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\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

*Reserved on: 3<sup>rd</sup> September, 2020*  
*Pronounced on: 16<sup>th</sup> December, 2020*

+ I.A. 6441/2020 in CS(COMM) 295/2020

**INTERDIGITAL TECHNOLOGY  
CORPORATION & ORS.**

.....Plaintiffs

Through Mr. Pravin Anand, Ms. Vaishali  
Mittal, Mr. Siddhant Chamola  
and Ms. Pallavi Bhatnagar,  
Advs.

versus

**XIAOMI CORPORATION & ORS.**

..... Defendants

Through Mr. Saikrishna Rajagopal, Mr.  
Siddharth Chopra, Ms. Sneha  
Jain, Ms. Garima Sahney, Ms.  
Anu Paarcha, Dr. Victor  
Vaibhav Tandon, Mr. Arjun  
Gadhoke and Ms. Charu  
Grover, Advs.

AND

+ I.A. 6447/2020 in CS(COMM) 296/2020

**INTERDIGITAL VC HOLDINGS  
INC. & ORS.**

.....Plaintiffs

Through Mr. Pravin Anand, Ms. Vaishali  
Mittal, Mr. Siddhant Chamola  
and Ms. Pallavi Bhatnagar,  
Advs.

versus

**XIAOMI CORPORATION & ORS.**

..... Defendants

Through Mr. Saikrishna Rajagopal, Mr.  
Siddharth Chopra, Ms. Sneha  
Jain, Ms. Garima Sahney, Ms.  
Anu Paarcha, Dr. Victor



Vaibhav Tandon, Mr. Arjun  
Gadhoke and Ms. Charu  
Grover, Advs.

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

% **JUDGEMENT**

1. InterDigital Technology Corporation has sued Xiaomi Corporation (hereinafter referred to as “Xiaomi”), alleging infringement, by Xiaomi, of Indian Patents Nos 262910, 295912, 298719, 313036 and 320182. It is alleged that Xiaomi is, without obtaining any license from InterDigital, using the technology, contained in these Standard Essential Patents (SEPs), held by InterDigital. InterDigital has, therefore, prayed, in its suit, that Xiaomi be enjoined, permanently, from manufacturing, selling, assembling, distributing, advertising, exporting, importing or using, in their devices, technology which infringes these SEPs. In the alternative, a direction is sought, to Xiaomi, to take a license, from InterDigital, for usage of its SEPs, on Fair, Reasonable and Non-Discriminatory (FRAND) terms, to be fixed by this Court.

2. With the suit, InterDigital filed IA 6440/2020 under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908 (CPC) and IA 6441/2020, under Chapter VII Rule 17 of the Delhi High Court (Original Side) Rules, 2018 (hereinafter referred to as “the Original Side Rules”). Arguments, in IA 6440/2020, are presently being heard. This judgement adjudicates IA 6441/2020 in CS(COMM) 295/2020 and IA 6447/2020 in CS(COMM)296/2020.



3. Chapter VII Rule 17 of the Original Side Rules reads thus:

**“17. Confidentiality Club.** – When parties to a commercial suit wish to rely on documents/information that are commercially or otherwise confidential in nature, the Court may constitute a Confidentiality Club so as to allow limited access to such documents/information. In doing so, the Court may set up a structure/protocol, for the establishment and functioning of such Club, as it may deem appropriate. An illustrative structure/protocol of the Confidentiality Club is provided in Annexure F. The Court may appropriately mould the structure/protocol of the Club, based upon the facts and circumstances of each case.”

4. The Confidentiality Club regime, admittedly, is standard protocol, especially while dealing with litigations involving allegation of patent infringement. Particularly in the case of SEP litigations, learned counsels for the parties are *ad idem* that such Confidentiality Clubs are routinely established by Courts. Learned Counsel, for both the sides before me, are veterans in intellectual property litigation, and, rightly therefore, there is no opposition, by Mr. Sai Krishna Rajagopal, learned Counsel for the defendant, to the setting up of a Confidentiality Club, per se. Mr. Rajagopal, however, joins serious issue with Mr. Pravin Anand, learned Counsel for the plaintiff, regarding the structure of the Confidentiality Club, as sought by him. I am concerned, in the present case, therefore, not with whether a Confidentiality Club ought, or ought not, to be set up, but whether the Confidentiality Club could be set up in the manner sought by InterDigital.



5. InterDigital seeks, in its application, setting up of a “two-tier” Confidentiality Club, comprising an “outer tier” and an “inner tier”. The documents which would be open to the members of the “outer tier”, are denoted, in the application of InterDigital, as “Confidential Information”, whereas the documents, to which members of the “inner tier” alone would have access, had been denoted as “Legal Eyes Only (LEO) Confidential Information”. The difference between these two tiers, as visualised and suggested by InterDigital, is that the “outer tier” documents and material would be accessible to the advocates for both sides, experts appointed by them, as well as representatives of both parties, whereas the “inner tier” documents would be accessible only to the advocates for both sides (who would not be in-house counsel), and experts appointed by them. In other words, “inner tier” documents would not be accessible to representatives of the parties, other than “non-in-house” advocates and the experts appointed by them. More simply expressed, the parties, as well as their officials and employees, would have no access to the “inner tier” documents. This is why, submits Mr. Pravin Anand, these documents have been designated as meant for “Legal Eyes Only”.

6. This, according to Mr. Pravin Anand, is an arrangement, and a protocol, which is accepted and recognised by Courts, all over the world, dealing with SEP infringement litigation. Though the application suggests that the Confidentiality Club could consist of four advocates, six representatives and two experts on each side, Mr. Anand has, essentially, left the issue of the number of persons who would be included in the Confidentiality Club, to the wisdom of the



Court. The exclusion of representatives of the parties, from having access to the “inner tier” documents is, however, according to Mr. Anand, non-negotiable.

7. The only objection of Mr. Rajagopal, to the structure of the Confidentiality Club, as suggested by InterDigital, is to the exclusion of the representatives of his client, insofar as access to the “inner tier” documents are concerned. Mr. Rajagopal submits, simply, that nobody can be permitted to rely on documents, to which the other party has no access, and granting access to advocates and experts is no substitute to granting access to the parties themselves. He presses, in this context, the hallowed principle that an advocate acts only on the instructions of his client.

8. At the very outset, I posed two queries to Mr. Pravin Anand. The first was as to how an advocate could be expected to be appropriately instructed, if he is unable to share, with his clients, the material on which the opposite party seeks to rely. The second was as to how the court could come between the advocate and his client, insofar as the “inner tier” documents were concerned, and injunct the advocate from disclosing the documents to his client. Would this not, I queried, amount to an unwelcome and, in fact, unjustified, incursion, by the Court, into the sacred space that exists between client and counsel?

9. I am constrained to confess that, despite all the ingenuity and skill at his command, Mr. Pravin Anand has not provided me with



satisfactory answers to these queries. His response, in sum and substance, may be condensed into two words – “It works.” To the first query, Mr. Anand has really no clear-cut response, except to submit that such arrangements have been created, in the past, and have worked. The end, in other words, according to Mr. Anand, justifies the means; on a more culinary note, the proof of the pudding is in the eating. Such “two-tier” Confidentiality Clubs having been created by Courts in the past, and having “worked”, without hiccups, Mr. Anand would exhort this Court not to be unduly concerned with whether the setting up of such a Confidentiality Club would compromise full and fair opportunity to both parties.

**10.** In response to the second query, Mr. Anand submits that no occasion would arise for the Court to come between client and counsel as, if this Court were to accede to the prayer, of InterDigital, for setting up of the “two-tier” Confidentiality Club, it would be for Xiaomi to instruct its Counsel not to disclose, to it, the “inner tier” documents. Frankly, the response befuddles me. I am unable to understand how the Court could insist on Xiaomi contracting, with its Counsel, to keep documents shown to its Counsel, and on which InterDigital relies against Xiaomi, undisclosed to Xiaomi itself. If Xiaomi decides, for some inscrutable reason, to permit its Counsel not to disclose, to it, material, on which InterDigital relies, that is a contractual understanding between Xiaomi and its Counsel, with which the Court is least concerned. To me, it is clear that the Court cannot, by judicial fiat, *impose* any such contractual dispensation between Xiaomi and its counsel.





**11.** Mr. Anand did draw my attention to judgements, of courts located outside the territory of India, where such “two-tier” Confidentiality Clubs were set up. Beyond providing, to this Court, information that such Confidentiality Clubs do exist in foreign regimes, I am unwilling to accord, to decisions passed by Courts abroad, any greater significance, in a case such as this. The jurisprudence of natural justice, due opportunity and fair play has, in this country, its own distinct contour and complexion. The request of InterDigital has to be gauged and assessed in the backdrop of “fair play jurisprudence”, as it exists in India. The mere fact that courts, overseas, may have acquiesced to the setting up of such Confidentiality Clubs cannot, in my view, be of any substantial significance, in deciding the present application of InterDigital. I rely, respectfully, in this context, on the following observations, contained in the judgement of the Division Bench of this Court in *M. Sivasamy v. Vestergaard Frandsen A/S*<sup>1</sup> (hereinafter referred to as “*Sivasamy v. Vestergaard*”):

“We may state that before the Learned Single Judge, and as reflected from the impugned order, reference has been made by the parties to proceedings between the parties in Courts of U.K., Denmark and France and help sought from such proceedings for the disposal of the subject application. However, according to us, with respect to the litigation in India, the Courts in this country would be guided by the provisions of the Laws as applicable in this country and the pleadings in the suit in this court and not by any orders or decisions of the foreign court, unless, the decision of the foreign Court becomes final and so that it can operate as res judicata between the parties and operate in the parameters of

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<sup>1</sup> 2009 (113) DRJ 820 (DB)



Section 13 and Section 44-A of the Code of Civil Procedure, 1908. No useful purpose will be served in making reference to various orders of the Courts in the different countries as one does not know what are the ingredients/requirements of causes of action of the different laws of those countries and what were the pleadings of the cases in the foreign courts. In fact, we do feel that none of the parties can contend or plead on the basis of orders of the Courts in foreign jurisdiction (particularly interim orders) as there is no finality (including by disposal of appeals) with respect to findings in such orders/judgments, especially in regard to whether the plaintiffs or the concerned defendants are the owners of the product or whether the products are same or different and so on. The orders/judgements in such proceedings having not achieved finality, according to us are not relevant and cannot be relied upon by either of the parties, particularly so where some orders (or portion thereof) are said to be in favour of one party and some in favour of the other.”

