

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ADMIRALTY AND VICE-ADMIRALTY JURISDICTION**

**NOTICE MOTION NO. 2269 OF 2015  
IN  
ADMIRALTY SUIT NO. 31 OF 2013**

Rasesh Shipping Services .. Plaintiff  
Vs.  
R.V. Akademik Boris Petrov & Anr. .. Defendants

**WITH  
NOTICE MOTION NO. 2268 OF 2015  
IN  
COMMERCIAL SUIT NO. 31 OF 2013**

Prash Logistics .. Applicant

***In the matter between :***

Prash Logistics .. Plaintiff  
Vs.  
R.V. Akademik Boris Petrov & Anr. .. Defendants

Mr. Arnab Ghosh a/w. Mr. Manoj Khatri i/b Manoj R. Khatri for plaintiff.

Mr. V.K. Ramabhadran i/b Subra Karmakar for defendants.

**CORAM : K.R.SHRIRAM, J.  
RESERVED ON : 24<sup>TH</sup> JANUARY 2018  
PRONOUNCED ON : 31<sup>ST</sup> JANUARY 2018.**

**P.C.**

1 These notices of motion are for identical reliefs in two separate suits and both suits have been tagged together because the plaintiff in both suits are sole proprietary concern of two brothers who are carrying on business together from the same premises and defendants are also common. The

cause of action also is identical. The documents proposed to be introduced in evidence through these notices of motion are also common. The affidavits in support are also identical except that they are affirmed by two different persons, viz., Ashish Khialani in notice of motion No. 2269 of 2015 and Pratap Khialani in notice of motion No. 2268 of 2015. Therefore, I am considering the facts in notice of motion No.2269 of 2015 in Admiralty Suit No. 31 of 2015 and my findings will apply squarely to notice of motion No. 2268 of 2015 in Admiralty Suit No.11 of 2013 converted into Commercial Suit No. 31 of 2013 also.

2 The suit has been filed on the basis that plaintiff was a ship chandler and supplied various goods/necessaries and rendered services to 1<sup>st</sup> defendant vessel and there are amounts still unpaid.

3 After the issues were settled on 14<sup>th</sup> March 2014, plaintiff filed evidence of their first witness. As recorded in the order dated 16<sup>th</sup> April 2014, plaintiff informed the Court that there will be two witnesses. The first witness was Mr.Ashish Khialani in Admiralty Suit No.31 of 2013 and Mr. Pratap Khialani in Commercial Suit No.13 of 2013 as PW-1 and the 2<sup>nd</sup> witness in both the suits will be one Mr. Mohnish Mackdani.

With the evidence of PW-1 in Admiralty Suit No.31 of 2013, plaintiff had filed a compilation of about 147 documents and in Commercial Suit

No.31 of 2013, plaintiff had filed a compilation in two volumes containing a total of about 900 pages. Plaintiff thereafter on 12<sup>th</sup> August 2014 sought liberty of the Court to withdraw the affidavit of evidence of Ashish Khialani (PW-1) filed in Admiralty Suit No.31 of 2013 because the averments did not include averments regarding various documents and invoices. In the interest of justice, this Court permitted plaintiff to withdraw the affidavit of evidence of Mr.Ashish Khialani and granted liberty to file fresh evidence affidavit. Therefore, fresh evidence affidavit was filed of Mr.Ashish Khialani in Admiralty Suit No. 31 of 2013. On 31<sup>st</sup> October 2014, the 147 documents were received in evidence and marked as exhibits in Admiralty Suit No.31 of 2013 and on 7<sup>th</sup> May 2014, the 900 (approx.) pages were received in evidence and marked as exhibits in Commercial Suit No.31 of 2013.

4 The evidence of Mr.Ashish Khialani and Mr.Pratap Khialani, who were PW-1 in Admiralty Suit No. 31 of 2013 and Commercial Suit No.31 of 2013, respectively, was recorded before the Court appointed Commissioner and the cross-examination of PW-1 in both suits was concluded on 5<sup>th</sup> September 2015 and the witnesses were discharged. Subsequent thereto, plaintiff filed the affidavit of one Mr.Mohnish Mackdani in lieu of examination in chief in both the suits on 26<sup>th</sup> October 2015. At that stage, it

is the case of plaintiff that they realized that there are approximately 22 documents which have not been even referred to in the affidavit of documents and consequently as they have not been received in evidence, are required to be brought through Mr.Mohnish Mackdani, proposed PW-2. Hence, are seeking leave of this Court to file further affidavit of documents.

