

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CHAMBER SUMMONS NO. 838 OF 2015
IN
SUIT NO. 1633 OF 2008

Om Health Centres Pvt. Ltd.

... Plaintiff

vs.

Vijay Gangan

... Defendant

Dr. Birendra Saraf, along with Ms. Pooja Kshirsagar and Mr. Prakash Shah, instructed by M/s. Prakash and Co. for the Plaintiff.

Mr. C. R. Naidu for the Defendant

CORAM; S.J. KATHAWALLA, J.
DATE: 4th DECEMBER, 2015

P.C.:

1. By the present Chamber Summons the Plaintiff seeks to obtain leave to file additional documents in the evidence as per the list annexed to Schedule of the chamber summons (**“the Additional documents”**).

2. The brief facts as stated in the Affidavit in support of the Chamber Summons are as under :-

2.1 The Plaintiff had filed its compilation of documents in support of its evidence on 30th July 2014 alongwith the affidavit in lieu of examination-in-chief of its first

witness, Mr. Anant R. Jani (“PW1”), who is an advocate and solicitor. On 11th February 2015, the documents of the Plaintiff were marked and a Commissioner for recording evidence was appointed for recording the cross-examination of PW-1.

2.2 It is stated that PW1 was handling the suit transaction through his erstwhile firm Gagrath and Co and thereafter through his present firm. His erstwhile firm M/s Gagrath & Co. was dissolved in the year 2005. Most of the erstwhile partners of M/s Gagrath and Co. formed the firm M/s Vigil Juris & Co (*“present firm”*) to which PW1 is attached. Many files pertaining to the matters handled by him and his son late Chandras Jani while they were with M/s Gagrath and Co. were forwarded to his present firm. The files of his matters were mixed or lost along with the files of others partners over a period of time. After dissolution, a large number of files were sent by Gagraths to his present firm. The files which were sent by Gagraths to his present firm, were sent in very disorganized and haphazard manner. The papers and files of different matters were mixed up, some files were opened up, there were loose papers, etc. During such transfer, some documents / files were misplaced or lost. He had tried to organize and put together the records to the extent possible. The balance records which could not be organized were stored in state in which they were received. It was further stated that at the time of disclosure of documents in the present suit, PW1 had caused a search to be made to locate files relating to the present dispute in the records of present firm. However, no relevant papers other than what was filed earlier could be located at that time.

2.3 Sometime in second week of February 2015, PW1 informed the Plaintiff's Director that he had been looking for some document pertaining to another matter. Since he could not find that particular document, he told a clerk of his present firm to check the old papers and records in the entire office, including the records received from Gagrats lying in an unorganized state. His clerk carried out a search . While checking the files, he came across certain papers pertaining to the present matter. PW1 went through the papers and came across some documents which were relevant for the controversy raised in the present matter. The said documents are listed in paragraph 2 (F) (ii) of the affidavit in support of Chamber Summons.

2.4 PW1 further informed the Plaintiff's Director that since he found the ledger accounts of M/s. Gagrats & Company, he called for ledger accounts of the present firm pertaining to present transaction from the accounts department of the present firm which is also relevant for the present case. PW1 informed the Plaintiff's director that it is his duty to point out and place those documents before this Court so that they can be considered for proper adjudication of the matter and that he was desirous to make an additional affidavit in lieu of examination in chief to produce and prove those documents which are relevant for deciding the issues raised in the present matter. He has accordingly sworn an additional Affidavit in lieu of examination in chief ("**additional Affidavit**"), a copy of which is annexed to the Affidavit in support of Chamber Summons.

2.5 It is further stated that in the light of discovery made by PW1, the Plaintiff's

Director also asked his office staff to check in all cupboards, shelves, drawers, etc. and look for the documents pertaining to the above suit and the sale transaction with respect to suit property. His office staff also found certain documents, which they had not been able to trace at the time of filing the first compilation of documents. The said documents are listed in the Affidavit in support of Chamber Summons.

