

NTPC Ltd. and Another Vs. Reliance Industries Ltd.

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Court : Mumbai

Decided On : Jan-29-2016

Judge : S.J. Kathawalla

Appeal No. : Chamber Summons No. 629 of 2015 in Suit No. 95 of 2006

Appellant : NTPC Ltd. and Another

Respondent : Reliance Industries Ltd.

Judgement :

1. By the above Chamber Summons, the Defendant Reliance Industries Ltd. has prayed for the following relief:

That in the event of this Hon'ble Court coming to the conclusion that the Defendant has not been granted leave, by the order dated 25th November, 2014, passed by this Court in the present Suit, to produce additional documents which are annexed to the affidavit in lieu of examination in chief of Mr. B.K. Ganguly dated 24th February, 2015, the Defendant be granted leave to produce additional documents as per the list appended in Schedule hereto.

2. It is necessary to point out at the very outset that the above Suit filed by the Plaintiff NTPC Ltd. (NTPC) (formerly National Thermal Power Corporation Limited) against the Defendant Reliance Industries Limited (RIL) is pending in this Court since the last 10 years. In fact 7 years have passed since the hearing of the Suit being expedited in the year 2008 by the then Hon'ble the Chief Justice of

this Court. As more particularly set out hereinafter, RIL has already filed three Affidavits of Documents dated 31st October, 2007, 3rd December, 2009 and 23rd January, 2010. This is one more attempt on the part of RIL to file certain fresh documents which interestingly include documents internally exchanged by RIL Officials pertaining to the Meetings held during July 2004 and November, 2005. RIL chooses to file these documents which according to RIL are in their possession since 2004-2005 i.e. even prior to RIL filing its Written Statement on 2nd November, 2007, followed by two subsequent amendments to their written statement, three Affidavits of Documents filed from time to time, and after the cross-examination of the Plaintiff's witnesses is over. This Court has in three recent orders, i.e. Order dated 20th February, 2014 whilst dismissing Chamber Summons No. 2091 of 2010 filed by RIL, Order dated 20th March, 2014 dismissing RIL's Appeal being Appeal (Lodging) No. 151 of 2014, and the Order dated 11th July, 2014 allowing RIL's amendment application which was moved on the day the NTPC's Witness was scheduled to be cross-examined, observed against RIL as follows:

(i) in the Order dated 20th February, 2014:-

24.

.The aforesaid facts clearly indicate that the defendant wants to some how delay the trial of the suit. The chamber summons is though filed in the year 2010, has not been heard till 2014. As a result thereof, the cross examination of the plaintiff's witness could not commence.

(ii) in the Order dated 20th March, 2014:-

14.

.. It is not open to a party to keep making repetitive applications so as to frustrate the progress of the trial

(iii) in the Order dated 11th July, 2014:-

4. I believe Mr. Kadam is justified. There is absolutely no reason why this suit of 2006 should be delayed indefinitely. A list of dates submitted by Mr. Kadam prima facie indicates that every attempt to begin the cross-examination has been met with one obstacle or the other. This should not be permitted in any view of the matter.

3. As set out hereinabove, RIL has now once again filed the above Chamber Summons seeking liberty to file fresh documents which include documents internally exchanged by RIL officials pertaining to the meetings held during July, 2004 and November, 2005, admittedly in possession of RIL since about a decade.

4. The facts which are relevant for the purpose of deciding the above Chamber Summons are briefly set out hereunder:

4.1 On 30th December, 2005, NTPC has filed the above Suit inter alia for a declaration that there exists a valid, concluded and binding contract between NTPC and RIL for the supply of Natural Gas of 132 Trillion btu annually for a period of 17 years (Suit Contract) and for specific performance of this Contract. NTPC's case is that this Contract came into existence when the duplicate of the Letter of Intent (LOI) duly stamped and signed by RIL was forwarded to NTPC. According to NTPC, the Contract is contained in the letters and documents at Exhibits D , E , F and G to the Plaint and in the LOI duly issued by NTPC, the duplicate of which LOI was duly signed and returned by RIL .

4.2 According to RIL, two relevant letters are not referred to by the Plaintiff in the chain of documents. The first letter is dated 24th June, 2004 from NTPC to RIL asking RIL to accept the LOI unconditionally and the second is the letter dated 15th July, 2004, from RIL to NTPC conditionally accepting the LOI, expressly subject to the condition that the terms of the draft Gas Sale and Purchase Agreement (GSPA) were required to be negotiated and finalized. RIL has therefore alleged that since the GSPA was to be executed, until the same was executed there was no concluded contract between the parties.

4.3 On 30th December, 2005, the present Suit was filed.

4.4 On 2nd November 2007, RIL filed its written statement which was verified and declared by Mr. B. Ganguly.

4.5 On 8th January, 2008, Mr. B. Ganguly filed an Affidavit of Documents dated 31st October, 2007, on behalf of RIL (the first Affidavit). None of the internal documents of RIL which are now sought to be relied upon were referred to in the Schedule of the first Affidavit. In fact, in the said Affidavit, Mr. Ganguly has on behalf of RIL expressly stated on oath as under:

3. According to the best of my knowledge, information and belief, the Defendant have not now, and never had in their possession, custody, or power or in the possession, custody or power of my advocate or in the possession, custody or of any other person or persons on their behalf any deed, account, book of account, voucher, receipt, letter, memorandum, paper or writing or any copy of or extract from any such document or any other document whatsoever relating to the matters in question in this suit or any of them or wherein any entry has been made relative to such matter or any of them other than and except the documents set forth in the Schedule hereto

4.6 On 6th October, 2008, issues were framed in the above Suit. The principal issue in the Suit is, Do the plaintiffs prove that there exists valid, concluded and binding contract as reflected in Exhibits D, E, F and G and the Letter of Intent issued by the plaintiffs and signed and returned by the defendants for supply of natural gas of 132 Trillion btu annually for a period of 17 years by defendants to plaintiffs? .

