



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

% **Judgment reserved on: 08 December 2023**
Judgment pronounced on: 14 December 2023

+ **FAO (COMM) 222/2023**

**AGVA HEALTHCARE PRIVATE LIMITED
& ORS.**

..... Appellants

Through: Mr. Kapil Midha, Mr. Ashish
Garg, Ms. Samiksha Gupta and
Mr. Govind Singh, Advocates.

versus

AGFA-GEVAERT NV & ANR

..... Respondents

Through: Mr. Jayant Kumar, Ms. Ruchi
Singh and Mr. Sumit Verma,
Advocates.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE RAVINDER DUDEJA

J U D G M E N T

RAVINDER DUDEJA, J.

**CM APPL. 55652/2023 (delay in filing of the appeal) & CM APPL.
55653/2023 (delay in re-filing of the appeal)**

These applications have been preferred on behalf of the appellants seeking condonation of delay of 04 days in filing of the appeal and of 109 days in re-filing of the appeal.

Bearing in mind the disclosures made in the applications, the delay is condoned. The applications shall stand disposed of.



FAO (COMM) 222/2023

1. Feeling aggrieved and dissatisfied, the appellants have preferred the present appeal against the impugned order dated 23 March 2023, passed by the learned District Judge, Commercial Court-03, Central District in CS (COMM) No. 858/2022, whereby, the learned District Judge allowed the respondents' application under Order XI Rule 1(5) wrongly mentioned as under Order XI Rule 5 CPC r/w Section 151 CPC) of the Code of Civil Procedure, 1908 ['CPC'] to take additional documents on record.

2. The respondents herein, original plaintiffs, filed a suit for permanent and mandatory injunction to restrain infringement, passing off, dilution and unfair trade competition, as well as, for damages and rendition of accounts etc. against the defendants. Along with the suit, the respondents filed an application under Order XI Rule 1 (4) CPC, seeking 30 days' time to file old invoices and other documents. Subsequently, after filing of the replies by the appellants, respondents filed documents along with their rejoinders to the respondents' application under Order XXXIX Rule 1 & 2 CPC. These were, however, struck off by the learned District Judge, inasmuch as, the same were filed without leave of the court and without even moving any appropriate application. Thereafter, respondents filed an application under Order XI Rule 5 CPC seeking to file additional documents. The same was allowed *vide* impugned order dated 23 March 2023. It is this



order which is being challenged in the present appeal.

3. The learned counsel for the appellants has assailed the order, arguing that the additional documents which the respondents sought to file are dated back to the time much prior to the filing of the suit and were well within the power, possession, control and custody of the appellants, but the same were consciously and deliberately not filed. It is also submitted that in the statement of truth filed by the respondents, they have categorically stated on oath that they do not have any other document(s) in their power, possession, control or custody except as mentioned in the list of reliance filed with the suit. In fact, the said documents dated back to time much prior to the filing of the suit, but it has not been explained how the said documents were not in power and possession of the respondents at the time of filing of the suit. It is thus argued that the respondents have failed to establish “reasonable cause” for non-disclosure of additional documents.

4. *Per contra*, learned counsel for the respondents has argued that all the documents sought to be filed are relevant and necessary to prove the acts of infringement and passing off. It is argued that the documents were not in the power and possession of the respondents due to which the same could not be filed initially with the suit.

5. Relying upon Rule 5 of Delhi High Court (Original Side) Rules, 2018, Chapter VII, it is argued that respondents are permitted to file legible copies of all documents in its power and possession alongwith



their application and that the documents permitted to be filed *vide* impugned order are necessary for the adjudication of the issues involved in the suit and no prejudice would be caused to the appellants by taking the additional documents on record.

6. The respondents sought permission before the learned Trial court, to file the following documents alongwith their application under Order XI Rule 5 r/w Section 151 CPC.

- “1. Annexure A - True copy of documents showing past business transaction between Plaintiffs and AIIMS.
2. Annexure B - True copy of the webpages hosted by the Defendants at <https://insul.agvahealthcare.in/>
3. Annexure C- True copy of Order dated February 3, 2022 passed by WIPO Arbitration and Mediation Center in Case No. D2021-3420, *Agfa-Gevaert N. V. v. Perfect Privacy, LLC /Prof Diwakar Vaish, Ag Va Healthcare*.
4. Annexure D- True copy of WhoIs report of domain name <agvahealthcare.com>
5. Annexure E- True copy of Arbitration Award dated December 18, 2018 passed by NIXI in *Agfa-Gevaert N. V. v. Diwakar Vaish*
6. Annexure F- True copy of WhoIs report of domain name <agva.co.in>
7. Annexure G- True copy of webpage hosted at [https://www.crunchbase.com/organization.agfa-healthcare](https://www.crunchbase.com/organization/agfa-healthcare)
8. Annexure H- True copy of Certificate Under Section 65B



of the Indian Evidence Act, 1872.”

