

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

Present:

The Hon'ble JUSTICE MOUSHUMI BHATTACHARYA

G.A. 445 of 2020

With

C.S. 146 of 2016

ITC Limited

Vs.

JP Morgan Mutual Fund India Pvt. Ltd. & Ors.

For the Plaintiff : Mr. S.N. Mookherjee, Sr. Adv.
Mr. Dhruba Ghosh, Sr. Adv.
Mr. Samik Kanti Chakraborty, Adv.
Mr. Dipendra Nath Chunder, Adv.

For the Defendant : Mr. Jishnu Saha, Sr. Adv.
Mr. Rudraman Bhattacharya, Adv.
Mr. Vineet Unnikrishnan, Adv.
Mr. Bineet Bhansali, Adv.
Mr. Sourojit Dasgupta, Adv.
Mr. Souvik Mazumdar, Adv.
Mr. Ishan Saha.

Last Heard on : 11.03.2020.

The evidence in the suit was thereafter fixed on 15.04.2020. Physical hearing of court matters was suspended from 23.03.2020.

Delivered on : 11.06.2020.

Moushumi Bhattacharya, J.

1. This is an application filed by the defendant no.2, JP Morgan Asset Management India Private Limited, for leave to produce further documents annexed to the application which are marked as 'A' to 'I' i.e. 9 documents. The suit was filed on 18th May, 2016 for a decree against the defendants for loss suffered by the plaintiff in relation to the plaintiff's investment in the Liquid Fund and the Treasury Fund which are debt funds of the first defendant. An application for rejecting the plaint and for deleting the names of some of the defendants was rejected by an order dated 24th August, 2018 by which the hearing of the suit was expedited. After the issues were settled on 24th January, 2019, the evidence of the plaintiff's witness was concluded on 13th January 2020. The examination-in-chief of the witness of the defendant no.1 commenced on 21st February 2020 and was due to resume in the middle of April, 2020 as the travel plans of the defendant's witness became uncertain by reason of the Coronavirus pandemic. The Physical hearings of Court matters were thereafter suspended from 23rd March 2020.

2. Mr. Jishnu Saha, learned Senior Counsel appearing for the applicant/defendant no.2 urges that four out of the nine documents which the defendant no.2 seeks to produce are in the public domain while one document has already been produced by the plaintiff. A list of what the

defendant no.2 seeks to produce by way of the present application is given below;

- A) Web-pages from the respective websites of CARE, Brickwork, CRISIL and ICRA showing the respective credit rating scales of relevant debt instruments.
- B) Web-pages from the website of BSE containing Share Price Statement of Amtek Auto from January 2015 to August 2015.
- C) CARE Rating Statement dated 25th August, 2014
- D) Brickwork Rating Statement dated 29th January, 2015
- E) Research report of 5th January, 2015 relating to Amtek Auto
- F) Research Report of Amtek Auto dated 05th June, 2015
- G) Bloomberg Screen Grab from the online portal of Bloomberg
- H) Monthly fact sheets from the Treasury Fund and the Liquid Fund from January 2015 to August 2015
- I) Investment statement of the plaintiff in respect of its investment in the Liquidity Fund.

3. Counsel relies on Order VIII Rule (1-A) of The Code of Civil Procedure (the CPC) "*Duty of defendant to produce documents upon which relief is claimed or relied upon by him*" - which casts an obligation on the defendant to produce a document in court with the written statement which supports the defence or claim for set-off or counter-claim of the defendant. In essence, all documents in the possession or power of the defendant shall be filed with the written statement and the defendant can only produce a new document

with the leave of the court. Counsel submits that the 9 documents became necessary to produce after the evidence given by the plaintiff's witness and that the present application was filed before the examination-in-chief of the defendant's witness commenced on 21st February 2020. According to counsel, since the written statements were filed before the suit was transferred under Section 15 of The Commercial Courts Act, 2015, the procedure prescribed under the mandatory provisions of the CPC will apply in this case. Even otherwise, counsel submits that under the proviso to section 15(4) of the 2015 Act dealing with transfer of pending suits, the court has discretion to prescribe a new time line under section 15(3) which provides that the 2015 Act will apply only to those procedures which were not complete at the time of transfer. In this case, since the written statements had already been filed before the suit migrated to the new regime under the Commercial Courts Act, the defendant will be governed by Order VIII Rule (1-A) of the CPC. Counsel submits that even if Order XI "*disclosure, discovery and inspection of documents in suits before the Commercial Division of a High Court or a Commercial Court*" of the CPC as amended by the Commercial Courts Act applies to the defendant, Order XI Rule 1 Sub-rule 7(c) makes an exception to the obligation of a defendant to file all documents in its power, possession, control or custody, etc. where further documents are required for the cross-examination of the plaintiff's witnesses, or is not necessary to any new case set up by the plaintiff or handed over to a witness for refreshing his memory. Counsel also relies on Order XI Rule 1 Sub-rule 10 which preserves the power of a court to grant leave to a defendant to rely

on further documents which were not disclosed along with the written statement upon the defendant establishing reasonable cause for such non-disclosure. Counsel submits that the plaintiff and/or its counsel will not be prejudiced as he will have the opportunity to cross-examine the defendant's witness on these documents.