2.6 In these circumstances, the Plaintiff has filed the present chamber summons.

3. It is submitted on behalf of the Plaintiff that the Additional documents could not be found after making a diligent search by the Plaintiff and also by PW1 and thus the documents could not be filed earlier. It is submitted that cross-examination of PW1 has not yet commenced and no prejudice would be caused to the Defendant if the documents enlisted in the schedule of Chamber Summons are taken on record and marked as exhibits. It is further submitted on behalf of the Plaintiffs that the documents listed in the schedule to Chamber summons are relevant and crucial for deciding the issues raised in the present suit.

4. The Learned Counsel for the Plaintiff argued that although order XIII Rule 1 provides for production of documents in original on or before the settlement of issues, Rule 2 of order XIII and section 151 of Code of Civil Procedure, 1908 ("CPC") gives ample powers to court to accept additional documents. The Learned Counsel for the Plaintiff relied upon the judgment of Hon'ble Supreme Court of

India in ***Billa Jagan Mohan Reddy and Anr. vs Billa Sanjeeva Reddy and Ors.***¹ wherein it was held by the Hon'ble Supreme Court of India that :

“4. Order XIII Rule 1 provides thus:

1. Documentary evidence to be produced at or before settlement of issues -

(1) The parties or their pleaders shall produce, at or before the settlement of issues, all the documentary evidence of every description in their possession or power, on which they intend to rely, and which has not already been filed in Court, and all documents which the Court has ordered to be produced.

(2) The Court shall receive the documents so produced;

Provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs.

5. It is clear from its bare reading that the parties or their counsel shall be required to produce all the documentary evidence in their possession or power which they intend to rely on to establish their right along with pleadings or before settlement of the issues. The Court is enjoined under Sub-rule (2) to receive such documents provided they are accompanied by an accurate list thereof prepared

¹ (1994) 4 SCC 659

*in the prescribed form. If they are not in the party's possession or custody, it shall be filed by the party along with an application to condone the delay in filing them. **The explanation for delay is not as rigorous as one filed under Section 5 of the Limitation Act** These documents were not in the possession or custody of the appellant, but they have obtained certified copies from the revenue authorities and sought to be produced. It is undoubted that there is a delay in production of the said documents. But the trial court had stated that the application was filed at the stage of arguments, seeking to produce those documents and sought to rely upon the documents. It is settled law that, if the documents are found to be relevant to decide the real issue in the controversy and when the Court felt that interest of justice requires that the documents may be received, exercising the power under Order 41, Rule 27 C.P.C. the appellate court would receive the documents and consider their effect thereof. When such is the position, when the documents are sought to be produced in the trial court, before the arguments are completed, normally they may be received; an opportunity given to prove them and rebuttal if any and their relevance and effect they may have, be considered in deciding the issues arising in the controversy. Under these circumstances, the trial court was not justified in refusing to condone the delay and to receive the documents. The High Court also committed the same error in not considering the effect in this behalf in the right perspective. The orders are accordingly set aside and the delay in filing the documents is condoned. The Trial Court is directed to receive the documents, give an opportunity to the*

parties to prove the documents and if necessary, opportunity to the respondent to rebut the same and then dispose of the reference according to law.” (emphasis supplied)

5. The Learned Counsel for the Plaintiff also relied upon a Judgment of this Court in the case of ***Chitrakala Fal Dessai vs Balu Marathe***² wherein it was held that

“9. It is pertinent to note that Rule 2 of Order 13 requiring good cause to be shown has now been deleted and by amendment Sub-rule (3) is added to Order 14 which states that leave of the Court has to be obtained for production of such documents. But even accepting that while persuading the Court to grant leave, a party has to show cause why the documents could not be produced earlier, not a very strict, restricted and pedantic view can be taken of this provision. Ultimately the Court will have to ensure that all documents which assist it to resolve the controversy before it in an efficient manner are available for its perusal. Unless the Court comes to a conclusion that the facts are so gross that the only inference that can be drawn from the conduct of the party is that the documents which are sought to be produced are manufactured, the Court should not generally deny leave to produce documents because ultimately it is always open to the other side to cross-examine the party who produces the documents to establish that the said documents are not relevant or that the case based on the said documents is not true. In my opinion in this case, at this stage, it is not possible to come to a conclusion that the documents at serial