4.7 On 9th January, 2009, the Affidavit-in-Lieu of Examination-in-Chief of NTPC's Witness was filed.

4.8 On 17th November, 2009, RIL amended its written statement.

4.9 On 21st/24th November, 2009, NTPC filed its Replication and its additional Affidavit of Documents.

4.10 On 4th December, 2009, an additional issue was framed in the Suit. Also, RIL through Mr. B.Ganguly filed a further Affidavit of Documents (the second Affidavit

). Once more, none of the documents internally exchanged in RIL were referred to in the Schedule of the Second Affidavit and the same contained an identical paragraph as extracted and reproduced in paragraph 4.5 above from the First Affidavit, namely that RIL or its Advocates are not in possession, custody, or power of any other document whatsoever relating to the matters in question in the Suit except the documents, set out in the Schedule to the Second Affidavit.

4.11 On 8th January, 2010, NTPC filed a further Affidavit-in-Lieu of Examination-in-Chief.

4.12 On 29th January, 2010, RIL through Mr. B. Ganguly filed further Affidavit of Documents (the Third Affidavit). Once more, none of the documents internally exchanged in RIL were referred to in the Schedule of the Second Affidavit and the same contained an identical paragraph as extracted and reproduced in paragraph 4.5 above from the First Affidavit, namely that RIL or its Advocates are not in possession, custody, or power of any other document whatsoever relating to the matters in question in the Suit except the documents, set out in the Schedule to the Third Affidavit.

4.13 On 3rd February, 2010, RIL filed Chamber Summons No. 201 of 2010 for discovery and inspection of the NTPC's internal documents such as notices/letters/e-mails/Inter-Office Memos sent by officials of NTPC among themselves regarding issues to be discussed with RIL during various meetings held between July, 2004 and November, 2005 in respect of the subject bid as well as pertaining to finalization of GSPA, etc. In the Affidavit-in-Support of the said Chamber Summons or in the course of arguments before the learned Single Judge or the Hon'ble Appeal Court, RIL has not mentioned that they are relying on or seeking to produce their internal documents. In fact there was no mention of the existence or relevance of RIL's internal documents.

4.14 The above Chamber Summons was dismissed by an Order dated 20th February, 2014. Certain relevant findings/observations found in the said Order are reproduced hereunder:

23. A perusal of the record indicates that the plaintiff did not rely upon the documents in respect of which disclosure is sought in the plaint. In the written statement filed by the defendant, the defendant has alleged about the discussions held between the plaintiff and the defendant and not the officials of the plaintiff inter se. . A perusal of the schedule to the chamber summons and the record indicates that the discovery and inspection prayed for by the defendant is in respect of alleged conversation which are not for the recent period but are for much prior period before filing of written statement and affidavit of documents including additional affidavit of documents by the defendant.

24.

For the first time Defendant by their letter dated 2nd February, 2010 referred to their own written statement and alleged that in the written statement filed by the defendant, it was alleged that during the period between July, 2004 and November, 2005, several meetings were held from time to time between the representatives of the plaintiff and defendant and various issues were discussed including settling the terms and conditions of GSPA. For the first time it was alleged that various documents, notices of meetings, agenda and minutes of the meeting and internal correspondence relating to the meetings at which presentations in writing were made as also notes and records of such discussions which were in custody, power, possession and control of the plaintiff ought to have been disclosed by the plaintiff but not disclosed and all such documents were related to the said meetings are relevant for effecting and complete adjudication of issues involved in the matter. The said letter was served upon the plaintiff's advocate on 2nd February, 2010. On 3rd February, 2010, the defendant filed this chamber summons. The aforesaid facts clearly indicate that the defendant wants to some how delay the trial of the suit. The chamber summon is though filed in the year 2010, has not been heard till 2014. As a result thereof, the cross examination of the plaintiff's witness could not commence.

25.

A perusal of the schedule to the chamber summons, it clearly indicates that the discovery sought in respect of the documents described in the schedule is totally

vague and is also by way of fishing enquiry. In my view none of these documents, would be relevant for the purpose of deciding the issue already framed as to whether the Letter of Intent issued by the plaintiff and accepted by the defendant is a concluded contract or not . (emphasis supplied)

26. Court has to consider before passing an order for discovery of documents about the relevancy of such documents with regard to dispute or controversy between the parties. In my view discovery of any of the documents described in the schedule appended to the chamber summons is not necessary and in any event could not be permitted at this stage. Both parties have filed their respective affidavits of documents. Plaintiff has already filed affidavit of its first witness in lieu of examination in chief as far back as on 9th January, 2009. This chamber summons is pending for last four years for hearing and final disposal. Defendant has not disclosed any reasons as to why there was gross delay in filing his application for disclosure.

27.

"Since none of the documents in respect of which discovery is sought are relevant for the purpose of deciding the issue as to whether Letter of Intent issued by the plaintiff and accepted by the defendant would be a concluded contract or not, in my view there is no merit in the chamber summons filed by the defendant and the same thus deserves to be dismissed.

(emphasis supplied)

4.15 RIL filed an Appeal being Appeal (L) No. 151 of 2014 against the above Order passed by the Learned Single Judge dated 20th February, 2014 dismissing the Chamber Summons being Appeal (L) No. 151 of 2014. The said Appeal was also dismissed by an Order dated 20th March 2014 by a Division Bench of this Court inter alia holding as under:

14. Even on merits we are not inclined to interfere with the impugned order of the learned trial Judge. Before us it was contended by the appellant-defendant that the chamber summons was taken out under Order 11 Rule 14 of the CPC. The power

under the aforesaid provision is bestowed upon the Court to call for documents at any stage of a suit. It gives no right to a party under the aforesaid provision to insist that a particular document be ordered to be produced. So far as non disclosure of a document as required under Order 11 Rule 12 of the CPC is concerned the consequence is provided for in Order 11 Rule 21 of the CPC. It is not open to a party to keep making repetitive applications so as to frustrate the progress of the trial. The question whether there was a concluded contract between the parties will be determined on the basis of the documents which parties have already produced in the suit. Learned Trial Judge has held that principal issue in the suit will accordingly be decided on the basis of the documents already produced by the parties and the internal noting or correspondence between officers of the plaintiff company are not relevant".

