

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

CHAMBER SUMMONS NO.60 OF 2014

IN

SUIT NO.148 OF 2013

Amlin Underwriting Limited & Ors.Applicants/Defendants

IN THE MATTER BETWEEN :

New India Assurance Co. Ltd. & Anr.Plaintiffs

V/s.

Amlin Underwriting Ltd. & Ors.Defendants

WITH

CHAMBER SUMMONS NO.922 OF 2014

IN

SUIT NO.148 OF 2013

New India Assurance Co. Ltd. & Anr.Applicants/Plaintiffs

V/s.

Amlin Underwriting Ltd. & Ors.Defendants

WITH

NOTICE OF MOTION NO.809 OF 2014

IN

SUIT NO.148 OF 2013

New India Assurance Co. Ltd. & Anr.Applicants/Plaintiffs

V/s.

Amlin Underwriting Ltd. & Ors.Defendants

WITH

THIRD PARTY NOTICE NO.1 OF 2014

IN

SUIT NO.148 OF 2013

New India Assurance Co. Ltd. & Anr.Plaintiffs

V/s.

Amlin Underwriting Ltd. & Ors.Defendants

Mr. Shyam Kapadia a/w. Mr. Keanan Nagporiwala and Ms. Shivani Rawat i/b. Tuli & Co. for the plaintiffs.

Mr. Rahul Narichania, senior advocate a/w. Mr. Ashish Kamat and Mr. Siddharth Thacker and Ms. Aarti Shah i/b. Mulla & Mulla & C.B.C. for the defendant nos.1 to 8 and for the applicants in CHS/60/2014.

Mr. Rohan Rajadhyaksha a/w. Ms. Swati Singh and Ms. Sonali Mathur i/b. AZB Partners for the defendant no.9.

Mr. Sarosh Bharucha a/w. Mr. Pulkitesh Dutt i/b. M/s. Khaitan and Co. for the defendant nos.10 & 11.

CORAM : K.R.SHRIRAM,J

DATE : 21st SEPTEMBER, 2016

P.C.:-

CHAMBER SUMMONS NO.60 OF 2014

1 This chamber summons is taken out to direct the plaintiffs to disclose and discover by way of an affidavit the documents set out in Schedule 'A' to the chamber summons and also give inspection thereof. Prayer clause -(b) is not relevant since the defendants have already filed the written statement.

2 The background of this case is that the claim as made by the plaintiffs is on the basis that the plaintiffs had issued Terrorism Cover to one Essar Steel Limited (ESL). The plaintiff no.1 had covered 80% and plaintiff no.2 had covered 20%. This risk was re-insured with defendant nos.1 to 8 through defendant nos.9 to 11. There is a separate chamber summons taken out by the plaintiffs to add the respondent therein also as a party defendant in this suit. That chamber summons is pending.

3 The suit proceeds on the basis that the claim of the plaintiffs upon defendant nos.1 to 8 under the reinsurance policy has

been wrongly repudiated by defendant nos.1 to 8 and that the plaintiffs had disclosed all material facts to defendant nos.9 to 11 and if at all defendant nos.9 to 11 have failed to disclose, as alleged by defendant nos.1 to 8, then the defendant nos.9 to 11 are liable to pay the claim of the plaintiffs. This in brief is the dispute between the parties.

4 From the affidavits filed in support and in reply, the following facts emerge. The plaintiff no.1 had issued a Mega Risk Insurance Policy to ESL for the period 1st September, 2008 to 31st August, 2009. During the subsistence of the Mega Risk Insurance Cover, ESL raised a claim of Rs.16.87 lacs due to damage caused to pipeline in May, 2009 by unknown miscreants. Plaintiff no.1 refused to pay the claim made by ESL under the Mega Risk Insurance Cover on the ground that it was not a loss caused by a risk covered under the said policy. In view thereof, ESL took a separate cover from plaintiff no.1, i.e., Terrorism Insurance Policy. Plaintiff no.1 issued Terrorism Insurance Policy to ESL writing 80% of risk for the period 20th November, 2009 to 19th November, 2010 and plaintiff no.2 wrote balance 20% of risk for the same period. Plaintiff no.1 and plaintiff no.2, through defendant nos.9 to 11, sought reinsurance cover from defendant nos.1 to 8 in respect of the same risk as the sum involved

was very large. Defendant nos.1 to 8 covered the entire 100% of the risk cover by plaintiff no.1 and plaintiff no.2, each taking a percentage.

