

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

Date of Decision: 6.1.2014

+ **CM(M) 8/2014**

SHRI RAMESH KUMAR & ANR. Petitioners

Through: Mr. Ajit Dayal with
Mr. M.K. Bansal, Advs.

versus

SMT SANGEETA KHANNA Respondent

Through: Nemo.

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

% **MR. JUSTICE NAJMI WAZIRI (Open Court)**

1. This petition impugns under Article 227 of the Constitution of India, an order of 11th September, 2013 (“impugned order”) of the learned Civil Judge – 14, Tis Hazari Courts (“Trial Court”) in Suit No. 1327 of 2011 (“Suit”) which dismissed two applications of the petitioner; one filed under Section 151 CPC for placing documents on record and the other filed under Section 63 of the Indian Evidence Act for leading secondary evidence qua photocopies of the documents so filed. The case of the petitioner is that the said documents which are now being sought to be brought on record and for which secondary evidence is being sought to be led, were inadvertently not filed alongwith the Written Statement (WS) since all these years the petitioner/defendant had been under the impression that they had already been filed. The respondent/plaintiff had

opposed the application before the Civil Judge on the ground that these documents existed prior to the WS being filed therefore they could not be permitted to be taken on record now.

2. The Suit was filed by the respondent against the petitioner in January, 2000 seeking possession of the suit property and injunction against interference with possession. The petitioner filed his Written Statement in July, 2002 taking an objection as to the maintainability of the Suit while, otherwise, opposing the Suit. He filed his affidavit in evidence on 2nd April, 2013. On 14th August, 2013 – i.e., eleven years after filing his WS and four months after filing his affidavit of evidence – he filed two applications, one to place on record additional documents and another to lead secondary evidence *qua* the same on the ground that the same could be placed on record due to inadvertence; that the petitioner was under the *bonafide* impression that the documents had already been filed but this illusion was discovered only when the occasion arose for exhibiting the documents. The application was opposed by the respondent on the ground that documents which are now sought to be adduced are of a period prior to the filing of the WS, they could have been procured and filed alongwith the WS and surely cannot be permitted 11 years thereafter.

3. After considering the submissions of the parties, the Trial Court rejected both the applications. It observed that the defendant's contention that the documents – fifteen of them – were not filed at the time of filing of the WS nor at the time of filing the affidavit of evidence was due to *inadvertence* is neither believable nor a sufficient ground for granting leave at this stage – when the plaintiff's evidence had been closed. It observed that it was inconceivable that a party would have – over a period of eleven years after the filing of the Written Statement, and even after filing an affidavit in evidence, *inadvertently* not filed such numerous documents. It reasoned the applicant ought to provide cogent and sufficient reason for having failed to file the evidence. It held that mere ignorance of the documents not having been filed –is neither sufficient nor cogent reason in law. Observing that the respondent has already led evidence in the matter and it is only at the stage of leading of petitioner's evidence that the petitioner sought to produce these documents, it held that the respondent is likely to be prejudicially affected by the grant of leave to file the documents.

4. Aggrieved by the impugned order, the petitioner has preferred the instant petition. It was contended that the Trial Court has failed to exercise jurisdiction vested in it by not granting leave to file the documents. It was contended that the petitioner was always diligent in

prosecuting the case and, in any event, the respondent would not be prejudicially affected if the documents were placed on record. Learned Counsel for the petitioner vehemently argued that the documents were necessary for effective adjudication of the dispute before the Trial Court, and hence they ought to be allowed to be exhibited.

5. I am not persuaded by the arguments of the petitioner; there is no reason requiring interference with the impugned order. To the contrary, the impugned order is well in keeping with the law as laid down by the Supreme Court and this Court in respect of grant of leave to file documents not filed originally with the Written Statement.

6. Although neither the application before the Trial Court nor the impugned order makes specific reference to the provision, the instant matter is to be governed by the provisions of Order VIII Rule 1A(3) of the First Schedule to the Code of Civil Procedure, 1908 (“**Code**”). The said provision reads as under:

1A. Duty of defendant to produce documents upon which relief is claimed or relied upon by him

(1) Where the defendant bases his defence upon a document or relies upon any document in his possession or power, in support of his defence or claim for set off or counter claim, he shall enter such document in a list, and shall produce it in Court when the written statement is presented by him and shall, at the same time, deliver the document and a copy thereof, to be filed with the written statement.

(2) Where any such document is not in possession or power of the defendant, he shall, wherever possible, state in whose possession or power it is.

(3) 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..

(4) Nothing in this rule shall apply to documents-

(a) produced for the cross-examination of the plaintiff's witnesses, or

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

7. Thus, it is evident that the application of the petitioner to file additional documents is one to be tested on the touchstone of Order VIII Rule 1A (3) of the Code. The said provision, which was added to the Code by way of an amendment in 1999, provides that the appropriate time for filing a document in support of a defendant's defence is when the Written Statement is filed. It provides that as a matter of rule, a document that is not produced alongwith the Written Statement or entered in the list filed with the Written Statement ought to not be received in evidence without the leave of the Court.