(emphasis supplied)

15. One more fact to be noticed is that the suit is pending since 2006. Written statement was filed by the appellant-defendant in October 2007. The plaintiff had filed the affidavit of documents on 7 December 2007. The amendment to the written statement had prima facie nothing to do with the merits of the controversy of the suit as filed initially. The defendant knew in December 2007 which documents the plaintiff had not produced, of which discovery is now sought, as they pertained to the period July 2004 to November 2005. Therefore, the learned Trial Judge is correct in taking a view that there was gross delay in filing an application for discovery. Reliance placed by the appellant-defendant upon the decision of the Apex Court in *M. L. Sethi vs. R. P. Kapur* 1972(2) SCC 427 is not apposite as it did not deal with an application under Order 11 Rule 14 of the CPC. Besides, the consequence of not complying with the order 11 Rule 12 of the CPC already passed in this case is provided for in Order 11 Rule 21 of the CPC. Thus the trial Judge was right in holding that the above decision is completely distinguishable from the present facts

4.16 On 11th April, 2014, documents were marked as Exhibits in the Suit in terms of three Indexes tendered by the parties. Volume VI of the Compilation of Admitted Documents was tendered. Even at this stage, RIL did not make a mention of any

further documents that RIL was desirous of producing. RIL did not mention that they were wanting to produce their internal documents pertaining to the bid or finalization of GSPA Contract.

4.17 On 10th July, 2014, RIL filed Chamber Summons (L) No. 1070 of 2014 seeking a Second Amendment to the written statement (by addition of paragraph 7-B). The Second Amendment sought a very limited addition to the pleading namely inclusion of a plea that there had been an alleged gas reservoir failure, and that assuming that a concluded contract existed, the same was incapable of being performed on this account.

4.18 On 11th July, 2014, when the above Chamber Summons was allowed, RIL did not make any request for filing any further documents at that stage or seek any order for discovery.

4.19 On 11th July, 2014, 25th July, 2014, 14th August 2014 and 12th September, 2014, NTPC's Witness was Cross-Examined at length. He could not be and was not confronted with any of the internal documents of RIL listed in the Schedule to the Chamber Summons.

4.20 On 25th November, 2014, when the Suit came up for directions, the following Order was passed:

.. Defendants are directed to file affidavit in lieu of examination in chief of the first witness alongwith documents on or before 12th January, 2015 and copy thereof shall be served upon the plaintiffs' advocate simultaneously. Place the matter on board on 19th December, 2014 at 03.00 p.m. for recording reexamination of the plaintiff's witness Mr.Anil Agarwal.

There was no application made by RIL on 25th November, 2014 for leave to produce fresh and additional documents not disclosed by it in its earlier three Affidavits of Documents.

4.21 On 19th December, 2014 the NTPC's witness was Re-Examined and further Cross-Examined and NTPC's evidence was closed.

4.22 On 25th February, 2014, RIL filed an Affidavit of Mr. B. K. Ganguly in Lieu of Examination-in-Chief, and sought to introduce certain new documents not disclosed at any of the earlier stages, by way of Annexures to the said Affidavit-in-Lieu of Examination-in-Chief. Of the 24 Annexures to the said Affidavit, only Annexure Nos. 19 to 21 had been disclosed by RIL in its Affidavits of Documents and Annexure No. 2 is an enclosure to a document which has been marked as an Exhibit in the Suit. Apart from that, Annexure Nos. 22 to 24 are mentioned in the said Amendment to the Written Statement that had been permitted on 11th July, 2014. Aside from these documents, the documents at Annexure Nos. 1 and 3 to 18 are all internal documents of RIL, which pre-date even the Written Statement filed in 2007. RIL has not mentioned in the said Affidavit-in-lieu of Examination-in-Chief as to why these documents were not disclosed earlier and were being produced in this manner as Annexures to the said Affidavit. Pertinently, no leave had been sought to produce these undisclosed documents.

4.23 On 24th March, 2015, when the Suit came up for directions, the Counsel appearing for NTPC opposed the Affidavit of RIL's first Witness in lieu of Examination-in-Chief being taken on record as RIL had sought to produce fresh documents without obtaining leave of the Court.

4.24 RIL has thereafter filed the above Chamber Summons seeking relief as set out in paragraph 1 above.

4.25 At the first hearing of the Chamber Summons, RIL submitted that by an Order dated 25th November 2014, passed by R.D. Dhanuka J., RIL has been granted leave in the present Suit to produce additional documents whereas it was submitted on behalf of NTPC that no such leave has been granted. The parties were therefore directed to seek a clarification from R.D. Dhanuka J.

4.26. On 8th October 2015, the learned Judge before whom the matter was placed for clarification, was pleased to pass the following Order:-

A perusal of the order passed by this Court on 25th November 2014 in Suit No.95 of 2006 clearly indicates that by the said order, the defendants are directed to file affidavit in lieu of the examination-in-chief of the first witness along with documents

on or before 12th January 2015. This Court has not indicated as to what documents could be filed along with the examination-in-chief of the first witness by the defendants. It is for the parties to make submissions in the on-going proceedings before Shri S.J. Kathawalla, J.

Accordingly, the Chamber Summons is now taken up for final hearing.

5. The Learned Senior Advocate appearing for RIL has first referred to the legal provisions relating to production, discovery and inspection of documents and has submitted as follows:

5.1 That Order VII Rule 14(3) of the Civil Procedure Code, 1908 (CPC) provides for production of documents by the Plaintiff. Rule 14(3) deals with a situation where documents, which ought to have been produced, have not been produced, are allowed to be produced with the leave of the Court. Order VII Rule 14 Sub-Rule (3) reads as follows:

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.

5.2 That a similar provision in respect of production of documents by a Defendant is made in Order VIII Rule 1A Sub-Rule (3) of the CPC, which reads as follows:

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.

5.3 That Order XI of the CPC deals with discovery and inspection. This Order primarily deals with directions for discovery and inspection either by the Court on its own or on an application by the party seeking discovery from the other side. Rule 21 provides for consequences of non-disclosure of a document i.e. dismissal of a suit.

5.4 That Order XIII provides for production, impounding and return of documents. Sub-Rule (2) of Order XIII, as it existed prior to its amendment by Civil Procedure (Amendment) Act, 1999, provided for the effect of nonproduction of documents, which reads as follows:

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 record the reasons for so doing.

