

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

Before:

The Hon'ble Justice Hiranmay Bhattacharyya

**C.O. 3986 of 2024
M/s. Jadob Electric Co.**

VS.

**Durgapur Projects Limited & Anr.
With
CO 4214 of 2024**

For the Petitioner	: Mr. Sharanya Chatterjee Mr. Saptak Naskar	 advocates
For the WBSEDCL (in CO 3986 of 2024)	: Mr. Debjit Mukherjee	
		 advocate
For the WBSEDCL (in CO 4214 of 2024)	: Mr. Debanjan Mukherjee	 advocate
Reserved on	: 06.05.2025	
Judgment on	: 15.05.2025	

Hiranmay Bhattacharyya, J.:-

1. These Civil Revision Applications arise out of the same suit between the self same parties and for such reason the same were heard analogously and are being decided by this common order.
2. These applications under Article 227 of the Constitution of India are at the instance of the plaintiff. The order being no. 66 dated 23.07.2024 passed by the learned Commercial Court at Asansol in Money Suit (Commercial) no.7 of 2024 is under challenge in CO 3986 of 2024. CO 4214 of 2024 is directed against an order being no. 59 dated 15.12.2023 passed in the aforesaid Money Suit.

3. The petitioner herein instituted a Money Suit (Commercial) no. 7 of 2024 before the learned Commercial Court at Asansol praying for recovery of a sum of Rs. 1,61,61,709/- along with interest at the rate of 18% per annum against the opposite party herein. The opposite party no. 2 is contesting the said suit by filing a written statement.
4. During cross examination on 24.08.2023, PW1 was shown four letters which have been marked as exhibits. The petitioner filed an application for recalling the PW 1 for the purpose of relying upon some additional documents.
5. The learned Trial Judge, by an order being no. 59 dated 15.12.2023, rejected the application for recalling. Thereafter, the petitioner filed an application praying for expunging the documents which were marked as Exhibit-A,B,C and D. By the order being no. 66 dated 23rd July, 2024, the application for expunging the exhibits stood rejected.
6. Mr. Chatterjee, learned Advocate appearing for the petitioner submitted that the learned Trial Judge, in an earlier order dated 12th July, 2023 recorded that the defendant no. 2 will not produce any document in support of the statements made in clauses (f) and (g) of paragraph 22 of the written statement. He further submitted that the defendant no. 2 did not disclose the documents along with written statement and for such reason the plaintiff/petitioner herein did not get any opportunity to cross-examine the defendant-witness on such documents. He further submitted that in order to controvert the said additional documents of the defendant no. 2, the petitioner should be given an opportunity to recall his own witness. Mr. Chatterjee placed reliance upon Order XI Rule 1 (7) and 1 (10) of the Commercial Courts Act, 2015 in support of his contention that the defendant shall not be allowed to rely on documents which were in the defendant's power, possession, control and custody and not disclosed along with the written statement. Mr. Chatterjee further submitted that Rule 5 of Order XI of the Commercial Courts Act, 2015 permits a party to a proceeding to produce documents. He further submitted that learned Trial

Judge ought to have allowed the petitioner to produce the documents in support of its case by recalling the witness. Mr. Chatterjee further submitted that the learned Trial Judge rejected the application for expunging the exhibit nos. A, B, C and D from the list of exhibited documents by applying the provisions laid down under Order VII Rule 14(4), Order VIII Rule 1 as well as Order XIII Rule 1 (3) of the Code of Civil Procedure without appreciating that the aforesaid provisions have no manner of application to commercial suits pending before Commercial Courts in view of Rule 7 of Order XI of the Commercial Courts Act, 2015. He, therefore, submitted that the order impugned suffers from total non-application of mind by the learned Trial Judge. Mr. Chatterjee further submitted that in view of the Order dated 12th July, 2023 passed by the learned Trial Judge recording that the defendant no. 2 did not produce any document in support of the statements made in clauses (f) and (g) in paragraph 22 of the written statement, the production of the documents at the time of cross-examination of PW 1 is barred by the principles of *res judicata*. In support of such contention, he placed reliance upon the decision of the Hon'ble Supreme Court in the case of **S. Ramachandra Rao vs. S. Nagabhushana Rao and Others** reported at **2022 SCC OnLine SC 1460**.