8. The injunction of the law under Order VIII Rule 1A(3), where it enjoins the Court from accepting in evidence a document that has not be produced as per the mandate of Order VIII Rule 1A(1) is not one to be lightly ignored, *a fortiori* and especially in matters such as the present case, where excessive delay – of over 11 years, has been caused by the defendant in eventually approaching the Court under said provision. The

Supreme Court, speaking through P. K. BALASUBRAMANYAN J (who concurred with the majority) in *R. N. Jadi Brothers & Ors. v Subhashchandra*, ((2007) 6 SCC 420) stressed the importance of following a strict interpretation and giving full effect to the amendments to the Code in 1999 – which included the present provision. He observed that the legislative intent in the amendments is apparent – to prevent undue delay in litigation by the parties, especially the defendant in a Suit. The Trial Judge was right in refusing to lightly consider the application of the petitioner to file additional documents after such an inordinate delay without any justified reasons for the delay.

9. This Court too through a learned Single Judge of this Court cautioned against lightly ignoring the mandate of Order VIII rule 1A(3) in *Y. N. Gupta v Jagdish Chander Sharma & Anr.*, (CM(M) No. 1199 of 2009):

“Even unamended Civil Procedure Code gave a specific procedure for filing of pleadings and documents and the circumstances under which additional documents could be filed by parties. All documents were supposed to be filed by the parties along with pleadings. The documents not in power and possession of the parties were required to be mentioned in a list and against each document it was to be mentioned in whose possession it is, if it has been lost or how the document is sought to be proved in the court. This procedural requirement was necessary so that trial proceeds in an orderly manner and both the parties know each others' case and the documents relied upon by them. Only those documents could be withheld by the parties which they

intended to put in cross-examination to the witnesses. The additional documents could be produced by the parties only where despite, due diligence and effort, the party could not lay hand on any of those documents or the documents were not within the knowledge of the party and they were discovered later on by the party during pendency of the trial. The court before allowing the additional documents was to be satisfied not only about the relevancy of documents but also about the reasons as to why the documents could not be filed at the initial stage either along with the plaint or along with written statement.

The amendments which were made by the Parliament from time to time in Code of Civil Procedure and other laws were made after observing the working of the Code and after considering that there was need to change the law. These statutory amendments cannot be ignored or thrown to winds by the courts because in one or the other case, they are to the disadvantage of a party. Disadvantage of an individual cannot be a ground to ignore the statute. Statutory provisions are made for general application and to give certainty to the law. If the law remains uncertain, it becomes a hay day for the parties to twist the law and that is why it is necessary that the procedural aspects of the law also must be settled and should not be considered so lightly that the courts have liberty to ignore the procedural aspects whenever and wherever they like. No doubt, procedure is hand maid of justice but what is justice cannot be a concept and idea of an individual judge. Justice has to be looked from the broader prospective. If a judge is given discretion to decide applications without following procedure, as laid down by Parliament, that will result into total chaos and would breed contempt for law and infuse corruption.”
(Emphasis supplied)

10. In the aforementioned case, the Trial Court had, despite observing that no explanation was given for the delay in filing the documents, allowed the application under Order VIII Rule 1A(3) merely on the

ground that no objection has been raised as to the veracity of the documents and the documents were relevant for effective adjudication of the dispute. However, in the present case, the Trial Court was right in dismissing the contention of the petitioner that the documents ought to be taken on record merely because they were allegedly necessary for effective adjudication of the dispute.

11. That a document that is not filed at the appropriate stage shall not be received by the Court is a principle that the Supreme Court emphasised in *Madan Lal v Shyam Lal*, (2002) 1 SCC 535. This principle has been followed *qua* applications under Order VIII Rule 1A(3) by this Court in *Aligarh Roller Flour Mills Pvt. Ltd. v Parvinder Khanna*, (judgement dated 30th August, 2010 in CM(M) No. 1085 of 2010) and *Durga Devi v Lalita Rakyan*, (judgement dated 9th September, 2010 in CM(M) No. 1141 of 2010).

12. Being *in pari materia* with the provisions of Order VII Rule 14 (3) CPC – a factum recognised even by the Supreme Court in *Salem Bar Advocates Association v Union of India* ((2005) 6 SCC 344) – the principles applicable to the said provision would apply on all fours to considering applications under Order VIII Rule 1A(3) CPC. A similar view was taken earlier by a learned Single Judge of this Court in *F. Hoffman La Roche Ltd. v Cipla Ltd.*, (2012 (52) PTC 1).

