

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Pronounced on: 7th January, 2022

+ CS (COMM) 383/2020 & CC(COMM) 4/2021

KONINKLIJKE PHILIPS N.V.

..... Plaintiff

Through: Mr. Chander Lall, Senior Advocate
with Mr. Ashutosh Kumar, Mr.
Swamil Dey, Ms. Vrinda Bagaria,
Mr. Munesh Sharma, Mr. Vinod
Chauhan & Ms. Ananya Chugh,
Advocates

versus

VIVO MOBILE COMMUNICATION CO. LTD & ORS.

.....Defendants

Through: Mr. Saikrishna Rajagopal, Ms.
Julien George, Ms. Anu Paarcha,
Mr. Arjun Gadhoke, Mr. Avijit
Kumar, Mr. Aniruddh Bhatia, Mr.
Skanda Shekhar, Ms. N. Parvati
and Mr. Vivek Ayyagari,
Advocates for D-1 and D-2
Ms. Nupur Aggarwal and Mr.
Maanav Kumar, Advocates for D-3

CORAM:

HON'BLE MS. JUSTICE ASHA MENON

ORDER

I.A. 3048/2021 (by the plaintiff under Order XI, Rules 2 and 14 CPC as amended by the commercial Courts (Amendment) Act, 2018 read with Section 151 CPC, seeking discovery by interrogatories and production of certain documents from the defendants No.1 and 2)

1. This application has been filed by the plaintiff under Order XI

Rules 2 & 14 CPC as amended by the Commercial Courts (Amendment) Act, 2018 read with Section 151 CPC seeking discovery by interrogatories and production of certain documents from the defendants No.1 and 2.

2. It may be mentioned here that the plaintiff alleges that the defendants were infringing five of its patents, namely, (i) Indian Patent Number: IN 275419: A method of operating a radio communication apparatus and a radio communication apparatus; (expires on 10.8.2026), (ii) Indian Patent Number: IN 271469: A method of multiplexing data packets having different assigned priorities; (expires on 4.11.2025), (iii) Indian Patent Number: IN 228133: A method of operating a radio communications system; (expires on 20.4.2024), (iv) Indian Patent Number: IN 221703: A method of operating a radio communication system; (expired on 8.5.2020 and is being asserted for past infringement), (v) Indian Patent Number: IN 211041: A radio communication system and a method for operating the same. (expired on 24.12.2019 and is being asserted for past infringement).

3. It is stated that the suit patents (including the expired patents) relate to four different technologies used in the field of telecommunications namely, (i) Universal Mobile Telecommunication System (UMTS) technology (sometimes also referred to as 3G or WCDMA), (ii) High-Speed Packet Access (HSPA) technology, (iii) Evolved High-Speed Packet Access (HSPA+) technology and, (iv) Long Term Evolution (LTE) technology. These are all technologies which the plaintiff claims have been standardized by Third Generation Partnership Project (3GPP)

and adopted by various standard setting organizations (SSOs)/Standard Development Organizations (SDOs) including European Telecommunications Standards Institute (ETSI). It is also claimed that in India too, these are the prescribed standard essential patents, which are usually exploited by manufacturers/importers, including the defendants.

4. The suit has been filed seeking a decree of permanent injunction to restrain the defendants from manufacturing/assembling, importing, selling, offering for sale, advertising including through their and third party websites, mobile phones including the models mentioned in the plaint and any future or other devices or models, that include UMTS enhancements (HSPA, HSPA+) and LTE technologies and result in infringement of the suit patents until the defendants have procured Fair, Reasonable and Non- Discriminatory (FRAND) license from the plaintiff. *Inter-alia*, damages have also been sought for the past use of all the patents including those that have since expired.

5. Mr. Chander Lall, learned senior counsel appearing for the plaintiff, has submitted that the defendants in their written statement have stated that they were not liable to make any payment to the plaintiff even under FRAND and as they had obtained their chipsets from Qualcomm and MediaTek, the defendants were not liable for any infringement. It is in these circumstances, the instant application has been moved for production of the license agreements executed between the defendants and Qualcomm and other companies, as it would help to determine the truth in the claim of the defendants. Thus, the *lis* could be determined from the disclosure made. It was submitted that the interrogatories were

therefore to be allowed and the question of relevancy need not be considered at this stage.