(This Rule has since been deleted)

5.5 That Chapter XI of the Bombay High Court (Original Side) Rules under the caption Discovery and Inspection provided for production of documents. Rule 172 thereof confers power upon the Court to allow a party to produce documents at any stage on good cause being shown. Rule 172 reads thus:

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

(This Rule is pari-materia with Rule 174 of the Bombay High Court (Original Side) Rules as they existed prior to 1980).

6. The Learned Senior Advocate appearing for RIL has after pointing out and making submissions qua the above provisions made the following further submissions:

6.1 That the documents listed at Item (2) of the Schedule to the Chamber Summons should actually be part of the letter dated 2nd September 2003, being

letter addressed by RIL to NTPC, which is already marked as Exhibit C 7, at page 966 of Volume III of the Compilation of Documents. This Document, therefore, should be treated as a part of the already marked documents. The Documents at Sr. Nos. 19, 20 and 21 are the documents which are referred to in Paragraph 7B of the amended Written Statement, and therefore there can be no objection to the production of those documents. The remaining documents are the subject matter of the present controversy. As a matter of fact, by virtue of the Order dated 25th November 2014, RIL has been permitted to produce additional documents along with Affidavit in lieu of Examination-in-Chief. This Order is in the nature of directions given after the amendment of the Written Statement by an Order dated 14th July 2014 and hence NTPC is not entitled to object to the production of documents.

6.2 That in view of the clarification given by R.D. Dhanuka J. by his Order dated 8th October, 2015 (reproduced in paragraph 4.26 above), there is no manner of doubt that the Order dated 25th November, 2014 was an order in the nature of direction for discovery and inspection which was necessary to be passed after the amendment of the written statement and therefore the objections on behalf of NTPC are untenable.

6.3 That in the alternative it is submitted that production of documents can be allowed at any stage, subject to the discretion of the Court on good cause being shown and the documents being relevant. The principles for production of documents are laid down by this Court and other Courts in its decisions in (i) Chitrakala Fal Dessai vs. Balu Marathe (2006) 6 Mah. LJ 427), (ii) Ramnath Nandlal Dhoot and Co. vs. B.R. Shrotri (AIR 1980 Bom 387), (iii) Sir Hari Ram Goenka vs. Lachmi Singh (AIR 1928 Patna 537) and (iv) Gopika Raman Roy vs. Atal Singh (AIR 1929 PC 99 : 1929 JC Vol. LVI 119).

6.4 That the only ground on which the other party can object to the production of documents is that the documents are not relevant or are not genuine. Both these contingencies are required to be adjudicated and tested during the trial by way of cross-examination and arguments and not at the stage of granting leave for production of documents. The documents, for which leave is sought, relate to the

negotiations and events which transpired for finalization of draft Gas Sale and Purchase Agreement (GSPA), which negotiations took place between the representatives of the NTPC and RIL between July 2004 and November 2005. This fact is undisputed. During such negotiations, the draft GSPA underwent various changes and about 4-5 versions of GSPA are already on record, which the NTPC Witness has accepted and admitted. Whether the draft GSPA was required to be finalized or not is an issue in question and the documents are directly linked to this issue. The documents sought to be produced demonstrate the thread of negotiations and prove RIL's case (i) that RIL has never accepted the LOI unconditionally; (ii) that conditionality of acceptance of LOI was to finalize the GSPA, (iii) that until GSPA was negotiated, concluded, finalized and signed, there can't be, and there is no valid, concluded, or binding contract between the parties, and (iv) that the GSPA remained at negotiation stage and the parties therefore were only exchanging the offers and counter-offers and there is no concluded contract. In order to establish this case, the documents are relevant and that relevancy is the only test for production of documents.

6.5 That Section 5 of the Evidence Act postulates that evidence may be given only of facts which are declared to be relevant under the Act. Sections 7 and 11 of the Act clearly deal with the contingencies of relevancy, applicable in the present case.

6.6 That the objections raised by NTPC are unsustainable and not relevant. NTPC cannot rely on the decision of the learned Single Judge in Chamber Summons No. 201 of 2010 dated 20th February, 2014 and the Order passed in Appeal dismissing the Appeal filed by RIL on 20th March, 2014. It is submitted that, on a proper reading of the above orders, the same have no relevance with the application filed by RIL. Those orders were on the application made by RIL, seeking a mandatory order of discovery against NTPC, whereas the present application is for production of RIL's own documents. The said orders cannot be construed as adjudication on relevancy of the documents, which RIL is seeking to produce. The only conclusion from those two orders, which can be reached, is that, since the application of RIL for seeking discovery of documents from the Plaintiff was made at a belated stage, it was rejected, and in that context the

Courts have said that the trial will proceed on the basis of the documents already produced, which obviously related to NTPC, and not RIL. Besides, the Appeal Court has clearly observed that, in case NTPC does not produce the documents, it will face the consequences as provided in Order XI Rule 21 of the CPC. Viewed from this perspective, it is clear that the objections of NTPC to the production of documents are clearly erroneous and unsustainable.

6.7 That good cause as set out in Rule 172 of the Bombay High Court (Original Side) Rules is made out. RIL has clearly stated that it had made an application seeking direction against NTPC for production of their internal documents and RIL would produce its internal documents on reciprocal basis. Since that application was rejected with the Appeal Court observing that the party not producing a document will face the consequences of adverse inference being drawn under Order XI Rule 21 of the CPC, RIL has produced the concerned documents. NTPC would not be prejudiced in any way as it would have ample opportunity by way of cross examination, to demonstrate its objection that the documents are not relevant or that they are not genuine. Again, the standard of good cause is much lower than the standard of sufficient cause .

7. The Learned Senior Advocate appearing for NTPC has taken me through the chronology of events set out in paragraph 4 above, and submitted as follows:

7.1 That annexing new documents to its Affidavit in Lieu of Evidence is clearly a brazen attempt on the part of RIL to delay the trial of the Suit and prejudice NTPC. The above Chamber Summons is bereft of bona fides and a patent abuse of the process of this Court as well as a deliberate attempt to frustrate the progress of the trial of the Suit. In fact RIL has consistently resorted to such dilatory tactics to frustrate the trial of this Suit as observed by this Court in its various Orders, including the Orders dated 20th February, 2015, 20th March, 2014 and 11th July, 2014.