5 Admittedly, these documents have not even been referred to in plaintiff. There is not even a foundation laid in the plaintiff. In the affidavit in support of the notices of motion, it is stated that the documents that are required to be filed are computer print out of email correspondence exchanged between the representative/proprietor of plaintiff and representative/agent of defendants; the documents are integral part of the correspondence exchanged between the parties; defendants had admitted to clear the outstanding due to plaintiff and had failed to do so; these documents were inadvertently left out in the affidavit of documents filed by plaintiff and the same were under the care and control of Mr.Mohnish Mackdani the Operation Manager who was responsible for the day-to-day operation of plaintiff and he was not consulted before the filing of affidavit of documents; and if these documents are not allowed to be taken on record, great prejudice will be caused to them.

In the affidavit in rejoinder, it is also stated that the present documents are filed in order to enable plaintiff to rectify its mistake or

inability to produce the documents in support of the plaint which ought to have been produced along with the plaint and defendants have ample opportunity to meet these documents in course of recording of evidence including the cross-examination of the witness.

Defendants are strongly opposing the notices of motion.

6 Shri Ghosh appearing for plaintiff relied on the following judgments :-

(i) *Vitorino Rodrigues & Ors. Vs. Nirmalabai Shivajirao Dessai (deceased)*<sup>1</sup>,

(ii) *Chitrakala Fal Dessai Vs. Balu Marathe alias Mane s/o Jyotiba Marathe* <sup>2</sup>,

(iii) *Asman Investment Ltd. Vs. K.L. Suneja* <sup>3</sup> ; and

(iv) *United India Insurance Company Ltd. Vs. M/s. Madgavkar Salvage and Towage Co. Pvt. Ltd.* <sup>4</sup>

and submitted that it is settled law that 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. 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

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1 [2017(7) Mh.L.J.813]

2 2006(6) Mh.L.J.

3 1998 (44) DRJ

4 1996 4 Bom.CR 50

documents to establish that the said documents are not relevant or that the case based on the said documents is not true. Shri Ghosh submitted that mere inadvertence or oversight which may be human error caused by lack of professional advice or directive or party's lack of knowledge of the urgency of a document being filed early or oblivion of consequences of not doing so cannot come in the way of the party knocking at the doors of this Court for justice. Shri Ghosh submitted that non-filing of the documents earlier was not a design or motivated and was inadvertent and not gross negligence. Shri Ghosh also submitted that defendants have not stated how prejudice will be caused to them, if the application was allowed.

7 Shri Ramabhadran appearing for defendants submitted :-

- (a) plaintiff had ample opportunity to produce these documents;
- (b) these documents do not even form part of the plaint and there is no reference in the plaint that such correspondence was exchanged between plaintiff and the representatives of defendants and that representatives had admitted liability. Therefore, no evidence with regard to the facts not pleaded can be looked into;
- (c) there will be miscarriage of justice and grave prejudice will be caused to defendants inasmuch as, if these facts were in the plaint, defendants would have got an opportunity to place the facts and contentions necessary to repudiate or challenge such a claim or relief and

in such a situation, the Court would have framed issues as to whether plaintiff proves that they sent such emails to defendants and whether defendants admitted its liability;

(d) it is settled law that Courts cannot permit parties to lead further evidence to fill up lacuna or mistakes in their evidence and in the affidavit in rejoinder plaintiff has admitted that these documents are only being introduced to rectify its mistake.

