-suit injunction application filed by the defendants in the said complaint before the Wuhan Court.

94.3 Notice, in the main proceedings, quite obviously, does not amount to notice in every application filed therein. Nor can a litigant, who is not clairvoyant by nature, be expected to have knowledge of every application filed in the main proceeding, merely because he has been put on notice in that main proceeding. The order of the Wuhan Court does not record any notice having been issued to, or served on, the plaintiffs, of the anti-suit injunction application filed by the defendants in those proceedings. Though notice is stated to have been issued, twice, to the plaintiffs, first on 11th August, 2020 and, thereafter, on 2nd September, 2020, these are, expressly, "of the complaint, evidence materials, procedural documents and court summons". Even qua these proceedings/documents, the order goes on to record thus:

> "The complaint, evidence, procedural materials, court summons of the present case is still in the serving process and the Respondents have not signed for the Proof of Service or reply to this Court yet. This Court issued the antisuit injunction ruling directly, in a sense of behavior preservation. However, this ruling will not prevent the Respondents from exercising remedy of procedural rights i.e. submitting the evidence or expressing its opinions through reconsideration procedures."

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By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

(Emphasis supplied)

Even as regards the main complaint and the documents filed by the defendants, in that regard, the Wuhan Court records, candidly, that service of the complainant and the documents were still in process, but that it was nevertheless proceeding to issue the anti-suit injunction "directly", "in a sense of behavior preservation". Whether the Wuhan Court was justified in doing so, or not, is not for me to comment on, in the present proceedings. Suffice it to state that, in the circumstances, the contention that the order of the Wuhan Court was passed after due notice to the plaintiffs is obviously unacceptable. The record reveals, rather, that it was only during the pendency of these proceedings in this Court that the plaintiffs were ever made aware of the fact that the defendants had filed an anti-suit injunction application in the Wuhan Court.

94.4 Viewed thus, the failure, of the plaintiffs, to enter appearance consequent to notice being issued by the Wuhan Court in the complaint filed by the defendants, i.e. consideration (ii) in para-74 (supra), cannot be treated as relevant for the purposes of granting anti-suit injunction, restraining the plaintiffs from prosecuting the present proceedings.

95. The remaining considerations which prompted the Wuhan Court to pass the order dated 23rd September, 2020 require, in order for their proper appreciation, a juxtaposed view of the case of the plaintiffs in

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By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

the present suit, vis-à-vis the case of the defendants in the complaint before the Wuhan Court.

The present plaint

96. Para 15 of the plaint acknowledges the commitment of the plaintiff, to the ETSI, to grant licences, of its SEPs, to implementers of ETSI wireless communications standards on FRAND terms and conditions. The cause of action, for filing the plaint, is manifested in para 26, which avers that "all products of the defendants, which implement those aspects of the 3G and 4G standards to which the plaintiff's patents are essential" infringe the plaintiff's sole and exclusive rights over the said patent. Thereafter, the plaint enumerates, by way of example, specified handsets of the REDMI NOTE 8, REDMI K20 PRO, Mi A3, REDMI NOTE 7 PRO and REDMI NOTE 8 PRO handsets of the defendants as specifically infringing the plaintiffs' SEPs, as is apparent from the advertisements relating to the said handsets and descriptions of the specifications thereof, which implement the standards to which the plaintiff's SEPs are essential. "This fact alone", alleges the plaint, "qualifies as proof of infringement by the defendants", who "have made use of technology which is specifically covered by the plaintiffs' claims in the suit patents". Use of technology covered under claims which are essential to a particular standard, asserts the plaint, requires the entity using the technology to secure a license from the owner of the patents, which the defendants have been unwilling to do, on FRAND terms and conditions. This, asserts the plaint, entitles the plaintiffs to an

