

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO. 3869 OF 2016

(M/s. Vibrant Infotech Limited...VS...The Corporation of the City of Nagpur and Another)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri Avinash Gharote, Advocate for Petitioner.
Shri A. M. Quazi, A.G.P. for Respondent Nos.1 and.

CORAM : S.C.GUPTE, J.
DATED : 23rd AUGUST, 2017.

Heard learned counsel for the parties.

The present petition challenges an order passed by 5th Joint Civil Judge Senior Division, Nagpur on an application filed by the petitioner (original plaintiff before the Civil Court) under the provisions of Order 11 Rule 12 of the Code of Civil Procedure for discovery of documents. The discovery was sought at the stage of cross-examination of respondents' (original defendants') witness. The subject matter of controversy between the parties in the present suit arises out of a contract between the respondent Corporation and the petitioner contractor. The contract involves two aspects, one, the maintenance of street lights (nearly 72000) for the contract period and two, installation of energy saving devices on the street lights by the petitioner contractor. Admittedly, in so far as maintenance of street lights is concerned, it involves a fixed payment and there is no

controversy between the parties as to the payment received by the petitioner contractor towards this item. (Though there is some controversy concerning a claim made even in respect of maintenance of street lights for the period after the termination of the contract.) The controversy pertains to the payment to be made for the energy savings devices purportedly installed by the petitioner contractor.

The documents, of which discovery was sought, were all relevant, according to the petitioner, in respect of this claim. Relevance of the documents can only be in the context of actual recording of energy saving by means of the devices purportedly installed by the petitioner on street lights. It is, however, the case of the respondent Corporation that for the period of about six months, after the petitioner purportedly installed these devices, adhoc payments were made to the petitioner without actually recording the factum of energy saving. In fact, it is submitted, there are documents on record to show that the petitioner was to install mechanism for measuring saving of electricity and that was not done. Be that as it may, in the face of an express case set up by the respondent Corporation that it does not have any record, which reflects any electricity saving throughout the relevant period, no useful purpose would be served by directing the respondent Corporation to produce such record. Such record, it is reiterated by the learned advocate for the respondent, does not exist.

If one has regard to the provisions of Rule 12 of Order 11 of the Code of Civil Procedure, it is only those documents which have been in possession or power of the party which can be ordered to be discovered by that party. When the party affirms that it is neither in possession nor in control of such document, there is no question of ordering that party to make any discovery of such document.

In the premises, the impugned order of the learned Civil Judge does not suffer from any infirmity and calls for no interference under Articles 226 and 227 of the Constitution of India.

The petition is, accordingly, dismissed.

It is, however, clarified that it will be open to the petitioner to apply to the trial Court to draw an adverse inference, on the basis of whatever material is on record, for non-production of these documents. It is equally open to the respondent to resist such application. All rights and contentions of the parties on merit in this behalf are kept open.

JUDGE