I entirely endorse these sentiments.

**12.** Mr. Sai Krishna Rajagopal, for Xiaomi, submitted that the present application, as filed, could not succeed for the simple reason that InterDigital had not disclosed, even to the Court, the documents which it sought to include in the “inner tier”, and those which it sought to include in the “outer tier”.

**13.** Though the application is silent regarding the nature of documents, and material, which would be included in the “inner” and “outer” tiers, InterDigital has, in its rejoinder, disclosed that “Tier 2 will include confidential, comparable patent license agreements on FRAND terms, as executed by the parties in the suit”. I am required to decide, therefore, whether such “comparable patent license agreements” could be justifiably included in an “inner tier” of





confidential documents, to be kept away from the eyes of the defendant, as well as all its officers and employees

**14.** Mr. Pravin Anand further submitted that, as this Court is presently functioning virtually, certain obvious handicaps, in presenting the documents to the Court, were bound to arise. Even so, he submitted, should this Court so desire, InterDigital was willing to provide, either in sealed cover personally to me, or by way of an encrypted e-mail, the documents in respect of which it sought to plead “enhanced confidentiality”.

**15.** It is not necessary for me to consider this request of Mr. Pravin Anand as, in my view, there can be no question of allowing the request, of InterDigital, for a “two-tier” Confidentiality Club. The prayer, for keeping certain documents, and information, inaccessible to Xiaomi and its personnel, and allow access, thereto, only to the advocates and experts nominated by Xiaomi is, in my view, completely unacceptable.

**16.** I proceed, now, to deal with the individual submissions advanced by Mr. Pravin Anand.

**17.** Mr. Pravin Anand emphasised, at the outset, that the Confidentiality Club arrangement was always reciprocal in nature. If, therefore, InterDigital was seeking the setting up of a “two-tier” Confidentiality Club, Xiaomi would, equally, be entitled to the benefit thereof. Mr. Anand submitted that Xiaomi would also desire that



some of the information, and documents, on which it sought to rely, be not made accessible to InterDigital or its personnel, and access, to such documents, be restricted only to the advocates and experts appointed by InterDigital. He was perfectly agreeable to such an arrangement.

**18.** To my mind, this submission is entirely tangential to the issue at hand. In case the Court finds the request, of InterDigital, for setting up of a “two-tier” Confidentiality Club, to be acceptable, the benefit thereof would, naturally, enure to Xiaomi as well. That goes without saying. The question, therefore, is not whether Xiaomi would also get the benefit of such an arrangement, but of whether such an arrangement is, to the mind of the Court, legally palatable or not. This submission, of Mr. Anand, therefore, cannot assist in resolving this controversy.

**19.** Mr. Anand submitted, next, that, in cases such as this, it was an accepted legal position that it was not necessary that all information be disclosed to the parties, or their personnel. Reliance was placed, in this context, on the following passage, from *Transformative Learning Solutions Pvt Ltd. v. Pawajot Kaur Baweja*<sup>2</sup>, especially on the italicized words:

“Of late however, in respect of a certain class of suits, it was felt that documents filed should not be permitted to go in public domain, as happens on filing in the Court. Provision has thus been made for keeping such documents in a sealed cover, for eyes only of a limited number of persons who also agree/undertake not to divulge contents thereof to others. *In*

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<sup>2</sup> AIR 2019 Del 197



*some cases, as in cases of patent infringement or infringement of copyright in source code of a computer software, the need for a party to a lis to see the document may not arise as the opinion with respect thereto is to be given by the expert only.”*

(Emphasis supplied)

The words used in the afore-extracted passage, and italicized therein for emphasis, cannot, by the farthest stretch of imagination, be regarded as according, by this Court, of its imprimatur to setting up of a Confidentiality Club, in which certain documents, or details, are made entirely inaccessible to the opposite party, and its representatives, barring advocates and the experts. This Court has merely observed that the *need* for a party to a *lis*, to see a particular document, may not arise, in some cases of patent infringement of copyright infringement. Whether there is need, for Xiaomi, or its personnel, to see the documents and data on which InterDigital relies, is one thing; whether InterDigital can insist on such documents, and details, being kept away from Xiaomi, and its personnel, and whether the Court can accord its judicial approval to such insistence, is entirely another. Significantly, this Court has, in the afore-extracted passage from *Transformative Learning Solution*<sup>2</sup>, being careful in referring only to the “need” of the representatives of the opposite party seeing the documents, “arising”, without stating, in so many words, that either party could insist on the establishment of a regime in which documents and details, on which it relies, could be kept away from the opposite party, and its personnel. It is well settled that a decision is



only an authority for what it decides, and not for what may logically be said to flow therefrom.<sup>3</sup>

20. Having said that, the facts, in *Transformative Learning Solutions*<sup>2</sup>, are interesting. The plaintiffs sought an injunction, against the defendants, from disclosing or using their confidential information and trade secrets, among other things. The plaintiffs demurred from disclosing the “confidential information”, in the proceedings before the Court. Ultimately, in exercise of the power vested by Chapter VII Rule 17 of the Original Side Rules, a Confidentiality Club, consisting of Defendants 1 and 2 and their counsel as members, was constituted. The plaintiffs were directed to supply the confidential information, in a sealed cover, to the counsel for Defendants 1 and 2. The plaintiffs filed a Review Petition, seeking review of this order, to the extent that it constituted the Confidentiality Club. It was contended, by the plaintiffs, that Chapter VII Rule 17 of the Original Side Rules, read with Annexure F thereto, did not allow the parties, or their officers and employees, to be members of the Confidentiality Club, which was restricted to the advocates for the parties. It was pointed out that the proforma for the Confidentiality Club, as provided in Annexure F to the Original Side Rules, did not contemplate inclusion of the parties or their officers or employees, as members thereof. Reliance was placed on clause (b) in the said proforma, which reads thus:

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<sup>3</sup> *Union of India v. Dhanwanti Devi*, (1996) 6 SCC 44; *State of Orissa v. Md. Illiyas*, (2006) 1 SCC 275; *Uttaranchal Road Transport Corporation v. Mansaram Nainwal*, (2006) 6 SCC 366; *Dr. Shah Faesal v. Union of India*, (2020) 4 SCC 1.



“Each party shall nominate not more than three Advocates, who are not and have not been in-house lawyers of either party, and not more than 2 external experts, who shall constitute the Confidentiality Club. Members of the Confidentiality Club alone shall be entitled to inspect the Confidential Documents/Information

Premised on this clause, in the “model Confidentiality Club” protocol contained in Annexure F to the Original Side Rules, it was submitted that neither the parties themselves, nor their employees or officers, could be part of the Confidentiality Club.

21. The Court, during the proceedings on 27<sup>th</sup> March, 2019, specifically queried, of the learned Counsel appearing for the plaintiffs, as to how such an arrangement could sustain, as the advocate would have to act on the basis of instructions from his client, which would necessarily require the advocate to disclose, to the client, the contents or the nature of the documents cited by the opposite party. In response, the plaintiffs merely placed reliance on the earlier decision of this Court in *Telefonaktiebolaget LM Ericsson (Publ) v. Xiaomi Technology*<sup>4</sup> (referred to, hereinafter, as *Ericsson v Xiaomi*). Dealing with the submission, this Court observed, at the outset, thus (in para 21 of the report):

*“A civil lis, governed by the CPC, requires each party thereto to have notice of the case of other, which is required to be met and the CPC does not permit any surprises. The trial and adjudication of a civil lis is regulated by pleadings in evidence, documentaries or otherwise, beyond pleadings is not permitted. The documents of each other are required to be admitted and/or denied and issues on which adjudication is required to be done, struck. No evidence, even if led, beyond*

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<sup>4</sup> 2017 SCC OnLine Del 11069





pleadings is permitted to be led. *Thus, the proceedings require complete disclosure.*”

(Emphasis supplied)

**22.** No civil suit, be it for enforcement of rights relating to intellectual property, or any other right, can claim innocence to the rigour and discipline of the CPC and the Specific Relief Act, 1963. In commercial suits, the provisions of the CPC stand, to some extent, modified or amended by the Commercial Courts Act, 2015. The Original Side Rules of this Court have been framed in exercise of the power conferred by Section 129 of the CPC, which empowers all high Courts, notwithstanding anything contained in the CPC, to make rules to regulate its own procedure in the exercise of its original civil jurisdiction, as it thinks fit. The *non obstante* clause, with which Section 129 begins, indicates that the Original Side Rules, framed by the High Court in exercise of the power conferred by the said provision would abide, irrespective of anything to the contrary, that may be found in the CPC. In a sense, therefore, the Original Side Rules of the High Court would prevail over the procedural dispensations contained in the CPC, to the extent of any overlap. Rule 17 in Chapter VII of the Original Side Rules, undoubtedly, marks such a departure from the regime of complete transparency, envisaged by the CPC. It permits parties to a commercial suit, who wish to rely on documents or information which are confidential, to request the Court to constitute a Confidentiality Club, “so as to allow limited access to such documents/information”. The moot question that arises is whether such “limited access” could be so limited as to deny access to the opposite party, as well as its employees and officials, and limit access only to its nominated “ex-house” counsel and experts.



