

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

INTERIM APPLICATION NO.4567 OF 2022  
IN  
COMMERCIAL SUMMARY SUIT NO.778 OF 2017

M/s. Sandy Ltd. : Applicant/Original Plaintiff

In the matter of

M/s. Sandy Ltd. : Plaintiff

versus

M/s. Diligent Media Corporation Ltd. : Defendant.

-----

Mr. Bimal Rajasekhar a/w Mr. Rishi Murarka and Mr. Ramjay Narayan for the  
Applicant/Plaintiff.

Mr. Jay Sanklecha a/w Nikita Menon i/by Parinam Law Associates for  
Defendant.

-----

CORAM : ARIF S. DOCTOR, J.

Reserved on : 15<sup>th</sup> March 2023.

Pronounced on : 18<sup>th</sup> April 2023.

P.C. :

1. The Applicant is the Plaintiff in the captioned Commercial  
Summary Suit ("the Suit") and has filed the Suit seeking a decree against the

Defendant for a sum of US Dollars 3,61,797. For convenience the Applicant is referred to as the Plaintiff. The Suit is based on Invoices dated 28<sup>th</sup> October 2012 and 29<sup>th</sup> October 2012. The Defendant was, subsequent to the filing of the Suit, taken the plea that the Suit is barred by limitation. It is thus that the Plaintiff has, by the present Interim Application, sought to bring on record certain email correspondence addressed by the Defendant to the Plaintiff by which, according to the Plaintiff, the Defendant was admitted its liability under the said invoices and from which it is clear that the Suit is within limitation.

2. The brief background of facts in which the present Interim Application has been filed and which are necessary to give a context to the rival submissions are as follows, viz.

- i. The Plaintiff had filed a Company Petition (being Company Petition No. 1097 of 2015) against the Defendant. In the course of the said Company Petition, the Defendant had without prejudice to its rights and contentions, agreed to pay the Plaintiff the entire principal amount in installments provided that the same was accepted in full and final settlement. This was not acceptable to the Plaintiff. The present Suit was filed for both principal and interest. Paragraph 11 of the Plaint sets out that the Suit was filed within limitation.

- ii. The Plaintiff then took out a Summons for Judgment. The Defendant thereafter filed an Application under Order VII Rule 11 of the Code of Civil Procedure (“the CPC”) seeking rejection of the plaint on the ground that the same was barred by limitation.
- iii. By an order dated 20<sup>th</sup> August 2018 passed in the Summons for Judgment, the Defendant was granted unconditional leave to defend the Suit to the extent of the Plaintiff’s claim for interest. The Defendant was directed to file its Written Statement within four weeks from the date of the said order. By an order dated 26<sup>th</sup> March 2019 this Court was pleased to direct that the Application filed by the Defendant under Order VII Rule 11 of the CPC would be decided at the trial of the suit.
- iv. The Defendant thereafter affirmed its Written Statement on 30<sup>th</sup> April 2019 and by an order dated 8<sup>th</sup> April 2021 was permitted to file its Written Statement. It is thus that the Written Statement came to be filed. In the Written Statement, the Defendant *inter-alia* took the plea that the Suit was barred by limitation.
- v. It was thus on 27<sup>th</sup> July 2022 the Plaintiff took out the present Interim

Application seeking to bring on record certain e-mail correspondence in support of the averments made in paragraph 11 of the Plaint i.e., to show that the Suit was not barred by limitation.

**Submissions of Mr. Rajasekhar, Learned Counsel appearing on behalf of the Applicant/Plaintiff**

3. Mr. Rajasekhar, Learned Counsel appearing on behalf of the Plaintiff submitted that the present Interim Application was taken out to meet the case set up by the Defendant in the Written Statement. He did not dispute that Order XI Rule 1 specifically contemplated that a Plaintiff was to file a list of all documents in its power, possession, control, or custody pertaining to the Suit or that the Plaintiff was required to give a declaration as contemplated under Order XI Rule 3. He however submitted that Rule 1 (c) of Order XI was an exception to the general mandate of Order XI Rule 1 in as much as permitted a Plaintiff to produce any document which was required to answer a case set up by the Defendant subsequent to the filing of the Plaint notwithstanding the declaration made under Rule 3 of Order XI. He submitted that the present Interim Application fell squarely within the exception carved out in Order XI Rule 1 (c) (ii) of the CPC as amended since the Defendant in the Written Statement set up a case that the Suit was barred by limitation which was

subsequent to the filing of the Plaint. He pointed out that this contention had never been raised at any time prior to the filing of the filing of the Suit either in correspondence or the Company Petition. He submitted that in the Company Petition, the Defendant had infact agreed to pay the Plaintiff the principal amount claimed. He therefore submitted that the plea/case of limitation was raised for the first time in the Written Statement. It was thus that the Plaintiff had taken out the present Interim Application to answer this case set up by the Defendant.