(e) the basis of these applications is that Mr.Mohnish Mackdani was responsible for day-to-day operation of plaintiff and he was not consulted before the affidavit of documents. At the same time, plaintiff has not stated that PW-1 who are sole Proprietors, in both the suits, did not even discuss with Mr.Mohnish Mackdani before they filed affidavit in lieu of examination in chief or compilation of documents. Shri Ramabhadran also submitted that even during the cross-examination, PW-1 in both the suits have stated that they are in-charge of day-to-day operations and in any event in M/s.Rasesh Shipping (Admiralty Suit No.31 of 2013), PW-1 has stated that there are only 5 employees; 2 in Accounts Department, 1 handles operation, 1 procures materials and 1 is the Peon and in M/s. Prash Logistics (Commercial Suit No.31 of 2013), PW-1 stated that there are only 2 employees and they manage supplies, accounts and the paper work. Hence one cannot believe that Mr. Mackdani was not consulted

before filing affidavit of documents; and

(f) the documents are manufactured and cooked up documents for being introduced at this stage and the Court should not exercise its discretion in favour of plaintiff even though it is settled law that the Court may based on facts and circumstances of a case, allow the parties to lead evidence at any stage in the interest of justice. Shri Ramabhadran also submitted that the Apex Court in *Bagai Construction through its Proprietor Lalit Bagai Vs. Gupta Building Material Store* <sup>5</sup> held that as a matter of routine, if parties are allowed to recall witnesses or introduce further documents at any stage, the purpose of speedy trial will be defeated and certainly not to fill up lacunae or mistakes.

In any event, the thrust of the arguments of Shri Ramabhadran is that these are cooked up documents after plaintiff realized that they did not have any evidence filed to prove interest was payable.

8 As stated earlier, in Admiralty Suit No.31 of 2013, plaintiff has produced 147 documents and in Admiralty Suit No.11 of 2013 now Commercial Suit No.31 of 2013, plaintiff has produced about 900 pages of documentary evidence. The documents now being introduced are common to both the suits. In the affidavits of documents in the two suits filed by PW-1, it is stated as under :

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<sup>5</sup> (2013) 14 SCC

*“Admiralty Suit No.31 of 2013*

*I, Ashish Khialani, the Proprietor of Rasesh Shipping Services having its office at 1, Rex Chambers, Ground floor, Walchand Hirachand Marg, Ballard Estate, Mumbai 400 001 do hereby on solemn affirmation state as under :-*

- 1. I am the Proprietor of the Plaintiff above-named. I am aware of the facts and circumstances of the present suit and I am able to depose as under :*
- 2. According to the best of my knowledge, information and belief, I do not have now, nor have ever had in my possession, custody or power or in the possession, custody or power of my pleader, or in both possession, custody or power of any other person on behalf of myself any receipt, letter, paper or writing or any copy of or extract from any such document, or any other document whatsoever, relating to the matter in question wherein any entry has been made relating to such matter or any of them, other than and except the documents set forth in the first and second parts of the first schedule hereto.”*

*II)*

*“Admiralty Suit No.11 of 2013/  
Commercial Suit No.31 of 2013*

*I, Pratap Khialani, the Proprietor of Prash Logistics having its office at 1<sup>st</sup>, 2<sup>nd</sup> floor, Zakariya Building, 7 Chakala Street, Mumbai 400 003 do hereby on solemn affirmation state as under :-*

- 1. I am the Proprietor of the Plaintiff above-named. I am aware of the facts and circumstances of the present suit and I am able to depose as under :*
- 2. According to the best of my knowledge, information and belief, I do not have now, nor have ever had in my possession, custody or power or in the possession, custody or power of my pleader, or in both possession, custody or power of any other person on behalf of myself any receipt, letter, paper or writing or any copy of or extract from any such document, or any other document whatsoever, relating to the matter in question wherein any entry has been made relating to such matter or any of them, other than and except the documents set forth in the first and second parts of the first schedule hereto.”*

who has also affirmed the affidavit in support of notice of motion has averred that he was in charge of the day-to-day affairs of the proprietary concern. It is also stated that the said emails were sent to defendants/agents from the email address 'rashesshipping@hotmail.com'. He also stated that "The aforesaid emails were addressed by the Plaintiff having email address 'rashesshipping@hotmail.com'. I certify that the computer of Plaintiff vide which the electronic mails were sent was operating in proper working condition during the relevant period and the information contained in the print outs of the electronic mails were received in the ordinary course of business. As I am the Proprietor of the Plaintiff, I have access to all the correspondence in the regular course of business and therefore I am producing the same. I can identify the same and certify the same to be true and correct....."

In the cross-examination of PW-1-Ashish Khialani, his answers to question Nos.7, 8, 13, 14, 15, 21 to 24, 27, 28, 37, 38, 73, 77, 79 to 83, 95 are as under:-

Q.7 : What does the person working in the operations do ?

