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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CS(COMM) 279/2020 & I.A. 24/2024**

**WATERBRIDGE CAPITAL
MANAGEMENT LLP**

..... Plaintiff

Through: Mr. Naman Joshi, Ms. Ritika Vohra
and Mr. Anirudh Singh Advs (M.
9810057280)

versus

ASIAN HOTELS (NORTH) LIMITED

..... Defendant

Through: Mr. Sidhant Kumar, Mr. Shivankar
Rao, Mr. Om Batra, Advs. (M.
9810225856)

CORAM:

JUSTICE PRATHIBA M. SINGH

ORDER

% **04.01.2024**

1. This hearing has been done through hybrid mode.

I.A.24/2024 (seeking rejection of evidence)

2. This is an application seeking rejection of an affidavit in evidence dated 13th December, 2023 filed by the Plaintiff. Issues were framed in this matter on 16th November, 2023 and three weeks time was granted to file affidavit of evidence and thereafter the matter was listed for recording of Plaintiff's evidence before the Local Commissioner.

3. The disputes arises out of a lease and maintenance agreement dated 29th July, 2019 along with recoveries of monies being claimed by both parties.

4. In the present case the affidavit of Ms. Anubha Jaiswal has been filed, to which the Defendant has an objection on the ground that the following



four documents, which have been annexed with the said affidavit, were not on record along with the Plaint, and the same have been filed without seeking leave of the Court. The said documents are as under:

- (a) A copy of Partner's Resolution dated 12th December 2023
- (b) A copy of email dated 3rd October 2019
- (c) A copy of video footage
- (d) A copy of media report dated 3rd March 2020

5. The matter is listed today before the Local Commissioner for recordal of the evidence at 2pm. Ld. counsel for the applicant *i.e.*, the Defendant submits that the partner resolution, the email as also other above stated documents including the video footage & media report were documents in the power and possession of the Plaintiff and the same cannot be filed at this stage when the evidence is about to commence. Mr. Marwah, ld. counsel for the Defendant relies upon the decision of a ld. Single Judge of this Court in ***Zee Entertainment Enterprises Ltd. v. Saregama India Ltd., 2019:DHC:4487*** wherein it was observed that the Plaintiff is required to go through all the documents in his power, possession, control or custody whether in support or adverse and make a declaration thereto, before instituting the suit. Further it was held that embargo as per Order XI Rule 1 (5), which does not allow the Plaintiff's to rely on such documents can be lifted only upon the establishment of reasonable cause for non-disclosure.

6. On the other hand, Mr. Naman Joshi ld. Counsel for the Plaintiff submits that the affidavit has been filed of a person in whose favour the resolution was required as the earlier resolution in favour of the said witness had been misplaced due to shifting. Insofar as the email dated 3rd October, 2019 is concerned, the same is an email addressed by a third party to both



the Plaintiff and the Defendant and in fact, it has not been disputed during the course of pleadings and documents.

7. Insofar as the video footage and media report is concerned, the same relates to water seepage in the building, which the Plaintiff wishes to rely upon. He relied upon the decision of this Court in ***Xerox Corporation & Anr. v. P.K. Khansaheb & Anr., (2019) 77 PTC 249.***

8. After having considered the matter and the two decisions, which have been relied upon by the parties, this Court is of the view that insofar as the documents at serial number (a) and (b) are concerned, the same deserve to be taken on record and exhibited as the resolution is dated 12th December, 2023, which is subsequent to the filing of the suit and insofar as the email is concerned, the Defendant does not dispute the existence of the said email.

9. Only two documents in respect of which there is a dispute, are the documents at the serial numbers (c) & (d) above. It has been observed in ***Xerox Corporation (supra)*** that whenever documents are filed with the affidavit in evidence, in order to ensure that delay is not occurred in the recordal of evidence, especially when the witness is present, the documents should be exhibited, subject to the objection being taken by the Defendant and the evidence would proceed. The relevant portions of the said judgment are set out below:

“14. What is the procedure to be followed in case documents are attached with the affidavit-in-evidence? Is the Joint Registrar required to place the case before the Court before recording the examination-in-chief when the affidavit-in-evidence is filed with documents? As per the procedure, examination-in-chief and exhibit marking is required to be done when the witness is present. The exhibition of documents which are filed



with the affidavit-in-evidence is a process which is performed in front of the Joint Registrar/Local Commissioner and if in each and every case where the affidavit is filed with documents, the matter is placed before the Court, it would in effect mean that no evidence can be recorded on the said date. The purpose of recordal of evidence by affidavit and expeditious recordal there to would completely be defeated. With this object in mind, Order XVIII Rule 4(1), provides as under: “Order XVIII Rule 4. Recording of evidence:- (1) In every case, the examination-in-chief of a witness shall be on affidavit and copier thereof shall be supplied to the opposite party by the party who calls him for evidence. Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with affidavit shall be subject to the orders of the Court.

15. Even, the DHC (OS) Rules specifically have a provision in respect of objections to exhibition of documents in Chapter XI Rule 11. The same reads as under: “Chapter XI Rule 11. Objections to exhibition of documents. – (i) Objection(s) to exhibiting any document or its production, shall be recorded to be decided at the time of decision of the suit/ other original proceeding or at such time as the Court considers appropriate (ii) In case, the Registrar/ Commissioner considers that the objection(s) needs to be decided forthwith, he shall place the matter before Court, without delay after recording of reasons for the same.”

16. Further, in amendments to the DHC (OS) Rules, that have been introduced w.e.f. 1st November, 2018, the Rule with respect to documents has also been considerably streamlined and copies of documents are sufficient to be filed and originals need not be filed. The purpose of the DHC (OS) Rules and the amendments thereof is to ensure that documents are



not objected to just for the sake for doing so, unless there is a serious allegation in respect of the documents or exhibition thereof such as fraud, forgery, fabrication, etc.