7.2 That the new documents sought to be relied upon by RIL are irrelevant documents as held by the Learned Single Judge of this Court by his Order dated 20th February, 2014 in the earlier Chamber Summons No. 201 of 2010 taken out by RIL calling upon NTPC to produce its internal documents. The said Chamber

Summons has been rejected with the finding reproduced hereunder that internal documents (i.e. documents of the same class) now sought to be produced by RIL in the above Chamber Summons are not relevant for deciding the principal issue in the Suit :

27. ..none of the documents in respect of which discovery is sought are relevant for the purpose of deciding the issue as to whether Letter of Intent issued by the plaintiff and accepted by the defendant would be a concluded contract or not, in my view there is no merit in the chamber summons filed by the defendant and the same thus deserves to be dismissed

7.3 That the above Order of the Learned Single Judge was confirmed by the Hon ble Division Bench vide Order dated 20th March, 2014. The Hon ble Division Bench, in fact further elucidated the finding of the Learned Single Judge and held that,

14. The question whether there was a concluded contract between the parties will be determined on the basis of the documents which parties have already produced in the suit. Learned Trial Judge has held that principal issue in the suit will accordingly be decided on the basis of the documents already produced by the parties and the internal noting or correspondence between officers of the plaintiff company are not relevant.

7.4 That the aforesaid Order dated 20th March, 2015 has not been challenged by RIL and has attained finality. This observation in respect of the same class of documents is therefore binding on the parties as well as this Court. Hence there is no question of the new documents being relevant for adjudication of the above Suit.

7.5 That the contention of RIL that it was permitted to produce the new documents by the Order dated 25th November, 2014 was proved false when the Learned Single Judge by Order dated 8th October, 2015 clarified that he had not indicated as to what documents may be filed by RIL with its first witness affidavit. In any event for RIL to bring on record documents which are not disclosed in its Affidavit of Documents, it would have to make an application to this Court in accordance

with the provisions of Rule 172 of the Bombay High Court (Original Side) Rules, 1980. A bare perusal of the Order dated 25th November, 2014, makes it clear that there are no reasons recorded therein for permitting new documents not disclosed in RIL's earlier three Affidavits of Documents. The fact is that RIL did not even raise a plea for production of new documents and consequently the same could never have been considered by the Court, much less permitted. Even in the present Chamber Summons, RIL does not disclose any reasons as to why it did not produce the new documents earlier.

7.6 That the case law cited by RIL is clearly inapplicable to the facts of the present matter. In each of those cases, the circumstances in which the documents were not produced at the appropriate time have been set out. In clear contra-distinction, in the present matter there are no such circumstances to elaborate.

7.7 That reliance on provisions of Sections 5 and 7 of the Indian Evidence Act, 1972 by RIL is also inapplicable to the present case.

7.8 That therefore no case whatsoever is made out by RIL. RIL has failed to show any cause, much less, good cause for non-production of the new documents. Apart from the application being bereft of any cause or merit, the new documents themselves are clearly irrelevant belonging to the class of internal documents, in respect thereof as submitted above, there is a binding finding of the Learned Single Judge which is confirmed by the Hon ble Division Bench of this Court.

8. I have heard the Learned Senior Advocates appearing for the parties. I have also considered the submissions as well as the case law relied upon by them. As stated earlier, the Suit is pending disposal in this Court for the last 10 years. However, the Suit is not disposed of till date despite the then Hon'ble the Chief Justice having expedited the same by an Order passed in 2008.

9. It is submitted on behalf of NTPC that their objection is only against the documents which are listed at items 1 and 3 to 18 in the Schedule of the Chamber Summons and sought to be brought on record by RIL. Documents listed at items 19 to 21 have been disclosed in the Affidavit of Documents of RIL. Document listed at item 2 forms part of the document which has been marked as an Exhibit in

the Suit. Documents listed at item Nos. 22 to 24 have been mentioned only in the latest amendment to the written statement permitted in July, 2014.

10. The first submission advanced on behalf of RIL is that the Learned Single Judge (Coram: R.D. Dhanuka, J.) has by his Order dated 25th November, 2014, granted leave to RIL to produce additional documents which are annexed to the Affidavit in Lieu of Examination in Chief of Mr. Ganguly dated 24th February, 2015. It is submitted on behalf of NTPC that no such leave was granted by the Order dated 25th November, 2014. However, the controversy is now put to rest by R.D. Dhanuka, J. who has in his Order dated 8th October, 2015, observed that he has not indicated as to what documents could be filed by RIL along with the Examination-in-Chief of its first witness, and it is for the parties to make its submissions before this Court, in regard thereto, in the above Chamber Summons.

10.1 Again, RIL itself has relied on the legal provisions relating to production, discovery and inspection of documents which are set out hereinabove. Order VII Rule 14 (3) of the CPC clearly provides that documents which ought to have been produced by the Plaintiff but have not been produced, are allowed to be produced only with the leave of the Court. Rule 172 of the Bombay High Court (Original Side) Rules confers power upon the Court to allow a party to disclose documents in its possession or power, at any subsequent stage of the proceedings, which documents a party ought to have disclosed in its Affidavit of Documents or in the Supplementary Affidavit of Documents, only upon good cause being shown to the satisfaction of the Court for the non-disclosure thereof. The Court whilst granting such permission or receiving such documents in evidence, is also required to record reasons for doing so.

