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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CS(COMM) 628/2023, I.A. 17216/2023, I.A. 17217/2023, I.A.
17218/2023 & I.A. 17219/2023

Reserved on: 31 October 2023
Pronounced on: 1 November 2023

ITW GSE APS & ANR. Plaintiffs
Through: Mr. Pravin Anand, Ms. Vaishali
Mittal, Mr. Gursimran Singh Narula and Mr.
Siddhant Chamola, Advs.

versus

DABICO AIRPORT SOLUTIONS
PVT LTD & ORS. Defendants
Through: Mr. Saikrishna Rajagopal, Mr.
Himanshu Bagai, Ms. Garima Sawhney, Ms.
Deepshikha Sarkar and Ms. Bhanu, Advs.
for Defendants 1 to 3
Ms. Bitika Sharma, Mr. Sudeep Chatterjee,
Mr. Rohan Swarup, Mr. Rakesh Karela, Mr.
George Vithayathil and Mr. Tanya Arora,
Advs. for Defendant 4

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

% **J U D G M E N T**

I.A. 17217/2023 (Order XXVI Rules 4, 9 and 10 of the CPC)

1. By this application, the plaintiffs seek appointment of a local Commissioner to visit the premises of Defendants 1 and 4 and execute a commission in terms of the prayer clause, which is contained in para 12 of the application, and which reads as under:

“12. Therefore, it most humbly and respectfully prayed before this Hon’ble Court that it may be pleased to pass the following orders:



(i) Appoint a Local Commissioner to visit the address belonging to the Defendant No. 1, Defendant No. 4, which is identified by them as being the address where the Defendants' PCA units as identified in paragraph 7 of this application are stored and are available for inspection by the Learned Local Commissioner, and empower the said Local Commissioner to perform the following acts:

(a) Enable the representatives of the Plaintiffs to inspect such PCA units of the Defendants, so as to prepare a technical report mapping the claims of the Plaintiffs' patent IN '145 with the features of the Defendants' said products to demonstrate infringement of IN '145;

(b) Demand the details and disclosure of other locations where the Defendant's PCA units are stored, and to visit any other premises where such activities are carried out to inspect and audit them in the same manner as enumerated in Prayer 12 (i) (a) above;

(c) Inspect, make a copy and file such copies of all books of accounts including ledgers, cash books, purchases and sales records, profit and loss accounts, invoices etc. pertaining to the Defendants' PCA units;

(d) Break open locks in furtherance of the aforesaid purposes, in the event there is any obstruction caused to the Local Commissioner;

Any further orders as this Hon'ble Court may deem fit and proper in the facts and circumstances may also be passed in favour of the Plaintiff and against the Defendant."

2. I asked Mr. Pravin Anand, learned Counsel for the plaintiffs, whether he was aware of any precedent in which a prayer, such as the above, has been granted by any Court. He candidly answered in the negative, though he submitted that the decision of a coordinate Single Bench of this Court in *Sotefin SA v. Indraprastha Cancer Society*




*and Research Center*¹ comes close to doing so. Given the vastness of Mr. Anand's experience, it appears that the issue in controversy in this application is, therefore, *res integra*.

3. CS (Comm) 628/2023, in which the present application has been filed, alleges that the PCAs (Preconditioned Air Units) manufactured by the defendants of certain specified series and models infringe Indian Patent No. IN 330145 (IN'145) (hereinafter "the suit patent"), registered in the plaintiffs' favour. Mr. Anand, during the course of arguments on this application, pointed out that the allegation of infringement, by the defendants, of the Suit Patent had not been made in vacuo and that the plaintiffs have, in fact, mapped the features of the aforesaid PCAs manufactured by the defendants with the claims in the suit patent, based on the defendants' brochures, the defendants' Instruction Manual and a Request For Proposal issued by the defendants pursuant to a notice inviting tenders.


4. The mapping as carried out on the basis of the Defendant 4's brochure has been filed along with plaint and reads thus:

Claim mapping of IN 330145 with MAK brochure


<p>Feature 1.1 (claim 1)</p> <p><u>A preconditioned air unit (10) for supplying preconditioned air to an aircraft parked on the ground, the preconditioned air unit comprising:</u></p>	
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¹ 2022 SCC OnLine Del 516

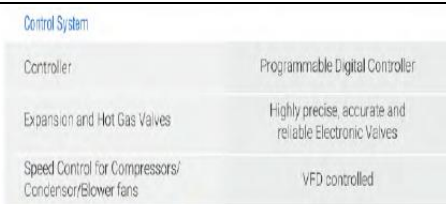


<p>Feature 1.2 (claim 1)</p> <p>a housing (12) accommodating a flow duct (20) with an air inlet for ambient air and an air outlet for connection to the parked aircraft</p>	<p>Supply air</p> <ul style="list-style-type: none"> Air Flow kg/s (lbs/min) Outlet Pressure @ Max .Air Flow Pascal Pa (inchesWC) Unit Outlet Air Temperature Degrees °C (degrees °F) Aircraft Outlet Hose(s) Nominal Tons 		
<p>Feature 1.3 (claim 1)</p> <p>a blower (30) connected with the flow duct (20) for generation of an air flow from the air inlet (22) toward the air outlet (25)</p>	<p>Centrifugal blower</p> <ul style="list-style-type: none"> Type of blower fan (incl. material of construction) Blower Speed Blower Motor Rating kW (Hp) Blower Quantity 		
<p>Feature 1.4 (claim 1)</p> <p><u>a plurality of refrigeration systems</u> (36), wherein each refrigeration system comprises: <u>at least one compressor</u> (38); at least one condenser (40); at least one expansion valve (42); at least one evaporator (44) connected in a flow circuit containing a refrigerant, and wherein the at least one evaporator (44) interacts with the air flow in the flow duct (20); and <u>at least one variable frequency driver</u> (46, 54, 56) for power supply of the at least one compressor (38); and</p>	<p>Control System</p> <ul style="list-style-type: none"> Controller Expansion and Hot Gas Valves Speed Control for Compressors/ Condensor/Blower fans Compressors/Condensers/Evaporators Type of Compressor Quantity Stages Rating * Coils <table border="1" data-bbox="775 1868 1326 1951"> <tr> <td>Speed Control for Compressors/ Condensor/Blower fans</td> <td>VFD controlled</td> </tr> </table>	Speed Control for Compressors/ Condensor/Blower fans	VFD controlled
Speed Control for Compressors/ Condensor/Blower fans	VFD controlled		