4. Counsel submits that Order XI Rule 1(7) does not mention the words "amendment" which indicates that further documents can be brought in at a later stage if a defendant is covered by Order XI Rule 1(10). Counsel relies on *K. Kasturi Vs. C. Mohan* reported in (2006)4 Mad LJ 1061, a decision of a Single Judge of the High Court of Judicature at Madras for the proposition that before the amendment of 1.07.2002 to Order XIII of the CPC, parties were entitled to produce all documentary evidence at or before the settlement of issues if not already filed in court. This was curtailed after the amendment by allowing only those documentary evidence to be produced in original at or before the settlement of issues where copies of such have been filed with the plaint or written statement. Counsel relies on *M/s. Sadhu Forging Limited Vs. M/s. Continental Engines Ltd.* reported in 2017 SCC Online Del 10039 of a Single Judge of the Delhi High Court which preserved the right of a party to file documents even at a later stage with the leave of the court under Order VII Rule 14 read with Section 151 of the CPC and on *Lindsay International Private Limited Vs. Laxmi Niwas Mittal* in G.A.266 of 2020 , C.S. 2 of 2017 in which the plaintiff was permitted to file additional

documents under Order XI Rule 1 (4) and (5) of the CPC as amended by the Commercial Courts Act.

5. Mr. S.N. Mookherjee, learned Senior Counsel appearing for the plaintiff, opposes the application on the un-amended Order XIII Rule 1 of the CPC which casts an obligation on parties to produce all documentary evidence in original, copies of which have been filed with the plaint or written statement, at or before the settlement of issues. Counsel submits that before the 2002 amendment, Rules 1 and 2 of Order XIII gave a party the liberty to produce the documentary evidence in its possession or power if it had not been produced at the stage contemplated under the un-amended Rule 1, with the condition that “good cause” must be shown to the satisfaction of the court for the documents not being produced at the earlier stage. Relying on the effect of the amendment, counsel submits that Rule 1(2) has closed the window which had been available to a party to produce additional documents on condition of the “*good cause*” requirement and that after amendment, no such liberty has been retained for a party who fails to produce documentary evidence at or before the settlement of issues. Counsel submits that even under Order XI, as amended, a defendant’s right to file additional documents is circumscribed by Order XI Rule 1(7) save and except the three instances under Order XI Rule 1(7) (c) namely, documents relevant for the cross-examination of the plaintiff’s witness, in answer to any case set up by the plaintiff subsequent to the filing of the plaint or handed up to a witness only to refresh his memory. Counsel submits that the issues

were settled on 24th January, 2019 and there is no statutory provision available to the defendant for filing further documents after the commencement of evidence. Counsel relies on the affidavit-in-reply of the defendant no.2 which specifically states that the procedure for discovery and disclosure in the present suit is governed by the un-amended provisions of the CPC as existed prior to the coming into force of the Commercial Courts Act. Counsel relies on *Chitrakala Fal Dessai Vs. Balu Marathe @ Mane S/o Jyotiba Marathe* reported in (2006) 6 Mah. L.J. 427 where the Bombay High Court held that a court must ensure that all documents which would assist it to resolve the controversy are available for its perusal, unless it is concluded that the documents sought to be produced are manufactured or the conduct of the concerned party would disentitle the party from producing such documents. Counsel relies on *NTPC Limited Vs. Reliance Industries Limited* reported in 2016 SCC Online Bom 60 where the Chamber Summons of the defendant for filing fresh documents was rejected by reason of the fact that it would involve substantial time and delay hearing of the suit. Counsel also relies on *Societe DES Produits Nestle S.A. Vs. Essar Industries* reported in 2016 SCC Online Del 4279, where the Delhi High Court frowned upon filing of documents at a later stage beyond the prescribed time limit in the light of the coming into force of the Commercial Courts Act.