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

injunction. Thereafter, paras 30 to 43 of the plaint explains the standards, and paras 45 to 74 explain how the IN '910, IN '912, IN '719, IN '036 and IN '182 suit patents are essential to the said standards. Paras 79 to 84 set out the details of the infringement analysis and testing conducted by the plaintiffs, and para 85 asserts that "in keeping with the very definition of essentiality, once the suit

patents have been shown to be essential to certain specific standards, it would be impossible on technical grounds for the defendants' devices to comply with the said standards without infringing the suit patents". Paras 86 to 91 explain the plaintiffs FRAND commitment and paras 92 to 94 explain the defendants' obligation to obtain licenses from the plaintiffs on FRAND terms, if they seek to continue to utilize the technology to which the plaintiff's SEPs are essential. Paras 95 to 115 seek to demonstrate how the defendants have been unwilling to take licenses from the plaintiffs on FRAND terms, despite the plaintiffs having a successful SEP licensing program, the details of which the plaintiffs purport to set out in paras 116 to 121. Paras 122 and 123 justify the plaintiff's claim for damages against the defendants. Paras 124 to 133 are formal paras dealing with limitation, cause of action, jurisdiction, valuation and the like.

The defendants' Wuhan complaint

97. The prayer clause, in the Wuhan complaint of the defendants, requested the Wuhan Court "to determine the global royalty rates or the range for the licensing of all standard essential patents ("SEPs") and patent applications in (the plaintiffs) 3G, 4G patent portfolios that

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

(the plaintiffs) hold or have the right to license in accordance with FRAND principal". The complaint asserts that the 3G and 4G patent portfolios managed by the plaintiffs contained a large number of wireless communication patents, covering all declared SEP families held and granted to be licensed by the plaintiffs. The complaint thereafter refers to a Confidentiality Agreement executed between the plaintiffs and the defendants in December 2016, for a potential patent cooperation project, whereafter it is asserted that substantive licensing negotiations, for the patents held and managed by the plaintiffs, commenced. Details of the negotiations follow, resulting in the defendants alleging that "the royalty rates for the relevant wireless communication SEPs offered by InterDigital (were) obviously too high, which violate(d) FRAND licensing obligations". Exception has also been taken, into the complaint, to the refusal, by the plaintiffs, to disclose the basis on which they had worked out the royalty rates. The relevant paras from the complaint, with which, in fact, the complaint concludes, and which constitute the basis of the cause of action set out therein, read thus:

> "The royalty rates for the relevant wireless communication SEPs offered by InterDigital are obviously too high, which violate FRAND licensing obligations. Moreover, in the licensing negotiations, InterDigital refused to compromise, and consistently insisted on royalty rates that violate FRAND terms.

> First, InterDigital has not disclosed the royalty rates it referred to when calculating the royalty rates offered to Xiaomi. Although Xiaomi had asked for the calculation methods and relevant referred comparable agreements for several times, InterDigital refused to provide any explanation on the ground of the confidentiality clauses in other licensing

Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

> agreements. Thus, the royalty rates directly provided in its offer cannot be deemed as a reasonable and sufficient basis.
>
> Second, the rates offered by InterDigital to Xiaomi are much higher than the rates offered by other SEP licensors. Xiaomi has always respected the intellectual property rights of others and is willing to enter into licensing agreements with SEP licensors on FRAND terms. Up to now, Xiaomi has entered into licensing agreements with several SEP licensors in the industry. Compared with those of the licensors, InterDigital has offered royalty rates that are much higher and are inconsistent with the quality and quantity of its SEPs.
>
> Third, the royalty rates offered by InterDigital are disproportionate to the relevant proportion of the SEPs held and granted to be licensed by InterDigital compared to all other SEPs covering relevant standards, which would lead to an excessively high cumulative royalty rate. If its royalty rates were applied, manufacturers of mobile terminals, such as Xiaomi, would bear an unfair and unreasonable burden."

