

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 09.12.2019

Pronounced on: 13.12.2019

Coram::

The Honourable Dr.Justice G.Jayachandran

Application Nos.9251 to 9253 of 2019
in C.S.No.1163 of 2008

M/s.Kapoor Imaging Private Limited,
Rep. by its
No.6, III Street,
Balaji Nagar, Royapettah,
Chennai – 600 014.

... Applicant
in all cases

/versus/

M/s.Kodak (India) Private Limited,
[Formerly known as M/s.Kodak Graphic
Communication (India) Private Limited]
Rep. by its Director,
Kalpataru Synergy,
Off Western Express Highway,
Vakola, Santacruz East,
Mumbai – 400 050.

... Respondent
in all cases

Prayer in Application Nos.9251 to 9253 of 2019:-

Judges summons under order XIV Rule 8 of Original Side Rules read with order XV-A(2)(b) of the Commercial Courts Act and Section 151 of the C.P.C, prays this Court for the following relief:-

a). Permit the Applicant to examine its auditor or a person authorized by its auditor, as PW.2;

b). Permit the Applicant to file additional documents as set out in tabular column in para 3 above;

c). Pass an order modifying the order dated 03.10.2019 fixing the case management schedule for completion of evidence, by taking into account the Applicant's need to examine an additional witnesses.

For Applicant : Mr.R.Parthasarathy Rahul Balaji Madhan
in all cases

For Respondent : Mr.S.Arjun Suresh
in all cases

ORDER

Regular suit filed for recovery of money alleging defect in the goods sold and consequential loss incurred because of the defective goods was resisted by the defendant by way of counter claim. After the Commercial Courts Act came into force and Constitution of the Commercial Division in the High Court, this Court has determined the jurisdiction held that the lis fall within the definition of 'Commercial Dispute' of 'Specified Value' and expressed its intention to exercise jurisdiction over the suit vide order dated 16.08.2018. At that stage, pleadings were completed but an application by the plaintiff to condone the delay in filing reply statement was pending. On 31.08.2018, this Court allowed the application to condone 1168 days in filing reply

statement to the written statement of sole defendant, on payment of cost of Rs.5,000/- payable to Blue Cross Society of India. The plaintiff complied the condition and furnished receipt evidencing payment of cost. Hence, on 11.09.2018, this Court passed the following order:-

"Ms.Revathy Kannan, learned counsel representing the counsel on record for plaintiff and Mr.R.P.Ragavendra, learned counsel, representing the counsel on record for sole defendant submit that pleading are completed. Next procedural steps as per amended 'The Code of Civil Procedure, 1908' ('C.P.C' for brevity) as amended by 'The Commercial Courts Act, 2015' ('said Act' for brevity) are inspection of documents followed by admission and denial under Rules 3 and 4 respectively of Order XI of amended C.P.C as amended by said Act."

2. Thereafter, there was no much progress in the matter on the next two hearings. On 12.06.2019, the plaintiff move applications O.A.Nos.9407 & 9408 of 2018 for the following reliefs.

Sl.Nos	Application Nos.	Reliefs
1.	A.No.9407 of 2018	To permit the applicant to substitute and mark xerox copies of the documents, viz., (i) Plaint Document No7, viz., e-mails dated 28.01.2008, 20.04.2007 and 03.05.2007 and (ii) Plaint Document No.9 Credit Notes sent by Kodak to kapoor Imaging on Multiple dates.

Sl.Nos	Application Nos.	Reliefs
2.	A.No.9408 of 2018	To permit the applicant to mark Xerox copies of (i) Plaint Document No.3, Reseller agreement entered between the plaintiff and defendant dated 01.04.2006, (ii) Plaint Document No.5, Letter sent by M/s.K.M.Graphics to the plaintiff dated 05.01.2008 (iii) Plaint Document No.8, Xerox with Highlighted Marking of Credit Notes sent by Kodak to Kapoor Imaging on Multiple dates (iv) Plaint document No.13, Letter sent by the Plaintiff to the defendant regarding defective supply of goods dated 31.10.2008 and (v) Plaint Document No.16, Letter sent by the plaintiff to defendant seeking return of defective goods dated 31.10.2008.

