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A.No.5421 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 23.02.2024

Pronounced on : 27.02.2024

CORAM:

THE HON'BLE MR. JUSTICE ABDUL QUDDHOSE

Application Nos.5421 of 2023

in

C.S.No.565 of 2012

State Bank of India,
Stressed Assets Management Branch,
Egmore, Chennai – 8.
Rep. By its Manager

... Applicant

Vs.

The Oriental Insurance Company Ltd.,
CBU II, Oriental House,
Churchgate,
Mumbai – 400 020.

... Respondent

For Applicant : Mr.T.Mohan, Sr. Counsel
for Mr.K.Mohandas

For Respondent : Mr.M.B.Gopalan

ORDER



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For the sake of convenience and clarity, the parties are referred to
by their respective ranks in the main suit.

2. This application has been filed by the plaintiff to direct the first defendant to produce the documents disclosed in the Judges Summons filed along with this application.

3. The suit has been filed for recovery of money under the trade credit policies issued by the defendants 1 and 2.

4. The plaintiff's claim has been repudiated by the defendants 1 and 2 by their letter dated 08.04.2011 on the ground that the insurance policies covered specific transactions, which are subject to terms and conditions of the insurance policies. Aggrieved by the repudiation, the plaintiff bank has filed the suit against the insurers, namely, defendants 1 and 2, as well as the borrower, namely, third defendant, jointly and severally.

5. Along with the plaint, at the time of filing of the suit, the plaintiff had filed 170 documents in support of their claim, and thereafter,



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with leave of this Court, 44 documents were filed, and in all put together, 214 documents were filed by the plaintiff, which includes (a) policies of insurance; (b) claims made by the bank; (c) survey reports on the claims; (d) repudiation letters; and (e) correspondences.

6. A written statement was also filed by the defendants 1 and 2 denying their liability and they have stated that they have rightly repudiated the insurance claim made by the plaintiff under the trade credit policy issued in respect of debt payable by the borrower of the plaintiff, namely, the third defendant. The third defendant, who is the borrower, has gone into liquidation and has been wound up pursuant to the orders passed by this Court and now is represented by the official liquidator.

7. Based on the pleadings of the respective parties to the suit, this Court framed issues. After framing the issues, this Court had fixed the Case Management Schedule for the trial, which has also commenced by examination of the plaintiff's witnesses. At the stage of examination of plaintiff's witnesses, this application has been filed seeking for a direction to the first defendant to produce the documents disclosed in the Judges



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Summons pursuant to the notice to produce dated 07.09.2023 issued by the plaintiff to the counsel for the defendants 1 and 2.

8. The plaintiff contends that the documents sought for from the first defendant are relevant documents, which are required for the plaintiff to prove the suit claim. According to the plaintiff, they are filing this application at this stage after the trial had commenced as it has come to their knowledge only now that the additional documents are relevant. They have also stated that the defendants 1 and 2 filed their written statement with an inordinate delay. Therefore, according to them, no prejudice would be caused if a direction is issued by this Court to the first defendant to produce the documents disclosed in the Judges Summons to this application. It is also contended that the non-production of vital documents enumerated in the Judges Summons will interfere with the proper adjudication of the suit by this Court. It is also contended that deliberately the first defendant has failed to produce the relevant documents, which are in their custody, to thwart the genuine claim of the plaintiff.

9. The plaintiff also claims that they have served notice through its



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counsel on the first defendant to produce the documents disclosed in the Judges Summons through a letter dated 07.09.2023. According to the plaintiff, despite receipt of the said notice to produce dated 07.09.2023, the defendants 1 and 2 have failed to produce the documents sought for by the plaintiff.

10. In support of the plaintiff's contention that this application is maintainable at the stage when the trial has commenced, the learned Senior counsel for the plaintiff drew the attention of this Court to the following authorities:-

(a) Twilight Properties Pvt. Ltd. and another Vs. Supratik Bhattacharjee and others [2019 SCC Online Cal 8173];

(b) Collector, Land Acquisition, Anantnag and another Vs. Katiji and others [(1872) 2 SCC 107]; and

(c) M.Sivasamy Vs. Vestergaard Frandsen and others [2009 SCC Online Del 2310]

11. A counter affidavit has been filed by the defendants 1 and 2 in this application denying the allegations of the plaintiff. According to



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them, the present application is not maintainable at this belated stage.

According to them, since the issues have already been framed by this Court and the written statement has already been filed by the defendants 1 and 2, the present application filed by the plaintiff after commencement of the trial is not maintainable.