² 2006 (5) Bom. C. R. 602

Nos. (f) and (j) are manufactured. However, that does not preclude the defendant, if he so desires, to cross-examine the plaintiff and persuade the Court to hold so. In the nature of things, no final opinion can be expressed by this Court on this aspect of the matter, at this stage.” (emphasis supplied)

6. The Learned Counsel for the Plaintiff also relied upon the judgment of this Court in the case of **Vitorino Rodrigues and Ors Vs Smt. Nirmalabai Shivajirao Dessai (deceased) through L.R's and Ors.** ³ Wherein it was held that :

“10. Admittedly the application was filed by the plaintiffs in terms of Order 7, Rule 14(3), C.P.C. As regards this provision it has been held by this Court in Smt. Chitrakala Fal Dessai (supra) that while persuading the court to grant leave, a party has to show cause why the documents could not be produced earlier, not a very strict, restricted and pedantic view can be taken of this provision. Ultimately the court will have to ensure that all documents which assist it to resolve the controversy before it, in an efficient manner are available for its perusal. Unless the Court comes to a conclusion that the facts are so gross that the only inference that can be drawn from the conduct of the party is that the documents which are sought to be produced are manufactured, the Court

³ 2010(4) bom C R. 631

should not generally deny leave to produce documents because ultimately it is always open to the other side to cross examine the party who produced the documents to establish that the said documents are not relevant or that the case based on the said documents is not true.” (emphasis supplied)

7. The Learned Counsel for the Plaintiff also relied on the judgement of the High Court of Andhra Pradesh in the case of **Sirugudi Adinarayana Vs Bodla Mariamma** wherein it was held that :

“6. This Court in N. Narayana Reddy v. G.R. Subba Reddy, 2000(1)ALT69 and Aravapalli Sriranganayakulu v. Godavarthi Leelavathi, : 2001(3)ALD516 , held that under Order 13, Rule 2 of the Code of Civil Procedure, the Court can direct the reception of the documents at any subsequent stage of the proceedings upon good cause being shown to the satisfaction of the Court for the non-production thereof earlier by assigning the reasons for doing so. Rule 3 of Order 13 of the Code of Civil Procedure, however, is a different provision under which the Court may reject any document, which it considers irrelevant or otherwise inadmissible by recording the grounds for such rejection. Although it is said in the said rule that at any stage the Court may do so but on a holistic consideration of the provisions under Order 13 of the Code of Civil Procedure. The stage envisaged under Rule 3 is certainly not a stage at which the Court is expected to consider the good cause for the non-production of the documents earlier. The order directing the reception of the documents is entirely different from the order

admitting the documents in evidence. The documents would be allowed to be accepted when the three other requirements are satisfied, namely, (i) the relevancy; (ii) the admissibility; and (iii) proof. Thus, those three requirements are not at the stage when the documents are sought to be produced before the Court, but at a later stage by showing good cause for non-production of the same earlier at the relevant time.” (emphasis supplied)

8. Relying on aforesaid judgments, it is submitted on behalf of the Plaintiff that this Court has ample powers to allow the Plaintiff to file the Additional documents under Order XIII Rule 2 and section 151 of CPC. It is further submitted that the documents could not be filed earlier in the circumstances set out in the Affidavit in support of the Chamber Summons, which were beyond the control of the Plaintiff. There has been no deliberate or intentional delay on behalf of the Plaintiff in producing the documents and that the chamber summons was taken out at the earliest opportunity as soon as the Additional documents were traced/found. It is also urged that since the cross-examination of PW1 has also not begun, no loss, harm or prejudice will be caused to the Defendant if the additional documents are allowed to be produced. It is further submitted that the admissibility or otherwise of the documents are to be considered at appropriate stage and not at the stage of considering whether leave to produce such document ought to be granted or not.

9. The Defendant has filed an Affidavit in reply to the Chamber Summons and

opposed grant of reliefs as prayed in the Chamber Summons. The following submissions were made on behalf of the Defendant:

9.1 That there has been inordinate and unexplained delay in producing the Additional documents. It was argued on behalf of the Defendant that the Plaintiff was required to produce documents on which they rely and which are in their possession and power in support of their claim at the time of institution of the suit.