4. Learned Counsel then submitted that the present Interim Application neither sought a new relief nor set out a fresh cause of action and/or facts. He invited my attention to paragraph 11 of the Plaint to submit that the Plaintiff had made the necessary averments to show that the Suit was within limitation. He submitted that by the present Interim Application all that the Plaintiff was seeking was to bring on record the documents which were required to meet the case set up by the Defendant in the Written Statement which was naturally subsequent to the filing of the Plaint. He reiterated that the same was necessitated solely because of the case set up by the Defendant for the first time in the Written Statement. He submitted that the emails/correspondence which the Plaintiff was seeking to bring on record were all infact the Defendant's documents.

5. Learned Counsel then strictly without prejudice to the aforesaid contention submitted that even assuming the present case did not fall within the exception carved out in Order XI Rule 1 as amended the same was maintainable under the provisions of Order XI Rule 5 of the CPC as amended. He submitted that Order XI Rule 5 of the CPC as amended permitted the Plaintiff to rely upon documents which had not been disclosed along with the Complaint provided that the Plaintiff was able to establish reasonable cause for not producing the same earlier. He submitted that Order XI Rule 5 was therefore clearly a provision which could be invoked notwithstanding the undertaking given under Order XI Rule 3. He submitted that the only requirement under Order XI Rule 5 was for the Plaintiff to establish reasonable cause for non-production of the said documents earlier. Learned Counsel in support of his contention that the Plaintiff had established reasonable cause for not producing the said emails/correspondence earlier invited my attention to Paragraph 6 of the Application in which the Plaintiff had pleaded as follows: –

*“6 The Applicant was unable to produce the documents it now seeks to rely on and produce with the Complaint despite exercising due diligence because these documents were not in its regular files. Further, many of the Applicant’s old emails were archived and not readily accessible on its*

*servers. However, when dealing with the O7 R11 application filed by the Defendant the Applicant undertook a renewed search of papers at its office and emails on its servers and came across the documents – which it produced immediately i.e., in the O7 R11 proceedings.”*

From the above, Learned Counsel pointed out that the Plaintiff had specifically stated that since the emails were of several years ago the same had been archived and were thus not in the Plaintiff's regular files. The said emails were therefore not readily accessible on the Plaintiff's servers. He submitted that this clearly satisfied the test of reasonable cause which the Plaintiff was required to meet under the provisions of Order XI Rule 5 of the CPC, as amended. He submitted that the degree of reasonableness of such cause is what this Court was called upon to consider in the facts of each case. Learned Counsel submitted that the Plaintiff had in the present case shown reasonable cause by setting out that these emails had been archived and thus were not readily accessible/available. He submitted that it was essential to bear in mind the stand taken by the Defendant before the Company Court that the Defendant had admitted its liability for the principal amount and there was no occasion for the Plaintiff to doubt that the Plaintiff would change its stand qua the interest. In support of his contention that in the facts of this case, the Plaintiff had established a case of reasonable cause, he placed reliance upon the

following judgments in the case of *Khurmi Associates (P) Ltd vs. Maharishi Dayanand Co-operative Group Housing Society*<sup>1</sup> and *Mahesh Chaudhri vs. IMV India Pvt. Ltd.*<sup>2</sup>

6. He then, without prejudice to the above submissions, submitted that the documents which were sought to be produced were emails/correspondence all of which emanated from the Defendant and were therefore the Defendant's documents. He invited my attention to Order XI Rule 7 of the CPC as amended to submit that it was the Defendant who was equally under an obligation to produce these documents which the Defendant had admittedly not done. He submitted that the Defendant had deliberately held back these documents since they were completely against the case set up by the Defendant in the Written Statement. He submitted that the Defendant's opposition to the present Interim Application was entirely untenable since (a) the same was necessitated on account of the case set up by the Defendant in the Written Statement and (b) that in any event these documents ought to have been produced by the Defendant. He therefore submitted that the present Application was required to be allowed in the interest of justice and equity and for a fair, proper and effective adjudication of the issues in dispute.