23. Having noted, as above, the fact that “surprises” were foreign to the procedural dispensation contained in the CPC, this Court, in *Transformative Learning Solutions*<sup>2</sup>, went on to record the observations, in para-22 of the report, reproduced in para 19 *supra*, on which Mr. Pravin Anand places reliance. What is observed in this paragraph? Has this Court, in the said paragraph, approved the Constitution of Confidentiality Clubs, in which one party, as well as its officials and employees, are kept completely aloof from the documents and material relied upon by the opposite party in the proceedings before the Court? No such inference can, in my view, be drawn, from a reading of para 22 of the decision in *Transformative Learning Solutions*<sup>2</sup>. This Court has, in the said paragraph, merely observed that, despite the transparency contemplated by the provisions of the CPC, “in respect of a certain class of suits”, it has been felt that documents filed “should not be permitted to go in public domain, as happens on filing in the Court”. This obviously means that public access, to the documents filed in the litigation, may not be allowed, in respect of a certain class of suits. This sentence, obviously, does not concern access to the documents/material, by the opposite party. The paragraph goes on to observe that, in such cases, provision has been made for keeping the documents in a sealed cover, “for eyes only of a limited number of persons who also agree/undertake not to divert contents thereof to others”. This, essentially, is the *raison d’etre* of the Confidentiality Club regime. Again, the question that arises is, as to how limited, this “limited number of persons” should be. Para 22 goes on to state that, in some



cases, as in cases of patent infringement, “the need for a party to a *lis* to see the documents may not arise”, as the opinion, with respect thereto, is to be given only by the expert. In my opinion, however, it would be erroneous, on the part of this Court, to read, into this observation, anything more than what it says. As this Court has correctly observed, there may be documents, relied upon by one party, on which expert opinion is provided, *which may not be need to be seen* by the opposite party, as an expert has already opined on the document. That, however, would be an issue which arises on a document-to-document basis, based on the document and the contents of the report of the expert. Whether either of the parties, to a litigation, needs, or does not need, to see a particular document, would be a decision which essentially rests with the party itself. Can InterDigital, simply put, assert that Xiaomi does not need to see a document on which InterDigital places reliance, to contest the case initiated by it against Xiaomi? The answer, in my view, has unexceptionably to be in the negative. It would be stretching the observation of this Court, in *Transformative Learning Solutions*<sup>2</sup> to breaking point, if one were to read, into it, judicial affirmation of the right of a party to a litigation to require the Court to permit him to withhold, from the opposite party as well as all its officials and employees, documents and material on which he seeks to rely.

**24.** Far more reflective of the view of this Court, in my opinion, are paras 23 and 24 of the decision in *Transformative Learning Solutions*<sup>2</sup>, which reads thus:

“23. However in the present suit to restrain defendants from using confidential information of plaintiffs and for ancillary



reliefs, the defendants are permitted to defend the suit inter alia on the grounds, that the plaintiffs have no copyright in the customers list and even if the plaintiffs have a copyright, the defendants have not infringed the same. I may mention that the suit has been filed as a commercial suit and not as an ordinary suit. This suit, under Section 2(c) of the Commercial Courts Act, 2015, can qualify as a commercial suit only if arising out of intellectual property rights relating to trade marks, copyright, patent, design etc. and not if arising out of property rights or a tort. *In such a suit, to ask the defendants to contest the suit without knowing the customers list in which copyright is claimed and without knowing what they are sought to be restrained from doing, would not only be unfair to the defendants but also would be contrary to procedure prescribed by law. The Advocates of defendants and experts, even if any possible in such scenario, cannot be expected to make pleadings, to meet the case of plaintiffs. The non disclosure to the defendant sought by the plaintiffs, in my opinion deprives the defendant of opportunity of being heard and the right to defend the suit.*

24. As far as ***Telefonaktiebolaget LM Ericsson (PUBL) supra*** is concerned, *the counsel for defendant no. 2 is correct in his contention that Annexure-F supra is only illustrative and else there is no absolute bar to a party/litigant being a member of a Confidentiality Club. This is also clear from bare language of Rule 17 of Chapter VII supra.* Moreover, here, it is the pleaded case of plaintiffs that defendants are privy to the customers list of the plaintiffs. *In such circumstances, the reluctance of the plaintiffs is inexplicable and intended only to have a walkover and obtain an absolute but vague order/decreed of injunction against defendants, to stop the defendants from competing with the plaintiffs. This is impermissible in law.”*

(Emphasis supplied)

These observations are clear and categorical, and the correct position in law, in my opinion, could not have been better expressed. I express my complete and respectful concurrence therewith.



25. In *Transformative Learning Solution*<sup>2</sup>, the plaintiff was seeking to withhold, from the defendant, the list of customers in respect of which copyright was claimed. This, opined the Court, effectively resulted in the defendant being kept unaware of what it was sought to be restrained from doing, which was impermissible. The position, in the present case, is a trifle more nuanced, but is effectively equally damaging, insofar as the defendant is concerned. The plaintiff, InterDigital, in the present case, also seeks an injunction, against the defendant, from infringing its patents. It is true that, unlike *Transformative Learning Solutions*<sup>2</sup>, the plaintiff does not seek to withhold, from the defendant, the patents, in respect of which infringement is alleged, and restraint, in respect whereof, is sought. Patent infringement, in the case of SEPs has, however, a unique feature. A holder of an SEP is not entitled, of right, to seek injunction against infringement of its SEP, merely on making out a case of such infringement. The patent holder is also required to establish that it is FRAND compliant. This, essentially, means that every holder of an SEP is required, in law, to agree to the licensing of its SEP to willing licensees. “Willing licensees” are those who are willing to take a license, to exploit the SEP, on payment of royalty, to the patent holder, on fair, reasonable and non-discriminatory (FRAND) terms. It is for this reason that, even in the present case, the plaintiff has not sought an absolute injunction, against the defendant, from infringing its SEPs. An alternative prayer, for a direction to the defendant to obtain a license, from the plaintiff, for using its SEPs at FRAND rates, has also been made. Indeed, as is acknowledged by Mr. Pravin Anand, such a prayer has necessarily to be made in every





application seeking injunction against exploitation of an SEP, given the global ramifications and implications that such exploitation has. In such a scenario, disputes and differences, regarding the FRAND rates which may legitimately be charged by the SEP holder, is nearly inevitable. Such a dispute has, predictably, arisen in the present case, as it is the plaintiffs' assertion that, though the defendant has agreed to take a license, for exploitation of the suit SEPs of the plaintiffs, the rate offered by the defendant is not FRAND. The plaintiffs, therefore, seek, *inter alia*, determination of a FRAND rate, as a viable alternative, for the defendants to avoid an absolute injunction.

**26.** The mechanics of FRAND rate fixation litigation necessarily involve reliance, by the patent holder, on the royalty rates at which it has licensed its SEPs to other licensees. An integral part of the resolution of the dispute, therefore, is the estimation of whether the rates at which the plaintiff has licensed its SEPs, to other licensees is, or is not, FRAND. For this, a holistic appreciation of the license agreements, between the plaintiff and other licensees, is absolutely essential. To say that this exercise can be meaningfully undertaken by limiting access to such agreements and the contents thereof, to the Court, the plaintiff, and advocates and experts of the defendant, keeping the defendant, as well as its employees and associates, entirely "out of the loop" as it were is, in my view, unthinkable. (That some Courts, in foreign jurisdictions, have so thought, is a different matter altogether.)



27. As has already been noted hereinabove, it is these license agreements, that the plaintiff desires to include in the “inner tier”, to be kept away from the eyes of the defendants, as well as all their officers and employees. To me, the very suggestion is completely antithetical to, and destructive of, the most fundamental notions of natural justice and fair play. It is obvious that, in contesting the prayer, of the plaintiff, for a direction, to the defendant, to take a license from the plaintiff at rates similar, or comparable, to those at which licences have been granted, by the plaintiff, to other licensees, the defendant would be entitled to contend that such rates are not FRAND, i.e., that they are not fair, reasonable, or non-discriminatory. For this, it is obvious that the defendants would have to be made privy to the license agreements with other licensees. Without knowing the identity of the licensee, the particulars of the license agreement, or its covenants, it defeats comprehension as to how the defendants can be expected to make any submission, regarding whether the rate, at which such license has been granted, is, or is not, FRAND.

28. I do not deem it necessary to venture into an imaginative excursion, regarding all exigencies, which may arise, requiring the defendant to know the covenants of the agreements with other licensees. One circumstance, however, immediately comes to mind. FRAND terms are required to be, per definition, “non-discriminatory”. Whether, in extending a particular royalty rate to a licensee, for exploitation of its SEP, the plaintiff has discriminated, favourably or otherwise, *qua* that particular licensee, becomes, therefore, a relevant consideration, in assessing whether the rate



extended to the licensee is, or is not, FRAND. Mr. Sai Krishna Rajagopal has, in fact, pointed out that, in order to assess whether the royalty rate, at which InterDigital has licensed its SEPs to any third party, is, or is not, FRAND, it would be necessary for Xiaomi to know the identity of the licensee, the exact scope of the license granted to the licensee, the area over which the licenses granted, and all considerations, on the basis of which the royalty rate has been worked out in the license. *Ex facie*, the submission merits acceptance; indeed, Mr. Pravin Anand did not seriously contest this position. Mr. Anand's submission, in response, is that knowledge of, and access to, the third-party license agreements, by "ex-house" advocates, and experts nominated by Xiaomi, would suffice for this purpose, and disclosure to Xiaomi, its officers and personnel, is not necessary. The submission, in my view, is far too presumptive, to merit consideration. These are matters having huge commercial implications, and worldwide markets, and to expect a party to meaningfully present its case, without being shown the "comparable license agreements", merely allowing its counsel and experts to work out the arguments without instructions is, in my view, bordering on the preposterous. At the very least, the first question that would arise would be whether, in fact, such "license agreements" are "comparable". It is always open to the defendant to argue that they are not. How is he expected to do so, without being made aware of the license agreements themselves? The very concept of "comparison" involves a juxtaposition of the circumstances applicable to the defendants *vis-à-vis* the circumstances in which such other licensee was placed. Who, other than the defendant, would be best aware of its circumstances, or whether its



case is comparable to the case of another licensee, on whom the plaintiff places reliance? How, then, is the defendant expected to instruct its advocate, regarding whether the agreement, with such other licensee is, or is not, “comparable”? The damage that would ensue, to the fundamental principles of natural justice, fair play and due process, were the defendant to be excluded access from such allegedly “comparable” license agreements, is serious and irreparable. Any procedural arrangement, which is fraught with the possibility of such damage has, in my view, to be unequivocally jettisoned.

**29.** In this context, the justification, for “Tier 2”, as contained in para-11 of the rejoinder filed by the plaintiff, is revealing. It reads thus:

“With respect to Tier 2, there is a pressing need to ensure that internal representatives and other employees of the parties do not have access to documents which are marked and designated as LEO Confidential Information (particularly third-party patent license agreements). This is because such documents contain sensitive commercial information, including trade secrets concerning the Plaintiffs and their licensees, such that disclosure of such information is strictly restricted in the license agreements. If such information is placed in the hands of other parties such as the Defendants, and if it is misused or further disclosed thereafter, it could cause such grave prejudice to the commercial interests of the Plaintiffs, as well as the third party entities, who in many instances are competitors to the Defendants. In the case that such confidential and sensitive information is disclosed to the Defendants, or is disclosed to other third parties thereafter, then it will cause grave prejudice not just to the Plaintiffs, but their third party licensees as well, since it will be very difficult for the Plaintiffs to be able to negotiate future licence agreements with licensees who cannot be assured that the confidentiality obligations with respect to such negotiations can be complied with. In such a situation, any order from this Hon’ble Court passed later cannot reverse the damage.”