<p>Feature 1.5 (claim 1)</p> <p>the housing (12) further accommodates a <u>central controller (60)</u> that is <u>configured for controlling operation of the preconditioned air unit (10)</u> including the variable frequency drivers (46, 54, 56) of the plurality of refrigeration systems (36), characterized in that</p>	<p>Control panel layouts allow for easy maintenance and access.</p> 						
<p>Feature 1.6 (claim 1)</p> <p>the at least <u>one variable frequency driver (46;54;56)</u> has a controller that is configured for variation of the output frequency of the at least one variable frequency driver (46, 54, 56)</p>	<p>Control System</p> <table border="1"> <tr> <td>Controller</td> <td>Programmable Digital Controller</td> </tr> <tr> <td>Expansion and Hot Gas Valves</td> <td>Highly precise, accurate and reliable Electronic Valves</td> </tr> <tr> <td>Speed Control for Compressors/ Condensor/Blower fans</td> <td>VFD controlled</td> </tr> </table>	Controller	Programmable Digital Controller	Expansion and Hot Gas Valves	Highly precise, accurate and reliable Electronic Valves	Speed Control for Compressors/ Condensor/Blower fans	VFD controlled
Controller	Programmable Digital Controller						
Expansion and Hot Gas Valves	Highly precise, accurate and reliable Electronic Valves						
Speed Control for Compressors/ Condensor/Blower fans	VFD controlled						
<p>Feature 1.7 (claim 1)</p> <p>and the central controller (60) is connected to at least one controller of the at least one variable frequency driver (46;54;56)</p>	<p>Control System</p> <table border="1"> <tr> <td>Controller</td> <td>Programmable Digital Controller</td> </tr> <tr> <td>Expansion and Hot Gas Valves</td> <td>Highly precise, accurate and reliable Electronic Valves</td> </tr> <tr> <td>Speed Control for Compressors/ Condensor/Blower fans</td> <td>VFD controlled</td> </tr> </table>	Controller	Programmable Digital Controller	Expansion and Hot Gas Valves	Highly precise, accurate and reliable Electronic Valves	Speed Control for Compressors/ Condensor/Blower fans	VFD controlled
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<p>Feature 1.8 (claim 1)</p> <p>wherein the <u>central controller (60)</u> automatically adjusts the cooling performed by the preconditioned air unit (10) to at least one of: <u>the selected type of aircraft, the ambient temperature, the humidity, the cabin temperature, the outgoing temperature</u> and</p> <p>the outgoing airflow from the preconditioned air unit (10)</p>	<p>Aircraft types served (Aircraft-Unit compatibility to maintain 24°C (75°F) Cabin)</p> <table border="1"> <tr> <td>Regional Jet</td> </tr> <tr> <td>Narrow Body, B737, A319/20/21</td> </tr> <tr> <td>Wide Body, B767, B787, A310</td> </tr> <tr> <td>Code E, B747, A350, B777, A340</td> </tr> </table>	Regional Jet	Narrow Body, B737, A319/20/21	Wide Body, B767, B787, A310	Code E, B747, A350, B777, A340		
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Code E, B747, A350, B777, A340							
<p>Claim 4</p> <p>The preconditioned air unit (10) as claimed in claim 1, wherein the housing (12) accommodates at least <u>one variable frequency driver (54)</u> connected for power supply of at least one condenser fan (48) for generation of an airflow interacting</p>	<p>Control System</p> <table border="1"> <tr> <td>Controller</td> <td>Programmable Digital Controller</td> </tr> <tr> <td>Expansion and Hot Gas Valves</td> <td>Highly precise, accurate and reliable Electronic Valves</td> </tr> <tr> <td>Speed Control for Compressors/ Condensor/Blower fans</td> <td>VFD controlled</td> </tr> </table>	Controller	Programmable Digital Controller	Expansion and Hot Gas Valves	Highly precise, accurate and reliable Electronic Valves	Speed Control for Compressors/ Condensor/Blower fans	VFD controlled
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with the at least one condenser (40) of the plurality of refrigeration systems (36).	
Claim 5 The preconditioned air unit (10) as claimed in one of claims 1 to 3, wherein the housing (12) accommodates a <u>variable frequency driver (56) connected for electrical power supply of the blower (30).</u>	

5. The mapping done on the basis of the defendants' Instruction Manual and the Request For Proposal have been filed as confidential documents by the plaintiffs. I refrain, therefore, from reproducing them in this order. Suffice it to state, however, that the plaintiffs have carried out detailed mapping of the claims in the Suit Patent with the features of the defendants' allegedly infringing PCAs.

6. The Defendants 1 and 4 have, in its response to the present application, contended that the application seeks to initiate a roving and fishing enquiry. The prayer for appointment of a Local Commissioner to visit the premises of the defendants, merely to engage into such a roving and fishing enquiry is, according to the defendants, and as argued by Mr. Rajagopal, abuse of process.

7. I also queried of Mr. Anand as to the justification for the prayers in this application, when the plaintiffs have already mapped the claims in the Suit Patent with the features of the allegedly infringing PCAs not once but thrice. Mr. Anand, in response, while seriously refuting the defendants' allegation that the present



application was intended to initiate a roving and fishing enquiry, submits that the application was essentially intended to confirm the aspect of infringement of the Suit Patent by the defendants' PCAs, on a physical assessment.

8. Appointment of a local Commissioner for carrying out such a confirmatory exercise, he submits, is well within the scope of the Court's authority under various statutory provisions. Mr. Anand relies, in this regard, on Order XXVI Rule 10A of the Code of Civil Procedure, 1908 (CPC), Order XI Rule 3(2) of the CPC as amended by the Commercial Courts Act, 2015, Order XI Rule 5(4) of the CPC as amended by the Commercial Courts Act and Rules 5(1) and (3) of the High Court of Delhi Rules Governing Patent Suits, 2022 (hereinafter "the DHC Patent Rules"). These provisions read as under:

Order XXVI Rule 10A of the CPC

10-A. Commission for scientific investigation.— (1) Where any question arising in a suit involves any scientific investigation which cannot, in the opinion of the Court, be conveniently conducted before the Court the Court may, if it thinks it necessary or expedient in the interests of justice so to do, issue a commission to such person as it thinks fit, directing him to inquire into such question and report thereon to the Court.