17. Documents that are relevant for adjudication of issues usually ought to be accepted and taken. The purpose of recordal of examination-in-chief by way of evidence ensures that the affidavit along with all the documents is given in advance to the opposite side so that any objection can be recorded at the time of exhibit marking. The view taken by the Supreme Court in Bipin Shantilal Panchal v. State of Gujarat & Ors. 2001 (3) SCC 1 and the Division Bench of this Court in Exide Industries Ltd. v. Exide Corporation USA & Ors., is to ensure that repeated objections are not taken against documents so as to increase the inconvenience to witnesses who have to appear before the Court for recordal of evidence. The procedural safeguard that documents should be filed with pleadings is to ensure that the opposite side has notice of all the documents and by attaching the documents with affidavit-in-evidence and supplying advance copies of the same, that purpose is being satisfied. Thus unless there is an allegation of egregious nature against a particular document, usually documents filed by witnesses, which are broadly within pleadings, ought to be either exhibited or marked at the time of when the same are being tendered after recording all the objections raised by the parties. The said objections should not de-rail the trial of the suit in any manner as it has happened in the present case.

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20. A conjoint reading of the provisions of the CPC, the Commercial Courts Act and the DHC (OS) Rules 2018 (as notified w.e.f. 1st November 2018) requires parties to broadly adhere to the following procedure in respect of documents, admission/denial, exhibit marking and during recordal of evidence.



- a) All documents in the power of possession of parties are required to be filed with the pleadings [Order VII Rule 14 and Order VIII, Rule 1A CPC, Order XI Rule 1 CPC as amended by the Commercial Courts Act, Chapter IV, Rule 1 and Annexure E of the DHC(OS) Rules, 2018, as amended by Notification No.722/Rules/DHC dated 16th October, 2018];*
- b) Filing of copies is sufficient [Chapter IV Rule 1(a), as amended by Notification No.722/Rules/DHC dated 16th October, 2018];*
- c) If a party wishes to inspect original documents, notice ought to be given by the counsel and at a mutually convenient date, time and venue, inspection ought to be given within the time stipulated [Order XI Rule 15 & 17 CPC, Order XI Rule 3 CPC as amended by the Commercial Courts Act, Chapter VIII of the DHC (OS) Rules, Chapter VII Rule 2(ii) of the DHC (OS) Rules as amended by Notification No. 722/Rules/DHC dated 16th October, 2018];*
- d) Affidavits/Statements of admission/denial have to be filed with either the Written Statement or the Replication [Chapter VII Rule 3, Rule 6 and Rule 7 of the DHC (OS) Rules];*
- e) After inspection is sought and given, a document schedule shall be filed before the Joint registrar, duly endorsed by counsels for all parties [Chapter VII Rule 7A of the DHC (OS) Rules as amended by Notification No.722/Rules/DHC dated 16th October, 2018];*
- f) Exhibit marking shall be carried out by the Joint Registrar on the basis of the Document Schedule [Chapter VII, Rule 16 of the DHC (OS) Rules as amended by Notification No.722/Rules/DHC dated 16th October, 2018];*
- g) If any party wishes to file any documents after Issues are struck and the matter has proceeded for evidence, leave has to be sought from the Court [Order XI Rule 5 CPC as amended by the Commercial Courts Act];*
- h) Affidavits of evidence usually should not have any*



documents attached to them. Any objections raised in respect of the said documents are to be recorded subject to the orders of the Court. [Order XVIII Rule 4 (1) CPC, Order XIX Rule 3 CPC as amended by the Commercial Courts Act, Chapter XI Rule 1(ii), Chapter XIX of the DHC (OS) Rules]. However, in respect of such documents attached with the affidavits in evidence, the witness ought to state reasons in the affidavit itself as to why the same were not filed earlier. The said documents have to be within the broad contours of the pleadings and the documents already on record. Advance copies of the same ought to be served.

i) At the time of examination in chief, objections can be raised, which shall be recorded by the Joint Registrar or the Local Commissioner and the trial will continue. No derailment of the trial is permitted, once the witness is present [Order XVIII Rule 4(1) CPC, Chapter XI Rule 11 of the DHC (OS) Rules].

10. The present case would clearly be governed by the directions given in paragraphs 20(h) of the ***Xerox Corporation (supra)***. Advance copy of the evidence and the documents have already been served upon the Defendant. Accordingly, the following directions are issued in the matter in terms of ***Xerox Corporation (supra)***.

i. All the documents shall be exhibited subject to the objection that no explanation or substantial cause has been shown for not filing the documents at (c) & (d) stated above earlier. The cross-examination in respect of the said documents shall, however, be conducted subject to the objection. The Plaintiff would be required to prove the documents including the electronic evidence in accordance with law. The same shall be



subject to payment of Rs.20,000/- as costs to be paid to the Defendant within two weeks.

ii. The objections relating to documents at serial numbers (c) & (d) shall be first adjudicated at the stage of final hearing and thereafter, the matter would proceed for hearing.

iii. If the Defendant wishes to file any rebuttal documents in its evidence in response to the above documents, it is free to do so.

11. The Local Commissioner shall proceed for recordal of evidence today at 2:00 pm.

12. The application is disposed of in the above terms.

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13. Delay in filing the affidavit is also condoned, subject to the above terms. Thus, the application being ***I.A.25265/2023*** is disposed of.

14. List on 24th April, 2024, the date already fixed.

PRATHIBA M. SINGH, J.

JANURARY 04, 2024/dk/ks