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

COMMERCIAL APPEAL NO. 299 OF 2018

in

NOTICE OF MOTION NO. 2268 OF 2015

with

NOTICE OF MOTION (st.) NO. 259 OF 2018

with

NOTICE OF MOTION (st.) NO. 612 OF 2018

in

COMMERCIAL APPEAL NO. 299 OF 2018

Prash Logistics

... Appellant/Applicant

V/s.

R.V. Akademik Boris Petrov and Anr.

... Respondents.

with

APPEAL NO. 300 OF 2018

in

NOTICE OF MOTION NO. 2269 OF 2015

with

NOTICE OF MOTION (st.) NO. 611 OF 2018

in

APPEAL NO. 300 OF 2018

Rasesh Shipping Services

... Appellant/Applicant

V/s.

R.V. Akademik Boris Petrov and Anr,

... Respondents.

Mr. Arnab Ghosh I/b. Manoj R. Khatri for the Appellants in both Appeals.

Mr. Anuj Jhaveri, Ms. Disha Ponda, Ms. Dhvani Shah I/b. PSL Advocates and Solicitors for the Respondents.

***CORAM : NARESH H. PATIL, C.J. &
N.M. JAMDAR, J.***

DATE : 11 APRIL 2019.

P.C. :-

Heard learned Counsel for the parties. The impugned order dated 31 January 2018 has declined a motion by the Appellants to file further documents in the two Admiralty Suits which have been tagged together because the Plaintiff in both the Suits is common and the Defendants are also common. Common question of law and facts arose for consideration.

2. Issues were settled on 14 March 2014. Affidavit by way of evidence of Ashish Khialani and Pratap Khialani were filed. Ashish Khialani appeared as PW-1. He was cross-examined at length. Cross examination concluded on 5 September 2015. Witness was discharged. The Plaintiff filed affidavit of one Mr. Mohnish Mackdani by way of examination-in-chief in both suits and claimed that at that stage the Plaintiff realized certain relevant documents were not filed in the suit and sought leave to file the documents.

3. A perusal of the document would show that the Plaintiff intends to prove certain e-mails containing admissions. The learned Single Judge has noted that there is no reference to any exchange of such e-mail ID in the plaints. The same are not even a part of the foundation in the plaint.

4. Learned Counsel for the Appellant concedes to said fact.

5. It is settled law that there cannot be a variation between the pleadings and the proof. Meaning thereby, only such facts can be proved, either by documentary or oral evidence, in respect whereof there are pleadings. The reason is that the facts in issue are proved at a trial. Unless a fact is pleaded in a plaint, the question of said fact being in dispute would not arise.

6. A perusal of the impugned decision would show that the witness of the Plaintiff was examined at length. Cross-examination on the subject of dispute regarding the correspondence exchanged between the parties and the documents available with the Plaintiff. The response of the witness shows that due care was taken by the Plaintiff to ensure that all relevant documents were filed. Learned Single Judge has highlighted this aspect in the impugned order. It is also relevant to note, as held by the learned Single Judge in paragraph 12 of the impugned order, that the documents sought to

be proved were of the nature that the Plaintiff wanted to prove acknowledgment by the Defendant of the liability to pay. In our opinion, such documents could not have espoused the attention of the Plaintiff when the two plaints were filed.

7. The principle of law adopted by the learned Single Judge is that unless a party shows that inspite of due diligence it was not able to file documents, same could not be brought on record once recording of evidence commences.

8. We find no merit in the Appeals. The same are dismissed.

9. In view of disposal of the Appeals, the Notice of Motion No. 2268 of 2015 with Notice of Motion (St.) No. 259 of 2018 with Notice of Motion (St.) No. 612 of 2018 in Appeal No. 299 of 2018 and Notice of Motion No. 2269 of 2015 with Notice of Motion (St.) No. 611 of 2018 in Appeal No. 300 of 2018 does not survive and are disposed of.

N.M. JAMDAR, J.

CHIEF JUSTICE