(2) The provisions of Rule 10 of this Order shall, as far as may be, apply in relation to a Commissioner appointed under this rule as they apply in relation to a Commissioner appointed under Rule 9.

Order XI Rule 3(2) of the CPC as amended by the Commercial Courts Act, 2015

“3. *Inspection* -



(2) Any party to the proceedings may seek directions from the Court, at any stage of the proceedings, for inspection or production of documents by the other party, of which inspection has been refused by such party or documents have not been produced despite issuance of a notice to produce.”

Order XI Rule 5(4) of the CPC as amended by the Commercial Courts Act

“5. *Production of documents.* – *****

(4) The Court may draw an adverse inference against a party refusing to produce such document after issuance of a notice to produce and where sufficient reasons for such non-production are not given and order costs.”

Rule 5(1) and (3) of the DHC Patent Rules

“5. **First hearing of the suit.** –

(i) At the first hearing, the patentee may seek an interim injunction as also appointment of a Local Commissioner for inspection, *etc.* If appointment of a Local Commissioner is being prayed for, the specific premises where the product is being manufactured or the process is being implemented, be ascertained and mentioned in the application.

(iii) In order to assist the Local Commissioner, technical experts from both sides may be permitted to be present at the time of execution of the commission. The Local Commissioner shall address any issues of confidentiality, if raised by either party, at the time of execution of the commission by filing the said confidential information before the Court in a sealed cover for further orders.”

9. Mr. Anand also relies on the judgment of the Supreme Court in *Committee of Management Anjuman Intezamia Masjid, Varanasi v. Rakhi Singh*² (“*Anjuman Intezamia*”, hereinafter), the judgment of

² 2023 SCC OnLine SC 980



the High Court of Karnataka in *Shadaksharappa v. Kumari Vikayalaxmi*³ and the judgment of a learned Single Judge of this Court in *NBCC (India) Ltd. v. Ramacivil India Construction Pvt Ltd*⁴. He also submits that a similar exercise had been undertaken by a Coordinate Bench of this Court in *Sotefin SA* and that various other learned Single Benches have, albeit on concession, passed such orders, in which regard he cites order dated 13 December 2023 passed by a learned Single Judge in *J.C. Bamford Excavators Ltd. v. Preet Agro Industries Pvt Ltd*⁵, order dated 12 December 2011 in *J.C. Bamford Excavators Ltd v. Bull Machines Pvt Ltd*⁶ and orders dated 23 April 2015 and 17 August 2015, in CS(OS) 3062/2012 (*Hadley Industries Overseas Holdings Ltd. v. Ashfaque Khan*).

10. On the attention of Mr. Anand being drawn, by the Court, to the fact that Order XXVI Rule 10A applies where a question as arisen before the Court requiring scientific investigation, Mr. Anand submits that this requirement is obviously met, as the plaintiffs are alleging infringement, by the defendants, of the suit patent and the defendants are denying the allegation. A question requiring scientific investigation, according to Mr. Anand, *ipso facto* stands made out even on this basis, as, in adjudicating an issue of patent infringement, especially in a case such as the present, several esoteric scientific issues would arise for consideration, which would require scientific investigation for resolution.

³ 2023 SCC OnLine Kar 53

⁴ 2023 SCC OnLine Del 5472

⁵ CS(OS) 2482/2013

⁶ CS(OS) 2934/2011



11. Apropos the concern expressed by the defendants in their replies to the present application to the effect that allowing the plaintiffs' prayers would result in disclosure of confidential information of the defendants. Mr. Anand submits that this apprehension can easily be allayed by appointing an independent expert, instead of the plaintiffs' own man, to execute the local commission as prayed in the application and, if necessary, directing the expert's opinion to be placed in a sealed cover, or disclosed only to members of a confidentiality club that the Court could set up. Mr. Anand submits that his client is agreeable to any safeguard that the Court may deem necessary to put in place in order to ensure that the defendant's confidential data remains confidential. He submits that the present application has been necessitated only because the defendant's PCAs are huge machines, which are already installed at various locations in the Airport, and cannot possibly be transported or examined, save and except in the manner suggested by the plaintiffs in the present application.

12. Mr. Anand has also placed reliance on para 4 of the reply filed by Defendant 1 to the present application, which reads as under;

“4. It is respectfully submitted that the application under reply is nothing more than a fishing and roving inquiry and a complete and utter abuse of process of law. The sole and mala fide intention of the Plaintiffs is to acquire confidential information of the Defendant No. 1 's PCA units which is not in public domain. The motive of the application is to gain access to the Defendant No. 1 's PCA units to enable the Plaintiffs to secure the crucial information of the Defendant No. 1 which is not in public domain. Had the real intention of the Plaintiffs been to get an independent, unbiased and conclusive claim mapping of the Defendant No. 1 's PCA units against the Suit Patent, the Plaintiffs would have sought the



appointment of an independent scientific advisor under Section 115 of the Patents Act, 1970 or a technical expert who would have accessed the Defendant No. 1 's PCA units and formed an independent view. Instead the mala fide and bad faith intent of the Plaintiffs is writ large on account of the Plaintiffs seeking the leave of the Hon'ble Court to appoint a Local Commissioner to permit the Plaintiffs representative to access and examine the Defendant No. 1 and Defendant No.4's products.”

He submits that Defendant 1 has, thus, in the afore-extracted para 4 of its reply to the present application, impliedly consented to execution of a local commission as sought in the application, with the sole caveat that the commission be executed not by the plaintiff's representative, but by an independent expert. Mr. Anand submits that his client has no objection to the said suggestion.

13. The present application having been thus preferred *ex debito justitiae*, Mr. Anand prays that it may be allowed in terms of the prayers contained therein.

14. Appearing for Defendants 1 to 3, Mr. Saikrishna Rajagopal submits that the present application is wholly lacking in *bona fides* and is merely intended to embarrass the defendants. He submits that the units in question are already installed at various locations and, if a local commissioner is permitted, under orders of the Court, to undertake the exercise that the plaintiffs seek, it would cause needless embarrassment to the defendants, especially as the defendants are leading bidders in government contracts for installation of such PCAs.

