

* **HIGH COURT OF DELHI : NEW DELHI**

+ **CS (OS) No. 894/2001**

Judgment reserved on: 17-01-2007

% Judgment delivered on: 18-01-2007

La Chemise Lacoste & another Petitioners
Through: Mr. C. M. Lall with Ms. Shikha
Sachdev & Mr. Manish Dhir,
Advocates
versus

Crocodile Indl. Pte. Ltd. Respondents
Through: Mr. Sandeep Kakra, Advocate

**CORAM
HON'BLE MR. JUSTICE VIPIN SANGHI**

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

VIPIN SANGHI, J.

Mr. Christian London, who is a French national is a witness for the plaintiff. He has come to India specially to depose in the matter. Vide order dated 8.1.2007 it was directed that the recording of evidence be carried out on a day to day basis to accommodate the foreign witness. The matter was fixed for cross-examination of the

foreign witness on 16.1.2007 before the Joint Registrar.

When the matter came up before the Joint Registrar on 16.1.2007, even though the witness was present with the translator, the defendant's counsel raised various objections and did not cross-examine the said witness.

The Joint Registrar has placed the matter before the Court to deal with the various objections raised by the defendants, which have been elaborately recorded in the order dated 16.1.2007 passed by the Joint Registrar.

The defendant firstly objected by stating that there were two affidavits of the same witness, namely, Mr. Christian London, one filed on 3.12.2005 and the second on 2.2.2006. During the course of arguments, it was stated by learned counsel for the plaintiff that the document that the defendant is claiming to be an affidavit of Mr. Christian London filed on 2.2.2006 is in fact not an affidavit.

A bare perusal of the said document shows that it is merely a certificate issued by Mr. Christian London. It does not even purport to have been made and signed on solemn affirmation. To this, learned counsel for the defendant countered by relying upon the index wherein the document had been described as an affidavit of Mr. Christian London. In my view, it is elementary that a statement, which is not made on solemn affirmation and does not even purport to be as made

on solemn affirmation, cannot be treated as an affidavit. Mere description of the said document as an affidavit in the index does not make the said document an affidavit. This objection of the defendant is wholly frivolous and I reject the same.

The second objection raised by the defendant's counsel is that the affidavit filed on 3.12.2005 is in the nature of a replication to the written statement of the defendant. It is stated that despite repeated opportunities and imposition of costs replication was not filed by the plaintiff and right to file replication was closed by the Court vide order dated 24.10.2003. Learned counsel for the defendant submitted that the plaintiff could not file its replication in the garb of an affidavit by way of evidence.

In my view this objection merely needs to be stated to be rejected. The affidavit has been filed by the witness as his examination-in-chief. It is for the witness to state, whatever he may choose to state and depose in his affidavit by way of examination-in-chief. It is not for the defendant to raise an objection that the affidavit is in fact a replication. It is not for the defendant to advise as to what the plaintiff's witness should state in his examination-in-chief. The defendant cannot obstruct the trial by such means. It is for the defendant to cross-examine the witness and if the deponent has in his affidavit deposed beyond pleadings the defendant can certainly

confront the witness with regard to that part of the deposition which is beyond the pleadings of the plaintiff. It would be for the Court, ultimately at the time of hearing of the suit to rule upon such objections and to decide whether or not to disregard any part of the deposition of the witness. However, that by itself cannot be a ground for the defendant to object to the recording of evidence and for refusal to proceed with the cross-examination of the witness. This objection of the defendant is, therefore, rejected.

The next objection raised by the defendant was that documents at Sl.Nos. 2,3,6,7,8,9 & 10 in the index dated 3.12.2005 were new documents, copies whereof had not been placed on record earlier, nor any permission had been sought to file the originals of these documents from the Court. Learned counsel for the defendant submitted that the affidavit by way of evidence of the witness Mr. Christian London filed on 3.12.2005, until tendered in evidence, need not have been objected to by the defendant and that the occasion to raise the objection as raised by the defendant on 16.1.2007, for the first time arose on that date itself.

I find that the affidavit by way of evidence of Mr. Christian London had been filed as early as on 3.12.2005. No objection to the filing of additional documents by the plaintiff with the said affidavit was raised by the defendant for all this time even though the defendant has

been served a copy of this affidavit along with all the documents attached to it on 3.12.2005 itself. The examination-in-chief by way of an affidavit of Mr. Christian London was filed in compliance with Order 18 Rule 4 CPC, which states that in every case the examination-in-chief of the witness shall be on affidavit and copies thereof shall be supplied to opposite party.

The proviso to sub-rule 4 of Rule 4 states that, if any objection is raised during the recording of evidence before the Commissioner, the same shall be recorded by him and decided by the Court at the stage of arguments.