Ans. Operation person attends the vessel and looks into all the supplies and repairs, etc.

Q.8 : What do you do?

Ans. : I do overall and look at all the departments.

..

Q.13 : You had filed affidavit in May 2014 which was withdrawn on the ground that further facts came to your light after the affidavit was filed. Could you please tell, what were the further facts which came to your light after the affidavit was filed?

Ans. : After going through the affidavit we saw some things were missing and wanted to put them and re-file the affidavit.

Q.14 : When you filed the first affidavit, did you or did you not read it?

Ans. : I had gone through, but that time did not realize that some things were missing.

Q.15 : What were those some things?

Ans. : We wanted to incorporate delivery challans, invoices and all relevant documents in that affidavit.

Q.21 : Have you produced all the documents, correspondence, Books of Accounts in relation to the suit transaction?

Ans. : We have submitted invoices, delivery challans, quotations, some approvals and some email correspondence with the owners, agents and vessels.

Q.22 : Have you produced all the documents, correspondence, Books of Accounts in relation to the suit transaction?

Ans. : We have submitted all invoices, all delivery challans, all written quotations, all written approvals and all email correspondence with the owners, agents and vessels.

Q.23 : I am putting it to you that you are deliberately avoiding to answer the question.

Ans. : I deny.

Q.24 : Have you produced the Books of Accounts?

Ans. : No.

....

Q.27 : Have you produced all correspondence?

Ans. : As per my knowledge, yes.

Q.28 : Who else in your office will have knowledge in relation to the suit transaction?

Ans. : It's only me who was handling it directly with my

Advocate.

.....

Q.37 : I put it to you that there was no outstanding invoices and therefore you have not sent any reminders.

Ans. : I deny.

Q.38 : Who instructed your lawyer from your firm when the purported notice of demand was made against EMS Seacrest Marine Services?

Ans. : I instructed my lawyer to issue a notice against master and owners.

.....

Q.73 : Is it correct that all your purported invoices were sent only to the office of EMS Seacrest Marine Services?

Ans. : Yes.

.....

Q.77 : Have you produced before this Court any purported statement having been sent to the Owners?

Ans. : Yes. It is Exhibit "H" to the Plaint.

...

Q.79 : Have you produced any document in these proceedings, in the nature of statement of accounts, having been sent to the owners, which has been duly acknowledged, other than the purported statement which you claim to have sent (Exhibit "H")?

Ans. : Two notices have been sent legally to the owners for these outstanding payments.

Q.80 : Above question is repeated.

Ans. : No.

Q.81 : What is a relation between Rasesh Shipping Services and Prash Logistics?

Ans. : They are sister concerns, operating from same office.

Q.82 : Is Prash Logistics a sole proprietary firm?

Ans. : Yes.

Q.83 : Is the sole proprietor of Prash Logistics is your brother?

Ans. : Yes.

...

Q.95 : In the Complaint you have claimed that you placed order for supply of necessities upon third parties raised invoices and you claimed to have made payments. Have you produced any purported invoices raised by third party upon your firm and any document establishing that you have made the purported payment?

*Mr. Manoj Khatri, Advocate for the Plaintiff objects that the Plaintiff has not mentioned about any orders being placed upon third parties and therefore the said question is only being asked to confuse the witness as there are no averments in the Complaint to that effect?*

*Mr. V.K. Ramabhadran, Sr. Advocate appearing for the Defendants states that in paragraph 6 of the Complaint it is clearly stated that Plaintiff would rely upon invoices raised by the third parties upon the Plaintiff.*

*The witness is asked to answer, subject to the objection.*

Ans. : No. I have not produced.

(emphasis supplied)

10 It is true that the Courts have been generous, in the interest of justice to permit parties to lead evidence even at a belated stage in certain cases. I also believe in that. At the same time, there cannot be a strait jacket formula for allowing any such application. That would depend on the explanations given in the application as to why those documents could not be produced earlier.

11 It is settled law that these are discretionary orders which the Court should pass considering the facts and circumstances of the case. Of course,

even while exercising this discretion, the Court will look into the pleadings in the plaint and no evidence with regard to facts not pleaded can be looked into.