10.2 RIL was allowed to amend its written statement by an Order dated 11th July 2014 for the second time. By the second amendment RIL had sought a very limited addition to the pleading namely inclusion of a plea that there had been an alleged gas reservoir failure and that assuming that a concluded contract existed, the same was incapable of being performed on this account. RIL did not make any request for filing any further documents at that stage or seek any order for discovery. On 11th July, 2014, 25th July, 2014, 14th August 2014 and 12th

September, 2014, NTPC's witness was cross-examined at length and the cross-examination was concluded. On 25th November, 2014, when the Suit came up for directions before the Learned Single Judge (Coram: R.D. Dhanuka, J.), routine directions were passed viz. that RIL should file its Affidavit of Evidence and Affidavit of Documents on or before 12th January, 2015. From a perusal of the Order dated 25th November, 2014, it is clear that the Learned Single Judge was not even informed that RIL had on 8th January, 2008, 3rd December, 2009 and 29th January, 2010 already filed three Affidavits of Documents. It is also clear from the said Order that no application was made by RIL before the Learned Single Judge seeking leave to produce additional documents which were not disclosed by RIL in its earlier three Affidavits of Documents. The question therefore of RIL showing good cause for non-disclosure of documents in its three earlier Affidavits of Documents and the Court (R.D. Dhanuka, J.) granting leave or permitting such disclosure upon being satisfied by such cause shown, or recording reasons for granting such permission does not arise. Therefore, in my view, pursuant to the said directions dated 25th November, 2014 (i.e. in the absence of obtaining leave from the Court to disclose/produce documents which were in possession and power of RIL since the years 2004/2005 but not disclosed by RIL in its earlier three Affidavits of Documents) RIL would be entitled to file only such documents which were mentioned in its earlier three Affidavits of Documents and/or documents concerning the amendment which was introduced by RIL by addition of paragraph 7-B to its written statement on 11th July, 2014. RIL is therefore allowed to file documents set out in paragraph 9 above. However, RIL has by misconstruing the Order dated 25th November, 2014 annexed the documents to its Affidavit of Evidence which according to RIL were internally exchanged by RIL officials pertaining to the meetings held during July 2004 and November 2005 and which were in possession of RIL since then, without showing good cause for non-disclosure of the same in its earlier three Affidavits of documents and without obtaining leave from this Court as required under the above provisions. The aforesaid Order dated 25th November, 2014, passed by the Learned Single Judge therefore by no stretch of imagination can be construed as an order granting leave to RIL to produce documents which were admittedly in the possession of RIL since the last more than one decade and which RIL failed to

disclose in its earlier three Affidavits of Documents dated 31st October, 2007, 3rd December, 2009 and 23rd January, 2010.

11. This leads me to the next question as to whether RIL has in accordance with the mandate of Rule 172 of the Bombay High Court (OS) Rules shown good cause to the satisfaction of this Court for non-disclosure of documents in its possession and power, and which documents ought to have been disclosed by RIL in its earlier Affidavits of Documents. As set out hereinabove, RIL filed its written statement in the Suit on 2nd November, 2007. RIL filed its first Affidavit of Documents on 8th January, 2008. In the said first Affidavit of Documents Mr. B. Ganguly on behalf of RIL, stated that to the best of his knowledge, information and belief RIL or its Advocates are not in possession, custody or power of any other document whatsoever relating to the matters in question in the Suit, except the documents set out in the Schedule to the said first Affidavit of Documents. Though at the time of filing of the written statement and the first Affidavit of Documents, RIL purportedly was in possession of the documents internally exchanged by its own Officers pertaining to the meetings held during July 2004 and November 2005, RIL did not deem it fit to rely upon the same and therefore gave the above declaration in its first Affidavit.

11.1 On 6th October, 2008, issues were framed in the matter. On 9th January, 2009, the Affidavit-in-Lieu of- Examination- in- Chief of NTPC s witness was filed. On 17th November, 2009, RIL amended its written statement to which NTPC filed its replication on 21st/24th November, 2009, along with its Additional Affidavit of Documents. Since on 4th December, 2009 an additional issue was framed in the Suit, RIL filed a further Affidavit of Documents of Mr. B. Ganguly dated 3rd December, 2009 (the Second Affidavit) and again the factum of any internal exchange of documents by RIL was not alluded or adverted to therein or at that stage. On 8th January, 2010, NTPC filed a further Affidavit-in-Lieu of- Examination- in- Chief and immediately thereafter on 29th January, 2010 RIL filed yet another further Affidavit of Documents (the Third Affidavit) wherein once again the factum of any internal correspondence exchanged by the Officers of RIL was not alluded or adverted to.

11.2. On 3rd February, 2010, RIL filed Chamber Summons No. 201 of 2010 for discovery and inspection of the Plaintiff's internal documents, alleging that the same are documents which are very relevant for the purpose of deciding the present Suit. The above Chamber Summons was dismissed inter alia holding that none of the documents in respect of which discovery was sought are relevant for the purpose of deciding the issue as to whether the Letter of Intent issued by NTPC and accepted by RIL would be a concluded contract or not. The Appeal filed from the said Order was also dismissed. RIL did not make even a whisper about the internal documents/correspondence exchanged between its Officers during the period 2004-2005 either in its Chamber Summons No. 201 of 2010 or in the Appeal filed by it. No submission pertaining to the same was made by RIL before the Learned Single Judge or before the Learned Division Bench.

11.3 On 11th April, 2014, the parties went ahead with the marking of exhibits in the Suit. Even at this stage, RIL did not make any mention of any of its internal documents that RIL was desirous of producing.

11.4 On 10th July, 2014, RIL filed Chamber Summons (L) No. 1070 of 2014 seeking a second amendment to the written statement by addition of paragraph 7-B only to the extent of submitting that there had been an alleged gas reservoir failure and that assuming that a concluded contract existed, the same was incapable of being performed on this account, which Chamber Summons was allowed on 11th July, 2014. However, RIL did not make any request for filing any further documents at that stage or seek any order for discovery.

11.5 Thereafter the NTPC's witness was cross-examined at length on 11th July, 2014, 25th July, 2014, 14th August, 2014, and 12th September, 2014.

11.6 As stated earlier, even on 25th November, 2014, no application was made by RIL for leave to produce its internal documents/correspondence exchanged inter se between Officers of RIL during July, 2004 and November, 2005 which were not disclosed by RIL in its earlier three Affidavits of Documents.

11.7 On 25th February, 2015, Mr. Ganguly of RIL filed his Affidavit-in-Lieu of Examination- in- Chief wherein he has annexed Annexures 1 and 3 to 18 which

are all internal documents of RIL which predate even the written statement filed in 2007. No reason whatsoever is mentioned in the said Affidavit-in-Lieu of Examination- in- Chief as to why these documents were not disclosed earlier and were being produced for the first time as Annexures to the Affidavit-in-Lieu of Evidence by RIL.

