

(2014) 10 BOM CK 0096
In the Bombay High Court
Case No : Admiralty Suit No. 33 of 2010

Coromandel International Ltd.

APPELLANT

Vs

M.V. Glory I

RESPONDENT

Date of Decision : 30-10-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 11 Rule 12, Order 11 Rule 13, Order 11 Rule 14, Order 13 Rule 1, Order 18 Rule 4

Citation : (2015) 4 ABR 627 : (2015) 1 ALLMR 619 : (2015) 1 BomCR 795

Hon'ble Judges : K.R. Shriram, J

Bench : Single Bench

Advocate : Bimal Rajasekhar, Advocate i/b Ashwin Shanker, Advocate for the Appellant; V.K. Ramabhadran, Advocate and Subra Karmakar, Advocate for the Respondent

Judgement

K.R. Shriram, J.—The suit is listed today for framing of issues.

At the outset, the counsel for the plaintiff stated that the affidavit of documents of the plaintiff is ready and the plaintiff is relying upon some 156 documents.

The counsel for the defendants objected to the affidavit of documents being taken on record. Relying on Order VII Rule 14 and Order XIII Rule 1 of the Code of Civil Procedure (for brevity referred as "CPC") he submitted that the question of the plaintiff filing any affidavit of documents itself does not arise as no application for discovery has been taken out by the defendants.

The counsel further submitted that the plaint refers to about 21 documents and only those 21 documents can be accepted and nothing more than that. He stated that the plaintiff cannot rely on any document that is not annexed to the plaint. He submitted that as provided in the CPC all documents relied upon by the plaintiff have to be annexed to the plaint with a copy, together with a list thereof. And, the document that is referred in the plaint and it is stated in the plaint that it is not in the possession of the plaintiff and hence not produced and leave is

craved to produce the same at a later stage, originals of only such documents have to and can be produced on or before the settlement of issues. Any other document, without the leave of the Court cannot be received in evidence on behalf of the plaintiff at the hearing of the suit. He submitted that hearing of the suit means when the plaintiff files his affidavit in lieu of examination in chief and before that the plaintiff has to take out an application for leave of the Court to receive those documents in evidence.

He also expressed apprehension that, the written statement having been filed and the defendants having stated in their written statement that the plaint is based on fraudulent arrangements these contentious documents could be even cooked up documents.

2. Mr. Rajashekhar, counsel for the plaintiff disagreed with the submissions of Mr. Ramabhadran and submitted that only crucial documents have to be annexed to the plaint and not the evidence. According to Mr. Rajasekhar, a letter for example will be a crucial document on which a right in favour of plaintiff is created but proof of service or receipt is only a piece of evidence and can be brought in later. He relied upon a judgment of the Privy Council in the matter of Sulaiman Vs. Biyaththumma and Ors AIR 1916 PC 217 in support of this submission.

He also submitted that under Rule 172 of the Bombay High Court (OS) Rules, there is a provision for filing affidavit of documents and supplementary affidavit of documents and therefore all documents including those not referred to or annexed to in the plaint or not included in the list of documents annexed to the plaint can be introduced through the affidavit of documents and only if the same is missed out in the affidavit of documents, should the leave of the Court be sought for receiving any such evidence. In short he said all documents whatsoever on which the parties rely can be introduced even for the first time in the affidavit of documents.

He also submitted that Bombay High Court (OS) Rules will prevail over the CPC since it is settled law that Bombay High Court (OS) Rules are like special law.

3. Mr. Rajasekhar also relied upon a judgment of this Court in the matter of Mohanraj Rupchand Jain alias Chhaged Vs. Kewalchand Hastimal Jain and Others, to submit that the Court should not take a pedantic approach and the Court should construe the same liberally and so long as no prejudice is caused to the defendants, the Court should allow each and every document in evidence. He also submitted that the onus is on the defendants to prove that they are prejudiced and the onus is not on the plaintiff to prove why the documents which were not included in the plaint should be allowed to be taken on record. He also relied upon an unreported order of this Court in the matter of Global Fuels and Lubricants Inc V/s. m.v. Bos Angler & Ors. (Bos Angler) to submit that the Court accepted a document on record on the basis that no prejudice will be caused to the plaintiff, if leave was granted.