3. This Application was allowed on 12.06.2019 and the case was adjourned to 27.06.2019 for filing Draft Issues.

4. At that juncture, the plaintiff has filed Application No.4792 of 2019 to amend the prayer clause in the application No.9408 of 2018. This application was also allowed by this Court vide order dated 11.07.2019. Thereafter, considering the pleadings and materials on record, issues was framed, after case management hearing, date for commencement of trial was fixed as under:-

"3. The chief examination of P.W.1 shall commence on 18.10.2019 and cross examination of P.W.1 shall be completed before 16.11.2019. The defendant shall commence examination of witness on his side on 21.10.2019 and the cross examination shall be completed by 25.10.2019.

4. Post before this Court on 18.11.2019 for filing written arguments."

5. The plaintiff not convenient with the dates fixed by this Court during the Case Management Hearing mentioned on 26.09.2019 before this Court to change the Hearing schedule. Accordingly, on 03.10.2019, the Case Management Schedule was refixed as below:-

"3. The chief examination of P.W.1 shall commence on 18.11.2019 and cross examination of P.W.1 shall be completed before 26.11.2019. The defendant shall commence examination of witness on his side on 06.12.2019 and the cross examination shall be completed by 16.12.2019.

4. Post before this Court on 20.12.2019 for filing written arguments."

6. While fact being so, the present three applications were taken by the plaintiff without adhering to the time schedule fixed as above. In these applications, he has sought for receiving additional documents and to permit to examine its Auditor as P.W.2 and Accordingly, the time fixed under the case Management schedule has to be refixed.

7. The Learned Counsel for the respondent/defendant has filed common counter affidavit challenging the applications on the ground that, 12 additional documents now sought to be filed are not relevant to the suit and cannot be entertained at this stage. The reasons stated by the defendant is below:-

(a). 5 documents, which authenticity is denied by this Respondent, are titled "Auditor's Certificate dated 23.11.2019" and appear to have been prepared as recent as on 23.11.2019 only for the purpose of these proceedings and as an afterthought;

(b). 3 documents are balance sheets of the Applicant as on 31.03.2007, 31.03.2008 and 31.03.2009, which were purportedly filed with the Registrar of Companies during the relevant period, and were in the knowledge, custody and possession of the Applicant since then;

(c). 2 documents are debit notes allegedly issued by the Applicant to the Respondent and

(d). 2 documents, which authenticity is denied by this Respondent, are extracts of ledger statements, prepared by the Applicant (internal documents), bearing a date in March 2012 i.e. After institution of the Suit but sought to be filed only now.

8. It is contended by the Learned Counsel for the Respondent that, the suit pertaining to the year 2008 and being pending for more than 11 years. After the counter claim made by the defendant, the plaintiff, in order to delay the disposal of the case, has taken out these applications belatedly, as an afterthought. Those documents which were in power, possession, control or custody of the plaintiff not disclosed in the plaint, cannot be introduced after completion of the pleadings. Without any reason, for not filing those documents for the past 11 years and waiting till the drawing of Case Management Hearing, attempt to introduce documents clearly indicates the intention to the plaintiff to protract the proceedings with untenable and vexatious application.

9. It is pointed out in the counter that, earlier an application to receive Additional documents was filed in Application No.4089 of 2018

and same was allowed. Except the auditor's certificates alleged to have been prepared on 23.11.2019, all other documents were prior to Application No.4089 of 2018. The applicant/plaintiff has not stated any reason why these documents were not filed along with the additional document sought to be accepted in Application No.4089 of 2018. While so, omission to include those documents in the earlier application when not explained by the plaintiff this application deserves to be dismissed. Further, admittedly, the auditor's certificates intended to be relied upon is a document prepared recently.