7. Order XI Rule 1 CPC, as applicable to the Commercial Suits mandates the plaintiff to file list of all documents, photocopies of all the documents in its power, possession, control or custody pertaining to the suit, alongwith the plaint and the procedure provided under Order XI Rule 1 CPC is required to be followed by plaintiff and defendant when the suit is a Commercial suit. Order XI Rule 1 CPC as applicable to Commercial Suits reads as under:-

“1. Disclosure and discovery of documents.—(1) Plaintiff shall file a list of all documents and photocopies of all documents, in its power, possession, control or custody, pertaining to the suit, along with the plaint, including:— (a) documents referred to and relied on by the plaintiff in the plaint; (b) documents relating to any matter in question in the proceedings, in the power, possession, control or custody of the plaintiff, as on the date of filing the plaint, irrespective of whether the same is in support of or adverse to the plaintiff’s case; (c) nothing in this Rule shall apply to documents produced by plaintiffs and relevant only— (i) for the cross-examination of the defendant’s witnesses, or (ii) in answer to any case set up by the defendant subsequent to the filing of the plaint, or (iii) handed over to a witness merely to refresh his memory.”

8. Order XI Rule 1 (3) CPC further provides that the plaint shall contain a declaration on oath from the plaintiffs that all documents in power, possession, control or custody of the plaintiffs, pertaining to the facts and circumstances of the proceedings initiated by him have been disclosed and the copies thereof annexed with the plaint and the



plaintiffs do not have other document(s) in its power, possession, control or custody.

9. As far as condition under Order XI Rule 1 (3) CPC is concerned, declaration on oath under this sub rule shall be contained in the Statement of truth as set out in the Appendix.

10. Thus, perusal of Order XI CPC, as noted above reveals that the plaintiff is bound to file all the documents in his power, possession, control or custody with the plaint and in case of urgent filing of a suit, if some additional documents are to be filed under Order XI Rule 1(1) CPC, the plaintiff may seek leave of the Court to rely on additional documents, which additional documents are required to be filed within 30 days of filing of the suit.

11. Under Order XI Rule 1(5) CPC, the plaintiff cannot be permitted to rely on the documents which were in his power, possession, control or custody and not disclosed along with the plaint or within the extended period save and except by leave of the Court and such leave can only be granted if the plaintiff establishes “reasonable cause” for non-disclosure along with the plaint.

12. The word used in Order XIII Rule 2 CPC (since repealed) were “unless good cause is shown” and the Supreme Court in the decision reported in **Madanlal vs Shyamlal** [(2002) 1 SCC 535], noted the distinction between “good cause” and “sufficient cause” and held that “good cause” requires a lower degree of proof as compared to



“sufficient cause” and thus the power under Order XIII Rule 2 CPC should be exercised liberally. Order XI Rule 1(5) of Commercial Courts Act, 2015 uses the word “reasonable cause”, which would require even a lower degree of proof as compared to “good cause”.

13. Thus it is to be seen in the present case whether the respondent had “reasonable cause” for non-disclosure of documents (Annexure A to Annexure H) along with the plaint. While dealing with the same, learned District Judge observed as under:-

“52. In this regard, it is seen that the documents which form Annexure-A were directed to be taken off record vide order dated 20.05.2022 as they had been filed then without seeking any leave of the Court or moving necessary application and hence it is per se not a ground for rejection of the said documents at this stage. Even otherwise, since defendants have denied that they were well aware of plaintiffs, plaintiffs' products and their mark AgFa, the plaintiffs would be entitled to put these documents to defendants, during their cross-examination, and even though the documents may have been in power, possession, control and custody of the plaintiffs, they fall in category of documents plaintiffs could have produced under Order XI Rule 1(lc) (i) &(ii).