Sustainability of the surviving grounds for grant of anti-suit injunction, in the order of the Wuhan Court

98. Holistically viewed, I do not think that the Wuhan Court was justified either in holding that the plaintiffs had sought to interfere with the complaint filed by the defendants in the Wuhan Court, by filing the present suit, or that they intended to exclude the jurisdiction of the Wuhan Court thereby. The cause of action in the present proceedings, initiated by the plaintiffs before this Court, is the perceived infringement, by the defendants, of six select and specific Indian patents. Much of the recital, in the plaint, is towards establishing that the utilisation of 3G and 4G technology, by the defendants, in fact requires use of the SEPs held by the plaintiff, in

Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:06.05.2021

16:24:51

order to subscribe to the standards set by Standard Setting Organisations. The defendants would have several defenses open to them, to contest the suit. It is open to the defendants, for instance, to contend that the suit patents are not, in fact, essential to the standards and are not, therefore, SEPs at all, as also that the defendants are not unauthorizedly using, or infringing, the suit patents. It is only if the plaintiff's patents are found to be SEPs, which would require the plaintiffs to demonstrate that, in order to utilize the 3G and 4G technologies in accordance with the standards set by the SSOs, the plaintiff's patents are "essential", that they can be regarded as SEPs at all. Once they are regarded as SEPs, the next issue for consideration would be whether the defendants are, in their handsets, utilising the plaintiff's patented technology, as would require the defendants to obtain a license from the plaintiffs. It is only if this question is also answered in the affirmative that the issue of the appropriate royalty rates, at which the plaintiffs would be obligated to license the SEPs, to remain in conformity with their FRAND obligations, would come up for consideration. There is substance in the contention of Mr. Banerjee, therefore, that the issue of FRAND royalty rates arises, in the present case, only as a part of the entire gamut of the controversy before this Court.

99. It is obvious, at a bare glance, that the issue of infringement, by the defendants, of the suit patents or, for that matter, of any of the patents of the plaintiffs, is not going to be addressed by the Wuhan Court, while adjudicating the defendants' complaint; or, at any rate, that the defendants have not called upon the Wuhan Court to address

Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

that issue, directly or indirectly. It is also significant that the present suit concerns itself only with six of the plaintiffs' patents, granted in India, whereas the Wuhan complaint is apropos the entire portfolio of all SEPs held by the plaintiffs. The scale and sweep of enquiry in the Wuhan complaint is also, therefore, decidedly different from that in which this Court has been called upon to engage itself, in the present proceedings. In this context, there is also, prima facie, substance in the contention of Mr. Banerjee that, unlike the Wuhan proceedings, the present suit does not concern itself with fixation of any global FRAND rate for the entire portfolio of the plaintiffs SEPs. This Court is required to address itself to the aspect of infringement of the specified patents forming subject matter of these proceedings, and, if necessary, determination of the FRAND royalty rate at which, if licenses taken by the defendants, infringement is obviated. As such, the nature of the enquiry which would be required to be conducted by this Court, in the matter of fixation of a FRAND royalty rate, would also be with respect to the infringement of the specified suit patents in this case. Unlike the Wuhan proceedings, this Court, at least foreseeably, is not required to enter into fixation of a global FRAND

rate covering the entire portfolio of the plaintiff's SEPs.

100. Perceived infringement of Indian patents can, indisputably, be challenged only in India, patent rights being territorial in nature and patents themselves being granted only by the concerned sovereign state. There is, therefore, no question of the plaintiffs having been able to seek injunction, against infringement of the suit patents in issue in the present case, before any forum outside India. The Wuhan

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

Court has, while observing that the plaintiffs were seeking, by initiating the present proceedings before this Court, to exclude the jurisdiction of the Wuhan Court can interfere with the Wuhan proceedings, completely overlooked this fact. There can be no question of exclusion of the jurisdiction of the Wuhan Court by the plaintiffs, in the present proceedings, for the simple reason that the Wuhan Court has no jurisdiction to adjudicate on the present suit or decide the issue in controversy raised therein, i.e. infringement, by the defendants, of the Indian suit patents of the plaintiffs. With greatest respect to the Wuhan Court, therefore, it appears, to me, that the order dated 23rd September, 2020, falls into error in opining that the plaintiffs had, by initiating the present proceedings before this Court, sought to exclude the jurisdiction of the Wuhan Court. Rather, the Wuhan Court has, by its order, sought to exclude the jurisdiction of this Court to adjudicate on the lis brought before it by the plaintiff which this Court, and no other, is empowered to adjudicate, as is explained in a little greater detail hereinafter.