5 One of the locations for which the cover was provided was at Chitrakonda, Orissa which included 267 km survey pipeline of ESL. On 23rd/24th March, 2010 there was an attack by Maoist on ESL's booster station in Orissa which resulted in loss to ESL. ESL submitted a claim upon the plaintiff no.1 and plaintiff no.2 for Rs.90.7 crores and Rs.881 crores allegedly for property damaged and loss of business, respectively. In turn, the plaintiffs lodged claim upon defendant nos.1 to 8 under the re-insurance policy. The defendant nos.1 to 8 avoided the claim in or about November to December, 2010 on the ground that on the basis of their independent investigation it came to light that the plaintiffs had not disclosed various material facts and that there was material misrepresentation. This avoidance of the policy by defendant nos.1 to 8 is the main subject matter of the present suit.

6 It has subsequently come to light of defendant nos.1 to 8 that even the plaintiffs had rejected/repudiated the claim of ESL on 9th September, 2011 under the Terrorism Cover, for which the plaintiffs have lodged the claim on defendant no.1 to 8 and

indisputably this has not been disclosed in the plaint. Since the plaintiffs had rejected the claim of ESL, ESL invoked arbitration clause under the Terrorism Insurance Policy. ESL filed an arbitration application before this court seeking appointment of an arbitrator on 3rd January, 2013. Plaintiff no.1 opposed the arbitration application on the grounds that they have rejected the claim, there was fraud played by ESL and there was non disclosure of material facts, etc. They also sought to avoid the policy. This court by an order dated 8th May, 2013 rejected the submissions of plaintiff no.1 and appointed an Arbitrator. Against the said order, plaintiff no.1 filed a Special Leave Petition before the Hon'ble Supreme Court of India, which was decided on 2nd September, 2015 and the Supreme Court directed the parties to go for arbitration.

7 The entire basis of the applicants' case is that most of the facts mentioned above came to light when the applicants came across the order dated 8th May, 2013 passed by the Learned Single Judge of this court in arbitration petition no.18 of 2013. It is recorded in the said order that the plaintiff no.1 refused to grant ESL's claim under the ambit of Mega Risk Insurance Policy, in view of which ESL sought Terrorism Cover from plaintiff no.1. It also came to light that the plaintiffs had rejected the claim of ESL even under the Terrorism

Cover which the plaintiffs are now making against the defendants. The applicants also state that in view of what is stated in the said order, it came to light that the plaintiffs had misrepresented to defendant nos.1 to 8. It is also stated that the plaintiffs failed to disclose other material facts in its placing slip at the time of obtaining a Terrorism Reinsurance Cover from the applicants.

8 The plaintiffs have opposed this application and Mr. Kapadia, counsel for the plaintiffs made valiant efforts to have the application rejected. According to plaintiff no.1 the present application is a fishing exercise, discovery sought are for documents without stating their relevance, some of the details sought are unrelated to the present suit, some of the documents sought are in public domain and the attempt by the defendants is only to delay the present proceedings.

9 The applicants have listed about 60 documents/sets of documents for discovery/inspection. The counsel for the applicants handed over a chart wherein the documents sought are split into two parts, the first one containing 26 documents, which are referred to in the order dated 8th May, 2013 and the second one containing 34 documents, which are referred to in the plaint. The counsel for the

plaintiffs submitted that as regards the documents referred to in the order, the applicants are not entitled to these documents because ESL is not a party to the present proceedings, the policy issued by plaintiff no.1 to ESL is not a subject matter of the present suit, the order dated 8th May, 2013 has no relevance to the present proceedings and several of the documents are available in public domain. He also submitted that the defendant nos.1 to 8 having avoided the reinsurance policy, cannot seek such documents to which the defendants could have sought had the policy not been avoided and discovery exercise cannot be used to develop the defendants' case and the defendant nos.1 to 8 have adopted discovery as a mean to develop their case. As regards the last point, it is no more an issue since the defendants have already filed their written statement.

