

IN THE HIGH COURT OF DELHI

CM(M) No.2721-23/2005

Mrs.Reba Mukherjee & ors. Petitioners
! through: Mr.C.S.Vaidyanathan, Sr. Adv. with
Mr.Manoj V. George and
Mr.H.N.Takkar, Advs.

VERSUS

\$ Sh. Rajiv Behl Respondent
^ through: Mr.Kumar Dushyant Singh, Adv.

% DATE OF DECISION: 10.1.2008

CORAM:

* **Hon'ble Mr.Justice Pradeep Nandrajog**

1. Whether reporters of local papers may be allowed to see the judgment? Y
2. To be referred to the Reporter or not? Y
3. Whether judgment should be reported in Digest? Y

: **PRADEEP NANDRAJOG, J.**(Oral)

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1. After both parties closed evidence an application

was filed by the plaintiff pleading as under:-

“1. That the plaintiff has filed the afore-said suit for specific performance of the collaboration agreement dated 6th September, 1995 which had been entered in between him and the predecessor-in-interest of the defendants and in the alternative for the relief of damages.

2. That the facts and circumstances as stated in the accompanying suit may be read as part and parcel of this application. The same are not being repeated for the sake of brevity and to avoid

unnecessary repetition. The plaintiff applicant craves leave of this Hon'ble Court to refer to and rely upon the same at the time of hearing.

3. That the present application is being made seeking summons for the attendance Mr.B.Chakrawarthy S/o B.P.Chakrawarthy address as given herein above who is the attesting witness of the receipt dated 6.9.1995.

4. At this stage it is pertinent to mention that the receipt dated 6th September 1995 has never been denied by the defendant in pleadings. In the written statement in para 6 and further the defendants have categorically admitted that there is a token money receipt dated 6th September 1995.

5. It is further submitted that the defendants after the completion of the plaintiff's evidence the defendants malafidely, just to delay the proceedings moved an frivolous application under Order 7 Rule 11 CPC. However the same was dismissed with cost.

6. Subsequently, when the affidavit by way of evidence was filed on behalf of the defendant No.2, he is now disputing the signature of Mr.P.K.Mukherji on the front side of the receipt, as well as the signatures of the witness on the back of the receipt dated 6.9.1995.

7. It is respectfully submitted that the original receipt filled by the plaintiff exhibited as Ex.PW-1/A is the principal documents and to prove the validity and authenticity of the said document the examination of Mr.B.Chakrawarthy is necessary in the interest of justice and equity.

8. That the plaintiff earlier did not examine the said witness as the receipt dated 6th September 1995 was never disputed by the defendant neither was the authenticity of the signatures of the witness, was questioned except now in the affidavit by way of evidence filed by him.

9. At this stage as there is a dispute with

regard to the main documents hence the examination of the attesting witness is necessarily required.

10. The present application is made bonafidely and in the interest of justice and equity. No prejudice would be caused to either party if the aforesaid witness is called for the examination by the Court.”

2. It was prayed that Mr.B.Chakrawarthy be permitted to be examined as a witness to prove the receipt dated 6.9.1995.

3. Dealing with the application learned Trial Judge has passed the impugned order dated 5.9.2005 which reads as under:-

“This application of the plaintiff has come up for arguments and consideration. As per the plaintiff, this application was necessitated on the ground that while in para 8 of the written statement the defendants have admitted execution of the receipt, in the cross-examination, it has been denied. He, therefore, submits that the attesting witness to the receipt be examined or in the alternative the hand writing analysis of the same be carried out.

The prayer of the applicant is vehemently opposed by the learned counsel for the defendant on the grounds that the said receipt is an after thought and has been fabricated.

Be that as it may, it would be in the interest of both sides to have evidence adduced on record whether the said signatures are genuine or fabricated. I have no reasons to appreciate the opposition of the defendant. The plaintiff shall take necessary steps to summon the witness on filing of PF and DM for 6.10.05.”