101. Nor is there any possibility of interference, by the plaintiffs in the present proceedings, or by the present proceedings themselves, with the proceedings pending before the Wuhan Court in connection with the complaint filed by the defendants before it (in which respect the observations and findings in IPCom v Lenovo1 (supra) apply, mutatis mutandis, to the present case. I agree with Mr. Banerjee in his contention that the degree of overlap - and, for that matter, the nature of overlap - between the present proceedings and the Wuhan

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

proceedings is not such as would justify the present proceedings being brought to a halt, pending disposal of the Wuhan proceedings.

102. Mere overlap of issues is not regarded, either by the law in this

country or in any other jurisdiction, as sufficient to grant anti-suit injunction. It is only where the overlap results in the foreign proceedings being rendered "oppressive or vexatious" that anti-suit injunction may be justified. If one were to examine the present case on this anvil, the position that emerges is that, while the Wuhan Court may not have been justified in granting anti-suit injunction, this Court would certainly be justified in injuncting the defendants from enforcing, against the plaintiffs, the order dated 23rd September, 2020 of the Wuhan Court. I am not convinced with the submission of Mr. Kaul that, merely because determination of a FRAND compliant royalty rate may be an issue which arises for consideration in the proceedings before this Court, and also before the Wuhan Court, the present proceedings could be regarded as oppressive or vexatious qua the Wuhan proceedings, as would justify the Wuhan Court injuncting the plaintiffs from prosecuting these proceedings. On the other hand, the order, dated 23rd September, 2020 of the Wuhan Court expressly prohibits exercise, by the plaintiffs, of their right to seek legal redressal, in accordance with the laws of this country, against perceived infringement of the suit patents.

103. Another concern, voiced by the Wuhan Court in the order dated 23rd September, 2020, as justifying grant of anti-suit injunction against the plaintiffs, is the possibility of conflicting orders being

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

passed. While so observing, the Wuhan Court has, with greatest respect, failed to take into account the fact that the relief sought by the plaintiffs before this Court does not form any part of the subject matter of the proceedings before the Wuhan Court. At best, it may be said that, if the defendants acknowledge that the plaintiff's patents are SEPs and that, in the absence of any license from the plaintiffs authorizing them to utilize the said patents, they would be in infringement thereof, this Court may have to examine the issue of fixation of a FRAND compliant royalty rate. It is only at that stage, and in those circumstances, that any kind of overlap, between the present proceedings and the proceedings pending before the Wuhan Court, could be said to arise. That overlap, if and when it may arise cannot, in my view, constitute a legitimate basis for the Wuhan Court restraining the plaintiffs from prosecuting their application for injunction against infringement of the suit patents, either at the interlocutory or at the final stage. It need hardly be stated that every overlap of issues cannot justify an anti-suit injunction.

104. I also have my reservations regarding whether the mere possibility of conflicting orders being passed could be a ground for a Court, in one sovereign country, to injunct proceedings before the Court in another, over which it has no dominion at all. I have not come across any decision which justifies this. To my mind, a step so

extreme as an anti-suit injunction cannot be justified on a mere apprehension of the possibility of conflicting orders, were proceedings in both jurisdictions to be allowed to proceed. Assuming, for the sake of argument, that one of the Courts were to arrive at a decision prior

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

in point of time to the other, it would always be open to the latter Court to follow, or distinguish, the decision of the former, or take a different view. The defendants do not seek to contend that the order of this Court would bind the Wuhan Court, or vice versa. It would, therefore, be too simplistic to treat the mere apprehension of a possibility of two views, on one issue, resulting, as justifying a Court in one sovereign jurisdiction injuncting, in its tracks, proceedings in another. In the present case, however, as the issues before this Court and before the Wuhan Court, despite some degree of overlap, are fundamentally distinct, and the proceedings before this Court could not have been preferred before any other jurisdiction, least of all Wuhan, the "conflicting orders" conundrum may not assume much significance.