10. The Learned Counsel for the respondent would submit that, the provisions of Commercial Courts Act as well as Civil Procedure Code does not permit parties to introduce additional documents, after framing of issues. Without leave of the Court. The Court cannot entertain such applications without the parties placing sufficient cause for not filing the documents along with the plaint. Since, in this case, the plaintiff has not explained the reason for not filing the additional documents along with the plaint, the leave to receive the additional documents should not be granted.

11. The Learned Counsel further submitted that, after determining the jurisdiction that the litigation fall within the meaning of Commercial dispute and triable by the Commercial Division of the High Court, the provision of Commercial Court Act, 2015 alone will apply. Under Order XI Rule 7 of C.P.C, as amended, certain provisions of Civil Procedure Code shall not apply to the suit or applications before the Commercial Courts of High Court or Commercial Court. One such provision is Order VII Rule 14 of C.P.C. Therefore, Applications filed under Order VII Rule 14 of C.P.C, to receive additional documents is not maintainable.

12. As far as merits on fact of these applications, the learned counsel for the plaintiff would submit that, the documents mentioned in these applications are very much necessary to establish his case and these documents are the statement of accounts extracted from the ledger and certified by the Auditor.

13. Regarding the legal issue, the Learned Counsel would submit that, the suit in hand was a regular suit filed on the Original Side of the High Court, later transferred to the Commercial Division, as per

Section 15 of the Commercial Court Act, after determining the jurisdiction. Hence, the rigour of Commercial Court Act will not strict sense only the general procedure as said in C.P.C has to apply.

14. In support of his submission, the learned Counsel has relied upon the following judgments:-

(i). **BGC International Pvt. Ltd and another Vs. Shree Mallikarjun shipping and others** reported in **(2016 (2) Mh.L.J))**

"It must be noted here that the provisions relating to powers of the Court to grant leave to produce additional documents fall within the province of the procedural law and it is now well settled that procedural law is there for rendering assistance to the parties as well as the Court so that substantial justice is done. It has been often said that procedural law is a handmaiden of justice and the end is advancing cause of substantial justice which is to be achieved by using provisions of procedural law in an appropriate manner. These provisions are a tool for reaching a certain goal which is of substantive justice and do not constitute by themselves the goal. A similar view has been expressed by the learned Single Judge of this Court in the case of Mohanraj Rupchand Jain Vs. Kewalchand Hastimal Jain and Ors., reported in 2007(1) Mh.L.J 691=AIR 2007

Bom.6. In para 8 the learned Judge observed that the provisions provided under Order 7, Rule 14 exist essentially to assist the parties and the Court to arrive at an appropriate decision in the matter and when no prejudice is seen to be caused to the other side, the Court must exercise its discretion by granting the necessary leave.

In any case, the provision is discretionary and it has to be operated in a manner that Court is able to ascertain the truth and put an end to the controversy, not on technical but on substantive grounds. In other words it has to be construed liberally and not in a pedantic way. Of course, the extent to which the liberal interpretation of the provision should go would depend upon the facts and circumstances of each case. In the instant case, from the nature of the documents themselves it becomes crystal clear that the documents could not have been produced at the time of filing of the written statement by the petitioner, as the petitioner No. 1 being the company would always require some time to decide upon as to who would be the person fittest in its opinion to tender evidence on its behalf."

(ii). **SCG Contracts India Pvt. Ltd Vs. K.S.Chamankar**

Infrastructure Pvt. Ltd and others reported in **2019 SCC Online SC 226**

"Several High Court judgments on the amended order

VIII Rule 1 have now held that given the consequence of non-filing of written statement, the amended provisions of the CPC will have to be held to be mandatory. [See Oku Tech Private Limited Vs. Sangeet Agarwal by a learned Single Judge of the Delhi High Court dated 11.08.2016 in CS (OS) No.3390/2015 as followed by several other judgments including a judgment of the Delhi High Court in Maja Cosmetics Vs. Oasis Commercial Pvt. Ltd 2018 SCC Online Del 6698.