4. Respondents suit seeking specific performance of a collaboration agreement dated 6.9.1995 averred in para 4 and

para 8 as under:-

"4. The predecessor-in-interest of the defendants herein entered into a collaboration agreement on 6th September 1995 with the plaintiff for developing the suit property by way of demolition of the old structure and erecting new structure. The plaintiff undertook the entire project of carrying out the demolition and erection of the structure.

xxx xxx xxx

8. In pursuance of the said collaboration agreement, the plaintiff paid as token money an amount of Rs.25,000/- (Rs.20,000/- by way of cheque and Rs.5,000/- in cash) to the predecessor-in-interest of the defendants against which a formal receipt dated 6th September 1995 was issued to the plaintiff."

5. Responding in the written statement to paras 4 and 8 of the plaint, respondents replied as under:-

"4. Contents of the para 4 of the plaint are wrong and the same are denied. It is specifically and emphatically denied that the predecessor of the defendants had entered into a collaboration agreement on 6th September 1995 with the plaintiff for developing the suit property. It is stated that predecessor of the defendants never entered into a collaboration agreement on 6th September 1995 as alleged by the plaintiff in the para under reply.

xxx xxx xxx

8. Contents of the para 8 of the plaint are wrong and are denied. It is specifically denied that in pursuance of the said collaboration agreement the plaintiff paid token money of Rs.25,000/- paid by the plaintiff to the predecessor of the defendant neither was an advance, earnest money nor part payment but the same was token money. It is also relevant here to point out that the formal receipt of the token money was a condition precedent to discuss further negotiations of the proposed collaboration agreement,

which were never agreed upon between the parties. It is also relevant to point out that the proposed terms and conditions suggested by the plaintiff to the predecessor of the defendants which were never accepted by the predecessor of the defendants, hence the talks of the collaboration agreement between the parties failed and negotiations came to an end. It is also relevant to point out that after the negotiations for the proposed collaboration agreement failed between the parties and the token money of Rs.25,000/- was returned on 18.9.95 by the predecessor of the defendants to the plaintiff and for the same plaintiff promised to issue the receipt on his letter head on the next day. Thereafter the plaintiff never came to the predecessor of the defendants the plaintiff on the one pretext or the other kept on avoiding and till date no receipt has been issued to the defendants in lieu of money received back in cash from the defendants.”

6. Suffice would it be to note that it was categorically pleaded in the written statement that the defendants never entered in a collaboration agreement on 6.9.1995. With respect to the sum of Rs.25,000/- stated to be paid by the plaintiff to the defendants it was specifically stated in para 8 of the written statement that execution of a formal receipt evidencing receipt of token money was a condition precedent for the parties to further discuss negotiations for the proposed collaboration agreement. It has further been stated that this never happened. Meaning thereby it is specifically stated by the defendant that the receipt relied upon was not executed.

7. A perusal of the case set up in the written statement and in particular the averments made in para 8 of the written

statement and as noted above clearly brings out that the defendants categorically and in unequivocal terms denied execution of any receipt which was stated to be executed as per the plaintiff in para 8 of the plaint.

8. Under the circumstances it is obvious that the learned Trial Judge has wrongly proceeded on the basis as if the receipt was denied only during evidence.

9. The other reason which can be culled out from the impugned order interest of justice requiring evidence to be led on the issue, suffice would it be to state that interest of justice cannot be used as in an unruly and unbridled manner.

10. When parties have led their evidence and closed the same, it is impermissible to allow a party to fill up the gaps and lacuna unless compelling circumstances are brought on record as to why a particular witness could not be examined by the party while leading evidence. A prayer made to examine a person as a witness has to be on basis of strong and compelling facts more so when this prayer is made even after defendant's evidence is led.

11. Irreparable injustice may result to the defendant in permitting plaintiff to lead evidence to prove gaps in the case of the plaintiff for the reason defendant's evidence is always led keeping in view the evidence led by the plaintiff.

12. The petition is allowed. Impugned order dated 5.9.2005 is quashed. Respondent's application praying that Mr.B.Chakrawarthy be permitted to be examined as plaintiff's witness is dismissed.

13. No costs.

January 10, 2008
d.k.bainsla

PRADEEP NANDRAJOG, J.