6. On the other hand, learned counsel for the defendants has submitted that an application under Order XI Rules 2 & 14 CPC as amended by the Commercial Courts (Amendment) Act, 2018 read with Section 151 CPC cannot be routinely allowed and the court had to consider whether the answers and documents sought were necessary for the determination of the dispute. It was submitted that since it was the case of the plaintiff that their patents were standard essential patents, it was necessary to disclose and explain every stage of such mapping of the industry standards with their patents. The burden was on the plaintiff to prove its case and the onus could not be shifted by asking questions that also infringed on industry confidentiality, by means of the present application.

7. The learned counsel submitted that the services that it had advertised as being available on its handset were derived from the chips which were sourced from Qualcomm and MediaTek. Therefore, if there was any infringement, the plaintiff had to question these two companies, who have, however, not been made parties to the present case. The more important question would be whether the plaintiff had any arrangement with Qualcomm and/or MediaTek and if there was such an agreement, the patent would be exhausted and the plaintiff would be foreclosed from claiming further licenses downstream i.e. from manufacturing entities like the defendants.

8. It is also argued by the learned counsel for the defendants that the plaintiff under the FRAND obligation had to make disclosures before demanding a certain license fee from the defendants to establish that its demand was fair. However, in the present suit, there has been no such disclosure made. The defendants had moved I.A. 8259/2020 for production of third-party comparable patent license agreements in a sealed cover, which was still pending constitution of a confidentiality club.

9. Thus, it was the contention of the learned counsel for the defendants that the interrogatories and documents were not relevant and the application was liable to be dismissed. It was also submitted that in any case, a detailed reply had been submitted by the defendants in response to the application, where it was clearly mentioned that the defendants did not know the composition of the chip with regard to its software and nothing further was required to be answered.

10. I have heard the submissions and have perused the record including the judgments relied upon by both sides.

11. The interrogatories are intended to cut short trial. Time and expenses can be saved by interrogatories being served upon the adversary. While it is trite that one who asserts must prove and that the burden of proof never shifts, however, interrogatories may be served upon the adversary if the document or information in its possession and the production of documents and answers to the interrogatories, would have a bearing on the determination of the dispute. In determining

whether a document should be disclosed or questions answered, it would be seen whether the document/questions are relevant or would throw some light on the resolution of the dispute.

12. It is to be noted that even with the amendment of the CPC pursuant to the enactment of the Commercial Courts Act, there is an obligation on parties to produce all documents in their possession and to answer every plea, giving reasons as to why a stand contrary to the plea was being taken. The salutary provisions are intended only to expedite disposal of commercial suits. The only precaution to be taken by the court while exercising its discretion under Order XI Rules 2 & 14 CPC is to ensure that the applicant is not embarking on a roving or fishing inquiry. So long as the document sought to be produced would throw light on the subject matter of the suit and the answers sought would assist in the fair disposal of the suit, the same ought to be allowed.

13. Before proceeding further, it may be seen as to what are the documents sought by the plaintiff from the defendants and what are the questions to which answers have been sought. The plaintiff had sought the third-party license agreements entered into by the defendants with Qualcomm and other companies, relating to 3G (UMTS) or 3.5 (HSPA and HSPA+) or 4G (LTE) technologies. The questions and the interrogatories to which the answers have been sought are :

(a) Whether the defendants' mobile devices comply with the following ETSI Standards relating to UMTS (including HSPA/HSPA+) and LTE technologies-