15. Mr. Rajagopal submits that a local Commissioner can be appointed either to secure evidence which has been obtained, or to



obtain evidence which is otherwise not available. The plaintiffs, he submits, have mapped the claims in the suit patent with the features of the defendants' PCAs, in the present case, not once but thrice. These mapping exercises, he submits, are more than sufficient to empower the plaintiffs to urge a plea of infringement against the defendants if, in fact, such a case of infringement is made out. Having thus mapped the claims in the Suit Patent to the features of the impugned PCAs on multiple occasions, Mr. Rajagopal submits that there is no justification, whatsoever, for a prayer to execute a local commission in the terms sought in this application.

16. Having said that, Mr. Rajagopal submits that if, at any subsequent stage of the present proceedings, the Court has any doubt, or feels that the material already on record is insufficient for it to arrive at a conclusion on the aspect of infringement, the Court can, even at that stage, appoint a local commissioner in terms of Order XXVI Rule 10 of the CPC. This, in fact, he submits, was the exercise which this Court undertook in *Sotefin SA*. At this stage, he submits that, having provided three detailed mapping charts along with the plaint, the plaintiffs cannot seek, by means of the present application, to use the Court to procure additional evidence to support its case.

17. Mr. Rajagopal also submits that, in a case such as this, the Court should balance the benefit to the plaintiffs with the hardship to the defendants. Should the need arise for appointment of a local commissioner, as sought in the present application, at any subsequent stage, the Court would always be within its authority to do so. Doing



so at this stage, without sufficient justification, and without the Court being satisfied that such an exercise is absolutely necessary, would seriously prejudice the commercial interests of the defendants.

18. As a final submission, Mr. Rajagopal urges that the plaintiffs can always seek recourse to Order XI Rule 2 of the CPC as amended by the Commercial Courts Act, by seeking response from the defendants on interrogatories. There is no justification, therefore, for the plaintiffs to seek appointment of a Local Commissioner to proceed to the premises where the defendants' PCAs are installed and carry out a mapping exercise.

19. Mr. Rajagopal, therefore, prays that the application may be rejected as, firstly, it is bereft of *bona fides*; secondly, the law does not permit such an exercise to be undertaken; and thirdly, the commercial interests of the defendants would be seriously prejudiced if such an exercise is permitted to be undertaken at this stage.

20. Insofar as para 4 of Defendant 1's reply to the present application is concerned, Mr. Rajagopal submits that Defendant 1 has not conceded, in the said paragraph, to the grant of the prayers in the present application. The reference to the plaintiffs having sought appointment, not of independent scientific advisor, but of its own representative to carry out the commission, he submits, was only to highlight the want of *bona fides* in the application, and not for any other purpose.



21. Thus, submits Mr. Rajagopal, the present application merits dismissal.

22. Ms. Bitika Sharma, appearing for Defendant 4, submits that her client merely manufactures the PCAs for Defendants 1 to 3 and supplies it to them. She submits that there are no PCAs available in her premises as on date. However, her client also undertakes contract work for the Ministry of Defence and the Defence Research Development and Organisation (DRDO), which involves serious security concerns and, therefore, granting of the prayers in the present application would also be subversive of national security.

23. In rejoinder, Mr. Anand submits that he is not insisting on the local commission being carried out at the premises of any of the defendants. He submits that the commission could be executed wherever the machines are available or installed. Apropos the prejudice and embarrassment that Mr. Rajagopal apprehends, Mr. Anand submits that, he is willing to subject the grant of the prayers in this application to any safeguard that this Court may see fit to put in place to allay such misgivings.

24. Mr. Anand has, in this context, also invited attention to para 20 of the reply to the present application, filed by Defendants 1, which reads thus:

“20. It is further submitted that the Defendant No. 1 undertakes to provide any other relevant information or specifications as sought by the Plaintiffs by way of interrogatories, in accordance with law. The Plaintiffs have further filed brochures of the Defendant No. 1 products (PCA Units of Model Nos. PDX45-IS and PDX60-IS) and other documents which contain the entire



features and specifications of the PCA units of the Defendant No.1, which allegedly infringe the Suit Patent. It is submitted that only the model nos. PDX45-IS and PDX60-IS have been installed by the Defendant No. 1 at Greenfield International Airport (Goa) and Rajiv Gandhi International Airport (Hyderabad). In light of para 58 of the Plaintiff, the need for inspecting the Defendant No. 1 's products at various airports may perhaps have arisen if the Defendant No. 1 was denying the brochures of the Defendant No. 1. Defendant No. 1 does not deny the said brochures' correctness. In view of the same, it is reiterated that admittedly, as per paragraph 58 of the Plaintiff the Plaintiffs' have all the information and evidence as required by them. In light of the fact that the information as sought by the Plaintiffs is already available with them, the present Application for appointment of a local commissioner is liable to be rejected.”

Analysis

25. I may straightaway note that the aspect of embarrassment to the defendants are really tangential to the issue at hand. If, in fact, the plaintiffs are entitled to grant of the prayers in this application, the court would not hold its hands merely because such grant of the said prayers may result in embarrassment to the defendants. The Court has always to act *ex debito justitiae* and keeping the primordial interests of justice in mind. Commercial interests of rival parties cannot triumph over the interests of justice, which would include the requirement of the Court having, before it, all necessary information in order to dispassionately and effectively adjudicate the *lis*.

26. I now proceed to examine whether the prayers in this application can be granted under any of the provisions that Mr. Anand has sought to invoke. Admittedly, there is no judicial precedent on the issue.



Order XXVI Rule 10A of the CPC

27. Order XXVI Rule 10A can be broken into following ingredients:

- (i) One or more of questions which arise in the suit before court must involve scientific investigation.
- (ii) It should not be possible to conduct that scientific investigation conveniently before the court.
- (iii) Issuance of the commission, in terms of the sub-rule, must be necessary or expedient in the interests of justice.

Of these three requirements, the first is a substantive requirement of the Rule, whereas the second and third requirements essentially are matters within the discretion of the Court.