105. Jurisdiction to adjudicate on the dispute in the present suit vests only in this Court

105.1 Section 104 of the Patents Act46 specifically prohibits the institution of any suit, for infringement of a patent, in any court inferior to a District Court having jurisdiction to try the suit. Section 20 of the CPC47 requires the suit to be instituted in a Court, within the

46
104. Jurisdiction
No suit for declaration under section 105 or for any relief under section 106 or for infringement of a patent shall be instituted in any court inferior to a District Court having jurisdiction to try to suit:
Provided that where our counter-claim for revocation of the patent is made by the defendant, the suit, along with the counter-claim shall be transferred to the High Court for decision."

47
20. Other suit is to be instituted where defendants reside or cause of action arises. - Subject to the limitations aforesaid, every suits shall be instituted in a Court within the local limits of those jurisdiction -
(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually involuntarily resides, or carries on business, or personally works for gain; or
(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually involuntarily resides, or carries on business, or personally works again, provided

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

local limits of whose jurisdiction the defendants reside or carry on

business, or where the cause of action arises, wholly or in part. Indeed, it is not disputed, even by the defendants, that the present suit, seeking injunction against infringement of the plaintiff's Indian suit patents IN 910, IN 912, IN 719, IN 036 and IN 182, could not have been maintained before any court outside India. Nor do the defendants dispute the territorial jurisdiction of this Court, to adjudicate and decide the present suit.

105.2 Clearly, therefore, the order, dated 23rd September, 2020, of the Wuhan Court, injuncts the plaintiff from prosecuting its suit and application for injunction, against infringement of the suit patents, which are amenable only to the jurisdiction of this Court. In other words, what has happened in the present case is that a foreign court has restrained the plaintiff from prosecuting a proceeding which is maintainable before this Court, and could not be maintained before any other Court.

106. The Wuhan Court does not have the jurisdiction to grant the relief sought by the plaintiff in IA 6440/2020. The result of allowing the anti-suit injunction order passed by the Wuhan Court to be enforced by the defendants against the plaintiff would be that the plaintiff is completely prohibited - till the Wuhan Court lifts or vacates the anti-suit injunction - from prosecuting its claim for injunction against infringement, by the defendants, of the suit patent,

that in such case either the leave of the Code is given, or the defendants who do not reside, or carry on business, or personally works again, as aforesaid, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises."

as this claim can be prosecuted only before this Court, and before no other court, least of all before the Wuhan Court. It is not, therefore, a situation in which the claim of the plaintiff could equally be prosecuted before the Wuhan Court. The Wuhan Court, which does not possess the jurisdiction to decide the issue of infringement of the plaintiff patent has, by the order dated 23rd September, 2020, interdicted the plaintiff from prosecuting the said claim before the only Court which has the jurisdiction to entertain it. The proceedings arising out of the anti-suit injunction application filed by the defendants before the Wuhan Court were, in that regard, prima facie oppressive in nature, as they were intended to altogether prevent the plaintiff from prosecuting its prayer for anti-suit injunction of the suit patent. Equally, therefore, the order, dated 23rd September, 2020, of the Wuhan Court, allowing the prayer of the defendants in the said anti-suit injunction application, but also, prima facie, be oppressive to the plaintiff even on this sole ground.

107. It is obviously disingenuous, on the part of the defendants, to

contend that the order of the Wuhan Court merely suspends, and does not altogether foreclose, the plaintiffs from pursuing the present claim for injunction against the defendants. There being no other forum before which the plaintiffs could agitate their claim against infringement, it is totally unthinkable that a forum which has no jurisdiction in that regard could injunct the plaintiffs from agitating the issue before the only forum which has. Such injunction cannot be allowed to continue even for a single day. That apart, it is common knowledge - which is why I characterize the contention as