Even before the affidavit is tendered by the witness during his appearance for cross-examination before the Commissioner or Court, it is open for the opposite party to raise its objections to the tendering of fresh documents. The affidavit or the documents filed therewith cannot be wholly ignored by the opposite party. The objection of the kind sought to be raised by the defendant in this particular case could well have been raised on the various dates of which the matter came up after 3.12.2005. I may note that the plaintiff had moved an application being IA no. 2342/2006 seeking exemption from appearance of the deponent Mr. Christian London at the time of marking the documents according to the deposition made by him in his affidavit by way of evidence. That application was allowed by the Court

on 27.2.2006. If the defendant had any objection to the production of the said documents along with affidavit of Mr. Christian London, the said objection could well have been taken and ought to have been taken on the said date. In fact, it appears that the order dated 27.2.2006 was passed without any objection by the defendant, who was represented through counsel on that date. I may also refer to the order dated 11.10.2006 in the matter. On this date the second witness of the plaintiff Mr. Anoop Singh was present for cross-examination while Mr. London was not present. The matter was, however, adjourned on the ground that the documents referred to at Sl. Nos. 1 to 17 of PW1 need to be tendered first and that PW1 i.e. Mr. Christian London needed to be examined first. Though, it is not clear from the order passed by the Joint Registrar on 11.10.2006 that any such objection was raised by the defendant, it is argued by learned counsel for the plaintiff that it was at the defendant's behest that the cross-examination of the witness, who was present, namely, Mr. Anoop Singh could not proceed. Even on that date the defendant did not raise any objection to the filing of the fresh documents by Mr. Christian London with his affidavit. On the contrary, the order shows that the production of Mr. Christian London as the first witness to tender the documents filed by him before examination of the other witness was ordered.

Even if the defendant had any valid objection to the

production of the said documents with the affidavit of Mr.Christian London, in terms of sub-rule 4 of Rule 4 of Order 18, the objection of the defendant could have been recorded and the cross-examination of the witness proceeded with. However, learned counsel for the defendant chose not to proceed with the cross-examination of Mr. Christian London, when the matter came up on 16.1.2007 before the Joint Registrar.

In my view the conduct of the defendant in not raising any objection to the filing of the aforesaid documents with the affidavit filed on 3.12.2005, in the aforesaid facts and circumstances amounts to a waiver by it of its objections. The defendant knew that the witness was specially coming from France for the recording of his evidence. He did not raise the objection when it could have been so raised earlier and waited for the witness to arrive. The conduct of the defendant is clearly designed to frustrate the progress of the trial and to inconvenience the plaintiff's witness.

The fresh documents had been filed as early as on 3.12.2005 and the defendant has had notice of these documents since then. These documents are (i) the Notarised Power of Attorney, (ii) Certified copy of the plaintiffs copyright registration, (iii) Notarised copies of world wide registration certificates (iv) certified copies of court orders and (v) some literature/reports in respect of the plaintiffs

copyright and trademark.

The documents at Sl.Nos. (i) to (iv) above are of the kind which can be allowed to be produced since they are in the nature of public documents. So far as documents at Sl.No. (v) above are concerned, even they can be allowed to be produced at this stage. No serious prejudice would be caused to the defendant by the production of any of these documents. The defendant would have his right to cross examine the witness and raise his objection to the admissibility of these documents. In the interest of justice, I grant leave to the plaintiff to produce the said documents subject to any objections with regard to their admissibility, and the manner of proof of the contents of the documents.

The next objection raised by the defendant was that various documents sought to be placed on record are in foreign languages of which no translation has been placed on record, in accordance with the Delhi High Court Rules and Orders. Learned counsel for the defendant referred to Rule 5 in Chapter 3 of Delhi High Court (Original) Rules, 1967 which inter alia states that no document in a language other than English shall be received by the Registry unless it is accompanied by a translation in English. It further states that a suit or other proceedings will not be set down for hearing until all the documents filed on which the parties intend to rely, are in English or have been translated into

English.

Here again, I find that the said reason by itself is not good enough for the defendant not to proceed with the cross-examination of the witnesses. As noticed herein above, the defendant could well have raised his objections to the said documents being proved on record and all such objections would have to be dealt with by the court at the stage of arguments. Learned counsel for the plaintiff submits that he is aware of the fact that some of the documents are in foreign languages and since translations have not been filed, they cannot be legally proved. However, that by itself cannot be a ground for the defendant not to proceed with the cross-examination of the witnesses. I agree with the contention of the plaintiff that defendant could have raised its objection before the Local Commissioner with regard to the admissibility of the documents in other languages but could not have refused to cross-examine the witnesses or to prevent the progress of the cross-examination altogether.