In making the above averments, InterDigital seems to have omitted, from consideration, two essential factors; firstly, that litigation is not a one-way street and, secondly, that InterDigital has invited Xiaomi into the arena, and not vice versa. InterDigital has waxed eloquent on the “irreversible damage” that would result, were confidential data, contained in the license agreements with third parties, to be disclosed to Xiaomi. The argument proceeds, however, completely oblivious of the damage that would result to Xiaomi, were it to be required to defend the action brought by InterDigital, without being shown such third-party license agreements.

**30.** How does the situation pan out? InterDigital is willing to license their SEPs to Xiaomi at FRAND rates. Xiaomi offers a rate. InterDigital rejects it as not FRAND. Xiaomi queries, then, as to the rate which, according to InterDigital, *is* FRAND. InterDigital claims that the rates at which it has licensed its SEPs to other third-party licensees, are FRAND, i.e. that they are fair, reasonable and non-discriminatory. InterDigital calls upon Xiaomi to agree to such rates, without Xiaomi being made privy to the license agreements with the third parties.

**31.** This, in my view, is completely unreasonable. It is not as though Xiaomi is unwilling to take licenses from InterDigital. InterDigital relies on the third-party license agreements for determination of the rate at which licences should be granted to Xiaomi. Xiaomi has the option of accepting the rates quoted by InterDigital, as reflected in the third-party license agreements.





Equally, Xiaomi has the option of rejecting such rates, should they feel that they are not FRAND. In such latter eventuality, if InterDigital seeks to rely on the rates at which licences had been granted to other parties, the circumstances in which the said licences were granted have, in my view, necessarily to be made known to Xiaomi – and not merely to their attorneys and experts, with a proscription from disclosing the material to Xiaomi, its officers and employees – in order for Xiaomi to take an informed decision as to whether such licences are “comparable”, the rates at which such licences had been granted are, in fact, FRAND, and whether a comparison of such licences, which the rates offered by Xiaomi, reveals the rates offered by Xiaomi *not* to be FRAND.

**32.** While, therefore, not intending, in any manner, to downplay the argument, of Mr. Pravin Anand, regarding the possible damage that would ensue, were confidential covenants, contained in the agreements with third-party licensees to be disclosed to Xiaomi, that, in my view, cannot be sufficient as a ground to require Xiaomi to defend the suit, without being made aware of such agreements.

**33.** I may clarify, even at this juncture that, in penning this judgement, I am only addressing the prayer, of InterDigital, for constitution of a two-tier Confidentiality Club, consisting of “inner tier” and “outer tier” documents. Permitting the constitution of such a Club would amount to granting blanket permission, to InterDigital, to keep certain documents away from Xiaomi, its officers and its employees. In holding that this is not permissible, I do not intend to



come in the way of any *inter se* arrangement, between InterDigital and Xiaomi, regarding such “restricted access”, qua any particular documents or information, or even of the constitution of the Confidentiality Club consisting of two tiers, as proposed by InterDigital. If the parties are able to agree, or to arrive at a level playing field in that regard, this judgement shall not come in the way of their doing so.

**34.** Equally, if Xiaomi is agreeable, in respect of any particular documents or material on which InterDigital chooses to rely, to such documents or materials being disclosed only to their advocates and experts, and not to Xiaomi, its officers or employees, this judgement would not come in the way of such an arrangement. It is also not inconceivable that some kind of reciprocal understanding is arrived at, between the parties. This judgement does not intend to deal with such situations. I am concerned only with the issue of whether such an arrangement can, against its wishes, be imposed on Xiaomi.

**35.** At this point, I may also deal with Annexure-F to the Original Side Rules, on which Mr. Anand placed reliance. As is apparent from a reading of Rule 17 in Chapter VII of the said Rules, Annexure F is cited as “an illustrative structure/protocol of the Confidentiality Club”, which may be “appropriately moulded” by the Court, based upon the facts and circumstances of each case. Annexure F reads thus:

**“ANNEXURE F  
CHAPTER VII RULE 17  
PROTOCOL OF CONFIDENTIALITY CLUB**



**Procedure to be followed in dealing with  
confidential documents/ information**

Upon hearing of an application, the Court may allow constitution of a Confidentiality Club in the following manner:-

- a) All documents/ information considered as confidential (“Confidential Documents/ Information”) by the Court shall be permitted to be filed in a sealed cover to kept in the safe custody of Registrar General.
- b) Each party shall nominate not more than three Advocates, who are not and have not been in-house lawyers of either party, and not more than two external experts, who shall constitute the Confidentiality Club. Members of the Confidentiality Club alone shall be entitled to inspect the Confidential Documents/ Information.
- c) Members of the Confidentiality Club shall be allowed to inspect the Confidential Documents/ Information before the Registrar General, without making copies thereof. After the inspection, the Confidential Documents/ Information shall be resealed and kept in the custody of the Registrar General.
- d) Members of the Confidentiality Club shall not make copies of, or disclose, or publish the contents of, the Confidential Documents/ Information to anyone else in any manner or by any means, or in any other legal proceedings and shall be bound by the orders of the Court in this behalf.
- e) During recordal of evidence with respect to the Confidential Documents/ Information, only members of the Confidentiality Club shall be allowed to remain present.
- f) During proceedings of the Court, when the Confidential Documents/ Information are being looked at or their contents discussed, only members of the Confidentiality Club shall be permitted to be present.
- g) The Court may in its discretion and in an appropriate case, permit copies of the Confidential Documents to be given to the opposite party after redacting confidential information therefrom, if such redaction be possible and not otherwise.
- h) Any evidence by way of affidavit or witness statement containing confidential information derived from the Confidential Documents/ Information shall be kept in a sealed cover with the



Registrar General and would be accessible only to the members of the Confidentiality Club. However, a party filing such evidence by way of affidavit shall, if so directed by the Court, give to the opposite party, a copy of such affidavit after redacting therefrom the confidential information, if such redaction is possible and not otherwise.

i) The Confidential Documents/ Information shall not be available for inspection after disposal of the matter, except to the Party producing the same.

j) In cases where the Confidentiality Club is constituted or documents are directed to be kept confidential, the Court may consider extending the time for filing of pleadings. However, the same shall be within the overall limits prescribed by the applicable provisions.”

Clause (b) of the “Protocol of Confidentiality Club”, as stipulated in Annexure F, clearly excludes the parties, as well as their officials and representatives, from the Club. Membership of the Confidentiality Club, constituted in the manner envisaged by Annexure F is, clearly, limited to three advocates and not more than two external experts. Mr. Anand submits, relying on this Annexure, that the parties, and their officials and representatives, may legitimately be excluded from the Confidentiality Club constituted by the Court.

**36.** Para 24 of *Transformative Learning Solutions*<sup>1</sup>, to an extent, answers the submission, by observing that “Annexure F... is only illustrative and hence there is no absolute bar to a party/litigant being a member of a Confidentiality Club”. That apart, Annexure F is only in the nature of the suggested protocol for the Confidentiality Club, and its covenants cannot be treated as declaratory of the statutory position. Constitution of the Confidentiality Club, in the manner conceptualised by Annexure F may not be inconceivable, *provided the*



*parties agree to such constitution.* There may be any number of reasons why one party may agree to the suggestion, of the other, for the exclusion of its officials and employees from the Confidentiality Club. As Mr. Anand himself points out, a reciprocal arrangement may exist or emerge, between the parties. It is not impossible to visualise a situation in which both parties desire to keep documents, on which they rely, away from the eyes of the opposite party. In such a situation, they may well agree, mutually, that the Confidentiality Club would not include the parties, or their officials and employees, and would be limited to their advocates and experts. Such a Confidentiality Club would be in accordance with the protocol suggested in Annexure F to the Original Side Rules.

**37.** In the present case, however, Xiaomi is not being as accommodative. Mr. Anand sought to submit that the arrangement suggested by him would enure to the benefit of Xiaomi as well, as Xiaomi could also take advantage of such a Confidentiality Club, in respect of documents which Xiaomi did not desire to be seen by InterDigital. That, however, is in the realm of conjecture. If InterDigital can come to terms with Xiaomi, and they agree, *ad idem*, to the constitution of such a Confidentiality Club, in which “inner tier” documents would remain away from the prying eyes of InterDigital and Xiaomi, as well as their officers and employees, this order shall not stand in their way. As of today, however, Xiaomi is not agreeable to such an arrangement. Xiaomi submits, categorically and unequivocally, that it cannot concede to documents, on which InterDigital relies, being kept away from its officers and employees,





and disclosed only to its advocates and experts. The objection of Xiaomi, in my view, is legally sound, and merits acceptance.

**38.** The client-lawyer relationship, in Indian law, has its own distinct incidents. One may reproduce, to advantage, the following passages, from the judgement of the Supreme Court in *Himalayan Coop. Group Housing Society v. Balwan Singh*<sup>5</sup>, which place the legal position beyond any pale of doubt:

**“22.** Apart from the above, in our view lawyers are perceived to be their client's agents. The law of agency may not strictly apply to the client-lawyer's relationship as lawyers or agents, lawyers have certain authority and certain duties. Because lawyers are also fiduciaries, their duties will sometimes be more demanding than those imposed on other agents. The authority-agency status affords the lawyers to act for the client on the subject-matter of the retainer. One of the most basic principles of the lawyer-client relationship is that lawyers owe fiduciary duties to their clients. As part of those duties, lawyers assume all the traditional duties that agents owe to their principals and, thus, have to respect the client's autonomy to make decisions at a minimum, as to the objectives of the representation. Thus, according to generally accepted notions of professional responsibility, lawyers should follow the client's instructions rather than substitute their judgment for that of the client. The law is now well settled that a lawyer must be specifically authorised to settle and compromise a claim, that merely on the basis of his employment he has no implied or ostensible authority to bind his client to a compromise/settlement. To put it alternatively that a lawyer by virtue of retention, has the authority to choose the means for achieving the client's legal goal, while the client has the right to decide on what the goal will be. If the decision in question falls within those that clearly belong to the client, the lawyer's conduct in failing to consult the client or in making the decision for the client, is more likely to constitute ineffective assistance of counsel.