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

disingenuous - that, in intellectual property infringement claims, what matters is injunction of the exploitation of the infringing patent, or trade mark, or copyright. What is intended to be prevented, therefore, is assault on the intellectual property integrity of the holder of the intellectual property. The defendants have not chosen to undertake not to use the technology, involving the allegedly infringed suit patents, during the pendency of the Wuhan proceedings. What the defendants suggest is, therefore, that the plaintiffs should sit back and helplessly watch continued infringement of their suit patents by the defendants (as the plaintiffs would allege) without being able to lift a finger to prevent it, even while legal remedies, for redressal, continue to remain available in this country under the Patents Act. This would, clearly, render the Patents Act, and the statutory guarantees available thereunder, both otiose and impotent. Damages are but poor solace, once the damage itself is done.

108. For this reason, the submission of Mr. Kaul that, in order to avoid an "unseemly race" to obtain a decree, the prayer for anti-enforcement injunction of the plaintiff sought to be rejected, fails to impress. The question of an "unseemly race" would arise where the nature of the reliefs sought by the plaintiffs in the defendants is similar. It is not so in the present case. The plaintiffs seek injunction against infringement of their suit patents, whereas the defendants seek fixation of a global FRAND rate, for the entire portfolio of the plaintiffs' patents. The plaintiffs and the defendants are not, therefore, racing towards the same goal.

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

109. Before concluding the discussion, it is necessary to deal with the Microsoft30 decision, on which Mr Kaul placed considerable emphasis. As already noted in para 75 supra, a specific contention, advanced before the Court of Appeal, that grant of anti-suit injunction would disable Motorola from enforcing its German patents before the

only court competent to adjudicate thereon, was rejected. The Court of Appeal felt that this submission, of Motorola, "exaggerated" the scope of the injunction, as Motorola could continue, despite the anti-suit injunction, to continue agitating for damages or other non-injuncting remedies. With respect, this finding, in my view, is completely unacceptable, and I am constrained, therefore, to express my inability to concur therewith. It completely undermines, in my opinion, the very sanctity of intellectual property rights, by treating damages, or "other non-injunctive reliefs" as sufficient succour, for the plaintiff seeking relief against infringement of its patents. At least in the regime of the Patents Act in this country, such a position is totally unacceptable. The right to seek remedy against infringement of patents, validly held by the plaintiff, is a pre-eminent right, with the right to claim damages being residuary in nature, and not vice versa. I express my respectful disagreement, further, with the observation, of the Court of Appeal, that the argument of Motorola "exaggerated" the scope of the injunction sought by it. Rather, in my considered view, the observations of the Court of Appeal undermine the scope of the injunction sought by Motorola. The orders in the IPCom-Lenovo orders, rather, in my view, postulate the correct legal position, which is that a sovereign court in one jurisdiction cannot injunct proceedings in a sovereign court in another jurisdiction, especially in the realm of

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

infringement of intellectual property rights, which are maintainable only before such latter court, and none other. Any such injunction would amount to an assault on the rights of the litigant before the latter court and, in the absence of cogent and convincing material to indicate that the continuation of the proceedings before the latter Court would be oppressive or vexatious to the proceedings pending before the former, would be totally unjustified in law. Injunction against enforcement thereof would, therefore, in my view be eminently justified.

My concluding view

110. In my view, therefore, it is totally impermissible for a Court in one sovereign jurisdiction to injunct the party before it from pursuing its cause against infringement of its intellectual property before another sovereign jurisdiction, where such latter jurisdiction is the only forum competent to adjudicate the claim of infringement, save and except where continuation of the infringement proceedings are vexatious or oppressive to the proceedings pending before the former, injuncting, court. The mere fact that one or other aspect of the controversy may overlap cannot be a ground to grant such injunction. Nor can the consideration of the two courts arriving at differing decisions on that part of the issue which may overlap be regarded as sufficient to grant such injunction, which would result in denying the plaintiff seeking injunction against infringement the right to agitate such claim before the only forum competent to adjudicate thereon.

Such injunction would be ex facie destructive of the principle of

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

comity of courts. It cannot be tolerated even for a day. A clear case for injuncting enforcement, against the plaintiff, before the court before whom the action for infringement is brought, of such a diktat is, therefore, made out. Grant of anti-enforcement injunction is, therefore, imperative in such a case.