11.8 Since NTPC opposed RIL's attempt to introduce its internal documents without obtaining leave of this Court, RIL filed the present Chamber Summons and has in its Affidavit in- Support contended that, the documents relating to the internal notings of the parties during the time when the negotiations were being held, are relevant documents; however since RIL wanted that such internal documents ought to be produced on reciprocal basis i.e. both parties must produce them, RIL accordingly took out an Application by way of Chamber Summons No. 201 of 2010 calling upon NTPC to produce the internal correspondence exchanged between their Officers inter- se during July, 2004 and November 2005; since the Hon'ble Appeal Court by its Order dated 20th March, 2014 observed that in case of non-production of relevant documents, the legal consequences arising therefrom, can always be argued. RIL now wishes to produce the internal documents exchanged which are relevant for the purposes of determining the real controversy in the Suit.

11.9 In my view, the cause now sought to be shown/explained by RIL for not producing their internal documents which were admittedly in RIL's possession since 2004-2005 despite RIL having filed three earlier Affidavits of Documents dated 31st October, 2007, 3rd December, 2009 and 23rd January, 2010 is untenable and baseless. As pointed out hereinabove, at no point of time RIL in its Chamber Summons No. 201 of 2010 or in its Appeal filed from the Order dismissing the Chamber Summons has made even a whisper that RIL wanted NTPC to produce its internal documents on a reciprocal basis. No submission to this effect was advanced by RIL before the Learned Single Judge in Chamber Summons No. 201 of 2010 or before the Learned Division Bench which dismissed the Appeal filed therefrom by RIL. It is obvious that since RIL has no cause to show as to why RIL failed to produce the internal correspondence/documents exchanged inter se by the Officers of RIL, despite RIL being in possession of the

same since 2004-2005, RIL has come up with the aforesaid preposterous and unbelievable explanation which cannot be accepted. Again, since RIL has contended that the Appeal filed by RIL impugning the Order passed by the Learned Single Judge in Chamber Summons No. 201 of 2010 was disposed off/dismitted observing that the party not producing a document will face the consequences of adverse inference being drawn under Order XI Rule 21 of the CPC, RIL has produced the concerned documents. It is pertinent to note that the said Appeal was disposed off/dismitted by an Order dated 20th March, 2014. Thereafter on 11th April, 2014, documents were marked as exhibits in the Suit in terms of three Indexes tendered by the parties. RIL did not mention before this Court at that time that they were wanting to produce their internal documents pertaining to the bid or finalization of GSPA Contract. On 10th July, 2014, RIL filed Chamber Summons (L) No. 1070 of 2014 seeking a second amendment to the written statement by addition of paragraph 7-B. On 11th July, 2014, when the said Chamber Summons was allowed, RIL did not make any request for filing any further documents at that stage or seek any order for discovery. On 11th July, 2014, 25th July, 2014, 14th August 2014 and 12th September, 2014, NTPC's witness was cross-examined at length. On 25th November, 2014, when the Learned Single Judge directed RIL to file its Affidavit of Evidence along with the documents, there was no application made by RIL for leave to produce fresh and additional documents not disclosed by it in its earlier three Affidavits of Documents. On 19th December, 2014 the NTPC's witness was re-examined and further cross-examined and NTPC's evidence was closed. On 25th February, 2015, RIL filed an Affidavit of Mr. B. K. Ganguly in Lieu of Examination in Chief, and sought to introduce certain new documents not disclosed at any earlier stage, by way of Annexures to the said Affidavit-in-Lieu of- Examination- in- Chief. Since NTPC opposed filing of the said documents by RIL, without seeking leave of the Court, the present Chamber Summons is taken out by RIL only on 18th April, 2015 i.e. more than one year after the Order of the Division Bench dismissing RIL's Appeal was passed on 20th March, 2014. In *R. N. Dhoot and Co. vs. B.R. Shroti*, reported in AIR 1980 Bombay 387 Agarwal, J. has held in Para 9 what amounts to good cause and has stated that good cause is that which is adequate, sound, and based on genuine ground or reasons. What is good cause will depend upon the

facts and circumstances of each case. Therefore, in my view, RIL has not made out any cause much less good cause as required under Rule 172 of the Bombay High Court (Original Side) Rules, for this Court to allow RIL to bring its internal documents, which according to RIL itself are in its possession since 2004-2005, but which were not disclosed by RIL in its earlier three Affidavits of Documents dated 31st October, 2007, 3rd December, 2009 and 23rd January, 2010. In fact as pointed out in paragraph 2 hereinabove, this Court has repeatedly by its Orders dated 20th February, 2014, 20th March, 2014 and 11th July, 2014 recorded the attempt/intention of RIL to delay the matter which is pending in this Court since the last 10 years and the hearing of which is expedited by the Learned Chief Justice of this Court in the year 2008. The Chamber Summons deserves to be dismissed on this ground alone.

12. Though, as stated hereinabove, the Chamber Summons needs to be dismissed on the ground that RIL has not made out any good cause for allowing it to bring its internal documents on record at this stage, since RIL has contended that the internal documents sought to be relied upon by it are relevant, I shall also deal with the said submission hereunder:

13. RIL had taken out Chamber Summons No. 201 of 2010 seeking discovery of the documents internally exchanged by NTPC officials pertaining to the discussions with RIL during the various meetings held between July, 2004 and 2005 in respect of the subject bid. The Learned Single Judge while dismissing the Chamber Summons No. 201 of 2010 taken out by RIL, inter alia, held that:

25. ..none of these documents, would be relevant for the purpose of deciding the issue already framed as to why the Letter of Intent issued by the plaintiff and accepted by the defendant is a concluded contract or not.

27.

Since none of the documents in respect of which discovery is sought are relevant for the purpose of deciding the issue as to whether Letter of Intent issued by the plaintiff and accepted by the defendant would be a concluded contract or not, in my view there is no merit in the chamber summons filed by the defendant and the

same thus deserves to be dismissed.