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<sup>5</sup> (2015) 7 SCC 373



**23.** The Bar Council of India Rules, 1975 (for short “the BCI Rules”), in Part VI Chapter II provide for the “Standards of Professional Conduct and Etiquette” to be observed by all the advocates under the Advocates Act, 1961 (for short “the 1961 Act”). In the Preamble to Chapter II, the BCI Rules provide as follows:

“An advocate shall, at all times, comport himself in a manner befitting his status as an officer of the Court, a privileged member of the community, and a gentleman, bearing in mind that what may be lawful and moral for a person who is not a member of the Bar, or for a member of the Bar in his non-professional capacity may still be improper for an advocate. *Without prejudice to the generality of the foregoing obligation, an advocate shall fearlessly uphold the interests of his client and in his conduct conform to the rules hereinafter mentioned both in letter and in spirit.* The rules hereinafter mentioned contain canons of conduct and etiquette adopted as general guides; yet the specific mention thereof shall not be construed as a denial of the existence of others equally imperative though not specifically mentioned.”  
(Emphasis supplied)

**24.** The Preamble makes it imperative that an advocate has to conduct himself and his duties in an extremely responsible manner. They must bear in mind that what may be appropriate and lawful for a person who is not a member of the Bar, or for a member of the Bar in his non-professional capacity, may be improper for an advocate in his professional capacity.

**25.** Section II of the said Chapter II provides for duties of an advocate towards his client. Rules 15 and 19 of the BCI Rules, have relevance to the subject-matter and therefore, they are extracted below:

“**15.** It shall be the duty of an advocate fearlessly to uphold the interests of his client by all fair and honourable means without regard to any unpleasant consequences to himself or any other. He shall defend a person accused of a crime regardless of his personal



opinion as to the guilt of the accused, bearing in mind that his loyalty is to the law which requires that no man should be convicted without adequate evidence.

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**19.** An advocate shall not act on the instructions of any person other than his client or his authorised agent.”

**26.** While Rule 15 mandates that the advocate must uphold the interest of his clients by fair and honourable means without regard to any unpleasant consequences to himself or any other. Rule 19 prescribes that an advocate shall only act on the instructions of his client or his authorised agent. Further, the BCI Rules in Chapter I of the said Section II provide that the Senior Advocates in the matter of their practice of the profession of law mentioned in Section 30 of the 1961 Act would be subject to certain restrictions. One of such restrictions contained in clause (cc) reads as under:

“(cc) A Senior Advocate shall, however, be free to make concessions or give undertaking in the course of arguments on behalf of his clients on instructions from the junior advocate.”

**27.** Further, the “Code of Ethics” prescribed by the Bar Council of India, in recognition of the evolution in professional and ethical standards within the legal community, provides for certain rules which contain canons of conduct and etiquette which ought to serve as general guide to the practice and profession. Chapter III of the said Code provides for an “Advocate’s duty to the client”. Rule 26 thereunder mandates that an “advocate shall not make any compromise or concession without the proper and specific instructions of his/her client”. It is pertinent to notice that an advocate under the Code expressly includes a group of advocates and a law firm whose partner or associate acts for the client.

**28.** Therefore, the BCI Rules make it necessary that despite the specific legal stream of practice, seniority at the Bar or designation of an advocate as a Senior Advocate, the ethical duty and the professional standards insofar as making concessions before the Court remain the same. It is expected of the lawyers to obtain necessary instructions from the



clients or the authorised agent before making any concession/statement before the court for and on behalf of the client.

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**30.** The Privy Council in *Sourendra Nath Mitra v. Tarubala Dasi* [(1929-30) 57 IA 133 : (1930) 31 LW 803 : AIR 1930 PC 158], has made the following two observations which hold relevance to the present discussion: (IA pp. 140-41)

“Two observations may be added. First, the implied authority of counsel is not an appendage of office, a dignity added by the courts to the status of barrister or advocate at law. It is implied in the interests of the client, to give the fullest beneficial effect to his employment of the advocate. Secondly, the implied authority can always be countermanded by the express directions of the client. *No advocate has actual authority to settle a case against the express instructions of his client. If he considers such express instructions contrary to the interests of his client, his remedy is to return his brief.*”

(See: *Jamilabai Abdul Kadar v. Shankarlal Gulabchand*, (1975) 2 SCC 609 and *Svenska Handelsbanken v. Indian Charge Chrome Ltd*, (1994) 2 SCC 155)

**31.** Therefore, it is the solemn duty of an advocate not to transgress the authority conferred on him by the client. It is always better to seek appropriate instructions from the client or his authorised agent before making any concession which may, directly or remotely, affect the rightful legal right of the client. The advocate represents the client before the court and conducts proceedings on behalf of the client. He is the only link between the court and the client. Therefore his responsibility is onerous. He is expected to follow the instructions of his client rather than substitute his judgment. (Italics in original; underscoring supplied)



39. The duty of advocates to act, at all times, under instructions from their clients, was also iterated by the Supreme Court in *An Advocate v. B. B. Haradara*<sup>6</sup> and *Om Prakash v. Suresh Kumar*<sup>7</sup>.

40. In my view, SEP infringement litigation cannot be treated as a category *sui generis*, to which the principles enunciated in these decisions, as well as the Bar Council of India Rules, would not apply.

41. I proceed to examine, now, chronologically, the other decisions of this Court on which Mr. Pravin Anand sought to place reliance.

42. *MVF 3 APS v. M. Sivasamy*<sup>8</sup> was the judgement of a learned Single Judge of this Court, passed by way of implementation of the directions contained in the judgement, of the Division Bench of this Court in *Sivasamy v Vestergaard*<sup>1</sup>. These decisions cannot be said to be of much assistance, in resolving the controversy before me. *Sivasamy v Vestergaard*<sup>1</sup> involved a challenge to an order, of a learned Single Judge of this Court, directing discovery and production of documents, under Rules 12 and 14 of Order XI of the CPC. The Division Bench went, in great detail, into the said provisions and, ultimately, set aside the order of the learned Single Judge and remanded the matter to the learned Single Judge to devise a procedure, to ensure that information, documents, etc., of which production was sought by the plaintiff, and which pertained to the products of the defendants, could be kept confidential so as to avoid

<sup>6</sup> 1989 (1) ARC 72 (SC)

<sup>7</sup> 2020 SCC OnLine SC 100

<sup>8</sup> 193 (2012) DLT 352 : 2012 (52) PTC 552 (Del)





prejudice to the defendants. In essence, therefore, the Division Bench remanded the matter to the learned Single Judge to constitute a Confidentiality Club. Before the learned Single Judge, there was no dispute, relating to the constitution of the Confidentiality Club. Indeed, a reading of the decision does not even disclose the membership of the said Club. The learned Single Judge only proceeded to work out the mechanics, by which the Confidentiality Club would operate. This decision, therefore, is of no assistance, to the case at hand. Neither of these decisions addresses the issue of whether the membership of the Confidentiality Club would be restricted to the advocates and experts, appointed by the parties, though there is a passing reference to the constitution of such Confidentiality Clubs in the UK. These judgements do not indicate that the stand, which Mr. Sai Krishna Rajagopal has adopted in the present case, was taken by any of the learned Counsel, or that the merits of such a stand was deliberated upon.

**43.** In *Sanofi Winthorp Industrie v. Kirti B. Maheshwari*<sup>9</sup>, a short order of a learned Single Judge of this Court, a Confidentiality Club was set up, in terms of para 4 of the application before the learned Single Judge. The constitution of the Confidentiality Club, as set out in para 4 of the application is not, however, apparent from the order, clearly because there was no dispute, between the parties, regarding the constitution of the Confidentiality Club. This Court merely allowed the parties to set up the Confidentiality Club, as indicated in para 4 of the application before it, and directed each of the parties to

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<sup>9</sup> Order dated 7th August, 2014, of the learned Single Judge in CS (OS) 2265/2014



suggest the names of three advocates, who would be entitled to see the documents, which were in sealed cover. The advocates who were permitted to be privy to the documents were also directed to abide by the conditions contained in paras 4(ii) and (iii) of the application before the learned Single Judge. Interestingly, the order reveals that the learned Counsel for the defendants agreed to the constitution of such a Confidentiality Club, subject to the defendants being also entitled to the same arrangement. The plaintiffs did not object. As such, it is clear that this order was passed by consent between the parties, without any contest regarding the nature of the constitution of the Confidentiality Club. No principle of law is enunciated in the order which cannot, therefore, assist Mr. Pravin Anand.

**44.** In *Telefonaktiebolaget LM Ericsson (Publ) v. Lava International Ltd*<sup>10</sup>, the plaintiff Ericsson filed an application, seeking constitution of a Confidentiality Club. The dispute, in that case, was substantially similar to that in the present. Ericsson sought an injunction against infringement of various SEPs held by it or, in the alternative, for a direction to the defendant Lava International Ltd (hereinafter referred to as “Lava”) to take a license, from Ericsson, at the rates offered by Ericsson which, according to it, were FRAND. Ericsson sought to rely on various licensing agreements with third parties, but contended that they contained, apart from the licensing rates, business sensitive information which was confidential in nature. While contesting the claim of Ericsson on merits, Lava also opposed the constitution of the Confidentiality Club in the terms proposed by

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<sup>10</sup> 2016 SCC OnLine Del 1354



Ericsson, stating that the said terms were onerous, and impeded the defendant from being able to fairly present its case. Apart from a bald submission to this effect, the judgement of the learned Single Judge does not disclose any detailed arguments having been advanced by Lava, or any contention, to the effect that exclusion of the parties, and their officials and employees, from the Confidentiality Club, would not be justified, given the fact that advocates have always to act on the instructions of their clients. No reference, to the judgements to this effect, to which allusion has already been made hereinabove is, either, to be found in the judgement. The learned Single Judge ultimately, constituted the Confidentiality Club, in the manner proposed by Ericsson, “after having gone through the earlier arguments and nature of the present case and circumstances in hand”. This decision, too, therefore, does not really address any submissions similar to those advanced by Mr. Rajagopal before me.

**45.** More significantly, this order was, apparently, carried in appeal to the Supreme Court by way of SLP (C) 7595/2016, which was disposed of in the following terms:

“At the time of hearing of the petition, it has been submitted by the learned senior counsel appearing for the respondent-plaintiff that the respondent is willing, upon being directed by the Court, to give copies of the documents to the petitioner-defendant by redacting the confidential information including the name of the parties. However, the rates will not be redacted.

In view of the above statement made by respondent, the learned senior counsel appearing for the petitioner seeks permission to withdraw this petition.



In pursuance of the above statement, the respondent is directed to abide by the above statement at the time of trial.