He also submitted that CPC expects a plaint not to be verbose but give only facts

and if the Court was to accept Mr. Ramabhadran's submission in a case like the present case, the plaint will be in excess of 300 pages.

4. Bos Angler (supra) is relied upon by Mr. Rajasekhar is not relevant inasmuch as the document in that case was a Power of the Attorney in favour of the plaintiff's witness. The leave was granted because the plaint has been signed and verified and the affidavit in lieu of examination in chief was affirmed based on the said Power of Attorney. A notation of the Power of Attorney being in existence and having been sighted by the Associate of the Court is also made in the plaint. A copy of the Power of Attorney was also annexed to the plaint. Therefore, Bos Angler (supra) is not relevant to the present case.

5. Mr. Rajasekhar further submitted that if Rule 14 of Order 7 of CPC does not apply to a document produced for the cross-examination of the plaintiff's witness, then it means that only crucial documents are required to be annexed and not all the documents.

6. Before I consider the Code of Civil Procedure on this, the admitted position is apart from the 21 documents, none of the other 135 documents, majority of which are e-mails, find a mention even in the plaint and the list of documents annexed to the plaint let alone a copy being annexed to the plaint or produced with the compilation of documents filed while applying for the arrest of the first defendant vessel.

7. CPC as amended with effect from 1.07.2002, reads as under:

ORDER VII, RULE 14:

Production of document on which plaintiff sues or relies:

(1) Where a plaintiff sues upon a document or relies upon document in his possession or power in support of his claim, he shall enter such documents in a list, and shall produce it in Court when the plaint is presented, and shall at the same time deliver the document and a copy thereof, to be filed with the plaint.

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

(3) A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, but is not produced or entered accordingly, 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 apply to documents produced for cross-examination of the plaintiff's witnesses, or, handed to a witness merely to refresh his memory.

ORDER XIII, RULE 1 reads as under:

Original documents to be produced at or before the settlement issues

(1) The parties or their pleaders 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 witness of the other party, or

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

For the purpose of this matter, even order XI, Rule 12, 13 and 14 have to be reproduced as under:

ORDER XI -DISCOVERY AND INSPECTION

12. Application for discovery of documents--Any party may, without filing any affidavit, apply to the Court for an order directing any other party to any suit to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the Court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the suit, or make such order, either generally or limited to certain classes of documents, as may, in its discretion be thought fit:

Provided that discovery shall not be ordered when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

13. Affidavit of documents--The affidavit to be made by a party against whom such order as is mentioned in the last preceding rule has been made, shall specify which (if any) of the documents therein mentioned he objects to produce, and it shall be in Form No. 5 in Appendix C, with such variations as circumstances may require.

14. Production of documents--It shall be lawful for the Court, at any time during the pendency of any suit, to order the production by any party thereto, upon oath of such of the documents in his possession or power, relating to any matter in question in such suit, as the Court shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just.

Even Rule 157, 158, 164, 165 and 172 in Chapter XI-"Matters arising pending suit" of the Bombay High Court (OS) Rules are relevant. The same read as under:

150 to 156.....

157. Directions to be given:-When a suit appears on the board of the Judge in Chambers for directions, the Judge shall, for the speedy determination of the suit

and the avoidance of multiplicity of interlocutory proceedings, give such directions with respect to pleadings, interrogatories, particulars, admission of facts and documents, examination of witnesses, discovery, inspection and production of documents, fixing a date for settling issues and for trial of any issues as preliminary issues, fixing a date for hearing of the suit and such other matters, as he may think fit.

158. No affidavit to be made:-No affidavit shall be made or used by any party when the suit is on board for directions, except by leave of the Judge.

159 to 163

Discovery and Inspection

164. Agent may make affidavit of documents when a party is not residing in Greater Bombay:-Where the transactions which form the subject-matter of a suit have been carried on wholly or principally in Greater Bombay and any party is not residing in Greater Bombay at the time an affidavit of documents is required to be filed, such affidavit may be made on behalf of such absent party by his agent in Greater Bombay. For the purpose of this rule, a resident partner in Greater Bombay shall be the agent of his non-resident partner.

165. Procedure where the affidavit is required to be made by absent party personally:-If in the case provided for by the last preceding rule any party desires to have such affidavit made by all or any of the absent parties personally, he shall be at liberty to apply on summons for an order to that effect to the Judge in Chambers, setting forth the grounds for making such order, and the Judge after hearing the opposite party may make such order; but the party obtaining it shall, before serving the same, deposit a sum of rupees one hundred in Court for the cost of the opposite party of such order and affidavit which costs shall be dealt with by the Judge who tries the case.

