

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Reserved: 23.03.2021

Date of Decision: 06.04.2021

+ **CM(M) 181/2021**

SUDHIR KUMAR @ S. BALIYAN Petitioner
Through Mr.Sachin Datta, Sr. Adv. with
Mr.Amit Mehta, Mr.Jayant
Kumar, Advs.

versus

VINAY KUMAR G. B. Respondent
Through Ms.Kruttika Vijay, Ms.Kaveri
Jain, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition has been filed by the petitioner challenging the order dated 13.11.2019 passed by the learned Additional District Judge-10 (Central) in Suit, being TM No.123 of 2019, titled ***Sudhir Kumar @ S. Baliyan v. Vinay Kumar G B &Ors.***, dismissing the application filed by the petitioner under Order VII Rule 14(3) of the Code of Civil Procedure, 1908 (hereinafter referred to as 'the Code') seeking leave of the learned Trial Court to place additional documents on record.

2. The above suit has been filed by the petitioner *inter-alia* claiming for a decree of permanent injunction against the respondent from using the Trade Mark "INSIGHT", "INSIGHT ACADEMY",

“INSIGHT IAS ACADEMY” and “INSIGHT PUBLICATIONS”. The petitioner filed the above-referred application in the said suit, seeking leave of the Court to file certain additional documents on record. The same has been dismissed by the learned Trial Court by the impugned order.

3. The learned senior counsel for the petitioner submits that the learned Trial Court has been pleased to dismiss the application of the petitioner on the ground that the documents/invoices were suspicious in nature and that there was no explanation given as to why they were not forming part of the plaint. He submits that apart from various invoices, the petitioner had sought leave to place on record in form of the additional documents advertisements which are in public domain, etc. These could not have been disallowed as being suspicious in nature.

4. He further submits that in the present case, by the judgment dated 07.12.2020 of this Court, passed in CM(M) Nos.544 and 547 of 2020, titled ***Vinay Kumar G B v. Sudhir Kumar @ S. Balyan***, the respondent also had been allowed to place additional documents on record. He submits that therefore, no prejudice would be caused to the respondent if the petitioner is granted a similar opportunity to file additional documents on record and the same being considered by the learned Trial Court.

5. On the other hand, the learned counsel for the respondent submits that the present petition is liable to be dismissed on the ground of delay and laches. She submits that though the Impugned

Order is dated 13.11.2019, the present petition was filed only on 01.03.2021. The trigger for filing of the present petition is the dismissal of the application filed by the petitioner under Order XXXIX Rule(s) 1 and 2 of the Code.

6. On merit, the learned counsel for the respondent submits that the petitioner has not been able to make out any case for grant of leave of the Court to file such additional documents. She submits that prior to the filing of the present Suit, the petitioner had filed a Suit, being Trade Mark Suit No. 236 of 2018. In the said Suit, the respondent had filed its written statement denying the assertion of the petitioner of adoption and use of the trademark as claimed by him since 2006. Though the petitioner had filed his replication in the said Suit, the documents now sought to be placed on record were neither filed nor any mention thereof had been made in the replication. The petitioner thereafter withdrew the said Suit, and subsequently, filed the present Suit under the Commercial Courts Act, 2015. However, again the documents which are now sought to be placed on record, were not filed.

7. The learned counsel for the respondent has urged that the application under Order XXXIX Rule(s) 1 and 2 of the Code filed along with the plaint in the present Suit, was heard by the learned Trial Court on 09.09.2019 on the plea of the petitioner for *ad-interim* injunction. The same was listed for orders on 13.09.2019. She asserts that in the course of arguments, the respondent had submitted before the learned Trial Court that there were no documents filed along with

the plaint in support of the assertion of the plaintiff/petitioner, of having adopted and use of the trademark since 2006. It is only thereafter, that the application which has now been dismissed by the learned Trial Court by the Impugned Order, came to be filed by the petitioner on 13.09.2019.