The next ground taken by the defendant for not proceeding with the cross-examination was that the affidavit of Mr. Christian London filed on 03-12-2005 has not been legalized or aposilled and as such it cannot be tendered in evidence. According to the defendant, it is not an affidavit in the eyes of law. The argument of the defendant is that the affidavit of Mr. Christian London ought to have been affirmed

before a Diplomatic or Consular Officer in France in accordance with Section 3 of the Diplomatic and Consular Officers (Oaths and Fees) Act, 1948. He submits that the affidavit of Mr. Christian London appears to have been merely notarized by a French Notary. However, there is no certification by the Indian Consular or Diplomatic Officer of the fact that the so called notary was, in fact, authorized to notarize the affidavit of the witness.

He relied on **AIR 1967 Calcutta 636** in Re. **K.K. Ray (Private) Ltd.** In this case, the court was concerned with the two affidavits sworn before a Notary Public of New York, USA. The notarial act of the Notary had been certified by the Certify Country Clerk, a Clerk of the Supreme Court, New York County which is a court of record by affixation of its seal. Further, there was a certificate given by the Consulate General of India, New York for legalizing the seal of the Clerk of the County of New York. The court rejected the objections raised to the affidavits in question. In the course of its judgment, the court observed as follows :-

“(32) The Notary is now internationally known today in the modern world of commerce, industry and dealings between different nations and countries. Reciprocity between different countries is its essential basis. Without this reciprocity and mutual respect the whole system and rationale of notarial acts will break down, to the great detriment of commercial transactions throughout the world and their due administration by courts of law in different

countries and will jeopardised international commerce, law merchant and administration of justice. It is precisely to provide facilities of receiving affidavits, documents, protests of bills of exchange and other commercial papers that this institution of Notary Public grew up to fulfil a very practical need. Unnecessary or illogical impediments should not be put on his way. No doubt that does not mean that law of the Courts should not ensure reasonable authenticity and dependability of notarial acts.”

The defendant's counsel also drew my attention to the “Convention Abolishing The Requirement Of Legislation For Foreign Public Documents”, to which France is a Member State while India is also a non-Member signatory State. Article 1 of this Convention states

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“Article 1

The present Convention shall apply to public documents which have been executed in the territory of one Contracting State and which have to be produced in the territory of another Contracting State.

For the purposes of the present Convention, the following are deemed to the public documents:

- a) tribunals of the State, including those emanating from a public prosecutor, a clerk of a court or a process-server;
- b)
- c) notarial acts;”

Under Article 2, the contracting States are obligated to exempt from or legalization the documents to which the said Convention applies and which have to be produced in its territory.

Legalization means only a formality by which the Diplomatic or Consular agents of the country in which the document has to be produced, certify the authenticity of the signature, capacity in which the person signing the document has acted and the identity of the seal or stamp which it bears.

Under Article 3, it is stated :-

“Article 3

The only formality that may be required in order to certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears, is the addition of the certificate described in Article 4, issued by the competent authority of the state from which the document emanates.

However, the formality mentioned in the preceding paragraph cannot be required when either the laws, regulations, or practice in force in the State where the document is produced or an agreement between two or more Contracting States have abolished or simplified it, or exempt the document itself from legalisation.”

Article 4 reads :-

“The certificate referred to in the first paragraph of Article 3 shall be placed on the document itself or on an “allonge”, it shall be in the form of the model annexed to the present Convention.

It may, however, be drawn up in the official language of the authority which issues it. The standard terms appearing therein may be in a second language also. The title “Apostille (Convention de La Haye du 5 octobre 1961)” shall be in the French language.”

The submission of the defendant based on Section 3 of the

Diplomatic and Consular Officers (Oaths and Fees) Act, 1948, appears to be wholly misplaced. By the said provision, the Diplomatic and Consular Officers have been empowered to administer oath and take any affidavit and also to do any notarial act which a Notary Public may do in the State where the Diplomatic or Consular Officer is functioning. The documents notarized by such officers would be considered as validly notarized in India. It does not say that unless a Diplomatic or Consular Officer in the foreign country where the oath is administered or affidavit is taken, does the notarial act, the affidavit or the statement on oath cannot be used in India, though it may have been notarized by a Notary functioning in that foreign country. The notarial act of the Diplomatic or Consular Officer of India in the foreign country is made as effectual as the notarial act of any lawful authority in that particular country/State. Merely because the affidavit of Mr. Christian London is not notarized by the Diplomatic or Consular Officer of India in France, that by itself cannot mean that the said affidavit is not legalized or aposilled. Even the judgment relied upon by the defendant in **AIR 1967 Calcutta 636** does not advance the case of the defendant. On the contrary, the principle stated in the said case completely supports the plaintiff. It is clear that the defendant is seeking to put unnecessary and illogical impediment in the production of the affidavit. There is no ground stated by the defendant to impinge