---

1 2022 SCC OnLine Del 1011

2 2019 SCC OnLine Del 9813

7. Mr. Rajasekhar, then submitted that the trial in the captioned Suit had not commenced. He submitted that the amendment sought for was therefore a pre-trial amendment and no prejudice would or could be caused to the Defendant if the same was allowed. He submitted that the law pertaining to pre-trial amendments was only too well settled and the consistent view taken was that pre-trial amendments must be liberally allowed.

8. He then submitted that there was no delay in taking out the present Interim Application since it was only after the Written Statement had been filed that the need/opportunity to file the present Interim Application had arisen. He submitted that the Written Statement had been filed only in April 2021 and the present Application had been filed in July 2022, Learned Counsel submitted that in view of the orders of the Hon'ble Supreme Court suspending limitation till 1<sup>st</sup> March 2022. The question of there being any delay in filing of the present Interim Application did not arise.

9. Learned Counsel then submitted that the Plaintiff in any event could under Rule 1 (c) (i) confront the Defendant's witness with the said documents in cross examination and therefore no gainful purpose would be served by not allowing the present Application. He, therefore, submitted that for fair, equitable and effective adjudication of the dispute between the parties, that the

present Interim Application ought to be allowed. In support of his contentions, he placed reliance on the judgment in the case of ***Valo Automobile Pvt. Ltd. vs. Sprint Cars Pvt. Ltd.***<sup>3</sup> He submitted that the Plaintiff had not introduced any new case or cause of action and reiterated that the pleadings and reference to these admissions of liability were already present in the Plaint.

**Submissions of Mr. Sanklecha, Learned Counsel appearing on behalf of the Defendant**

10. *Per contra*, Mr. Sanklecha submitted that Order XI Rule 1 of the CPC as amended in its application to the Commercial Courts Act 2015, cast an obligation upon a Plaintiff to produce and annex photocopies of all documents “relating to any matter in question in the proceedings” which are in its “power, possession, control or custody” as on the date of filing the Plaint along with the Plaint. He submitted that it was thus that Order XI Rule 3 required a Plaintiff to make a solemn declaration on oath 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”. He submitted that in the present case, the Plaintiff had infact made the solemn declaration in the

---

3 2021 SCC OnLine Del 4080

Affidavit in support of the Plaint. He therefore submitted that having made the solemn declaration, the Plaintiff was now precluded from bringing on record any document unless the Plaintiff was able to establish reasonable cause for not having done so earlier. He submitted that the Applicant/Plaintiff having specifically pleaded that the suit was within limitation, it was therefore incumbent upon the Applicant/Plaintiff to have brought on record/annexed to the plaint all the necessary documents in support of the case pleaded in paragraph 11 of the Plaint. He submitted that the manner in which the Applicant/Plaintiff could now bring on record the additional documents was under the provisions of Order XI Rule 5 of the CPC as amended.

11. Learned counsel then submitted that Order XI Rule 5 further specified that the Plaintiff shall not be allowed to rely on documents which were in its *"power, possession, control or custody"* and not disclosed along with the Plaint save and except by leave of the Court. Such leave of the Court could be granted to the Plaintiff only if the Plaintiff succeeded in establishing *"reasonable cause for non disclosure along with the plaint"*. He submitted that Order XI of the CPC as amended brought about a radical change from the procedure contemplated for ordinary suits and the Plaintiff was statutorily required to satisfy and establish *"reasonable cause"* for non-disclosure/production of any document pertaining to any matter in

question in the proceeding, which was its *“power, possession, control or custody”* at the time of filing of the suit.

