

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.6548 OF 2019

Gujarat Themis Biosyn Ltd.	...	Petitioner
Vs.		
Aristo Pharmaceuticals Ltd.	...	Respondent

Mr. Atul Damle, Senior Advocate i/b. SRS Legal for Petitioner.
Mr. Vishal Kanade a/w. Mr. Mohil Punjabi and Mr. Phiroze Merchant
i/b. Kanga & Co. for Respondent.

CORAM : UJJAL BHUYAN, J.
DATE : DECEMBER 10, 2019

P.C. :

Heard Mr. Damle, learned Senior Counsel for the petitioner and
Mr. Kanade, learned counsel for the respondent.

2. By filing this Petition under Article 227 of the Constitution of India, petitioner has assailed legality and correctness of order dated 29.01.2019 passed by the learned Ad-hoc Judge, Bombay City Civil Court in Notice of Motion No.1429 of 2018 arising out of S.C.Suit No.6817 of 2004.

3. By the said order dated 29.01.2019, the Notice of Motion filed at the instance of the respondent (defendant) was allowed and the defendant was permitted to file document as set out in the compilation dated 02.12.2017 along with affidavit of evidence.

4. Petitioner as the plaintiff had instituted the related suit alleging that full payment for the supplies were not made by the defendant. Defendant filed written statement whereafter issues were framed. After closure of evidence of the plaintiff, defendant produced one witness who was examined and cross-examined and in the course of evidence of the second witness relied upon a test report dated 11.06.2002. Since copy of the said report was not annexed with the written statement, a notice of

motion was sought for by the defendant for production of the said document.

5. By the impugned order, defendant was permitted to bring on record the said report along with affidavit of evidence.

6. Learned counsel for the petitioner submits that there is no pleading in the written statement of the defendant as to the test report dated 11.06.2002. There was no mention about such a report in the evidence of witness No.1 of the defendant. Only during the evidence of the second witness of the defendant, reference to the said report was made whereafter the Notice of Motion was sought for. He submits that when a document is not mentioned in or annexed to the pleading, the same cannot be brought on record at the subsequent stage. Leave granted by the Court below is therefore not justified.

7. On the other hand, learned counsel for the respondent submits that though not specifically mentioned nonetheless a statement was made in the written statement that such report would be produced before the Court at a subsequent stage. Therefore, it would not be correct to say that there was no foundation at all in the written statement to enable production of the document by the defendant at a subsequent stage. In this connection, learned counsel has placed reliance on Order VIII Rule 1-A(3) of the Code of Civil Procedure, 1908.

8. Submissions made by learned counsel for the parties have been considered; also perused the materials on record.

9. Short point for consideration is whether learned Court below was justified in permitting the defendant to bring on record document not annexed to the written statement.

10. At the outset, impugned order dated 29.01.2019 may be adverted

to, relevant portion of which is extracted hereunder:

“4) The defendant desire to produce the documents about the report at Sr.Nos.4 to 7 in the compilation of document of defendant’s witness No.2. The defendant in para 2 of written statement has specifically stated that

“defendant had withheld payment as material supplied i.e. Rifampicin were of sub-standard quality which has led doctors of repute to lodge complaints with the defendants which has further led to loss of reputation of the defendants. The plaintiff had at the behest of and in collusion with the competitors of the defendants supplied sub standard quality material to blemish the defendant’s reputation. Para 5(a) to (d) represents some of the part of letters received addressed about the quality of medicine. Para (c) and (d) states about the contents of Rifampicin used in the medicine.”

5) The defendant in para 9(n) of the written statement specifically stated that,

“it is evident that earlier the plaintiffs supplied Rifampicin with a very high potency level and thereafter have supplied Rifampicin with a potency level of 91.27%, 91.615%. The defendants crave leave to refer to and rely upon the reports mentioned herein above. Thus the defendants noticing the change in the quality supplied by the plaintiffs addressed various letters (being exhibits 14, 15 to 18) above, requesting the plaintiffs to depute their technical personnel to resolve the matter amicably. However, the plaintiffs failed to neglected to do so. It is submitted that in view of this declining quality which is evidence from the reports referred to herein, the defendants started receiving complaints in respect of the results on the patients. The reputation of the defendants has been affected adversely.”

6) The plaintiff is not denying about the evidence of DW2. But, it is the contention of the plaintiff during the argument that by way of evidence of DW1’s witness, this report cannot be allowed to be filed on record. The defendant cannot fill up lacuna in the evidence of this witness. DW1 is directed to bring the document on record but he is examining the witness DW2 B. Reddy who has conducted the test in respect of disputed drug.