SUIT PATENT	ETSI STANDARDS
IN 211041	1. ETSI TS 125 211 V4.6.0 (2002-2009) 2. ETSI TS 125 214 V4.6.0 (2003-03) 3. ETSI TS 125 101 V4.13.0 (2006-2012)
IN 221703	1. ETSI TS 125 211 V4.6.0 (2002-2009) 2. ETSI TS 125 214 V4.6.0 (2003-03) 3. ETSI 125 331 V4.21.0 (2012-01)
IN 228133	1. ETSI TS 125 211 V6.10.0 (2009-09) 2. ETSI TS 125 214 V6.11.0 (2006-12) 3. ETSI TS 125 212 V6.10.0 (2006-12)
IN 275419	1. ETSI TS 125 211 V7.10.0 (2010-10) 2. ETSI TS 125 214 V7.17.0 (2011-01) 3. ETSI TR 125 903 V7.0.0 (2007-03)
IN 271469	1. ETSI TS 136 321 V8.12.0 (2012-03) 2. ETSI TS 136 300 V8.12.0 (2010-04)

(b) Whether the defendants' mobile devices launched since the date of incorporation of the defendant No.2, support/comply with the following features of ETSI Standards-

- i. Whether defendants' mobile devices are capable of supporting LTE Logical Channel Prioritization procedure as specified in 3GPP TS 36.321;
- ii. Whether defendants' mobile devices are capable of supporting UMTS Compressed Mode as specified in TS 25.214 and TS 34.121-1;
- iii. Whether defendants' mobile devices show behavior of the uplink E-DPDCH, the uplink DPDCH and the uplink DPCCH transmit power before and after the mobile handset reaches a threshold transmit power according to UMTS standard as detailed in technical documents being TS 25.214;
- iv. Whether defendants' mobile devices are capable of supporting UMTS UL DPCCH Slot Format 4 and whether the same is in conformance with TS 25.211 and TS 25.903;
- v. Whether defendants' mobile devices support the behavior of the uplink power change when receiving TPC (Transmit Power Control) commands in different patterns, and whether the same was in conformance with the UMTS standard as detailed in technical documents being TS 25.214 and TS 25.331.

(c) Provision of details as to whether the defendants have entered into a licensing arrangement with Qualcomm and other companies, only after the licensors provided evidence of direct infringement/feature by feature demonstration of infringement of each and every patent in their respective portfolio.

(d) Provision of details as to whether defendants' license agreement(s) with Qualcomm and other companies, were executed only after Vivo representatives as well as its appointed external economic expert analyzed ALL third-party license agreements entered into by concerned licensors.

14. Since it has been the consistent stand of the defendants, that the patents are incorporated in the chipset and not in the handset, whereas the plaintiff has insisted that the standard essential patents are in the handset, the third-party license agreements executed between the defendants and Qualcomm and other companies would definitely throw light on this question.

15. The contention of the learned counsel for the defendants that it is for the plaintiff to map their patents on to the standard essential features would also be settled by the production of this agreement, as it would be evident as to whether the patents work on the chipset or handset and what was the technology transferred by Qualcomm and others to the defendants. Of course, keeping the necessity of industry confidentiality, these documents need not be brought out into the open. However, as suggested in respect of I.A. 8259/2020, moved by the defendants for production of third-party agreements by the plaintiff, to determine FRAND, a confidentiality club can be constituted even in respect of these agreements.

16. With regard to the interrogatories, the interrogatories No.(c) and (d) seem to be interrogatories that do not lead anywhere and are therefore

disallowed. With respect to the interrogatories No.(a) and (b), since they have a direct bearing on the technologies used by the defendants which in turn would have a bearing on the question of infringement as well as FRAND, it is considered appropriate to direct the defendants to answer these interrogatories by way of an affidavit.

17. The application is thus, partly allowed. The affidavit alongwith the third-party agreements executed between Qualcomm and the defendants and other companies be filed within three weeks in a sealed cover with a copy to the learned counsel for the plaintiff. Once the affidavit is filed, the plaintiff may furnish the name of two experts and eight lawyers who would be authorised to inspect the said third-party agreements.

18. The application stands disposed of.

19. The order be uploaded on the website forthwith.

(ASHA MENON)
JUDGE

JANUARY 7th, 2022
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