28. The very first requirement of Order XXVI Rule 10A is that the suit must give rise to a question, for the determination of which scientific investigation is necessary. No doubt, the words used in the rule are “where any question arising in a suit involves any scientific investigation”. They can, however, in my opinion, be meaningfully interpreted only as “where any scientific investigation is involved *for determination of* any question arising in a suit”. I am sanguine that, in so holding, I am not rewriting the statute, but merely according, to the words that the statute employs, a meaningful interpretation.



29. The sequitur would be that it is only where the court is considering the questions involved in the suit that the stage for invocation of Order XXVI Rule 10A would arise. Moreover, the scientific investigation must be necessary for the court to determine the said question. The Court cannot, without due justification, set a local commission in place under Order XXVI Rule 10A, to make enquiries.

30. Even where the court finds that one or more of the questions that arise in the suit involves scientific investigation, the issuance of a commission under Order XXVI Rule 10A has to be preceded by a decision, by the Court, that it is necessary or expedient in the interests of justice to do so.

31. The invocation, by Mr. Anand, of Order XXVI Rule 10A stands defeated even by Mr. Anand's own submission that he is seeking issuance of a commission, as prayed in this application, *to confirm the material which is already with his client, and which, as per the averments in the following passage from the plaint, is by itself sufficient to make out a case of infringement:*

*“58. Having mapped the claim 1 and other claims of the Suit Patent three different documents, the Plaintiffs have sufficient proof that the Suit Patent is being infringed by the products manufactured and sold by the Defendants. The Plaintiffs request the appointment of a local commission authorising an inspection of the Defendants' PCA units *to unequivocally demonstrate that the Defendants' PCA units map to the Plaintiff's suit patent.* As stated earlier, the Defendants' PCA units are not ordinarily available in the market, which could enable the Plaintiff to purchase them and test them for the purposes of claim-mapping and demonstrating infringement. The said PCA units are operational at various*



airports in the country, or may be available in the warehouses or some other location of the Defendants. *Resultantly, an inspection under the supervision of a Local Commissioner, in the presence of representatives of the Plaintiffs is imperative to present the best evidence of infringement by the Defendants of the Plaintiffs' suit patent.*"

(Emphasis supplied)

32. In a similar strain, para 6 of the present application asserts thus:

"6. The Plaintiff has demonstrated that the Defendants' PCA units infringe the claims of the suit patent IN'145 by comparing the said claims, to the specifications and features of the Defendants' PCA units."

(Emphasis supplied)

The paragraph goes on to cite the documents from which the features and specifications of the defendants' products have been assessed as being (i) the brochure of the defendants' PCA units, (ii) the brochures and data sheets of Defendant 4, (iii) the Request For Proposal and (iv) the Operation, Maintenance and Trouble Shooting Manual for the PCA Model PDX 60IS.

33. Again, para 8 of the present application asserts, confidently, that "through an analysis of the details of the Defendants' product, as emanating from in the abovementioned documents, *the Plaintiffs have confirmed that the Suit Patent IN'145 is being infringed by the PCA units manufactured and sold by the Defendants.*" Para 11 of the application goes on to state that an inspection by a local commissioner, as sought in the present application, "will facilitate detailed claim-mapping between the actual features and specifications of the Defendants' product and *will present the best evidence of infringement to this Hon'ble Court.*"



34. Mr. Saikrishna Rajagopal also points out, in this context, that his client stands by the specifications and features of the defendants' PCAs as contained in the documents on the basis of which the plaintiffs claim to have undertaken its claim-mapping exercise. That being so, he claimed to soliloquize (or, as he put it, "ask himself") as to the justification for the plaintiffs seeking a physical inspection-based mapping by a local commissioner. He submits that, once the plaintiffs have themselves claimed to have adduced sufficient evidence to establish infringement of the suit patent by the defendants' PCAs, and the document and material on which the said mapping was done was not denied by the defendants, there is no justification, whatsoever, for the prayers in this application.

35. I entirely agree.

36. The avowed purpose for the filing of the present application, as per these averments, is both at odds and at variance with the purpose of Order XXVI Rule 10A of the CPC. Order XXVI Rule 10A of the CPC does not empower the court to issue a commission in order to equip the plaintiffs with "best evidence". It is invocable only where, during consideration of the issues involved in the suit, the court forms the opinion that, firstly, determination of one or more of the issues involves scientific investigation; secondly, that such scientific investigation cannot be conveniently conducted before the court and, thirdly, that it is necessary or expedient in the interests of justice to issue a commission, so as to conduct the said scientific investigation. Cumulative satisfaction of these three criteria is the *sine qua non* for



Order XXVI Rule 10A to apply. The averments contained in para 58 of plaint indicate that the purpose of the plaintiffs in exhorting the court in the present case to issue a commission, by means of the present application, does not conform to any one of these criteria, but is essentially to equip the plaintiffs with what, in its estimation, is the “best evidence” – even while the plaintiffs categorically asserts that it *has sufficient proof of infringement of the suit patent* by the defendant’s products.

37. Order XXVI Rule 10A can never be pressed into service by a party who asserts that it is in possession of sufficient evidence to support its case and only seeks to marshal better evidence. The provision is intended to assist the Court, not to assist either party.

38. A case in point, which underscores the circumstances in which Order XXVI Rule 10A *cannot* be invoked and with which I find myself in respectful agreement, is the judgment of a learned Single Judge of the High Court of Karnataka in *Renuka v. Sri Tammanna*⁷. In that case, Renuka filed a suit against Tammanna, seeking a declaration that Renuka was the daughter of one Ramakrishna and his wife Lalitha. Tammanna denied the claim, and asserted, *per contra*, that Renuka was the daughter of one Narayana and his wife Geetha Reddy. Pleadings were completed, issues were framed and the matter was set down for evidence. At this stage, Tammanna filed an application under Order XXVI Rule 10A, seeking appointment of a court commissioner for scientific investigation. The learned trial court

⁷ AIR 2007 KAR 133



allowed the application and appointed a court commissioner to conduct scientific investigation by obtaining blood samples of the plaintiff, Narayana and Geetha Reddy and to conduct a DNA test. The High Court, which was approached in writ proceedings against the said order, held thus, regarding the invocation of Order XXVI Rule 10A:

“7. It is settled position of law that Court Commissioner cannot be appointed to collect evidence in support of a claim. After completion of evidence on both the sides, if it is found that there is any ambiguity in the evidence adduced by the parties, then the Court may appoint a Commissioner for the purpose of clarification of such an ambiguity. In the instant case the evidence is not yet commenced and therefore the question of ambiguity in the evidence will not arise at this stage. The Trial Court without considering the settled position of law committed an error in passing the impugned order appointing a Court Commissioner. On this ground the impugned order is liable to be quashed.”

