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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CM(M) 604/2013**

% **19th November, 2014**

SH. KARANVEER SINGH Petitioner
Through : Mr. Sandeep Agarwal, Adv. with
Mr.M.K. Singh, Adv.

versus

SH. DHARAMVEER SINGH & ORS Respondent
Through : Dr. L.S. Chaudhary, Adv. with
Mr.Ajay Chaudhary, Adv.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This petition under Article 227 of the Constitution is filed by the petitioner/plaintiff impugning the order of the trial court dated 6th May, 2013 by which the trial court has rejected an application filed by the petitioner/plaintiff under Section 165 of the Indian Evidence Act, 1872 (hereinafter referred as to 'the Act') read with Section 151 of the Code of Civil Procedure, 1908 (CPC) to lead additional evidence and also for cross examining the witness of the other side.
2. Paras 2 and 4 of the impugned judgment are relevant and the same

read as under:-

“2 Ld. counsel for the plaintiff submitted that the present suit has been filed by the plaintiff against the defendant seeking possession and permanent injunction with respect to the properties alleging that the defendants have encroached upon the properties. Ld. counsel submitted that it was for the plaintiff to show that defendants have encroached upon the property and in this regard he has made complaints dated 24.06.2006 to SHO PS Ashok Nagar, East Delhi and dated 26.6.2006 to the Dy. Commissioner of Delhi Police, East District that the defendants have forcibly encroached upon the suit property. Ld. counsel has alleged that he has been engaged recently on behalf of the plaintiff and when he was preparing the case he observed that only the photocopies of the said two complaints have been filed but the previous counsel due to oversight could not place on record the carbon copy of the aforesaid two receipts. Those two complaints also could not be proved which are very material for deciding the present controversy between the parties. Ld. counsel further submitted that the witness examined as DW1 though admitted in his cross examination on 21.8.2012 that plaintiff had obtained a loan from State Bank of India but wrongly alleged in order to mis-lead the court that loan was not paid by the plaintiff. Therefore in order to prove this fact, the witness from the bank is required to be examined. DW3 when examined also spoke about one document of partition but that has also not been placed on record. It is prayed that u/Sec. 165 Indian Evidence Act. It is the duty and responsibility of the court to call

for all the relevant documents and the witness shall also act pro actively instead of mere spectator. Ld. counsel in support of its arguments relied upon the judgment cited as JGA Fashion Private Limited Vs Krishan Kumar Khanna & others, CS(OS) No. 66/2010, Delhi High Court, SKYLAND INTERNATIONAL PVT. LTD. V. KAVITA P. LALWANTI, 191 (2012) DLT 494.

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4. After hearing the arguments and going through the record, I found that in the present case the issues were framed and plaintiff was very well knowing about the onus placed upon him. He has also placed the copy on the record of those documents but never tried to prove the same. It is important to note that plaintiff has already closed his evidence. Defendant has also closed the evidence after examining three witnesses thereafter plaintiff was asked whether he want to give any evidence in rebuttal but he refused. The case thereafter was fixed for final arguments. Now the plaintiff wants to open his own evidence. At the same time he also wants to recall DW3. It is just filling up the lacuna. He was very well knowing that he has to prove and establish this complaint and law is very clear that a party cannot be permitted to fill up the lacuna either u/Sec 151 or any other provision. So far as Section 165 Evidence Act is concerned i.e. only for the court for the purpose to bring out the truth but not to fill up the lacuna either of the party in his case. The power even cannot be exercised even u/O 18 Rule 17 CPC or u/Sec. 151 CPC. In having this opinion, I am fortified by the judgment cited as

*M/s Bagai Constructions through its proprietor
Lalit Bagai Vs M/s Gupta Building Material
Store 2013 vol-3, AD SC 235.*

(underlining added)

A reading of the aforesaid paras shows that the basic reason which is given is that the earlier counsel did not properly conduct the case, and therefore in view thereof, the new counsel wants to ensure that additional evidence is led in the interest of the petitioner/plaintiff.

3. In my opinion, the ground given of a new counsel having been engaged and therefore new evidence is required to be led because according to the new counsel certain evidence has been left out, if is permitted, then each time when a counsel would be changed, the new counsel will feel that he being more competent than the earlier counsel who has not done his job and therefore courts will be bound to allow additional evidence to be led. Even for the sake of arguments, it is assumed that earlier counsel was less competent and did not lead evidence, the fact of the matter is that it is the petitioner/plaintiff in this case who himself closed his evidence not only in affirmative but also in rebuttal/rejoinder. Evidence of the defendant was thereafter led and closed. The case was thereafter fixed for final arguments. Therefore, at the stage of final arguments, the case cannot be thrown back and again the case cannot be fixed at the stage of evidence because if this is

allowed then there would be no end to the trial of a case. Of course, the CPC is a handmaid of justice but that does not entitle a petitioner/plaintiff who has had more than sufficient opportunities to lead evidence, in affirmative and rebuttal and thereafter has closed his evidence and the case is at the stage of final arguments, to claim further opportunities to lead evidence to fill up the lacuna left behind at the time of leading evidence and also failing to cross-examine the witness. Vested rights thus created in favour of the defendant hence cannot be rightly disturbed.

4. During arguments I put to the counsel for the plaintiff whether he would wish to exercise his rights under Section 105 of the CPC to challenge the impugned order in an appeal, if the petitioner/plaintiff fails in the suit for the possession, but, the counsel states that the petitioner/plaintiff wants that the case be decided on merits. I have failed to understand this stand of the petitioner.

5(i). The petitioner in support of his arguments relies upon a judgment of the Supreme Court in ***Ritesh Tiwari and Another Vs. State of Uttar Pradesh and others (2010) 10 SCC 677*** and its para 37 to argue that this court should exercise powers under Section 165 of the Act.

(ii) The judgment of the Supreme Court lays down a general law under

Section 165 of the Act, however, it is not as if that in all the cases irrespective of the facts of the cases powers under Section 165 of the Act should be exercised by the court in every case inasmuch as powers under Section 165 of the Act cannot be used in every case even where it is found that enough opportunities have been given to conclude evidence and the only ground for leading additional evidence and to further cross examine the witness is the change of a counsel.

6(i). Learned counsel for the petitioner also relies upon the judgment of the Supreme court in a case of *K.K. Velusamy Vs. N. Palanisamy (2011) 11 SCC 275* to argue that even at the stage of final arguments, courts can permit leading of additional evidence.

(ii) There is no doubt that additional evidence can be led depending upon facts of the case even at the stage of final arguments, however, once again the law laid down in this judgment is not that in all cases and in all the facts evidence be allowed at the stage of final arguments. A party cannot be allowed to fill up the lacuna by leading additional evidence including by failing to cross examine the witness of the other side, when the case is at the stage of final arguments without giving any plausible reasons. Section 165 of the Act empowers the court to bring out the truth but not to fill up the

lacuna of either of the party in his case and not to act as a litigant by itself conducting a case irrespective of the aspect that a litigant has had sufficient opportunities to lead evidence.

7. Dismissed.

VALMIKI J. MEHTA, J

NOVEMBER 19, 2014

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