12. According to the defendants 1 and 2, the present application is not a bonafide one, but, it is a misuse of discovery provision under Order XI of the Commercial Courts Act, 2015, for the following reasons:-

a) With regard to Item 6, template adopted by the first defendant during the period 2002-2007, sought for by the plaintiff, there can be no document called a template to seek a direction.

b) With regard to Item 2, reports/assessments of the third defendant conducted by the first defendant from time to time for extending the insurance cover, sought for by the plaintiff, there are no such formal documents.

c) With regard to Item 3, the insurance proposals submitted to the first defendant by the third defendant and other related materials, there are no such proposals available.

d) With regard to Item Nos.1, 4 & 5, the documents referred to in



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those items are irrelevant for deciding the suit claim. The plaintiff has sought for those documents in a vague manner without specific details.

e) With regard to Item 7, communication between the first defendant and GIC (General Insurance Corporation) including approval note, if any, the policies as issued were accepted by the plaintiff. The final contract, namely, the insurance policies contain the terms and conditions for claiming the insurance coverage. Internal communication or GIC correspondences when GIC is not even a party to the present suit, cannot be demanded by the plaintiff to dispute the policy terms at this point of time after 15 years.

f) With regard to Item Nos.8 to 10, any correspondence between the defendants 1 and 2 and Investigating Agency is not material to the claim under the policies. The criminal case and conclusion of any investigation are not relevant for the purpose of determining the claim under the policies of insurance. Similarly, list of documents taken by the Investigating Agency has no relevancy to decide whether the claim of the plaintiff is covered by the suit policies of Insurance. Chargesheets stated to be against the officials of the first defendant cannot be produced by the defendants 1 and 2. The plaintiff cannot expect the defendants to obtain and submit chargesheets to which they are not a party. Moreover, such



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chargesheets have no relevancy to the question whether the plaintiff's claim is covered by the suit policies or not.

13. The learned counsel for the defendants 1 and 2 would rely upon the following authorities in support of his contention that the instant application is not maintainable.

(a) Union Bank of India and others Vs. Hemantlal Ranchhodbhai Vegad [AIR 1991 Guj 113];

(b) Bhagwani Devi Mohata Hospital Vs. ADJ Rajgarh & Another [AIR 2005 Raj 274]

(c) Delhi State Industrial & Infrastructural Development Corporation Ltd. Vs. Shiv Kumar [2013 SCC Online Del 3773]; and

(d) M/s.J.S.Construction Pvt. Ltd., Vs. Damodar Rout [AIR 1987 Ori 207]

Relying upon the aforesaid decisions, the learned counsel for the defendants 1 and 2 would submit that the application filed by the plaintiff at this stage of the suit is not maintainable.



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WEB COPY 14. Heard Mr.T.Mohan, learned Senior counsel, for Mr.K.Mohandas, learned counsel, for the plaintiff; and Mr.M.B.Gopalan, learned counsel for the defendants.

DISCUSSION:

15. Under the Indian Evidence Act, Sections 101 to 103 deal with the burden of proof in general, whereas Sections 104 to 106 deal with a situation where the burden of proof is placed on a specific individual. Anyone who wants the court to rule on a legal right or responsibility based on facts in his favour, he must first show that such facts exist. Section 101 of the Indian Evidence Act stipulates that when a person is required to show the existence of a fact, that person shall also bear the burden of proof. Therefore, a person seeking a favourable decision from the court must provide evidence in support of his case. The usual rule is that the party that asserts a truth bears the burden of proof, not the side that denies it.

16. The application under Order 11 of the Commercial Courts Act seeking for production of documents has been admittedly filed after the



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issues have been framed by this Court in the suit and after the trial has commenced. The documents sought for by the plaintiff are generic documents as no specific details of the same have been given by the plaintiff. Further, with the insurance policies, based on which, the insurance claim has been made by the plaintiff is available on record, the question of directing the first defendant to produce the documents in the form of communications/proposals between the plaintiff and the third defendant at this belated stage does not arise, as it does not have any relevancy for the purpose of proving the plaintiff's claim. The insurance policies contain terms and conditions of the insurance coverage and the insurance policies are very much available on record and therefore, this Court cannot direct the first defendant to produce the documents sought for by the plaintiff, that too, when the first defendant contends the following:-

- (a) There is no document called a template to seek direction.
- (b) There are no formal documents in the form of reports/assessments of the third defendant conducted by the first defendant from time to time for extending the insurance cover.
- (c) No insurance proposal has been submitted to the first defendant by the third defendant.



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(d) The correspondences between the first defendant and the third defendant prior to taking insurance policies are irrelevant documents for the purpose of proving the suit claim, as the insurance policies which are the final documents have been placed on record and also marked as exhibits.

(e) The internal recommendations/approval note submitted for each of the insurance policies and renewal thereof, are irrelevant, since the said recommendations/approval note were culminated in the final insurance policies issued by the first defendant, which have been marked as exhibits.

(f) The documents sought for by the plaintiff are vague in nature and they are not specific and therefore, the first defendant is not bound to produce the additional documents.

(g) There is no suppression of any material document by the defendants 1 and 2. Having filed 214 documents, which includes the policies, claims, survey reports and correspondences, it is sufficient for the plaintiff for the purpose of prosecuting the suit claim.