The documents shall be given by the respondent in the course of the day to the present petitioner. Cross-examination shall proceed further on Monday, the 4<sup>th</sup> April, 2016 in the High Court.

The special leave petition is, accordingly, disposed of as withdrawn.”

The matter regarding constitution of the Confidentiality Club was, therefore, ultimately compromised, in these proceedings, with Ericsson agreeing to provide copies of the confidential license agreements to Lava, after redacting confidential information therefrom, and Lava acceding to the proposal. No such offer has been made by InterDigital in the present case. This decision cannot, therefore, assist in resolving the controversy before me. Nor, in view of the order passed by the Supreme Court, can it be said that the Supreme Court approved the constitution of the Confidentiality Club, as effected by the learned Single Judge. In fact, once the protocol of the Confidentiality Club, as set up by the learned Single Judge, stood modified by the Supreme Court, the precedential value of the judgement of the learned Single Judge obviously stands eroded.

**46. *Dolby International AB v. GDN Enterprises Private Limited*<sup>11</sup>,** though a short order, undoubtedly supports the case set up by Mr. Pravin Anand. The plaintiff Dolby International (hereinafter referred to as “Dolby”) claimed confidentiality in respect of the licensing rates,

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<sup>11</sup> Order dated 4th August, 2017, by a learned Single Judge in IA 6911/2017 in CS (Comm) 1425/2016



*vis-à-vis* third parties. The defendant opposed the request, stating that, in order for the defendant to be able to marshal an effective defence, it was required to be disclosed the name of the licensee, the date of the patent license agreement and the license of the patented product as well as the licensing rate. For this purpose, the defendant sought the inclusion of one of its representatives in the Confidentiality Club, other than lawyers and experts. Relying on, *inter alia*, the earlier order of this Court in *MVF 3 APS*<sup>8</sup>, the learned Single Judge held that a consistent view had been taken, by this Court, allowing only lawyers and external experts as members of the Confidentiality Club. He further observed that the reasons for such an arrangement were already set out in the earlier decisions of this Court, and did not require recapitulation. Further observing that “no other Indian decision contrary to the decision in *MVF 3 APS*<sup>8</sup> and *Roche Products (India) Pvt Ltd v. Drugs Controller General of India*<sup>12</sup> had been cited before him, the learned Single Judge held that “the nature of litigation” in the case before him was “such that access to confidential documents in question by a representative of contesting defendants is not warranted”. I would briefly advert to this decision, and its effect on the view that I propose to take in this application, later in the course of this judgement.

**47. *Ericsson v. Xiaomi***<sup>4</sup>, too, saw the establishment of a Confidentiality Club along the lines advocated by Mr. Pravin Anand, in that the parties, as well as their officials and representatives, were excluded therefrom. The judgements cited by Mr. Anand before me

<sup>12</sup> 2016 SCC OnLine Del 2358





were also cited before the learned Single Judge in the said case. As against this, Mr. Rajagopal, who appeared for the defendant in the said case as well, relied on *Himalayan Coop. Group Housing Society*<sup>5</sup> to contend that, as lawyers act on the instructions of their clients, they would not be in a position to obtain such instructions, *qua* the allegedly similarly placed licensees, if the license agreements were not disclosed to their clients. The learned Single Judge, however, did not return any finding on the said submission, but chose to constitute the Confidentiality Club excluding the defendant, as well as its officers and employees, on the ground that similar Confidentiality Clubs stood constituted in earlier judgements of this Court, to which reference has already been made hereinabove. Additionally, the learned Single Judge relied on Section 103(3) of the Patents Act which, with greatest respect to the learned Single Judge, may not apply as the provision pertains to cases where the disclosure of a document, regarding any invention, or the evidence of the test or trial thereof, is prejudicial to public interest in the opinion of the Central Government. In such circumstances, Section 103(3) permits disclosure of the documents regarding the invention, or the evidence of the test of trial thereof, confidentially to the advocate of the other party, or to a mutually agreed independent expert.

**48.** There is, however, no gainsaying the fact that a specific submission had been advanced, by the defendant Xiaomi, before the learned Single Judge in *Ericsson v. Xiaomi*<sup>4</sup>, and, impliedly, stood rejected. It is, however, equally apparent that the judgement of the learned Single Judge does not return any specific findings on the



applicability, or otherwise, of the decision in *Himalayan Coop. Group Housing Society*<sup>5</sup>.

49. The most recent decision, of this Court, on which Mr. Pravin Anand placed reliance, was the judgement of a learned Single Judge in *Genentech Inc. v. Drugs Controller General of India*<sup>13</sup>. The third defendant in this case (whose identity is not immediately apparent from the judgement) sought to file certain documents in a sealed cover. In the said application, a learned Single Judge of this Court passed an order on 12<sup>th</sup> February, 2020, appointing an advocate as a Local Commissioner, before whom the documents would be inspected by two advocates and an expert, from the side of the plaintiffs, in the presence of two advocates from the side of the defendants. A subsequent application was filed, by the third defendant, submitting that the plaintiffs had appointed an in-house expert, which was not acceptable. The third defendant sought to contend that permitting inspection of the confidential documents by an in-house expert of the opposite side would defeat the very purpose of the constitution of Confidentiality Clubs, which was to ensure that sanctity and confidentiality of commercially sensitive information, filed by a party, was maintained. Reliance was placed, by the third defendant, on Rule 17 in Chapter VII of the Original Side Rules read with the protocol envisaged in Annexure F thereto. It was sought to be pointed out that Annexure F to the Original Side Rules contemplated inclusion, in the Confidentiality Club, only of an external expert. Reliance was also placed on Section 103(3) of the Patents Act, as well

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<sup>13</sup> MANU/DE/0670/2020



as the judgements of this Court in *Ericsson v. Lava*<sup>10</sup>, *Ericsson v. Xiaomi*<sup>4</sup> and *Dolby International*<sup>11</sup>.

**50.** The learned Single Judge, however, rejected the submission of the third defendant, for preventing access, to the confidential information, by any internal expert of the plaintiff. It was noted, by the learned Single Judge, that, in the order dated 12<sup>th</sup> February, 2020, this Court had not specified that the expert, of the plaintiffs, had to be an “internal expert”. Interestingly, the learned Single Judge also agreed, with the submission of learned Senior Counsel for the plaintiffs before him, that “even if inspection is carried out by external expert, still he has to divulge the information acquired from the documents to enable the plaintiff carry out the amendments to establish its claim in the suit”. “Otherwise”, it was observed, “inspection shall lose its relevance, if the outcome of the same is not utilised purposefully by the party, which sought the inspection”. Reliance was also placed, by the learned Single Judge, on paras 21 to 23 of the judgement in *Transformative Learning Solutions*<sup>2</sup> which, at the cost of repetition, may be reproduced thus:

**“21.** A civil *lis*, governed by the CPC, requires each party thereto to have notice of the case of other, which is required to be met and the CPC does not permit any surprises. The trial and adjudication of a civil *lis* is regulated by pleadings and evidence, documentaries or otherwise, beyond pleadings is not permitted. The documents of each other are required to be admitted and/or denied and issues on which adjudication is required to be done, struck. No evidence, even if led, beyond pleadings is permitted to be led. Thus, the proceedings require complete disclosure.

**22.** Of late however, in respect of a certain class of suits, it was felt that documents filed should not be permitted to go in



public domain, as happens on filing in the Court. Provision has thus been made for keeping such documents in a sealed cover, for eyes only of a limited number of persons who also agree/undertake not to divulge contents thereof to others. In some cases, as in cases of patent infringement or infringement of copyright in source code of a computer software, the need for a party to a *lis* to see the document may not arise as the opinion with respect thereto is to be given by the expert only.

**23.** However in the present suit to restrain defendants from using confidential information of plaintiffs and for ancillary reliefs, the defendants are permitted to defend the suit *inter alia* on the grounds, that the plaintiffs have no copyright in the customers list and even if the plaintiffs have a copyright, the defendants have not infringed the same. I may mention that the suit has been filed as a commercial suit and not as an ordinary suit. This suit, under Section 2(c) of the Commercial Courts Act, 2015, can qualify as a commercial suit only if arising out of intellectual property rights relating to trade marks, copyright, patent, design etc. and not if arising out of property rights or a tort. In such a suit, to ask the defendants to contest the suit without knowing the customers list in which copyright is claimed and without knowing what they are sought to be restrained from doing, would not only be unfair to the defendants but also would be contrary to procedure prescribed by law. The Advocates of defendants and experts, even if any possible in such scenario, cannot be expected to make pleadings, to meet the case of plaintiffs. The non disclosure to the defendant sought by the plaintiffs, in my opinion deprives the defendant of opportunity of being heard and the right to defend the suit.”

**51.** To borrow the phrase used by the learned Single Judge in *Genentech*<sup>13</sup>, allowing advocates, or experts, access to the “inner tier” documents and material would lose its relevance, if, before opining on whether the rates, at which licenses had been granted to third parties, could also be applied to Xiaomi, they are not allowed to confabulate with Xiaomi, or disclose the particulars and details of such third-party license agreements with the officers of Xiaomi. In my view, it would



be totally presumptuous to assume that, without any discussion with the officials of Xiaomi, regarding the third-party license agreements and the covenants thereof, the advocates and experts of Xiaomi could make submissions regarding whether the rates, at which licenses were granted in such agreements were, or were not, FRAND, and whether such rates would be acceptable to Xiaomi.

**52.** I had, at the very commencement of the hearing, queried, of Mr. Pravin Anand, as to how his request for exclusion of Xiaomi, and its officials and employees, from access to the “inner tier” documents, even while allowing such access to the advocates of Xiaomi, could co-exist with the requirement, in law, for an advocate to act only on instructions of his client, for which purpose the client would necessarily be required access to the documents shown to the advocate, or at least disclosure of the contents of such documents. Mr. Pravin Anand responded that this precise issue had been considered by several courts in India and abroad, and that, after considering the issue, Confidentiality Clubs, excluding officials and representatives of the opposite party, had in fact been constituted. A perusal of the decisions, of this Court, on which Mr. Pravin Anand relies, and to which reference has been made hereinabove, fails to bear out this submission of Mr. Pravin Anand. The only judgement, in which such a pointed issue was raised by the defendants is *Ericsson v. Xiaomi*<sup>4</sup>, which does not really address the issue.