10 The law relating to discovery of documents under the provisions of Order 11 of the Code of Civil Procedure prior to the amendment dated 23rd October, 2015 is well settled. Order 11 Rule 12 and Rule 14 of the Code of Civil Procedure read as under :-

“12. Application for discovery of documents.- Any party may, without filing any affidavit, apply to the court for an Order directing any other party to any suit to make discovery on oath of the documents which are or have been his possession or power, relating to any matter in question therein. On the hearing of such application the court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the suit, or make such order, either generally or limited to certain classes of documents, as may, in its discretion, be thought fit:

Provided that discovery shall not be ordered when and so far as the court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

13.

14. Production of documents .- *It shall be lawful for the Court, at any time during the pendency of any suit, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such suit, as the Court shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just.”*

11 It is settled that under Order 11 Rule 14 of the Code of Civil Procedure, the Court is equally empowered and it shall be lawful for it to order the production, by any party to the suit, such documents in his possession or power as relating to any matter in question in the suit provided the court shall think right that production of the documents are necessary to decide the matter in question. It is settled law that no party can be allowed to make fishing and roving enquiry. While allowing discovery or production, the court also has to consider whether the documents are privileged. It is settled that the party seeking discovery or production of the document need not satisfy the court that the document in question is admissible as evidence in the suit, it would be sufficient to show that the contents of the document would throw light on the subject matter of the suit. (***Harish N. Salve vs. Spiritual Regeneration Movement Foundation of India¹***).

1. 2010 SCC Online Del. 49

12 It is also settled, as held in *Shri M.L. Sethi vs. Shri R.P. Kapur*¹, that the party seeking discovery need not even specify in detail which are these documents. It is sufficient if the documents would be relevant for the purpose of throwing light on the matter in controversy and every document which will throw any light on the case is a document relating to a matter in dispute in the proceedings, though it might not be admissible in evidence. When the court makes an order for discovery under the rule, the opposite party is bound to make an affidavit of documents and if he fails to do so, he will be subject to the penalties specified in Rule 21 of Order 11.

13 The applicants' case is that from the order dated 8th May, 2013 it came to light for the first time that the plaintiffs had rejected the claim of ESL under the Terrorism Policy on the grounds of non disclosure, misrepresentation and fraud, for which the plaintiffs are making a reinsurance claim in the suit. The plaintiffs have also not disclosed in the plaint that they had rejected the claim of ESL for reasons mentioned earlier. The documents which the defendants are seeking discovery and inspection are those documents which are either referred to by this court in its order dated 8th May, 2013 and/or in the plaint filed in this suit.

1. (1972) 2 SCC 427

14 Therefore, I cannot say that the documents of which discovery/inspection has been sought are irrelevant for the purpose of throwing light on the matter in controversy or it is a fishing or roving enquiry. The issue is whether the plaintiffs are guilty of non disclosure and misrepresentation and if it is so, whether the defendant nos.1 to 8 can avoid the contract. In the chart given by Mr. Narichania, the applicants have given reference to paragraph numbers and page numbers in the order and also in the plaint. They have also given reason why they are seeking discovery and inspection for each of the document. The plaintiffs have not even listed the documents which are in the public domain. It is not the plaintiffs' case that the documents are privileged. Except for baldly saying that it is nothing but a fishing exercise and the inspection of the documents sought have no relevance to the present proceedings, there is nothing much in the affidavit in reply.

15 In the circumstances, the chamber summons is allowed and accordingly disposed with the following order :

ORDER

(a) The plaintiffs to disclose and discover by way of an affidavit the documents set out in Schedule 'A' annexed to the chamber summons within three weeks.

(b) The plaintiffs are also directed to give inspection thereof within five weeks from today. It is also clarified that the plaintiffs will also specifically mention the documents which are not in their possession.

(c) The plaintiffs are also directed to provide to the applicants photocopies of the documents, at the expense of the applicants, within the five weeks provided in (b) above.

CHAMBER SUMMONS NO.922 OF 2014

The chamber summons be listed for hearing on
28th September, 2016.

NOTICE OF MOTION NO.809 OF 2014

1 The counsel for the applicant states that nothing survives in the notice of motion since the defendants have already filed their written statement.

2 Therefore, the notice of motion accordingly stands disposed.

(K.R.SHRIRAM,J)