172. Effect of non-disclosure of documents:-

No documentary evidence in the possession or power of any party, which should have been but has not been disclosed in the affidavit of documents, or which is required to be disclosed in a supplementary affidavit of documents and has not been disclosed shall be received at any subsequent stage of the proceedings, unless good cause is shown to the satisfaction of the Court for the non-disclosure thereof; and the Court receiving any such evidence shall record the reasons for so doing.

[emphasis supplied]

8. Under Order VII, Rule 14 of the CPC where a plaintiff is suing upon a document or relies upon document in his possession or power in support of its claim, such document has to be entered by the plaintiff in a list to be annexed to the plaint and the plaintiff shall also produce it in Court when the plaint is presented. The plaintiff shall also at the time the plaint is presented produce the

documents and copies thereof. Where any such document is not in the possession or power of the plaintiff, then the plaintiff, where possible, shall state in whose possession or power, the document is. If any such document ought to be produced with the plaint or entered in the list to be added or annexed to the plaint is not so produced or entered accordingly, the plaintiff may still produce the document and the Court may receive the same in evidence provided the plaintiff obtains leave of the Court at the hearing of the suit. This Rule is not applicable to documents produced for the cross examination of the "defendant's witness" not "plaintiff's witness" as the Rule reads. I am reading as "defendant's witness" and not "plaintiff's witness" in view of the judgment of the Apex Court in the matter of Salem Advocate Bar Association, Tamil Nadu Vs. Union of India (UOI), in which the Apex Court has observed that the Legislature by mistake has used the words "plaintiff's witnesses" instead of "defendant's witnesses". Paragraph 34 and 35 of the said judgment read as under:

34 Order VII Rule 14 deals with production of documents which are the basis of the suit or the documents in plaintiff's possession or power. These documents are to be entered in the list of documents and produced in the Court with plaint. Order VII Rule 14(3) requires leave of Court to be obtained for production of the documents later. Order VII Rule 14(4) reads as under:

"14. (4) Nothing in this rule shall apply to document produced for the cross examination of the plaintiff's witnesses, or, handed over to a witness merely to refresh his memory."

In the aforesaid Rule, it is evident that the words "plaintiff's witnesses" have been mentioned as a result of mistake seems to have been committed by the legislature. The words ought to be "defendant's witnesses". There is a similar provision in Order VIII Rule 1A(4) which applies to a defendant. It reads as under:

"1-A. (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."

35 Order VII relates to the production of documents by the plaintiff whereas Order VIII relates to production of documents by the defendant. Under Order VIII Rule 1A(4) a document not produced by defendant can be confronted to the plaintiff's witness during cross-examination. Similarly, the plaintiff can also confront the defendant's witness with a document during cross-examination. By mistake, instead of "defendant's witnesses", the words "plaintiff's witnesses" have been mentioned in Order VII Rule 4. To avoid any confusion, we direct that till the legislature corrects the mistake, the words "plaintiff's witnesses, would be read as "defendant's witnesses" in Order VII Rule 4. We, however, hope that the mistake would be expeditiously corrected by the legislature.

[emphasis supplied]

9. Therefore, the Rule 14 of Order VII of the CPC is very clear that the plaintiff shall produce all the documents with a copy thereof and also enter all the documents in a list annexed to the plaint and if any document is not produced when the plaint is presented should state, if possible, in whose possession the document is. If the plaintiff wishes any document other than those documents produced with the plaint and not entered in the list at the hearing of the suit to be received in evidence on his behalf, the plaintiff has to obtain leave of the Court. Sub-rule, (1) is a blend of old sub-rule (1) and (2) of Rule 14, sub-rule (2) is from old Rule 15 and sub-rules 3 and 4 were originally part of Rule 18 of Order VII. Therefore, in Order VII, the new Rule 14 is a mixture of old Rules 14, 15 and 18. You will find similar provision in Order VIII, Rule, 1A regarding written statement and counterclaim. Rule 6A (4) says for a counterclaim rules of plaint shall apply.