We are of the view that the view taken by the Delhi High Court in these judgments is correct in view of the fact that the consequence of forfeiting a right to file the written statement; non-extension of any further time; and the fact that the Court shall not allow the written statement to be taken on record all points to the fact that the earlier law on Order VIII Rule 1 on the filing of written statement under Order VIII Rule 1 has now been set at naught."

(iii). **Reliance General Insurance Company Ltd Vs. Colonial Life Insurance Company (Trinidad) Ltd and another** reported in **(2019) 6 Bom CR 130**.

"19. In my view, [Section 15](#) (4) and the proviso thereto applies squarely to suits which were filed prior to the enactment of the Commercial Courts Act but have been subsequently 'transferred' as Commercial Suits to be heard by a Commercial Division of this Court.

20. I therefore hold that the mandatory timeline of

120 days for filing a written statement in a Commercial Suit is not applicable to suits which Nitin 29 / 29 were filed prior to the enactment of the Commercial Courts Act, 2015 and subsequently 'transferred' as Commercial Suits to be heard by a Commercial Division of this Court. I further hold that a Commercial Division or Commercial Court, as the case may be, may hold Case Management Hearings in respect of such transferred suits under the newly introduced Order XV-A of the CPC to prescribe new timelines or issue further directions including prescribing a new time period within which a written statement shall be filed. The jurisdiction to exercise such discretion is expressly found in [Section 15](#) (4) of the Commercial Courts Act and the proviso thereto."

(iv). ***Dilip Choudhury Vs. Pratishruti Projects Limited***

and others

20. The element of shifting of timelines continues in [Section 16\(1\)](#) and (2) under Chapter VI of The Commercial Courts Act which provides that the Code of Civil Procedure would, in its application to any suit in respect of a commercial dispute of a Specified Value, stand amended in the manner as specified in the Schedule and that the Commercial Division and Commercial Court shall follow the provisions of the CPC, as amended by the 2015 Act in the trial of a suit. Clause 4 of the First Schedule to the Commercial Courts Act which deals with the amendment of the C.P.C in connection with [Section 16](#) of the Act, provides the following;

"4. Amendment of First Schedule-In the

First Schedule to the Code, -

A) In the Order V, in Rule 1, in sub-rule (1), for the second proviso, the following proviso shall be substituted, namely:-

"Provided further that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the written statement on such other days, as may be specified by the Court, for reasons to be recorded in writing and on payment of such costs as the Court deems fit, but which shall not be later than one hundred twenty days from the date of service of summons and on expiry of one hundred twenty days from the date of service of summons, the defendant shall forfeit the right to file the written statement and the Court shall not allow the written statement to be taken on record."

In Order VIII, "As per S. 16 of Act 4 of 2016, in its application to any suit in respect of a commercial dispute of a Specific Value, in Order VIII, in Rule 1, the proviso, the following proviso shall be substituted, namely:- "Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the written statement on such other day, as may be specified by the Court, for reasons to be recorded in writing and on

payment of such costs as the Court deems fit, but which shall not be later than one hundred twenty days from the date of service of summons and on expiry of one hundred twenty days from the date of service of summons, the defendant shall forfeit the right to file the written statement and the Court shall not allow the written statement to be taken on record".

21. *In the present case, no steps were admittedly taken by the plaintiff to transfer the suit to a commercial suit by applying before the Commercial Appellate Division by invoking Section 15(5) of the Commercial Courts Act. The suit has also not been automatically transferred under [section 15\(1\)](#). Although, SCG Contracts India has been relied upon on behalf of the plaintiff in respect of the mandatory provisions of Order V read with Order VIII, in that case the Supreme Court did not have any occasion to consider the relevance of section 15 of the Commercial Courts Act as the scope of enquiry was whether an earlier decision of the High Court would be binding on a later decision in light of the amended provisions of the CPC. Moreover, there is no discussion in the said decision whether the suit had been transferred following the provisions of [section 15](#) of the 2015 Act. The Supreme Court was also of the view that mandatory provisions of the CPC cannot be circumvented by resorting to inherent powers under section 151 of the CPC.*

22. *This court also finds substance in the reliance placed by counsel for the defendants on Hitendra Vishnu Thakur, where the*

Supreme Court while laying down the principles with regard to the ambit of an amending Act and its retrospective operation, cautioned that a procedural statute should generally not be applied retrospectively where the result would be to create new disabilities or impose new duties in respect of transactions which have already been accomplished. The note of caution was continued by the court in holding that a statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation unless otherwise provided either expressly or by necessary implication."