upon the authenticity or the dependability of the notarial act done by the Notary Public while notarizing the affidavit of Mr. Christian London. Even the Convention relied upon by the plaintiff does not support the arguments of the defendant. As noticed above, notarial acts are deemed to be public documents by virtue of Article 1. Section 3 of the Diplomatic and Consular Officers (Oaths and Fees) Act, 1948 is, in fact, in conformity with Article 2 since it does not purport to limit the process of legalization merely to the Diplomatic or Consular agents of India who are working in foreign countries. No other legal provision has been cited by either party which requires the process of legalization of documents to be done only by the Diplomatic and Consular Officers of India who are working in foreign countries. Article 3 also is of no avail to the defendant and fully supports the case of the plaintiff. Firstly, the said Article says that the only formality that "**may**" be required in order to certify the authenticity of the signature, the capacity in which the person signing the document has acted and the identity of the seal or stamp which it bears, is the addition of the certificate described in Article 4. In India, there is no formality prescribed with regard to the certification of authenticity of signature of the Notary, the capacity in which the Notary signs the document, or the identity of the seal or stamp which he affixes on the document. By virtue of later part of Rule 3, such condition cannot be required for

purpose of legalization of documents notarized in foreign countries.

On the other hand, learned counsel for the plaintiff has relied upon **AIR 1980 Allahabad 369, Abdul Jabbar & others Vs. 2nd Additional District Judge, Orai & others.** In this case, the court after following the cited decisions, held that Section 85 of the Indian Evidence Act (which raises a presumption in respect of a Power of Attorney having been executed before an authenticated Notary Public) applies equally to the documents authenticated by Notaries Public of other countries. The court held - *"In my opinion, documents which purport to be executed before or authenticated by Notaries Public, bearing proper seals, of other countries ought to be presumed to have been duly notarized within the meaning of Section 85....."*

The plaintiff also relied upon **AIR 1976 Delhi 263 National Grindlays Bank Ltd. Vs. M/s. World Science News & others.** This court in para 11 inter alia held as follows :-

"..... the purpose of Section 57 and 85 is to cut down recording of evidence. For such matters, like the due execution of a power of attorney in the present day of international commerce, there is no reason to limit the words "Notary Public" in Section 85 or Section 57 to Notaries appointed in India. The fact that notaries public of foreign countries have been recognized as proper authorities for due execution and authentication for purpose of Section 85 of the Evidence Act is illustrated by the Supreme Court in case Jugraj Singh V. Jaswant Singh, (1971) 1 SCR 38 = (AIR 1971 SC 761). In this case the Supreme Court held that a power of attorney

executed and authenticated before a notary public of California satisfied the test of Section 85 of the Evidence Act and Section 33 of the Indian Registration Act. If the interpretation of notary public is limited to notaries public appointed in this country only, it will become impossible to carry on commerce with foreign countries. Surely, Section 57 of the Indian Evidence Act enjoins upon the Courts to take judicial notice of seals of Notary Public. Such judicial notice cannot be limited to Notaries appointed in India only.....”

In **37(1989) DLT 88 Rajesh Wadhwa Vs. Dr. (Mrs.) Sushma Govind**, this court has held that even though there might not be reciprocity between India and another country (in that case, USA) u/s 14 of the Notaries Act, 1952, the notarial acts of the Notaries in the foreign country could be given legal recognition by the courts and authorities in India. The Notification u/s 14 of the Notaries Act was held to be non-mandatory.

Learned counsel for the plaintiff also submitted, and I think rightly so, that even if there was a doubt about the affidavit of the witness not being duly attested as being made on solemn affirmation, since the witness was personally present to dispose on oath, he could well have been put under oath and could have made a statement that the affidavit filed on 3.12.2005 was a statement made on oath.

In the light of the aforesaid discussion, in my view the objections raised by the defendant are liable to be rejected.

On the other hand, the defendant has succeeded in delaying the

progress of the trial and cross-examination of a foreign witness who has been available since 16-01-2007. His cross-examination could not take place on 16th and 17th January 2007 on account of the unjustified and wholly unacceptable conduct of the defendant. All the objections raised by the defendant were of the nature which could have been raised during the course of cross-examination of the witness and the cross-examination ought not to have been refused by the defendant. In my view, the defendant by its conduct, has disentitled itself to its right of cross-examining the witness. The defendant must be taken to have acted at its own peril. Due to the conduct of the defendant, this court has had to put aside the other urgent and pressing matters since a foreign witness is waiting to be cross-examined before he leaves India.

I, therefore, allow as the last and the only opportunity to defendant to cross-examine the aforesaid plaintiff's witness today itself at 2 P.M. before the Joint Registrar/Local Commissioner subject to the payment of Rs.50,000/- as costs. The Joint Registrar may conduct the cross-examination today itself and if necessary, tomorrow as well. The matter be placed before the Joint Registrar today at 2 P.M. for recording of evidence.

January 18, 2007
mw/spg

VIPIN SANGHI, J