12. Learned counsel submitted that the documents sought to be introduced by the Plaintiff vide the present Application were admittedly in the Plaintiff's *“power, possession, control or custody”* at the time of filing the suit and that the Plaintiff was allegedly unable to retrieve the same because they had been archived. He submitted that there was no averment in the present Application that those documents had been found subsequently and were in fact not in the Plaintiff's *“power, possession, control or custody”* at the time when the Plaint was filed. In these circumstances, he submitted that the full *rigour* of Order 11 Rule 5 was squarely applicable, and that the Plaintiff was required to establish *“reasonable cause for non disclosure along with the plaint”*. Learned counsel then submitted that the Plaintiff had failed to make out any *“reasonable cause”* for not disclosing the said documents together with the Plaint. He pointed out that the reason given by the Plaintiff for non production of the said documents did not amount to reasonable cause but infact amounted to the Plaintiff being negligent or then not adequately diligent. Given the salutary object of the Commercial Courts Act, it was incumbent on the Plaintiff to have taken a search of all its files before filing the captioned commercial suit. The Plaintiff therefore could not be permitted to take advantage of its own

negligence, oversight and/or inadvertence in not undertaking a thorough search of all the documents in its custody before the filing of the captioned Suit. Learned Counsel submitted that the Plaintiff had clearly undertaken a search of all email communication between the parties only after the Defendant had filed and served the Application for rejection of the Plaint under Order VII Rule 11 of the CPC. He submitted that this fact alone made evident that the Plaintiff had not been diligent in its search before the filing of the captioned Suit.

13. He then placed reliance upon the following judgments in support of the contention as to what constitutes reasonable cause, in the context of Order XI Rule 1(5) of the CPC Viz (1) ***Bela Creation Pvt. Ltd.*** (supra) and (2) ***Bank of Baroda*** (supra). Basis these judgments he pointed out that “*reasonable cause*” does not contemplate negligence, oversight or inadvertence on the part of a party to a suit. As per the Hon’ble Delhi High Court “*reasonable cause*”, necessarily must refer to a cause which was outside the control of the party, and which prevented the party from filing the concerned documents along with the Plaint/Written Statement. He submitted that the Plaintiff had failed to establish that there was any “*cause*” outside its control which prevented it from filing the said documents now sought to be produced along with the Plaint. Infact, the Plaintiff had effectively conceded that the cause was the inadvertent failure on its part to take search of all the files in its custody before filing of the

captioned Suit.

14. He then without prejudice to the aforesaid contentions, submitted that there was a delay in the filing of the present Interim Application. He pointed out that the Plaintiff had become aware of these documents at least as far back as 18<sup>th</sup> July 2019 when the Additional Affidavit in Reply to the Defendants Application under Order VII Rule 11 of the CPC had been affirmed. He submitted however that the present Application had however been filed only on 27<sup>th</sup> July 2022. He submitted that there was no averment in the present Application which sought to explain the delay in the filing of the present Application. He submitted that the averment in the Interim Application that the Plaintiff had acted expeditiously was infact belied by the record and conduct of the Plaintiff. He submitted that the delay of over three years from the date of the filing of the Additional Affidavit in Reply to the date of the present Interim Application was reason enough to reject the same. He submitted that if the same was considered in the context of the date of filing of the captioned Suit, the delay in filing of the present Interim Application was approximately around five years.

15. He submitted that, for all the aforesaid reasons, the present Interim Application must necessarily be dismissed.

## Reasons and Conclusion

16. I have heard Learned Counsel, considered the case law cited as also the provisions of Order XI of the CPC as amended, and after a careful consideration of the same I find that the present Interim Application deserves to be allowed for the following reasons viz.

- i. It is not in dispute that Plaintiff had initially filed a Company Petition in which the Defendant had agreed/offered to pay the entire principal amount of the Suit invoices. The Defendant at that stage did not raise any dispute that the invoices were barred by limitation. Since however the Plaintiff was not agreeable to forgo the interest, the Suit came to be filed. Thus, on the date when the Suit was filed, the issue of limitation was perceivably *not a matter in question in the proceedings* or one that the Plaintiff could have reasonable cause to believe would be a matter in question in the Suit/proceedings. It was only when the Defendant subsequent to the filing of the Suit took the plea that the Suit is barred by limitation did the issue of limitation arise and, in that sense, become *a matter in question in the proceedings*. This was solely on

account of the case set up by the Defendant after the filing of the present Suit, first, by way of the Application for rejection of the Plaintiff under the provisions of Order VII Rule 11 of the CPC and second, in the Written Statement. The Defendant has not placed on record any material to show that such a plea was ever taken prior to the filing of the Suit. The record infact militates to the contrary since the Defendant had in the Company Petition offered to pay the Plaintiff the entire principal amount. Therefore, it is beyond the pale of doubt that the case of limitation was set up by the Defendant after the filing of the Suit and therefore in my view would fall squarely within the exception carved out in Rule 1 (c) (ii) of Order XI of the CPC as applicable to the Commercial Courts Act.