12 In this case, I am not inclined to grant the application for the following reasons :

(a) The documents which are proposed to be introduced at this stage are to show that these were emails that were sent to one Mr. Karyakin, a representative/employee of defendant no.2 before October 20, 2012. It is the case of plaintiff that said Mr. Karyakin had visited plaintiff's office representing defendant no.2 to resolve the the issue of payments due to plaintiff and defendant no.2 had not objected to the exchange of emails with Mr. Karyakin. According to plaintiff, by these emails, defendant no.2 had admitted to clear plaintiff's dues but defendant no.2 failed to do so.

Admittedly, there is no reference to any these emails in the plaint. Admittedly, it is not mentioned anywhere in the plaint that these emails were sent to Mr. Karyakin and defendant no.2 never objected to that and defendant no.2, vide these emails admitted to clear plaintiff's dues. Moreover, as it is plaintiff's case that by these emails, defendant no.2 admitted to clear plaintiff's dues, all the more reason they should have been mentioned in the plaint, and as a result of not mentioning defendants

have not got an opportunity to repudiate or challenge such a case. In fact, to a pointed question posed by the Court, the counsel for plaintiff-applicant admitted that there is no foundation laid in the plaint. In **Bacchaj Nahar Vs. Nilima Mandal & Anr.**,<sup>6</sup> the Apex Court has held as under :-

*“10. The High Court, in this case, in its obvious zeal to cut delay and hardship that may ensue by relegating the plaintiffs to one more round of litigation, has rendered a judgment which violates several fundamental rules of civil procedure. The rules breached are :*

- (i) No amount of evidence can be looked into, upon a plea which was never put forward in the pleadings. A question which did arise from the pleadings and which was not the subject matter of an issue, cannot be decided by the court.*
- (ii) A Court cannot make out a case not pleaded. The court should confine its decision to the question raised in pleadings. Nor can it grant a relief which is not claimed and which does not flow from the facts and the cause of action alleged in the plaint.*
- (iii) A factual issue cannot be raised or considered for the first time in a second appeal.*

11 XXX

*12 The object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the court for its consideration. This Court has repeatedly held that the pleadings are meant to give to each side intimation of the case of the other so that it may be met, to enable courts to determine what is really at issue between the parties, and to prevent any deviation from the course which litigation on particular causes must take.*

*13 The object of issues is to identify from the pleadings the questions or points required to be decided by the courts so as to*

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<sup>6</sup> (2008) 17 SCC 491

*enable parties to let in evidence thereon. When the facts necessary to make out a particular claim, or to seek a particular relief, are not found in the plaint, the court cannot focus the attention of the parties, or its own attention on that claim or relief, by framing an appropriate issue. As a result the defendant does not get an opportunity to place the facts and contentions necessary to repudiate or challenge such a claim or relief. Therefore, the court cannot, on finding that the plaintiff has not made out the case put forth by him, grant some other relief. The question before a court is not whether there is some material on the basis of which some relief can be granted. The question is whether any relief can be granted, when the defendant had no opportunity to show that the relief proposed by the court could not be granted. When there is no prayer for a particular relief and no pleadings to support such a relief, and when defendant has no opportunity to resist or oppose such a relief, if the court considers and grants such a relief, it will lead to miscarriage of justice. Thus it is said that no amount of evidence, on a plea that is not put forward in the pleadings, can be looked into to grant any relief.”*

(b) In the affidavit in lieu of examination in chief, Mr.Ashish Khialani has stated that he was in charge of the day-to-day affairs of the proprietary concern. It is also stated that the said emails were sent to defendants/agents from the email address 'rasheshshipping@hotmail.com'. He also stated that *“The aforesaid emails were addressed by the Plaintiff having email address 'raseshshipping@hotmail.com'. I certify that the computer of Plaintiff vide which the electronic mails were sent was operating in proper working condition during the relevant period and the information contained in the print outs of the electronic mails were received in the ordinary course of business. As I am the Proprietor of the Plaintiff, I have access to all the correspondence in the regular course of business and therefore*

*I am producing the same. I can identify the same and certify the same to be true and correct.....”*