7. Per contra Mr. Debjit Mukherjee learned Advocate appearing for the opposite party in C.O.no. 3986 of 2024 contended that the suit is at the stage of argument and at such a belated stage, the plaintiff could not be allowed to recall the PW 1. He submitted that the petitioner is trying to fill up the lacunae in evidence by way of recalling the witness which is not permissible in law. He further submitted that the documents which were shown to the PW 1 during his cross-examination were admitted by him and in view thereof the said documents were marked as exhibits A,B, C and D. Mr. Mukherjee submitted that no case has been made out by the petitioner for expunging the exhibits.
8. Mr. Debanjan Mukherjee learned Advocate appearing for the opposite party in C.O. 4214 of 2024 adopted the argument advanced by Mr. Debjit

Mukherjee learned advocate appearing for the opposite party in C.O. 3986 of 2024.

9. Heard the learned Advocates for the parties and perused the materials placed.
10. Record reveals that the plaintiff/petitioner herein filed an application being I.A. G.A. no. 4 of 2023 dated 26th April, 2023 praying for a direction upon the defendant no. 2 to file copies of the documents in support of the statements in clauses (f) and (g) of paragraph 22 of the written statement and for a further direction upon the defendant to serve the copies of the same to the plaintiff or his Counsel for inspection. The learned Judge, Commercial Court Asansol in the order dated 12th July, 2023 observed that since the defendant no. 2 has not filed any list of documents and has also not annexed any documents along with written statements, consequences as stipulated under Order XI Rule 5 will follow.
11. Order XI Rule 1(7) of the Commercial Courts Act, 2015 states that 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 written statement including the documents referred to and relied on by the defendants in the written statement and the documents relating to any matter in question in the proceeding in power, possession, control or custody of the defendant, irrespective of whether the same is in support of or adverse to the defendant's defence. Clause (c) of Rule 1(7) of Order XI states that nothing in the said Rule shall apply to documents produced by the defendants and relevant only for (i) the cross examination of the plaintiff witnesses; (ii) in answer to any case set up by the plaintiff subsequent to the filing of the plaint, or (iii) handed over to a witness merely to refresh his memory. Rule 1(10) of Order XI states that 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 written statement save and except by leave of Court and such leave

shall be granted to the defendant for establishing reasonable cause for non-disclosure along with the written statement.

12. Order XI Rule 5 deals with production of documents. Order XI Rule 5(4) states that the Court may draw an adverse interference against a party refusing to produce such document after issuance of a notice to produce and where sufficient reasons for such non-production are not given and order costs.
13. The learned Trial Judge after noting that the defendant no. 2 has not filed any list of documents and has also not annexed any documents along with written statement passed an order dated 12.07.2023 by holding that the consequences as stipulated under Order XI Rule 5 of the Commercial Courts Act 2015 will follow. Thus, the effect of such order is that the Court may draw an adverse interference against a party refusing to produce such document after issuance of a notice to produce.
14. In the case on hand certain letters were produced by the defendant at the time of cross examine of PW 1. From the cross examination of PW1 dated 24.08.2023 this Court finds that the documents which were shown to the PW1 were admitted by him and on such admission those documents were marked as Exhibit A, B, C and D.
15. After going through the provisions laid down in Order XI of the Commercial Courts Act, 2015 more particularly Rule 1(7) and 1(10) of Order XI this Court finds that there is no bar to mark the documents admitted by a witness which were handed over to him at the time of cross examination as exhibits.
16. In course of arguments Mr. Chatterjee learned advocate appearing for the petitioner could not point out any provision of law which provides for expunging the documents marked as exhibits in accordance with law. Though, Mr. Chatterjee may be right in submitting that Order XIII Rule 1, Order VII Rule 14 and Order VIII Rule 1A of the Code of Civil Procedure shall not apply to suits or applications before the Commercial Divisions of High

Court or Commercial Courts in view of Order XI Rule 7 of the Commercial Courts Act 2015, the learned Judge was right in arriving at the ultimate conclusion that there is no merit in the application praying for expunging the exhibits as the plaintiff in his cross examination admitted the documents put to him by the defendants.