13. Discussing the background in which the provision came into existence and the scope of the discretionary power of the courts under Order VII Rule 14, a learned Single Judge of this Court, in *Gold Rock World Trade Ltd. v Veejay Lakshmi Engineering Works Ltd.* (2007 (143) DLT 113), observed:

“4. I have heard counsel for the parties. The Supreme Court decision in Salem Advocate Bar Association (supra) was in the context of additional evidence. By virtue of the 1976 amendment, Rule 17-A had been introduced in Order 18. The said Rule 17-A granted discretion to the Court to permit production of evidence not previously known or which could not be produced despite due diligence. Rule 17-A of Order 18 was deleted by the Code of Civil Procedure (Amendment) Act, 1999 which took effect on 1.7.2002. While considering the effect of this deletion the Supreme Court observed:-

13. In Salem Advocate Bar Assn. (I) v. Union of India, 2002 Indlaw SC 1374, it has been clarified that on deletion of Order 18 Rule 17-A which provided for leading of additional evidence, the law existing before the introduction of the amendment i.e. 1-7-2002, would stand restored. The Rule was deleted by Amendment Act of 2002. Even before insertion of Order 18 Rule 17-A, the court had inbuilt power to permit parties to produce evidence not known to them earlier or which could not be produced in spite of due diligence. Order 18 Rule 17-A did not create any new right but only clarified the position. Therefore, deletion of Order 18 Rule 17-A does not disentitle production of evidence at a later stage. On a party satisfying the court that after exercise of due diligence that evidence was not within his knowledge or could not be produced at the time the party was leading evidence, the court may permit leading of such evidence at a later stage on such terms as may appear to be just.

Thus, the Supreme Court held that the insertion of Rule 17-A was only clarificatory of the in-built power of the Court to permit parties to produce evidence not known to them earlier or which could not be produced in spite of due diligence. The learned counsel for the plaintiff sought to invoke this in-built power of the court even in respect of Order 7 Rule 14 (3) which relates to production of documents at a belated stage. There would be no difficulty in holding that the in-built power referred to in the said Supreme Court decision could also be invoked when the question of granting leave arises in the context of Rule 14 (3) of Order 7. Consequently, before leave of the Court can be granted for receiving documents in evidence at a belated stage, the party seeking to produce the documents must satisfy the Court that the said documents were earlier not within the party's knowledge or could not be produced at the appropriate time in spite of due diligence. It has been submitted by the learned counsel for the defendant that the documents pertain to a settlement between the plaintiff and a foreign party (COGETEX). The settlement was arrived at, as per the statement recorded in the cross-examination of PW1, on 7.10.1996.

However, there is not a whisper of this statement even in the replication which was filed on 11.9.1997. In fact, the affidavit by way of evidence was filed by the plaintiff in the year 2003 and even in that affidavit, there is no reference to the documents which are now sought to be introduced. In my view, these circumstances clearly show that the conditions necessary before leave of the Court can be granted have not been satisfied. It cannot be said that the plaintiff was not aware of the documents earlier, or that the same could not be produced in spite of due diligence on the part of the plaintiff. All the material now sought to be introduced, was well within the knowledge of the plaintiff at least in the year 2003. As the plaintiff was not diligent enough at that point of time, this Court is left with no alternative but to reject its request.

(Emphasis supplied)

14. For exercise of discretion by the Court under Order VIII Rule 1A(3) of the Code in favour of a defendant, the defendant would have to satisfy the court to the following qualifying criteria:

- i) that the documents were earlier not within the knowledge of the party; or
- ii) that the documents could not be produced despite exercise of diligence on the part of the defendant.

15. In yet another case a similar view was held by a learned Single Judge of this Court in *Dr. J. K. Jain v Krishnaram Baldeo Investment & Finance Co. Ltd.*, (judgement dated 14th August, 2008 in CM(M) No. 217 of 2008), where it was observed:

“The Court may permit the production of such documents only on showing sufficient cause. In the present case, the documents sought to be produced by the petitioner later on were not such which were not in the power of the petitioner or could not have been obtained by the petitioner. The petitioner had not made any reference to these documents in the written statement neither filed a list of documents relied upon. I find no reason as to why the court should allow filing of such documents at a belated stage when the petitioner is not able to satisfy the court about the relevancy of these documents and reasons for not filing the same with the written statement or before framing the issues.”

16. The impugned order has clearly set out that the petitioner has failed to provide sufficient and cogent reasons for allowing the documents to be filed. It was not the case of the petitioner before the Trial Court that the

documents were not within his power, nor has the petitioner made out any case of exercise of diligence, despite which the documents could not be filed. To the contrary, the impugned order observes the lack of diligence on the part of the petitioner, as the documents had not been filed for a period of eleven years from date of filing of the Written Statement and not even adverted to in the evidence filed later. The only explanation proffered by the petitioner is inadvertence, which cannot be regarded as a ground for exercise of discretion under Order VIII Rule 1A(3) – a view echoed by a judgement of a learned Single judge of this Court in *Harkesh Singh & Anr. v Ved Raj*, (order dated 2nd February, 2010 in CM(M) No. 945 of 2007).

17. As discussed above, the petitioner has not made out a sufficient case it is without merit. The reasons for and the conclusion arrived at in the impugned order is a plausible view in law. It does not suffer from material irregularity warranting interference of this Court in its revisionary jurisdiction. For the aforesaid reasons, the petition is dismissed.

**NAJMI WAZIRI
(JUDGE)**

JANUARY 06, 2014