(Emphasis supplied)

Resultantly, the High Court set aside the order passed by the learned trial court.

39. In *Anjuman Intezamia*, cited by Mr. Anand, the respondents, who may collectively be referred to as “Rakhi Singh”, filed a civil suit for a declaration that they were entitled to perform rituals in the Gyanvapi Mosque. During the course of proceedings before the learned Civil Judge, Rakhi Singh filed an application under Order XXVI Rule 10A, seeking a direction to the Archaeological Survey of India (ASI) to undertake a scientific survey of the plot where the mosque was situated, to ascertain the nature of construction and age of the structure.



40. The learned District Judge allowed the application and directed the ASI “to undertake the scientific investigation/survey/excavation on the property in question i.e. at Settlement Plot bearing No. 9110”, with the following directions:

“(a) The Director of ASI is directed to undertake the scientific investigation/survey/excavation at the property in question i.e. at Settlement Plot No.9110 in the case excluding the areas scaled by the Hon'ble Supreme Court vide order dated 17.05.2022, 20.05.2022 as well as vide order dated 11.11.2022 in SLP(C) No.9388/2022 titled as Committee of Management Anjuman Intejamia Masjid Varanasi vs. Rakhi Singh & Ors.;

(b) The Director of ASI is also directed to conduct a detailed scientific investigation by using GPR Survey, Excavation, Dating method and other modern techniques of the present structure to find out as to whether same has been constructed over a pre-existing structure of Hindu temple;

(c) The Director of ASI is also directed to conduct scientific investigation in the light of the averment made in this application after associating the Plaintiffs, Defendants and their respective counsels and submit report to this Hon'ble Court upto 04-08-2023 and also to photograph and video-graph the entire survey proceedings;

(d) The Director of ASI is also directed to investigate the age and nature of construction of the western wall of the building in question through scientific method(s);

(e) The Director of ASI is also directed to conduct Ground Penetrating Radar (GPR) survey just below the 3 domes of the building in question and conduct excavation, if required;

(f) The Director of ASI is also directed to conduct Ground Penetrating Radar (GPR) survey beneath the western wall of the building and conduct excavation, if required;

(g) The Director or ASI is also directed to conduct Ground Penetrating Radar (GPR) survey beneath the ground of all the cellars and conduct excavation, if required;

(h) The Director of ASI is also directed to prepare a list of all the artefacts which are found in the building specifying their contents and carry out scientific investigation and undertake dating exercise to find out the age and nature of such artefacts;



- (i) The Director of ASI is also directed to conduct dating exercise of the pillars and plinth of the building to find out the age and the nature of construction;
- (j) The Director of ASI is also directed to conduct GPR survey, excavation wherever required, dating exercise and other other scientific methods for determining the age and nature of construction existing at the site in question;
- (k) The Director of ASI is also directed to investigate the artefacts and other objects of historical and religious importance existing in different parts of the building and also beneath the structure which may be found during such exercise; The Director of ASI is also directed to ensure that there should be no damage to the structure standing on the disputed land and it remains intact and unharmed. Report will be submitted up to 04- 08-2023. Put up on 04-08-2023 for further proceedings.”

41. One of the issues which arose before the Supreme Court, in subsequent appeal, was whether the above order passed by the High Court was within the scope of Order XXVI Rule 10A of the CPC.

42. *Anjuman Intezamia* sought to contend that Order XXVI Rule 10A could not be used by the parties to gather evidence in their favour. The High Court rejected the contention, observing that, “where a question arising in a suit involves a scientific investigation which cannot, in the opinion of the court, be conveniently conducted before the court, it may, if it thinks necessary or expedient in the interest of justice so to do, issue a commission for the purpose”.

43. On this aspect, the Supreme Court restricted its findings to an observation, in para 15 of its judgment, that the order of the learned trial court under Order XXVI Rule 10A could not *prima facie* be construed to be without jurisdiction.



44. No doubt, *Anjuman Intezamia* did seek to contend, before the Supreme Court, *inter alia*, that ordinarily a scientific survey ought not to have been ordered till the court was cognizant of the issues which arose in the suit and, *per contra*, Rakhi Singh contended that an order under Order XXVI was essentially for the benefit of the court, and was neither adversarial nor prejudicial to the parties. However, a holistic reading of the order passed by the Supreme Court clearly indicates that the Supreme Court has not examined, in detail, the circumstances in which Order XXVI Rule 10A of the CPC can be invoked, though it has held, as noted above, that the invocation of the provision by the learned trial court could not, *prima facie*, be said to be without jurisdiction.

45. That apart, there is a world of difference between the justification for invocation of Order XXVI Rule 10A by the court in *Anjuman Intezamia*, and the justification cited by the plaintiffs in para 58 of the present plaint. The Court did not, in *Anjuman Intezamia*, invoke Order XXVI Rule 10A to arm either of the parties with evidence, much less “best evidence”. It did so because one of the issues that arose in the suit was the age of the structure which was subject matter of controversy. As the determination of the age of the structure could not be conveniently done before the court, and required scientific investigation, the ASI was directed to execute a commission in that regard. The execution of the commission was obviously to provide the court with specifics regarding the age of the structure etc.



46. As against this, Mr. Anand seeks to invoke Order XXVI Rule 10A to equip his client with best evidence even when, as per his own categorical assertion in para 58 of the plaint, sufficient evidence to substantiate the case of infringement that the plaintiffs seek to bring against the defendants already stands adduced with the plaint.

47. *Anjuman Intezamia* and the present case are, therefore, as alike as chalk and cheese.