15. The facts involved in all the above cases cited is whether to apply the timelines prescribed under the Commercial Court Act to the suits instituted prior to the advent of Commercial Court Act, 2015 and prior to constitution of Commercial Division and Commercial Court under the Commercial Courts Act.

16. The application of Section 15(4) of the Commercial Court Act, in respect of filing the written statement beyond 120 days was the subject matter in all these cases. Whereas, in the case in hand the question is whether Order XI Rule 7 of C.P.C as amended will apply to the suit transferred under Section 15 of the Commercial Court Act. If one go by the dicta laid down in the cases cited above, the Principle of Reading down has to be applied. After the jurisdiction of the suit is

determined and Commercial Division taken the suit on file, from that point of time, the provisions of Commercial Courts Act has to apply. While so, under Order XI Rule (1)(1) and (1)(4) of C.P.C. The plaintiff is supposed to file all the documents relied along with the plaint. In case of emergency filing leave of the Court should be obtained to file additional document within 30 days of the suit.

17. Further, Order XI and Rule 7 of amended C.P.C says Order VII Rule 14 of C.P.C, will not apply to suits or applications before the Commercial Divisions of High Court.

18. Besides the legal impediment, even on facts, the application deserves dismissal. The suit was filed in the year 2008 by the applicant/plaintiff for recovery of Rs.1,81,62,728 with interest. The defendant has filed counter claim of Rs.82,32,040.33/- with interest. The written statement was filed on 22.12.2009. Thereafter, the plaintiff has not shown any interest in perusing the matter. Only after the constitution of Commercial Division and jurisdiction determined by this Court on 16.08.2018, holding that the dispute falls within the definition of commercial dispute and of Specified value. The application to receive

reply to the written statement with delay of 1168 days filed and thereafter, at every stage, the plaintiff has taken out some application or another to delay the commencement of trial. Earlier, he has filed Application No.4089 of 2018 to receive additional documents that was also allowed by this Court. After fixing the schedule under Case Management Hearing now the present applications are filed. The affidavit filed along with these applications reads as below:-

19. The reason for belated filing of the additional documents are stated as below:-

4. The applicant states that all the documents as indicated hereinabove are necessary to prove the claims of the applicant, which are all essentially claims for damages sustained by the Applicant on account of defective goods supplied by the Defendant. These documents, in the form of auditor's certificate, stock statements and ledger extracts are only being filed in addition to the documents already filed, in order to substantiate the claim for damages. These documents could not be filed earlier at the time of filing Application No.4089 of 2018, since the documents were more than 10 years old and had to be complied with the assistance of the office of the Auditor of the Applicant Company and hence, the delay.

5. Further, the Applicant is still in the process of

compiling ledger extracts and other supporting documents for claims described in paragraphs 10(i) and 10(iv) of the Plaint, in as much as the same requires scrutiny of voluminous documents which are more than 10 years old, both by the Applicant as well by its auditor and the Applicant craves leave of this Hon'ble Court to file the ledger extracts and other supporting documents for the said two claims, at the time when they examine their auditor.

20. The suit is primarily based on accounts, if the plaintiff try to introduce documents related to accounts 11 years after instituting the suit, it is not much difficult to infer the reasons.

21. The further irony, the plaintiff crave leave of this Court to introduce few more documents at the time of examining his auditor. Thus, the intention of the plaintiff is clearly spelt that, he wants the defendant keeping his fingers crossed, without knowing the evidence which he has to counter or defend. Neither Civil Procedure Code nor Commercial Courts Act permits such procedure.

