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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CM(M) 644/2022 & CM APPL. 30080/2022, CM APPL. 30081/2022

THE GREAT GATSBY CLUB OF INDIA Petitioner
Through: Mr. Rahul Malhotra, Mr. Saqib Ansari and Ms. Himanshi Madan, Advs.

versus

MAHESH PREFAB PVT LTD Respondent
Through: Mr. Rajnish Kr. Gaind and Mr. Hemant Kaushik, Advs.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

% **J U D G M E N T (O R A L)**
18.07.2022

1. The impugned order dated 7th May, 2022, passed by the learned District Judge, Commercial Court (“the learned Commercial Court”) in CS(Comm) 185/2021 (***Mahesh Prefab Pvt. Ltd. v. The Great Gatsby Club of India***), dismisses the application of the petitioner (the respondent before the learned Commercial Court) under Order VIII Rule 1(A) of the Code of Civil Procedure, 1908 (CPC), and also closes defence evidence.

2. Both these decisions are assailed by the petitioner.

3. Given the nature of the dispute, no detailed reference to the assertions in the plaint, wherefrom the present proceedings emanate, is



necessary. A brief overview would suffice.

4. The respondent filed CS(Comm) 185/2021 against the petitioner, for recovery of an amount of ₹ 27,49,698/-.

5. It was alleged that the petitioner had awarded work order dated 23rd April 2015 and supply order dated 3rd September 2015 to the respondent for supply and erection of certain panels at the petitioner's site at Delhi and that, despite the respondent having successfully completed the assignment, the petitioner was in default of payment required to be made to the respondent against the work executed by it. On this basis, as already noted, the suit sought a decree, against the petitioner and in favour of the respondent, for ₹ 27,49,698/-.

6. The suit was filed as a commercial suit, under the CPC as amended by the Commercial Courts Act, 2015, where under an application for permission to place certain additional documents on record was moved.

7. Paras 3 to 7 of the said application, which set out the justification for the said prayers, read thus:

“3. The Defendant for just adjudication of the present *lis* craves leave of this Hon'ble Court to bring on record the following documents.

(i) Current Statement of account which reveals that an amount of Rs. 14,89,068/- (Rupees Fourteen Lakhs Eighty-Nine Thousand Sixty Eight Only) was paid by the Defendant to the Plaintiff.



(ii) Debit note vide which Rs. 14,89,068/- (Rupees Fourteen Lakhs Eighty-Nine Thousand Sixty Eight Only) was paid by the Defendant to the Plaintiff.

4. It is submitted that the above stated document could not be filed along with the Written statement as the management of the Defendant society was taken up by the current management in the year 2019 and the documents were not collated at the time of filling of reply. Thereafter, the outbreak of Novel Corona virus made situation worst from worse.

5. It is submitted that the Defendant since day one has maintained the stand that as per the statement of accounts maintained by the Defendant it is the Plaintiff Company who owes a liability to pay an amount of Rs.2,42,481/- (Rupees Two Lakh Forty-Two Thousand Four Hundred and Eighty-One Only) to the Defendant as the balance amount in the execution of the work. The said fact echoes in the written statement as well as in the examination of Plaintiff's witness.

6. It is submitted that by filling the above stated documents no additional fact or development is brought up by the Defendant as such the suit will not move in reverse direction. It is further submitted the matter is still at the stage of Defendants Evidence and so the defendant may be permitted to place on record the above stated documents to lead the Defendant's Evidence for proper and just adjudication of the Suit.

7. It is submitted that if the present Application is allowed, it is not detrimental to the interest of the Plaintiff, whereas, if the present Application is not allowed, it is detrimental to the interest of the Defendant as irreparable injury shall be caused to the Defendant.”

8. Clearly, therefore, the only ground urged, for the default on the part of the petitioner in filing the documents that it now sought to place on record, along with its written statement, was that, when the written statement was filed, “the documents were not collated”.



9. Mr. Malhotra, learned Counsel for the petitioner, has sought emphatically to urge that the management of the petitioner, which was dealing with its affairs at the time of filing of the written statement was unaware of the documents which were sought to be placed on record under cover of the aforesaid application.

10. That submission, however, would be contrary to the specific assertion in para 4 of the application, to the effect that the documents were not filed as they had not been collated. The very assertion that the documents were not *collated* at the time of filing of the written statement indicates that they were within the knowledge of the petitioner.