8. Referring to the provisions of the Order XI of the Code, as applicable to the commercial disputes, the learned counsel for the respondent submits that Order XI Rule 1 of the Code requires the plaintiff to file all documents in its power, possession, control or custody, pertaining to the Suit, along with the plaint. She submits that in fact, in terms of Order XI Rule 1(3) of the Code, the plaintiff is to give a declaration on oath that all documents in its power, possession, control or custody, pertaining to the Suit, have been filed. Such declaration was given by the petitioner in the present Suit as well.

9. The learned counsel for the respondent, referring to the application filed by the petitioner before the learned Trial Court, submits that in the said application, the petitioner admitted that these documents, apart from the invoices, were available with the petitioner at the time of the filing of the Suit. She submits that therefore, no case for grant of leave to file such additional documents was made out by the petitioner.

10. In support of her submission, she places reliance on the judgments of this Court in *Nitin Gupta v. Texmaco Infrastructure & Holding Ltd.*, 2019 SCC OnLine Del 8367, and *Zee Entertainment*

Enterprises Ltd. v. Saregama India Ltd., 2019 SCC OnLine Del 10215.

11. I have considered the submissions made by the learned counsels for the parties.

12. The documents now sought to be placed on record by the petitioner by way of the application, which has been dismissed by the learned Trial Court, are in support of its alleged adoption and use of the trademark in question since 2006. The petitioner had filed the earlier Suit, being Trade Mark Suit No. 236 of 2018, claiming such adoption and use of the trademark. The respondent in its written statement denied such claim of the petitioner. Though the petitioner had filed a replication to the said Suit, the documents now sought to be placed on record were not filed.

13. The petitioner withdrew the said Suit on 27.07.2019, as the same had not been filed in conformity with the provisions of the Commercial Courts Act, 2015 and subsequently filed the present suit on 04.09.2019, again asserting its alleged adoption and use of the mark since 2006. However, again the documents now sought to be placed on record by way of an application which now stands dismissed, were not filed.

14. The application seeking leave of the Court to file additional documents was filed only on 13.09.2019, after the application seeking *ad-interim* injunction had been heard by the learned Trial Court and the same was listed for orders. The application pleads the following

grounds for seeking leave of the Court to place the additional documents on record:

- “3. That the accompanying documents along with the present application in particular invoice dated 03.05.2005, invoice dated 08.07.2005, invoice dated 10.08.2005, invoice dated 22.02.2006, invoice dated 10.04.2006, invoice dated 05.06.2006, invoice dated 15.07.2006, invoice dated 10.01.2007, invoice dated 14.03.2007, invoice dated 19.05.2007, invoice dated 08.07.2007, invoice dated 06.09.2007, invoice dated 14.03.2007, invoice dated 01.10.2007 could not be filed along with plaint being very old and not in possession of the plaintiff at the time of filing the plaint. Now the plaintiff has found the same from the Shivalik Graphics.*
- 4. That the documents other than above said documents could not be filed due to voluminous records pertaining to plaintiff case could not be filed at the time of filing of case but the same are very important for the adjudication of dispute between the parties.”*

15. A reading of the abovementioned grounds would show that as far as the invoices are concerned, the petitioner at least asserts that they were not in his possession at the time of filing of the plaint, for the other documents the petitioner admits the possession, however, submits that the same were not filed due to them being voluminous.