6. The stand of the applicant/defendant no.2 can be summarised thus; the defendant no.2 proceeds on the basis that the suit will be governed by

the provisions of The Code of Civil Procedure as it stood before its provisions were amended by The Commercial Courts Act, 2015 since the written statement was filed before the suit migrated to a Commercial Suit. Counsel for the defendant has also relied on Order XI of the CPC, as amended, to urge that further documents can also be allowed to be brought in at this stage under the new procedural regime. A defendant's right under the relevant provisions of the CPC, as it existed before the 2015 Act came into force as compared to the post-amendment position needs to be seen with regard to filing of additional documents after settlement of issues.

7. The defendant's case if considered under the law as existed before coming into force of the Commercial Courts Act of 2015.

Order XIII Rules 1 and 2 of The Code of Civil Procedure relating to Production, Impounding and Return of documents before the Amendment of 1.7.2002 is set out;

*"1. Documentary evidence to be produced *[at or before the settlement of issues]. (1) The parties or their pleaders shall produce, *[at or before the settlement of issues], all the documentary evidence of every description in their possession or power, on which they intend to rely, and which has not already been filed in Court, and all documents which the Court has ordered to be produced.*

(2) The Court shall receive the documents so produced:

Provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs.

*2. Effect of non-production of documents.-**[(1)] No documentary evidence in the possession or power of any party which should have been but has not been, produced in accordance with the requirements of rule 1 shall be received at any subsequent*

stage of the proceedings unless good cause is shown to the satisfaction of the Court for the non-production thereof; and the Court receiving any such evidence shall not record the reasons for so doing.

***[(2)] Nothing in sub-rule (1) shall apply to documents,-*

(a) produced for the cross-examination of the witnesses of the other party, or

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

After the Amendment, Order XIII Rule 1(1), (2) and (3) became as follows:

“Production, Impounding and Return of Documents

1. Original documents to be produced at or before the settlement of issues.- (1)

The parties or their pleader shall produce on or before the settlement of issues, all the documentary evidence in original where the copies thereof have been filed along with plaint or written statement.

(2) The Court shall receive the documents so produced:

Provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs.

(3) Nothing in sub-rule (1) shall apply to documents-

(a) produced for the cross-examination of the witnesses of the other party; or

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

Therefore, the amendment did away with the “good cause” window available to a party for production of documentary evidence at a subsequent stage of the proceedings. Under the existing provisions, the only exception to the obligation upon a party for producing all documentary evidence in original at or before the settlement of issues can be found under Order XIII Rule 1(3) which provides a relaxation for the purpose of the cross-examination of the

witness of the other party or where a document is handed over to a witness merely to refresh his memory.

8. It should be borne in mind that the defendant's case is not that the documents sought to be produced now should be treated as coming under any of the clauses under Order XIII (1)(3).

9. Order VIII Rule 1-A, on the duty of a defendant to produce documents upon which relief is claimed or relied upon by him, provides that a defendant has to enter a document on which the defendant relies upon and will have to produce it in court at the time of presenting the written statement and file the document along with the written statement. Under Order VIII Rule 1-A (3) (inserted with effect from 1.7.2002), a defendant can produce a document which ought to have been produced under Rule 1-A(1) but has not been, with the leave of the court and such document may be received in evidence on behalf of the defendant. Order VIII Rule 1-A is set out below;

Order VIII Rule 1-A.

Duty of defendant to produce documents upon which relief is claimed or relied upon by him.- (1) Where the defendant bases his defence upon a document or relies upon any document in his possession or power, in support of his defence or claim for set-off or counter-claim, he shall enter such document in a list, and shall produce it in Court when the written statement is presented by him and shall, at the same time, deliver the document and a copy thereof, to be filed with the written statement.

(2) Where any such document is not in the possession or power of the defendant, he shall, wherever possible, state in whose possession or power it is.

(3) A document which ought to be produced in Court by the defendant under this rule, but, is not so produced shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

(4) Nothing in this rule shall apply to documents-

(a) produced for the cross-examination of the plaintiff's witnesses, or

(b) handed over to a witness merely to refresh his memory."

10. Does the defendant have any additional recourse under the CPC for production of documents?

Order VIII Rule 1-A (brought into effect from 1.7.2002) is a mirror of a similar right provided to the plaintiff for producing additional documents under Order VII Rule 14 (3), also brought in on 1.7.2002. It can therefore be seen that under the un-amended provisions of the CPC, a defendant's right to produce documents on which relief is claimed or reliance is placed, has been preserved under Order VIII Rule 1-A(3) subject to the defendant obtaining leave from the court. Unlike Order XIII Rule 1, Order VIII Rule 1-A does not mention the time line within which the defendant has to exercise its right to produce additional documents.