11. The impugned order dated 7th May, 2022, passed by the learned Commercial Court, rejects the aforesaid application of the petitioner, reasoning thus:

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CLUB OF INDIA

07.5.2022

Present: Shri Hemant Kaushik- Ld. Counsel for the plaintiff
Shri SM Ansari - Ld. Counsel for the defendant

An application has been filed under Order 8 (1) A CPC which should have been under Order 11 Rule 10 CPC, as amended by the Commercial Court Act, by the defendant for placing on record two additional documents, i.e. current statement of account and a debit note for a sum of Rs.14,89,068/- on the premise that the management had changed and these documents were not handed over to the Ld. Counsel as they could not be traced earlier. Ld. Counsel for



the defendant submits that he has put questions regarding these documents during the cross-examination and they fortify his defence. However, order 11 Rule 10 CPC clearly provides that defendant shall not be allowed to rely on documents which were in defendant's power, possession, control or custody and not disclosed with the written statement except with the leave of the Court which shall be granted on defendant's establishing a reasonable cost for non-disclosure of these documents with the written statement. The explanation given by the Ld. Counsel for the defendant shows that these documents were in the power, possession and custody of the defendant and the mere fact that the management changed or they could not be traced earlier is not a reasonable ground. Even otherwise, issues have already been framed in this case and evidence of the plaintiff already stands closed. Hence, the application is dismissed.”

12. The initial observation, in the impugned order dated 7th May, 2022, to the effect that the application of the petitioner ought to have been filed under Order XI Rule 1(10) (wrongly referred to, in the impugned order, as “Order XI Rule 10”) is supported by the judgment of the Supreme Court in ***Sudhir Kumar @ S. Baliyan v. Vinay Kumar G.B.***¹, which holds that an application for placing additional documents on record, in a commercial suit, is relatable not to Order VIII but to Order XI of the CPC.

13. The reasoning of the learned Commercial Court in the afore-extracted passages from the impugned order is also supported by the decision of the Supreme Court in ***Sudhir Kumar***¹, as well as by the express wordings of Order XI Rule 1(10) of the CPC as amended by the Commercial Courts Act, 2015.

¹ 2021 SCC OnLine SC 734



14. Order XI Rule 1(10) of the CPC, as amended by the Commercial Courts Act, 2015, reads thus:

“ORDER XI

DISCLOSURE, DISCOVERY AND INSPECTION OF
DOCUMENTS IN SUITS BEFORE THE COMMERCIAL
DIVISION OF A HIGH COURT OR A COMMERCIAL
COURT

1. Disclosure and discovery of documents.—

(10) Save and except for sub-rule (7) (c) (iii), defendant shall not be allowed to rely on documents, which were in the defendant's power, possession, control or custody and not disclosed along with the written statement or counterclaim, save and except by leave of Court and such leave shall be granted only upon the defendant establishing reasonable cause for non-disclosure along with the written statement or counterclaim.”

15. Order XI Rule 1(7)(c) (iii) of the CPC, to which Order XI Rule 1(10) refers, reads as under:

“ORDER XI

**Disclosure, discovery and inspection of documents in suits
before the Commercial Division of a High Court or a
Commercial Court**

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:—

XXX

(7) The defendant 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 written statement or with its counterclaim if any, including—

xxx

(c) nothing in this Rule shall apply to documents produced by the defendants and relevant only—

xxx

(iii) handed over to a witness merely to refresh his memory.”

16. Clearly, in proceedings under the Commercial Courts Act, there is an absolute statutory proscription on a defendant being allowed to rely on any documents which were in its power, possession or custody and not disclosed along with the written statement or counter claim, except by leave of the court. The Court is also statutorily proscribed, by Order XI Rule 1(10), from granting leave except where reasonable cause for not filing of the documents along with the written statement or counter claim has been made out.