In answer to Q.8, Mr. Ashish Khialani (Proprietor/PW-1 and person who has affirmed the affidavit in support and rejoinder) has said *“I do overall and look at all the departments”*. In response to Q.22, he says *“We have submitted all invoices, all delivery challans, all written quotations, all written approvals and all email correspondence with the owners, agents and vessels.”* To Q.28 in his cross-examination, Mr. Ashish Khialani has, in response to the question *‘Who else in your office will have knowledge in relation to the suit transaction?’*, answered *“It's only me who was handling it directly...”*. He has also in his cross-examination stated that all invoices were sent only to the office of the agents, EMS Seacrest Marine Services, the only purported statement sent to the owners is at Exh.'H' to the plaint and no invoices have been sent to the owners. The stand of the witness has been that he was handling the transaction as the Proprietor and he had access to all the correspondence in regular course of business. The reason according to plaintiff, they did not produce these 22 documents earlier because the same were under the care and control of Mr. Mohnish Mackdani who was the Operation Manager who was responsible for the day-to-day operation of plaintiff and he was not consulted. But in his cross-examination, PW-1 says *“Operation person attends the vessel and looks into*

*all the supplies and repairs etc.”*. He does not say he was corresponding with defendant no.2 or its representatives. Even in the affidavit in support to notice of motion, he does not say Mohnish Mackdani was corresponding with defendant no.2 or its representative. This is also contradictory to the stand taken by PW-1/Ashish Khialani, who has also affirmed the affidavit in support, in his evidence that as he was the Proprietor of plaintiff, he had access to all the correspondence in the regular course of business. In fact, based on this averment in the affidavit in lieu of examination in chief, the documents which were brought through him were also taken on record and marked in evidence.

Further, in the affidavit in support, Ashish Khialani/PW-1 only states that he did not consult Mr.Mohnish Mackdani before he filed the affidavit of documents but is conveniently silent as to whether he consulted before plaintiff filed its evidence affidavit and compilation of documents. If he had only stated in the affidavit in support that he had not consulted him then that would be in direct contradiction to what he had stated in the affidavit in lieu of examination in chief, viz., *“As I am the Proprietor, I have access to all the correspondence in the regular course of business”*.

Moreover, the documents that are being introduced now, if one considers, are all one sided and addressed to one Mr. Karyakin except 5 or 6 messages which apparently are allegedly from Mr. Karyakin on behalf of

defendant no.2 in response to the emails sent by plaintiff. Even these emails are just one/two line with nothing material in that. It should be noted that in almost all the emails that are being introduced now, the sender or one of the recipient is [raseshshipping@hotmail.com](mailto:raseshshipping@hotmail.com)/ [operations@prashlogistics.com](mailto:operations@prashlogistics.com)/ [akhialani@hotmail.com](mailto:akhialani@hotmail.com).

There is no explanation in the affidavit in support as to why these emails were not produced earlier when they were from or marked copy to Mr.Ashish Khialani at [akhialani@hotmail.com](mailto:akhialani@hotmail.com) and also to [raseshshipping@hotmail.com](mailto:raseshshipping@hotmail.com). It should be noted that in the affidavit in examination in chief, PW-1-Ashish Khialani has stated that all emails were addressed to/from [raseshshipping@hotmail.com](mailto:raseshshipping@hotmail.com) and he had access to each of the emails. Plaintiff has conveniently chosen to be silent about this and I would say economical with truth.

(c) As recorded in the order dated 16<sup>th</sup> April 2014, the counsel for plaintiff had stated that his second witness will be Mr.Mohnish Mackdani. The cross-examination of Ashish Khialani (PW-1) took place on 5<sup>th</sup> September 2015. Certainly, when plaintiff had decided that Mr.Mohnish Mackdani will be their second witness still plaintiff did not apply earlier to introduce these documents. Only when in cross-examination it came out that there are no other documents and plaintiff realized that they may have a problem in proving their claim for interest etc., this notice of motion has

been taken out. Considering the above, it does appear, though we cannot conclude at this stage for sure, the documents to be manufactured or cooked up documents.

(d) Moreover, all the emails that are being introduced have been sent by Ashish Khialani. There is no explanation in the affidavit in support or in the rejoinder as to how these could be in control of Mohnish Mackdani, when sent by Ashish Kehlani or copy sent to [rasheshshipping@hotmail.com](mailto:rasheshshipping@hotmail.com). Ex-facie, it has been sent by PW-1-Ashish Khialani but they are now cooking up a story that they were in the control of Mr. Mohnish Mackdani.