10. Moving to Rule 1 of Order XIII, it provides that the parties or the pleader shall produce on or before the settlement of issues, all the documentary evidence in original where copies thereof have been filed along with the plaint or written statement and the Court shall receive the documents so produced. A precondition to receive those documents is in the Proviso, i.e., the documents should be accompanied by an accurate list thereof prepared in such form as the High Court directs. Sub-rule 1 does not apply to documents produced for the cross-examination of the witnesses of the other party or handed over to the witnesses merely to refresh his memory.

11. Therefore, it cannot be disputed that if the plaintiff fails to mention the documents in the list annexed to the plaint and place the originals and a copy on record of such documents which are required to be produced with the plaint, the plaintiff is not entitled to produce any additional document thereafter except with the leave of the Court. The freedom that the parties, i.e., the plaintiff and the defendants had pre-2002 amendment, to produce all documentary evidence of every description or possession of their power on which they intend to rely and which has not already been filed in Court is no more available post-amendment. Under the old Order VII, Rule 1(2) of CPC, it says "where he sues on any document in his possession, he shall deliver the same in plaint and those not in his possession, he shall enter the same in a list to be annexed to the plaint". Under the old Order XIII, Rule 1, parties could produce all the documentary evidence, on which they intended to rely and which has not been filed in the Court, at or before the settlement of issues. The amended Order XIII, Rule 1 says "... where copies thereof have been filed along with the plaint or written statement". The words were not there pre-amendment. Therefore, the parties were permitted to produce those missed out documents by filing an affidavit of documents before or at the time of settlement of issues. That freedom, as it appears from the Commentary by Mulla on the Code of Civil Procedure (18th Edition), 2011, to file documents in evidence at any subsequent stage of the suit stand curtailed and this has been done to expedite the hearing of the suit and also bar the litigants from taking the other party by surprise. Post-amendment, it

would appear, even the discretion the Court exercised relating to time when the original documents have to be filed in a case is not left. It makes the parties and pleaders to produce their original documents at the time the plaint is filed and only those documents the originals whereof could not be filed with the plaint and copies were filed, could be filed on or before the settlement of issues. Or else at the time of the hearing, leave of the Court has to be obtained to produce further documents.

12. The judgment of the Privy Council in Sulaiman Vs. Biyaththumma and Ors. (supra) relied upon by the counsel for the plaintiff does not anywhere state that only crucial documents have to be annexed to the plaint.

13. In my view, all documents are crucial. Other than the 21 documents copies of which were filed in the compilation of documents filed when the arrest application was moved, the remaining 135 documents appear to be all emails and correspondence exchanged between persons who are not parties to the suit or only one party is party to the suit. The plaintiff wants to rely on those emails only because they are crucial to prove the plaintiff's case. Certainly these emails were available at the time when the plaint was presented and even before the amendment to the plaint was carried out. In fact, the Privy Council, referring to Section 59 of the CPC of 1882 (Order VII, Rule 14 of CPC 1908) in the Sulaiman Vs. Biyaththumma and Ors. (supra) also states that a document referred to or sought to be enforced in a suit must be produced in Court when the plaint was presented or a copy thereof must be filed with the plaint. Therefore, it does not help the plaintiff's case at all.

14. Even the judgment passed by this Court in the case of Mohanraj Rupchand Jain Vs. Kewalchand Hastimal Jain & Ors. (supra) which was in a writ petition challenging the order passed by the revisional bench of the Small Causes Court, Mumbai, in paragraphs 5, 6 and 8 which are reproduced herein, confirms the fact that Order VII Rule 14 provides that a document which ought to be produced by the plaintiff when the plaint is presented or to be entered in the list annexed to the plaint but is not produced or entered and if the plaintiff wants to produce the same later, it can be done only with the leave of the Court. Paragraph 5, 6 and 8 read as under:

5. Perusal of the order passed by the trial Judge discloses that the petitioner had taken out the notice for rejecting the documents which were filed along with the affidavit under Order XVIII, Rule 4 of the Code as also for rejection of the suit. The learned Judge, after hearing the parties and on consideration of the Order VII, Rule 14 of the Code, held that though in terms of the Order VII, Rule 14 of the Code it is necessary for the parties to produce documents on which the suit is based as also to submit a copy of the list of documents which are relied upon, the petitioner having failed to make out any case of prejudice on account of admission in evidence, the documents which are sought to be produced by the respondents along with the affidavit under Order XVIII, Rule 4 of the Code, while reserving the right of the petitioner to lead necessary evidence in rebuttal, has

rejected the said application filed by the petitioner. As far as the order of the Revisional Bench is concerned, it discloses that the revision application has been dismissed as not maintainable after taking into consideration the decision in Sukhdev Prasad Raghubir's case (supra).