22. Reading of Section 15 of Commercial Court Act, with regard to transferred case, we find that legislatures conscious of the time frame fixed under Order XV-A (Case Management Hearing) and had

given discretion to the Court to fix the timeline according to the facts of the case and exempted only Order V Rule 1 of C.P.C, from its application, in case of Commercial dispute transferred from regular Court. In order words, the new provision under Order XI Rule 7 shall apply to the transferred case also. Therefore, both on facts and law the application to receive additional documents filed after 11 years of instituting the suit and after fixing the time schedule is not maintainable. Hence, Application to receive additional documents is dismissed. Consequentially, the Application to permit the applicant to examine its Auditor as P.W.2 is also dismissed. Due to pendency of these three applications, the time schedule already framed has expired. Hence, the new time schedule is fixed as below:

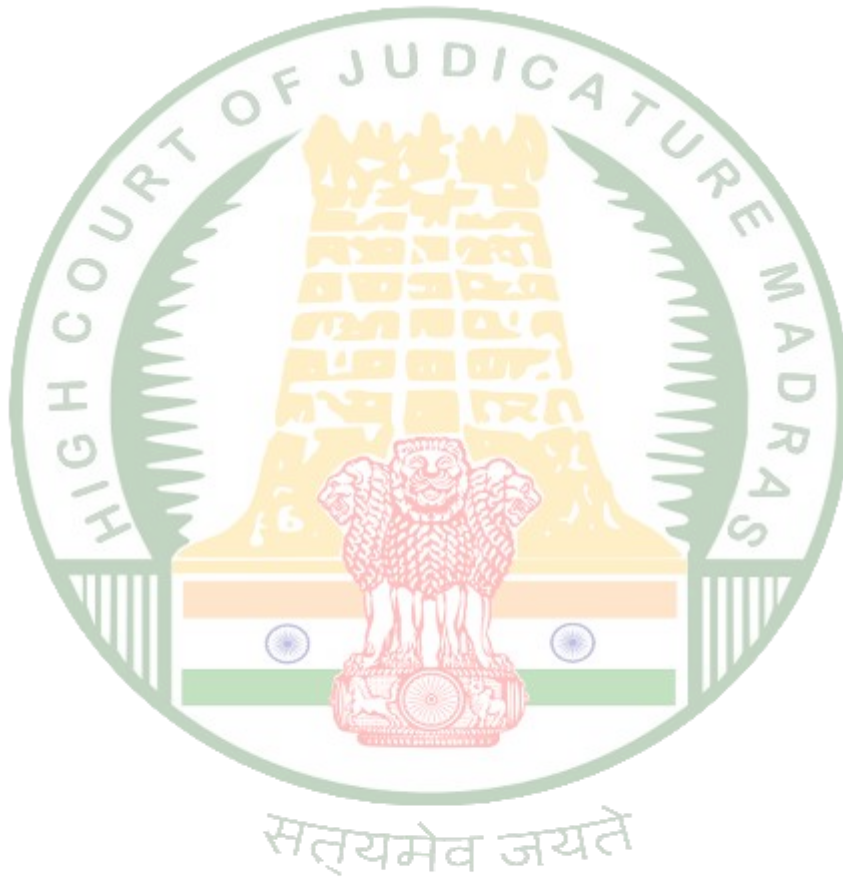
"The chief examination of P.W.1 shall commence on 17.01.2020 and cross examination of P.W.1 shall be completed before 23.01.2020. The defendant shall commence examination of his witnesses on his side on 27.01.2020 and complete by 30.01.2020.

Post before this Court on 04.02.2020 for filing written arguments."

13.12.2019

Index :Yes
Internet :Yes
Speaking Order/Non-speaking order

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Dr.G.Jayachandran,J.

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Pre-delivery order in
Application Nos.9251 to 9253 of 2019
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