16. Order XI Rule 1 of the Code lays down a special procedure applicable to commercial disputes. Order XI Rule 1(1) to Rule 1(6) of

the Code states the procedure applicable to the documents filed by the plaintiff in the Suit, and reads as under:

“1. Disclosure and discovery of documents— (1) Plaintiff shall file a list of all documents and photocopies of all documents, in its power, possession, control or custody, pertaining to the suit, along with the plaint, including:-

- (a) documents referred to and relied on by the plaintiff in the plaint;*
- (b) documents relating to any matter in question in the proceedings, in the power, possession, control or custody of the plaintiff, as on the date of filing the plaint, irrespective of whether the same is in support of or adverse to the plaintiff's case;*
- (c) nothing in this rule shall apply to documents produced by plaintiffs and relevant only –*
 - (i) for the cross-examination of the defendant's witnesses, or*
 - (ii) in answer to any case set-up by the defendant subsequent to the filing of the plaint, or*
 - (iii) handed over to a witness merely to refresh his memory.*

(2) The list of documents filed with the plaint shall specify whether the documents in the power, possession, control or custody of the plaintiff are originals, office copies or photocopies and the list shall also set out in brief, details of parties to each document, mode of execution, issuance or receipt and line of custody of each document.

(3) The plaint shall contain a declaration on oath from the plaintiff that all

documents in the power, possession, control or custody of the plaintiff, pertaining to the facts and circumstances of the proceedings initiated by him have been disclosed and copies thereof annexed with the plaint, and that the plaintiff does not have any other documents in its power, possession, control or custody.

Explanation. – A declaration on oath under this sub-rule shall be contained in the Statement of Truth as set out in the Appendix.

(4) In case of urgent filings, the plaintiff may seek leave to rely on additional documents, as part of the above declaration on oath and subject to grant of such leave by Court, the plaintiff shall file such additional documents in Court, within thirty days of filing the suit, along with a declaration on oath that the plaintiff has produced all documents in its power, possession, control or custody, pertaining to the facts and circumstances of the proceedings initiated by the plaintiff and that the plaintiff does not have any other documents, in its power, possession, control or custody.

(5) The plaintiff shall not be allowed to rely on documents, which were in the plaintiff's power, possession, control or custody and not disclosed along with plaint or within the extended period set out above, save and except by leave of Court and such leave shall be granted only upon the plaintiff establishing reasonable cause for non-disclosure along with the plaint.

(6) The plaint shall set out details of documents, which the plaintiff believes to be in the power, possession, control or custody of the defendant and which the plaintiff wishes to rely upon and seek leave for production thereof by the said defendant."

17. A reading of the above provision would show that the plaintiff has to file a list of all documents along with photocopies of such documents in its power, possession, control or custody, as pertaining to the Suit, along with the plaint. Order XI Rule 1(3) of the Code requires the plaintiff to give a declaration on oath that all documents in its power, possession, control or custody, pertaining to the facts and circumstances of the Suit, have been disclosed and copies thereof annexed with the plaint, and that the plaintiff does not have any other documents in its power, possession, control or custody. In case of urgent filing, Order XI Rule 1(4) of the Code allows the plaintiff to seek leave of the Court to rely on additional documents, which the plaintiff shall file within thirty days of filing of the Suit. Order XI Rule 1(5) prohibits the plaintiff from relying upon any documents, which were in its power, possession, control or custody and not disclosed along with the plaint or within the extended period as mentioned in Rule 1(4), save and except by leave of the Court and such leave shall be granted only upon the plaintiff establishing “reasonable cause for non-disclosure along with the plaint.”

18. This Court in *Nitin Gupta* (supra) considered the above provisions and held, that for seeking leave of the Court for belated filing of a document, it is essential for the plaintiff to not only plead but ‘*establish*’ “reasonable cause for non-disclosure along with the plaint”. The Court further held as under:

“38. Unless, the Commercial Divisions, while dealing with the commercial suits, so start enforcing Rules legislated for commercial

suits, and refuse to entertain applications for late filing of documents, especially with respect to documents of suspicious character and continue to show leniency in the name of 'interest of justice' and 'a litigant ought not to suffer for default of advocate', the commercial suits will start suffering from the same malady with which the ordinary suits have come to suffer and owing whereto the need for the Commercial Courts Act, 2015 was felt. Commercial Division is thus not required to entertain or allow applications for late filing of documents, without any good cause being established for non-disclosure thereof along with pleadings. The plaintiff herein has utterly failed in this regard. The application nowhere explains as to why the plaintiff, if had obtained the said letter from the defendant, did not remember the same and make disclosure of the same at the time of filing the police complaint and/or at the time of filing of this suit, even if the letter had been misplaced or was not immediately available. The form prescribed for filing affidavit of documents requires a litigant in a commercial suit to, even if not immediately possessed of a relevant document, disclose the same. A litigant who fails to do so and also does not satisfy the Court while seeking to belatedly file the document, why no disclosure of such document was made, cannot be permitted to so file documents.

39. *Order XIII Rules (1) & (2) of the CPC as it existed prior to amendment with effect from 1st July, 2002, required the documents to be filed at or before the settlement of issues and no documents could be received at any subsequent stage unless "good cause was shown to the satisfaction of the Court for non-production thereof". Post amendment with effect from 1st July, 2002 of CPC, vide Order VII Rule 14(1)&(3) and Order VIII Rule 1A(1)&(3) a plaintiff was required to file documents along with plaint and a defendant required to file documents along with written*

statement and documents were not permitted to be received thereafter without leave of the Court. Prior to 2002, the parties, if had not filed the document prior to settlement of issues, were required to satisfy the Court as to why the document was not filed till the stage of settlement of issues and were not required by language of Order XIII Rule (2) to satisfy whether the document was within their knowledge or not. I emphasise, only reason for 'non-production' was to be stated and not the reason for 'non-disclosure'. Though with effect from 1st July, 2002, for late filing of documents only leave of the Court was required to be taken but the test continued to be applied by the Courts for granting such leave continued to be as prior to 2002 i.e. of reasons for 'non-production' of documents at the stage provided therefor. Order XI Rule (1) of the CPC as applicable to commercial suits brought about a radical change. The late filing of documents thereunder is permitted applying the test of reasonable cause of 'non-disclosure' of the document at the stage provided for filing thereof. An applicant now is required to satisfy the Court as to why the document was not in his knowledge and if in his knowledge why was the document not disclosed at the appropriate time. Thereunder, documents, even if not immediately available, are required to be disclosed."

19. In ***Zee Entertainment Enterprises Ltd.*** (supra), this Court reiterated the radical change brought about by the Commercial Courts Act, 2015, in the following words:

"13. The changes brought about by the Commercial Courts Act, 2015 in respect of filing of documents having already been discussed in Nitin Gupta and Societe Des

Produits Nestle S.A. supra, need to reiterate the same is not felt. Suffice it is to state that:

(a) *while*

Order VII Rule 14 of the CPC, applicable to ordinary suits, requires a plaintiff, when suing upon a document or relying upon documents in his possession or power in support of his claim, to enter such documents in a list and to produce it in the Court when the plaint is presented by him,

Order XI Rules 1 to 3 of the CPC as applicable to commercial suits requires a plaintiff to file a list of all documents and photocopies of all documents in its power, possession, control or custody, pertaining to the suit, along with the plaint including documents relating to any matter in question in the proceedings, in the power, possession, control or custody of the plaintiff, as on the date of filing the plaint, irrespective of whether the same is in support of or adverse to the plaintiff's case and to, in the said list also specify whether the documents in the power, possession, control or custody of the plaintiff are originals, office copies or photocopies and the list to also set out in brief, details of parties to each document, mode of execution, issuance or receipt and line of custody of each document; the plaint is also required to contain a declaration on oath from the plaintiff that all documents in the power, possession, control or custody of the plaintiff, pertaining to the facts and circumstances of the proceedings initiated by him have been disclosed and copies thereof annexed with the plaint, and that the plaintiff does not have any other documents in its power, possession, control or custody;

(b) while

Order VII Rule 14(3) of the CPC pertaining to ordinary suits provides that a document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, but is not produced or entered accordingly, such document, without the leave of the Court, shall not be received in evidence on behalf of the plaintiff at the hearing of the suit,

Order XI Rule 1(5) pertaining to commercial suits, bars the Court from allowing the plaintiff to rely on documents which were in the plaintiff's power, possession, control or custody and not disclosed along with the plaint, save and except by leave of the Court and which leave shall be granted only upon the plaintiff establishing requisite cause for non-disclosure along with the plaint.