6. It cannot be disputed that in terms of Order VII, Rule 14 of the Code, where a plaintiff sues upon a document in his possession or power in support of his claim, he shall enter such document in a list, and shall produce it in Court when the plaint is presented by him and shall, at the same time deliver the document and a copy thereof to be filed with the plaint. Sub-rule (3) of Rule 14 thereof clearly provides that a document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint but is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit. Sub-rule (4) thereof provides that nothing in the said rule shall apply to document produced for the cross-examination of the plaintiffs witnesses, or, handed over to a witness merely to refresh his memory. Similar is the provision under the Sub-clause (3) of Rule 1 of the Order XIII of the Code. Being so, it cannot be disputed that if the plaintiff fails to mention the documents in the list annexed to the plaint and to place on record a copy of such document, which is required to be produced under the law at the time of filing of the plaint, the plaintiff is not entitled to produce any additional document thereafter, without the leave of the Court. The contention of the learned advocate for the petitioner, however, is that such leave has necessarily to be obtained prior to the documents being placed on record. The contention cannot be found fault with. But, at the same time, it is also to be noted that nothing prevents the Court in its discretion to grant leave subsequent to the documents being produced before the Court even though such documents were not entered in the list annexed to the plaint. It would depend upon the facts of each case. Undoubtedly, the order of the Court in that regard will have to be a speaking and reasoned order. In the case in hand, however, the said issue does not arise at all.

[emphasis supplied]

7.

8. It cannot be forgotten that the provision comprised under Order VII, Rule 14 of the Code relates to the procedure to be followed in the civil proceedings before the Court. The said provision is essentially to assist the parties as well as the Court in the matter of production of the documentary evidence of the plaintiff while adjudicating the dispute raised before the Court. Being so, it is essentially to assist the parties and the Court to arrive at an appropriate decision on the matter in dispute. Being so, the provision in that regard is necessarily to be construed liberally, and no pedantic approach should be adopted while enforcing the said provision of law. The documentary evidence which is not disputed to be relevant and material for the just and appropriate decision in the matter, merely because the respondents had failed to enter the same in the list annexed to the

plaint, could not be ignored, unless it is shown by the petitioner that there would be real prejudice caused to the petitioner on account of the respondents being allowed to produce such documents. A document which pertains to the matter in issue cannot be said to cause prejudice to either of the parties, merely because there is some delay in production of such document. It is to be noted that the deponent who has filed the affidavit on behalf of the respondents along with the documents is yet to be cross-examined and evidence in that regard by the petitioner is yet to be led in the matter. Being so, there would be ample opportunity to the petitioner to meet those documents in the course of recording of evidence including the cross-examination of the witness of the respondents.

15. The Court also says that nothing prevents the Court in its discretion to grant leave subsequent to the documents being produced before the Court even though such documents were not annexed to plaint or included in the list annexed to the plaint and no pedantic approach should be adopted. At the same time, this Court also says it would depend on the facts of each case and the order of the Court in that regard will be speaking and reasoned order. The Court cannot give a speaking and reasoned order unless an application is made for leave to produce such documents that were not presented with the plaint or entered in the list annexed to the plaint. Therefore, the plaintiff will have to apply explaining as to why these documents were not annexed to the plaint or included in the list of documents and why leave should be granted. It is not for the defendants, as submitted by Mr. Rajasekhar, to take out an application explaining what prejudice will be caused if the document is accepted in evidence.

16. Coming to the affidavit of documents under Order XI, Rule 12 of the CPC any party, may, without filing any affidavit, apply to the Court for an order directing any other party to any suit to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein and if the Court allows the application then the party against whom such an order under Rule 12 is made, shall file an affidavit of documents under Rule 13 of Order XI and specify which (if any) of the documents therein mentioned he objects to produce. This has to be read with Order VII, Rule 14 [and Order VIII, Rule 1A(2)] of CPC which says where any document is not in the possession or power of the plaintiff/[defendant], he shall, where possible, state in whose possession or power it is.