7) The witness Rajneesh Anand, is thoroughly cross-examined by defendant. In para 21 is that,

“I therefore, say and submit that the plaintiffs are

entitled for a decree and the defendants are liable to be decreed to pay to the plaintiffs a sum of Rs.13,28,307/- as per the particulars of claim and further interest @ 15% p.a. on the principle sum of Rs.10,00,00/- from the date of filing of this suit till the date of payment. I am producing the particulars of claim, which is annexed at page No.44 to the compilation of original documents separately filed alongwith this affidavit. The same be taken on record and be exhibited.”

8) In the cross-examination of defendants witness S.D. Kalyani, the question was to put to the witness that,

“Q:- You have not produced original test report given by the plaintiff alongwith the drugs supplied in year 2000?

Ans: It is true to say. Witness volunteered that plaintiff is in possession of the copy of the documents and defendant company did not feel it necessary.”

9) The plaintiff has relied on authority report “Rajesh Shipping Services Vs. R. V. Akademik Boris Petrov & Anr.” (Notice of Motion No.2269/15 in admiralty suit No.31/13) that 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. The Notice of Motion has been filed ... It is settled law that evidence cannot be led on facts which have not been pleaded in the plaint or in the written statement. In the present fact of the above case contention of the plaintiff is that in the written statement formality of the document is not completed by the plaintiff cannot be considered. In the written statement the defendant has specifically stated about the test of the Rifampicin and he has also referred the various letters. I have also gone through the authority relied by the plaintiff. Considering the pleadings in the written statement and cross-examination of plaintiffs and defendant No.1’s witness, it cannot be said that it is not within the knowledge of the plaintiff. Plaintiff is well aware about the contents and therefore, the ratio relied in the authority is not applicable to the present facts of the case.

10) Defendant has stated in his written statement about the test. Defendant desires to file said document and the said document is necessary for proper adjudication of the dispute between the parties. Plaintiff is aware of the pleadings of the defendant when the written statement was filed wherein it has been specifically stated about the drug of Rifampicin. The objection of the plaintiff is that the defendant’s witness No.1 desires now to bring the said document on record in his evidence is not correct. The defendant in the written statement

has specifically stated that the said document is tested by witness Reddy and his evidence affidavit is filed on record. The plaintiff will get opportunity to cross examine the witness. Hence, pass following order:

ORDER

- 1) Notice of Motion No.1429/18 is allowed.
- 2) Defendant is allowed to file document set out in the compilation dated 2/12/17 submitted alongwith the affidavit of evidence in lieu of examination in chief on behalf of the defendant's witness No.2 dated 2/12/17."

11. Insofar written statement of the defendant is concerned, it is seen that in paragraph 7(a) thereof it was stated that on receipt of complaint, not only from the plaintiff but also from other suppliers defendant had tested the concerned drug in their laboratory and had sought for leave to refer to and rely upon copies of the test reports.

12. Ordinarily, since such test report was in the custody of the defendant and defendant had full knowledge of such test report, it ought to have been mentioned in the written statement itself and copy thereof ought to have been annexed.

13. Order VIII Rule 1-A mentions about the duty of defendant to produce documents upon which relief is claimed or relied upon. As per clause (1), if the defendant bases his defence upon a document or relies upon any document in his possession or power, he shall produce it in Court along with the written statement.

13.1. As per clause (3), a document which ought to be produced in Court by the defendant under this Rule but is not so produced shall not be received in evidence on his behalf at the time of hearing of the suit without the leave of the Court.

14. Therefore, from a very careful reading of Order VIII Rule 1-A (3), it is seen that there is no absolute embargo on a defendant to produce a document in Court on which he relies upon but which he did not file

along with the written statement. Leave of the Court has to be sought for production of such document.

14.1. In the instant case, though such leave was sought for at a belated stage after evidence of the plaintiff was closed and that of defendant's witness No.1, nonetheless taking an overall view of the matter, Court is of the opinion that production of the said document may only aid and assist the Court for a fair and proper adjudication of the suit. Of course, plaintiff will have all the rights to contest the said report as well as to cross-examine both the witnesses of the defendant who have tendered evidence as well as any other witness who may depose before the Court below subsequently.

15. Consequently, interference is declined.

15.1. Subject to the above, Writ Petition is dismissed.

(UJJAL BHUYAN, J.)

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