48. *NBCC*, decided by a learned Single Judge of this Court, reinforces the view that I have taken. In the said case, this Court extracted the following observations from the 54th Report of the Law Commission:

“Apart from this general power, we are of the view that there should be a special provision empowering the court to issue commissions for conducting scientific inquiries, *when such an inquiry is needed for determination of any issue before the court....*”

It was observed that the insertion of Rule 10A in Order XXVI of the CPC was a consequence of the above recommendation of the Law Commission.

49. The circumstances in which this Court, in *NBCC*, appointed a commission in terms of Order XXVI Rule 10A are also significant. This Court, in that case, was concerned with a suit instituted by NBCC for recovery of ₹ 750 crores, on the ground that the construction carried out by the defendant, Ramacivil India Construction Pvt. Ltd. (“**RICPL**” hereinafter) was unsafe.



50. NBCC sought appointment of a commission Order XXVI Rule 10A on the ground that, if an expert committee was not appointed and scientific tests carried out, RICPL could probably wrongly contend that the structures in question, made using RCC (Reinforced Cement Concrete), were safe for human habitation, and in the event of collapse, would result in fatalities and loss of evidence. Though one of the contentions advanced by RICPL was that Order XXVI Rule 10A of the CPC could not be used by the plaintiffs to gather evidence in its favour, this Court, while appointing a commission in terms of the said provision, justified its decision thus, in para 16 of the judgment:

“16. Admittedly, the Flat Buyers of these flats are also affected by safety issues and because of the DDMA order they cannot use their flats. *Considering that question of safety of human life & larger interest of public safety is involved and the photographs depicts the sorry state of affairs, and the question arising in this suit involves scientific investigation, which cannot be conducted by the court, this court think it necessary and also expedient in the interest of justice to appoint an expert from renowned institutions with thorough knowledge of subject and access of sophisticated testing equipment.*”

(Emphasis supplied)

51. Thus, the exercise of appointment of the commission, in *NBCC*, was strictly in terms of Order XXVI Rule 10A of the CPC. This Court found that the flat buyers of the flats in question were affected by safety issues and could not use their flats owing to statutory governmental orders. The decision to appoint a commission was taken “considering that question of safety of human life and larger interest of public safety is involved and the photographs depicts the



sorry state of affairs, and the question arising in the suit involves scientific investigation, which cannot be conducted by the Court”.

52. Quite obviously, *NBCC*, too, can also not be likened to the present case, so as to constitute a useful precedent for the plaintiffs. Yet again, at the cost of reiteration, Order XXVI Rule 10A cannot be invoked to help a plaintiffs who assert that he has all necessary evidence, to make out his case, available with him, but seeks to gather better, or “best”, evidence, through the agency of the Court.

53. The decision of High Court of Karnataka in *Shadaksharappa* has no relevance, as it did not deal with Order XXVI Rule 10A, but was concerned with appointment of a Commissioner under Order XXVI Rule 9, and whether the report of such a commissioner would constitute evidence under Order XXVI Rule 10. Though, during arguments, Mr. Pravin Anand did not seek, or rely upon Order XXVI Rule 9 of the CPC, it is clear that the said provision, on its terms, does not apply. Order XXVI Rule 9 deals with appointment of a Commissioner to carry out local investigation for elucidating any mater in dispute, or for other purposes which are not material for the present case. The prayer in the present application does not seek appointment of a local commissioner to carry out any investigation. Rather, the local commissioner, as per the prayer in the application, is required to inspect the defendants’ PCA and to prepare a technical report, mapping the claims of the PCA to the claims in the suit patent. Mapping of the features of the defendant’s PCA with the suit patent is, as Mr. Anand candidly acknowledges during hearing, a prerequisite



for sustaining any claim of infringement of a patent. Para 58 of the plaint reveals that the plaintiffs are well aware of this requirement. According to the plaintiffs, the plaint adduces sufficient evidence to meet this requirement. Avowedly, the prayer in the application is to enable the plaintiffs to obtain what, according to the plaintiffs, is “best evidence”. Order XXVI Rule 10 A of the CPC cannot be invoked for such a purpose.

54. Permitting such an attempt would amount to the Court acting in aid of one of the parties to litigation, by aiding in obtaining of evidence only to support the case that the party seeks to set up, which would be completely destructive of the most basic principles of judicial independence.

55. The decision in *Sotefin SA* similarly, cannot assist the plaintiffs. In that case, this Court appointed a local commissioner to take pictures and videos of the Smart Dollies which were being imported by Indraprastha Cancer Society and Research Centre (“**ICSRC**” hereinafter). Sotefin’s case was that the Smart Dollies infringed the patent held by it in its product “Silomat Dollies”. As noted, the local commissioner was entrusted with the task only of taking photographs and pictures and videos of the Smart Dollies.

56. In this background, the circumstances in which this Court decided to include scientific advisors in the adjudicatory exercise are relevant. The decision was taken after hearing Counsel for the parties. This Court deemed it necessary to obtain scientific opinion *on the*



following specific questions, framed in the order dated 15 September 2021:

- a. Whether all the features of the Plaintiffs Suit Patent as mentioned in Claim 1 are found in the Defendants' product as installed/lying in the premises of Defendant Nos. 1 and 2?
- b. What are the overlaps, in technology/ mechanism and the apparatus used, between the Defendants' product and the Plaintiff's suit patent? c. How is the process, apparatus and system used in the Plaintiffs patent different from the process, apparatus and system of the Defendants' product, i.e., whether the Defendant's products fall within the claims of the Plaintiffs patents.
- d. Whether the supporting means in Defendants' carriage has elements that are dissimilar to claims in Plaintiff's suit patent in terms of their parts and their method of operation?
- e. Whether the Defendants' product has the same mechanism of engagement with the motor vehicle as described in Claim No. 2 of the suit patent, if so, what are the elements of engagement? If not, what are the elements of disengagement?
- f. Whether the electronic device/mechanism for detecting the presence of the wheel of the motor vehicle and movement of the carriage are also present in the Defendants' product?"

57. There is, thus, no comparison between *Sotefin SA* and the present case. That was a case in which, during arguments, the court framed specific questions, for the determination of which a conscious decision regarding necessity of scientific investigation was taken. It was pursuant to this decision that the scientific advisors were co-opted in the matter, and the commission was appointed. There is, therefore, no similarity between the facts in *Sotefin SA* and the circumstances in which the plaintiffs seek appointment of a local commissioner by the present application.