- ii. The entire thrust of the Defendant's case was that under the provisions of Order XI Rule 1 of the CPC, a Plaintiff was under an obligation to produce and annex photocopies of all documents *pertaining to the Suit* which were in the Plaintiffs "*power, possession, control or custody*" as on the date of filing the Plaintiff along with the Plaintiff. This read with the obligation which was required to be given in terms of Rule 3 of Order XI would therefore preclude the Plaintiff from producing any document

which was in the Plaintiffs power, possession, and control as on the date of the filing of the Plaint *unless* the Plaintiff was able to satisfy the Court that there was reasonable cause for not being able to produce the same earlier. I find that such a contention is entirely untenable and contrary to the very scheme of Order XI since Order XI Rule 1 (c) specifically provides that nothing in Rule 1 would apply in relation to documents produced by the Plaintiff for viz.

- 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.

As I have already held that in the present case, there is no doubt that the Defendant has set up a case of limitation for the first time, subsequent to the filing of the Plaint. The declaration contemplated in Rule 3 and upon which heavy reliance was placed would therefore clearly exclude the three contingencies provided for in Rule 1(c) of Order XI reproduced above. If the

undertaking in Rule 3 is to be construed in the manner suggested by the Defendant, then the same would effectively render Rule 1 (c) of Order XI otiose. Therefore, there is no gainsaying that the Plaintiff cannot be permitted to bring on record additional documents by virtue of having given such a declaration or that the Plaintiff can be permitted to bring on record such documents only if reasonable cause is shown under Order XI Rule 5.

- iii. Additionally, the object and purpose of Order XI of the CPC as amended is to ensure a fair, efficient, and expeditious trial by ensuring that both/all Parties at the first instance produce all the documents pertaining to the Suit. Order XI specifically requires both/all Parties to produce even those documents which are adverse to their respective cases so as to ensure that all the material relevant to decide the Suit is before the Court. In the facts of the present case, the documents that are sought to be produced are those emanating from the Defendant to the Plaintiff, which according to the Plaintiff would answer the case of limitation set up by the Defendant. The Defendant though having taken the plea of limitation has admittedly not produced these documents. Therefore, effectively what the Defendant seeks to do on the one hand is to raise the plea of limitation, while on the other hold back

documents it was obliged to produce under Order XI Rule 7 and also oppose the same from being brought on record to answer the Defendants case. To permit such a course of action would in my view not only be against the very object of Order XI but also against ensuring a fair trial.

- iv. It is not in dispute that the present amendment is a pre-trial amendment. It is only too well settled that pre-trial amendments ought to be liberally allowed. The factors to be taken into consideration when dealing with an application for amendment are broadly viz.
  - i. whether the amendment sought is imperative for proper and effective adjudication of the case.
  - ii. whether the application for amendment is bona fide or mala fide;
  - iii. the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;
  - iv. refusing amendment would in fact lead to injustice or lead to multiple litigation;
  - v. whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case;

and

- vi. as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

In this case there has been no delay (much less inordinate delay) on the part of the Applicant/Plaintiff in moving the present Interim Application. No conceivable prejudice can be caused to the Defendant if the present Interim Application is allowed. Furthermore, the only purpose which will be served is to ensure that a fair adjudication of the disputes between the parties takes place.

17 For all these reasons the present Interim Application deserves to be allowed in terms of prayer clauses (a) and (b) which read as under:-

- (a) *For an order allowing the Plaintiff to carry out the proposed amendments as set out in Schedule A hereto, within such time as this Hon'ble Court may deem it and proper;*
- (b) *For an order and direction, directing the Prothonotary & Sr. Master, High Court Bombay to take on record the amended Plaint and list the matter on a convenient date for directions.*

18 Amendments to be carried out within a period of two weeks from  
the date of this order being uploaded.

19 On the amendments being carried out, liberty is granted to the  
Defendant to file its Additional Written Statement, if any, within a period of  
four weeks thereafter.

20 The Interim Application is accordingly disposed of.

**(ARIF S. DOCTOR, J.).**