It would thus be seen that the requirement for filing of documents along with the plaint is much more detailed, precise and specific in a commercial suit than in an ordinary suit. The plaintiff in an ordinary suit is required to produce along with the plaint only such documents on which he is suing or on which he intends to rely in support of his claim. On the contrary, in a commercial suit, the plaintiff along with the plaint is required to file all documents pertaining to the suit irrespective of, whether the same are in support of or adverse to the claim of the plaintiff. The list of documents required to be filed by a plaintiff in an ordinary suit is only required to have an entry of the document. On the contrary, the list of

documents required to be filed by a plaintiff in a commercial suit is required to specify, whether the documents are originals or office copies or photocopies and also contain details of parties to each document, mode of execution and line of custody of each document. The plaint in a commercial suit is also required to contain a declaration on oath from the plaintiff with respect to the documents, as aforesaid. There is no such requirement in the ordinary suit.

14. What emerges is, that the plaintiff in a commercial suit, before instituting the suit, is required to go through all the documents in his power, possession, control or custody pertaining to the subject matter of the suit, whether in support of or adverse to his case and make a declaration with respect thereto on oath. The requirement in a commercial suit of declaration on oath qua the documents is not an empty formality. The form of list of documents and the particulars/specifications to be contained therein, coupled with declaration on oath with respect thereto, in a commercial suit, requires a plaintiff to, at the time of institution of suit, rather than stating only the title and date of the document, which alone is required to be filled in the list of documents in an ordinary suit, peruse each document and only then fill the particulars/specifications required to be filled in the list of documents. The requirement of such contents being declared to be correct on oath, places a more heavy onus on the plaintiff.

15. Preparation of such a list of documents as aforesaid, leaves no scope of 'inadvertent errors' as is pleaded by the plaintiff.

16. A plaintiff in an ordinary suit, if desirous of producing a document required to be produced along with the plaint at a subsequent stage, is only required to obtain the leave of the Court. The Legislature has not laid down the grounds on which such leave is to be granted. I have however in *Nitin Gupta supra* held that grant of such leave by the Court is not a ministerial function and the Court has to be satisfied qua the reasons for non-production of the documents along with the plaint. The same however places no restriction on the power of the Court to grant such leave. As distinct therefrom, under Order XI Rule 1(5) as applicable to commercial suits, there is an embargo on the Court, not to allow the plaintiff to rely on any document which was in plaintiff's power, possession, control or custody and not disclosed along with the plaint. The disclosure under Rules 1(1) & (2) has to be accompanied with listing and filing of the documents. The said embargo placed on the Court can be lifted only upon the plaintiff establishing reasonable cause for non-disclosure along with the plaint. The use of the word 'establishing' conveys that there should be something more than a mere explanation for non-production along with plaint, amounting to proof of the explanation."

20. In the present case, though the petitioner asserts that the invoices were not in its possession at the time of filing of the plaint and were found from one Shivalik Graphics, in light of the earlier Suit and the pleadings therein, the above explanation is not acceptable. It has not been asserted as to why these invoices were not traced earlier during the pendency of the earlier Suit or at least before filing of the present Suit in question, especially where the defendant/respondent

had taken a plea denying the adoption and use of the trademark as claimed by the petitioner from 2006.

