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

% Date of Decision: 09.03.2021

+ CS(COMM) 84/2019 & IA. 9890/2020

KENT RO SYSTEMS LTD. & ANR. .... Plaintiffs  
Through Ms.H.Rajeshwari, Mr.Vikramjeet and  
Mr.Talwaj A.J., Advs.  
versus

JAIDEEP KISHNANI & ORS. .... Defendants  
Through Mr.Neeraj Grover, Ms.Meenakshi  
Ogra and Ms.Suvangana Agarwal,  
Advs.

**CORAM:  
HON'BLE MR. JUSTICE JAYANT NATH**

**JAYANT NATH, J. (Oral)**

**IA. No.9890/2020**

1. This application is filed by the defendants under Order 11 Rule 1 (10) of the Code of Civil Procedure seeking leave of the court to file additional documents.
2. It is stated that the present suit was filed in the District Court alleging infringement of plaintiffs' design. In view of various grounds and defences taken by the defendants/applicants in the written statement and in view of Section 22 (4) of the Designs Act, 2000, the suit was transferred to this court on 11.02.2019.
3. It is pleaded that under the scheme of the Designs Act, a design registration can be obtained for new or original features of shape, configuration, pattern, ornament or composition of lines or colours applied

to any article. It is stated that in the plaint the plaintiffs have nowhere stated what exactly is the novelty claimed in respect of design Nos.262661 & 252225. All that is stated is “The product using design No.262661 being octagonal in shape is unique”.

4. It is pleaded in the written statement that plaintiff's design Nos.262661 & 252225 are not novel and have been published prior to in the industry.

5. Hence, it is pleaded that via the present application the defendants/applicants wish to place on record various documents exhibiting prior publications in reference to impugned design Nos.262661 & 252225. It is further stated that recently the counsel for defendants stumbled upon the judgment of this Court in *M/s Crocs Inc. USA vs. Bata India Ltd & Ors., (2019) 78 PTC 1*, where he came across the existence of "WayBack Machine", which is an internet archive i.e. a non-profit library of millions of free books, movies, software, etc. This website provides screen shots of web pages which could be searched for on the web archive. The search was started for prior publication of water purifiers with ‘novel’ features, as has been claimed by the plaintiffs in respect of two registered design Nos.262661 & 252225 and the defendant came across various web pages advertising water purifiers, prior to the date of registration of plaintiff's designs. It is pleaded that it has become imperative to place these documents on record which have now been discovered on the web to strengthen its objection of prior publication already stated in the written statement. It is pleaded that these documents are necessary to show that the ‘novel’ features claimed by the plaintiffs existed in public domain and the same were available to the public prior to the date of registration of the plaintiffs’ said

designs. Hence, the present application.

6. In the reply, the plaintiffs have stated that the plea taken by the defendant that he was unaware of the website “WayBack Machine” is not a ground in law to sustain the present application. The said website has been in existence since 1995. It is urged that after filing of the written statement in October, 2018, the learned counsel for the defendants has changed and it is clear that the filing of the additional documents is nothing but an afterthought and a device of indirect improvement of the written statement, and there is no subsequent development. It is stated that a vague plea was raised by the defendants in the written statement that the plaintiffs’ designs were pre-published and covered by prior art but no specific prior art was produced. The plea remained unsubstantiated. The matter has now reached the stage of evidence and the defendants have realised that their case is weak. Through the present application the defendants are merely trying to improve their case by introducing documents which were always available to them. It is further stated that the defendants have sought to file 13 additional documents out of which 7 do not relate to the website WayBack Machine. Hence, the documents filed by the defendants should not be considered at all.

7. I have heard learned counsel for the parties.

8. Learned counsel for the defendants/applicants has urged that the documents proposed to be taken on record relate to issue No.IV framed on 10.02.2020. The applicants seek to place on record copies of three applications before the concerned registration office. Two applications are of third parties and balance comprises of internet records. Reliance is placed on judgment of the Supreme Court in the case of *N. Balakrishnan v. M.*

*Krishnamurthy AIR 1998 SC 3222* and judgment of a Co-ordinate Bench of this court in the case of *Hassad Food Company Q.S.C. & Ors. v. Bank of India & Ors., 2019 SCC OnLine Del 10647*).