17. As regards the submission of Mr. Rajasekhar that this Court had directed the plaintiff to file their affidavit of documents and hence the plaintiff is filing the affidavit of documents, it is true that this Court had directed filing the affidavit of documents and complete discovery and inspection.

Mr. Rajasekhar may find support in Order XI, Rule 14 and High Court (OS) Rule 172, which are reproduced earlier. Rule 12 and Rule 14 are independent of each other and it is not necessary in every case that an application has to be made only under Rule 12 first. Rule 13 is a result of an order passed on an application made under rule 12. But under Rule 14, no such application is necessary. The

Court has the power to direct production of documents without any application by any party and such production of documents that the party has in his possession or power relating to any matter in question in the suit, has to be made on oath. A party can produce documents in his possession or power under oath only by filing an affidavit of documents. It has been a practice of this Court, once the pleadings are completed, to direct parties to file affidavit of documents and also complete discovery and inspection within a fixed period. This means that all parties are directed to produce on oath, by filing an affidavit of documents, all documents in their possession or power, that they feel is required relating to any matter in question in the suit. As and when they are disclosed in the affidavit, the other party gets to take inspection and also gets copies thereof. Just because a document which has not been referred to at all in the plaint is disclosed for the first time in the affidavit also will not cause any prejudice to the other party. Simple disclosure does not mean that the document will be received in evidence and even if received and marked as an exhibit, the other party may cross examine the witness.

In this case also directions have been passed to the parties to produce upon oath all documents that it has in its possession or power relating to any matter in this suit. Hence the affidavit of documents as being filed by the plaintiff has to be accepted and taken on record.

18. Rule 157 of the High Court (OS) Rules also provides that the Court for speedy determination of the suit and the avoidance of multiplicity of interlocutory proceeding, shall give such directions with respect of admission of facts and documents, discovery inspection and production of documents etc.

19. Under Rule 164, it provides "at the time an affidavit of documents is required to be filed, such affidavit may be ". So also Rule 165 that provides, "if in the case provided for by the last preceding rule any party desires to have such affidavit made..... " Therefore, under Rule 164, it says "affidavit of documents is required to be filed, such affidavit" and Rule 165 says, "in the case provided for in the last preceding rule..... such affidavit made". "Such affidavit" could mean an affidavit of documents required to be filed under Order XI, Rule 13 pursuant to an order passed under Order XI, Rule 12 or as per directions passed under Rule 14. So in cases where an affidavit of documents is required to be filed under Order XI, Rule 13 or 14, then, when such an affidavit is required to be filed an agent may do so as provided under Rule 164. Rule 165 only provides for the procedure to be followed where such affidavit is required to be made by the absent party personally.

20. It is well settled that the Bombay High Court (OS) Rules are like special law and the rules will prevail. Rule 172 provides, no documentary evidence in the possession or power of any party, which should have been but has not been disclosed in the affidavit of documents, or which is required to be disclosed in a supplementary affidavit of documents and has not been disclosed shall be received at any subsequent stage unless good cause is shown for non-disclosure

thereof. Therefore, this affidavit of documents being filed by the plaintiff can be accepted and only for those documents that have not been annexed to the plaint and/or disclosed in the affidavit of documents, leave of the Court is required at the hearing of the suit to be received in evidence.

21. In this Court, there has been a practice where plaint is filed only with photocopies of documents relied upon and such a plaint is admitted. There has also been a practice of the Prothonotary and Senior Master and the Courts herein directing the parties, after the pleadings are completed, to file their affidavit of documents and complete discovery and inspection.

If the plaintiff/defendant wants any document, copies whereof are not annexed to the plaint or written statement and/or not included in the list of documents annexed to the plaint/written statement or in the affidavit of documents, to be received in evidence at the hearing of the suit, the plaintiff/defendant can always apply to the Court for leave.

22. In the circumstances, if the plaintiff wishes to rely upon any document other than the 21 documents that were produced at the time of arrest of the 1st defendant vessel and additional 135 documents referred to in the affidavit of documents, the plaintiff may apply if so advised. Such leave can be applied for, to reduce multiplicity of proceedings and to avoid delay in beginning of trial, in the affidavit of evidence itself filed under Order XVIII, Rule 4 of CPC.

23. I should also clarify that this order should not be construed as making any observation on the admissibility of any of the 156 documents listed.