11. The defendant's case if considered *after* coming into force of the Commercial Courts Act of 2015.

Rule 1(7) of Order XI of the CPC relating to disclosure, discovery and inspection of documents in suits sets down the procedure for filing of documents in a commercial suit by the defendant. Rule 1(7) requires the defendant to file all documents in its power, possession, control or custody,

pertaining to the suit along with the written statement or the counter-claim with the three exceptions under Order XI Rule 1(7) (c). These exceptions are identical to the two exceptions under Order XIII Rule 1(3), save an additional exception where the defendant is called upon to answer to any case set up by the plaintiff subsequent to the filing of the plaint. Under Order XI Rule 1(10), the defendant can rely on documents which were in the defendant's power, possession, etc. and not disclosed along with the written statement or counter-claim subject to leave of court on the defendant establishing reasonable cause for such non-disclosure. Order XI Rule 1(7) and Rule 1(10) are set out below;

Order XI Rule 1(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 counter-claim if any, including-

(a) the documents referred to and relied on by the defendant in the written statement;

(b) the documents relating to any matter in question in the proceeding in the power, possession, control or custody of the defendant, irrespective of whether the same is in support of or adverse to the defendant's defence;

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

(i) for the cross-examination of plaintiff's 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.

Order XI Rule 1(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 counter-claim, 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 counter claim.

Hence, under the new law, i.e. post-2015, a defendant can rely on additional documents provided the Court grants it leave to do so and upon being satisfied of the reasons shown by the defendant for non-disclosure of the documents along with the written statement.

12. The defendant no.2 has stated in its Affidavit-in-Reply that the procedure for discovery and disclosure of documents in the present suit falls outside the scope of the Commercial Courts Act since both the defendants had already filed their written statements in 2016 and their affidavits of documents in July 2017 before the present suit was directed to appear as a commercial suit on 6th November, 2017. This Court is inclined to accept the aforesaid stand as Section 15 of Chapter V of the 2015 Act dealing with transfer of pending suits provides under sub-section (3):

15. Transfer of pending cases.- (3) *Where any suit or application, including an application under the Arbitration and Conciliation Act, 1996 (26 of 1996), relating to a commercial dispute of Specified Value shall stand transferred to the Commercial Division or Commercial Court under sub-section (1) or sub-section (2), the provisions of this Act shall apply to those procedures that were not complete at the time of transfer.*

Hence, as the filing of the written statements as well as the disclosure and discovery were all completed before the suit migrated to a commercial suit, the defendant would be governed by the un-amended provisions of the CPC, namely, Order VIII Rule 1-A (3) under which, the defendant has only to obtain leave for producing additional documents.

13. Therefore, under the un-amended laws, more specifically Order VIII Rule 1(3), a defendant would have to take leave of the court for producing additional documents for the trial. The '*leave of court*' would necessarily mean that a defendant cannot take the liberty as a matter of right and the court must assess whether the law taken with the attendant facts calls for the leave or not.

14. Revisiting the cases cited, the applications of *NTPC* and *Nestle* (defendants in both cases) for producing further documents were rejected on considering the object of speedy disposal of commercial suits. In *NTPC*, the Bombay High Court dwelt on the total lack of 'good cause' under Rule 172 of the Bombay High Court (Original Side) Rules for the non-production of the new documents compounded by the fact that *RIL* had been allowed to amend its written statement for a second time and three earlier affidavits of documents and most important, that the documents sought to be disclosed by *RIL* in 2014 were in its power and possession since 2004/2005. The Delhi High Court in *Nestle* also focussed on the conduct of the defendant (*Essar*) in seeking to file a large number of additional documents in 2016 in a suit filed in 1993 where the issues were framed in 2000 and 2005, the

plaintiff's evidence concluded in 2015 and the concerned defendants had been permitted to file a fresh affidavit of documents. Considering the conduct of the defendants, the Court disallowed the additional documents on the ground that there was no justification for the defendants to file documents at such a later stage in a suit of 1993 vintage and would also result in delaying the trial. Both the Delhi High Court in *Sadhu Forging* and the Bombay High Court in *Chitrakala Fal Dessai* placed completeness of adjudication over procedure while taking note of the other side having the opportunity of cross-examination of the concerned witnesses. The deletion of Order XIII Rule 2 of the CPC by the Amendment of 1999 and the insertion of Order VII Rule 14 (3) by the Amendment of 2002 for disclosure of additional documents was viewed by the Madras High Court in *K. Kasturi* as a kind of 'compensation' to a party who seeks to file additional documents at the time of hearing of the suit and held that the right of a party to file a document at the time of hearing of the suit, if not already filed along with the plaint, is retained by the amendment of 2002 and is only subject to the party obtaining leave of the court. The plaintiff in *Lindsay International* was allowed to file additional documents at a stage when the sequence of filing of pleadings and documents as introduced under the amended Order XI of the CPC, had not commenced. In that case, a substantial number of defendants had either not entered appearance or filed written statements by reason of which the parties were directed to comply with the sequential stages starting with discovery and inspection of documents of commercial suits under the amended Order XI. The parties in that matter had also proceeded on the