9. Learned counsel for the plaintiffs has vehemently opposed the present application. She relies upon the written statement filed by the defendants to state that other than a bald statement that there is no novelty in the said designs-in-question, there is no elaboration in the written statement. By allowing the present documents to be introduced after pleadings are over and evidence has commenced would tantamount to depriving the plaintiffs of an opportunity to comment on the said documents in the pleadings. The pleas as already elaborated were mainly bald pleas, and are now sought to be elaborated without giving an opportunity to the plaintiffs to respond to the same. She relies upon a judgment of a Co-ordinate Bench of this court in the case of *Zee Entertainment Enterprises Ltd. v. Saregama India Ltd.*, CS (COMM) 1674/2016 dated 11.09.2019 and a judgment of a Division Bench of this court in the case of *Santosh Malik (since deceased) Through Lrs. vs. Maharaj Krishan & Anr. 2012 (127) DRJ 582*.

10. *Order 11 Rule 1 Sub - Rules 7 and 10 CPC* as applicable for Commercial Division of the High Courts or Commercial Courts read as follows:

**“ORDER XI**

Disclosure, Discovery and Inspection of Documents in Suits  
Before the Commercial Division of a High Court or a  
Commercial Court

**1. Disclosure and discovery of documents-**

xxx

(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 the plaintiff's witnesses,

(ii) in answer to any case setup by the plaintiff subsequent to the filing of the plaint, or

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

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(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;”

11. Hence, a defendant shall not be allowed to rely on documents which are in the defendant's power, possession, control or custody and not disclosed along with the written statement except by leave of the court which is to be granted only to the defendants on establishing a reasonable cause for non-disclosure along with the written statement or counter claim.

12. A Co-ordinate Bench of this court in *Zee Entertainment Enterprises*

*Ltd. vs. Saregama India Ltd.*(supra) held as follows:

“1.The plaintiff in this commercial suit, after framing of issues on 9th October, 2017 and after commencement of the recording of evidence, seeks leave to file additional documents.

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13.The changes brought about by the Commercial Courts Act, 2015 in respect of filing of documents having already been discussed in Nitin Gupta and Societe Des Produits Nestle S.A. supra, need to reiterate the same is not felt. Suffice it is to state that:

(a) while Order VII Rule 14 of the CPC, applicable to ordinary suits, requires a plaintiff, when suing upon a document or relying upon documents in his possession or power in support of his claim, to enter such documents in a list and to produce it in the Court when the plaint is presented by him, Order XI Rules 1 to 3 of the CPC as applicable to commercial suits requires a plaintiff to 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 plaint including documents relating to any matter in question in the proceedings, in the power, possession, control or custody of the plaintiff, as on the date of filing the plaint, irrespective of whether the same is in support of or adverse to the plaintiff’s case and to, in the said list also specify whether the documents in the power, possession, control or custody of the plaintiff are originals, office copies or photocopies and the list to also set out in brief, details of parties to each document, mode of execution, issuance or receipt and line of custody of each document; the plaint is also required to contain a declaration on oath from the plaintiff that all documents in the power, possession, control or custody of the plaintiff, pertaining to the facts and circumstances of the proceedings initiated by him have been disclosed and copies thereof annexed with the plaint, and that the plaintiff does not have any other documents in its power, possession, control or custody;

(b) while Order VII Rule 14(3) of the CPC pertaining to

ordinary suits 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, such document, without the leave of the Court, shall not be received in evidence on behalf of the plaintiff at the hearing of the suit,

Order XI Rule 1(5) pertaining to commercial suits, bars the Court from allowing the plaintiff to rely on documents which were in the plaintiff's power, possession, control or custody and not disclosed along with the plaint, save and except by leave of the Court and which leave shall be granted only upon the plaintiff establishing requisite cause for non-disclosure along with the plaint.

It would thus be seen that the requirement for filing of documents along with the plaint is much more detailed, precise and specific in a commercial suit than in an ordinary suit. The plaintiff in an ordinary suit is required to produce along with the plaint only such documents on which he is suing or on which he intends to rely in support of his claim. On the contrary, in a commercial suit, the plaintiff along with the plaint is required to file all documents pertaining to the suit irrespective of, whether the same are in support of or adverse to the claim of the plaintiff. The list of documents required to be filed by a plaintiff in an ordinary suit is only required to have an entry of the document. On the contrary, the list of documents required to be filed by a plaintiff in a commercial suit is required to specify, whether the documents are originals or office copies or photocopies and also contain details of parties to each document, mode of execution and line of custody of each document. The plaint in a commercial suit is also required to contain a declaration on oath from the plaintiff with respect to the documents, as aforesaid. There is no such requirement in the ordinary suit.