58. Order XXVI Rule 10A of the CPC cannot, therefore, justify the prayers in the present application.

Order XI Rule 3(2) of the CPC

59. Order XI Rule 3(2) has, quite obviously, no relevance, whatsoever, as it permits a party to seek direction from the court for inspection or production of documents by the other party, of which inspection has been refused by such other party, or not produced despite notice. No such eventuality arises in the present case and prayer in the present application, too, has no relationship with the Order XI Rule 3(2).

Order XI Rule 5(4) of the CPC

60. Order XI Rule 5(4), again, has no relevance to the present application, as it empowers the court to draw an adverse inference against a party who refuses to produce a document after issuance of notice in that regard, without sufficient reason.

Rule 5(i) and (iii) of the DHC Patent Rules

61. Rule 5(i) and (iii) of the DHC Patent Rules, again, have no relevance. They deal with the right of a patentee, who institutes an infringement suit to, at the first hearing of the suit, seek an interim injunction and appointment of a local commissioner *for inspection etc.*, and permits technical experts to be present at the time of



execution of the commission. These provisions do not, even distantly, envisage the appointment of a commissioner to prepare technical reports mapping claims of the suit patent to the features of the allegedly infringing products of the defendant.

62. In this context, the word “etc.” following “inspection” under Rule 5(i) of the Delhi High Court Patent Rules has to be understood *noscitur a sociis* or *eiusdem generis*⁸ with the word “inspection”.

63. In *Rajagopala Pandarathar v. Thirupathi Pillai*⁹, the High Court of Madras held that the word “etc.” following an enumeration of specific things, having some characteristic, had to be restricted to things of the same nature, applying the *eiusdem generis* principle. The *eiusdem generis* principle was also held applicable to the interpretation of the word “etc.” by the High Court of Kerala in *CIT v. Maulane T. Company*¹⁰, which ruled that “etc.” did not have the character of an inclusive definition but meant “others and so forth and the rest, other things of the same character or only those things *eiusdem generis*”. In *K.V. Mathew v. District Manager*¹¹, also by the Kerala High Court, it was held, in similar terms, that the word “etc”

⁸ Both these principles effectively require an expression in a statute to be interpreted in the light of the words which surround it, and whose company it keeps. The difference is that *eiusdem generis* would apply where the surrounding words constitute a distinct genus, whereas *noscitur a sociis*, which is a specific manifestation of the *eiusdem generis* principle, applies where the surrounding words do not constitute a genus. Where the word or expression being interpreted is accompanied only by one other expression – as in the present case – the principle that would classically apply would be *noscitur a sociis*, rather than *eiusdem generis*. The distinction, however, is more one of form than of substance.

⁹ AIR 1923 Madras 511

¹⁰ AIR 1984 Ker 1940

¹¹ AIR 1984 KER 40



does not share the character of an inclusive definition and cannot therefore enlarge the scope of the expression “institution”.

64. Applying the said principle to the interpretation of the word “etc.” following “inspection” in Rule 5(i) of the DHC Patent Rules, any other purpose, for which a local commissioner could be appointed under Rule 5(i) would have to take colour from the word “inspection”. It cannot, therefore, extend to the local commissioner mapping claims of the suit patent with the features of the Defendants’ PCAs, especially where, admittedly, such mapping was being sought by the plaintiffs to equip the plaintiffs with “best evidence” to support the case of patent infringement that it seeks to raise against the defendants.

65. The present application cannot, therefore, be sustained even under Rules 5(i) and (iii) of the DHC Patent Rules.

In conclusion

66. There are sufficient provisions, in the CPC, which either party to a *lis* can press into service to obtain information or evidence. Among these is the right to seek interrogatories from the defendants, as Mr. Rajagopal correctly contends. It is not for this Court to suggest any course of action that the plaintiffs should follow in that regard. However, it is clear, in my view, that a court cannot travel outside the legitimate boundaries of the CPC and act as an agent, even unwittingly, for either side to gather evidence to support the case that it seeks to set up against the other. The court can, no doubt, in an



appropriate case, direct execution of a commission and the report of the commissioner would, in that event, constitute “evidence”. That, however, is only the statutory character of the report of the commissioner. The court *does not appoint the local commissioner with a view to secure evidence to support the case of either party*. The court appoints the local commissioner, under Order XXVI Rule 10A of the CPC, only to conduct a scientific investigation where, in the opinion of the court, such scientific investigation is necessary to determine any question which arises with respect to one or more of the issues in the suit, which cannot be determined by any other reasonable method.

67. Para 58 of the plaint, which sets out the *raison d’etre* for the present application, is fatal to the application. The prayers in the application cannot be justified under any of the legal provisions of the CPC to which Mr. Anand has drawn my attention. Nor, as Mr. Anand candidly acknowledges, is there any precedent where such orders have been passed by the Court.

68. To my mind, an application under Order XXVI Rule 10A has to clearly set out (i) the question or questions arising from the issue in controversy in the suit, (ii) how the determination of said question or questions requires scientific investigation, (iii) why the scientific investigation cannot be conveniently undertaken before the Court and (iv) how the appointment of a local commissioner to carry out such investigation is necessary or expedient in the interests of justice. Even where all these criteria are satisfied, the decision on whether to accede



to the applicant's request, or not, is ultimately one of the discretion of the Court. Needless to say, the exercise of such discretion, like the exercise of all judicial discretion, cannot be arbitrary, capricious or whimsical. The Court has, for its part, to remain acutely aware of the fact that the report of such a Commissioner, were he to be appointed, would constitute "evidence". The line between directing a scientific investigation to aid in determination of the questions arising in the case, and acting, even unwittingly and in the absence of any ill intent of the applicant, as an agent to procure evidence to support the case that it seeks to set up is at times thin, and the Court has to be cautious not to overstep it.

69. I do not deem it necessary to refer to the orders passed in *Hadley Industries* or the two decisions in *J.C. Bamford Excavators Ltd.*, as they were orders passed on concession.

70. Resultantly, I am not inclined to grant the prayers contained in this application.

71. The application is dismissed as misconceived.

C. HARI SHANKAR, J.

NOVEMBER 1, 2023

ar/dsn

Click here to check corrigendum, if any