111. The right of the citizen, in this country, to legal redressal to ventilate his legitimate rights, is hallowed, sacred, and fundamental. It is a sanctified and preambular constitutional goal, and derives sustenance from the most sublime of our fundamental rights, including those consecrated by Articles 14 and 21. It is an inviolable and inalienable facet of access to justice.48 It triumphantly carries forward the torch lit, over two centuries ago, by Chief Justice Marshall in Marbury v. Madison49 which hailed the right to obtain civil redress as "the very essence of civil liberty". What the order of the Wuhan Court does, unfortunately, is to deny, to the plaintiffs, the right to even flavour this essence, without due justification.

112. Specifically in the Indian context, our Constitution guarantees "justice, social economic and political" to every citizen. This guarantee cannot be sacrificed at the altar of comity.

Concealment, lack of fairness and transparency by the defendants before this Court

113. One more aspect remains, regretfully, to be addressed.

48 Refer Anita Kushwaha v. Pushp Sudan, (2016) 8 SCC 509

49 5 US (1 Cranch) 137 (1803)

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

114. Despite the emphatic assertions to the contrary by Mr. Kaul, I am constrained to observe that the defendants have, in these proceedings, been less than fair, not only to the plaintiffs, but also to this Court. Even in the proceedings before this Court, no copy, of the anti-suit injunction application, filed by them before the Wuhan Court, was ever furnished by the defendants to the plaintiffs - or,

indeed, even to this Court. Most disturbingly, even in the reply dated 25th August, 2020, filed by the defendants in response to IA 6440/2020, while reference is to be found to the complaint filed before the Wuhan Court, there is conspicuous absence of any reference to the anti-suit injunction application filed in the said proceedings. After the anti-suit injunction application was filed, the present proceedings were listed before this Court on as many as six occasions, before passing of the ad interim order, in the present application, on 9th October, 2020, but the respondents never disclosed the fact of filing of the anti-suit injunction application. A transparent intent, to keep the plaintiffs, as well as this Court, in the dark, regarding the filing of the anti-suit injunction application, and the passing of the order, thereon, it is apparent. In my view, such an attitude, in a commercial litigation such as the present - or, for that matter, in any proceeding in a court - is completely intolerable. It amounts to fraud on the Court as well as material concealment from the plaintiffs. Even on this sole ground, I am convinced that the defendants deserve to be injuncted from enforcing, against the plaintiffs, the order dated 23rd September, 2020, of the Wuhan Court, passed in such circumstances.

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

115. The inaction, on the part of the plaintiffs, in responding to the summons issued by the Wuhan Court in the complaint of the defendants, cannot wish away this default. Even as on date, the plaintiffs are not opposing the continuation of the proceedings in the Wuhan complaint. It is completely unfair, therefore, on the part of the defendants, to seek to capitalize on that default, in an attempt to justify the passing of the anti-suit injunction, by the Wuhan Court, without the plaintiffs even been made aware of the pendency, or even the filing, of the anti-suit injunction application.

Re. Prayer (iv)

116. Prayer (iv), which Mr. Banerjee pressed, seeks imposition of costs, on the defendants, equivalent at least to the "fine" with which the order, dated 23rd September, 2020, of the Wuhan Court, mulcts the plaintiffs, in the event they continue to prosecute their application for injunction before this Court. The prayer has merit. One of the defences taken by the defendants is that they are powerless to prevent any order, by the Wuhan Court, requiring the plaintiffs to pay the said fine, for disobeying the anti-suit injunction granted by the Wuhan Court and continuing to prosecute their application for interim injunction before this Court. Once it has been found that enforcement of the anti-suit injunction order of the Wuhan Court, by the defendant against the plaintiffs, deserves to be injuncted, it follows merely as a sequitur that the plaintiffs cannot be fastened with the "fine" imposed by said order of the Wuhan Court. Mr. Kaul submits that this Court