14. What emerges is, that the plaintiff in a commercial suit, before instituting the suit, is required to go through all the documents in his power, possession, control or custody pertaining to the subject matter of the suit, whether in support of or adverse to his case and make a declaration with respect thereto on oath. The requirement in a commercial suit of declaration on oath qua the documents is not an empty formality. The form of list of documents and the particulars/specifications to be contained therein, coupled with declaration on oath with respect thereto, in a commercial suit, requires a plaintiff to, at the time of institution of suit, rather than stating only the title and date of the document, which alone is required to be filled in the list of documents in an ordinary suit, peruse each document and only then fill the particulars/specifications required to be filled in the list of documents. The requirement of such contents being declared to be correct on oath, places a more heavy onus on the plaintiff.

15. Preparation of such a list of documents as aforesaid, leaves no scope of “inadvertent errors” as is pleaded by the plaintiff.”

13. Clearly, the procedure for filing documents in a commercial suit requires meticulous compliance by the defendants. The defendant has to file a detailed list of all the documents in its power, possession, control or custody pertaining to the suit along with the written statement. The written statement shall also contain a declaration on oath made by the deponent that all the documents in the power, possession, control or custody of the defendant pertaining to the facts and circumstance of the proceedings initiated by the plaintiff has been disclosed and copies thereon annexed with the written statement and the defendant does not have in its power, possession, control or custody any other document. Leave can only be granted to the defendant to file new documents after filing of the written statement on the defendant establishing reasonable cause for non-disclosure

along with the written statement.

14. There is merit in the plea of the learned counsel for the plaintiff that the written statement filed by the defendants does not contain any details as to why the design of the plaintiffs-in-question 262661 is not novel. A bald plea is taken in para 7(c) of the written statement that the design is not novel and has been prior published in the industry. Further details are not given. By the present application the defendant seek to introduce documents to show alleged prior publication much after filing of the written statement and framing of issues. Further by the time this application was filed, the plaintiff had filed its evidence by way of affidavit. Great prejudice would be caused to the plaintiff if the present application is allowed and the fresh evidence is permitted to be taken on record. Further the proceedings would get needlessly delayed.

15. I may look at the judgment relied upon by learned counsel for the defendants. In *Hassad Food Company Q.S.C. & Ors. v. Bank of India & Ors.*(supra), the Co-ordinate Bench of this court held as follows:

“13. Perusal of Order XI as noted above reveals that the plaintiff is bound to file all documents in its power, possession, control or custody with the plaint and in case of urgent filing of a suit if some additional documents are to be filed under sub-rule (1) of Rule 1 of Order XI, the plaintiff may seek leave of the Court to rely on additional documents which additional documents are required to be filed within 30 days of filing of the suit. Under sub-rule (5) of Rule 1 of Order XI, the plaintiff shall not be allowed to rely on documents which were in the plaintiff’s power, possession, control or custody and not disclosed along with the plaint or within the extended period save and except by leave of the Court which leave can be granted only if the plaintiff establishes reasonable cause for non-disclosure along with the plaint. The language used in the sub-rule (5) is that the plaintiff is required to show “a

reasonable cause” and not a “sufficient cause” as is ordinarily provided in other provisions.

14. While dealing with Order XIII Rule 2 CPC wherein the words used are: “unless good cause is shown”, the Supreme Court in the decision reported as (2002) 1 SCC 535 Madanlal vs. Shyamlal, noted the distinction between “good cause” and “sufficient cause” and held that “good cause” requires a lower degree of proof as compared to “sufficient cause” and thus the power under Order XIII Rule 2 CPC should be exercised liberally. Sub Rule (5) of Rule 1 of Order XI of the Commercial Courts Act, 2015 uses the phrase “reasonable cause” which would require even a lower degree of proof as compared to “good cause”.

16. In my opinion, in the facts of this case, it cannot be said that the defendants have even shown reasonable cause for the belated filing of these documents at this stage. The above judgment does not assist the case of the defendant.

17. There is no merit in the present application. The same is dismissed.

**MARCH 9, 2021/v**  
Corrected and released  
on 08.04.2021.

**JAYANT NATH, J.**

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