17. There is no quarrel to the proposition to law laid down by the Hon'ble Supreme Court in the case of **S. Ramachandra Rao** (supra) that the doctrine of res judicata is attracted not only in separate subsequent proceedings but also at subsequent stage of the same proceeding. In the case on hand the learned Trial Judge in the order dated 12.07.2023 only recorded that the consequences as stipulated in Order XI Rule 5 of the Commercial Courts Act will follow. By the said order no issue was decided. Subsequently, the documents hand over to the witness of the plaintiff at the time of his cross examination by the defendant were marked as exhibits on admission. Tendering of documents by the defendant at the time of cross examination of PW1 cannot be said to be barred by *res judicata* as the same is in accordance with the provisions of the Commercial Court Act, 2015.
18. This Court accordingly holds that the order dated July 23, 2024 does not call for any interference.
19. Order XVIII Rule 17 of the Code enables the Court, at any stage of a suit, to recall any witness who has been examined (subject to the law of evidence for the time being in force) and put such questions to him as it thinks fit. It is well settled that the power to recall any witness under Order XVIII Rule 17 can be exercised by the Court either on its own motion or on an application filed by any one of the parties to the suit requesting the Court to exercise such power. Such power is discretionary as would be evident from the use of the word "may" in Order XVIII Rule 17 of the Code and should be used sparingly only in appropriate cases to enable the Court to clarify any doubts it may have in regard to the evidence led by the parties. Such power is not intended to be invoked to fill up the lacunae in evidence. (See **Vadiraj**

Naggappa Vernekar (D) Th. Lrs. Vs. Sharad Chand Prabhakar Gogate
reported at **(2009) 4 SCC 410.**)

20. The Code of Civil Procedure prior to its amendment had a specific provision under Order XVIII Rule 17A for production of evidence not previously known or the evidence which could not be produced despite due diligence. After the omission of Order XVIII Rule 17A, a question arose whether the parties can reopen the evidence for the purpose of further examination-in-chief or cross-examination.
21. The Hon'ble Supreme Court in the case of ***K.K. Velusamy vs. N. Palaanisamy*** reported at **(2011) 11 SCC 275** held that if a party comes across some evidence which he could not lay his hands on earlier, or in regard to conduct or action of the other party comes into existence, the Court may in exercise of its inherent power under Section 151 of the Code, permit the production of such evidence if it is relevant and necessary in the interest of justice, subject to such terms as the Court may deem fit to impose. The Hon'ble Supreme Court further held that where the additional evidence, oral or documentary, will assist the Court to clarify the issues and will assist in rendering justice, the Court may exercise its discretion to recall the witnesses or permit the fresh evidence.
22. Now, turning back to the facts of the case on hand, the defendant at the time of cross examination of PW 1 produced certain documents, copies of which were not produced along with the written statement but were marked as exhibits.
23. In the application for recall of PW-1, the petitioner has specified three letters dated 17.11.2012, 07.11.2016 and 21.11.2016 which the petitioner seeks to produce as additional evidence by recalling the PW1.
24. The learned Trial Judge did not consider as to whether such documents will assist the Court to clarify the evidence which were marked as Exhibit A,B, C and D and will assist in rendering justice. To the mind of this Court, the learned Trial Judge was not right in drawing an adverse inference against

the plaintiff for non production of the aforesaid three letters when the defendants produced the documents being Exhibits A, B,C and D for the first time during cross examination of PW1.

25. The learned Trial Judge without even making any endeavor to consider whether the evidence sought to be produced would assist in clarifying the evidence led on the issues or lead to a just and effective adjudication rejected the application for recalling of PW1 as the same was filed at a belated stage i.e., when the suit has been fixed for argument. There is no straitjacket formula that no application for recalling should be allowed after the suit is fixed for argument. This Court is, therefore, of the considered view that the learned Trial Judge ought to have considered whether it was necessary to allow production of further evidence.
26. For all the reasons as aforesaid, this Court is inclined to interfere with the Order no. 59 dated 15.12.2023.
27. Accordingly, C.O. No. 4214 of 2024 stands allowed. The order being no. 59 dated 15.12.2023 stands set aside. The application for recall of PW1 is restored to the file of the learned Trial Judge. Learned Trial Judge is directed to consider such application afresh in accordance with law and dispose of the same as expeditiously as possible without granting any unnecessary adjournment to either of the parties.
28. For all the reasons as aforesaid, CO No. 3986 of 2024 stands dismissed without, however, any order as to costs.
29. Urgent photostat certified copies, if applied for, be supplied to the parties upon compliance of all formalities.

(HIRANMAY BHATTACHARYYA, J.)