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Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:06.05.2021
16:24:51

should not interfere with the manner in which the Wuhan Court, being a court in another sovereign jurisdiction, seeks to enforce its orders. I agree. It is, quite obviously, not permissible for this Court to restrain the Wuhan Court from passing any order. The defendants, however, contend that the Wuhan Court order is self enforcing its character, in that it becomes enforceable, with respect to the fine which the plaintiffs would have to pay there under, without any intervention by the defendants. Equally, submit the defendants, they cannot restrain such enforcement, should the Wuhan Court seek to do so. The fine, which would have to be so paid, according to the defendants, would augment the treasury, not of the defendants, but of the Wuhan Court. The defendants claiming helplessness in this regard, the only manner in which succour can be granted to the plaintiffs, as regards the said fine, is by directing the defendants to, in the event of the Wuhan Court directing payment of the fine by the plaintiffs, indemnify the plaintiffs by directing deposit, by the defendants, of the amount so directed by the Wuhan Court with this Court, so that the plaintiffs could withdraw the amount and stand recompensed. This follows as a natural corollary to the restraint, of the execution of the Wuhan Court order against the plaintiffs, on plain principles of restitution.

117. Additionally, the direction for such indemnity, by the defendants in favour of the plaintiffs, would also be justified in view of the fact that the defendants have resorted to unfair practice in securing the order from the Wuhan Court, keeping the plaintiffs, as well as this Court, in the dark, throughout. The financial implications of this direction are, no doubt, prohibitive but, if the Wuhan Court,

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Signing Date:06.05.2021
16:24:51

towards enforcement of its anti-suit injunction order, directs payment of the fine, the brunt has to be borne either by the plaintiff or the defendants. Given the findings heretofore, it would be the defendants who have to suffer.

The troika considerations

118. Applying the troika test of prima facie case, balance of convenience and irreparable loss, therefore, grant of anti-enforcement injunction, as sought by the plaintiffs, would be eminently justified. The plaintiff has a clear prima facie case against enforcement of the order by the defendants, in view of the findings heretofore. If the order were to be permitted to be enforced, irreparable loss is bound to occur to the plaintiffs, as the plaintiffs would be unable to prosecute the only remedy available to them against the (perceived)

infringement of their suit patents, and would also stand exposed to the fine imposed by the Wuhan Court for pursuing their legitimate legal remedies in this country. As the plaintiffs are not seeking any restraint against the defendants continuing to prosecute their complaint before the Wuhan Court, whereas the order of the Wuhan Court brings the present proceedings to a grinding halt, without due justification, the balance of convenience would also be in favour of grant of anti-enforcement injunction as sought.

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Signing Date:06.05.2021
16:24:51

F. Conclusion

119. In view of the above discussion, this application is allowed in the following terms and to the following extent:

(i) The ad interim injunction granted by this Court on 9th October, 2020 is made absolute, pending disposal of CS (COMM) 295/2020. The defendant shall remain restrained, during the pendency of the present suit, from enforcing, against the plaintiffs, the order dated 23rd September, 2020, passed by the Wuhan Court.

(ii) In the event of any orders been passed by the Wuhan Court, or any other measures being taken, against the plaintiffs, towards deposit of the fine of RMB 1 million per day, as directed by the order dated 23rd September, 2020 of the Wuhan Court, the defendants shall, within one week of passing of the said order (which period may be reduced or extended at that stage, if necessary), secure such amount of fine, imposed on the plaintiffs, by depositing, with the Registrar General of this Court, an equivalent amount, by way of crossed cheque/demand draft, and the plaintiff shall be entitled, on such deposit, to withdraw the said amount, or have been transferred to the account of the plaintiffs.

(iii) As the plaintiffs have not pressed the prayer, in this application, for a direction to the defendants to withdraw the

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Signing Date:06.05.2021
16:24:51

complaint filed by them before the Wuhan Court, no orders are being passed on the said prayer which is, accordingly, disposed of.

C. HARI SHANKAR, J.

MAY 3, 2021 dsn/ss/rbararia