The Hon'ble Division Bench has in paragraph 14 of its Judgment held as under:

14. Even on merits we are not inclined to interfere with the impugned order of the learned trial Judge. Before us it was contended by the appellant-defendant that the Chamber Summons was taken out under Order 11 Rule 14 of the CPC. The power under the aforesaid provision is bestowed upon the Court to call for documents at any stage of a suit. It gives no right to a party under the aforesaid provision to insist that a particular document be ordered to be produced. So far as non disclosure of a document as required under Order 11 Rule 12 of the CPC is concerned the consequence is provided for in Order 11 Rule 21 of the CPC. It is not open to a party to keep making repetitive applications so as to frustrate the progress of the trial. The question whether there was a concluded contract between the parties will be determined on the basis of the documents which parties have already produced in the suit. Learned Trial Judge has held that principal issue in the suit will accordingly be decided on the basis of the documents already produced by the parties and the internal noting or correspondence between officers of the Plaintiff company are not relevant.

14. More than one year after the Hon'ble Appeal Court dismissed the Appeal, RIL has taken out the present Application seeking leave of this Court to take the internal notings/correspondence between its Officers on record. Though the Learned Single Judge, as reproduced hereinabove, has held that since the internal documents of the Plaintiff are not relevant for the purpose of deciding the issue as to whether the Letter of Intent issued by the Plaintiff and accepted by the Defendant would be a concluded contract or not, the Defendants are now seeking to introduce the same class of documents, of course, this time their own internal documents.

15. Again, independently of what the Learned Single Judge or the Appeal Court has held/observed, I am of the view that the internal documents/correspondence exchanged by and between the official of RIL cannot be of any assistance to RIL in establishing what is alleged by it and recorded in paragraph 6.4 above. The question before the Court is whether there was a concluded contract between

NTPC and RIL. This question is essentially a matter of interpretation of the terms of bargain which are reflected in writings executed by the parties. Terms of bargain are a bilateral matter and have to be ascertained from the language employed in the writings themselves. When the language employed is certain and clear, the meaning must be gathered from it alone. Only if there is any ambiguity in the language employed, the Court is free to invoke other external aids including the conduct of the parties to ascertain the meaning. But the endeavour is to find out what both parties together meant or understood by the terms of the bargain. An internal document of a party unilaterally prepared and not shared with the other, cannot possibly throw any light on what the parties together meant. It has, thus, no relevance for establishing or proving the existence or otherwise of a concluded contract. Therefore, apart from the fact that RIL has failed to show any case for nondisclosure of documents, I am of the view that the documents with regard to which leave is sought from this Court for being produced at this stage are not relevant for deciding the present suit.

16. RIL has cited various judgments in support of its contention that RIL ought to be permitted to produce additional documents. The same are clearly inapplicable to the facts of the present matter. In each of those cases, the circumstances in which documents were not produced at the appropriate time have been set out. In clear contra-distinction, in the present matter, there are no such circumstances. To elaborate:

(i) The facts in *R. N. Dhoot and Co. vs B. R. Shrotri* (reported in AIR 1980 Bom 387), are inter alia that documents which were official/public records such as a seizure memo, a First Information Report and Railway Receipt Book had been produced in the Sessions Court where the matter was being heard. Thereafter, when the matter was over, the documents were withdrawn and kept by the Defendant in the aforementioned matter. Subsequently, during the matter before the Civil Court, the Advocate for the said Defendant probably did not take care to include the documents in the Affidavit of Documents resulting in the same remaining to be produced before the Civil Court.

(ii) The facts in *Gopika Raman Roy vs. Atal Singh* (reported in AIR 1929 PC 99), are inter alia that, certain official, government records and documents to be produced, had not been so produced, as they were not within the possession or power of the plaintiff in the matter and the plaintiff did not know of their existence so as to enable the plaintiff to inspect them and form an opinion as to whether the plaintiff would rely on the documents or not.

(iii) The facts in *Sir Hari Ram vs. Lachmi Singh* (reported in AIR 1928 Pat 537), are inter alia that the plaintiff in the aforementioned matter produced a document (bearing the seals/stamps of various courts proving its veracity), before the lower court and the same was taken and kept in the lower court's custody for some time, without passing any order either accepting or rejecting the said document. Subsequently, the said document was rejected by the lower court, on the basis that it was filed too late.

(iv) The facts in *Chitrakala Fal Dessai vs. Balu Maratha* [reported in 2006 (6) Mh LJ 427], are distinguishable in as much as the plaintiff in the aforementioned suit filed an application to subsequently bring her title deeds (most of which were public documents) which had been lost and misplaced by her and could not be produced at the time of filing the suit.

Thus it is clear that the aforesaid cases are of no aid to the Defendant.

17. RIL also sought to rely on the provisions of Sections 5 and 7 of the Indian Evidence Act, 1872. The said provisions are inapplicable to the present case. These provisions mainly relate to pleas of alibi in criminal matters and have no bearing on the circumstances of the present case.

18. RIL has submitted that the question of any delay does not arise since NTPC can immediately start with the cross-examination of RIL's witness. RIL is well aware that by taking out such an Application once again, a lot of time will be consumed. RIL is well aware that a Chamber Summons with reliefs as sought would be strongly opposed by NTPC and a final decision on the same would once again involve substantial time thereby delaying the hearing of the Suit. The contention therefore on the part of RIL that no motive of causing delay can be

attributed to RIL in taking out the above Chamber Summons cannot be accepted.

19. RIL has also contended that if RIL is allowed to rely on its internal documents which were in its possession since the year 2004-2005 but were not produced by RIL along with its First, Second and Third Affidavits of Documents, the same will not cause any prejudice to NTPC also cannot be accepted. As correctly submitted by NTPC, examination in chief, cross-examination and re-examination of its witness has concluded. It is only thereafter that RIL has tried to rely on the documents which were in its possession since 2004-2005. This will certainly cause prejudice to NTPC, if the said documents are now allowed to be relied upon by RIL.

20. In the circumstances, the Chamber Summons is allowed to the extent of granting leave to RIL to produce the documents listed at items 2, 19 to 21 and 22 to 24 in the Schedule of the Chamber Summons. For the reasons stated hereinabove, RIL is not granted leave to produce the documents listed at items 1 and 3 to 18 in the Schedule of the Chamber Summons. The Chamber Summons is accordingly disposed of.

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