53. It is also the case of plaintiffs that defendants have expanded the use of their mark AgVa in respect of insulin products/services and this fact can be ascertained from their web pages of their website hosted at <https://insul.agvahealthcare.in/>. The defendants have controverted this assertion by saying that they were already hosting website <https://insul.agvahealthcare.in/> at the time of filing suit by the plaintiff. The defendants may have been hosting the website <https://insul.agvahealthcare.in/> but the period of time when products other than portable ventilator were introduced on said web page would be relevant for the purposes of adjudication of the present case and thus are relevant under Order XI Rule 1(lc) (i) &(ii) though



the document pertaining to website <https://insul.agvahealthcare.in/> may have been in power, possession, control or custody of the plaintiffs at the time of filing of the suit.

54. As regards Annexures-'C' to 'F' i.e. (i) UDRP Domain Name Dispute Order passed by WIPO in respect of <agvahealthcare.com> (2) INDRP Arbitration Award in respect of <agva.co.in> (3) Whols report of the domain name <agvahealthcare.in> (4) Whols report of the domain name

<agva.co.in>, the explanation given by plaintiffs in their application under consideration is sufficient to conclude that the said documents were not in power, possession, control or custody

of plaintiffs for the plaintiffs to have filed the same alongwith the plaint, irrespective of the fact that plaintiff no.1 was party to said proceedings.

55. Coming to document annexed as Annexure-G i.e. plaintiff no.1's listing at a third party website hosted at <https://www.crunchbase.com/organization/agfa-healthcare>, the plaintiffs' knowledge about the document can be ascertained only at an appropriate stage of evidence for defendants have merely denied that plaintiffs came across this web page recently. At this stage, it cannot be ascertained whether the documents pertaining to <https://www.crunchbase.com/organization/agfa-healthcare> were in power, possession, control or custody of plaintiffs prior to filing of the suit or not.

56. The plaintiffs have succeeded, at this stage, to establish 'reasonable cause' within the meaning of Order XI Rule 1(5) CPC as amended by the Commercial Courts Act which prevented them from non-disclosure and filing of these documents alongwith the plaint. The documents annexed as Annexure 'A' and 'B' are also relevant under Order XI Rule 1(1c) (i) and (ii) CPC, as observed in foregoing paragraphs."



14. It may be seen from the order of the learned District Judge that the contentions/arguments of the defendants were duly considered and dealt by the Court before granting permission to the plaintiffs to place the documents on record. Hon'ble Supreme Court in the case of **Sugandhi (Dead) by Legal Representatives v. P. Rajkumar** [(2020) 10 SCC 706] held as under:-

“8. Sub –rule (3), as quoted above, provides a second opportunity to the defendant to produce the documents which ought to have been produced in the court along with the written statement, with the leave of the court. The discretion conferred upon the court to grant such leave is to be exercised judiciously. While there is no straightjacket formula, this leave can be granted by the court on a good cause being shown by the defendant.

9. It is often said that procedure is the handmaid of justice. Procedural and technical hurdles shall not be allowed to come in the way of the court while doing substantial justice. If the procedural violation does not seriously cause prejudice to the adversary party, courts must lean towards doing substantial justice rather than relying upon procedural and technical violation. We should not forget the fact that litigation is nothing but a journey towards truth which is the foundation of justice and the court is required to take appropriate steps to thrash out the underlying truth in every dispute. Therefore, the court should take a lenient view when an application is made for production of the documents under sub-rule (3).”

15. At the stage of granting leave to place on record additional documents, the Court is not required to consider the genuineness of the documents/additional documents, the stage at which the genuineness of the documents is to be considered is during the trial.

16. We may also note that the present application had been filed when the suit is still at an initial stage and the issues are yet to be



framed. The plea of the appellants that along with the plaint, the plaintiffs had filed appropriate declaration that all documents in power, possession, control or custody of the plaintiffs has been disclosed etc. is misplaced. By placing on record the documents, the respondents are neither setting up a new case nor withdrawing any admission. By virtue of the additional documents, plaintiffs are not setting up a case contrary to what has been pleaded in the plaint.

17. Having regard to the statutory provisions and observations of the Supreme Court in Sugandhi (supra), to the case in hand, we find that without prejudice to the rights and contentions of the parties, the additional documents can be taken on record. We find no illegality or perversity in the order passed by the learned District Judge in permitting the plaintiffs to file additional documents.

18. Consequently, the appeal is dismissed.

RAVINDER DUDEJA, J.

YASHWANT VARMA, J.

DECEMBER 14, 2023/RM/SK/vp