(e) The Apex Court in *Bagai Construction* (supra), though considering an application primarily under Order 18 Rule 17 of the Code of Civil Procedure, has held that the powers to recall witnesses or opportunity to put additional evidence to prove documents have to be sparingly exercised and in appropriate cases and not as a general rule merely on the ground that his recall and re-examination or putting in additional evidence to prove documents would not cause any prejudice to the parties just because, other side will be able to cross-examine the witness. The Apex Court stated that the provisions are not intended to be used to fill up omissions in the evidence of a witness who has already been examined and such powers is to be invoked not to fill up the lacunae in the evidence of the witness. In the affidavit in rejoinder, plaintiff has admitted that these documents are

being introduced only to rectify its mistake. In *Bagai Construction* (supra), plaintiff wanted to place on record the original bills, copies whereof were already on record. Even in such a situation, the Supreme Court concurred with the views of the Trial Court that when those documents have remained in exclusive possession of plaintiff but for reasons known to it has not placed those bills on record, cannot be permitted to file such application to fill the lacunae because in its pleadings and evidence led. The Apex Court concurred with the views of the Trial Court that there is no acceptable reason or cause which has been shown by plaintiff as to why these documents were not placed on record by plaintiff during the entire trial. Therefore, even when copies were already on record, still the Apex Court did not accept the originals at a later stage as plaintiff could have produced the original earlier itself. In this case, the situation is much worse as observed earlier. The affidavit in support also exposes plaintiff's economy with truth.

(f) Moreover, Order 18 Rule 17-A prior to the amendment with effect from 1<sup>st</sup> July 2002 read as under :-

*“17-A. Production of evidence not previously known or which could not be produced despite due diligence.-- Where a party satisfies the Court that, after the exercise of due diligence, any evidence was not within his knowledge or could not be produced by him at the time when that party was leading his evidence, the Court may permit that party to produce the evidence at a later stage on such terms as may appear to it to be just.”*

This Rule 17-A was introduced by an amendment that came into force with effect from 1<sup>st</sup> February 1977 in the Code of Civil Procedure (Amendment) Act, 1976. This Rule was omitted with effect from 1<sup>st</sup> July 2002 and object was to speed up the trial. Otherwise, a party will keep on producing evidence at every stage which will cause prejudice to the other side.

13 Shri Ghosh kept saying that defendants can cross-examine the witness on these documents and no prejudice will be caused to defendants. But the fact is there are no pleadings in the plaint to the effect that these correspondence were sent to Mr. Karyakin and defendant no.2 has admitted his liability. Only if such averment were there, defendants would have denied in the written statement and an issue would have been framed as to whether plaintiff proves that they sent these emails to defendants and whether defendants by these emails have admitted liability. Therefore, certainly, grave prejudice will be caused to defendants because it could be argued that there is no denial in the plaint. And it is settled law that evidence cannot be led on facts which have not been pleaded in the plaint or in the written statement.

14 Moreover, in the affidavit in support, it says that the documents to be introduced were under the control of Mr. Mohnish Mackdani as he was responsible for the day-to-day operations of plaintiff. However, plaintiff

does not explain why only these 22 documents were in the control of Mr.Mohnish Mackdani wherein in Admiralty Suit No.31 of 2013 about 147 documents and in Admiralty Suit No.11 of 2013 about 900 pages of documentary evidence were in control of Ashish/Pratap Khialani.

The plaintiff has been economical with truth.

15 In the circumstances, even if these 22 documents proposed to be introduced cannot be termed as cooked up documents, still, these documents were very well available with the plaintiff throughout and in view of the contradictions or incongruity as noted above, the notices of motion have to be rejected.

In *K.K.Velusamy vs. N.Palanisamy* <sup>7</sup>, the Apex Court held that if the application is found to be mischievous or frivolous or to cover up negligence or lacunae, it should be rejected with heavy costs. In this case, however, I do not intend to impose any costs.

16 Both notices of motion dismissed.

(K.R. SHRIRAM, J.)

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<sup>7</sup> 2011(11) SCC 275