9.2 That Order XIII Rule 1 of Code of Civil Procedure, 1908 (“**CPC**”) mandates that every party ought to produce all documents in original on or before the settlement of issues. Since, the Plaintiff has failed to produce the Additional documents before the settlement of issues, it is now not open for them to produce the same at the subsequent stage;

9.3 That the Plaintiffs’ Application is based on Order XIII Rule 2 of CPC which speaks of original documents and since some of the additional documents are photocopies of the original documents, the application of the Plaintiff should be rejected as far as the photocopies are concerned; and

9.4 That the Defendant has also taken objection on the admissibility of the Additional documents on various grounds.

10. I have heard the submissions of the Advocates for the Plaintiff and the Defendant. I have also considered the provisions of law and the judgments relied on behalf of the parties. In affidavit in support of the Chamber Summons, the Plaintiff

has set out the circumstances in which these documents could not be produced earlier. The reasons given cannot be said to be frivolous or implausible . This is more so when PW1 being a Solicitor has deposed an affidavit which is at Annexure B to affidavit in support as regards the manner in which he subsequently discovered the documents. It is also the case of the Plaintiff that in light of the documents discovered by PW1 , the Plaintiff conducted a further search and discovered further documents. As per the law laid down by the Hon'ble Supreme Court and this Court as referred hereinabove, while considering an application under Order XIII Rule 2 of CPC , a party has to show cause why the documents could not be produced earlier and the court should not adopt a very strict, restricted and pedantic view while considering such an application. Ultimately the Court will have to ensure that all documents which assist it to resolve the controversy before it in an efficient manner are available for its perusal. In the present case, I am satisfied with the cause shown by the plaintiff for non production of the additional documents at an earlier stage. The cross examination of PW1 is yet to commence. No prejudice will be caused to the Defendant if the present Application is allowed. The Defendant will have adequate opportunity to object to the admissibility of the documents and if the documents are found admissible, to cross examine the witness on the same.

11. It is contended on behalf of the Defendant that the documents sought to be relied upon are not referred to in the Plaint. This contention is devoid of merits. Every

document produced in evidence need not necessarily be mentioned in the plaint and merely because a document is not mentioned in the plaint, the same cannot be precluded from being produced in evidence. This is more so when the documents are said to have been discovered subsequently. It is then argued on behalf of the Defendant that the Plaintiffs' Application is based on Order XIII Rule 2 of CPC which speaks of original documents and since some of the additional documents are photocopies of the original documents, the Application of the Plaintiff should be rejected as far as the photocopies are concerned. In my opinion, the right of the party to produce secondary evidence cannot be taken away merely because there has been delay in producing the document. In my opinion upon showing cause for non production of the documents earlier, the court can allow any party to produce additional document/s at a later stage, which have not been produced before settlement of issues. It is open to the Defendant to object to the admissibility of the documents on all grounds available in law. This argument of the Defendant is devoid of merits.

12. The Defendant has also taken objection on the admissibility of the additional documents on various grounds. According to me, this is not the stage where such objections can be taken or considered by this Court. I am in agreement with the view taken by the High Court at Andhra Pradesh in **Sirugudi Adinarayana (supra)** that the order directing the reception of the documents is entirely different from the

order admitting the documents in evidence. Even if the Plaintiff is allowed to produce the additional documents, it will be open for the Defendant to raise the issues of admissibility at the time of marking of the documents. I do not consider it necessary to deal with the objections as to admissibility of the Additional documents at this stage.

13. Considering the facts and circumstances of the present case, I am of the view that the Plaintiff has made out a case for permitting it to file the additional documents as set out in the schedule to the chamber summons. Since, there has been some delay in filing the additional documents, the Defendant ought to be compensated by the Plaintiff for delay caused. In these circumstances, the following order is passed :-

- (i) The Chamber Summons is made absolute in terms of prayer clause (a) subject to payment of Rs. 1,00,000/- by the Plaintiff to the Defendant within a period of 12 weeks from today;
- (ii) The suit be listed for marking of additional documents on 5th February, 2015.

(S.J. KATHAWALLA, J.)