**53.** Certain ancillary submissions, also advanced by Mr. Pravin Anand, may be dealt with, as under:





(i) Mr. Pravin Anand pointed out that the contracts, between the plaintiffs and the third-party licensees, contained confidentiality clauses, which did not allow the plaintiffs to disclose the contents of the agreements to third parties. That, to my mind, is irrelevant. No confidentiality clause, which may be contained in third-party license agreements, entered into between the plaintiffs and third-party licensees, can justify denial of fair opportunity, to the defendants, to meet the case set up by the plaintiffs. Fair opportunity, to the defendants, in my view, cannot be said to be granted, if the defendants are not allowed access to the third-party license agreements, which constitute the very basis for the allegedly FRAND rate proposed by the plaintiffs. The business interests of InterDigital, howsoever legitimate, cannot prevail over the paramount consideration of grant of fair opportunity, and natural justice, to Xiaomi, to meet the case set up by InterDigital. The choice, between these two competing considerations, in my view, is Hobsonian in nature.

(ii) Mr. Pravin Anand further invited my attention to para 35 of the rejoinder, filed by the plaintiffs to the reply, of the defendants, to the present application. It reads thus:

“It is evident that the present proceedings are of a highly technical nature and high-level of expert involvement is inevitable. Since the matter in question in the present proceedings is of so esoterically technical in nature, the Defendants would necessarily require technical and professional experts and may not be able to form an opinion on their own *but would be*



*bound to act merely upon advice on the technical and professional experts.* Since the aid of the technical and professional experts is inevitable, the Hon'ble Court will be justified in directing disclosure of confidential information only to external lawyers and expert of the Defendants with the exclusion of the Defendants in-house counsel and employees to secure the rights of the Plaintiffs and its third-party licensees. Further, it is reiterated that the Plaintiffs are contractually obligated not to disclose to any entity, the third-party license agreements, and/or the contents thereof, unless they are ordered by this Hon'ble Court. The Defendant's contention that the Plaintiffs must place on record such agreements, without protective orders of this Hon'ble Court is an invitation to the Plaintiffs to willingly breach their confidentiality obligations for such agreements. The Plaintiffs cannot be compelled to make such disclosures in the absence of protective orders of this Hon'ble Court. Such a contention of the Defendants is clearly *mala fide* and should be dismissed."

The submissions contained in the afore-extracted para from the rejoinder of the plaintiffs, in my opinion, are inherently unacceptable for a variety of reasons, viz.

(a) It is totally presumptuous, on the part of the plaintiffs, to assert that the defendants "may not be able to form an opinion on the road but would be bound to act *merely* upon advice of the technical and professional experts". The word "merely", in my view, has been deliberately added in this proposition, so as to justify the request, of InterDigital, for excluding officials and employees of Xiaomi from the "inner tier" Confidentiality Club. No educated litigant, in today's day and age, prefers to remain in an ivory tower, unaware



of the facts of the case, leaving his fortune entirely in the hands of his advocates and/or experts. Especially in a litigation as complex as this, involving fixation of FRAND rates and determination of the issue of whether Xiaomi is, or is not, infringing the SEPs of InterDigital, it is a prime necessity that the officials of Xiaomi, who are conversant with its activities, and who can take a decision on the rate at which Xiaomi can take a license, for exploitation of the SEPs, from InterDigital, are kept abreast of all aspects of the case set up by InterDigital, a prime element of which would be the allegedly “comparable” license agreements, on the basis of which FRAND rates are proposed by InterDigital.

(b) In the very next sentence, it is averred that, “since the aid of the technical and professional experts is inevitable, the Hon’ble Court will be justified in directing disclosure of confidential information only to external lawyers and expert of the defendants which the exclusion of the defendants in-house counsel and employees”. The very fact that Xiaomi would only, at best, be obtaining the “aid” of the technical and professional experts, is itself a reason to include, in the Confidentiality Club, the officials of Xiaomi. “Aid” can be extended only to someone who is aware of the facts, including all particulars of the stand adopted by the opposite party.



(c) The assertion that, by requiring InterDigital to place on record the third-party license agreements, InterDigital is being invited to “willingly breach their confidentiality obligations for such agreements” is completely tangential to the issue at hand. Nobody is inviting InterDigital to breach any of its obligations, with its third-party licensees. If, however, in its litigation with Xiaomi, InterDigital intends to rely on third-party license agreements, so as to be able to fix, with Xiaomi, a FRAND rate of its choice, that cannot be done by keeping away, from Xiaomi, the third-party license agreements, on which InterDigital seeks to rely to justify such FRAND rate. As such, the further assertion, in para 35 of its rejoinder, that the plaintiff, i.e. InterDigital, cannot be compelled to make disclosures in the absence of protective orders of this Court, is also tangential to the issue at hand.

In fact, I am constrained to observe that, in making its submissions, both written as well as orally during the course of arguments, InterDigital seems to be oblivious of the necessity of justice being done to Xiaomi, as much as to InterDigital. The business interests of InterDigital cannot be placed on a higher pedestal than those of Xiaomi. The financial implications of an unreasonable FRAND rate are huge. It would be completely unreasonable, therefore, to thrust, on Xiaomi, a FRAND rate, in the exercise of fixation of which neither Xiaomi, nor any of its officials or personnel, have been



allowed to participate. The complete iniquity of the arrangement is underscored by the insistence, of InterDigital, that the advocates, to be included in the “inner tier” Confidentiality Club, should not be “in-house” counsel. In other words, the prayer of InterDigital is for Xiaomi to be completely dissociated, as it were, from the exercise of FRAND rate fixation, relying entirely on strangers and their subjective opinions, even if such strangers are professionally engaged by Xiaomi for the purpose. InterDigital, on the other hand, would have the advantage of all its in-house legal personnel being privy to the third-party license agreements, as the agreements are being relied upon by InterDigital itself. Such a position is, to my thinking, completely unacceptable in law.

(iii) Mr. Pravin Anand also sought to contend that this “two-tiered” Confidentiality Club management was needed only as a regime, in place during the consideration of InterDigital’s prayer for interim injunction, and that this regime could be modified later. That, in my view, would be seeking to bolt the stables after the horses have fled. Once an interlocutory injunction is obtained, without grant of due opportunity to the defendants, it is a matter of common knowledge that, in such litigations, the damage, to the defendants, is permanent and irreversible.

**54.** Mr. Sai Krishna Rajagopal submits – and I agree – that it is essential for the officials of Xiaomi to be able to peruse the covenants





of the third-party license agreements for two reasons; firstly, to examine whether the royalty rates offered by InterDigital to the third-party licensees were actually FRAND and, secondly, to assess whether the case of Xiaomi was similar to that of any of the licensees in the said license agreements. The exercise involved in this assessment, Mr. Rajagopal submits, justifiably, is entirely factual in nature, involving elements which are within the peculiar knowledge of Xiaomi. An external expert, submits Mr. Rajagopal, would have no intimate knowledge of the activities of Xiaomi. While it may, conceivably, be possible for an external expert to opine whether the conduct of InterDigital, vis-à-vis the licensees in other license agreements, is FRAND or not, working out of a FRAND rate, between InterDigital and Xiaomi, would require the peculiar business realities of Xiaomi to be borne in mind. The submission, in my view, merits acceptance.

**55.** I am also in agreement with the submission, of Mr. Rajagopal, that even a bare assessment of similarity, of the case of Xiaomi with that of the third-party licensee, would involve comparison of Xiaomi with the said licensee, the scope of the license, the area over which the licenses granted and examination of all considerations on the basis of which the royalty rate, in the said license, has been worked out. It is apparent, *ex facie*, that the determination of the issue of whether Xiaomi should be required, by judicial fiat, to take a license from InterDigital, for exploitation of its SEPs, on payment of royalty at the rate suggested by InterDigital, involves myriad complex factors, which hardly need enumeration. An assessment of these factors, only



by “strangers”, i.e. advocates who are not in-house counsel and external experts, without allowing the officials of Xiaomi access to the license agreements, wherein the rates proposed by InterDigital have been offered to the licensees, in my view, would be impossible or, at the very least, grossly unfair.

**56.** In this context, I also agree with the submission, of Mr. Rajagopal, that acceptance of the arrangement proposed by Mr. Pravin Anand would result in an unequal balance, as the officials and personnel of InterDigital would have full access to the third-party license agreements, and would be aware of the contents thereof, whereas none of the officials and personnel of Xiaomi would be privileged to gain such access. It is no answer, in my opinion, to contend – as Mr. Pravin Anand would seek to urge – that Xiaomi is also entitled to the same privilege. The plaint has been brought by InterDigital. InterDigital is the SEP holder. InterDigital is required, by law, to allow exploitation of SEPs by Xiaomi, by granting a license to Xiaomi at FRAND rates. The rate offered by Xiaomi is unacceptable to InterDigital. InterDigital, instead, is requiring Xiaomi to agree to take a license, from InterDigital, at the rate at which it offers the SEPs to other licensees. Third-party license agreements would, therefore, obviously be produced by InterDigital, rather than by Xiaomi, in support of its case. As such, the occasion for Xiaomi to request for any such “two-tier” Confidentiality Club, *ex hypothesi*, does not arise. Even if it did, it would be for InterDigital to arrive at an agreement, with Xiaomi, for the establishment of a “two-tier” Confidentiality Club, excluding officers and personnel of the parties from access to the “inner tier” confidential documents. This Court



cannot trust such an arrangement upon Xiaomi, without its consent, in the absence of any clear right having been established, by InterDigital, for the imposition, on Xiaomi, of such an arrangement.

**57.** It was not once, but several times, during the course of hearing of this application, that the thought came to me – What if Xiaomi is unwilling – as it is, in the present case – for the third-party license agreements, on which InterDigital relies, to be shown only to its advocates and experts, and not to its own officials or personnel? What if Xiaomi says that it is not willing to contract, with its counsel, to keep undisclosed, from Xiaomi, the documents which have been shown to him? Mr. Pravin Anand submits that, if Xiaomi is unwilling for such an arrangement, the Court could legitimately draw an adverse inference against, treating it as an “unwilling licensee”. In other words, Mr. Pravin Anand submits that, having involved Xiaomi in a litigative exercise, by filing the present suit against it, InterDigital can insist on Xiaomi prosecuting the suit, and defending itself against InterDigital, without being shown the documents on which InterDigital proposes to rely. The insistence, by Xiaomi, on access to the documents on which InterDigital proposes to rely, so as to be able to defend the case set up by InterDigital, according to Mr. Pravin Anand, would justify an adverse inference against Xiaomi. The submission, in my view, deserves to be summarily rejected. It flies in the face of the most elementary canons of natural justice and fair play. I need say no more.