21. As far as the remaining set of documents are concerned, in fact, the petitioner does not assert that they were not in its power or possession. In fact, there is an admission that they were available with the petitioner, however, were not filed due to them being voluminous. This certainly is not and cannot be a ground for grant of leave to the plaintiff to file such documents at such a belated stage. The petitioner had also not filed an application under Order XI Rule 1(4) of the Code, as applicable to the Commercial Disputes, disclosing such documents and seeking leave to file the same at a later stage and in any case, within thirty days of filing of the suit. Clearly, the explanation for non-filing of these documents now given, is merely an afterthought.

22. As noted hereinabove, Order XI Rule 1(3) of the Code requires the plaintiff to put in a declaration on oath that all documents pertaining to the Suit in its power, possession, control or custody have been disclosed and copies thereof annexed with the plaint. Such declaration has been duly given by the petitioner herein. If the assertion now made by the petitioner is to be believed, the earlier declaration given by it on oath would clearly be false and in fact, the petitioner would be liable to be proceeded against for making such false declaration.

23. Another aspect which needs to be considered in the present case is that the Impugned Order was passed on 13.11.2019. Though, the

learned senior counsel representing the petitioner asserted that the petitioner changed its counsel as the earlier counsel was not properly prosecuting the case on its behalf, such change also happened on 05.12.2019. Further proceedings for the respondent to place an amended written statement on record and certain additional documents, culminated in the judgment dated 07.12.2020 of this Court in petition(s) filed by the respondent, being CM(M) Nos. 544 and 547 of 2020. Thereafter, the application filed by the petitioner under Order XXXIX Rule(s) 1 and 2 of the Code was considered by the learned Trial Court on various dates, culminating in an order dated 16.01.2021, whereby the said application was dismissed. The present petition has been filed only thereafter, clearly to cover up the deficiencies that have been pointed out by the learned Trial Court in the claim of the petitioner, and as an afterthought. The petition, therefore, even otherwise, is also liable to be dismissed on the ground of delay and laches.

24. The submission of the learned senior counsel for the petitioner that the respondent having been allowed by this Court in its judgment dated 07.12.2020 in petition(s), being CM(M) Nos. 544 and 547 of 2020, to file additional documents on record, as a matter of parity, the petitioner should also be allowed such indulgence, is only stated to be rejected. The leave of the Court to file additional documents, especially in a Commercial Suit, cannot be claimed as a matter of parity. Each party's claim is to be determined on its own merit.

25. The learned senior counsel for the petitioner has also placed reliance on the judgment dated 29.07.2019 of this Court in I.A. No. 5294/2019 in CS (COMM) 900/2018, ***Mahesh Chaudhri & Anr. vs. IMV India Pvt. Ltd.***, to contend that this Court had allowed the plaintiff therein to file additional documents on record where the application had been filed at the initial stage; the defendant in the cross suit had availed of a similar opportunity to file additional documents; and the documents could not be said to be irrelevant.

26. The judgment in ***Mahesh Chaudhri*** (supra) is clearly distinguishable to the facts of the present case. The documents sought to be placed on record by the plaintiff therein were occasioned due to the written statement filed by the defendant therein. The Court held that the plaintiff had therefore, been able to give a plausible explanation for non-filing of the documents alongwith the suit. The same cannot be said in the present case for the reason that the issue had been highlighted by the respondent herein even in his written statement filed to the earlier suit.

27. Similarly, the reliance of the learned senior counsel for the petitioner on the judgment of this Court in ***Hassad Food Company QSC & Anr. vs. Bank of India & Ors.***, 2019 SCC OnLine Del 10647, cannot be accepted for the reason that in the said case, the Court found that the documents were such that the defendants therein should have fairly disclosed with their written statement rather than placing the burden of proving the assertion regarding the same on the plaintiff therein. The Court also believed the assertion of administrative lapse

pleaded by the defendants therein. In the present case, however, no such case is made out by the petitioner herein.

28. In view of the above, I find no merit in the present petition. The same is dismissed with costs quantified at Rs. 35,000/-.

NAVIN CHAWLA, J

APRIL 06, 2021
RN/P/A