(h) The provisions of Order XI of the Commercial Courts Act do not confer an unfettered right upon the plaintiff and the plaintiff has to discharge its burden of proving the suit claim as per the Indian Evidence



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17. This Court cannot engage in an investigative exercise against the defendants to search for evidence at the stage of trial, that too, when the Case Management Schedule was earlier fixed by this Court, to which, all the parties to the suit agreed upon. The substantive provisions relating to evidence contained in Evidence Act, especially relevancy, burden of proof, impermissibility of adducing evidence contrary to terms of written contract (insurance policy) do not stand amended or modified by Order XI of the Commercial Courts Act. By seeking vague and generic documents with total lack of specificity, some of which cannot even be considered as documents or existing, the defendants 1 and 2 cannot be subjected to a direction under Order XI of the Commercial Courts Act to produce such documents.

18. It is well settled law that terms of the policies shall be construed strictly to decide Insurer's liability for a claim. Having filed the policies as well as other documents, the plaintiff cannot seek to introduce extraneous records, such as, emails prior to insurance, internal note, template, CBI chargesheet etc. to interpret the insurance coverage



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contrary to the Indian Evidence Act. Order XI of the Commercial Courts Act does not permit the plaintiff to indulge in a fishing expedition or roving enquiry against the defendants.

19. This application has been filed only in the year 2023. When the suit is of the year 2012 and the defendants filed the written statement as early as in the year 2017, the question of allowing this application at this belated stage does not arise. The first defendant has pleaded non-availability, irrelevancy, vague description, hardship and delay, and has questioned the maintainability of this application on those grounds. This Court is in agreement with such a cumulative plea taken by the first defendant.

20. This application filed under Order XI of the Commercial Courts Act claiming to exercise the right to discover on the proposition that the commercial suit jurisdiction has now been inquisitorial and not adversarial is not maintainable. Being a commercial suit, there are strict timelines fixed by this Court and in fact, in the instant case, case management schedule earlier fixed by this Court was not adhered to and instead of adhering to the same, the plaintiff has come forward with this



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application, when the trial in the suit had already commenced. Pleadings of the suit were completed six years back. Apart from filing 170 plaint documents, the plaintiff consequently filed additional 44 documents with leave of the Court and in all put together 214 documents have been filed on the side of the plaintiff. The defendants 1 and 2 did not consider necessary to file any document on their side, eventhough pleadings in the suit were completed six years back.

21. Eventhough notice to produce documents disclosed in the Judges Summons were sent by the plaintiff to the defendants 1 and 2, the non-production of the documents by the defendants 1 and 2 due to the reasons that they are not available, irrelevant and not specific, has to be accepted by this Court. It is also to be noted that some of the documents in addition to the trade policies issued in favour of the plaintiff by the defendants 1 and 2 have been seized by the Investigating Agency from the first defendant and are available before the CBI Court at New Delhi. Both the parties having admitted the said fact, the question of the first defendant producing those documents at this belated stage to the plaintiff does not arise.



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22. The defendants 1 and 2 have also pleaded that they have made bonafide disclosures of all the relevant documents and they have not suppressed any information with regard to the documents in their custody. When the plaintiff has not specified the exact details of documents sought for by them, the first defendant's plea that requirements of the plaintiff are too vague has to be accepted by this Court. Order XI of the Commercial Courts Act only stipulates that there cannot be deliberate suppression of any document in the custody of either the plaintiff or the defendant and therefore, non-production of the documents by the defendants 1 and 2 on receipt of notice to produce documents sent by the plaintiff, cannot be held to be deliberate.

23. The judgments relied upon by the learned Senior counsel for the plaintiff has no bearing for the facts of the instant case for the following reasons:-

(a) Being a commercial suit, strict timelines are required to be followed for early disposal of the commercial suit. The issues have already been framed and the Case Management Schedule was already fixed by this Court. The trial has also commenced based on the Case



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Management Schedule fixed by this Court. Only at this stage, this application has been filed belatedly.

(b) The plaintiff cannot be allowed to use Order XI of the Commercial Courts Act to indulge in fishing expedition or roving enquiry against the defendants. Under Section 101 of the Evidence Act, the initial burden to prove the suit claim is upon the person who asserts it, that is, the plaintiff herein.

(c) The plaintiff has not specified the documents sought to be produced and the notice to produce sent by them as well as the present application are vague and they lack specificity.

(d) The defendants 1 and 2 have also expressed their difficulty in producing those documents either for want of relevancy or for not having it in their custody.

24. On the other hand, the judgments relied upon by the learned counsel for the defendants 1 and 2 substantiate the stand of the defendants 1 and 2 that the present application cannot be entertained at this belated stage, when the trial has already commenced and the documents sought for by the plaintiff are vague and bereft of particulars and are irrelevant and have been sought only to protract the trial. If this



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application is entertained at this belated stage and that too, when the application lacks specificity and is vague, the purpose of the commercial suit for early resolution of the commercial dispute as per the objects of the Commercial Courts Act will get defeated.

25. For the forgoing reasons, this Court does not find any merit in this application and accordingly, this application is dismissed. Post the matter for Case Management Hearing on 12.03.2024.

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Index: Yes/no
Speaking order/non-speaking
Neutral citation : Yes/no
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ABDUL QUDDHOSE, J.
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