provisions of the CPC, as amended by the Commercial Courts Act. *Lindsay* cannot be of much assistance as the case made out in the pleadings in the present case is that the procedure should fall outside the amending provisions of the Commercial Courts Act.

15. This court is however of the view that leave cannot be obtained or granted as a matter of right and that although Order VIII Rule 1-A(3) does not contain the additional obligations on a defendant as in Order XI Rule 1(10) as amended by the Commercial Courts Act, a court should grant leave upon recording its satisfaction as to why a defendant should have the benefit of the relaxed timelines provided under Order VIII Rule 1-A, which otherwise mandates that documents should be filed along with the written statement.

16. The question of leave would necessarily involve the reasons as to why the 9 documents now sought to be produced are necessary for deciding the present suit. On these facts, why is the defendant no.2 keen to bring in the following 9 documents?

Document A: The credit- rating scales of CARE, Brickwork etc. of debt instruments would be relevant to understand the implication of the revisions in the credit rating of the debentures issued by Amtek Auto which is a principle issue in controversy in the present suit.

Document B: Share price statements of Amtek Auto from January to August 2015 would be required to understand the share price movement during the relevant period.

Documents C, D and E: CARE and Brickwork Statements together with the January Research Report are relevant as they would show whether the defendant no.2 took adequate measures in mitigating the liquidity risk attached to the Amtek non-convertible debentures (NCDs) at the relevant point of time.

Documents F and G: the June Report and a screen-grab from the Bloomberg online portal showing that the default on Amtek NCDs took place for the first time in September 2015 with reference to the plaintiff's evidence that there were red flags around Amtek Auto even before May 2015 which the defendant should have taken note of.

Document H: Copies of fact-sheets of the Treasury and Liquid Fund from January to August 2015 setting out the monthly portfolio of holdings of the funds together with the credit ratings held by the Funds would show whether the defendant took sufficient care in the management of the Funds.

Document I: Investment statement of the plaintiff showing the total returns earned by the plaintiff on its investment in the Liquid Fund is relevant in determining the loss suffered by the plaintiff from its exiting the Liquid Fund.

17. The issue to bear in mind is that allowing the further documents would not mean that the defendant will gain an edge over the plaintiff in the proceedings. The plaintiff will get an opportunity to cross-examine the defendant's witness on the 9 documents and also have the liberty of recalling its witness (under Order XVIII Rule 17) if required. There is a stark difference in the facts leading to the present application and those in *NTPC* and *Nestle*, where the Courts noted the conduct of the respective defendants in sitting over the documents for close to more than 20 years (Essar) and failing to produce the documents despite three opportunities to do so (RIL). In both those decisions, the Courts were also concerned with the conduct of the defendants and the resulting delay caused to the trial in the event additional documents were brought in. The evidence of the defendants' first witness commenced on 21st February, 2020 and continued until 27th February notwithstanding the filing of the present application on 17th February 2020. The defendant did not propose to stall the evidence by pressing for a decision in the application before the proceedings could resume.

18. Being satisfied that the defendant no.2 is entitled to the leave as provided under Order VIII Rule 1-A(3) of The Code of Civil Procedure, G.A. 445 of 2020 is allowed in terms of prayers (a) and (b). The defendant no.2 is granted leave to produce the documents marked "A" to "I" by way of an additional affidavit of documents and file the same by 17th July 2020. A copy of the said additional affidavit of document should be served on the

plaintiff's advocate on record by 10th July 2020. The 9 documents will be put to the witness of the defendant no.2 on the next date of the examination in chief and the plaintiff's counsel will thereafter cross-examine the witness on the said documents. The date of hearing will be fixed upon mentioning by counsel and upon sufficient notice to all concerned.

G.A. 445 of 2020 is disposed of in terms of the above directions.

Urgent Photostat certified copy of this Judgment, if applied for, be supplied to the parties upon compliance of all requisite formalities.

(MOUSHUMI BHATTACHARYA, J.)