58. As I observed towards the commencement of this judgement, I have refrained from alluding to the various judicial authorities, from other countries, on which Mr. Pravin Anand relied. For the sake of the record, it may be noted that Mr. Pravin Anand cited, apart from the judgements of this Court, noted hereinabove, the judgement of the High Court of England and Wales in *Mitsubishi Electronic Corporation v. Sun Cupid Technology HK Ltd*<sup>14</sup>, the District Court for the Eastern District of Texas in *Blue Spike, LLC v. Huawei Technologies Co. Ltd*<sup>15</sup>, the Chancery Division of the High Court in *Unwired Planet International Ltd v. Huawei Technologies Co. Ltd*<sup>16</sup>, the judgement of the Court of Appeal, on appeal from the said decision, in *Unwired Planet International Ltd v. Huawei Technologies Co. Ltd*<sup>17</sup>, the judgement of the California District Court in *TCL Communication Technology Holdings Ltd v. Telefonaktiebolaget LM Ericsson*<sup>18</sup> and the judgement of the Chancery Division of the High Court of UK in *IPCom GMBH & Co. v. HTC Europe Co. Ltd*<sup>19</sup>. Without adverting to each of these decisions, a reading thereof would reveal that no serious dispute, regarding exclusion of the officials from the Confidentiality Club, was agitated in any of these cases. Besides, as I have already opined hereinabove, I had to decide the present application on the basis of whether the request of InterDigital is compatible with the peculiar dynamics of the lawyer-client relationship, as they exist in this

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<sup>14</sup> Judgement dated 22nd July, 2020 in [Claim No HP-2019-000014](#)

<sup>15</sup> Judgement dated 1st September, 2015 in [Civil Action No 6:13-CV-679-RWS](#)

<sup>16</sup> (2017) EWHC 3083 (Pat)

<sup>17</sup> (2018) EWCA Civ 2344

<sup>18</sup> Judgement dated 8th December, 2015 in [Case No. 8:14-CV-00341-JVS-AN](#)

<sup>19</sup> (2013) EWHC 52 (Pat)



country. This relationship is crystallised in both statute and precedent, and is sacred and inviolable. In my view, there can be no question of this Court lending its approval to any arrangement in which the third-party license agreements, constituting the very basis of the case set up by InterDigital against Xiaomi, remain undisclosed to Xiaomi, as well as its officials and personnel, and are shown only to advocates (who are not in-house counsel) and experts. Any such arrangement would violate the provisions of the Bar Council Rules as well as the law laid down in various decisions including, *inter alia*, **Himalayan Coop. Group Housing Society**<sup>5</sup>.

**59.** I debated, in my mind, as to whether I should refer the present matter to the Hon'ble Chief Justice for constituting a Division Bench, as Confidentiality Clubs, excluding officials and personnel of the opposite party, have, in fact, been established by this Court on earlier occasions. A perusal of the decisions, which have set up such Confidentiality Clubs, however, reveal that, except for **Dolby International**<sup>11</sup> and **Ericsson v. Xiaomi**<sup>4</sup>, the proposal to exclude officials and personnel from such Confidentiality Clubs was not opposed in any case. In all but these two cases, therefore, the issues raised by Mr. Sai Krishna Rajagopal in the present case, and which have impressed the mind of this Court, have passed *sub silentio*. These decisions cannot, therefore, be regarded as valuable precedents, to decide the issue in controversy before me.<sup>20</sup>

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<sup>20</sup> For the proposition that a decision is not an authority for an argument which passes *sub silentio*, having neither been raised nor considered in the said decision, one may refer to **Arnit Das v. State of Bihar, (2000) 5 SCC 488**.





60. *Dolby International*<sup>11</sup> merely recorded the submission, of learned counsel for the defendants, that their right to a fair defence would be prejudiced, if the confidential information was not disclosed to them. No contention, regarding such an arrangement being violative of the legal regime, regarding lawyer-client relationship, as it exists in India, was raised in the said case. Such a contention was raised in *Ericsson v. Xiaomi*<sup>4</sup>, and the judgement in *Himalayan Coop. Group Housing Society*<sup>5</sup> was also cited in support. The learned Single Judge in that case did not, however, return any finding regarding the applicability of the said decision, but proceeded to set up the Confidentiality Club, excluding officials and personnel of Xiaomi, on the ground that similar confidential clubs had been set up earlier.

61. *Himalayan Coop. Group Housing Society*<sup>5</sup> has neither been distinguished by any larger bench, or even by any coordinate bench, in facts analogous to those before me. The judgement binds me, under Article 141 of the Constitution of India. It is clearly held, by the Supreme Court, in the said decision, that a counsel has to act on instructions from the client, and not at his own sweet will. It is also pointed out, by the Supreme Court, in the said decision, that the Bar Council of India Rules specifically codifies this requirement. Accepting the proposal, of InterDigital, to constitute a Confidentiality Club, excluding the officials and personnel of Xiaomi therefrom, insofar as the “inner tier” documents are concerned, in my view, would violate this legal regime. For the reasons set out in detail hereinabove, any such arrangement would also be grossly unfair to



Xiaomi, and would certainly prejudice Xiaomi, in defending the case set up by InterDigital. It is presumptuous to assume that Xiaomi would be able to answer the case set up, by InterDigital, regarding fixation of a FRAND royalty rate, at which InterDigital could license the usage of its SEPs to Xiaomi, without being provided access to the third-party license agreements, containing the rates proposed by Xiaomi. Even if this were hypothetically possible, I cannot adjudicate this application on that premise.

**62.** As the judgement in *Himalayan Coop. Group Housing Society*<sup>5</sup>, and the permissibility of excluding officials and personnel of either party from the Confidentiality Club, in the light of the said decision and the Bar Council of India Rules, has not been examined or analysed in any earlier decision to which my notice has been invited, I am of the opinion that the matter need not be referred to a larger bench.

**63.** There is substance in Mr. Pravin Anand's submission that InterDigital cannot, very well, disclose details, in third-party license agreements which, as agreed between InterDigital and such third parties, are required to remain confidential. At the same time, InterDigital cannot, in my view, rely on such material against Xiaomi, holding the material back from the representatives of Xiaomi on the plea of confidentiality. InterDigital is, therefore, at liberty to redact, from the documents being treated as confidential, any such detail which, according to it, cannot be disclosed to any third party, including the representatives of Xiaomi. InterDigital cannot,



however, be permitted, in such an event, to rely on such redacted material. The interests of natural justice and fair play also require that Xiaomi be allowed to plead, in such an event, that the redacted details had been unfairly or unjustifiably redacted, and that their disclosure is necessary in order to enable Xiaomi to put up a substantial defence. In such an eventuality, it would be for the court to take a decision on the competing claims, regarding such redacted material. No pre-emptive direction, in that regard, can possibly be issued.

### **Conclusion**

**64.** The prayer, of InterDigital, for setting up of a “two-tier” confidentiality club, with “inner tier” documents being shown only to advocates (who are not in-house counsel) and external experts nominated by Xiaomi is, therefore, rejected.

**65.** Instead, a single tier Confidentiality club is constituted, in the following terms:

(i) Each party shall nominate four advocates, six representatives and two experts, who would constitute the confidentiality club.

(ii) The members of the confidentiality club alone shall be entitled to inspect the confidential information. In the case of the advocates and experts, such inspection would be to the extent such inspection is required in order to perform their



professional duties in relation to the present proceedings on behalf of the party by whom they are engaged.

(iii) The documents, regarded as “confidential information” would be filed in sealed cover, to be retained with the Registrar General of this Court under seal and in safe custody.

(iv) The members of the confidentiality club shall be entitled to inspect the confidential information before the learned Registrar General and, after the inspection is over, the documents and information shall be resealed and returned to the learned Registrar General. The members of the confidentiality club shall also be entitled to electronically transmit and receive copies of the confidential information so long as adequate safeguards are in place to ensure that such transmission shall only be available to members of the confidentiality club.

(v) The members of the confidentiality club shall be bound by confidentiality orders passed by this Court and will not be allowed to make copies, disclose or publish the contents of the confidential information or documents anywhere else or to any individuals who are not privy to the confidential information, including in other legal proceedings or oral and written communications to the press, etc.

(vi) During the recording of evidence and other proceedings of this Court with respect to the confidential information, or when the confidential information is being looked at, only



members of the confidentiality club shall be allowed to remain present. Such proceedings will be conducted in camera.

(vii) Any evidence, by way of affidavit or witness statement, containing confidential information shall also be kept in a sealed cover reflecting the confidential and designation, with the learned Registrar General, and would be accessible only to the members of the confidentiality club.

(viii) Neither party would be permitted to rely on any material which is not disclosed to the nominated representatives (as opposed to advocates and experts) of the opposite party. Should either party feel that any details, contained in any document, cannot be shown to the nominated representatives of the opposite party, it is at liberty to redact such details or particulars from the document(s) in question. Needless to say, the party that redacts any particular is, in any document or evidence, shall not be permitted to rely on such a redacted particulars. It shall, however, be open to the opposite party to plead that disclosure of such redacted material is necessary for its defence. In such a case, the court would decide, on a document-to-document basis, whether redacting of the “confidential” details, in the document, should, or should not, be allowed. This, in my view, is the maximum extent to which the plea, of InterDigital, for keeping away, from the representatives of Xiaomi, “confidential” details and documents, can be accommodated.





(ix) The confidential documents/information shall not be available for inspection after disposal of the matter, except to the parties producing the same.

**66.** This Court has constituted the aforesaid Confidentiality Club keeping in mind the objection, of Xiaomi, to a “two-tier” Confidentiality Club, as sought by InterDigital. Should, however, Xiaomi be agreeable to constitution of the Confidentiality Club in the manner suggested by InterDigital, this order would not stand in the way of any such agreement and, in such an event, the Confidentiality Club would be established in the manner agreed upon, between the parties. In such event, it would be open to either party to move this Court for appropriate orders.

**67.** It is clarified that all observations in this judgement are intended only for the purpose of disposing of the application, of InterDigital, for constitution of a Confidentiality Club. They should not be treated as an expression of opinion, even tentative, on the aspects discussed in this order, for any other purpose, and in respect of any other application or the main suit itself.

**68.** The application stands disposed of accordingly.

**C. HARI SHANKAR, J.**

**DECEMBER 16, 2020**  
**HJ**