17. The Supreme Court has reiterated this position, in the following passages from its decision in *Sudhir Kumar*¹:

“31. Therefore a further thirty days time is provided to the plaintiff to place on record or file such additional documents in court and a declaration on oath is required to be filed by the plaintiff as was required as per Order XI Rule 1(3) if for any reasonable cause for non disclosure along with the plaint, the documents, which were in the plaintiff's power, possession, control or custody and not disclosed along with plaint. *Therefore plaintiff has to satisfy and establish a*



reasonable cause for non disclosure along with plaint. However, at the same time, the requirement of establishing the reasonable cause for non disclosure of the documents along with the plaint shall not be applicable if it is averred and it is the case of the plaintiff that those documents have been found subsequently and in fact were not in the plaintiff's power, possession, control or custody at the time when the plaint was filed. Therefore Order XI Rule 1(4) and Order XI Rule 1(5) applicable to the commercial suit shall be applicable only with respect to the documents which were in plaintiff's power, possession, control or custody and not disclosed along with plaint. Therefore, the rigour of establishing the reasonable cause in non disclosure along with plaint may not arise in the case where the additional documents sought to be produced/relied upon are discovered subsequent to the filing of the plaint."

(Emphasis Supplied)

18. The only ground urged, in the application filed by the petitioner to place additional documents on record, was that, at the time of filing written statement, the petitioner's affairs were being managed by an earlier management which had not collated the documents. This itself indicates that the documents were within the power, possession and control of the petitioner at that time. Obviously, therefore, in view of the proscription contained in Order XI Rule 1(10) of the CPC, the learned Commercial Court could not have allowed the documents to be brought on record and no exception can, therefore, be taken to the refusal, by the impugned order, to do so.

19. Mr. Malhotra has emphasised the importance of the documents for a proper adjudication of the controversy between the parties. He has also submitted that bringing the documents on record would not



cause any prejudice to the respondent.

20. Unfortunately, these considerations cannot be of any relevance where the suit has been filed as a commercial suit, under the Commercial Courts Act. The proscription against bringing additional documents on record, save and except where sufficient cause were not filing of the documents along with the plaint or with the written statement, in the case of the plaintiff and the defendant, as contained in clauses (5) and (10) of Order XI Rule 1 of the CPC as amended by the Commercial Courts Act, are absolute.

21. The court cannot dilute the rigour of the said provisions on any sympathetic or other considerations. It is presumed that these considerations were in the mind of the legislature when they enacted the Commercial Courts Act. There can be no charity beyond the law.

22. As such, the challenge, in this petition, to the order dated 7th May, 2022, insofar as it rejects the petitioner's application for placing the additional documents on record, must necessarily fail.

23. The second challenge, in the present petition, is to the decision of the learned District Judge to close the petitioner's DE. The observation of the learned Commercial Court in this regard is brief, and read thus:

“Another application has been filed by the defendant for amending the list of witnesses and a new affidavit of the Engineer of the defendant namely of Shri Sunil Kumar has



been filed on the ground that the previous AR Shri Akash Jain is unwell and is unable to depose before the Court. Same is allowed and amended list of witnesses and the affidavit of Shri Sunil Kumar is taken on record.

DW1 examined and discharged. No other witness is present or cited. Hence, DE is closed despite protest by Ld. Counsel for the defendant.

Put up for final arguments on **11.7.2022.**”

24. On this issue, the petitioner clearly has a case. The afore-extracted passages from the impugned order dated 7th May, 2022 are contrary in terms. The learned Commercial Court has, in the same breath, allowed an amended list of witnesses to be filed by the defendant and taken it on record, and has closed the defence evidence on the ground that, apart from DW-1, no other witness was present or cited.

25. These two decisions cannot go hand in hand.

26. As such, on this aspect, the impugned order cannot sustain. The learned Commercial Court having allowed the additional list of witnesses to be taken on record, the petitioner, as the defendant before the learned Commercial Court, would, of needs, have to be allowed to lead their evidence.

27. As such, the present petition is disposed of in the following terms:

- (i) The challenge to the impugned order dated 7th May, 2022, insofar as it dismisses the petitioner’s application for bringing



additional documents on record, is rejected.

(ii) The impugned order dated 7th May, 2022, insofar as it closes the defence evidence, is, however, quashed and set aside. The petitioner would be at liberty to lead the evidence of the remaining witnesses as per the amended list of witnesses that the learned Commercial Court as permitted to be taken on record by the impugned order dated 7th May, 2022.

28. The petition stands partly allowed in the aforesaid terms, with no order as to costs.

29. All pending applications also disposed of.

JULY 18, 2022

dsn

C. HARI SHANKAR, J.

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